

PCA Case No. 2013-15

**IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE
GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN
IRELAND AND THE GOVERNMENT OF THE REPUBLIC OF BOLIVIA FOR THE
PROMOTION AND PROTECTION OF INVESTMENTS, DATED MAY 24, 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”)

PROCEDURAL ORDER NO. 11

Tribunal

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

January 28, 2016

1. The Tribunal received from the Parties the below-mentioned communications regarding (i) the extension of the deadline for the Plurinational State of Bolivia (“**Bolivia**” or “**Respondent**”) to submit its Rejoinder; and (ii) the Respondent’s request to South American Silver Limited (“**SAS**” or “**Claimant**”) for the production of the typed versions of documents, that were provided in a handwritten format.
2. The Arbitral Tribunal will next address each of these issues.

I. Date for Submission of Respondent’s Rejoinder

3. The Tribunal received the Respondent’s letter dated January 15, 2016, requesting an extension of two months for the submission of its Rejoinder. Likewise, the Tribunal received the Claimant’s letter dated January 20, 2016, opposing such request.
4. According to the Respondent, the extension is justified for five reasons: (i) the Claimant submitted new documents, expert reports and witness statements along with its Reply, which should have been submitted with the Statement of Claim in accordance with Procedural Order No. 1, and which response will require Bolivia to retain an expert, who shall access the Data Room; (ii) the Claimant had almost eight months to prepare its Reply, whereas the Respondent would only have three months from the receipt of Claimant’s Reply to prepare its Rejoinder; (iii) the Claimant produced Category 18 documents with delay; (iv) Bolivia further alleges that it is still receiving documents from the Claimant and that it will have to submit new requests in light of the new evidence; and (v) neither the hearing dates nor the time limit for the Claimant to file its Rejoinder on Jurisdictional Objections will be affected by the requested extension.¹ Bolivia considers this extension to be necessary in order to “*exercise its right of defense with the minimal conditions required by the due process.*”²
5. The Claimant, on its part, argues that the Respondent’s request is “*untimely, violates SAS’s rights in this arbitration and runs contrary to basic principles of procedural fairness and the Parties’ duty to act in good faith during the proceeding.*”³ According to the Claimant: (i) this is Bolivia’s fifth extension request in the arbitration and it constitutes an unjustified attempt to reargue Bolivia’s last request, which was rejected by the Tribunal⁴; (ii) SAS submitted the alleged new evidence in accordance with Section 6.3 of Procedural Order No. 1, in order “*to respond or rebut matters raised in the [Respondent’s] written submissions*”⁵; (iii) Bolivia already has an expert, Dr. Dagdelen, and it follows, from the correspondence between the Parties, that since at least January 15, 2015, Dr. Taylor was ready and available to visit the Data Room⁶; (iv) Bolivia received all Category 18 documents on time, three months before the deadline to submit its Rejoinder, and SAS “*has provided all of the additional information that Bolivia requested*”⁷; (v) SAS only had three months to prepare its Reply as of the termination of the document production phase; and (vi) granting the Respondent’s request will affect the time

¹ Respondent’s Letter dated January 15, pp. 2-3.

² Respondent’s Letter dated January 15, 2016, p. 3 [Tribunal’s translation].

³ Respondent’s Letter dated January 15, 2016, p. 4.

⁴ Respondent’s Letter dated January 15, 2016, p. 2.

⁵ Claimant’s Letter dated January 20, 2016, pp. 2-3, referring to Section 6.3 of Procedural Order No. 1

⁶ Claimant’s Letter dated January 20, 2016, p. 3, referring to Bolivia’s e-mail dated January 19, 2016 (“Claimant’s Letter, Annex C”). *See also*, Bolivia’s e-mail dated January 19, 2016 (“Claimant’s, Annex B”); Bolivia’s e-mail dated January 18, 2016 (“Claimant’s Letter, Annex A”).

⁷ Claimant’s Letter dated January 20, 2016, pages 3-4.

period for SAS to prepare for the Hearing, and would possibly make it necessary for SAS to submit an extension request for the submission of its Rejoinder on Jurisdictional Objections.⁸

6. The Tribunal reminds that the procedural calendar for this arbitration was fixed after hearing the Parties' positions in this regard, and taking into account their propositions.⁹ Likewise, it recalls that the Parties shall request the extension as soon as practicable after they became aware of the circumstances which prevent them from complying with the original deadline.¹⁰
7. In this case, the Tribunal observes that the Claimant did not comply with the deadline fixed by the Tribunal to provide the Respondent with Category 18 Documents. Indeed, pursuant to Procedural Order No. 8, SAS should have disclosed Category 18 Documents by September 3, 2015.¹¹ However, the Claimant did not produce such documents until November 30, 2015, date of the submission of its Reply.
8. Furthermore, the Tribunal notes that the Claimant submitted, along with its Reply, the Witness Statement of Mr. David B. Dreisinger and the Expert Report of Mr. Barry Cooper in accordance with Section 6.3 of Procedural Order No. 1. On this same basis, Bolivia is also allowed to submit expert reports to respond to those submitted by SAS in its Reply. For this purpose, Bolivia has stated that it requires retaining a metallurgical expert in order to respond to the aforementioned Witness Statement and the Expert Report.
9. As set out by the Parties in their communications, the Tribunal understands that, on January 19, 2016, Bolivia still was in the process of retaining a metallurgical expert to participate in this arbitration¹², who would review the information contained in the Data Room in order to prepare the relevant report.
10. The Tribunal finds that the two reasons mentioned above, *i.e.*, the Claimant's delay in the production of Category 18 Documents and the need for Bolivia to finalise the formalities aimed to retain a metallurgical expert, would justify granting an additional time period. However, two months seem excessive to compensate for these situations.
11. As a result, the Tribunal grants the Respondent an additional time period of twenty (20) calendar days for the submission of its Rejoinder. The Tribunal considers that, in accordance with Section 4.7 of Procedural Order No. 1, this extension does not affect the scheduled dates for the Hearing, insofar as (i) it does not affect the dates reserved by the Tribunal and the Parties for this Hearing, and (ii) allows sufficient time for the preparation of the Hearing.
12. The Tribunal, pursuant to its authority to conduct the arbitration in such manner as it considers appropriate provided that the Parties are treated with equality, taking into account the positions of the Parties, in accordance with Article 19 of the UNCITRAL Arbitration Rules (as revised in 2010) and paragraph 4.7 of Procedural Order No. 1, grants the Respondent an extension of the period for the submission of its Rejoinder until **Monday, March 21, 2016**.

