

**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)**

**(the “UNCITRAL Rules”)**

**- between -**

**SOUTH AMERICAN SILVER LIMITED (BERMUDA)**

**(the “Claimant”)**

**- and -**

**THE PLURINATIONAL STATE OF BOLIVIA**

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

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**PROCEDURAL ORDER NO. 23**

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*Tribunal*

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

**August 11, 2016**

## I. Introduction

1. By letter dated August 1, 2016, South American Silver Limited (“**SAS**” or the “**Claimant**”) requested leave of the Tribunal to incorporate to the record a document published by the Society of Mining, Metallurgy, and Exploration, Inc. (“**SME’s Article**”), relating to share-price-based valuation (“**SAS’ Request**”). In its request, SAS did not provide additional information enabling identification of the said document.
2. On August 2, 2016, the Tribunal invited the Plurinational State of Bolivia (“**Bolivia**” or the “**Respondent**”) to submit comments on SAS’ Request.
3. By letter dated August 5, 2016, Bolivia opposed SAS’ Request. Likewise, it stated that, should SME’s Article be admitted, the Tribunal should allow the experts of The Brattle Group (“**Brattle**”) to comment on it in a new expert report and allow the Respondent to examine SAS’ experts on the content of that article at a new hearing.<sup>1</sup>

## II. The Parties’ Positions

### *The Claimant’s Position*

4. The Claimant’s request is based on the following grounds: first, Procedural Order No. 1 is silent on the possibility of requesting leave to introduce new documents after the Hearing. However, paragraph 9.3 of that procedural order regulates the possibility of introducing new evidence at the Hearing with the Tribunal’s leave and subject to the ability of the other Party to submit new rebuttal evidence. According to SAS, there is no reason why the same procedure should not apply to a post-Hearing request.<sup>2</sup> In any case, the Tribunal may request, on its own motion, the production of this document based on its power to conduct the arbitration in the manner it considers appropriate and the authority conferred therefor under the UNCITRAL Rules, applicable to this arbitration.<sup>3</sup>
5. Second, SME’s Article is “highly relevant” and the need for its late admission arises from the Respondent’s decision to wait until its Rejoinder Memorial to submit the share-price-based valuation. According to the Claimant, SME’s Article relates to an important topic that emerged at the Hearing in relation to the propriety of the share-price-based valuation proposed by the Respondent and its experts.<sup>4</sup> In addition, its relevance increased due to the declarations made by Professor Davis at the Hearing concerning SME’s work. The Claimant submits that Bolivia only introduced the share-price-based valuation with its Rejoinder Memorial, when SAS would no longer have an opportunity to respond in the written phase of the proceeding, and that this is reason alone for the Tribunal to grant its request.
6. Lastly, SAS argues that the Respondent would not suffer prejudice by the admission of the document given that pursuant to the procedure set forth in paragraph 9.3 of Procedural Order No. 1, Bolivia would have the opportunity to submit new evidence to rebut SME’s Article, and

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<sup>1</sup> Respondent’s letter dated August 5, 2016, p. 2.

<sup>2</sup> Claimant’s letter dated August 1, 2016, p. 1.

<sup>3</sup> Claimant’s letter dated August 1, 2016, pp. 1-2.

<sup>4</sup> Claimant’s letter dated August 1, 2016, p. 2.

both Parties could respond to the new evidence, including with the assistance of their experts, in the Post-Hearing Briefs.<sup>5</sup>

*The Respondent's Position*

7. The Respondent argues that SAS' Request is untimely and should be rejected.
8. In relation to SME's Article, Bolivia states, in the first place, that it is a public document since October 21, 2012, and thus, it was available to SAS at the moment of submitting any and all of its written pleadings in this arbitration.<sup>6</sup>
9. Next, Bolivia states that SAS attempted to submit the document with its Rejoinder on Jurisdiction and, due to Bolivia's objections, had to withdraw them by letter of May 26, 2016. On that occasion, SAS reserved its right to submit the document before the Hearing; however, it did not do so<sup>7</sup>. Notwithstanding the foregoing, SAS made reference to this document during the examination of Bolivia's experts.
10. Bolivia submits that SAS' Request infringes upon Bolivia's right of defense. Indeed, SAS' decision not to submit SME's Article before the Hearing deprived Bolivia's experts from having the possibility of referring to it during their presentation, and Bolivia's lawyers from examining SAS' experts on the article.<sup>8</sup>
11. The Respondent argues that SAS's proposal that Bolivia submit new evidence and that it relies on its experts to rebut SME's Article is not acceptable given that, on the one hand, the Post-Hearing Briefs have a limited extension and may not be accompanied by expert evidence, and on the other hand, it would impose a new financial burden on Bolivia to remedy the Claimant's negligence or procedural tactic.<sup>9</sup>
12. In any event, Bolivia submits that SAS' Request lacks legal and factual justifications. Firstly, paragraph 9.3 of Procedural Order No. 1 invoked by SAS applies only to the submission of new evidence at the Hearing. The provision applicable to this case would be paragraph 6.4 of Procedural Order No. 1 and SAS' Request does not comply with the requirements set forth therein.<sup>10</sup>
13. Additionally, it is not true, as SAS submits, that Bolivia invoked the validity of the share-price-based valuation for the first time with its Rejoinder Memorial. In fact, Brattle criticized FTI for having departed from the share-value method since its first report, dated March 30, 2015. Brattle included a whole appendix of that first report to rebut FTI's criticisms to the use of share value. Therefore, the Claimant and FTI could have submitted SME's Article with the Reply Memorial.<sup>11</sup>

