

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. 16

Tribunal

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

April 22, 2016

I. Procedural History

1. In Procedural Order No. 15, the Tribunal decided to exclude from the record of this arbitration the witness statements of Javier Díez de Medina Romero and Juan Mamani Ortega (the "Testimonies").
2. By letter of April 14, 2016, the Plurinational State of Bolivia ("Bolivia" or the "Respondent") requested that the Tribunal reconsider the decision adopted in Procedural Order No. 15 regarding the exclusion of the Testimonies.
3. By communication of April 15, 2016, the Tribunal granted until April 18, 2016, to South American Silver Limited ("SAS" or the "Claimant") and, together with the Respondent, the "Parties") to submit comments on Bolivia's letter.
4. By letter of April 18, 2016, the Claimant requested that the Tribunal reject Bolivia's request and, consequently, reaffirm Procedural Order No. 15 in its entirety.

II. Position of the Parties

Respondent's Position

5. Bolivia submits that the Tribunal erred in its appreciation of the relevance of the Testimonies.¹ According to the Respondent, these Testimonies are necessary to respond to arguments and evidence submitted by SAS with its Reply which had not been submitted with the Statement of Claim.² The exclusion of the Testimonies interferes with Bolivia's ability to present its defense on said arguments and evidence and, thus, infringes its right to due process.³ Bolivia offers three arguments in support of its position.
6. First, Bolivia notes that in its Reply, SAS established for the first time a comparison between the Influence Area of the Project of Compañía Minera Malku Khota, S.A. ("CMMK") and the Influence Area of the Project of Compañía Minera San Cristóbal, S.A. ("CMSC"). According to Bolivia, the Testimonies were submitted to rebut the relevance of such comparison.⁴ Moreover, Bolivia notes that SAS and its witnesses could respond to these Testimonies in its Rejoinder on Jurisdiction and during the Hearing.⁵
7. Second, the Respondent states that in its Reply, SAS referred for the first time to the work carried out by three consultancy firms regarding the community relations programs of CMMK, which references did not appear in the Statement of Claim or the witness statements accompanying it. According to Bolivia, the explanations offered in the Testimonies on how the community relations programs should be carried out in the North of Potosí evidence that the plans proposed by the consultancy firms mentioned by SAS in its Reply are insufficient. Moreover, the comparison exercise would have been possible only after SAS' presentation, with its Reply and during the document production phase, of various documents that explained the scope of its community relations program.⁶

¹ Bolivia's letter to the Tribunal of April 14, 2016, p. 4.

² Bolivia's letter to the Tribunal of April 14, 2016, p. 1.

³ Bolivia's letter to the Tribunal of April 14, 2016, p. 1.

⁴ Bolivia's letter to the Tribunal of April 14, 2016, p. 2.

⁵ Bolivia's letter to the Tribunal of April 14, 2016, p. 2.

⁶ Bolivia's letter to the Tribunal of April 14, 2016, p. 3.

8. Lastly, Bolivia states that the Testimonies rebut SAS' assertion that at the time of the expropriation, there was neither a regulatory framework nor guidelines relating to community relations programs in Bolivia.⁷ These statements show the importance of the community relations programs for the respect of indigenous native peasant peoples, recognized and protected by the Bolivian legal system.⁸

Claimant's Position

9. The Claimant contends that this new request from Bolivia is an attempt to reopen an issue that had already been considered by the Tribunal, on the basis of the same arguments that it submitted in its letter of March 30, 2016, opposing SAS' request that said Testimonies, amongst others, be excluded.⁹
10. SAS notes that in Procedural Order No. 15, the Tribunal established that it is not possible to include new testimonies with the Rejoinder on matters raised in the Statement of Claim and that should have been responded to in the Counter-Memorial. According to the Claimant, in the letter of April 14, Bolivia itself admits that SAS raised the issues of the expansion of the Area of Influence and its community relations programs in its Statement of Claim. Bolivia criticized both matters in its Counter-Memorial and, thus, had the obligation to submit all evidence supporting such criticism with its Counter-Memorial.¹⁰
11. The Claimant states that Bolivia's position is that the Testimonies should be admitted because SAS made reference in its Reply to the Area of Influence of CMSC as an example. According to the Claimant, the fact that SAS would have submitted arguments or evidence to refute Bolivia's criticism does not grant the Respondent the right to submit additional testimonies relating to matters Bolivia criticized for the first time in its Counter-Memorial and that should have been submitted then.¹¹
12. Lastly, SAS notes that it is currently preparing its Rejoinder on Jurisdiction on the grounds that the Testimonies were excluded from the record of this arbitration and, consequently, it has not addressed them in its submission. Given that Bolivia submitted its request almost a week after the Tribunal's communication of Procedural Order No. 15 and 18 days before the expiration of the time limit to submit the Rejoinder on Jurisdiction, admitting the Testimonies at this time would prevent the Claimant from adequately responding to allegations of Bolivia that would purportedly be supported by such Testimonies.¹²

III. Tribunal's Analysis and Decision

13. As established by the Tribunal in Procedural Order No. 15, pursuant to paragraphs 6.2 and 6.3 of Procedural Order No. 1, it is not possible to submit new testimonies with the Rejoinder regarding matters raised in the Statement of Claim and which should have been responded to in the Counter-Memorial.
14. In order to adopt the decision in Procedural Order No. 15, the Tribunal carefully considered the arguments of both Parties, the provisions of Procedural Order No. 1, the Statement of Claim, the Counter-Memorial, the Reply, the Rejoinder, and the Testimonies, and concluded that the

⁷ Bolivia's letter to the Tribunal of April 14, 2016, p. 4.

⁸ Bolivia's letter to the Tribunal of April 14, 2016, p. 4.

⁹ SAS' letter to the Tribunal of April 18, 2016, pp. 1-2.

¹⁰ SAS' letter to the Tribunal of April 18, 2016, p. 2.

¹¹ SAS' letter to the Tribunal of April 18, 2016, p. 3.

¹² SAS' letter to the Tribunal of April 18, 2016, p. 3.

Testimonies do not refer to new facts presented in SAS' Reply, but to facts that were raised by Bolivia already in the Counter-Memorial and that, therefore, could have been submitted with said submission.

15. Having analyzed the arguments submitted by the Respondent in its submission of April 14, the Tribunal finds that neither the quotation of certain sections of the Parties' submissions made by Bolivia, nor the other arguments presented by the Respondent merit a change in the decision already adopted by the Tribunal. In fact, from the comprehensive revision of the Testimonies along with the Statement of Claim, the Counter-Memorial, the Reply, and the Rejoinder, it is clear that, as already noted by the Tribunal in Procedural Order No. 15, the Testimonies should have been submitted with the Counter-Memorial, and not with the Rejoinder.
16. Therefore, the Tribunal finds no reason to reconsider the decision adopted in Procedural Order No. 15.
17. Consequently, the Tribunal decides to reject the request submitted by Bolivia in its communication of April 14, 2016, and confirms Procedural Order No. 15 in its entirety.

Place of the Arbitration: The Hague, the Netherlands



Dr. Eduardo Zuleta Jaramillo
(Presiding Arbitrator)

On behalf of the Tribunal