⁸ Claimant's Letter dated January 20, 2016, page 4.

⁹ See Procedural Order No. 6, February 17, 2015, ¶ 5.

¹⁰ Procedural Order No. 1, May 27, 2014, ¶ 4.7. See Procedural Order No. 6, February 17, 2015, ¶ 6.

¹¹ Procedural Order No. 8, August 26, 2015, ¶ 37(d).

¹² See Claimant's Letter dated January 20, 2016, page 3 and Bolivia's e-mail dated January 19, 2016 (Claimant's Letter, Annex C).

13. In line with the above and taking into account the Tribunal's directions in Section 4.1 of Procedural Order No. 1, the Claimant shall submit its Rejoinder on Jurisdictional Objections by **Friday, April 22, 2016**.
14. The Hearing date remains unchanged.

II. Transcript of Certain Notes

15. The Tribunal received Bolivia's communication dated January 21, 2016, requesting the Tribunal to order SAS to promptly provide a typed transcription of certain handwritten notes, that FTI Consulting would have taken during the calls and/or meetings that it had with the analysts Byron, NBF, Redchip and Edison, in order to prepare its first and second expert reports (the "**Notes**").
16. The Respondent notes that the first 11 pages of the Notes are handwritten and illegible. Bolivia alleges that it has the right to receive legible documents in order to fully exercise its right of defense and that, in any event, the Tribunal may also, on its own motion, request the production of documents pursuant to Section 5.4 of Procedural Order No. 1.¹³
17. By letter dated January 21, 2016, the Claimant requested the Tribunal to reject Respondent's request. SAS alleges that Bolivia's request is not justified given that the handwritten notes from the first 11 pages of the document correspond to the typed notes from the following 19 pages, which were taken simultaneously during the same meetings.¹⁴ Moreover, SAS argues that the Respondent's request is not supported by any legal authority nor by Procedural Order No. 1, and may prove burdensome and inappropriate under the terms of Article 9.2 of the IBA Rules on the Taking of Evidence in International Arbitration.¹⁵
18. The Tribunal recalls, at the outset, that according to Section 8.2 of Procedural Order No. 1:

"Expert reports shall be accompanied by any documents or information upon which they rely, unless such documents or information have already been submitted with the Parties' written submissions, in which case the reference to the number of the exhibit will be enough."
19. Likewise, it observes that paragraph 6.7 of the FTI Report dated November 30, 2016, reads as follows:

"In preparing the FTI Report, we contacted the four analyst noted above [Byron (Base), NBF, Redchip and Edison] in order to understand their analyses. During the preparation of this report, we contacted these four analysts again to discuss the specific comments raised in the Brattle Report [...]."
20. Pursuant to the same text of the report of FTI Consulting, the conversations between FTI Consulting and these four analysts are information upon which FTI's expert report relies. These notes are part of the report in terms of Section 8.2 of Procedural Order No. 1. Consequently, it is reasonable that the Respondent has requested the Claimant to provide the notes taken by FTI Consulting during the calls and/or meetings that it had with these analysts in order to prepare its reports.

¹³ Respondent's communication dated January 20, 2016.

¹⁴ Claimant's Letter dated January 21, 2016, page 2.

¹⁵ Claimant's Letter dated January 21, 2016, page 2.

21. The Tribunal observes that the 11 first pages of the Notes provided by the Claimant correspond to a handwritten document, which content is practically illegible. Hence, it is not even possible to verify whether its content matches that of the 19 typed pages of the Notes.
22. The Tribunal considers that requesting the transcription of some notes to the person who drafted them is the most reasonable option and the least costly, and does not imply an excessive burden for the Claimant.
23. In consideration of the above, the Arbitral Tribunal orders the Claimant to provide the Respondent with a typed transcript of the 11 first pages of the Notes, by **Monday, February 1, 2016**.
24. The Tribunal reminds the Parties of their duty to collaborate with a view to the efficient development of this arbitration.

III. Tribunal's Decisions

25. In view of the foregoing, the Arbitral Tribunal decides to:
 - a. Grant the Respondent an extension of the deadline for the submission of its Rejoinder until **Monday, March 21, 2016**; and
 - b. Orders the Claimant to provide the Respondent with the typed transcript of the 11 first pages of the Notes, by **Monday, February 1, 2016**.

Place of the Arbitration: The Hague, the Netherlands



Dr. Eduardo Zuleta Jaramillo
(Presiding Arbitrator)

On behalf of the Tribunal