

PCA Case No. 2013-15

**IN THE MATTER OF AN ARBITRATION PURSUANT TO THE AGREEMENT
BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT
BRITAIN AND NORTHERN IRELAND AND THE PLURINATIONAL STATE OF
BOLIVIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS,
SIGNED 24 MAY 1988**

- and -

THE UNCITRAL ARBITRATION RULES (AS REVISED IN 2010)

- between -

SOUTH AMERICAN SILVER LIMITED (BERMUDA)

(the “Claimant”)

- and -

THE PLURINATIONAL STATE OF BOLIVIA

(the “Respondent”, and together with the Claimant, the “Parties”)

DISSENTING OPINION OF MR. OSVALDO CESAR GUGLIELMINO

Tribunal

Dr. Eduardo Zuleta Jaramillo (Presiding Arbitrator)
Prof. Francisco Orrego Vicuña
Mr. Osvaldo Cesar Guglielmino

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Opinion of Osvaldo Cesar Guglielmino

1. Despite the best efforts made to reach a unanimous agreement in deciding the case, I am compelled to express my dissent from the majority's opinion.
2. As explained below, following the sole method admissible for the drafting of an award –i.e., the thorough analysis of all of the elements at the disposal of the arbitrators to reach a decision– it is not possible, objectively, to join the majority, since it disregards or erroneously applies documents, standards, and awards in support of its arguments, which cannot consequently be sustained.
3. My dissent is not a matter of opinion. It is the facts that lead to a result different from the one that my colleagues propose.
4. I present below the reasons why I consider that the law applicable to the resolution of this dispute results in one sole viable conclusion, that is that this Tribunal lacks jurisdiction.
5. In the presentation of my reasoning I will follow the structure below. In Section I, I will summarize my opinion. In Section II.A.1, I will address the scope of the jurisdictional dispute between the Parties. In Section II.A.2, I will analyze whether there is evidence of Claimant's active involvement in the purported investment. In Section II.A.3, I will analyze the evidence on the active involvement of a company other than the Claimant in the purported investment. Upon establishing the facts supported by the evidence on the record, I will proceed, in Section II.A.4, to analyze if, based on such facts, it can be asserted that the Claimant made an investment under the terms of the Treaty between Bolivia and the United Kingdom. Subsequently, in Section II.A.5, I will analyze if the Treaty affords protection to indirect investments. Finally, in Section II.B, I will express the conclusion reached upon analyzing the proved facts and the applicable law.
6. In Section III, I will introduce some additional considerations. In Section III.A, I will analyze if Bolivia breached the compensation requirement against expropriation under the Treaty. In Section III.B, I will analyze the interest rate that should be applied to any potential compensation in the present case.
7. In Section IV, I will address costs.

I. Summary

8. The Agreement between the United Kingdom and Bolivia for the Promotion and Protection of Investments (“the Treaty”) requires some sort of active involvement by the purported investor in the investment to consider that the purported investor made an investment protected under the Treaty.¹
9. There is no evidence on the record of this arbitration of an involvement of any kind by the Claimant, South American Silver Limited (“SAS”), in the purported investment. The Claimant, SAS, did not make an investment protected under the Treaty.²
10. The documents on the record show an active involvement by a company other than the Claimant in the alleged investment. The company is South American Silver Corporation (“SASC”), a Canadian company. Canada does not have a BIT with Bolivia.³
11. To consider that the mere transfer of a holding of shares to a subsidiary shell company is sufficient to create a protected investor under the Treaty is to undermine the text, context, object and purpose of the Treaty.⁴
12. Even assuming that SAS made an investment in Bolivia, such investment would not be covered by the Treaty since the Treaty does not protect indirect investments.⁵
13. Before an international arbitral tribunal can decide on the merits of a dispute, it is indispensable to ensure the Parties’ consent to the tribunal's competence. Consent is a fundamental pillar in international law, in general, and particularly in international arbitration. It is a sacred boundary for every single tribunal. Unfortunately, the majority exceeded it.
14. Since I consider that the Tribunal lacks jurisdiction to resolve the present dispute, it becomes unnecessary to analyze the merits and damages. Nonetheless, I refer to two aspects of the majority decision regarding these issues: the lawfulness of the expropriation under Article 5 of the Treaty and the interest rate applicable to the potential compensatory amount. I consider that Bolivia did not conduct an illegal expropriation under the Treaty⁶ and that the applicable interest

¹ See *infra*, ¶¶76-136.

² See *infra*, ¶¶18-42.

³ See *infra*, ¶¶43-75.

⁴ See *infra*, ¶¶79-120.

⁵ See *infra*, ¶¶137-80.

⁶ See *infra*, ¶¶184-235.

rate should be the simple interest rate calculated by Bolivia based on the issuance of sovereign bonds by Bolivia in October 2012.⁷

II. Does the Tribunal have jurisdiction to resolve this dispute?

A. Did SAS make an investment protected under the Treaty?

1. The jurisdictional dispute between the Parties regarding the existence of SAS' investment

15. To begin with, it is important to duly define the jurisdictional dispute between the Parties in relation to the existence of an investment by SAS. Bolivia asserts that SAS has not made any investment and that, if there was an investment, it would have been made by SASC (which is a Canadian company) and not SAS (which is a company from Bermuda, a territory to which the scope of the Treaty was extended). Accordingly, the Tribunal lacks jurisdiction under the Treaty between the United Kingdom and Bolivia.⁸ As stated by the majority,⁹ Bolivia argues that, for an investment to exist, the purported investor should have been actively involved in the making of the investment in the host State. Bolivia submitted that the argument that the BIT does not protect an entity –such as SAS, according to Bolivia– that has not performed an investment was its “main argument.”¹⁰
16. Bolivia’s argument on the nonexistence of an investment by SAS was developed and addressed by the Parties notwithstanding the reference to the “Salini test.”¹¹ The arguments on jurisdiction,

⁷ See *infra*, ¶¶236-269.

⁸ See, for example, Counter-Memorial, ¶¶222-267, Rejoinder Memorial, ¶¶264-275, Post-Hearing Brief, ¶¶10-18.

⁹ Majority Opinion, ¶336.

¹⁰ In the Rejoinder Memorial, ¶264, Bolivia asserts that “SAS argues that ‘*whether South American Silver is the ultimate owner of the shares in CMMK and of the ten Mining Concessions is entirely irrelevant for purposes of the Tribunal’s jurisdiction*’ because ‘*[t]he Treaty protects such indirect owners even if they are not the ultimate owners of the investments [...]*’.” However, this does not address Bolivia’s main argument that the Treaty only protects those who made an investment” (emphasis added).

¹¹ In connection with this, see, for example, Rejoinder Memorial, ¶265: “[A]rticle 8 (1) of the Treaty confers jurisdiction only to investments ‘*of a company of [a] Contracting Party*.’” However, for an asset to constitute an investment of a company, that company must have an objective link with that asset: it must have been actively involved in the realization of the investment in the host State.” Along the same lines, also in Bolivia’s Post-Hearing Brief, ¶17: “Cognizant of its weak jurisdictional position, SAS limits itself to asserting that ‘*the definition of ‘investment’ should be the one contained in the BIT*’ and not an objective vision as the one proposed by Bolivia, which would correspond only to ICSID arbitrations [D1:P259:L6-10]. However, it is precisely in the analysis of the text of Treaties for the reciprocal protection of investments (such as the Treaty) and *not* the ICSID Convention that other tribunals, as in the Standard Chartered Bank case presided by Prof. “Rusty” Park, have concluded that the expression “*investment of*” does not mean “*the abstract possession of shares in a company that holds title to some piece of property*.” See also Bolivia’s Post-Hearing Brief, ¶18: “SAS, in summary, does not own an investment under the Treaty because SASC is the only one that

including the reference to the “Salini test,” developed by Bolivia in its Rejoinder Memorial (that the majority calls “Rejoinder”¹² and which addresses arguments both on jurisdiction and on the merits), were addressed by SAS in its Rejoinder on Jurisdiction,¹³ in connection with which the Tribunal awarded the Claimant an extension in Procedural Order No. 15.¹⁴

17. I agree with the majority vote that: “it is regarding SAS that the existence or not of the investment should be predicated for the purposes of the Tribunal’s jurisdiction.”¹⁵ This is clear since SAS is the Claimant in this arbitration. SAS is the party alleging that Bolivia breached international law and caused damages to it to be established and quantified by this Tribunal, and which the Respondent should compensate. However, seeing that my colleagues have endorsed this correct general assertion – “it is regarding SAS that the existence or not of the investment should be predicated for the purposes of the Tribunal’s jurisdiction” – only to later disregard the facts of the case, which compels me to underscore this mistake – which unfortunately underlies the entire majority opinion – and also to establish the facts as they are proven.

2. Is there evidence of SAS’ active involvement in the alleged investment?

18. Upon establishing the aforementioned, I will embark on an analysis that can result in a conclusion that can be explained with the utmost clarity and simplicity. A simple question is

performed an alleged investment in Bolivia. Since SAS cannot avail itself of the rights provided for under the Treaty for Bolivian and UK nationals, the Tribunal lacks jurisdiction over this dispute.” The Claimant itself recognizes that Bolivia’s argument points to the “active involvement” in the investment and that such an argument is supported by the text of the Treaty: “[W]e will dive into the second jurisdictional requirement, which Bolivia discusses in its Rejoinder, which is that of active involvement. So, according to Bolivia, the terms “investment of the former” in Article 8(1) would mean that there must be an objective link between the Company and the investment and that the Company must have been actively involved in the realization of the investment in the host State.” Tr. Hearing, Day 1, 129:9-16 (SAS’ Opening Arguments) (English). Likewise, at paragraphs ¶¶39-47 of SAS’ Post-Hearing Brief, the objection on the inexistence of an investment by SAS is discussed without reference to the “Salini test.”

¹² See Majority Opinion, ¶¶345 and ¶346. We should not lose sight of the fact that the reference to the “Rejoinder”, in reality, is an abbreviated reference to the Rejoinder Memorial on the Merits and Reply Memorial on Jurisdiction. After the submission of the Rejoinder Memorial on Jurisdiction, the Parties still made oral presentations on jurisdiction at the Hearing and in writing in the Post-Hearing Briefs (in that regard, see Bolivia’s Post-Hearing Brief, ¶¶10-18, and SAS’ Post-Hearing Brief, ¶¶37-54). When analyzing the jurisdictional defense on the inexistence of an investment by SAS, we are analyzing a defense that was developed separately and appropriately by each Party in their briefs and oral arguments before the Tribunal.

¹³ Rejoinder Memorial on Jurisdiction, 2 May 2016.

¹⁴ See Procedural Order No. 15, ¶51. Incidentally, in the same Procedural Order No. 15, the Tribunal decided to exclude from the record the witness statements of Javier Diez de Medina Romero (RWS-5), and Juan Mamani Ortega (RWS-6), presented by the Respondent with the Rejoinder Memorial on the Merits and Reply Memorial on Jurisdiction, without a declaration of inadmissibility of Bolivia’s jurisdictional arguments on the inexistence of an investment, an exclusion that was not requested by SAS at the time.

¹⁵ Majority Opinion, ¶332.

mandatory: Did SAS, as Claimant in this arbitration, make an investment under the terms of the Treaty?

19. To answer this question, I will first consider the available evidence on the Claimant's acts. Subsequently –see *infra*, Sections II.A.4, and II.A.5– I will consider the legal framework for those acts.
20. Bolivia has asserted that SAS is a shell company without staff or an office.¹⁶ The Claimant has not called this into question in any of its briefs or during the Hearing. There is no evidence on the record that would help the Tribunal consider that SAS is not a shell company, that it has personnel, or that its domicile is not the same domicile as that of many other shell companies incorporated in Bermuda. The Claimant has accepted that the shareholding in the companies which in turn had shares in the Bolivian company involved in the Malku Khota Project, is all that SAS “did” in this case as investor.¹⁷
21. To the best of my ability, I have performed a diligent and patient search in the record in the present case –comprising hundreds of evidentiary documents filed by the Parties– for documents evidencing the existence of an investment by SAS. I have not found them. And the majority has not found them either.¹⁸
22. Indeed, my colleagues do not assert the existence of acts of investment beyond SAS' shareholding,¹⁹ which is explained by the absence of documents on the record demonstrating that such acts existed. The fact that the majority does not attempt to demonstrate any form of active involvement in the purported investment by SAS would be sufficient to conclude here my considerations on this topic. However, understanding that the evidence produced by the Parties has to be studied thoroughly in order to offer a clear explanation of the respective positions, I will highlight some additional relevant elements.

¹⁶ Rejoinder Memorial, ¶272. The relevance of this piece of information to determine the existence of a protected investment under the Treaty is developed *infra*, at Section III.A.4.

¹⁷ See, for example, SAS' Post-Hearing Brief, ¶40: “[T]he Treaty does not require the claimant to do anything more than it did here, namely acquire 100% of the shares of CMMK, in order for that investment to be protected.”

¹⁸ In this respect, my colleagues limit themselves to accepting jurisdiction by considering that an indirect shareholding by SAS is proved and is sufficient to find that SAS made an investment protected under the Treaty.

¹⁹ See, for example, Majority Opinion, ¶331: “[T]he investment comprises shares in a Bolivian company – CMMK – and the Claimant holds 100% of the shares in the intermediary companies which, in turn, hold 100% of CMMK's shares.”

23. This case has a remarkable peculiarity: the company invoking the international protection under the Treaty and claiming compensation for damages, i.e. SAS, incorporated in Bermuda, has not submitted financial statements in this arbitration. On the contrary, the only financial statements that the Claimant has produced belong to a different company, SASC, incorporated in Canada, which is not covered by the scope of protection of the Treaty between Bolivia and the United Kingdom.
24. The absence of SAS' financial statements is considered by the majority itself when assessing SAS' damages claim. To reject the Claimant's claim for the payment of USD 12.5 million for administrative and general expenses related to the Project, my colleagues assert that "the financial statements provided are not SAS', but those of its parent, SASC, and include expenses that are not associated only with CMMK's operation but also with different projects as well";²⁰ that "there is no evidence that the administrative and general costs included by FTI in Appendix 6 to their Report bear a causal relationship with the Project";²¹ and that "CMMK's financial statements do not identify, from an accounting perspective, the administrative and general expenses supposedly incurred by the direct and indirect shareholders on their own or during the development of the Project. Such financial statements only reflect accounts payable to SASC for approximately US\$6 million included in the US\$18.7 million charged to the Project's costs by the experts."²² In light of this, my colleagues assert that "the Tribunal does not find evidence that the amount of US\$12.5 million claimed by the Claimant corresponds to SAS' general and administrative expenses attributable to the Project."²³
25. The majority does not ascertain the existence of evidence on the record of outlays attributable to SAS in connection with the Project.²⁴ That is, precisely, what is relevant to establish whether this Claimant — SAS — made an investment that supports the jurisdiction of this Tribunal under this Treaty — the Treaty between Bolivia and the United Kingdom.
26. Of course, it would not be possible to justify this lack of evidence on the basis of the difficulty to obtain or produce it, since the production of evidence of investments made in a project, when such an investment was made, is obviously a simple task.

²⁰ Majority Opinion, ¶869.

²¹ *Id.*

²² *Id.*

²³ Majority Opinion, ¶868.

²⁴ Majority Opinion, ¶¶868-870.

27. Likewise, it is impossible to consider that SAS could have made significant investments in Bolivia given the corporate capital declared in these proceedings. If we analyze the only piece of evidence available in this regard, Exhibit C-10, we see that the recorded capital amounts only to USD 12,000.²⁵
28. Regarding the constitution of CMMK's holding companies, i.e. Malku Khota Ltd., Productora Ltd., and GM Campana Ltd., incorporated in the Bahamas, the available documents are few. As the majority acknowledges,²⁶ they are exhibits C-6²⁷, C-7²⁸, and C-8²⁹. Those exhibits consist of a copy of the certificate of incorporation for each of the companies and a table with a register of members, which would reflect SAS' shareholding as of August 14, 2012. There is no part of those three documents proving SAS' intervention in the incorporation of CMMK's three holding companies.
29. The copy of the certificates of incorporation for Malku Khota Ltd., Productora Ltd., and GM Campana Ltd. can be considered relevant evidence that these companies are properly incorporated in a specific country (Bahamas) and that they exist. However, they are not relevant to determine who incorporated them. Establishing the existence of a corporation is different from establishing who incorporated it. The evidence furnished for the former does not replace the evidence for the latter. And it is the latter that must be proved to be able to assert that SAS incorporated CMMK's shareholding companies.
30. It should be noted that SAS did introduce into the record relevant documents to evidence the authoring of the incorporation of other companies. For example, Exhibit C-11³⁰ includes the Public Deed for the Incorporation of Compañía Minera Malku Khota S.A. (CMMK), of November 7, 2003, by Messrs. Fernando Rojas Herrera, Carlos Ferreira Vasquez, and Felipe Bernardo Malbran Hourton. It is not possible to find something similar on the record regarding the companies Malku Khota Ltd., Productora Ltd. and GM Campana Ltd.

²⁵ 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 (C-10).

²⁶ Majority Opinion, ¶81.

²⁷ Certificate of Incorporation, Certificate of Good Standing and Register of Members of Malku Khota Ltd. (C-6).

²⁸ Certificate of Incorporation, Certificate of Good Standing and Register of Members of Productora Ltd. (C-7).

²⁹ Certificate of Incorporation, Certificate of Good Standing and Register of Members of G.M. Campana Ltd. (C-8).

³⁰ Incorporation of Compañía Minera Malku Khota (CMMK), Public Deed No. 204/2003 and Public Deed No. 228/2003 (C-11).

31. Evidently, there is a legal difference between the incorporation of a company and the acquisition of its shares. As an illustration, let us consider the cases of Compañía Minera Malku Khota S.A. (CMMK), GM Campana Ltd. and SAS. Pursuant to Exhibit C-11, Compañía Minera Malku Khota S.A. (CMMK) was incorporated by Messrs. Fernando Rojas Herrera, Carlos Ferreira Vasquez, and Felipe Bernardo Malbran Hourton on November 7, 2003. Subsequently, three companies from the Bahamas—one of which is GM Campana Ltd.—acquired its shares. Pursuant to Exhibits C-9³¹ and C-37,³² GM Campana Ltd. acquired shares in CMMK on October 16, 2007. For its part, based on Exhibit C-8, GM Campana Ltd. was incorporated in the Bahamas on September 8, 1994. Later, based on Exhibit C-8, SAS acquired shares in GM Campana Ltd., from October 10, 1994. These examples illustrate the obvious: the incorporation of a company and the acquisition of its shares are distinct legal acts.
32. Regarding the acquisition of shares in the three Bahamian companies, there is no evidence on the record of this arbitration of the purchase of shares by SAS (previously known as General Minerals Corp. Limited) to acquire such shares. The only evidence on the record is the table reflecting SAS' participation as shareholder in the three Bahamian companies as of August 14, 2012, in which it is indicated that SAS would have (by issuance or transfer) a specific number of shares.³³
33. It should be noted that during the document production phase, Bolivia requested SAS to produce the share sale contract and any other element that would prove that it holds 100% of the Bahamian companies, and the amount paid to that effect:
- Request No. 1: "Documents relating to the acquisition, by SAS, of Malku Khota Ltd. including (but not limited to) the documents evidencing: (i) that SAS is currently holder of 100% of the Malku Khota Ltd. shares; and (ii) the cash payment of the value of such shares."³⁴
34. Bolivia's requests 2 and 3 extend that same request to the other two Bahamian companies that would be CMMK's shareholders, Productora Ltd. and GM Campana Ltd.³⁵

³¹ Share Certificates issued by CMMK in favor of Malku Khota Ltd. (Title 4), Productora Ltd. (Title 8), and G.M. Campana Ltd. (Title 9) (C-9).

³² CMMK Shareholders' Registry for Productora Ltd., Malku Khota Ltd., and G.M. Campana Ltda. (Exhibit C-37).

³³ 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 (C-10).

³⁴ See Procedural Order No. 7, Annex 1, Documents requested by Bolivia.

³⁵ *Id.*

35. SAS opposed the production of such documents. It argued that it considered that the investment had been proven through the mere holding of the shares, and that, in any event, the consideration paid was indicated in Exhibits C-6, C-7 and C-8, respectively:

Claimant has already provided ample evidence supporting the fact that it owns 100% of CMMK (including the consideration paid for Malku Khota Ltd.'s shares, at Exhibit C-6), and thus satisfies the definition of investor and investment under the Treaty.³⁶

Claimant confirms that it already provided ample evidence supporting the fact that it owns 100% of CMMK (including the consideration paid for Productora Ltd.'s shares, at Exhibit C-7).³⁷

Claimant confirms that it already provided ample evidence supporting the fact that it owns 100% of CMMK (including the consideration paid for Productora Ltd.'s shares, at Exhibit C-8).³⁸

36. The Tribunal granted the requests for documents 1, 2, and 3 by Bolivia and ordered SAS to produce the documents required as follows:

The Tribunal considers that the documents requested may be relevant and material for the resolution of the dispute. The Claimant's objections are founded on its interpretation of the Treaty between the United Kingdom and Bolivia, an aspect on which the Tribunal may not reach any conclusion at this stage of the proceedings. The Claimant shall produce all of the requested documents.³⁹

37. Despite the order for document production issued by the Tribunal, the documents were not introduced into the record of the case. It will be recalled that the Claimant bears the burden of proof regarding the Tribunal's jurisdiction and, in the present case, the making of the investment. Therefore, Bolivia could not be charged with the failure to produce such documents, if the Claimant produced them in a timely manner.

38. Incidentally, we find similar circumstances in the acquisition of the shareholding that the Bahamian companies (Malku Khota Ltd., Productora Ltd., and GM Campana Ltd) would have in CMMK. The limited documents that the Claimant produced in this regard (Exhibits C-9 and C-37) are not even consistent amongst themselves. Indeed, for example, while Exhibit C-9 reflects that Productora Ltd. had acquired its shareholding in CMMK on October 15, 2007,⁴⁰ Exhibit C-

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Share Certificates issued by CMMK in favor of Malku Khota Ltd. (Title 4), Productora Ltd. (Title 8), and G.M. Campana Ltd. (Title 9) (C-9), p. 3 of the electronic document.

37 indicates that Productora Ltd. had acquired its shareholding in CMMK on December 12, 2003.⁴¹

39. Further, if we go back to the evidentiary documents on the record as to SAS' shareholding in the Bahamian companies, Exhibits C-6, C-7, and C-8, we see that those documents register that SAS—the Claimant in this arbitration claiming damages for more than 385 million dollars— would have title (through issuance or transfer) to 104 shares of a one-dollar value each (totaling 104 dollars) in the three Bahamian companies. Provided it is an actual operation, this is the amount that SAS submitted reflected the effective cost of the operation.⁴²
40. These company documents are not only few and succinct but are also defective. For example, it is telling that the corresponding table that would reflect SAS' shareholding as of August 14, 2012 in Malku Khota Ltd., Productora Ltd. and GM Campana Ltd., in two out of three instances is not even complete. This is the case, for example, regarding Malku Khota Ltd. (C-6) and GM Campana Ltd. (C-8), where only one of the two pages of the document is filed, “page 1 of 2”, with page 2 missing.
41. It is undisputed that SAS bears the burden of proof for the propositions supporting its claim to jurisdiction. The lack of evidence of its purported investments, as well as the absence of and defects in the limited documents submitted in connection with its alleged shareholding, preclude the possibility of considering that the Claimant has met its burden of proof as to jurisdiction.⁴³
42. In sum, the analysis of the material on the record shows that there is no evidence that SAS has conducted any type of activity in connection with the Mining Concessions and with the Project, beyond—in the best case— a nominal and passive shareholding in CMMK's shareholding companies.

⁴¹ CMMK Shareholders' Registry for Productora Ltd., Malku Khota Ltd., and G.M. Campana Ltda. (Title 9) (C-37), p. 4 of the electronic document. Similarly, during the document production stage, the Respondent requested SAS to produce evidence that the three Bahamian companies had actually purchased and paid shares in CMMK and that they were currently their shareholders. SAS objected. The Tribunal granted the request by the Respondent and ordered the Claimant to produce these documents. (See Procedural Order 7, Annex 1, Documents requested by Bolivia, Request No. 4). The documents were never introduced into the record.

⁴² See Procedural Order 7, Annex 1, Documents requested by Bolivia.

⁴³ As stated by the *Standard Chartered v. Tanzania* tribunal, we arbitrators must decide cases based on the facts evidenced on the record. Otherwise, the litigants would win cases by simply asserting that some element of their case might well be true. In this regard, see *Standard Chartered Bank v. Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012 (Park, Legum, Pryles) (RLA-60), ¶262: “[T]he Tribunal must decide this question of fact based on the record. The Tribunal cannot accept that the possibility that control might have existed will relieve Claimant from making that showing. Were such an approach acceptable, litigants would win cases by simply asserting that some element of their case might well have been true.” (Emphasis added).

3. Evidence of active involvement by a company other than the Claimant in the purported investment

43. That said, from a jurisdictional point of view, the present case still has another peculiar characteristic as to the evidence on the record. Not only is there no evidence of an active involvement by the Claimant in the purported investment, but there is also ample evidence linking such alleged investment to a different company, SASC, whose Canadian nationality is outside the jurisdictional realm of the Treaty between Bolivia and the United Kingdom.
44. Perhaps the most significant fact in this regard comprises SASC's own actions and statements regarding its investment project in Bolivia. For example, once the dispute arose with Bolivia regarding the Mining Concessions and the Project, SASC sought diplomatic protection from the Embassy of Canada. SAS, the Claimant, did not, alternatively or additionally, request diplomatic protection from the United Kingdom.
45. As seen in Exhibit R-299, by seeking diplomatic protection from Canada, SASC asserts that it is the owner of the investment and that it is Canadian.⁴⁴

We are most concerned that we will **have all or part of our property taken away** from us at some stage. Whether that happens now or at some time in the future, the result will be equally as devastating for the country and our company, and will **inhibit future Canadian investment**. We are also very concerned that the **community issues have become highly politicized** in recent months and manipulated by outsiders for political purposes unrelated to the project.

46. Notably, SASC does not refer to SAS at any point in the document, not even when it describes in particular its company profile and the structure used for its operation in Bolivia:⁴⁵

South American Silver Corp. (SASC) is a Canadian public company listed on the Toronto Stock Exchange (TSX:SAC), with its head office in Vancouver. SASC's core business is exploration and development of mining projects and the company has exploration properties in Chile (Escalones) and Bolivia (Malku Khota). The company operates in Bolivia through its wholly owned Bolivian subsidiary Compañía Minera Malku Khota S.A. (CMMK).

47. The e-mails exchanged between SASC and the Embassy of Canada at the time that Bolivia adopted the measures questioned in this arbitration also leave no room for doubt. For example, in Exhibit R-300, Mr. Guillermo Funes, on behalf of SASC, addresses the Canadian Government official Alexandra Laverdure in connection with the protection of SASC's investment, saying "I

⁴⁴ Exhibit R-299 (excerpt).

⁴⁵ *Id.*

*will continue to thank you because today is one of those days in which I felt very fortunate and thankful for being Canadian”.*⁴⁶

48. Similarly, SASC publicly announced the acquisition of the mining project Malku Khota, which made up the value of its shares since it traded in the stock exchange, as seen at page 18 of SASC’s 2006 “Annual Report”:⁴⁷

(c) In 2003, the Company entered into an option agreement (the “Kempff Option”) to acquire the Malku Khota property located in the Department of Potosi in west central Bolivia. Pursuant to the Kempff Option, the Company has the right for a period of five years from July 24, 2003 to purchase the claims upon payment to the owner of \$255,000. As at December 31, 2006, \$45,000 has been paid to date and the Company is obliged to pay, at its election, either: (i) \$50,000 by January 30, 2007 and \$50,000 by March 30, 2007, or (ii) \$10,000 by July 30, 2007 and \$200,000 by July 30, 2008. See note 14 (a).

49. This is also reflected in SASC’s accounting documents, as indicated, for example, in Exhibit R-180:⁴⁸

South American Silver Corp - South America	
Summary of Properties	
as at Dec 31 2011	
	Year to Date Dec/11 USD\$
MALKU KHOTA	3,856,961.80
LAURANI	62,058.28
ESCALONES	1,207,270.42
TOTAL	\$ 5,126,290.50
2011 Laurani Costs to Recon	(62,058.28)
late AJE - Malku Khota - SBC	6,444.90
TOTAL at Dec 31, 2011	5,070,677.12

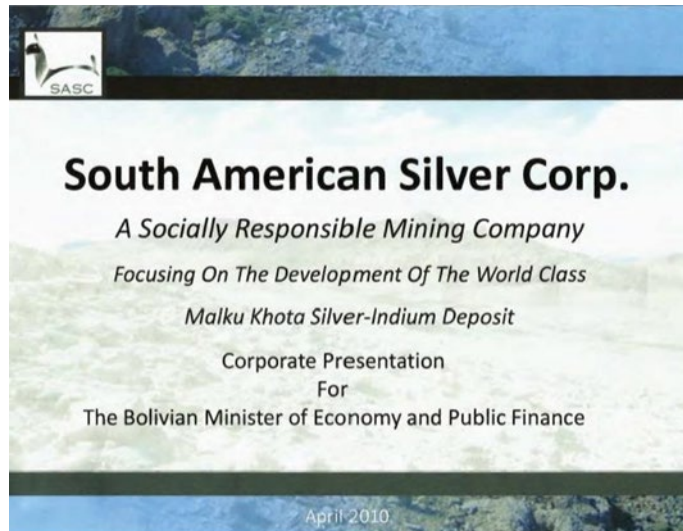
50. SASC appeared before the Bolivian authorities and presented its mining development plan for Malku Khota, as seen in the presentation of April 2010 before the Ministry of Economy and Public Finance of Bolivia included in Exhibit C-89.⁴⁹

⁴⁶ Exhibit R-300.

⁴⁷ SASC, 2006 Annual Report (FTI-6), page. 16 (excerpt).

⁴⁸ SASC, Summary of Properties (R-180) (excerpt).

⁴⁹ South American Silver Corp., *A Socially Responsible Mining Company Focusing on the Development of the World Class Malku Khota Silver-Indium Deposit, Corporate Presentation for The Bolivian Minister of Economy and Public Finance*, April 2010 (C-89) (excerpt).



51. Also in April 2010, Mr. Ralph Fitch, as SASC's Executive Director, reported as part of an update on SASC the results of his meetings with the Ministry of Economy and Public Finance of Bolivia, referring to the Malku Khota Project as "our Project," as seen in Exhibit C-40.⁵⁰

Subject: SAC Update
From: Ralph Fitch (ralphfitch@yahoo.com)
To: rdoran@soamsilver.com; wdf@malaspinaconsultants.com; ph@haberandco.com; grgsj@yahoo.com; wurray@polymetmining.com; john.w.paul@comcast.net; jewats@aol.com; Tina.Woodside@gowlings.com;
Cc: fmalbran@soamsilver.com;
Date: Thursday, April 29, 2010 12:05 PM

To The Board:

SAC Update April 29, 2010

Greg Johnson has now given his first series of talks to investors in New York and Toronto with pleasingly positive results. We are also advancing with our application to list on the QX which should further increase our liquidity and price.

Last week I visited with the Minister of Economy and Public Finance, Plurinational State of Bolivia to introduce our Malku Khota Project. The meeting was also attended by the General Consul of

Ralph Fitch
Executive Chairman

South American Silver Corp
4201 East Yale Ave, Suite 230
Denver, CO 80222 USA
direct 303-584-9656
office 303-584-0606
fax 303-758-2063

⁵⁰ Email from Ralph Fitch to SAC Board of Directors, April 29, 2010 (C-40) (excerpts).

52. Based on the above, it is not surprising to find that in Bolivia the investment in Malku Khota was referred as a Canadian investment, as seen, for example, in the press release included in Exhibit C-67.⁵¹

Morales destaca acuerdo con originarios de Malku Khota que permite recuperar recursos naturales

La Paz, 10 jul (ABI).- El presidente Evo Morales destacó el martes el acuerdo suscrito con los originarios de la población minera de Malku Khota, al norte de Potosí, porque aseguró que permite recuperar para el Estado los recursos naturales en beneficio de los bolivianos.

El jefe de Estado se reunió con los dirigentes de los ayllus de esa región que demandaban la anulación de la concesión otorgada a la compañía canadiense South American Silver (SAS).

El acuerdo establece que se nacionalizará ese yacimiento minero a través de un Decreto Supremo.

"Estos recursos naturales son del Estado por tanto del pueblo boliviano, por lo que el Gobierno nacional debe realizar la explotación y exploración con la participación de los comunarios de esa zona, eso hemos acordado", fundamentó el Jefe de Estado.

Morales lamentó el enfrentamiento entre grupos de comunarios, uno a favor de las actividades mineras de la empresa canadiense, y consideró que esa confrontación fue ocasionada por esa empresa transnacional.

"Aquí ha habido un problema, lamentablemente así son las empresas llamadas transnacionales, las empresas que enfrentaron a hermanos a cuñados, a primos, a vecinos, a hermanos del mismo ayllu, también soy culpable quiero reconocer al no ver que estaba pasando", reconoció.

En ese marco, recordó los conflictos generados por la explotación de los recursos naturales que -dijo- se registran desde la época de la colonia.

"Lo que debemos recordar es que nuestros antepasados, nuestros abuelos antes de la fundación de la República dieron su vida, su tiempo por la vida de los demás, por la patria y la Pachamama que son los recursos naturales", fundamentó.

53. We are confronted by the statements and the actions of the very company that owned the purported investment, which had effects on the Respondent and others. As arbitrators, we cannot behave as if these statements and actions never happened or as if they were not on the record. They happened, and they are on the record. It is not easy to understand why the majority of the Tribunal dismisses the statements and evidence from the company that declares itself an investor in connection with the disputed assets in this arbitration, but which sought the diplomatic protection of a State (Canada) different from the State (United Kingdom) whose nationality it now invokes through a shell company to assert the jurisdiction of the Tribunal.
54. SASC's actions and statements, acting as a Canadian investor in Bolivia are accompanied by a multitude of other statements and actions that confirm the Canadian character of the alleged investment invoked in this arbitration.
55. One of the witnesses presented by the Claimant, Mr. Felipe Malbran, categorically asserted during the hearing that there was an "absolutely direct" link between SASC and CMMK:

⁵¹ *Morales underscores the agreement with the Malku Khota indigenous communities that allows the recovery of natural resources*, Agencia Boliviana de Información, 10 July 2012 (C-67) (excerpt). Similarly, the following exhibits should be reviewed: *Gobierno dice que tenía hace un año la intención de anular contrato con minera en Malku Khota* (Government says that, a year ago, it had the intention to annul the contract with the Malku Khota Mining Company), 9 July 2012 (C-63) and *Definen que el Estado se hará cargo de la mina Malku Khota* (The State will take over the Malku Khota mine), PÁGINA SIETE, 11 July 2012 (C-64).

QUESTION (MR. SILVA-ROMERO): Let us now look at Tab Number 12, Mr. Malbran. This is a report by BSR, dated May '09. This is C-154, for the Transcript. First, you're familiar with this document; right?

ANSWER (MR. MALBRÁN): Yes.

Q: I understand that you read English?

A: Yes.

Q: This Report was prepared because it was--or rather at the behest of SASC; correct?

A: Yes.

Q: First, let us look at the second page. Here it says that this Report was commissioned by SASC—South American Silver Corporation--correct?

A: Yes.

Q: So, it wasn't CMMK who made the decision to hire BSR; correct?

A: Well, CMMK--and I was managing CMMK--well, we made the recommendation, and the Contract was entered into by SASC, and we had a direct link, CMMK and SASC.⁵²

56. Certainly, this examination confirms that the decisions and actions in connection with the Mining Concessions and the Project were the direct responsibility of SASC regarding CMMK. In this case, the topic was the report by the company *Business for Social Responsibility* (BSR), whose services had been retained by SASC, which referred to the relationship with the

⁵² See Tr. Hearing, Day 3, 553:14-25, 554:1-9 (ENG). In the Spanish transcript, this exchange can be found at Tr. Hearing, Day 3, 646:18 to 647:22 (SPA):

PREGUNTA (SR. SILVA ROMERO): Vamos al separador número 12 por favor, señor Malbrán.

RESPUESTA (SR. FELIPE MALBRÁN): Sí.

P: Este es el informe de BSR de mayo del 2009. Anexo C154 para la transcripción. Y entiendo que, primero que todo, usted está familiarizado con este documento.

R: Sí.

P: Bien. Este informe fue preparado por encargo de South American Silver Corporation. ¿Correcto?

R: Correcto.

P: Y ahí yo sí quisiera que corrigiéramos un punto, señor Malbrán, entre paréntesis. Primero quería que viéramos la segunda página. Ahí se dice claramente que el informe fue encargado o pedido por South American Silver Corporation. ¿Correcto?

R: Sí.

P: De tal manera que no fue CMMK quienes tomaron o quien tomó la decisión de contratar a BSR. ¿Correcto?

R: Bueno, eso es CMMK y estando yo, digamos, dirigiendo CMMK fue el que recomendó. Finalmente suscribió el contrato South American Silver Corporation.

P: Okay.

R: Pero sí había un vínculo absolutamente directo con CMMK

communities living on the mining project sites.⁵³ However, several other documents on the record reflect SASC's active and direct involvement in the decision-making and the management of the Mining Concessions and the Project during the relevant period; no similar traces exist regarding SAS and the financial, technical, and administrative decisions or of any other sort related to the Mining Concessions and the Project, such as the following decisions we can cite as illustrations.

57. Exhibit R-183 shows SASC's direct involvement in the commissioning of a *3D Resource Model Construction* to Pincock, Allen & Holt for the Malku Khota Project.⁵⁴

August 21, 2008

Mr. Ralph Fitch
President, CEO & Chairman
South American Silver Corp.
4201 East Yale Avenue, Suite 230
Denver, CO 80222
Email: ralphfitch@acs.com

Re: Malku Khota Project – 3D Model and 43-101 Technical Report
PAH Proposal No. 08-071

Dear Mr. Fitch:

Pincock, Allen and Holt (PAH) appreciates the opportunity to provide South American Silver Corp. (SASC) with a proposal for a 3D Resource Model Construction by September 30, 2008 followed by an updated 43-101 Technical Report by November 15, 2008 for the Malku Khota Project Silver-Gold Project located in Bolivia. PAH welcomes the opportunity to work with SASC on this project.

PROJECT BACKGROUND

SASC's Malku Khota property is located in the Cordillera Oriental, approximately 98 kilometers east-southeast of Oruro, Bolivia and 85 kilometers south of Cochabamba in southwest Bolivia. The historic gold and silver workings, some of which date back to Colonial Spanish times, are located within sandstone. SASC through its wholly owned subsidiary Compania Minera Maiku Khota S.A. (CMMK) currently holds mineral rights to 5,050 hectares that covers a core area encompassing the Malku Khota project area, and covers the majority of the mineralized sandstone unit. Drilling is in progress with 29 holes completed. Silver mineralization is associated with indium and gold.

58. Exhibit R-185 reflects SASC's direct involvement in the agreement with Compañía de Minas Buenaventura S.A., with SASC, as a Canadian company, continuously referring to the Malku Khota Project as its property.⁵⁵

⁵³ *Id.*

⁵⁴ Contract between Pincock, Allen & Holt and SASC, dated September 2, 2008 (R-183).

⁵⁵ Confidentiality Agreement between SASC and Compañía de Minas Buenaventura, December 3, 2009 (R-185) (excerpt).

Mr. Raul Benavides Ganoza
Manager, Business Development
Compania de Minas Buenaventura S.A.A.
Carlos Villaran 790, Santa Catalina
La Victoria, Lima, Peru

Dear Mr. Benavides Ganoza:

South American Silver Corp. ("SASC"), which is a Canadian Federal Corporation, holds rights to certain properties known as Malku Khota through its wholly owned subsidiary, Compania Minera Malku Khota S.A., in the Department of Potosi, Bolivia, which properties are described and identified in the attached Exhibit A (the "Properties"). Said Properties, together with all land within three (3) kilometres of the exterior boundary of the Properties, will be referred to collectively in this Agreement as the "Area of Interest".

SASC has conducted reconnaissance and other exploration and evaluation operations in connection with the Area of Interest in view of discovering and producing valuable minerals. SASC has offered to disclose to Compania de Minas Buenaventura S. A. A. ("Recipient"), certain information and data collected by SASC and others in tangible form (the "Information") to determine whether Recipient wishes whether or not to enter into future business transactions with SASC regarding the properties and the Area of Interest (the "Purpose").

59. Exhibit R-190 reflects SASC's direct involvement in the hiring of Optimum Project Services Ltd. for the development of the Malku Khota Project:⁵⁶

Ralph Fitch
President and CEO
South American Silver Corp.
880 – 580 Hornby Street
Vancouver BC V6C 3B6

Dear Ralph,

Proposal for Services to the Malku Khota project

Following our recent discussions, we are pleased to submit this proposal for Optimum Project Services Ltd. (Optimum) to provide services to South American Silver Corp. (SASC) to help take the Malku Khota project from its current scoping stage through future development phases to production.

60. Exhibit R-191 reflects how SASC approached its mining project in Bolivia within the corporation, and how the Malku Khota Project's management details were addressed by the SASC Board:⁵⁷

⁵⁶ Proposal for Services by Optimum Project Services to SASC, 30 January 2009 (R-190) (excerpt).

⁵⁷ SASC, Minutes of the Meeting of the Directors, January 31, 2009 (R-191).

SOUTH AMERICAN SILVER CORP.
(the "Corporation")

MINUTES OF THE MEETING OF THE DIRECTORS
Held in Denver, Colorado on January 31, 2009 at 9:00 am (Denver time),
11:00 am (Toronto time)

CALL TO ORDER

The meeting was called to order by Ralph Fitch, who, with the consent of the meeting, acted as Chairman of the meeting.

APPOINTMENT OF THE SECRETARY FOR THE MEETING

With the consent of the meeting, Richard Doran acted as secretary of the meeting.

CONSTITUTION OF THE MEETING

The directors of the Corporation present at the meeting were Ralph Fitch, Tina Woodside, John Paul, Paul Haber, and John Watson. As notice of the meeting had been given in accordance with the Corporation's by-laws, and a quorum was present, the Chairman declared the meeting properly constituted for the transaction of business. With the consent of the meeting, Richard Doran was also present.

PURPOSE OF THE MEETING

The Chairman reviewed the purpose of the meeting and began with an outline of the agenda which included the following:

1. a review of the Malku Khota property in Bolivia;
2. the status of the Pincock Allen and Holt ("PAH") preliminary economic assessment study on the Malku Khota property ("PEA Study");

61. Similarly, as observed in the valuation reports presented by both Parties and in their corresponding annexes and appendices, none of SAS' financial statements were produced in this arbitration, only those of SASC,⁵⁸ based on which all quantum calculations were performed. Indeed, reading the valuation reports is surprising in this regard since, in this arbitration, while SAS from Bermuda (United Kingdom) is the Claimant for more than USD 385 million, all references are to the Canadian company SASC, which is not a party to the arbitration.
62. By way of illustration, we can consider, for example, document FTI-10 submitted by SAS' valuation expert. These are the consolidated financial statements, as at September 30, 2012, not for the Claimant, SAS, but for a different company, SASC, as reflected on the very cover page of the document:⁵⁹

South American Silver Corp.

(An Exploration Stage Company)

Condensed Interim Consolidated Financial Statements
Third Quarter Ended September 30, 2012

(Unaudited - expressed in U.S. dollars)

63. SASC's consolidated financial statements do not allow the identification of any contribution made by SAS to the Project. In fact, a review of the financial statements in full shows that the

⁵⁸ See *supra*, ¶23.

⁵⁹ SASC. Condensed Interim Consolidated Financial Statements. Third quarter ended September 30, 2012 (FTI-10) (excerpt)

only reference to SAS is made in the notes to the financial statements, in particular in the sections referring to this international arbitration.⁶⁰

64. This is also the case, for example, in Appendix 6 to FTI's First Report, referred to by my colleagues in their opinion.⁶¹ As seen in the image below, Appendix 6 –which is a table developed by FTI, not an evidentiary document– includes “SASC's Bolivian costs (sic) related to the Project”, but without any mention of SAS or any element linking SAS with any of the cash flows related to the Project.⁶²

Appendix 6 Project Costs Incurred

A6.1 In the table below we have provided a reconciliation of SASC's Bolivian costs related to the Project based on capitalized exploration costs (Column A) and an allocation of general and administrative costs (Column H) based on exploration costs incurred on an annual basis (Column I).¹⁸¹

Figure 27 – SASC's Bolivian Costs

Period	A Maliku Khota Capitalized Exploration	B Total Capitalized Exploration	C Gross G&A	D Less: Share- based Payments	E Less: Reconnaissance and Sundry Exploration	F Less: Mining Claim Write- down	G Add (Less): Gains (Loss) on Disposal	H = C - D - E - F + G Net G&A	I % Allocation	J = H * I Maliku Khota G&A
2003	\$ 27,023	\$ 463,441	\$ 1,062,092	\$ -	\$ 3,789	\$ -	\$ (1,029,305)	\$ 28,998	6%	\$ 1,090.86
2004	\$ 170,978	\$ 511,188	\$ 17,958	\$ -	\$ 46,653	\$ -	\$ 17,600	\$ 48,905	36%	\$ 17,826.52
2005	\$ 155,003	\$ 465,410	\$ 286,912	\$ -	\$ 126,143	\$ 78,112	\$ -	\$ 160,769	0%	\$ -
2006	\$ 324,145	\$ 863,614	\$ 214,840	\$ -	\$ 30,207	\$ -	\$ -	\$ 184,633	42%	\$ 78,425.12
2007	\$ 1,893,243	\$ 3,180,496	\$ 2,705,776	\$ 1,507,714	\$ 16,160	\$ -	\$ -	\$ 1,181,902	68%	\$ 800,437.86
2008	\$ 5,845,999	\$ 6,454,790	\$ 2,118,609	\$ 1,031,578	\$ 10,600	\$ -	\$ -	\$ 1,076,431	98%	\$1,050,148.83
2009	\$ 7,845,524	\$ 8,675,051	\$ 1,873,796	\$ 548,443	\$ 73,019	\$ -	\$ -	\$ 1,252,334	90%	\$1,127,828.28
2010	\$ 11,457,634	\$ 12,524,955	\$ 3,774,996	\$ 784,604	\$ 16,905	\$ -	\$ -	\$ 2,973,487	94%	\$2,789,825.96
2011	\$ 15,321,041	\$ 17,595,632	\$ 10,293,856	\$ 4,989,090	\$ 98,863	\$ -	\$ -	\$ 5,205,903	76%	\$3,966,437.24
Q3 2012	\$ 18,711,088	\$ 24,396,225	\$ 8,022,910	\$ 1,810,252	\$ 16,429	\$ -	\$ -	\$ 6,196,229	50%	\$3,088,775.87
Total	\$18,711,088									\$12,921,397

¹⁸¹ SASC. “Excerpts from Financial Statements for Costs Incurred”. (FTI 55) Percentage G&A allocation (column I) calculated as Project exploration costs divided by SASC's total exploration costs in each period, expressed as a percentage.

65. In footnote number 181, below the table, it can be seen that the documentary support for the table developed by FTI are the “Excerpts from Financial Statements for Costs Incurred” by SASC, document FTI-55. Referring to FTI-55, it can be confirmed that these are excerpts from financial statements for SASC, not SAS.⁶³

South American Silver Corp.

(An Exploration Stage Company)

Condensed Interim Consolidated Statements of Loss and Comprehensive Loss
For the three and nine months ended September 30

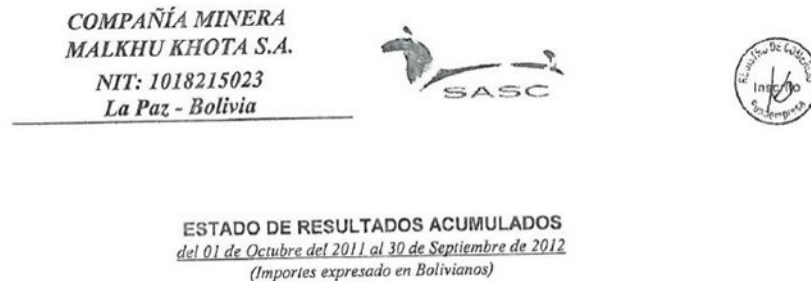
⁶⁰ *Id.*, p. 9 of the electronic document.

⁶¹ See Majority Opinion, ¶¶869.

⁶² FTI, First report, Appendix 6.

⁶³ SASC. Excerpts from Financial Statements for Costs Incurred (FTI-55) (excerpt).

66. Similarly, none of the excerpts included in document FTI-55 contain any reference to the Claimant, while they do include direct references to the Project in SASC's name.⁶⁴
67. A further example can be found in Exhibit BR-27, which contains the accounting documentation submitted by the Respondent's valuation expert. The relevant document is a financial statement from CMMK –not SAS– which contains no reference to SAS and whose heading speaks for itself regarding the direct relationship between CMMK and SASC.⁶⁵



68. Moreover, the study of these financial statements reveal that, under accounts payable to “related companies,” only Canada, the United States, and Chile are listed (the countries of registration, according to the organization chart provided by the Claimant,⁶⁶ of some of the remaining companies of the group other than SAS, Malku Khota Ltd., Productora Ltd., and GM Campana Ltd.), with no reference made to Bermuda, SAS's country of nationality based on which an attempt to generate jurisdiction under the Treaty between Bolivia and the united Kingdom has been made.⁶⁷

F. SOCIEDAD RELACIONADA

Las cuentas por pagar a largo plazo a las compañías relacionadas ascienden a un total Bs. 44.209.565,00.- al 30 de septiembre de 2012.

Detalle	Importe
Cuenta por Pagar Chile	319.589,28
Cuenta por Pagar USA	6.200.218,52
Cuenta por Pagar Canada	37.689.757,20
TOTAL CUENTAS POR PAGAR LP	44.209.565,00

⁶⁴ See SASC. Excerpts from Financial Statements for Costs Incurred (FTI-55), for example at page 2 of the electronic document.

⁶⁵ See Compañía Minera Malku Khota SA. Financial Statements, October 1, 2011 to September 30, 2012 (BR-27), page 4 of the electronic document.

⁶⁶ Statement of Claim and Memorial, ¶33.

⁶⁷ Compañía Minera Malku Khota SA. Financial Statements, October 1, 2011 to September 30, 2012 (BR-27) (excerpt).

69. As can be seen, the financial information on the record does not include elements of activity attributable to a company of a nationality within the realm of protection under the Treaty between Bolivia and the United Kingdom.⁶⁸
70. The same applies to the market value of the Claimant's shares, in connection with which no evidence was produced, taking into account instead the private share placements of the Canadian company SASC for the calculation of the damages claimed in this arbitration.⁶⁹
71. Along the same lines, as illustrated in Exhibit R-16, on SASC's own account, the third-party funding agreement to cover the costs of this international arbitration —with the purported inclusion of costs, risks, and warranties— was entered into by SASC, and not by SAS, despite SAS, not SASC, being the Claimant.⁷⁰

South American Silver Announces Arbitration Costs Funding Arrangement

By

Published: May 24, 2013 11:52 a.m. ET

VANCOUVER, BRITISH COLUMBIA, May 24, 2013 (Marketwired via COMTEX) -- South American Silver Corp. (SAC) (otcqx:SOHAF) (the "Company") is pleased to announce that on May 23, 2013 the Company entered into an agreement with a third party funder (hereinafter the "Fund") pursuant to which the Fund will cover South American Silver's future costs and expenses related to the international arbitration proceedings against the Plurinational State of Bolivia for the expropriation of the Malku Khota project. The funding is on a non-recourse basis and includes costs and expenses of the enforcement of any award rendered by the arbitral tribunal. No broker has acted in the transaction.

⁶⁸ Along the same lines, the following documents are available on the record: SASC Condensed Interim Consolidated Financial Statements. Second Quarter ended June 30, 2012 (FTI-4), SASC Consolidated Financial Statements for December 31, 2006 and 2005, March 27, 2007 (BR-11), SASC Consolidated Financial Statements for December 31, 2007 and 2006, March 25, 2008 (BR-12), SASC Consolidated Financial Statements for December 31, 2008 and 2007, March 25, 2009 (BR-13), SASC Consolidated Financial Statements for December 31, 2009 and 2008, March 24, 2010 (BR-14), SASC Consolidated Financial Statements for December 31, 2010 and 2009, March 18, 2011 (BR-15), SASC Consolidated Financial Statements for December 31, 2011 and 2010, March 20, 2012 (BR-16), SASC Consolidated Financial Statements for December 31, 2012 and 2011, March 28, 2013 (BR-17), SASC Condensed Consolidated Financial Statements, First Quarter Ended March 31, 2011 (BR-18), SASC Condensed Consolidated Financial Statements, Third Quarter Ended September 30, 2011 (BR-19), SASC Condensed Interim Consolidated Financial Statements, First Quarter Ended March 31, 2012 (BR-20), SASC Condensed Consolidated Financial Statements, Third Quarter Ended September 30, 2012 (BR-21), SASC Annual Information Form for the Fiscal Year Ended December 31, 2007, March 25, 2008 (BR-22), South American Silver Corp. Annual Information Form for the Fiscal Year Ended December 31, 2011, March 20, 2012 (BR-23), Compañía Minera Malku Khota SA. Financial Statements, October 1, 2011 to September 30, 2012 (BR-27)

⁶⁹ In this regard, see FTI, First Report, ¶¶9.43-9.52. See also price analysis for SASC's shares and its relevance for assessing the estimate presented by FTI in its First Report at ¶¶2.4 and ¶¶10.8-10-17.

⁷⁰ Press release, Market Watch, South American Silver Announces Arbitration Costs Funding Arrangement, May 24, 2013 (R-16) (excerpt).

72. Furthermore, as illustrated in Exhibit C-38, the patented invention regarding the mining exploration belongs to SASC, not SAS:⁷¹

(12) United States Patent Dreisinger et al.		(10) Patent No.: US 8,585,991 B2
		(45) Date of Patent: Nov. 19, 2013
<hr/>		
(54) METHOD FOR RECOVERING INDIUM, SILVER, GOLD AND RARE, PRECIOUS AND BASE METALS FROM COMPLEX OXIDE AND SULFIDE ORES	(56) References Cited	
U.S. PATENT DOCUMENTS		
2,283,198 A * 5/1942 Fink et al. 423/38		
3,545,964 A * 12/1970 Hansen et al. 423/38		
4,378,275 A 3/1983 Adamson et al.		
2002/0152845 A1 10/2002 Fleming et al.		
2002/0159927 A1 10/2002 Allen et al.		
2004/0156765 A1 * 8/2004 Lalancette 423/40		
2004/0228783 A1 11/2004 Harris et al.		
FOREIGN PATENT DOCUMENTS		
<hr/>		
(75) Inventors: David Dreisinger, Delta (CA); Ralph Fitch, Denver, CO (US); Cornelis Verbaan, Denver, CO (US)		
(73) Assignee: South American Silver Corp., Vancouver (CA)		

73. I could continue to list examples of documents from the case record.⁷² In order to avoid unnecessarily prolonging this opinion, I will simply mention once again that the record does not

⁷¹ 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 (C-38) (excerpt).

⁷² Along the same lines, the following documents are available on the record: Preliminary Economic Assessment Technical Report for the Malku Khota Project, March 13, 2009 (C-13), Preliminary Economic Assessment Update Technical Report for the Malku Khota Project, May 10, 2011 (C-14), Letter from CMMK to the Minister of Mines and Metallurgy, July 21, 2012 (C-18), Email from Marco A. Medrano Valdivia to Ralph Fitch, April 26, 2010 (C-90), SGS Canada Inc., An Investigation into Standard Soak Tests for Silver and Indium Extraction from the Malku Khota Deposit Samples (10 Series and Column Leach Residues), May 31, 2012 (C-295), South American Silver Corp. Enters into an Agreement to Acquire High Desert Gold Corporation, South American Silver Corp., Press Release, October 21, 2013 (C-28), Updated Malku Khota Study Doubles Production Levels and 1st 5 Year Cashflow Estimates, South American Silver Corp. Press Release, March 31, 2011 (C-41), Email from Jim Mallory to Walker San Miguel and Danilo Bocángel, May 9, 2012 (C-52), Letter from Xavier Gonzales to Félix Gonzales, February 3, 2012 (C-69), Letter from Jim Mallory and Xavier Gonzales to Félix Gonzales, February 22, 2012 (C-70), Letter from Xavier Gonzales to Governor of Potosí, June 4, 2012 (C-71), Email from Varinia Cecilia Daza to Ralph Fitch, June 2, 2010 (C-91), SGS Canada Inc., An Investigation into The Recovery of Lead, Copper and Zinc by Flotation from Malku Khota Samples, May 9, 2011 (C-135), SASC y Cumbre del Sajama S.A., Final Report, “Conociendo la Minería,” 2008 (C-139), Fundación Medmin, EMAP Form Update, PMA and PASA, Apr. 2012 and filed on Apr. 13, 2012 (C-148), SASC y Cumbre del Sajama S.A., *Talleres “Conociendo y Cuidando Nuestro Medio Ambiente Comunitario,”* May 2009 (C-166), South American Silver Corp., Malku Khota Project Community Relations Update, May 25, 2011 (C-170), South American Silver Corp., Operations Report March – 2012 (C-194), South American Silver Corp., Operations Report - February 2012 (C-212), South American Silver Corp., Operations Report - April 2012 (C-213), South American Silver Corp., Operations Report - May 2012 (C-214), E-mail from A. Cardenas to F. Caceres et. al, Jun. 11, 2012 (C-215), Fernando Caceres, Monthly Report on the Malku Khota Mining Project, Aug. 2007 (C-258), Fernando Caceres, Monthly Report on the Malku Khota Mining Project, Apr. 2007 (C-259), Fernando Caceres, Monthly Report on the Malku Khota Mining Project, May 2008 (C-260), Fernando Caceres, Monthly Report on the Malku Khota Mining Project, June 2008 (C-261), Memorandum from Santiago Angulo to Felipe Malbran, Monthly Report on the Malku Khota Project, Nov. 2007 (C-262), Memorandum from Santiago Angulo to Felipe Malbran, Monthly Report on the Malku Khota Project, Dec. 2008; C155, Memorandum from Santiago Angulo to Felipe Malbran, Monthly Report on the Malku Khota Project, May 2009. 2009 (C-264), Memorandum from Santiago Angulo to Felipe Malbran, Monthly Report on the Malku Khota Project, Dec. 2009 (C-265), Memorandum from Santiago Angulo to Felipe Malbran, Report on the Community Relations, Malku Khota Project, Sept. 2009 (C-266), Memorandum from Santiago Angulo to Felipe Malbran, “Talleres en el proyecto Malku Khota,” Jul. 2008 (C-267), Memorandum from Santiago Angulo to Felipe Malbran, Monthly Report on the Malku Khota Project, Apr. 2009 (C-268), Compañía Minera Malku Khota S.A., *Evaluation “Mensajes de la Compañía Minera Malku Khota”* Workshop, May 2, 2010 (C-269), Compañía Minera Malku Khota S.A., “Taller

include any document equivalent to the ones mentioned in this section showing an active role of any kind by SAS in the investment in Bolivia.

Mensajes,” Apr. 2010 (C-270), Press release, SASC, South American Silver Corp. Announces First Drilling Results at the Malku Khota Silver Project in Bolivia , June 28, 2007 (R-10), Press release, SASC, South American Silver Announces Intersection of New Lead-Zinc-Silver SEDEX Mineralization at Malku Khota, August 28, 2008 (R-11), Press release, SASC, South American Silver Corp. Completes Final Tranche of \$3.25 Million Financing, December 7, 2009 (R-12), Press release, SASC, South American Silver Provides a Metallurgical Update at Malku Khota Showing Improved Metal Recoveries, September 11, 2009 (R-13), Press release, SASC, South American Silver Third Quarter President’s Message and Project Update, November 18, 2010 (R-15), W. Sacher, *El modelo minero canadiense: Saqueo e impunidad institucionalizados*, July 2011 (R-19), Press release, SASC, South American Silver provides Update on Malku Khota Silver-Indium Project, May 4, 2011 (R-124), Press release, SASC, Two employees freed, South American Silver in discussion with Bolivian government and indigenous authorities, July 9, 2012 (R-128), Press release, SASC, South American Silver Responds Strongly to Bolivian Government Statements, July 10, 2012 (R-129), SASC, Minutes of the Meeting of the Directors, May 10, 2011 (R-166), SASC, Minutes of the Meeting of the Directors, January 12, 2011 (R-170), Consulting Agreement between General Minerals Corporation and Dreisinger Consulting Inc. of 4th May, 2006 (R-182), SASC, Minutes of the Meeting of the Directors, July 11, 2008 (R-184), Confidentiality Agreement between SASC and Coeur d’Alene Mines Corporation, November 13, 2008 (R-186), Confidentiality Agreement between SASC and Pan American Silver Corp., July 27, 2008 (R-187), Confidentiality Agreement between SASC and Koromet. Co. Ltd., December 8, 2009 (R-188), Confidentiality Agreement between SASC and SK Networks Co., December 1, 2009 (R-189), SASC, Minutes of the Meeting of the Directors, April 18, 2008 (R-196), SASC, Minutes of the Meeting of the Directors, March 22, 2007 (R-199), SASC, Minutes of the Meeting of the Directors, November 9, 2007 (R-200), SASC, Minutes of the Meeting of the Directors, January 18, 2008 (R-201), SASC, Minutes of the Meeting of the Directors, April 14, 2009 (R-202), SASC, Minutes of the Meeting of the Directors, August 12, 2009 (R-203), SASC, Minutes of the Meeting of the Directors, August 12, 2010 (R-204), SASC, Minutes of the Meeting of the Directors, December 7, 2011 (R-205), SASC, Board presentation for the approval of the 2012 business plan and budget, December 7, 2011 (R-206), Fernando Caceres, Monthly Report on the Malku Khota Mining Project, Jul. 2007 (C-283), Fernando Caceres, Monthly Report on the Malku Khota Mining Project, Sept. 2007 (C-284), Fernando Caceres, Monthly Report on the Malku Khota Mining Project, Oct. 2007 (C-285), Fernando Caceres, Monthly Report on the Malku Khota Mining Project, Dec. 2007 (C-286), South American Silver, Malku Khota: Community Relations Chronology, July 2012 (C-287), Descripción de Puesto de Promotor Territorial, July 2011 (C-289), Fernando Caceres, Monthly Report on the Malku Khota Mining Project, Nov. 2011 (C-290), Fernando Caceres, Monthly Report on the Malku Khota Mining Project, Dec. 2011 (C-291), Fernando Caceres, Monthly Report on the Malku Khota Mining Project, Jan. 2012 (C-292), SGS Canada Inc., An Investigation into Further Soak Tests for Silver and Indium from the Malku Khota Deposit, May 31, 2012 (C-296), South American Silver Corp., Corporate Report 2011, May 2, 2012 (C-300), South American Silver Corp., First Quarter Ended March 31, 2012 – Management’s Discussion & Analysis (“MD&A”), May 11, 2012 (C-301), South American Silver Corp., Press release, “South American Silver Corp. Announces Final Closing of \$16 Million Financing with Asian based High Technology Groups,” May 7, 2012 (C-302), SASC, Press release, February 19, 2007 (FTI-3), SAS, Annual Information Form, 2010 (FTI-5), SASC, Press release, April 17, 2007 (FTI-7), SASC, Press release, June 28, 2007 (FTI-8), Edison, “January 10, 2012 Report” (FTI-15), NBF, “June 17, 2011 Report” (FTI-34), NBF, “December 20, 2011 Report” (FTI-35), NBF, “July 11, 2012 Report” (FTI-36), Redchip, “April 3, 2012, Report” (FTI-37), Edison, “May 16, 2012 Report” (FTI-38), Edison, “May 17, 2012 Report” (FTI-39), SASC, “May 7, 2012 Press release” (FTI-41), “South American Silver Announces \$28 Million Financing.” South American Silver Corp., November 8, 2010 (BR-24), “South American Silver Announces \$16 Million Financing with Asian Based High Technology Manufacturers and Investors.” South American Silver Corp., April 16, 2012 (BR-25), Johnson, Greg. “South American Silver Corp. 2012 Corporate Presentation.” Precious Metals Mining Investment Seminar. CPM Group, May 17, 2012 (BR-51), South American Silver Press Release, “South American Silver Responds Strongly to Bolivian Government Statements,” July 10, 2012 (BR-74) and South American Silver Press Release, “Two employees freed, South American Silver in discussion with Bolivian government and indigenous authorities,” July 9, 2012 (BR-75).

74. The facts as analyzed above establish the following: a Canadian company that is not a party to this arbitration (SASC) asserts ownership of the purported investment and performs all of the management and control acts attributable to an actively involved company that owns the purported investment. However, the party appearing before this Tribunal as an investor is not the Canadian company, but another company from Bermuda (territory covered by the scope of the BIT between Bolivia and the United Kingdom), a shell company with a negligible capital and a nominal and passive shareholding in Bahamian companies and in connection with which no active involvement in the object of this dispute was established.
75. It remains to be established if, given the facts verified *supra* at Sections II.A.2 and II.A.3, it is possible to assert that the Tribunal has jurisdiction under the Treaty between Bolivia and the United Kingdom.

4. Did SAS make an investment under the terms of the Treaty between Bolivia and the United Kingdom?

76. From a legal perspective, the facts discussed in the previous sections should be analyzed under the Treaty. As my colleagues acknowledge, it is not about drafting a general doctrine on the protection of indirect investments under international investment law. It is about determining the specific scope of Article 8.1 of the Treaty for the purposes of this dispute.⁷³ The analysis should therefore begin with Article 8.1 of the Treaty, which is the investor-State dispute resolution clause
77. As my colleagues state, “nothing in Article 8(1) prevents the investment from belonging to an investor (being ‘of’ an investor) despite the lack of direct control over the investment by the investor except through intermediary companies also controlled by the investor.”⁷⁴ In Section II.A.5, I will explain why it is impossible to agree with this assertion on the protection of indirect investments under the Treaty. The point here is that the jurisdictional analysis begins earlier. Article 8.1, as discussed by the Parties, confronts us with the question about the existence of an

⁷³ See Majority Opinion, ¶296. “In this case, the Tribunal does not have the task of establishing a general doctrine on the protection of so-called ‘indirect investments’, nor to take a stand, in general terms, on the eventual rights of a company’s shareholders for the acts of a State that may affect the company of which they are shareholders. The jurisdictional exception raised by Respondent refers specifically to the Treaty and the scope of the Respondent’s consent in the Treaty.” See also Majority Opinion, ¶320: “[T]he subject of discussion is not whether the property or the direct possession in general is an object of protection in international investment law, but the specific scope of Article 8.1 in the Treaty for the purposes of this dispute.” Similarly, Majority Opinion, ¶284 and ¶326.

⁷⁴ Majority Opinion, ¶319.

investment despite the fact that the alleged investor has not had an active involvement with its alleged investment. This preliminary and distinct issue, which Bolivia qualified as its “main argument” on jurisdiction,⁷⁵ is not resolved by my colleagues in the cited passage.

78. In accordance with Article 31.1 of the Vienna Convention, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁷⁶ Let us first consider the literal sense of the Treaty.

a. The terms of the Treaty

79. Article 8.1 of the Treaty provides:

Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been legally and amicably settled shall after a period of six months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes.⁷⁷

80. Article 1(a) of the Treaty between Bolivia and the United Kingdom provides the following:

For the purposes of this Agreement:

(a) “investment” means every kind of asset which is capable of producing returns and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other form of participation in a company;

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights and goodwill;

⁷⁵ Rejoinder Memorial, ¶264.

⁷⁶ Vienna Convention on the Law of Treaties (CLA-11).

⁷⁷ To facilitate the comparison between the relevant treaties regarding the provisions discussed in this section, I transcribe below the Spanish text of Article 8.1 of the Treaty:

Las diferencias entre un nacional o una sociedad de una Parte Contratante y la otra Parte Contratante concernientes a una obligación de la última conforme a este Convenio y en relación con una inversión de la primera que no hayan sido arregladas legalmente y amigablemente, pasado un periodo de seis meses de la notificación escrita del reclamo, serán sometidas a arbitraje internacional si así lo deseara cualquiera de las partes en la diferencia.

(v) 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.

A change in the form in which assets are invested does not affect their characters as investments. Investments made before the date of entry into force as well as those made after entry into force shall benefit from the provisions of this Agreement.⁷⁸

81. Within the four corners of the Treaty, and without having to resort to any source beyond its text, we see that protection is afforded to investments by investors of one of the States Parties in the territory of the other State Party. In the English version of the Treaty, two different prepositions are used in the section referring to the investment,⁷⁹ “*of*” and “*by*”, while in the Spanish version the same preposition, “*de*”, is used.⁸⁰

⁷⁸ To facilitate the comparison between the relevant treaties regarding the provisions discussed in this section, I transcribe below the Spanish text of Article 1(a) of the Treaty:

Para los fines del presente Convenio

(a) el concepto "inversiones" significa toda clase de bienes capaces de producir rentas y en particular, aunque no exclusivamente, comprende:

(i) bienes muebles e inmuebles y demás derechos reales, como hipotecas y derechos de prenda;

(ii) acciones, títulos y obligaciones de sociedades o participación en los bienes de dichas sociedades;

(iii) derechos a fondos o a prestaciones bajo contrato que tengan un valor económico;

(iv) derechos de propiedad intelectual y goodwill;

(v) cualesquiera concesiones de tipo comercial otorgadas por las Partes Contratantes de conformidad con sus respectivas leyes, incluidas las concesiones para la exploración, cultivación, extracción o explotación de recursos naturales.

Un cambio de la forma de inversión de los bienes no afecta su condición de inversiones. Las inversiones realizadas antes de la fecha de entrada en vigor así como las realizadas después de la entrada en vigor se beneficiaran de las disposiciones del presente Convenio.

⁷⁹ The Parties have referred to the Oxford Dictionary to discuss the meaning of these prepositions for the definition of investment under the Treaty, including it as authority RLA-48 on the record, as mentioned in the Counter-Memorial, ¶228, Rejoinder Memorial, ¶252 and Rejoinder Memorial on Jurisdiction, ¶57 and footnote number 182. My colleagues also resort to the Oxford Dictionary to discuss the scope of these prepositions, as seen in the Majority Opinion at ¶301 and footnote number 468. The Claimant has referred to Bolivia’s “interest” in using dictionary definitions and it has proceeded to use the definition of the adjective “prompt” found in the Oxford Dictionary. See Reply Memorial, ¶296.

⁸⁰ Thus, for example, we see in the Preamble the declaration that Bolivia and the United Kingdom enter into the Treaty “Desiring to create favorable conditions for greater investment by nationals and companies of one State in the territory of the other State” (English version); “*Animados del deseo de crear condiciones favorables para mayores inversiones de capital de los nacionales o sociedades de un Estado en el territorio del otro Estado*” (Spanish version). Similarly, Article 8.1 of the Treaty provides for investor-State arbitration for “Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former...” (English version); “*Las diferencias entre un nacional o una sociedad de una Parte Contratante y la otra Parte Contratante concernientes a una obligación de la última conforme a este Convenio y en relación con una inversión de la primera*” (Spanish version).

82. The ordinary meaning of the preposition “*of*”, according to the Oxford Dictionary of the English Language, in its third sense, is both “*indicating an association between two entities, typically one of belonging, in which the first is the head of the phrase and the second is something associated with it*”⁸¹ and “*expressing the relationship between an author, artist, or composer and their works*”.⁸² Examples of the former would be phrases such as “the son of a friend” or “the government of India”.⁸³ Examples of the latter would be “the plays of Shakespeare” or “the paintings of Rembrandt”.⁸⁴
83. On the other hand, the ordinary meaning of the preposition “*by*”, according to the Oxford Dictionary of the English Language is, in its first and main sense, a relationship of authorship, of agency, “*identifying the agent performing an action*”. Examples of this would be phrases such as: “*the door was opened by my cousin Annie*”, “*damage caused by fire*”, “*a clear decision by the electorate*,” “*years of hard fund-raising work by local people*,” “*a book by Ernest Hemingway*.”⁸⁵ The Oxford Dictionary of the English Language does not include any meaning for the word “*by*” with reference to ownership.
84. As we have seen, the words chosen by the States Parties to the BIT between the United Kingdom and Bolivia to refer to the relationship between the investor and the investment establish an active involvement of the investor in the investment, since the only meaning shared by both expressions “*of*” and “*by*” is the active meaning of authorship, “*identifying an agent performing an action*”. It is essential to stick to the meaning that both prepositions share; otherwise, it would be inexplicable for the Spanish version of the Treaty to use the same preposition “*de*” in the sections where it refers to the investor-investment relationship, whereby in English the prepositions “*of*” and “*by*” are used interchangeably since, of course, it is the same text, equally authoritative in both languages,⁸⁶ and should be interpreted in the same manner in both languages.

⁸¹ See Oxford Dictionary of the English Language (RLA-48): “*Indicating an association between two entities, typically one of belonging, in which the first is the head of the phrase and the second is something associated with it*”.

⁸² See Oxford Dictionary of the English Language (RLA-48): “*Expressing the relationship between an author, artist, or composer and their works*”.

⁸³ See Oxford Dictionary of the English Language (RLA-48): “*the son of a friend*”, “*the government of India*”.

⁸⁴ See Oxford Dictionary of the English Language (RLA-48): “*the plays of Shakespeare*”, “*the paintings of Rembrandt*”.

⁸⁵ See Oxford Dictionary of the English Language (RLA-48): “*the door was opened by my cousin Annie*”, “*damage caused by fire*”, “*a clear decision by the electorate*,” “*years of hard fund-raising work by local people*,” “*a book by Ernest Hemingway*.”

⁸⁶ As the Treaty provides toward the end, before the signature by the representatives of the United Kingdom

85. Therefore, the text of the Treaty does not provide for a passive, nominal relationship with the purported investment, but rather requires an active involvement in the making of an investment, so that it is possible to assert that the investment is “of” the alleged investor appearing as the claimant. Absent this element of active involvement in the making of the investment, it would not be possible to consider that an investor has made an investment and, therefore, can be considered to be included in the consent to arbitration given by the States Parties to the Treaty.⁸⁷

b. The context of the terms of the Treaty

86. The context of the terms of the Treaty under review confirms this interpretation, since –as discussed below– the Treaty refers to investments “made” instead of investments “held” or “owned”.

87. A similar criterion regarding the most reasonable interpretation to be given to the term “of” is the one expounded by the tribunal in the *Standard Chartered v. Tanzania* case, according to which the preposition “of” in the investor-State dispute resolution clause of a BIT with a text essentially identical to the text of the Treaty⁸⁸ required an active relationship between the investor and the investment, with proof that the investment was made at the claimant’s direction, that the claimant funded the investment, or that the claimant controlled the investment in a direct and active manner. Passive or abstract ownership of shares was not sufficient:

Having considered the ordinary meaning of the BIT’s provision for ICSID arbitration when a dispute arises between a Contracting State to the BIT and a national of the other Contracting State concerning an investment “of” the latter set out in Article 8(1) of the UK- Tanzania BIT, the context of that provision and the object and purpose of the BIT, the Tribunal interprets the BIT to require an active relationship between the investor and the investment. To benefit from Article 8(1)’s arbitration provision, a claimant must demonstrate that the investment was made at the claimant’s direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner. Passive ownership of shares in a company not controlled by the claimant where that company in turn owns the investment is not sufficient.

and Bolivia: “*Hecho en doble ejemplar en la ciudad de La Paz, a los veinticuatro días del mes de mayo de mil novecientos ochenta y ocho años, en idiomas ingles y español, siendo ambos textos igualmente auténticos*” (Spanish version) and “Done in duplicate at La Paz this twenty fourth day of May 1988 in the English and Spanish languages, both texts being equally authoritative” (English version).

⁸⁷ My colleagues cannot but acknowledge that the Treaty “is the first source of law, which contains the consent of the Respondent to arbitration” (Majority Opinion, ¶324). However, their decision bends the limits of the consent provided by the Contracting Parties under the Treaty.

⁸⁸ See *infra*, ¶¶91-3.

The Tribunal is not persuaded that an “investment of” a company or an individual implies only the abstract possession of shares in a company that holds title to some piece of property.

Rather, for an investment to be “of” an investor in the present context, some activity of investing is needed, which implicates the claimant’s control over the investment or an action of transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to the other.⁸⁹

88. The issue in question is clear: in accordance with the Treaty, in particular with Article 8.1, for an international arbitral tribunal to have jurisdiction under the Treaty, the claimant investor should have made the investment for which it pursues a claim. If the investment was made by that investor, then the investment is of that investor. If the investment was not made by that investor, then the investment is not of that investor and, as a result, it is not an investor and it cannot invoke the protection under the Treaty.
89. The majority’s opinion does not give weight to the tribunal’s decision in the *Standard Chartered v. Tanzania* case, postulating a difference between the applicable law and the facts in both cases.⁹⁰ I do not share the distinction my colleagues propose. This analysis is relevant, in addition, as it explains why it is insufficient, for an investment to exist, as my colleagues suggest, that the claimant only constitutes a corporation or hold shares in a corporation – assuming that this could be considered proved with respect to SAS in the present case—.⁹¹
90. Firstly, the majority states that the *Standard Chartered v. Tanzania* case is based on a treaty whose investment definition is different from the definition under the Treaty applicable to the present case. At the outset, I should point out that the mere verification of textual differences between one treaty and another is irrelevant as an argument. What matters is what are the differences between one normative text and the other and why they are relevant.

⁸⁹ *Standard Chartered Bank v. Republic of Tanzania*, ICSID case No. ARB/10/12, Award, November 2, 2012 (Park, Legum, Pryles) (RLA-60), ¶¶230-232 (emphasis added).

⁹⁰ My colleagues assert: “[I]n connection with the award in the *Standard Chartered Bank v. Tanzania* case, the majority of the Tribunal finds that despite the Tribunal’s finding that the preposition ‘of’ in the phrase ‘investment [of the claimant]’ required ‘some activity of investing’, the tribunal in that case based its analysis on the Bilateral Investment Treaty between the United Kingdom and Tanzania, whose definition of ‘investment’ is different from the definition in the Treaty. Furthermore, in the above-mentioned decision, it was particularly relevant that the company that commenced the arbitration did not control the subsidiary that had made the investment—a loan to a Tanzanian company—a loan to a Tanzanian company—a fundamentally different situation from the one discussed in this arbitration where the investment comprises shares in a Bolivian company—CMMK—and the Claimant holds 100% of the shares in the intermediary companies which, in turn, hold 100% of CMMK’s shares.” Majority Opinion, ¶340.

⁹¹ Regarding the severe scarcity and defects in the documents that the Claimant provided in this case, see *supra*, Section II.A.2.

91. In this sense, it can be seen that the definition of “investment” in Article 1 of the treaty applicable to the *Standard Chartered v. Tanzania* case (the Treaty between Tanzania and the United Kingdom) is almost identical to the definition of “investment” in the Treaty between Bolivia and the United Kingdom, as set out above,⁹² including the same broad definition of investments as “every kind of asset” and the “shares... any other form of participation in a company” as examples of potential investments:

Article 1

For the purposes of this Agreement:

(a) “investment” means every kind of asset admitted in accordance with the legislation and regulations in force in the territory of the Contracting Party in which the investment is made and, in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other form of participation in a company;

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights, goodwill, technical processes and know-how;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.⁹³

92. The same applies to the investor-State dispute resolution clause and the preposition “of” in connection with the making of the investment:

Article 8.1

Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as “the Centre”) for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.⁹⁴

93. It was on the basis of these articles which are almost identical to the articles under the Bolivia-United Kingdom Treaty that the tribunal in the *Standard Chartered v. Tanzania* case reached the aforementioned conclusion on the existence of an investment.

94. The definition of investment in the *chapeau* of Article 1(a) of the Bolivia-United Kingdom Treaty does not include the expression “made” in connection with the investment, contrary to the

⁹² See *supra*, ¶80.

⁹³ BIT between the United Kingdom and Tanzania, Article 1(a) (emphasis added).

⁹⁴ BIT between the United Kingdom and Tanzania, Article 8.1 (emphasis added).

chapeau of Article 1 in the Tanzania-United Kingdom Treaty, which does include it. However, contrary to what the Claimant asserts⁹⁵ and what my colleagues accept,⁹⁶ this difference does not undermine, but rather strengthens the Respondent’s jurisdictional argument.

95. This is the case, because the tribunal in the *Standard Chartered v. Tanzania* case referred in particular to this word within the analysis of the text and in the context of Article 8(1) of the Tanzania-United Kingdom Treaty in observance of the rule of interpretation under Article 31 of the Vienna Convention on the Law of Treaties.⁹⁷ The tribunal inquired as to the type of action – if any– that was required under the treaty in connection with the protected investment. If there was a requirement for investments “made”, then the treaty required an active relationship between the investor and the investment –an active involvement in the making of the investment– instead of a mere passive ownership. If, alternatively, the treaty did not require any action in connection with the investment, or required to “hold” or “own the investment, then the treaty was not as rigorous regarding the active relationship between the investor and the investment.⁹⁸

96. The tribunal in the *Standard Chartered v. Tanzania* case noted that the Tanzania-United Kingdom Treaty referred to investments “made” by the investor (instead of investments “held” or “belonging to”), finding that expression in several sections of the BIT beyond Article 1.⁹⁹

97. As is the case under the Tanzania-United Kingdom Treaty, the Bolivia-United Kingdom Treaty refers to investments “made” (and not investments “held” or investments “belonging to”), with this expression being found in several sections of the BIT, including Article 1(a) itself that contains the definition of investment.

98. The first two instances are found in the second paragraph of the above-mentioned Article 1(a) of the Treaty:

A change in the form in which assets are invested does not affect their characters as investments. Investments made before the date of entry into

⁹⁵ SAS’ Post-Hearing Brief, ¶45.

⁹⁶ See Majority Opinion, footnote No. 487: “To support the assertion that the treaty in the case required certain investment activity, the *Standard Chartered v. Tanzania* tribunal placed special emphasis on the term ‘made’ included in the ‘investment’ definition transcribed above, as well as on other provisions of the corresponding treaty.”

⁹⁷ *Standard Chartered Bank v. Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012 (Park, Legum, Pryles) (RLA-60), ¶¶206-225

⁹⁸ *Id.*, ¶221.

⁹⁹ *Id.*, ¶¶222-224.

force as well as those made after entry into force shall benefit from the provisions of this Agreement.¹⁰⁰

99. The third instance is found in Article 13 of the Treaty:

This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of twenty years after the date of termination and without prejudice to the application thereafter of the rules of general international law.¹⁰¹

100. The clear textual inclusion of the expression “made” in connection with the investments protected under the Bolivia-United Kingdom Treaty, in addition to the absence of alternative expressions such as “held” or “owned by”, leads us to the same conclusions reached by the tribunal in the *Standard Chartered v. Tanzania* case:

[It is] open to interpretation whether “by” in Article 11 and the preamble implies “investment held/owned by” investor, or “investment made by” investor, a formulation that would connote a more active relationship between investor and investment.

Elsewhere in its provisions, however, the treaty repeatedly uses a verb to address the relationship between investor and protected investments. Article 1(a) of the BIT defines the term “investment” for purposes of the treaty. In its first paragraph, it refers to the “territory of the Contracting State in which the investment is made.” Its last paragraph includes within its definition of

¹⁰⁰ BIT between the United Kingdom and Bolivia (C-1), Article 1(a), second paragraph. To facilitate the comparison between the relevant treaties regarding the provisions discussed in this section, I transcribe below the Spanish text of Article 1(a) of the Treaty:

Un cambio de la forma de inversión de los bienes no afecta su condición de inversiones. Las inversiones realizadas antes de la fecha de entrada en vigor así como las realizadas después de la entrada en vigor se beneficiarán de las disposiciones del presente Convenio.

¹⁰¹ BIT between the United Kingdom and Bolivia (C-1), Article 13, second paragraph. To facilitate the comparison between the relevant treaties regarding the provisions discussed in this section, I transcribe below the English text of Article 13, second paragraph, of the Treaty:

El presente Convenio permanecerá en vigor por un período de diez años. Posteriormente continuará en vigor hasta la expiración de un período de doce meses contando a partir de la fecha en que una de las Partes Contratantes haya notificado la denuncia por escrito a la otra. No obstante, en lo referente a inversiones efectuadas mientras el Convenio permanezca en vigor, sus disposiciones continuarán teniendo su efecto en lo referente a dichas inversiones por un período de veinte años contando a partir de la fecha de la terminación del mismo, y sin perjuicio a la aplicación posterior de las reglas del Derecho Internacional General.

investment “all investments, whether made before or after the date of entry into force of this Agreement.” Similarly, the third sentence of Article 14 extends the protections of the treaty for twenty years after termination of “investments made whilst this Agreement is in force.” Again, nothing in these provisions suggests that the Contracting States in these provisions contemplated a relationship between investor and investment different from that in other provisions of the treaty, including Article 8(1). As noted above, the verb “made” implies some action in bringing about the investment, rather than purely passive ownership.

By contrast, the BIT nowhere uses the verb “own” or “hold” in connection with an investment by or of an investor.¹⁰²

101. Incidentally, it should be noted that the Claimant itself accepts that its case refers to an investment “owned”, instead of an investment “made.”¹⁰³ However, as seen above, the text of the Treaty requires the investor to have made an investment, not just to “hold” it.¹⁰⁴

102. Secondly, it is not true that the tribunal in the *Standard Chartered v. Tanzania* case reached its decision based on the fact that the claimant in that case did not “control” the shareholding in the company that held the purported investment. Despite considering the shareholding of the claimant company within the framework of the discussion in *Cemex v. Venezuela*,¹⁰⁵ the tribunal specifically clarified that its decision regarding the inexistence of investment did not rely on control in terms of a shareholding percentage but on control of the investment process as such:

For the avoidance of doubt, however, the Tribunal confirms its view that the UK-Tanzania BIT requires control of the investment process itself, which in some cases might be demonstrated through evidence that a third country subsidiary was acting under the alleged investor’s direction. No such control or direction can be found on the basis of Claimant’s evidentiary submissions.¹⁰⁶

¹⁰² *Standard Chartered Bank v. Republic of Tanzania*, ICSID case No. ARB/10/12, Award, November 2, 2012 (Park, Legum, Pryles) (RLA-60), ¶¶221-223 (emphasis added).

¹⁰³ SAS’ Post-Hearing Brief, ¶50.

¹⁰⁴ Interestingly, my colleagues cannot avoid using the specific language of the Treaty in reference to SAS’ nonexistent investment. Thus, for example, at ¶331 of their vote, they refer to making an investment: “It is true, as the Claimant asserts, that the above-mentioned preamble notes that the States party to the Treaty desire to create favorable conditions for “greater investment” by companies of the other State. However, it cannot be concluded that the qualified investor, as a company of a State party to the Treaty, may not obtain resources from external agents or companies of the group to which it belongs to make the investment.” (Emphasis added). However, my colleagues deviate from the conclusion imposed by this language of the Treaty.

¹⁰⁵ *Standard Chartered Bank v. Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012 (Park, Legum, Pryles) (RLA-60), ¶¶247-253

¹⁰⁶ *Id.*, ¶254 (emphasis added).

103. Indeed, the tribunal in *Standard Chartered v. Tanzania* supported its decision, in the absence of indications of control with reference to the investment process of the claimant company, even if it “made” the investment through a company under its control:

For a putative investor to have valid rights pursuant to the UK-Tanzania BIT, that investor should have “made” the investment in an active sense, even if operating through the agency of a company under its control. The activities qualified as relevant investment under the BIT would include the activity of purchasing debt, which was done by SCB Hong Kong, not Claimant.

Here, however, the record reflects no action by Claimant itself concerning the investment and Claimant has explicitly disavowed any reliance on control of SCB HK or its assets. Absent any such control, it is difficult to perceive in this record any evidence that could serve to show that the investment process was actually made at the direction of Claimant as investor.¹⁰⁷

104. Thirdly, as seen above,¹⁰⁸ just like in *Standard Chartered v. Tanzania*, here there is no evidence that SAS had any control over in relation to the purported investment in Bolivia, or undertook any management action (or action of any other type) in relation to it.

105. Other tribunals have reached similar decisions on this point. Thus, for example, in the *Caratube v. Kazakhstan* case, it was established that beyond the existence or not of an “origin-of-capital” requirement in the BIT, “there still needs to be some economic link between that capital and the purported investor that enables the Tribunal to find that a given investment is an investment of that particular investor.”¹⁰⁹

106. The Claimant attempts to differentiate its case from *Caratube v. Kazakhstan* by alleging that in that case the tribunal made a decision based on the requirement of control under Article 25.2(b) of the ICSID Convention.¹¹⁰ This is incorrect. The decision reached by the tribunal in *Caratube v. Kazakhstan* regarding the existence of an investment was based on the terms of the BIT (not the ICSID Convention) and independently from the establishment of the existence or not of foreign control, as the tribunal expressly indicated:

¹⁰⁷ *Id.*, ¶¶260-261 (emphasis added).

¹⁰⁸ See *supra*, Section II.A.2.

¹⁰⁹ *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012 (Böckstiegel, Griffith, Hossain) (RLA-59), ¶355.

¹¹⁰ SAS’ Post-Hearing Brief, ¶73.

Even if control had been shown, as discussed above, existence of an investment denotes an economic arrangement requiring a contribution to make profit, and thus involving some degree of risk.¹¹¹

107. Similarly, the tribunal's decision in the *Caratube v. Kazakhstan* case was made despite accepting the argument —expressed by my colleagues in their opinion— that the absence of an express origin-of-capital requirement under the treaty renders the analysis on the origin of the funds unnecessary in order to establish whether the investment is protected under the treaty. The tribunal in the *Caratube v. Kazakhstan* case found that the capital must still be somehow linked to the person purporting to have made the investment:

Claimant insisted that the origin of capital used in investments is immaterial. This is correct, however, the capital must still be linked to the person purporting to have made an investment. In this case there is not even evidence of such a link.¹¹²

108. The tribunal's decision in *Caratube v. Kazakhstan* in this regard also took into account the payment of a merely nominal price for the shares as indicative of the absence of an investment, and considered mainly that such shareholding was the entire purported contribution by the investor:

[P]ayment of only a nominal price and lack of any other contribution by the purported investor must be seen as an indication that the investment was not an economic arrangement, is not covered by the term 'investment' as used in the BIT, and thus is an arrangement not protected by the BIT.¹¹³

109. As mentioned above, this situation is substantially similar to the one in the present case, as recognized by the Claimant when it describes its own actions.¹¹⁴

110. If there are “peculiarities” in the “factual pattern”¹¹⁵ of the *Caratube v. Kazakhstan* case compared to our case, it is impossible to see how they favor SAS' jurisdictional position. Mr. Devincci Hourani —whose request for jurisdiction was rejected by the tribunal in the *Caratube v. Kazakhstan* case— had paid USD 6,500 for 92% for its shareholding, while here SAS would have paid USD 104 for 100% of its shareholding.¹¹⁶

¹¹¹ *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012 (Böckstiegel, Griffith, Hossain) (RLA-59), ¶408.

¹¹² *Id.*, ¶456 (emphasis added).

¹¹³ *Id.*, ¶435.

¹¹⁴ SAS' Post-Hearing Brief, ¶40.

¹¹⁵ SAS' Post-Hearing Brief, ¶73.

¹¹⁶ See *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012 (Böckstiegel, Griffith, Hossain) (RLA-59), ¶437. “A putative transaction to pay USD 6,500 for 92% for an enterprise into which over USD 10 million have been invested and for which later a

c. The object and purpose of the Treaty

111. Beyond our interpretation of the text and context of the Treaty based on the relevant decisions, it is necessary to consider its object and purpose. Bilateral investment treaties reflect a bilateral negotiation between States. In this case, the BIT entered into by the United Kingdom and Bolivia, and not between Canada and Bolivia, is invoked. No BIT exists between Canada and Bolivia.
112. Based on Article 31 of the Vienna Convention, one of the relevant aspects for the interpretation of a treaty is its object and purpose. To understand the object and purpose of the Treaty, the preamble should be considered.¹¹⁷ In the Preamble to the United Kingdom-Bolivia Treaty we read that the States Parties enter into the Treaty

“Desiring to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State;

Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;”

113. The Preamble explicitly states that the object and purpose of the Treaty was to create favorable conditions to increase investment by nationals and companies of one State Party in the territory of the other State, to promote individual business initiatives and to increase prosperity in both States.
114. Notwithstanding the analysis below, the reading of the Preamble imposes a preliminary question. Is it possible to sensibly accept that the sole transfer of shares to a shell company can imply “greater investments” or that “the prosperity between the States may increase”? How could the investment by nationals of the United Kingdom in Bolivia be “greater” or “increased” by the transfer of shares to a shell company incorporated in a territory covered by the scope of the Treaty?

relief of over USD 1 billion is sought calls for explanation and justification.”

¹¹⁷ Vienna Convention on the Law of Treaties (CLA-11). This is accepted by my colleagues, as seen in the Majority Opinion at ¶330: “The preamble to the Treaty, which is instrumental in unravelling its object and purpose.” Investment arbitral tribunals usually resort to the treaty preamble during the crucial task of studying its object and purpose, as explained, for example, by Rudolf Dolzer and Christoph Schreuer in their book *Principles of International Investment Law*, Oxford University Press, 2008 (CLA-62), ¶330: “A treaty's object and purpose is among the primary guides for interpretation listed in Article 31 VCLT. Tribunals have frequently interpreted investment treaties in the light of their object and purpose, often by looking at their preambles.”

115. In relation to this topic, as we have seen,¹¹⁸ the majority states that “[i]t is true, as the Respondent asserts, that the above-mentioned preamble notes that the States party to the Treaty wish to create favorable conditions for ‘greater investment’ by companies of the other State. However, it cannot be concluded an investor, as a company of a State party to the Treaty, may not obtain resources from third parties or companies of the group to which it belongs in order to make the investment. In fact, nothing in the Treaty states that the Tribunal must examine the origin of the capital invested by an investor in order to decide on its jurisdiction.”¹¹⁹ In my view, this interpretation by the majority of the Tribunal undermines the intention the parties to a treaty, through an analysis that –in my opinion– is misguided.

116. As seen in the *Caratube v. Kazakhstan* case, the existence or nonexistence of an origin-of-capital requirement under the Treaty does not exempt the Claimant from the need to have made an investment to be able to invoke the Treaty. This is acknowledged by my colleagues in the passage just cited, where they assert that the investor may have received resources from foreign agents “to make the investment.” My colleagues thus acknowledge that the origin of the funds and the making of an investment are separate issues. This is precisely SAS’ main problem in this case: that it did not made an investment. Whether or not there is an “origin of capital” requirement in the Treaty, it does not affect this finding imposed by the unbiased reading of the evidence in the case.¹²⁰ It is insubstantial to produce a polemic about the origin of an investment that SAS did not make.

117. My colleagues incur in a similar mistake when they posit that “Bolivia is asking the Tribunal to disregard the protected investment – SAS’ indirect ownership of CMMK’s shares and CMMK’s ownership of the Mining Concessions – by analyzing who contributed the resources to the Project, an economic test that is not provided for anywhere in the Treaty.”¹²¹ This is incorrect. Before discussing whether the Treaty requires that all the resources or technology originate in one place or the other, there is a need to determine if the purported investor performed any actions that would reveal an active involvement in the making of an investment. There is no evidence that the purported investor in this arbitration, SAS, has made an investment in Bolivia under the terms required by the Bolivia-United Kingdom BIT.

¹¹⁸ See *supra*, footnote number 104.

¹¹⁹ Majority Opinion, ¶322.

¹²⁰ See *supra*, Section II.A.4.

¹²¹ Majority Opinion, ¶334.

118. The majority holds that “[t]he Respondent does not question SAS’ ownership of the shares in the companies that are CMMK’s shareholders or the origin of the funds for the acquisition of such shares that – it is reiterated – constitute an investment protected under the Treaty. Its objection focuses on the origin of certain resources and technologies CMMK uses for the Mining Concessions.”¹²² However, as indicated *supra*,¹²³ the majority acknowledged¹²⁴ that Bolivia holds that, for an investment to exist, the alleged investor must have actively participated in the making of the investment in the host State, and Bolivia, in turn, emphasized as its “main argument” that the BIT does not protect a party –such as SAS, according to Bolivia– that has not made an investment.¹²⁵ The discussion regarding the existence or not of an origin-of-capital requirement under the Treaty does not negate the preliminary and fundamental determination on the existence or not of some sort of act that may be characterized as an investment by SAS in Bolivia, regardless of the origin of the potential resources and technologies that SAS could have employed in order make that potential investment.

119. Having said that, there is another inconsistency in the reasoning of the majority on this point. On the one hand, my colleagues state that, given that the Treaty does not expressly include an origin-of-capital requirement, the Treaty should be considered as not requiring the capital or the resources used in the investment to originate in the State of the investor’s constitution or incorporation.¹²⁶ However, on the other hand, my colleagues assert that, as the Treaty does not specifically include a provision for the protection of indirect investments, it should be considered that the Treaty does protect indirect investments.¹²⁷ In other words: in its interpretation of the Treaty regarding jurisdiction, the majority sometimes attributes a negative meaning and sometimes a positive meaning to silence, at all times favoring the jurisdictional claim presented by SAS. I cannot agree with this.

120. In conclusion, the object and purpose of the Treaty converge towards the same conclusion as that reached through the meaning and context of the Treaty analyzed in accordance with the Vienna Convention. There are no legal elements to support that the States Parties to the Bolivia-United Kingdom BIT consented to the use of the Treaty for the protection of purported investments by investors of third countries (such as Canada) by simply resorting to a shell company that has not made any investment in Bolivia or the United Kingdom.

¹²² Majority Opinion, ¶333.

¹²³ See *supra*, ¶15.

¹²⁴ Majority Opinion, ¶326.

¹²⁵ See Rejoinder Memorial, ¶264.

¹²⁶ Majority Opinion, ¶333.

¹²⁷ *Id.*, ¶¶305-316.

d. The lack of agreement between the Parties as to the existence of a protected investment

121. I do not share in the majority's statement that "both Parties agree that CMMK's shares and the Mining Concessions fall within the definition of 'investment' under the Treaty."¹²⁸ Beyond a certain expression that, overstating its importance, could be deemed unclear,¹²⁹ it is evident that Bolivia opposed in its Counter-Memorial and in all of its subsequent written and oral submissions that the Claimant, SAS, had made an investment under the Treaty. Similarly, SAS questioned in each of its written and oral submissions Bolivia's arguments regarding the nonexistence of a protected investment in this case. This discussion between the Parties¹³⁰ would make no sense if, as the majority holds, the Parties were in agreement that SAS made an investment under the Treaty. The point here is whether SAS made an investment. I do not find that the Parties reached an agreement regarding this point anywhere on the record in the sense stated by my colleagues.

e. Other legal authorities cited by SAS and my colleagues on the interpretation of the Treaty as to jurisdiction

122. The Claimant argues that it is not incumbent on the Tribunal to impose additional requirements beyond those already included in the underlying treaty by the States, in the exercise of their sovereignty,¹³¹ citing in support of its proposition the decisions in *Tokios Tokelés v. Ukraine*, *ADC v. Hungary*, *Yukos v. Russia*, *Gold Reserve v. Venezuela*, *Siag v. Egypt*, *Rompetrol v. Romania* and *Saluka v. Czech Republic*.¹³² As we have seen,¹³³ following the rule of interpretation of the Vienna Convention,¹³⁴ the existence of an investment made by the alleged investor is a requirement derived from the text and context of the Treaty, as well as its object and purpose. It is not necessary to impose any additional requirement to establish this. Precisely, it is interpreting something contrary to this that would modify the sovereign will of the States Parties expressed in the text of the Treaty.

123. In any event, the decisions cited by the Claimant do not help its position.

¹²⁸ Majority Opinion, ¶307.

¹²⁹ See Counter-Memorial, ¶224.

¹³⁰ For this, see the discussion *supra*, Section II.A.1.

¹³¹ See Rejoinder Memorial on Jurisdiction, ¶67: "[I]nvestment treaty tribunals have consistently rejected parties' efforts to impose additional jurisdictional requirements beyond those already included in the underlying treaty."

¹³² See Rejoinder Memorial on Jurisdiction, ¶44 and footnote number 135.

¹³³ See *supra*, Section II.A.4.

¹³⁴ Vienna Convention on the Law of Treaties (CLA-11).

124. To begin with, as indicated by the Respondent,¹³⁵ all of the excerpts from the decisions cited by the Claimant address a problem different from the one stated in its jurisdictional objection and discussed in the present case. However, a thorough review of the facts in these cases and the content of the decisions shows that they cannot be invoked to favor SAS' position regarding the existence of an investment in this arbitration.
125. For example, the majority opinion in the *Tokios Tokelés v. Ukraine* case stated the criterion cited by my colleagues in the analysis of whether, under the Lithuania-Ukraine BIT, there was an origin-of-capital requirement that resulted in setting aside the legal status of the Lithuanian claimant company to consider the legal status of those controlling and contributing the capital to such company, who were Ukrainian nationals.¹³⁶ In that case, abundant evidence was submitted to show that the company as such had made significant investments, which had also been reported and recognized by Ukraine.¹³⁷ SAS' situation is the opposite. The record does not include any evidence that SAS made an investment in Bolivia —regardless of the potential discussion about the origin of the capital had SAS made any investment— and there is no evidence of Bolivia acknowledging SAS as a British investment company linked to the Project during the making of the alleged investment.¹³⁸
126. A similar though even starker difference is found in the *ADC v. Hungary* case. The tribunal in that case noted that the Hungarian authorities knew and had expressly consented to structuring the investment through entities incorporated in Cyprus.¹³⁹ Moreover, it was uncontested that the claimant companies, ADC Affiliate and ADC & ADMC Management, of Cypriot nationality,

¹³⁵ Rejoinder Memorial, ¶290.

¹³⁶ *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 (Weil, Price, Bernardini) (CLA-115), ¶¶74-78.

¹³⁷ *Id.*, ¶76: "The Claimant has provided substantial evidence of its investment in Ukraine, beginning with its initial investment of USD 170,000 in 1994, and continuing reinvestments each year until 2002, for a total investment of more than USD 6.5 million. Moreover, although the Treaty does not require the Contracting Parties to acknowledge the investments of entities of the other Contracting Party in order for such investments to fall within the scope of the Treaty, in this case, the Respondent has done so. In particular, the Claimant has produced copies of twenty-three "Informational Notice(s) of Payment of Foreign Investment," in which the Claimant's investments were registered by Ukrainian governmental authorities."

¹³⁸ The excerpts cited by the Claimant and my colleagues from the decision in *Siag et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007 (CLA-114), basically transcribe excerpts from the decision in *Tokios Tokelés v. Ukraine*, thus rendering it unnecessary to conduct a separate analysis.

¹³⁹ *ADC Affiliate Limited et al. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006 (Kaplan, Brower, van den Berg) (CLA-35), ¶352 ("The fact that Cypriot entities were to be used was known at the time to Hungary and consented to by it.") y ¶360 ("In the present case, nationals of a third State, with substantial business interests and the express consent of the Hungarian Government, incorporated the Claimants in Cyprus.").

had an active economic and administrative involvement in the making of the investments.¹⁴⁰ The argument presented by Hungary in this case did not disregard these facts but it was based on the contention that the tribunal had to inspect the origin of the funds invested and the nationality of the controlling parties for the Cypriot companies.¹⁴¹ Again, the situation is diametrically opposed to SAS' in the present case. SAS has not evidenced the making of any investment. To delve into the discussion on the origin of the capital, first, there needs to be evidence that SAS made some investment under the Treaty. SAS, contrary to the claimant's Cypriot companies in the *ADC v. Hungary* case, has not shown the making of any investment under the Treaty.

127. In the *Yukos v. Russia* case, the tribunal very clearly expressed that the Energy Charter Treaty (ECT) was designed to protect international investments between the various signatory States, not the investments by nationals of a State in that same State (in this case, Russia).¹⁴² However, the tribunal accepted in the end its jurisdiction in light of its interpretation of the meaning of the ECT text, whose definition of investment refers to assets "owned" or "controlled directly or indirectly" by the purported investor.¹⁴³ The ECT text is substantially different from the text of the United Kingdom-Bolivia BIT, whereby —as seen above—¹⁴⁴ protection is afforded to investments "made" by the purported investor and —as we will see—¹⁴⁵ no references to indirect control are included. Additionally, again, in *Yukos v. Russia* the claimant had submitted evidence of significant payments to the company for the shares purchased¹⁴⁶ and it was not a shell

¹⁴⁰ *Id.*, ¶353.

¹⁴¹ *Id.*, ¶355: "The Respondent's jurisdictional argument is however posited on the contention that the source of funds and the control of the Claimants rests with Canadian entities."

¹⁴² *Yukos Universal Limited v. The Russian Federation*, PCA Case No. AA 227, UNCITRAL, Interim Award on Jurisdiction and Admissibility, 30 November 2009 (Fortier, Poncet, Schwebel) (CLA-113), ¶434: "The Tribunal accepts that the ECT is directed towards the promotion of foreign investment, especially of investment by Western sources in the energy resources of the Russian Federation and other successor States of the USSR. The Treaty is meant, as specified in the Secretariat's Introduction, to ensure "the protection of foreign energy investments." If the States that took part in the drafting of the ECT had been asked in the course of that process whether the ECT was designed to protect—and should be interpreted and applied to protect—investments in a Contracting State by nationals of that same Contracting State whose capital derived from the energy resources of that State, it may well be that the answer would have been in the negative, not only from the representatives of the Russian Federation but from the generality of the delegates."

¹⁴³ *Id.*, ¶430 y ¶435, in reference to Article 1(6) of the ECT.

¹⁴⁴ See *supra*, Section II.A.4.

¹⁴⁵ See *infra*, Section II.A.5.

¹⁴⁶ *Yukos Universal Limited v. The Russian Federation*, PCA Case No. AA 227, UNCITRAL, Interim Award on Jurisdiction and Admissibility, 30 November 2009 (Fortier, Poncet, Schwebel) (CLA-113), ¶429: "[A]lthough insisting that it is not required by the ECT and not relevant therefore to the issue of jurisdiction, Claimant asserts, by reference to various agreements regarding acquisition of Yukos shares, that it did in fact legally acquire and pay for its Yukos shares in 1999 and 2000. Claimant alleges that it paid more than US\$ 142 million in total for the acquisition of shares in 1999 and 2000."

company, contrary to SAS' situation in the present case, which has not been disputed by the majority or the Claimant.¹⁴⁷

128. The decision of the tribunal in the *Gold Reserve v. Venezuela* case was also based on the text of a treaty other than the United Kingdom-Bolivia BIT, as it refers to assets “owned” by the investor and includes direct or indirect control of the protected investment.¹⁴⁸ Likewise, in this case the tribunal considered that an active involvement in the investment of the claimant company incorporated in Canada had been evidenced, and its creation had been driven by the need to access Canadian funding for the investment,¹⁴⁹ which that tribunal understood that, indeed, had happened and amounted for most of the USD 300 million that the company had invested in Venezuela.¹⁵⁰ No parallel can be drawn with SAS' situation in this arbitration under the United Kingdom-Bolivia BIT.

129. The tribunal's decision in the *Rompetrol v. Romania* case is also clearly outside the ambit of relevance for the objection in question as it addresses aspects related to the “effective nationality” of a company under the international law and the origin-of-capital requirement which, again, do not impact on the fundamental and preliminary determination of the existence of an investment made by the alleged investor.¹⁵¹ Additionally, in *Rompetrol v. Romania* the claimant company did not accept that it was a shell company. In contrast, it submitted evidence of an active link of the company with the investment, including participation in strategic decisions, financing and capital markets, as well as evidence of an independent business operation reflected in circumstances such as the purchase of 75% of its shareholding package by the State-run oil company of Kazakhstan.¹⁵² SAS' situation is the opposite. In this arbitration,

¹⁴⁷ See, for example, SAS' Post-Hearing Brief, ¶40.

¹⁴⁸ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, (Bernardini, Dupuy, Williams) (RLA-27), ¶259.

¹⁴⁹ *Id.*, ¶265: “[T]he driver behind the restructure was the ability to access further funds from the Canadian market which were then used to further the investment in the Brisas Project.”

¹⁵⁰ *Id.*, ¶271: “Claimant has stated that one of the reasons for incorporating the Canadian entity was to raise funds in Canada for its mining activities in Venezuela and most of the US\$ 300 million invested in the so-called Brisas Project came through Canadian investors.”

¹⁵¹ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008 (Berman, Donovan, Lalonde) (CLA-112), ¶¶75-109.

¹⁵² *Id.*, ¶66: “The Claimant further rejects Mr. Haberman's portrayal of TRG as a “shell”, since the holding company was actively involved in corporate governance and financing and strategic matters, did some trading on behalf of the group, and had successfully expanded its activities throughout Europe, investing significantly since 1999 in several European countries. The Claimant characterises TRG as a well-established and important Dutch company with diverse international activities. Confirmation of this could be found in the fact that Kaz Munai Gaz, the State oil company of Kazakhstan, had one month before the hearing signed an agreement to purchase a 75% stake in TRG from the Swiss holding company.”

SAS has not disputed being a shell company and, in any event, has not produced any evidence of an active involvement in the investments in Bolivia.¹⁵³

130. Finally, the tribunal's decision in *Saluka v. Czech Republic* only confirms this standard. The tribunal in that case expressed its sympathy for the argument that a company, such as Saluka Investments BV, should not be entitled to invoke the provisions of that treaty if it had no real connection with a State Party to a BIT, and in reality was a mere shell company controlled by another company, and was not incorporated under the laws of that State.¹⁵⁴ Despite this, the tribunal in the *Saluka v. Czech Republic* case interpreted —by applying a standard which does not need to be weighed here— that the text of the treaty did not allow it to consider that the claimant was outside the scope of protection.¹⁵⁵ Now, the text of that treaty is substantially different from the text of the United Kingdom-Bolivia BIT, as it includes the protection of indirect investment¹⁵⁶ and, still more importantly, the tribunal based its interpretation on the fact that the Czech Republic had known at all times the intention of the group to which Saluka Investments BV belonged —Nomura Group—to transfer the shares to a special-purpose vehicle set up for the sole purpose of holding those shares,¹⁵⁷ a circumstance that is different from the relationship between SAS and Bolivia in this arbitration.

131. The majority refers to the decisions made by the tribunals in *Siemens v. Argentina*,¹⁵⁸ *Kardassopoulos v. Georgia*,¹⁵⁹ *BG Group v. Argentina*,¹⁶⁰ *Cemex v. Venezuela*,¹⁶¹ *Rurelec v. Bolivia*,¹⁶² and *Standard Chartered v. Tanzania*.¹⁶³ I have already referred to the scope of the

¹⁵³ It might be pertinent to confirm that with the expression “shell company” I only intend to refer to a company that has limited itself to invoking a shareholding in the Bahamian companies which hold 100% of the shares in the Bolivian company CMMK, which is an uncontested fact.

¹⁵⁴ *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (Watts, Fortier, Behrens) (CLA-46), ¶240: “The tribunal has some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty.”

¹⁵⁵ *Id.*, ¶241.

¹⁵⁶ *Id.*, ¶198.

¹⁵⁷ *Id.*, ¶242: “The Tribunal is confirmed in the appropriateness of the view which it has taken by the consideration, in the particular circumstances of the present case, that it was always apparent to the Czech authorities that it was Nomura’s intention to transfer the IPB shares it was purchasing to another company within the Nomura Group, and that that other company would be a special-purpose vehicle set up for the specific and sole purpose of holding those shares. The Share Purchase Agreement contained express provision to that effect.”

¹⁵⁸ See Majority Opinion, ¶336.

¹⁵⁹ *Id.*, ¶337.

¹⁶⁰ *Id.*, ¶338.

¹⁶¹ *Id.*, ¶313.

¹⁶² *Id.*, ¶314.

¹⁶³ *Id.*, ¶340.

tribunal's decision in the *Standard Chartered v. Tanzania* case.¹⁶⁴ I will later on refer to the scope of the *Cemex v. Venezuela* and *Rurelec v. Bolivia* cases when discussing whether the Treaty protects indirect investments.¹⁶⁵ None of these decisions helps SAS' jurisdictional case or the decision expressed in the majority's opinion.

132. Indeed, in *Siemens v. Argentina*, *Kardassopoulos v. Georgia* and *BG v. Argentina* the protection of the respective BITs is not extended to a shell company without any active involvement in the alleged investment. On the contrary, in those three cases, the claimant was the company or physical person that had the beneficial ownership and control of the purported investment; it was not a shell company without any type of verified activity related to the alleged investment.
133. Additionally, in *Siemens v. Argentina*, the German claimant company, Siemens A.G., was the ultimate controller and was actively involved in the management of the investment from the outset; this was informed to the Argentinean authorities expressly by Siemens Nixdorf Informationssysteme AG, the intermediary company –which was also German– which owned the shares in the local Siemens IT Services S.A. company that participated in the public bid for a contract to establish a system of migration control and personal identification.¹⁶⁶ Furthermore, the Ad Article 4 of the Protocol under the treaty applicable to the *Siemens v. Argentina* case (the Argentina-Germany BIT) provided specifically for indirect investment, which had been accepted by the respondent, and whose objection indicated that the Argentina-Chile BIT (that the claimant invoked by resorting to the MFN clause in that case) did not afford protection to indirect investments.¹⁶⁷

¹⁶⁴ See *supra*, ¶¶88-105.

¹⁶⁵ See *infra*, ¶¶163-74.

¹⁶⁶ See *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (RLA-55), for example at ¶¶23-24: “In August 1996, the Respondent invited bids for a contract to establish a system of migration control and personal identification (“the System”). The bidding terms required that a local company be established by bidders in order to participate in the bidding process. The Claimant established, through its wholly-owned affiliate Siemens Nixdorf Informationssysteme AG (“SNI”), a local corporation, Siemens IT Services S.A. (“SITS”). As required by the bidding terms, SITS took part as a bidder and its offer showed evidence – as requested by the Respondent - that SNI was wholly integrated into Siemens, the sole owner of its shares, that SNI was managed by Siemens and by virtue of law is jointly liable for the obligations that SNI assumes before third parties.”

¹⁶⁷ *Id.*, for example at ¶124: “The Respondent recognizes that indirect claims are possible under Article 4 of the Treaty and the related Ad Article 4 of the Protocol. This specific possibility in light of Article 4 of the Treaty and Ad Article 4 establishes the exceptional nature of indirect claims. It confirms that they cannot be implied but require an express provision in the agreement and the Chile BIT does not provide for indirect claims. Therefore, if the Tribunal found that the Chile BIT is applicable, Siemens could not pursue any indirect claim in light of the MFN clause.”

134. Clearly, the facts and law applicable to the *Siemens v. Argentina* case are substantially different from the facts and law applicable to this case. SAS is a shell company that was not involved in the making of the purported investment,¹⁶⁸ whose nationality (Bermuda) is different from the nationality of CMMK's shareholders (Bahamas) and the final controlling company (Canada) and whose existence was only revealed to the Bolivian authorities as a result of the arbitration (having always presented the ownership of the company as Canadian, including when looking for the diplomatic protection after the emergence of the dispute),¹⁶⁹ and the Treaty does not provide for protection of indirect investments.¹⁷⁰
135. In turn, in the *Kardassopoulos v. Georgia* case, the claimant was not a shell company such as SAS. Mr. Ioannis Kardassopoulos was the ultimate beneficial holder of the investment made in Georgia,¹⁷¹ which gave rise to a situation similar to the *Siemens v. Argentina* case, a similarity that the *Kardassopoulos v. Georgia* tribunal notes when it quotes the tribunal's decision in the *Siemens v. Argentina* case regarding indirect investments.¹⁷² The *Kardassopoulos v. Georgia* tribunal emphasizes the excerpt in which the *Siemens v. Argentina* tribunal holds that the treaty does not require intermediary persons between the investment and the last resort owner of the company. The *Kardassopoulos v. Georgia* tribunal did not state a general conclusion; it accepted that, given the circumstances of the case, the indirect shareholding could be a protected investment.¹⁷³ The jurisdiction of the *Kardassopoulos v. Georgia* tribunal was determined by two regulatory instruments, the Greece-Georgia BIT and the Energy Charter Treaty. The latter, as seen before,¹⁷⁴ at Article 1(6) provides expressly for the protection of indirect investments. Similarly, contrary to Bolivia in this case, the respondent in *Kardassopoulos v. Georgia* did not present a jurisdictional objection based on the nonexistence of the investment or on the fact that the treaty did not protect indirect investments.¹⁷⁵ The respondent contended that, at the time of

¹⁶⁸ See *supra*, Section II.A.2.

¹⁶⁹ See *supra*, Section II.A.3.

¹⁷⁰ See *infra*, Section II.A.5. My colleagues note this difference in their vote when they hold that Argentina's defense in this case was "founded on a treaty with a content different from the one under the consideration of this Tribunal." (Majority Opinion, ¶336.) However, my colleagues curiously appear to invoke this difference in the text of the treaties to favor the protection of indirect investments. It is not possible to know for sure what my colleagues refer to when they assert "content different from" the treaties, since they do not specify what the differences are.

¹⁷¹ *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Cases No. ARB/05/18 and ARB/07/15, Decision on Jurisdiction, 6 July 2007 (RLA-54), ¶47 and ¶141.

¹⁷² *Id.*, ¶123.

¹⁷³ *Id.*, ¶124.

¹⁷⁴ See *supra*, footnote number 143.

¹⁷⁵ *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Cases No. ARB/05/18 and ARB/07/15, Decision on Jurisdiction, 6 July 2007 (RLA-54), ¶43-5 and ¶120.

making the investment, Mr. Kardassopoulos had no direct or indirect interest¹⁷⁶ in the company (Tradex U.S. or, alternatively, Tradex Panamá) which constituted the *joint venture* that was awarded the concession,¹⁷⁷ GTI Ltd.¹⁷⁸ The tribunal disregarded this as a result of the evidence produced by Mr. Kardassopoulos during the proceeding.¹⁷⁹ As I have mentioned above, despite bearing the burden to establish the Tribunal's jurisdiction¹⁸⁰ (and that Bolivia so requested and the Tribunal ordered it during the document production phase),¹⁸¹ the Claimant did not introduce on the record any evidentiary support that would allow us to conclude that it made an investment protected under the Treaty.

136. The facts in our case clearly are so telling regarding the vacuum in the Claimant's conduct that not even the decisions considered may be invoked in its favor. A dissenting opinion is, by definition, solitary. However, as seen above, my colleagues' opinion is not even supported by the jurisprudence cited as favoring the position they adopted. Thereby, a paradox or an oxymoron emerges: that of a lonely majority.

¹⁷⁶ *Id.*, ¶125.

¹⁷⁷ *Id.*, ¶25.

¹⁷⁸ *Id.*, ¶21.

¹⁷⁹ *Id.*, ¶¶126-141. Similarly, in connection with the *BG Group v. Argentina* case, the majority –repeating the Claimant's propositions and respective quotes; see Reply Memorial, ¶192– states that the claimant's ultimate ownership was not ascertained or taken into consideration by the tribunal based on two paragraphs of that decision, paragraphs 109 and 138 (See Majority Opinion, ¶329). But those paragraphs in the *BG Group v. Argentina* decision have nothing to do with such a determination. These two paragraphs simply state the (debatable) conclusion reached by that tribunal, rather than its reasoning, and much less its reasoning regarding the topic under discussion. (See *BG Group Plc. v. Argentina*, ICSID Case No. ARB/02/8, Award, December 24, 2007 (CLA-04), ¶109: “BG therefore qualifies as an “Investor” under the Argentina-U.K. BIT.” See also *id.*, ¶138: “The Tribunal finds that BG's ownership interest as described in Paragraph 112(a) of this award is an “Investment” for the purposes of Article 1(a)(ii) of the Argentina-U.K. BIT.”). Similarly, the claimant company in the *BG Group v. Argentina* case was the multinational oil company BG Group Plc., which controlled all of the intermediary companies linked in the case to the purported shareholding in MetroGAS S.A., British Gas International BV (*Id.*, ¶24) and BG Gas Netherlands Holding BV (*Id.*, footnote number 8), and was also one of the shareholders that had constituted Gas Argentino S.A., GASA, (*Id.*, ¶24), in which it had direct ownership of 41% at the outset (*Id.*, ¶24: “BG initially owned 41% of GASA.” See also *id.*, ¶1: “The Claimant in this arbitration is BG Group Plc. (BG), a British corporation located at 100 Thames Valley Park Drive, Reading Berkshire, RG6 1PT, in the United Kingdom. BG has a direct and an indirect ownership interest in MetroGAS S.A. (MetroGAS)”). In addition, the tribunal in that case considered (erroneously or not) that Argentina had recognized in the final presentation of its case that BG's shareholding constituted an investment under the Argentina-United Kingdom BIT (*Id.*, ¶113). In any event, there is no evidence in that tribunal's decision that it did not take into consideration the status of the BG Group Plc. oil company as ultimate owner, a situation which is different from SAS' in the present case, which is only a paper company without any verified activity.

¹⁸⁰ See *supra*, ¶41.

¹⁸¹ See *supra*, ¶¶33-6.

5. Are indirect investments protected under the Treaty?

137. I do not agree with the conclusion that my colleagues reached in connection with the protection of indirect investment under the BIT.

138. Even considering that SAS made some sort of investment protected by the BIT—which, as seen above, did not happen—the truth is that such a hypothetical investment would not be covered by the BIT, given that SAS has not shown that the BIT protects indirect investments.

a. Interpretation of the Treaty regarding protection of indirect investments in accordance with Articles 31 and 32 of the Vienna Convention

139. As agreed by the Parties, the Treaty should be interpreted in light of the principles provided for in Articles 31 and 32 of the Vienna Convention. However, the majority of the Tribunal has not applied the principles under Article 32 of the Convention.

140. To limit—as SAS intends to do—the use of the principles under Article 32 of the Vienna Convention to cases in which the interpretation pursuant to Article 31 of the Convention produces some level of ambiguity or obscurity regarding the meaning of a term, or leads to a manifestly absurd or unreasonable result¹⁸² is erroneous because it ignores the text itself of Article 32 of the Convention, which provides for recourse to these supplementary means of interpretation “in order to confirm the meaning resulting from the application of article 31.”¹⁸³ This understanding—which is accepted even by the legal authorities that SAS introduced into the record—¹⁸⁴ has been confirmed by the most recent jurisprudence of the International Court of Justice.¹⁸⁵

¹⁸² In this regard, see SAS’ statement in the Reply Memorial, ¶¶178-80. “Under Article 32 of the Vienna Convention, if an interpretation in accordance with the general rule set out at Article 31 leaves the meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, then recourse may be had to supplementary means of interpretation.” Similarly, see SAS’ statement in Tr. Hearing, Day 1, 124:23-25, 125:1 (SAS’ opening arguments) (ENG): “[W]e would submit that there is no need to resort to Article 32 of the Vienna Convention. As you know, the purpose of Article 32 is to try and understand the meaning of text that is not clear.”

¹⁸³ Vienna Convention on the Law of Treaties (CLA-11).

¹⁸⁴ In this regard, see, for example, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, Oct. 21, 2005 (Caron, Álvarez, Alberro-Semerena) (CLA-099), ¶¶93 and ¶266, and Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Oxford University Press, 2008 (CLA-62), p. 32, referring to the decisions reached by other investment tribunals on the same topic.

¹⁸⁵ Territorial Dispute (Lybian Arab Jamahiriya v. Republic of Chad), 1994 ICJ Reports, Judgment of 3 February 1994 (RLA-10), ¶ 55. Several other decisions reach a similar conclusion reflecting the jurisprudence

141. Regarding the facts of the purported investment in the territory of Bolivia, as I have previously explained, the Respondent in this case argues —and I agree— that the Claimant has not made a protected investment under the Treaty. It can be explored, as I proceed to do next, whether the Treaty could similarly protect this purported investment as an indirect investment made by SASC through CMMK’s shareholding companies.
142. The relevant articles under the Treaty to understand this issue are Articles 8.1 and 1(a), mentioned above.¹⁸⁶
143. The discussion regarding the interpretation of both Parties revolves around the preposition “of” included in the expression “an investment of the former” in Article 8.1 and the absence of any reference to “direct or indirect” in Article 1(a).
144. Regarding article 8.1, the Tribunal’s majority accepts that the word “of” should be interpreted in accordance with the rule of interpretation of the Vienna Convention, although, as seen before,¹⁸⁷ the result I reach through the application of such rule is different from the one adopted by the majority.
145. In accordance with Article 31 of the Vienna Convention, the terms of a Treaty shall be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁸⁸ As part of the context, the Treaty text and its Preamble should be considered. The Treaty Preamble establishes that the States Parties have entered into the Treaty “[d]esiring to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State.” The object and purpose of the Treaty therein reflected¹⁸⁹ is the creation of favorable conditions for greater investment by companies of one State in the territory of the other State. In this case, as seen above,¹⁹⁰ there is no evidence of investments by a company from the United Kingdom in the territory of Bolivia.
146. The remainder of the Treaty text confirms that the meaning of Article 8.1 does not extend to indirect investments. In this regard, Article 1(a) of the Treaty, where “investments” are defined,

of the International Court of Justice. However, since the Parties have not introduced such legal authorities on the record, I refrain from referring to them.

¹⁸⁶ See *supra*, ¶¶79-80.

¹⁸⁷ See *supra*, Section II.A.4.

¹⁸⁸ Vienna Convention on the Law of Treaties (CLA-11).

¹⁸⁹ See *supra*, ¶113.

¹⁹⁰ See *supra*, Section II.A.2 and Section II.A.4.

does not refer to the possibility of “investments” being indirect, i.e., does not include indirect investments.

147. Similarly, Article 2.1, also referred to by the Tribunal's majority,¹⁹¹ refers to the creation of favorable conditions for “*nationals or companies of the other Contracting Party*” to “*invest capital in its territory*”. As noted above, this article also does not protect investments made by nationals or companies of other States, made through a special purpose company of one of the Contracting Parties, and in turn through other companies incorporated in other States.

148. In brief, based on the rule of interpretation of Article 31 of the Vienna Convention, the scope of protection under the Treaty is limited to investments made by nationals or companies of one of the Contracting Parties in the territory of the other Contracting Party. The Treaty does not provide for this protection to be afforded to companies of third party States that make investments through special purpose companies of one of the Contracting Parties. In turn, the Treaty does not provide for the protection of the purported investments in third States. In this case, and as elaborated above,¹⁹² there is no investment of a company from the United Kingdom in the territory of Bolivia; therefore, there are no reasons to afford the protection under the Treaty to such a situation. This Tribunal lacks the power to interpret the Treaty so as to extend its protection to situations that were not foreseen by the Contracting Parties at the time of its signing.

149. Regarding Article 32 of the Vienna Convention, the supplementary methods provided for in this article confirm the interpretation of Article 8.1 that I mentioned above. As I have already stated,¹⁹³ the use of the methods under Article 32 of the Vienna Convention to confirm the interpretation established through the application of Article 31 of the Convention is expressly provided for in the text of the Convention and reflects the understanding of the International Court of Justice. There are no reasons to limit the use of supplementary methods to cases where the outcome is manifestly absurd, unreasonable, ambiguous or obscure as SAS contends.

150. Article 32 of the Vienna Convention provides that “recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31”.¹⁹⁴ The majority considers that the “Respondent has not proven that the treaties signed prior to or

¹⁹¹ See Majority Opinion, ¶307.

¹⁹² *Id.*

¹⁹³ See *supra*, ¶142.

¹⁹⁴ Vienna Convention on the Law of Treaties (CLA-11).

contemporaneously with the Treaty, or their provisions on property, form part of the circumstances of the conclusion of the Treaty”.¹⁹⁵ I respectfully disagree with the conclusions reached by my colleagues on this issue.

151. The reference to treaties concluded contemporaneously with the treaty under consideration has been frequently used by investment tribunals when applying the interpretation methods of the Vienna Convention. Thus, for example, in the *Postova Banka v. Greece* case, the tribunal held that:

Treaties are carefully drafted and negotiated, and the differences in the examples used in the treaties that contain a broad-based definition of assets are not fortuitous.¹⁹⁶

152. On the other hand, the same majority opinion in this case develops the importance of analyzing the text of other treaties.¹⁹⁷

153. The reference to what States have negotiated under treaties other than the applicable treaty is an interpretation resource that is frequently used in international investment arbitration. In the *Postova Banka v. The Hellenic Republic* case, for example, the tribunal noted that

Several treaties, including the Slovakia-Greece BIT, contain similar – and even identical – concepts of “investment” in the chapeau of the article that refers to protected investments. In fact, the same chapeau contained in Article 1 of the Slovakia- Greece BIT, with a broad asset-based concept, is repeated not only in a significant number of Greek BITs but also in a number of other treaties referred to in decisions repeatedly cited by the Parties to this arbitration.

As to Greek treaties, the same or similar chapeau is used, inter alia, in the BITs with Albania (1991), Romania (1991), Cyprus (1992), and Romania (1997).¹⁹⁸

¹⁹⁵ Majority Opinion, ¶303.

¹⁹⁶ *Postova Banka, A.S. and Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015 (Zuleta, Townsend, Stern) (CLA-097), ¶294.

¹⁹⁷ In fact, my colleagues state that “[t]he States, in the exercise of their sovereignty, may include in the treaties additional requirements for the investor or the investment, as is the case with the clauses requiring that, in addition to the incorporation or constitution in the State party under the corresponding Treaty, the company has its main business seat in that State, or that conducts substantive activity in that State, or that the capital or the resources used in the investment have their origin in the State where the investor was constituted or incorporated, and including clauses on the denial of benefits under certain circumstances. None of these requirements or restrictions have been included in the Treaty by Bolivia or the United Kingdom and, as it has already mentioned before, the Tribunal may not create additional requirements for the investor or the investment beyond the ones agreed by two sovereign States”. Majority Opinion, ¶333.

¹⁹⁸ *Postova Banka, A.S. and Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015 (Zuleta, Townsend, Stern) (CLA-097), ¶280-290.

154. It would be difficult to consider that the conclusion of a treaty excludes consideration of other treaties concluded contemporaneously, as these also indicate the negotiators' viewpoints at the time and the differences made in the texts in each case. The aforementioned is based on the principle of good faith interpretation of the treaties, which coincides with the *effet utile* of the text.¹⁹⁹
155. In the *Postova Banka v. Greece* case just cited, the tribunal ratified the *effet utile* principle in the interpretation as included in the "good faith" principle mentioned under Article 31.1 of the Vienna Convention, and—as we have seen—underscored that States carefully negotiate their treaties, therefore nothing should be assumed to be fortuitous in that regard. Based on that, the tribunal concluded that effect should be given to what the BIT provides and does not provide, establishing that the parties did not desire to protect the loans—the purported investment in that case—as investments since they were not included in the broad definition of investment:

Interpretation of a treaty in good faith, considering not only the text but also the context, requires that the interpreter provide some meaning to the examples and to the content of such examples as part of the context of the treaty. The interpretation in good faith, be it considered alone or in conjunction with the object and purpose of the treaty, embodies the principle of effectiveness (*ut res magis valeat quem pererat*). Preference should be given to an interpretation that provides meaning to all the terms of the treaty as opposed to one that does not.²⁰⁰

156. My colleagues conclude that they would not be able to "restrict or extend the text and context of the Treaty through the simple exercise of textual comparison of the Treaty with other treaties concluded between third States and Respondent."²⁰¹ However, that is exactly what my colleagues do in their opinion. By disregarding the textual comparison of the Treaty, the majority extends the text of the Treaty to include indirect investments, notwithstanding that the Parties did not include indirect investments in the text of the Treaty.

¹⁹⁹ As indicated by the tribunal in *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008 (Nariman, Torres Bernárdez, Bernardini) (RLA-206), ¶165: "Nothing is better settled as a common canon of interpretation in all systems of law than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. This is simply an application of the wider legal principle of effectiveness which requires favoring an interpretation that gives to every treaty provision an "*effet utile*." On the efficacy or "*effet utile*" principle in the interpretation of the investment protection treaties, there follow some of the decisions available: *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990 (El-Koshi, Asante, Goldman) (RLA-28), ¶40(E), *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009 (Mantilla-Serrano, Rubins, Molfessis) (RLA-216), ¶195, *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (Briner, Cremades, Fadlallah) (RLA-215), ¶95.

²⁰⁰ *Postova Banka, A.S. and Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015 (Zuleta, Townsend, Stern) (CLA-097), ¶294.

²⁰¹ Majority Opinion, ¶303.

157. It should also be noted that the requirement that SAS proposes,²⁰² as well as the majority of the Tribunal,²⁰³ based on which the Treaty should expressly exclude indirect investments so that they are considered excluded from the protection afforded by the Treaty, contradicts the best standards developed in specialized scholarly writings²⁰⁴ and it does not correlate with reality, since there is no evidence on the record of the existence of a case where such exclusion was explicit.
158. Considering then the circumstances of the conclusion of the Treaty, the Respondent demonstrated, in the proceeding, that other bilateral investment treaties were concluded contemporaneously by Bolivia –for example the Switzerland-Bolivia BIT (1987),²⁰⁵ the Belgium-Luxembourg Union-Bolivia (1990),²⁰⁶ and the France-Bolivia BIT (1989)–²⁰⁷ which did expressly provide for the protection of direct and indirect investments. This clarification in the other treaties only makes sense, and has *effet utile*, if a tribunal cannot *proprio motu* include indirect investments in a treaty without the parties referring to them. Otherwise, the express inclusion of such investments in the text of the treaty would be devoid of any meaning.

²⁰² SAS contends that “[a] second contextual element that is relevant in interpreting the phrase ‘investment of the former’ in Article 8(1) of the Treaty is the fact that there is no express exclusion of indirect investments in the Treaty.” (See Reply Memorial, ¶168). Similarly, SAS stated that “Bolivia alleges that the Treaty would protect indirect investments only if a specific reference to indirect ownership had been included therein, but that is exactly the wrong conclusion to draw from the lack of exclusionary language concerning indirect investments. In the absence of such clear and specific exclusionary language, and in light of the broad definition of investments in Article 1(a) encompassing indirect investments, the more jurisprudentially-consistent interpretation of Article 8(1) is that it applies equally to direct and indirect owners of qualifying investments.” (See Reply Memorial, ¶171.)

²⁰³ Majority Opinion, ¶315, following in this regard the finding by the tribunal in the *Guaracachi America, Inc., and Rurelec PLC v. Bolivia* case, UNCITRAL Case No. 2011-17, Award, 31 January 2014 (Júdice, Conthe, Vinuesa) (CLA-01), ¶354.

²⁰⁴ In this regard, Professor Zachary Douglas has mentioned that “a great number of investment treaties do not contain a provision of the type under consideration” (i.e., an article indicating that the treaty protects direct and indirect investments) and therefore “there must be a concomitant limitation upon the tribunal’s jurisdiction *ratione personae*: the claimant must exercise effective control directly over the investment.” Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009 (RLA-53), ¶580 (emphasis added). It shall be noted that SAS attempts to contend that Professor Douglas does not state in the excerpt above that the absence of an express indication in the treaty regarding the protection of indirect investments implies a limitation on the tribunal’s *ratione personae* jurisdiction to situations in which the claimant has direct control over the investment (Reply Memorial, ¶174). I cannot agree with SAS’ attempt because it contradicts what Professor Douglas clearly –and reasonably– asserts in his book, as indicated by Bolivia (in this regard, see Rejoinder Memorial, ¶259).

²⁰⁵ Treaty between the Swiss Confederation and the Republic of Bolivia on the reciprocal encouragement and protection of investments, concluded on 6 November 1987 and in force since 17 May 1991 (RLA-52).

²⁰⁶ Treaty between the Belgium-Luxembourg Economic Union and the Republic of Bolivia on the reciprocal encouragement and protection of investments, concluded on 25 April 1990 (RLA-210).

²⁰⁷ Treaty between the Government of the French Republic and the Republic of Bolivia on the reciprocal encouragement and protection of investments, concluded on 25 October 1989 (RLA-211).

159. The practice reflected in the BITs concluded by Bolivia contemporaneously with the Treaty is also reflected in the practice of the other Contracting State, the United Kingdom, for the same period. Thus, for example, the BIT between the United Kingdom and Panama, which entered into force in November 1985, expressly provides for the protection of indirect investments,²⁰⁸ as seen in the BITs between Bolivia and Switzerland,²⁰⁹ with the BLEU²¹⁰ and France²¹¹ mentioned above. Moreover, the same is reflected in the practice of the United Kingdom in some of its most recent international investment instruments –such as the BIT between the United Kingdom and Colombia, which entered into force in October 2014–²¹² and even the Model BIT of the United Kingdom, of 2008.²¹³ This is not surprising. It is merely an instance of an extended practice of States in the conclusion of investment protection treaties, in which indirect investment is not expressly excluded whenever no protection of it is intended but it is expressly included whenever protection of it is intended.²¹⁴ This is the method adopted by almost all of the States of

²⁰⁸ See United Kingdom-Panama BIT, Article 5.2: “If either Contracting Party expropriates the investment of a company duly incorporated, constituted or otherwise organized in its territory, and if nationals or companies of the other Contracting Party, directly or indirectly, own, hold or have other rights with respect to the equity of such company, then the Contracting Party within whose territory the expropriation occurs shall ensure that nationals or companies of the other Party receive compensation in accordance with the provisions of the preceding paragraph.” (emphasis added). Available at: http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PAN_GBR_s.pdf.

²⁰⁹ See Treaty between the Swiss Confederation and the Republic of Bolivia on the reciprocal encouragement and protection of investments, concluded on 6 November 1987 and in force since 17 May 1991 (RLA-52).

²¹⁰ See Treaty between the Belgium-Luxembourg Economic Union and the Republic of Bolivia on the reciprocal encouragement and protection of investments, concluded on 25 April 1990 (RLA-210).

²¹¹ Treaty between the Government of the French Republic and the Republic of Bolivia on the reciprocal encouragement and protection of investments, concluded on October 25 1989 (RLA-211).

²¹² See United Kingdom-Colombia BIT, Article I.2 (a): “Investment means every kind of economic asset, owned or controlled directly or indirectly, by investors of a Contracting Party in the territory of the other Contracting Party [...]” (emphasis added). Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3253>.

²¹³ See United Kingdom Model BIT (2008), Article 1(a): “For the purposes of this Agreement: (a) “investment” means every kind of asset, owned or controlled directly or indirectly [...]”(emphasis added). Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2847>.

²¹⁴ By way of illustration, limiting the number of references to 200 to preclude excessively lengthening this footnote, and excluding the treaties already mentioned above in this opinion, the following agreements on investment protection may be consulted as examples of the States’ practice in this regard: Albania-Poland BIT (1993), Art. 1(c); Germany-Mexico BIT (1998), Ad. Art. 1(b); Algeria-Finland BIT (2005), Art. 1.1; Algeria-Jordan BIT (1996), Art. 1.1; Algeria-Qatar BIT (1996), Art. 1.1; Argentina – Guatemala BIT, Art. I.1; Argentina – Kingdom of the Netherlands BIT, Art. 1(b); Argentina-Armenia BIT (1993), Art. 1.2; Argentina-Australia BIT (1995), Art. 1.B(ii); Argentina-Sweden BIT (1991), Protocol, B.2; Argentina-Switzerland BIT (1991), Art. 1.2; Australia-Malaysia BIT (2012), Art. 12.2(c); Australia-Sri Lanka BIT(2002), Art. 1.1; Australia-Turkey BIT (2005), Art. 1.1(c); Austria-Kuwait BIT (1996), Art. I.1; Austria-Nigeria BIT (2013), Art. 1(2); Austria-Tajikistan BIT (2010), Art. 1(2); Benin-Canada BIT (2013), Art. 1; Benin-Mauritius BIT(2001), Art. 1; Burkina Faso BIT (2001), Art. 1.1; Burkina Faso-Canada BIT (2015), Art. 1; Burkina Faso-Guinea BIT (2003), Art. 1.1; CAFTA-DR BIT (2004), Art. 10.28; Cameroon-Canada BIT (2014), Art. 1; Canada-Côte d’Ivoire BIT (2014), Art. 1; Canada-Slovakia BIT (2010), Art I(d); Canada-Hungary BIT (1991), Art. I.b(ii); Canada-Jordan BIT (2009), Art. 1(s); Canada-Kuwait BIT (2011), Art. 1; Canada-Latvia BIT (2009), Art. I(g); Canada-Mali BIT (2014), Art. 1; Canada-Nigeria BIT (2014), Art. 1; Canada-Peru BIT

(2006); Canada-Poland BIT (1990), Art. 1; Canada-Czech Republic BIT (2009), Art. I(d); Canada-Senegal BIT (2014), Art. 1; Canada-Serbia BIT (2014), Art. 1; Canada-Tanzania BIT (2013), Art. 1; Chad-Benin BIT (2001), Art. 1.1; Chad-Burkina Faso BIT (2001), Art. 1.1; Chad-Guinea BIT (2004), Art. 1.1; China-Canada BIT (2013), Art. 1.1; China-Morocco BIT (1995), Art. 1.1; Croatia-Kuwait BIT (1997), Art. 1.1; Croatia-Morocco BIT (2004), Art. 1.1; Ecuador-Canada BIT (1996), Art. I(g); Egypt-Finland BIT (2004), Art. 1.1; Egypt-Central African Republic BIT (2000), Art. 1.2(c); United Arab Emirates-Mongolia BIT (2001), Art. 1.1; Japan-Mongolia EPA (2015), Art. 1.2(k); Slovakia-Kuwait BIT (2009), Art. 1.1; Slovenia-Austria BIT (2001), Art. 1.2; United States-Albania BIT (1995), Art. I(d); United States-Azerbaijan BIT (1997), Art. I(d); United States-Bahrain BIT (1999), Art. 1(d); United States-Bangladesh BIT (1986), Art. I(c); United States-Bolivia BIT (1998), Art. 1(d); United States-Cameroon BIT (1986), Art. I.1(b); United States-Congo BIT (1984), Art. I(c); United States-El Salvador BIT (1999), Art. 1(d); United States-Georgia BIT (1994), Art. I(d); United States-Haiti BIT (1983), Art. I(c); United States-Honduras BIT (1995), Art. I(d); United States-Jordan BIT (1997), Art. I(d); United States-Lithuania BIT (1998), Art. I.1(a); United States-Morocco BIT (1985), Art. I.4; United States-Mongolia BIT (1994), Art. I.1(a); United States-Mozambique BIT (1998), Art. 1(d); United States-Panama BIT (1982), Art. I(d); United States-Panama BIT, Art. 10.29; United States-Rwanda BIT (2008), Art. 1; United States-Senegal BIT (1983), Art. I(c); United States-Trinidad and Tobago BIT (1994), Art. I(d); United States-Turkey BIT (1985), Art. I(c); United States-Uruguay BIT (2005), Art. 1; United States-Uzbekistan BIT (1994), Art. I(d); Ethiopia-Finland BIT (2006), Art. 1.1; Ethiopia-Kuwait BIT (1996), Art. 1.1; Finland-Belarus (2006), Art. 1; Finland-Guatemala BIT (2005), Art. 1.1; Finland-Jordan BIT (2006), Art. 1.1; Finland-Kirghizstan BIT (2003), Art. 1.1; Finland-Kuwait BIT (1996), Art. 1.1; Finland-Mauritius BIT (2007), Art. 1; Finland-Mozambique BIT (2004), Art. 1.1; Finland-Nicaragua BIT (2003), Art. 1.1; Finland-Dominican Republic BIT (2001); Finland-Turkey BIT (1993), Art. 1.1(f); Finland-Ukraine BIT (2004), Art. 1.1; Finland-Zambia BIT (2005), Art. 1.1; France-Slovenia BIT (1998), Art. 1.3; France-Ethiopia BIT (2003), Art. 1.3; France-Kazakhstan BIT (1998), Art. 1.3; France-Malta BIT (1976), Art. 1(b); France-Mexico BIT (1998), Art. 2(b); France-Uganda BIT (2003), Art. 1(b); Georgia-Finland BIT (2006), Art. 1; Georgia-Kuwait BIT (2009), Art. 1.1; Kingdom of the Netherlands-Bosnia Herzegovina BIT (1998), Art. 1(b); Kingdom of the Netherlands-Bulgaria BIT (1999), Art. 1.2; Kingdom of the Netherlands-Slovenia BIT (1996), Art. 1(b)(iii); Kingdom of the Netherlands-Hungary BIT (1987), Art. 1(c); Kingdom of the Netherlands-India BIT (1995), Art. 2; Kingdom of the Netherlands-Kuwait BIT (2001), Art. 1.1; Kingdom of the Netherlands-Macao BIT (2008), Art. 1; Kingdom of the Netherlands-Turkey BIT (1986), Art. 1(c); Hungary-Kuwait BIT (1989), Art. 1.4; Hungary-Morocco BIT (1991), Art. 1.1; India-Kuwait BIT (2001), Art. 1.2; Italy-Bosnia-Herzegovina BIT (2000), Art. 1.2; Japan-Peru BIT (2008), Art. 1(1); Kuwait-Bosnia Herzegovina BIT (2001), Art. 1.1; Kuwait-Kazakhstan BIT (1997), Art. 1.1; Lithuania-Kuwait BIT (2001), Art. 1.1; Morocco-Cameroon BIT (2007), Art. 1.1; Morocco-Chad BIT (1997), Art. 1.1; Morocco-Finland BIT (2001), Art. 1.1; Morocco-Greece BIT (1994), Art. 1.1; Morocco-Guinea BIT (2002), Art. 1.1; Morocco-Equatorial Guinea BIT (2005), Art. 1.1; Mauritania-Burkina Faso BIT (2001), Art. 1.1; Mongolia-Finland BIT (2007), Art. 1; Nigeria-Finland BIT (2005), Art. 1.1; Poland-Estonia BIT, Art. 1.1; Poland-Lithuania BIT (1992), Art. 1.1(c); Poland-Lithuania BIT (1993), Art. 1.1; Poland-Morocco BIT (1994), Art. 1.1; Romania-Senegal BIT (1980), Art. 1.2; Russia-Switzerland BIT (1990), Art. 2; Senegal-Morocco BIT (2006), Art. 2(c); Serbia-Finland BIT (2005), Art. 1.1; Switzerland-Chile BIT (1993), Ad. Art. 1.2(B); Sweden-Lithuania BIT (1992), Protocol, 2(ii); Sweden-Romania BIT (2002), Art. 1.1; Sweden-Turkey BIT (1997), Art. 1.4; Switzerland-Malta BIT (1965), Art. 5; Switzerland-Sudan BIT (1974), Art. 7; Turkey-Bangladesh BIT (1987), Art. I.1(c); Turkey-Kuwait BIT (1988), Art. 1.1; BLEU-Albania BIT (1999), Art. 1; BLEU-Algeria BIT (1991), Art. 1.2(b); BLEU-Bahrain BIT (2006), Art. 1.2; BLEU-Belarus BIT (2002), Art. 1.2; BLEU-Benin BIT (2001), Art. 1.2; BLEU-Bosnia Herzegovina BIT (2004), Art. 1.2; BLEU-Botswana BIT (2006), Art. 1.2; BLEU-Brazil (1999), Art. 1.2; BLEU-Burkina Faso BIT (2001), Art. 1.2; BLEU-Cyprus BIT (1991), Art. 1.2; BLEU-Colombia BIT (2009), Art. 1.2; BLEU-Congo BIT (2005), Art. 1.2; BLEU-Côte d'Ivoire BIT (1999), Art. 1.2; BLEU-Croatia BIT (2001), Art. 1.1; BLEU-Cuba BIT (1998), Art. 1.2; BLEU-Egypt BIT (1999), Art. 3.1; BLEU-El Salvador BIT (1999), Art. 1.2; BLEU-United Arab Emirates BIT (2004), Art. 1.2; BLEU-Slovenia BIT (1999), Art. 1.1; BLEU-Georgia BIT (1993), Art. 1.2; BLEU-Guatemala BIT (2005), Art. 1.2; BLEU-Kazakhstan BIT (1998), Art. 1.2; BLEU-Latvia BIT (1996), Art. 1.1; BLEU-Lebanon BIT (1999), Art. 1.2; BLEU-Libya BIT (2004), Art. 1.2; BLEU-Lithuania BIT (1997), Art. 1.2; BLEU-Macedonia BIT (1999), Art. 1.1; BLEU-Madagascar BIT (2005), Art. 1.1; BLEU-Morocco BIT (1999), Art. 1.1; BLEU-Venezuela BIT (1998), Art. 1.2; Ukraine-Morocco BIT (2001), Art. 1.1; China-Japan-Korea Trilateral Agreement (2012), Art. 1(1); Australia-Chile FTA, Art. 10(j); Colombia – US FTA, Art. 10.28; Australia-

the world when determining the protection or not of indirect investments. And it has been the method followed unequivocally by Bolivia and the United Kingdom.

160. In support of this assertion, I have reviewed the 2,946 BITs compiled in the database on the investmentpolicyhub.unctad.org website of the United Nations Conference on Trade and Development (UNCTAD).²¹⁵ I have not been able to find one single treaty that expressly excludes indirect investments. Only 0.9% of all the BITs available²¹⁶ include a provision that could resemble an express exclusion of indirect investments; i.e., the assertion that direct investments are protected. The figures speak for themselves.

161. Holding that the absence of an express exclusion of indirect investment in a treaty implies the States' agreement with the inclusion of indirect investment is irreconcilable with the generalized practice of the States in this regard, including, again and in particular, the practice of the two States signatories to the Treaty governing this arbitration. All in all, the majority requires Bolivia and the United Kingdom to do something in this Treaty that they have never done before. This is untenable.

162. Let us see. We have two States negotiating a Treaty. Throughout their history, the two States have always opted, without exception, in more than 130 investment protection and promotion treaties concluded by both, for the common method used in international investment law, based on which the protection of indirect investments is expressed positively (and its exclusion is not expressed negatively). In other words, indirect investment is regulated expressly. Both States did so, at all times, in their treaties. How is it possible for the majority to hold that such a clear and evident fact should not be taken into consideration when interpreting this Treaty, whereby the States Party decided not to rely on the classic express protection formula of indirect investments that States use when they intend to protect that type of investment? It is clear that the majority is

China FTA, Art. 9.1(d); Australia-Korea FTA, Art. 11.16(b); Australia-Thailand FTA, Art. 103(l); Canada-Korea FTA, Art. 8.22.1(e); Canada-Honduras FTA, Art. 10.1; Canada-Panama FTA, Art. 9.01; Chile-Canada FTA, G40; China-Korea, FTA Art. 12.1; Colombia-Canada FTA, Art. 838; Colombia-Korea FTA, Art. 8.28; Korea-Peru FTA, Art. 9.18; Costa Rica-Singapore FTA, Art. 11.1; EFTA-Ukraine FTA, Art. 4.2(E); United States-Australia, Art. 11.17.4; United States-Chile FTA, Art. 10.27; United States-Korea FTA, Art. 11.28; United States-Morocco FTA, Art. 10.27; United States-Oman FTA, Art. 10.27; United States-Singapore FTA, Art. 15.1.13; India-Malaysia FTA, Art. 10.2(d); Japan-Peru FTA, Art. 209.1(b); Panama-Singapore FTA, Art. 9.1.4; Peru-Canada FTA, Art. 847; Energy Charter Treaty, Art. 1(6).

²¹⁵ See <http://investmentpolicyhub.unctad.org/>. This web site also maps the content of the BITs to allow very useful targeted searches. However, the protection or not of indirect investments is not one of the search criteria available. Therefore, I had to manually search each treaty individually in the various languages in which they have been concluded: Spanish, English, Italian, Portuguese, German, French, Russian, Arabic, Swedish, Slovakian, Serbian, Danish, Turkish, Czech, Romanian, Chinese, and Greek.

²¹⁶ Certainly, 89% of these cases correspond to one country, Turkey, which underscores its very exceptional nature.

not authorized to subscribe such an interpretation. The majority is not authorized to include in the Treaty a provision that the signatories decided not to include. Much less is it authorized to do so while it cautions against the rewriting of the treaties, since this is, precisely, what the majority does.

b. The legal authorities invoked by the majority regarding the protection of indirect investments

163. In connection with the decisions cited by the majority as authorities on this issue, I must again disagree with the way my colleagues have interpreted such decisions. I am referring to the awards in the *Cemex v. Venezuela* and *Rurelec v. Bolivia* cases, which the Tribunal's majority invoked alleging that its interpretation coincides with the interpretation in both cases and that they are "particularly relevant."²¹⁷ It is clear that these cases do not assist the Tribunal's majority in its opinion.
164. The tribunal's majority refers to the decision in the *Cemex v. Venezuela* case since it relates to, allegedly, a text almost identical to that of the Treaty. While it is true that the applicable treaty in that case is almost identical to the text of the Treaty applicable here, there is a fundamental difference. The Venezuela-Netherlands BIT applicable in the *Cemex* case includes in the definition of "nationals", "legal persons ... controlled, directly or indirectly by... legal persons" incorporated under the law of one of the contracting parties.²¹⁸ That is, contrary to the United Kingdom-Bolivia Treaty, the treaty that the tribunal applies in the *Cemex v. Venezuela* case includes a provision that refers in particular to the possibility of directly or indirectly controlled investments.
165. Regarding *Rurelec v. Bolivia*, the tribunal's majority relies upon this decision that interprets the same Treaty provisions concerned in this case.²¹⁹ However, there is a significant factual difference between both cases, which is that in *Rurelec v. Bolivia* the claimant was effectively the ultimate controlling company of the investment.²²⁰ This implies that the person making the

²¹⁷ Majority Opinion, ¶304.

²¹⁸ See Article 1(b) of the Venezuela-Kingdom of the Netherlands BIT, applicable to the *CEMEX Caracas Investments B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010 (CLA-100), ¶20.

²¹⁹ SAS also emphasizes in particular the tribunal's decision in the *Rurelec v. Bolivia* case, as seen, for example, in the Statement of Claim and Memorial, ¶¶110-11, Reply Memorial ¶153, ¶165, ¶170, ¶182 and Tr. Hearing, Day 1, 121:1235 (SAS' Opening Arguments) (English).

²²⁰ *Guaracachi America, Inc. and Rurelec PLC v. Bolivia*, UNCITRAL Case No. 2011-17, Award, 31 January 2014 (Júdice, Conthe, Vinuesa) (CLA-01), ¶125.

investment in Bolivia in that case was the claimant, whereas the person making the alleged investment in this case is not.

166. Even if *Rurelec v. Bolivia* did not have such fundamental difference with this case, it should be noted that precedents from other investment tribunals is not *stare decisis*, that is, while they may be relevant, they are not authoritative and their reasoning must always be analyzed.²²¹ The following paragraphs will demonstrate why the reasoning of the tribunal in the *Rurelec v. Bolivia* case should not be followed.

167. The tribunal in the *Rurelec v. Bolivia* case states the following: “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.”²²² This assertion is meaningless. It relies on a necessarily general purpose and moves on to directly require a particular method that it is simply not used.

168. Without distortion, the aforementioned idea could be expressed as follows: “All of the Treaties designed to encourage and protect foreign investment protect indirect investments except when specifically excluded”, which is equivalent to saying that all Treaties protect indirect investments. The *Rurelec v. Bolivia* doctrine would not deteriorate, really, if instead of relying on the purpose of the Treaty, it relied on the Treaty’s name: Treaty on the Promotion and Protection of Investments. It is an idea that cannot withstand the most minimal analysis. Firstly, it retroactively rewrites thousands of treaties. If this idea is applied in a widespread manner, as my colleagues unfortunately contend, all of the States would learn that, although the treaties that they concluded had the purpose of protecting only the investments of one State in another State, by declaring as the treaty’s general purpose the promotion and protection of investments they also agreed to protect indirect investments. This would happen, for example, with Bolivia and the United Kingdom, which in all of their Treaties resorted to the common method of expressly accepting the protection of indirect investments when they had the intention of protecting them.

169. I have literally reviewed thousands of Treaties as part of this search. I can assert that the general practice of the States is to afford positive protection to indirect investments, and not the other

²²¹ Thus, for example, we have referred *supra*, at Section II.A.4, to the reasoning of the tribunals in the *Standard Chartered v. Tanzania* and *Caratube v. Kazakhstan* cases.

²²² *Guaracachi America, Inc. and Rurelec PLC v. Bolivia*, UNCITRAL Case No. 2011-17, Award, 31 January 2014 (Júdice, Conthe, Vinuesa) (CLA-01), ¶353.

way around. As we have seen above,²²³ States do not resort to the negative formula. In addition to make it mandatory against the virtual unanimity of all Treaties, it is the carrier of a poison capable of destroying the most important pillar of international arbitration: the principle of consent.

170. Even if there was a logical method that permitted to reach such a specific and transcendental conclusion straight from the name of the BIT itself (Treaty for the Protection and Promotion of Investments), the *Rurelec v. Bolivia* holding is erroneous in this regard. As already seen, the object and purpose of the United Kingdom-Bolivia BIT is not to “promote and protect foreign investment” in general, but to promote and protect the investment of nationals of one of the States Parties in the territory of the other State Party. The Treaty is not an agreement with multilateral effect, but rather a bilateral treaty whose effect is relative²²⁴ to the Parties that signed it (the United Kingdom and Bolivia).²²⁵ Therefore, the purpose of the Treaty, as expressed in the Preamble invoked by the *Rurelec v. Bolivia* tribunal, does not support but refutes the claim to extend the ambit of protection to indirect investments.

171. There is no treaty for the promotion and protection of investments that is not designed to promote and protect investments. In fact, no BIT is designated otherwise. It would simply be a contradiction. What is already known from the very name of the Treaty is enough for the *Rurelec v. Bolivia* tribunal to extract conclusions regarding the provisions that should be included to establish if indirect investments are protected or not. This means that, according to the *Rurelec v. Bolivia* tribunal and the majority, thousands of treaties have historically followed an erroneous method by including the same general provision but not including a negative provision regarding this type of investment. This also means that, according to the *Rurelec v. Bolivia* tribunal and the majority, the States that have negotiated multiple treaties (Bolivia and the United Kingdom included) have acted in an inattentive manner by formulating the universal purposes of the Treaties, since they should have thought that because of it someday a tribunal would request them to include a provision that no treaty uses. This idea finds no support in the

²²³ See *supra*, ¶¶159-60.

²²⁴ See Rejoinder Memorial, ¶259.

²²⁵ The Claimant makes the same mistake when asserting that the purpose of bilateral investment treaties is to overtly protect “the foreign investment” (“This concern of overbreadth simply does not exist in the case of bilateral investment treaties whose overt purpose is to protect foreign investment, and where an interpretation that the phrase “investment of the former” as covering investments that are owned directly or indirectly by the investor is entirely consistent with the context of the Treaty”; Reply Memorial, ¶173) or when it speculates that in this Treaty the intent of Bolivia and the United Kingdom was solely to “maximize the flow of investments” (“[T]he parties to the Treaty desired to maximize the flow of investments which would include, in the absence of language to the contrary, indirect investments”; Reply Memorial, ¶175).

actual practice of the States. As a result, in my opinion, both *Rurelec v. Bolivia* and those who unfortunately follow its reasoning are doomed to repeat an unfounded and destructive idea of the sacred principle of consent, which cannot be overemphasized.

172. The aforementioned is not the only criterion that is manifestly wrong in the case we are reviewing and which is relied upon by the majority. That tribunal, moreover, departs from the definition of investment, as if it could by itself replace the nonexistence of a provision affording protection to indirect investments. That can never be the basis for a conclusion on this topic. My colleagues cite the following excerpts from the *Rurelec v. Bolivia* award:²²⁶ “...the Tribunal notes that Article 1 contains—as the majority of BITs do—a very broad definition of ‘investment’. Article 1 defines ‘investment’ as ‘every kind of asset which is capable of producing returns’.”²²⁷ Next, the *Rurelec v. Bolivia* tribunal reaches an unusual conclusion. It says: “[...] which would naturally include ‘indirect investments’ through the acquisition of shares in a company”.²²⁸ In order to reach this conclusion, it would be necessary that it not be possible to have a direct investment relating to any “kind of asset which is capable of producing returns”. As in fact it is possible, clearly, to have a direct investment comprising assets capable of producing returns, the finding reached by the *Rurelec v. Bolivia* tribunal, and accepted by the majority, is devoid of logic. What happens in reality is that it is possible to have investments made up of “every kind of asset which is capable of producing returns” directly or indirectly. For indirect investments to be protected, it is necessary—in addition to the purported investor having made some investment—for the indirect investments to be contemplated by the treaty. It is notoriously wrong to hold that a broad definition of investment necessarily results in a reference to indirect investments.

173. Furthermore, as my colleagues do, the *Rurelec v. Bolivia* tribunal seeks to exclude the relevance of other treaties concluded contemporaneously with the Treaty under discussion here.²²⁹ To claim that the States Parties to a treaty only exclude a specific type of investments from their protection when they so provide expressly, instead of requesting them to be included expressly, is to misconstrue all rules of treaty interpretation.

²²⁶ Majority Opinion, ¶305.

²²⁷ *Guaracachi America, Inc. and Rurelec PLC v. Bolivia*, UNCITRAL Case No. 2011-17, Award, 31 January 2014 (Júdice, Conthe, Vinuesa) (CLA-01), ¶352.

²²⁸ *Id.*

²²⁹ *Guaracachi America, Inc. and Rurelec PLC v. Bolivia*, UNCITRAL Case No. 2011-17, Award, 31 January 2014 (Júdice, Conthe, Vinuesa) (CLA-01), ¶352.

174. I must be emphatic about this. Neither the tribunal in *Rurelec v. Bolivia*, the Claimant in our case, nor my colleagues in their opinion have been able to identify a single investment protection treaty in which the United Kingdom or Bolivia—or, in any event, any other State—have expressly excluded the protection of indirect investment as such. Conversely, the Respondent has identified treaties of at least one of the parties, Bolivia—and, in any event, there are many other similar treaties entered into by other States—which expressly include the protection of indirect investment as such. This confirms that it is legally incorrect and untenable to resort to a *contrario sensu*²³⁰ interpretation in favor of the protection of indirect investment based on the non-inclusion of a clause that excludes such a protection in the BIT.²³¹ It would be tantamount to asserting that if indirect investment is provided for, it deserves protection, and if it is not, it deserves protection all the same. This is rather nonsensical. By attempting to follow an idea that is so devoid of a logical structure, so disrespectful of the actual practice of States in the conclusion of treaties for the protection and promotion of investments, including all of the treaties entered into by both States Parties to the applicable Treaty in this case, the majority joins one of the most lethal criteria available in international investment law: the one that has the potential to destroy one of the pillars of international law, which is the principle of consent.

²³⁰ The tribunal in the *Rurelec v. Bolivia* case cannot avoid the following statement regarding the *a contrario sensu* arguments: “[I]t is well accepted that this kind of argument is not on its own strong enough to justify a particular interpretation of a rule of law.” *Guaracachi America, Inc. and Rurelec PLC v. Bolivia*, UNCITRAL Case No. 2011-17, Award, 31 January 2014 (Júdice, Conthe, Vinuesa) (CLA-01), ¶354. The argument is remarkable, since that is exactly what the tribunal does in the *Rurelec v. Bolivia* case: it is based on a *contrario sensu* interpretation (since the protection of foreign investment is broad, if the indirect investment is not excluded, it should be considered included) to justify an interpretation of a rule of law which, even worse, determines something so crucial such as the scope of the State's consent to the international arbitral jurisdiction.

²³¹ SAS has invoked the decision of the International Court of Justice in the *Elettronica Sicula S.p.A. (ELSI)* case, Judgment, ICJ Reports 1989 (CLA-107) to support its premise that absent clear and specific language excluding indirect investments from the Treaty protection, Article 8(1) should be interpreted as referring to those indirect investments. (See Reply Memorial, ¶168 and Rejoinder Memorial on Jurisdiction, ¶159). SAS' reference to this decision is odd. In the ELSI case, the ICJ precisely refused to accept that, by resorting to a *a contrario sensu* argument, the consent granted by Italy to the jurisdiction of the ICJ was broadened under the 1948 Friendship, Commerce and Navigation Treaty between Italy and the United States. See *Elettronica Sicula S.p.A. (ELSI)*, Judgment, ICJ Reports 1989 (CLA-107), ¶¶48-9. Based on the ICJ, since there is no express exclusion in the treaty of the requirement to exhaust domestic remedies in cases of diplomatic protection as a condition for consent to the jurisdiction of the ICJ, it should not be considered that the Parties had decided to disregard it: “The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty ;or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so. This part of the United States response to the Italian objection must therefore be rejected.” In any event, as seen in the citation above, in the ICJ reasoning in the ELSI case, the consideration of the exhaustion of the domestic remedies was essential as an “important principle of international customary law” (*id.*, ¶50), a characteristic that, obviously, cannot be attributed to the protection of indirect or direct investments under the international investment arbitration.

c. Article 5.2 of the Treaty

175. Finally, my colleagues refer to Article 5.2 of the Treaty when they assert that “SAS’ indirect participation in CMMK’s share capital – which is the owner of the Mining Concessions at the same time – is an investment protected under the Treaty.”²³² This is strange, because Article 5.2 of the Treaty confirms, beyond any doubt, that the Treaty does not afford protection to indirect investments.

176. Article 5.2 of the Treaty provides:

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 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.

177. It can be seen that the Treaty is unequivocal in its limitation of the protection against uncompensated expropriation to nationals or companies of the other Contracting Party who are owners of the shares in the expropriated company. SAS is not the owner of shares in CMMK.²³³ Based on the Claimant's own account, SAS owns shares in companies that hold shares in CMMK,²³⁴ which establishes a key difference for the analysis and resolution of this case. The Treaty between the United Kingdom and Bolivia could have not limited its scope to nationals or companies that have shares in the expropriated company. Thus, for example, as seen above,²³⁵ the BIT between the United Kingdom and Panama does so, in an almost identical clause to that of Article 5.2 of the Treaty, to which the express provision for the protection of indirect rights over shares in the expropriated company is added. However, the Contracting Parties decided to establish an express limitation in the Treaty: the protection is extended to the nationals or companies that hold shares in the expropriated company. To disregard this limitation implies, simply, a modification of the text of the Treaty and a violation, as occurs throughout the opinion of the majority, of the principle of consent.

²³² Majority Opinion, ¶309.

²³³ Certificate of Incorporation, Certificate of Good Standing and Register of Members of Malku Khota Ltd. (C-6), Certificate of Incorporation, Certificate of Good Standing and Register of Members of Productora Ltd., share certificates (C-7), Certificate of Incorporation, Certificate of Good Standing and Register of Members of G.M. Campana Ltd. (C-8), Share Certificate issued by CMMK in favour of Productora Ltd., Malku Khota Ltd. y G.M. Campana Ltda. (C-9).

²³⁴ See Statement of Claim and Memorial, ¶33.

²³⁵ See *supra*, ¶163.

178. In this regard, my colleagues assert that “nothing in the Treaty prevents the Claimant from submitting claims based on measures adopted against CMMK’s assets which affect the value of the shares indirectly owned by the Claimant.”²³⁶ This is a serious and manifest error. SAS does not hold shares in CMMK. Therefore, Article 5.2 confirms that the Treaty precludes SAS from pursuing claims before this Tribunal.²³⁷
179. Similarly, my colleagues note that SAS does not have a direct right over CMMK’s assets “pursuant to the law of Bolivia”.²³⁸ This is a mysterious assertion. SAS does not hold a direct right over CMMK’s assets because it is not a shareholder in CMMK. The law of Bolivia has absolutely nothing to do with this. The decision that CMMK’s three shareholding companies be from the Bahamas (a country not included in the Treaty) was a decision made by the stakeholders in that operation for reasons that, whatever they may be, are not attributable to Bolivia nor do they derive, in any way, from the Bolivian legislation.²³⁹
180. Pursuant to those circumstances, I consider it is an obvious error to interpret the Treaty as including the protection of indirect investments.

B. Conclusion

181. For the above-mentioned reasons, I consider that the Claimant has not proved that it made an investment protected by the Treaty, which prevents this Tribunal from assuming jurisdiction to resolve the dispute.

²³⁶ Majority Opinion, ¶308.

²³⁷ It should be noted that the majority’s opinion requires Bolivia to compensate SAS as a result of the revocation of a license that, since it has not been compensated yet, would supposedly constitute an unlawful expropriation under the Treaty (See Majority Opinion, ¶¶588-610). Therefore, the specific jurisdictional limitation set forth by the United Kingdom and Bolivia in Article 5.2 of the Treaty in connection with the compensation for expropriation is particularly relevant in this case.

²³⁸ See, BIT between United Kingdom and Bolivia, Article 5.2 (C-1).

²³⁹ My colleagues do not deal with solving the mystery. Their assertion is not supported in any footnote or specification of any kind regarding the regulations under the law of Bolivia they are referring to and why those regulations (and not the will of those who plotted the corporate fabric linking SAS to CMMK) establish that SAS has no direct right over CMMK’s assets.

III. Additional Considerations

182. Considering that the Tribunal lacks jurisdiction to resolve this dispute, it is unnecessary, for clear methodological reasons, to analyze issues related to the merits and damages.

183. Nonetheless, I would like to refer to two aspects of the majority opinion regarding those issues: the lawfulness of the expropriation under Article 5 of the Treaty and the interest rate to be applied to the compensation awarded.

A. On the lawfulness or unlawfulness of the expropriation

184. Article 5(1) of the Treaty provides:

Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose and for a 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 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, the legality of the expropriation and the amount of the compensation in accordance with the principle set out in this paragraph.²⁴⁰

185. My colleagues conclude that Bolivia made an unlawful expropriation under international law because it breached its duty to compensate for expropriation under Article 5(1) of the Treaty.²⁴¹ The reasons that led my colleagues to reach this conclusion are unclear. Moreover, the award ignores relevant evidence and decisions that the Parties discussed and introduced into the record.²⁴²

186. The legal authorities cited by the Parties demonstrate that the absence of compensation does not in itself render an expropriation unlawful under international law. In the words of the tribunal in

²⁴⁰ BIT between the United Kingdom and Bolivia (C-1), Article 1(a).

²⁴¹ See Majority Opinion, ¶¶598-621.

²⁴² Statement of Claim and Memorial, ¶¶128-38, Counter-Memorial, ¶¶379-404, Reply Memorial, ¶¶289-314, Rejoinder Memorial, ¶¶421-48.

the *Goetz v. Burundi* case, the mere lack of compensation is insufficient to “stigmatize” (*entacher*) the expropriatory measure as a violation of international law.²⁴³

187. Indeed, as Ian Brownlie and others have noted, compensation is not a condition of lawful expropriation; likewise, the absence of compensation is not a condition of unlawful expropriation.²⁴⁴ The existence of a dispute between the Parties over the amount of compensation to be provided for expropriation does not render the expropriation unlawful.²⁴⁵

188. In the present case, I do not find –and the majority does not aid in my search– any element that rebuts the general presumption that an expropriation is lawful under international law when the only pending issue is the payment of compensation.

189. To begin with, Article 4 of the Reversion Decree had a specific provision for compensation of CMMK.²⁴⁶

1. The Corporación Minera de Bolivia, COMIBOL, shall hire the services of an independent firm to carry out a valuation of the investments made by Compañía Minera Mallku Khota S.A. and Exploraciones Mineras Santa Cruz Ltda. EMICRUZ LTDA, within a period not to exceed one hundred and twenty (120) business days.”

II. Based on the findings of such valuation, COMIBOL shall define the amount and conditions under which the Government of Bolivia shall recognize the investments made by Compañía Minera Mallku Khota S.A. and Exploraciones Mineras Santa Cruz Ltda. – EMICRUZ LTDA.

III. The amount mentioned in the paragraph above shall be paid by COMIBOL, to be included in its budget from its own resources.

190. As seen above, the State in this case did not refuse to pay compensation. Rather, it issued a detailed and specific compensatory provision related to the object of this dispute.²⁴⁷

191. Furthermore, even the absence of such a specific regulatory provision on compensation has been deemed insufficient to establish an unlawful expropriation under international law. For example,

²⁴³ See *Antoine Goetz et consorts c. Republic of Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999 (Weil, Bedjaoui, Bredin) (RLA-30), ¶130: “*Le Tribunal ne considère toutefois pas que cette circonstance suffit à entacher d’illicéité internationale la mesure litigieuse. La Convention exige une indemnité adéquate et effective; contrairement à ce que font certains droits nationaux en matière d’expropriation, elle n’exige pas une indemnisation préalable.*”

²⁴⁴ See Ian Brownlie, *Principles of Public International Law*, 7th ed., 2008 (RLA-253), p. 538.

²⁴⁵ See Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law*, Oxford International Arbitration Series, 2009 (RLA-102), ¶3.48. (“One may, therefore, conclude that according to arbitral practice and scholarly writing, the mere existence of a dispute about the amount of compensation does not render the expropriation unlawful”).

²⁴⁶ Reversion Decree, 1 August 2012 (C-4), Article 4.

²⁴⁷ *Id.*

in the *Venezuela Holdings v. Venezuela* decision, the relevant expropriatory law (Decree-Law No. 5200) did not include a compensatory provision.²⁴⁸ Still, the tribunal found that “the mere fact that an investor has not received compensation does not in itself render an expropriation unlawful.”²⁴⁹ Moreover, according to that tribunal, the inclusion of a compensatory provision in the expropriatory Decree-Law would have constituted an offer to compensate.²⁵⁰

192. I do not find that Bolivia ever disregarded its commitment to provide compensation based on the reversion of the exploration license, as established in Article 4 of the Reversion Decree.²⁵¹ Rather, the record includes several affirmations by Bolivia of its will to comply with its commitment to compensate.

193. For example, in the First Procedural Meeting held on May 13, 2014, the Assistant Attorney General Cariña Llorentti stated that:

The State of Bolivia has at no time taken an arbitrary decision; rather, it has provided and regulated under Article 4 of the said Supreme Decree that the COMIBOL shall hire the services of an independent company to value the investments made by Compañía Minera Mallku Khota; such a valuation is clearly intended to compensate for what was actually invested by the Mallku Khota Company. [...] I would like to make clear, Members of the Tribunal, that the State of Bolivia will, at no time, circumvent or evade its responsibility as expressly recognized under the Supreme Decree.²⁵²

194. In the Counter-Memorial, Bolivia held that

In our case, the Reversion Decree provided for the payment of compensation. The Parties held negotiations before and after the Reversion. Such negotiations are a clear demonstration of Bolivia’s willingness to comply with its obligation to compensate. SAS has not demonstrated that the proposals made by Bolivia were incompatible with the requirements provided for in the Treaty or that negotiations were held in bad faith.²⁵³

195. Finally, in the Rejoinder Memorial, Bolivia indicated that:

The mere fact that compensation has not been paid before the arbitration cannot constitute a violation of the Treaty since due compensation shall be set during

²⁴⁸ See RLA-105, *Venezuela Holdings and others and the Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014 (Guillaume, El-Kosheri, Kaufmann-Kohler) (RLA-105), ¶302.

²⁴⁹ *Id.*, ¶301.

²⁵⁰ See *id.*, ¶302.

²⁵¹ As indicated by the tribunal in the *Tidewater v. Venezuela* case, “This is not a case where the State took assets without any offer of compensation. The record does not demonstrate a refusal on the part of the State to pay compensation.” See *Tidewater Investment SRL v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015 (McLachlan, Rigo Sureda, Stern) (RLA-104), ¶145.

²⁵² Transcript of the First Procedural Meeting, 13 May 2014, pp. 15-6 (emphasis added).

²⁵³ Reply Memorial, ¶401.

the arbitration [...] Payment will be timely, provided that it is done promptly after the Tribunal issues its final decision ordering a payment (quod non) upon exhaustion of all remedies.²⁵⁴

196. Not only that. The record shows that Bolivia actively committed to complying with the compensation envisaged in the Reversion Decree, even in the face of difficulties that, eventually, it could have administered faster or more efficiently. Bolivia hired an independent company – Quality Audit²⁵⁵ to develop the valuation report, which was completed on June 27, 2014,²⁵⁶ before the presentation of SAS’ Statement of Claim and Memorial in this arbitration (which was submitted on 24 September 2014).
197. The majority asserts that the process of determining the amount of compensation sustained “inefficiencies and delays”²⁵⁷ not “attributable to any action or inaction of the Claimant.”²⁵⁸ The majority, however, does not provide clear reasoning on this point. It supports its assertions with vague and indeterminate reasoning divorced from the proven facts in the case.
198. The majority has not shown—nor would it be able to—that a delay in the process of determining the amount of compensation rendered the expropriation unlawful. To be sure, Bolivia was responsible for the valuation procedure provided in Article 4 of the Reversion Decree. It is therefore undeniable that Bolivia shares part of the responsibility for not having reached the valuation more immediately. Nonetheless, a review of the record shows that the majority errs in finding Bolivia solely responsible for the delay.
199. For example, on 24 August 2012, Bolivia sent a letter to South American Silver²⁵⁹ inviting their representatives to a meeting, regarding the Reversion Decree, to be held on 28 August at 9:00 am. The purpose of the meeting was to produce documents related to the Project.²⁶⁰

²⁵⁴ Rejoinder Memorial, ¶434 and ¶437.

²⁵⁵ See Minutes of the reception of offers, 7 April 2014 (R-105), Analysis by the Proposal Evaluation Committee, 8 April 2014 (R-106), Resolution authorizing the hiring of Quality, 23 April 2014 (R-107), Service Order for the hiring of a consultant directed to Quality, 25 April 2014 (R-108) and Service Contract for investment valuation services for CMMK and EMICRUZ Ltda., 8 May 2014 (R-109).

²⁵⁶ See Quality’s letter to COMIBOL, dated June 27 2014 (R-110) and Valuation report of the investments made by Compañía Minera Mallku Khota S.A. and Exploraciones Santa Cruz LTDA. – EMICRUZ LTDA, June 2014 (R-111).

²⁵⁷ Majority Opinion, ¶613.

²⁵⁸ *Id.*

²⁵⁹ Incidentally, it should be noted that nothing in the text of that letter suggests that, when referring to “South American Silver,” Bolivia intended to refer to SAS—a party it had never dealt with before— and not SASC, the Canadian company it had always dealt with and to which Bolivia—as reflected in the documents on the record—referred to simply as “South American Silver”, without the need to differentiate it from SAS, the shell company, which did not appear until the emergence of this dispute.

²⁶⁰ Letter from COMIBOL to South American Silver, 24 August 2012 (C-20).

Ref: INVITACIÓN A REUNIÓN DE ENTREGA DE DOCUMENTACIÓN

De mi mayor consideración:

En mérito al Decreto Supremo No. 1308 del 01.08.12, que revierte el yacimiento minero de Malku Khota a favor del Estado Boliviano y dentro del marco de dicha disposición legal, invitamos a ustedes a una reunión para el día martes 28.08.12 a horas 09:00, a efectos de realizar la entrega de toda la documentación pertinente que hacen al desarrollo de las actividades de dicho yacimiento minero.

Con este motivo, saludo a usted con la mayor consideración

P' CORPORACIÓN MINERA DE BOLIVIA

200. SAS did not attend the meeting. To justify its absence, SAS claimed that, although the letter was dated 24 August 2012, CMMK had only received it on 27 August 2012. Consequently, SAS claims it did not have the time to attend the meeting.²⁶¹ The image below reproduces the company's receipt stamp attached to the letter:²⁶²



201. It should be noted that –as it can be seen *supra* in the stamp image– the date is handwritten, and CMMK's stamp has SASC's logo, with no indication of the Claimant's involvement. The letter in which SAS responded to Bolivia to justify its absence from the meeting is dated 4 September 2012,²⁶³ eight days after SAS supposedly received the letter and seven days after the date of the meeting. The letter SAS sent Bolivia on 4 September does not include a receipt stamp.²⁶⁴ Out of all of the letters addressed to Bolivia by SAS since its unexpected entrance in this dispute and which have been introduced into the record,²⁶⁵ the 4 September 2012 letter is the only one that lacks a receipt stamp.

202. In the 4 September 2012 letter sent to justify SAS's failure to attend the meeting, SAS stated: "We do not have SAS personnel who reside in La Paz".²⁶⁶ This statement is curious coming from a company that claims title to an investment in Bolivia, and taking into account the

²⁶¹ See Letter from SAS to COMIBOL, 4 September 2012 (C-21).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ See Letter from South America Silver and SASC to the Vice President of Bolivia, July 31, 2012 (C-19), Notice of Dispute from South American Silver, October 22, 2012 (C-22), South American Silver's letters, December 12, 2012, January 16, 2013, and February 15, 2013 (C-23), Letter from South American Silver to the Attorney General of Bolivia, March 4, 2013 (C-25), Letter from South American Silver, April 12, 2013 (C-26), Letter from South American Silver, April 24, 2013 (C-27).

²⁶⁶ Letter from SAS to COMIBOL, 4 September 2012 (C-21).

numerous meetings held with Bolivian officials regarding the Project. Interestingly, SAS decided to send its “legal counsel in Bolivia,” Mr. Enrique Barrios, to the next meeting, which Bolivia convened on 21 February 2013 and held on 17 April 2013.²⁶⁷ South American Silver did not choose to send legal counsel or another representative that did “reside in La Paz” to the meeting convened by Bolivia on 24 August 2012, or to communicate in due time that it would not attend it.

203. The majority not only ignores that SAS did not attend the first meeting convened by Bolivia, but also that, in the second meeting, SAS confirmed its refusal to provide the information that Bolivia requested for valuation purposes. This is seen in SAS’ summary of the 17 April 2013 meeting, as stated in the letter dated 24 April 2013 sent by SAS to Bolivia.²⁶⁸

204. To begin with, SAS’s letter confirms that on 24 April 2013, that is, 266 days after the Reversion Decree, SAS knew that Bolivia asserted it needed information that the company had in order to move forward with the valuation, that it was aware that Bolivia had requested such information, and that it had not yet handed the information over.

205. By SAS’ own account, SAS resisted providing the information requested by Bolivia during the meeting with the Bolivian authorities. In a section in its letter dated April 24, 2013, which is key to understanding the situation faced by the Tribunal, SAS stated:

We also understand that Dr. Barrios and Dra. Guevara were advised that, despite the requirement in Supreme Decree 1308 dated August 1, 2012, COMIBOL was to engage an outside valuation consultant to complete a valuation of the Project for compensation purposes. COMIBOL has not yet engaged a valuation firm. This failure is purportedly because CMMK did not deliver all of the technical information requested by COMIBOL concerning the Project.

As Mr. Barrios informed you, much of the information related to the Project is highly confidential and proprietary. Furthermore, there is publicly available information that Bolivia can use for valuation purposes. South American Silver’s parent company, South American Silver Corp., is a publicly traded company in Canada, and a significant amount of information is available via the System for Electronic Document Analysis and Retrieval (“SEDAR”) located at <http://www.sedar.com>. These materials should be adequate for a valuation consultant to prepare a valuation of the Malku Khota Project.²⁶⁹

²⁶⁷ See Letter from South American Silver, 12 April 2013 (C-26), p. 2: “[t]his is to confirm that Dr. Enrique Barrios (C.I. 3376842 L.P.) - our Bolivian Legal Counsel- will attend the meeting at 3:00 p.m., on April 17, 2013, in representation of South American Silver.”

²⁶⁸ See Letter from South American Silver, 24 April 2013 (C-27).

²⁶⁹ *Id.*, p. 4 (emphasis added).

206. As seen above, SAS resisted providing Bolivia the requested information not only because it considered the information “highly confidential and proprietary,” but also because SAS disagreed with the compensation standard established in the Reversion Decree. Indeed, as seen in the letter of April 24, 2013, SAS suggested that Bolivia take into account certain information—the value of SASC’s shares in the Toronto stock exchange—²⁷⁰ for valuation purposes. This information would never be appropriate to determine the cost of the Project, which, under Article 4 of the Reversion Decree, is the applicable standard for determining compensation, and which was to be valued by the independent company.²⁷¹
207. This letter shows that SAS did not cooperate with Bolivia to conduct a valuation under Article 4 of the Reversion Decree, and that SAS believed that any compensation Bolivia offered under the Reversion Decree could not be adequate.
208. Bolivia alleges that the inadequacy of information frustrated the first tender for independent valuation companies, which took place in December 2012.²⁷² In the report presented by the company initially hired, BDO Berthin Amengual & Asociados, the company stated that it lacked the information necessary to perform the valuation.²⁷³ In spite of this, Bolivia assumed the full cost of generating information to be used in the valuation process.²⁷⁴ In turn, Bolivia drafted new terms of reference and started a new tender for independent companies; the contract was

²⁷⁰ *Id.*

²⁷¹ See Reversion Decree, 1 August 2012 (C-4), Article 4.

²⁷² See Counter-Memorial, ¶¶181-82: “COMIBOL, in accordance with the Reversion Decree, began the hiring process of an independent valuation company. To that end, it published two announcements in the local press on December 9, 2012 and between December 10 and 12, 2012. The only company that replied to them was BDO Berthin Amengual & Asociados. However, their proposal included a significant number of technical conditions and questions (mainly resulting from the inadequacy of the information provided by CMMK and SASC on the investments made). Therefore, COMIBOL considered that —BDO’s response was more of a request for expansion of the terms of reference than a proposal.”

²⁷³ See COMIBOL’s internal report on the tenders received, 14 December 2012 (R-101), p. 2 of the electronic document.

²⁷⁴ See inventory performed by COMIBOL in the Mallku Khota area between February 19 and 28, 2013 (R-108).

awarded to Quality Audit.²⁷⁵ Quality Audit completed its valuation on 27 June 2014.²⁷⁶ The company calculated the costs of the Project to be USD 17,047,190.01.²⁷⁷

209. The majority analyzes SAS' conduct as follows: "[i]n the opinion of the majority, failure to deliver certain information that the Claimant deems confidential does not justify the delay in the valuation process, more so when there is public information that the Claimant – a party interested in the valuation – deems sufficient, and the valuation was later conducted satisfactorily for Bolivia based on such information."²⁷⁸ I cannot agree with this.

210. First, as seen above,²⁷⁹ SAS' failure to cooperate, and its refusal to produce the information requested by COMIBOL for valuation purposes, was based not only on the alleged "confidential and proprietary" nature of "much of the information related to the Project",²⁸⁰ but also on the disagreement with the compensatory standard established under the Reversion Decree. According to the Claimant, Bolivia should assess the Project based on information publicly available on SASC' share trading value at Canada's stock exchange.²⁸¹ But SASC's share trading value in Canada is not useful for valuing the Project costs because it has no relation to the determination of these costs, which is what the Reversion Decree authorized to compensate²⁸² and what the majority accepted to compensate in this arbitration.²⁸³

211. Second, it is false that Bolivia was satisfied with a valuation report that used only the publicly available information that the Claimant considered adequate (namely, SASC's share trading in Canada's stock exchange). Quality Audit's analysis of the Valuation Report shows that, contrary to the majority's holding,²⁸⁴ the estimation was not conducted based on the publicly available information mentioned by the Claimant. Quality Audit's valuation was performed with the

²⁷⁵ See Minutes of the reception of offers, 7 April 2014 (R-105), Analysis by the Proposal Evaluation Committee, 8 April 2014 (R-106), Resolution authorizing the hiring of Quality, 23 April 2014 (R-107), Service order for the hiring of a consultant directed to Quality, 25 April 2014 (R-108) and Service Contract for the provision of investment valuation services for CMMK and EMICRUZ Ltda., 8 May 2014 (R-109).

²⁷⁶ See Quality's letter to COMIBOL dated June 27, 2014 (R-110) and Valuation report of the investments made by Compañía Minera Mallku Khota S.A. and Exploraciones Santa Cruz LTDA. – EMICRUZ LTDA, June 2014 (R-111).

²⁷⁷ See Valuation report of the investments made by Compañía Minera Mallku Khota S.A. and Exploraciones Santa Cruz LTDA. – EMICRUZ LTDA, June 2014 (R-111), p. 18.

²⁷⁸ Majority Opinion, ¶605.

²⁷⁹ See *supra*, ¶¶205-7.

²⁸⁰ Letter from South American Silver, 24 April 2013 (C-27), p. 4:

²⁸¹ *Id.*

²⁸² See Reversion Decree, 1 August 2012 (C-4), Article 4.

²⁸³ See Majority Opinion, ¶¶857-8.

²⁸⁴ See Majority Opinion, ¶616.

information provided by COMIBOL²⁸⁵ –including the fixed asset inventory that Bolivia made at its own expense—²⁸⁶ and the information that the company itself collected,²⁸⁷ also at Bolivia’s expense.²⁸⁸

212. Third, in addition to the majority’s errors in characterizing the information that the Claimant did not provide Bolivia, my colleagues do not deny that the Claimant declined to provide the information requested by Bolivia regarding the Project. In determining the compensation amount, there is no sensible reason to exclude the Claimant’s lack of cooperation with Bolivia from the Tribunal’s assessment of Bolivia’s conduct.

213. On September 24, 2014, in its Statement of Claim and Memorial, SAS categorically asserted that any compensation provided by Bolivia under the Reversion Decree would be a violation of the Treaty:

Even if this hypothetical compensation were to materialize, it would still violate the Treaty and international law requirement that compensation be paid promptly.²⁸⁹

214. Similarly, SAS noted in its Reply Memorial that the determination of the compensation to be provided under the Reversion Decree was an “empty exercise”, since limiting the reimbursement to the costs incurred by the Project was a violation of the Treaty:

[I]ts valuation process was, by its own admission, limited only to the “incurred costs by CMMK”, not the prompt, adequate and effective compensation and

²⁸⁵ See Valuation report of the investments made by Compañía Minera Mallku Khota S.A. and Exploraciones Santa Cruz LTDA. – EMICRUZ LTDA, June 2014 (R-111), p. 22.

²⁸⁶ See *id.*, Part V, “Valuation Technical Report for Fixes Assets,” Section 3: “The basis of our information has been a listing of the fixed assets provided by COMIBOL.” See also Inventory performed by COMIBOL in the Mallku Khota area between February 19 and 28, 2013 (R-103).

²⁸⁷ See *id.*, Part II, “Geological Technical Report,” Section 2 and Part IV, “Technical Report on Civil Works,” Section 2.

²⁸⁸ See Service provision contract for the valuation of the investments of CMMK and EMICRUZ Ltda. dated May 8, 2014 (R-109), Sixth Clause.

²⁸⁹ Statement of Claim and Memorial, ¶133. See also *id.*, ¶135-6: “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 Mallku Khota Project. 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. 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.”

market value of the investment required by the Treaty; this false premise rendered the entire exercise empty.²⁹⁰

215. SAS considered that the compensation proposed by Bolivia was “incompatible” with the requirements provided for in the Treaty:

[C]ontrary to Bolivia’s contention, its “proposals” were, in fact, incompatible with the requirements provided for in the Treaty.²⁹¹

216. In this regard, during the hearing, SAS stated that the compensation proposed by Bolivia is a violation of the Treaty:

Looking back to Supreme Decree 1308, it talks about a valuation process that would value the investments made by CMMK. That's not valuing the Market Value of the investment and, therefore, we submit that even if the Tribunal were to consider that an offer of compensation satisfies a standard, the fact that it is inconsistent with the standard means that the expropriation was a breach of the Treaty.²⁹²

217. As seen above,²⁹³ this position is consistent with the position adopted by SAS at its meetings with the authorities of Bolivia before commencement of the arbitration.²⁹⁴ SAS opposes the compensation provided in the Reversion Decree, which the independent company hired by Bolivia quantified at USD 17,047,190.01.²⁹⁵

218. The standard that Bolivia proposed from the very beginning, that is, compensation for the costs incurred in the Project, is the same standard that this Tribunal has accepted in its decision on damages.²⁹⁶

²⁹⁰ Reply Memorial, ¶291.

²⁹¹ *Id.*, ¶311.

²⁹² Tr. Hearing, Day 1, 77:8-15 (ENG)

²⁹³ See *supra*, ¶¶205-07.

²⁹⁴ See Letter from South American Silver, 24 April 2013 (C-27).

²⁹⁵ See Valuation report of the investments made by Compañía Minera Mallku Khota S.A. and Exploraciones Santa Cruz LTDA. – EMICRUZ LTDA, June 2014 (R-111), p. 18.

²⁹⁶ See Majority Opinion, ¶¶857-8: “In summary, the valuation method put forward by FTI is subject to uncertainties that preclude even a reasonable level of conviction regarding the Project’s value. This was a valuation subject to a high degree of contingencies, to the development of hypotheses, and to subjective appreciation in light of the absence of objective grounds. In the view of the Tribunal, this results from the clear difficulty of valuing with any degree of precision and objectivity a project that, as indicated at paragraphs 808 to 823 above, is at an incipient stage, without mining activity, with a significant amount of exploration still to be done, without a prefeasibility study and subject to serious uncertainties covering not only the technical aspects, including the uncertainty of using the untested Metallurgical Process, but also the real scope of the resources and their marketability given the lack of a degree of certainty with respect to the costs to attain commercially viable exploitation. In the end, it is a project at an almost embryonic stage that precludes a valuation with the required certainty as to its actual value. Based on the reasons above, the Tribunal finds that the valuation proposed by the Claimant cannot be accepted and, thus, in accordance with the text of paragraph 831 above, the Tribunal will first determine the applicability of the cost-based valuation

219. Likewise, the Tribunal (namely, the majority with my concurrence) has determined that Bolivia respected due process in the expropriation, which includes the determination of the compensation amount owed under Article 4 of the Reversion Decree.²⁹⁷ This undermines SAS' claim that Bolivia should pay for an unlawful expropriation resulting from the failure to comply with due process. SAS' claim concerning the failure to comply with due process—which the Tribunal has rejected—expressly includes the violation of due process resulting from the failure to provide compensation.²⁹⁸ The majority acknowledges that SAS' claim for the violation of due process in the expropriation includes the process of determining compensation.²⁹⁹
220. That is, Bolivia did not refuse to provide compensation for the costs incurred in the Project, and it did not extend an unreasonable offer or violate due process in the determination of the compensatory amount under the Reversion Decree. Rather, Bolivia agreed to provide compensation and proposed the exact compensatory standard –and almost the same figure– that

method of the Project and then the components of such approach in the present case before the Tribunal.” (emphasis added)

²⁹⁷ See Majority Opinion, ¶¶590-7. In particular, see Majority Opinion, ¶¶596-7: “Finally, the Tribunal notes that the Claimant did not participate in any legal proceeding to call into question the legality of the Reversion under the laws of the Respondent, but it chose to initiate an international arbitral claim that resulted in this arbitration. If the Claimant considered that a domestic legal proceeding was not a viable option, or that the Claimant was not going to be afforded fair treatment or, that the proceeding would be a futile exercise, Claimant cannot allege lack of due process based solely on its decision not to pursue the legal remedy available under the laws of Bolivia without showing the circumstances that would make the legal proceeding futile or impossible. There is no precondition to arbitration that requires Claimant to pursue legal actions in Bolivia to challenge the lawfulness of the Reversion Decree, The Claimant, however, cannot claim a violation of due process since it decided not to exercise the remedies available under the national law of Bolivia. As a matter of fact, the Claimant never alleged that such remedies were unavailable or that they did not comply with the due process guarantee. Consequently, the Tribunal considers that the expropriation was in accordance with the Treaty requirement to guarantee due process.”

²⁹⁸ See, for example, Statement of Claim and Memorial, ¶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.”

²⁹⁹ See, for example, Majority Opinion, ¶590: “The Claimant notes that in the Reversion Decree decision the Respondent breached the due process required under the Treaty as one of the conditions for expropriation. Based on the Claimant, the obligation Bolivia has to give an opportunity to the investor to “assert its rights” implies extending the opportunity to participate in the expropriatory decision and in the determination of the adequate level of compensation. However, the Claimant alleges that Bolivia made the decision to expropriate at a series of meetings without the Claimant being present and that the valuation process resulting from the Reversion Decree was developed unilaterally by COMIBOL, without the Claimant's participation in the quantification of compensation. See also Majority Opinion, ¶583: “The context of the Treaty or its object and purpose do not support the Claimant's position that, aside from that, it limits itself to noting that it should have been invited to attend the meetings where the expropriation was decided and to participate in the process advanced by COMIBOL to establish compensation.”

the Tribunal deems appropriate in this arbitration.³⁰⁰ This proposal was the result of a valuation that respected due process.

221. In addition to the specific commitment to compensate undertaken in the Reversion Decree and the effort that led to the hiring of Quality Audit and the submission of its first valuation report, the Attorney General of Bolivia, Hector Arce, asserted during the hearing that he had met with SAS' representatives, in Lima, Peru, and in Washington DC, USA, with the purpose of complying with the Reversion Decree and reaching a compensation agreement similar to those Bolivia had attained with other companies.³⁰¹ SAS did not deny the existence of those meetings. On the contrary, during the hearing, SAS itself invoked Attorney General Arce's assertion regarding the meetings as evidence of Bolivia's acknowledgement of its duty to provide compensation for the reversion of the exploration licenses.³⁰²
222. It should also be noted that it was SAS that decided to resort to international arbitration to settle the dispute with Bolivia, claiming here an amount exceeding the amount of the costs incurred in the Project by more than 350 million dollars.³⁰³ SAS submitted the Request for Arbitration which commenced this proceeding³⁰⁴ while the valuation for compensation was being performed.
223. Considering the aforementioned, I do not find any evidence to conclude –as the majority does– that Bolivia violated its obligation under the Treaty to compensate for the expropriation. The facts in the record show that Bolivia recognized the obligation to compensate in the Reversion Decree, that the Reversion Decree detailed the process to obtain the valuation and the methodology to adopt, and that –without SAS' cooperation– Bolivia performed the necessary administrative acts to obtain the valuation of the costs incurred in the Project. From the very beginning, SAS itself expressed its opposition to establish compensation under the standard

³⁰⁰ See Majority Opinion, ¶¶876-7.

³⁰¹ See Tr. Hearing, Day 4, 815:12-22 (English). “ATTORNEY GENERAL ARCE: We have had the best intention to comply with Supreme Decree enacted on August 1st, and Mr. Fitch, I understand, is here, but the Bolivian attorney is here, Mr. Barrios and Mr. Burnett are here. We have had negotiations in Lima, Peru, also here in Washington at the Embassy, the Peruvian Embassy, actually, but I'm not going to convey the contents of those negotiations because they're protected by an agreement, by Confidentiality Agreement, but we had the best intent, and we have already entered into 11 agreements already with other companies.

³⁰² See Tr. Hearing, Day 9, 1618:11-19 (ENG) “MR. BURNETT: Procuraduría [sic] Arce himself acknowledged in this Hearing that Bolivia had met with Claimant on two occasions to discuss compensation, and he said, among other things, (in Spanish) we have had the best intention to meet the provisions of the Supreme Decree of August 1st, and we had the best intention of reaching an objective and good agreement. So, there is no dispute that compensation is owed and that Bolivia recognizes that.”

³⁰³ See FTI, Second Report, ¶3.13.

³⁰⁴ See Notice of Arbitration, 30 April 2013 (R-1).

provided for in the Reversion Decree. As seen above, SAS believed that the determination of the compensatory amount under Article 4 of the Decree was an “empty exercise”³⁰⁵ and that even if such compensation were to materialize, it would still violate the Treaty.³⁰⁶ This means that even prompt payment by Bolivia would not have extinguished the compensation dispute that SAS has presented before the Tribunal. In other words, even in that scenario, the Claimant itself admits that it would have pursued this arbitration.

224. From a legal perspective, I find that the majority supports its opinion with reference to just one academic article from 1961 by Sohn and Baxter. The article concerns the promptness of compensation and is referred to by both Parties in their briefs. The article states: “While no hard and fast rule may be laid down, the passage of several months after the taking without the furnishing by the State of any real indication that compensation would shortly be forthcoming would raise serious doubt that the State intended to make prompt compensation at all”.³⁰⁷ The reading of the record quickly shows that SAS and Bolivia, contrary to the opinion of the majority,³⁰⁸ do not agree on the scope of this assertion or on its application to the present case.

225. In its Reply, SAS argued that, according to Sohn and Baxter, the passage of several months after a taking without compensation or the furnishing by the State of any real indication that compensation would shortly be forthcoming would render an expropriation unlawful.³⁰⁹ SAS argues that such was the case here, since more than several months have passed and SAS still has not been compensated.³¹⁰ In the Rejoinder, Bolivia responded that, according to Sohn and Baxter, after the passage of several months, the State should furnish a real indication that compensation would be forthcoming; actual payment is not required at this stage.³¹¹ Bolivia asserted that “it met this requirement since the Reversion Decree offered compensation and set the parameters for such compensation. However, SAS chose to resort to arbitration to demand a clearly exaggerated compensation.”³¹² It is clear that SAS and Bolivia disagree on the scope of the citation by Sohn and Baxter; Bolivia’s interpretation is different from SAS’.

³⁰⁵ See Reply Memorial, ¶291

³⁰⁶ See Statement of Claim and Memorial, ¶133 and ¶135-6, Reply Memorial, ¶311 and Tr. Hearing, Day 1, 77:8-15 (ENG)

³⁰⁷ See L.B. Sohn & R.R. Baxter, “Responsibility of States for Injuries to the Economic Interest of Aliens”, 55 American Journal of International Law, 1961, p. 558.

³⁰⁸ See *infra*, ¶226.

³⁰⁹ See Reply Memorial, ¶297

³¹⁰ *Id.*, ¶298.

³¹¹ Rejoinder Memorial, ¶424.

³¹² *Id.*, ¶425.

226. This disagreement between the Parties should not be exceedingly important; it is merely a disagreement on the interpretation of a citation from an old scholarly article, which is addressed in a few lines in the Parties' submissions. However, the majority has used the Parties' purported agreement on this article as the only legal support for its conclusion that Bolivia violated Article 5 under the Treaty (to the exclusion of the Parties' analysis of various decisions by arbitral tribunals to the contrary). Using unclear language, the majority states that "both Parties seem to agree that the passage of several months without the furnishing of a real indication by the State that compensation would be forthcoming is sufficient to establish a breach of the obligation of payment."³¹³ Of course, the agreement that the majority claims to exist (*rectius*: "seems" to exist) does not actually exist, thus depriving the majority opinion of the only legal support it invokes.
227. Additionally, the majority holds that Bolivia did not make any compensation offer: "there is no evidence in the record that Bolivia made a concrete payment offer to CMMK or to the Claimant for the expropriation of the Mining Concessions, other than a delayed and deficient valuation process that, it bears repeating, did not result in any compensation or offer to provide compensation or a clear indication that compensation would be forthcoming."³¹⁴ This is a strange position.
228. The majority lacks any legal authority –and does not provide any other type of argument or explanation– to support its finding that the compensation provided for in the Reversion Decree is insufficient to reflect the State's willingness to comply in good faith with its obligations under Article 5 of the Treaty. This deficiency becomes more remarkable if we recall later acts by Bolivia, including, as mentioned, the appointment of the independent company which established the compensation amount, Bolivia's affirmation of its commitment to pay the compensation owed, and the meetings Bolivia held with SAS' representatives. It is unclear what the majority is reproaching Bolivia here to the point of finding a violation of international law. It is worth repeating that it was the Claimant who brought the dispute with Bolivia to arbitration and claimed that the compensation proposed by Bolivia breached the Treaty.

³¹³ Majority Opinion, ¶601 (emphasis added).

³¹⁴ Majority Opinion, ¶609.

229. Moreover, the scholarly writings unequivocally make no distinction between an offer to pay compensation and the existence of a specific compensatory provision meant to address the compensation requirement for expropriation.³¹⁵
230. Similarly, Irmgard Marboe has underscored that there is consensus that at the time a State expropriates, an offer to compensate or to provide for the determination of compensation is sufficient to establish the expropriation's lawfulness.³¹⁶ Undeniably, this is what Bolivia did in this case.
231. Ripinsky himself indicates that good faith is an important consideration when assessing the lawfulness of an expropriation: "If, on the facts of a particular case, a tribunal establishes that a State has made good faith efforts to comply with its obligation to pay compensation, it should not be held to be in violation of the compensation requirement".³¹⁷ No evidence exists that allows the majority to infer that Bolivia did not act in good faith when it decided to pay compensation under Article 4 of the Reversion Decree and actively (albeit imperfectly) committed to complying with this provision.
232. Finally, the majority asserts that the valuation process was impaired by an annulment as part of the inefficiencies that would have resulted in a delayed determination of the compensation amount.³¹⁸ First, there were only 7³¹⁹ or 23³²⁰ days (depending on the act used to calculate the time lapsed) between the of annulment of the valuation contract with the first independent

³¹⁵ See in this regard S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008 (RLA-103), p. 68.: "[A] good faith offering of, or provision for, compensation (even if not in a sufficient amount, as long as not manifestly unreasonable) should render the expropriation lawful. However, a general provision for payment of compensation for expropriated property in the domestic law of the host State would not qualify as a recognition of a duty to pay compensation in the required sense, as such recognition would need to be expressed in relation to a specific expropriatory act." These authors refer indistinguishably to an "offering of compensation" and a "provision of compensation".

³¹⁶ See in this regard Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law*, Oxford International Arbitration Series, 2009 (RLA-102), ¶3.46: "While earlier the mere 'promise' of a State to pay any sum at any time was not enough for the lawfulness of an expropriation, today there seems to be consensus that it is sufficient, if a State, at the time of the expropriation, offers compensation or provides for the determination of compensation."

³¹⁷ See S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008 (RLA-103), pp. 68-9: "The requirement of good faith should be given an important role in deciding on the lawfulness of expropriation. If, on the facts of a particular case, a tribunal establishes that a State has made good faith efforts to comply with its obligation to pay compensation, it should not be held to be in violation of the compensation requirement."

³¹⁸ Majority Opinion, ¶613.

³¹⁹ See Minutes of the reception of offers, 7 April 2014 (R-105) and Analysis by the Proposal Evaluation Committee, 8 April 2014 (R-106).

³²⁰ See Resolution authorizing the hiring of Quality, 23 April 2014 (C-107).

company³²¹ and the rectification of this defect. It is therefore incorrect to invoke this annulment as a cause of delay relevant to the decision in this case. Second, there is no evidence indicating that Bolivia did not act in good faith when it attempted to quickly rectify the annulment, as indeed happened. Bolivia's actions brought it in compliance with its obligation to hire an independent company³²² to conduct the valuation.³²³ Third, the tribunal cannot divorce the modification of the terms of reference of the original tender for independent companies from SAS' lack of cooperation with the valuation process, as seen above.³²⁴

233. It is possible that Bolivia could have reached this result earlier and without defects in the relevant legal acts. However, it is clear that not every defect in a State's administrative conduct amounts to a violation of international law. If Bolivia's conduct in this case is considered in breach of international law, it will be difficult to imagine a State that could remain compliant in the face of a similar emergency.

234. To summarize, there is no objective evidence that Bolivia performed an unlawful expropriation under Article 5 of the Treaty by breaching its obligation to compensate.³²⁵ Bolivia consistently assumed in good faith a specific commitment to compensate, which was provided for in the Reversion Decree. Bolivia bore the costs of carrying out the administrative acts necessary to conclude a valuation report produced by an independent company. Moreover, from the outset, SAS categorically opposed the compensation standard provided for in the Reversion Decree, a standard that this Tribunal has upheld in its decision on damages.³²⁶

235. Based on the aforementioned, my colleagues' finding of an unlawful expropriation against Bolivia based on lack of compensation disregards the facts evidenced on the record and the law applicable to the dispute. I disagree with this decision.

³²¹ *Id.* See Minutes of the reception of offers, 7 April 2014 (R-105) and Analysis by the Proposal Evaluation Committee, 8 April 2014 (R-106).

³²² See Service order for the hiring of a consultancy addressed to Quality, 25 April 2014 (C-108) and Service Contract for the valuation of CMMK and EMICRUZ Ltda. Investments, 8 May 2014 (R-109).

³²³ See Quality's letter to COMIBOL, 27 June 2014 (R-110) and Valuation report of the investments made by Compañía Minera Mallku Khota S.A. and Exploraciones Santa Cruz LTDA. – EMICRUZ LTDA, June 2014 (R-111).

³²⁴ See *supra*, ¶¶200-07.

³²⁵ Having reached the conclusion that there was no violation of the Treaty in this case, it is unclear whether the Tribunal has competence to quantify and grant compensation for damages.

³²⁶ See Majority Opinion, ¶¶876-7.

B. On the applicable interest rate

236. I cannot join the majority's opinion on the interest rate applicable to the potential compensation awarded to the Claimant.³²⁷

237. The majority's opinion as to the interest rate suffers from a serious flaw at the outset. The majority decided to adopt an interest rate that the Claimant did not propose.³²⁸ Indeed, SAS (and its valuation expert, FIT) unequivocally and consistently proposed the application of a statutory interest rate of 6% per annum, understood as a minimum rate established by Bolivian civil law.

238. In its vote, the majority rejects the application of a statutory interest rate of 6% proposed by SAS—and rightly so.³²⁹

239. However, instead of proceeding to apply one of the interest rates proposed by Bolivia, the majority ventures to apply an interest rate that SAS did not propose, which would be even higher than the statutory rate of 6%. The majority's interest rate is one determined by the Central Bank of Bolivia for dollar-denominated loans that –according to FIT– would range between 6.5% and 7% for the relevant period.³³⁰

240. The majority states as follows: “The Claimant's expert proposes the interest rate certified by the Central Bank of Bolivia for dollar-denominated commercial loans”.³³¹ This assertion is incorrect.

241. To demonstrate as much, one need only read the source used by the majority to support its assertion:³³² FIT, Second Report, paragraphs 10.5-10.7, within a section titled: “*Central Bank of Bolivia published rates are higher than the statutory rate*.”³³³ As the section's title anticipates, FIT briefly mentions the Central Bank commercial rates for dollar-denominated commercial loans as part of its discussion about whether the statutory rate of 6% is a maximum or minimum rate.³³⁴ According to FIT, the 6% rate is a minimum applicable rate, supported by the assertion that it is lower than the one proposed by the Central Bank. That is, the Central Bank rate was never proposed. Let us see:

³²⁷ See *id.*, ¶¶888-908.

³²⁸ *Id.*, ¶903.

³²⁹ *Id.*, ¶895.

³³⁰ See FIT, Second Report, ¶10.7.

³³¹ Majority Opinion, ¶901.

³³² *Id.*, footnote number 1553.

³³³ FIT, Second Report, p. 82.

³³⁴ *Id.*, ¶10.2.

As an alternative interest rate, we understand that the award for damages in the Guaracachi America, Inc. and Rurelec PLC v. Bolivia case (“Rurelec”) is relevant to the current arbitration. The claimant in Rurelec filed for arbitration due to the expropriation of its investment in Bolivia by the Respondent under both the Treaty and the US-Bolivia Bilateral Investment Treaty. In Rurelec, the Tribunal provided the Claimant with an award of interest equal to the “interest rate reported on the website of the Central Bank of Bolivia for USD commercial loans in May 2010”, which amounted to approximately 5.6% for the month of May 2010.³³⁵

Per the chart shown above, it appears that an appropriate annual interest rate according to the Central Bank of Bolivia is between 6.5% and 7.0% from the Valuation Date to the end of October 2015. Therefore, as discussed in the FTI Report, the statutory rate of 6.0% is a minimum applicable interest rate and that a commercial rate of interest per the Central Bank of Bolivia may be between 6.5% and 7.0%.³³⁶

242. As seen, FTI mentions the Central Bank of Bolivia commercial interest rate for the purpose of comparing it to the 6% statutory rate it proposes. FTI makes this comparison to confirm that the 6% rate would be “a minimum applicable interest rate”. FTI did not calculate a compensatory amount by applying the alleged “alternative interest rate” in any of its reports, nor did it specify the percentage (between 6.5% and 7%) that should be applied to the base amount in Scenario 1 or in Scenario 2 for the relevant period. Furthermore, it never discussed how such an amount would be determined. That is, FTI used the Central Bank of Bolivia rate solely as a benchmark.

243. The FTI reports unequivocally show that the proposed interest rate is the statutory rate of 6% per annum. In its First Report, FTI states:

We have been advised that the Bolivian statutory rate is 6.0% per annum, and that the Claimant is thus entitled to pre-award interest on this rate at a minimum. Accordingly, we have calculated the interest based on the Bolivian statutory rate of 6.0% per annum.³³⁷

244. In their Second Report, FTI experts confirm that:

We then calculated pre-award interest on the damages calculated under Scenario 1 and 2 respectively to an estimated hearing date of May 31, 2016 on a compound basis, based on a statutory annual interest rate in Bolivia of 6.0%.³³⁸

245. In case there is any doubt, it is worth reiterating that all of SAS’ written and oral submissions in this arbitration have limited its interest rate proposal to 6%. SAS has not made any alternative or

³³⁵ *Id.*, ¶10.5

³³⁶ *Id.*, ¶10.7.

³³⁷ FTI, First Report., ¶12.8.

³³⁸ *Id.*, ¶3.12.

complementary proposal using the Central Bank of Bolivia rate for dollar-denominated commercial loans, either before or after FTI's Second Report.

246. Accordingly, in its Statement of Claim and Memorial, SAS advises the Tribunal that

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.³³⁹

247. In the Reply Memorial, SAS categorically confirms that it maintains its request for a statutory interest rate of 6%:

[T]here is no basis for FTI to change its calculation of pre-award interest based on the comments in the Brattle Report. FTI continues to apply a pre-award interest rate of 6.0% per annum and calculate pre-award interest on a compounded basis.³⁴⁰

248. During its opening arguments at the hearing, SAS presented two possible compensation amounts that it adjusts using the same compound interest rate of 6% per annum:

Claimant's Experts used various widely accepted valuation methods to value Malku Khota and, as you know, and you will hear later--their conclusion is that the Fair Market Value of Malku Khota for the purpose of compensation under the Treaty is 385.7 million which represents 307.2 million in Fair Market Value and pre-award interest of 78.5 million as of May 31, 2016, based on a percent interest rate compounded annually.³⁴¹

249. The aforementioned shows that SAS never proposed, principally or alternatively, the Central Bank's interest rate for commercial loans in a foreign currency as an interest rate that the Tribunal should apply to determine the amount of compensation in the present dispute.

250. Accordingly, my colleagues' decision to adopt that interest rate exceeds the ambit of possible decisions, which is limited to the claims of the Parties during the arbitration.

251. Of course, even if it were possible to apply an interest rate other than the ones proposed by the Parties to the arbitration, the rate adopted by the majority is unacceptable. Article 5 of the Treaty provides that "compensation 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

³³⁹ Statement of Claim and Memorial, ¶219.

³⁴⁰ Reply Memorial, ¶432. See also Tr. Hearing, Day 1, 17:1-8 (ENG) y Tr. Hearing, Day 9, 1969:5-9 (ENG)

³⁴¹ Tr. Hearing, Day 1, 17:1-8 (ENG)

payment.”³⁴² The interest rate adopted by the majority is neither a statutory rate nor a commercial rate. It is a rate established by the State’s monetary authority, which may be subject to financial policy guidelines.³⁴³ That is, the rate is a discretionary regulatory tool. Therefore, the application of this interest rate contradicts the terms of the Treaty.

252. Having rejected SAS’ proposed (or not proposed) interest rates, only the interest rates proposed by Bolivia remain: the risk-free interest rate of U.S. Treasury bills³⁴⁴ or the interest rate based on the yield of Bolivia’s 10-year sovereign bonds.³⁴⁵

253. Article 5 of the Treaty provides that, in the event of expropriation, an interest rate shall be applied until the date of payment. This means that the party receiving compensation under the Treaty must be compensated for the passage of time between the expropriation and the payment of compensation. In other words, the interest rate to be applied to adjust the compensatory amount shall compensate the aggrieved party for the time value of money.

254. Since the compensatory amount is denominated in dollars, the interest rate to be applied should be expressed in the same currency.

255. The interest rates that compensate an investment are positively correlated with the investment’s particular risk. Accordingly, each investment carries a specific risk and expected yield, and the higher the risk, the higher the return expected.

256. The nature of investment entails the possibility of suffering capital losses. That is because there always exists the possibility that at the end of the investment period, an investor will recover a lower amount of money than that originally invested. Therefore, an investor that makes a risky investment hopes for a return that is sufficient to compensate for the assumed risk.

257. On the contrary, an investment is risk free when there is no possibility that the investor will recover an amount of money lower than the amount he or she originally expected to recover at the end of the investment term.

258. Accordingly, the return associated with a risk-free investment should reflect an interest rate that simply compensates for the time during which the investor was not able to freely dispose of the

³⁴² BIT between the United Kingdom and Bolivia (C-1), Article 5.

³⁴³ See Brattle, Second Report, ¶262. The assertions of the majority to the contrary in this regard are unsupported. See Majority Opinion, ¶902.

³⁴⁴ See Counter-Memorial, ¶714 and Brattle, First Report, ¶¶188-90.

³⁴⁵ See Counter-Memorial, ¶714 and Brattle, First Report, ¶¶181-87.

money invested, that is, an interest rate that exclusively compensates for the time value of money.

259. Therefore, the risk-free interest rate of US Treasury bonds best applies to the circumstances of the case.³⁴⁶

260. In fact, the majority itself has declined to consider SAS' potential risks when determining the interest rate: "The Tribunal agrees with Bolivia that to establish an interest rate based on the risks SAS would have undertaken if it invested the money or SAS' risk as a lender is inappropriate —and, in addition, in the circumstances of the speculative case given the uncertainty of how each investor may invest the funds."³⁴⁷

261. Of course, the risk-free rate of US Treasury bonds (that, as seen, would be the correct rate in this case) is not applicable because the Treaty provides that "compensation shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Part, until the date of payment".³⁴⁸ This means that the interest rate must be applicable in the territory of Bolivia, and that cannot be said of the risk-free rate of US Treasury bonds, neither in principle nor based on the evidence in the record.

262. As a result, the only interest rate available to the Tribunal is the rate calculated by the Respondent based on the yield of 10-year sovereign bonds issued by Bolivia.

263. Although this interest rate includes a risk premium, which makes it higher than the yield of US Treasury bonds, it is a commercial interest rate that, as required by the Treaty, is applicable in the territory of Bolivia, and it contains a risk premium that is related to the sovereign State that owes compensation. This interest rate would not provide excessive return for a nonexistent risk, since it would simply reflect the time value of money.

264. Moreover, both Parties' experts agree on basing the risk premium on the issuance of Bolivian sovereign debt bonds. In fact, FTI, SAS' expert, suggested in its First Report using the yield of Bolivian sovereign bonds to calculate the applicable risk premium.³⁴⁹ FTI reaffirmed this position in its Second Report,³⁵⁰ in which it expressed its disagreement with Brattle over the

³⁴⁶ *Id.*, ¶¶188-90.

³⁴⁷ Majority Opinion, ¶900.

³⁴⁸ BIT between the United Kingdom and Bolivia (C-1), Article 5.

³⁴⁹ See FTI, First Report, ¶12.7.

³⁵⁰ FTI, Second Report, ¶10.14.

proper method for the calculation of the interest rate.³⁵¹ FTI stated in its Second Report that it had not applied that rate because it produced a percentage that was below the one SAS had advised it to consider as “minimum,” that is, the statutory rate of 6% per annum.³⁵²

265. The majority, for its part, does not offer in its opinion any reason to reject the application of the interest rate proposed by Bolivia.³⁵³

266. Interest should be paid at a simple, not compound, rate. The United Nations International Law Commission, in its commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, stated that “[T]he *general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest.*”³⁵⁴ This view has traditionally prevailed in the field of international investment law as well, and has been adopted still by some relatively recent tribunals in international investment arbitration.³⁵⁵

267. The Claimant insists on the existence of an alleged “*jurisprudence constante*”, according to which interest should be applied at a compound rate.³⁵⁶ Regardless of whether the cases cited by the Claimant amount to a “*jurisprudence constante*”, and independent of whether such jurisprudence would be binding on the Tribunal (it would not be), the determination of the interest rate applicable to the compensation amount must always be based on the circumstances of the case. As the ILC has indicated, there must be special circumstances warranting the application of compound interest as an element of full reparation.³⁵⁷ In this case, SAS has not shown any special circumstance that warrants the application of interest at a compound rate. This is even less the case given that the Treaty does not provide for compound interest³⁵⁸, that

³⁵¹ See Brattle, Second Report, ¶10.16, and Brattle, Second Report ¶264.

³⁵² *Id.*, ¶10.15.

³⁵³ See Majority Opinion, ¶¶888-908.

³⁵⁴ United Nations International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001 (RLA-159), ¶8.

³⁵⁵ See *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (Cremades, Hanotiau, Knieper) (RLA-272), ¶617, *Antoine Abou Lahoud and others v. Democratic Republic of Congo*, ICSID Case No. ARB/10/4, Award, 7 February 2014 (Park, Hafez, Ngwe) (RLA-273), ¶633, *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Award, 18 July 2014 (RLA-156), ¶1689. See also the individual opinion of Luis Herrera Marciano in *Total S.A. c. Republic of Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (Sacerdoti, Álvarez, Herrera Marciano) (RLA-261), ¶262.

³⁵⁶ See Statement of Claim and Memorial, ¶222.

³⁵⁷ United Nations International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001 (RLA-159), ¶8.

³⁵⁸ BIT between the United Kingdom and Bolivia (C-1), Article 5.

the Civil Code of Bolivia precludes compound interest³⁵⁹, and that Bolivia established its commitment to provide compensation in the Reversion Decree itself.³⁶⁰

268. Interest is not determined by weighing the Parties' conduct. However, the fact that the majority has chosen the highest rate for the Respondent leads one to assume that it is intended to be a sanction. A sanction of this sort is unwarranted based on the majority's analysis of both Parties' conduct during the crisis that led to the reversion.³⁶¹

269. Similarly, to establish such an unwarranted and high interest rate, both in terms of its percentage as well as of its cumulative nature, may create a harmful incentive. This is because such an interest rate would generate for the eventual investor and potential claimant a distinct and superior appeal as compared with a lawful compensation resulting from the determination of the value of an expropriated asset. This scenario would make more attractive the possibility that a State may fail to legitimately compensate, given the chance of a magnificent financial benefit in the form of a future award.

270. For the above reasons, the interest rate applicable to the amount of any compensation that may be awarded to the Claimant in this arbitration should be the interest rate calculated by Bolivia,³⁶² which is based on the sovereign bonds issued by Bolivia in October 2012.

IV. Costs

271. Considering that, in my opinion, and based on the reasoning presented in this vote, one of the parties has unsuccessfully commenced an international arbitration under a Treaty that clearly does not protect it, in observance of the rule established at Article 42.1 of UNCITRAL Arbitration Rules,³⁶³ I consider that the costs of this arbitration should be borne by the Claimant, which shall also reimburse the Respondent for its representation and assistance costs.

³⁵⁹ Civil Code of the Plurinational State of Bolivia (RLA-49), Article 412.

³⁶⁰ Reversion Decree, 1 August 2012 (C-4), Article 4.

³⁶¹ See, for example, Majority Opinion, ¶¶563-89.

³⁶² See Brattle, First Report, ¶187, and Brattle, Second Report ¶261.

³⁶³ Article 42.1 of the UNCITRAL Arbitration Rules provides that "[t]he costs of the arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determined the apportionment is reasonable, taking into account the circumstances of the case."