**III. The Tribunal's Analysis and Decision**

14. In paragraphs 6.2 to 6.4 of Procedural Order No. 1, the Tribunal, having heard the Parties, set forth the procedural opportunities and requirements for the taking of evidence in this arbitration. Paragraph 6.2 of Procedural Order No. 1 provides that: "[t]he Parties shall submit with their

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<sup>5</sup> Claimant's letter dated August 1, 2016, p. 2.  
<sup>6</sup> Respondent's letter dated August 5, 2016, p. 2.  
<sup>7</sup> Respondent's letter dated August 5, 2016, p. 2.  
<sup>8</sup> Respondent's letter dated August 5, 2016, p. 2.  
<sup>9</sup> Respondent's letter dated August 5, 2016, p. 2.  
<sup>10</sup> Respondent's letter dated August 5, 2016, p. 3.  
<sup>11</sup> Respondent's letter dated August 5, 2016, p. 4.

*written submissions all evidence and authorities on which they intend to rely in support of the factual and legal arguments advanced therein [...].”*

15. In turn, paragraph 6.4 of Procedural Order No. 1 provides that following the submission of the Reply and Rejoinder Memorials, the Tribunal shall not consider any evidence that has not been introduced as part of the written submissions of the Parties, unless the Tribunal grants leave on the basis of exceptional circumstances. In addition, paragraph 6.4 requires that the evidence had not been available to the Party intending to introduce it prior to the submission of its written pleadings, and even if it was not available prior to the submission, that the introduction is requested with no less than 20 days prior to the Hearing.<sup>12</sup> In such event, the Tribunal shall give opportunity to the other Party to submit relevant rebuttal evidence.
16. The foregoing means that, pursuant to Procedural Order No. 1, the Parties have the obligation to submit with their written pleadings all the evidence they intended to rely on and that only in exceptional circumstances, and provided that it was requested with no less than 20 days prior to the Hearing, the Tribunal may authorize the submission of new evidence.
17. In addition, paragraph 9.3 of Procedural Order No. 1 provides, as an exception, the possibility that the Tribunal authorize the submission of new evidence at the Hearing. In such case, the Tribunal shall authorize the other Party to submit new evidence to rebut that submitted by the opposing Party. This provision is specific to the Hearing and does not extend to the submission of new evidence in procedural stages thereafter. Hence, it is not applicable to SAS’ Request.
18. It follows from the above that Procedural Order No. 1 provides two exceptional circumstances in which the Tribunal may authorize the submission of additional evidence after the submission of the written pleadings of the Parties, provided that the other Party is granted the opportunity to submit rebuttal evidence. Procedural Order No. 1 does not support the possibility of submitting additional evidence after the Hearing, as suggested by SAS’ Request.
19. However, even admitting the Claimant’s interpretation of Procedural Order No. 1, the inclusion to the record of SME’s Article would not be admissible for the reasons indicated below.
20. The Tribunal observes that the Claimant does not identify the document that it intends to introduce to the record with its name and publication date, and limits itself to indicate that “*the document at issue is a publication of the Society of Mining, Metallurgy, and Exploration, Inc. (“SME”) and relates to [...] the propriety of Respondent/Brattle’s share-price-based valuation of the Malku Khota Project [...].*”<sup>13</sup>
21. Bolivia, in turn, argues that the document at issue is Exhibit C-335, a public document since year 2012, that was introduced by SAS with its Rejoinder on Jurisdiction, and which was subsequently excluded from the record with its consent.<sup>14</sup>
22. In this regard, the Tribunal notes that by letter of May 26, 2016, the Claimant agreed that Exhibit C-335 be removed from the record of this arbitration, but reserved the right to request its inclusion to the record before the Hearing, pursuant to paragraph 6.4 of Procedural Order No. 1.<sup>15</sup> However, it did not make any subsequent request to include that document to the record.
23. Regardless of whether SME’s Article and Exhibit C-335 are the same document (Bolivia affirms such is the case while the Claimant does not identify the article), Procedural Order No. 1 does not provide for a procedural opportunity to include documentary evidence to the record

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<sup>12</sup> See: Procedural Order No. 22 of June 30, 2016, ¶ 32.

<sup>13</sup> Claimant’s letter dated August 1, 2016, p. 2.

<sup>14</sup> See: Procedural Order No. 20 of June 1, 2016, ¶ 5.

<sup>15</sup> See: Claimant’s letter dated May 26, 2016; Procedural Order No. 20 of June 1, 2016, ¶ 4.

- after the Hearing, and even accepting the Claimant's interpretation, the Claimant has neither invoked nor proved the existence of an exceptional circumstance that would justify the admission of SME's Article at the current stage of the proceedings.
24. In its request, SAS states that "[...] *the need for [the document's] belated admission arises exclusively from Respondent's own decision not to present its share-price-based valuation until its Rejoinder, in breach of procedural fairness to Claimant.*"<sup>16</sup> This implies that SAS could have requested the inclusion of SME's Article from the submission of Bolivia's Rejoinder and until the Hearing, for which purpose it had the procedural opportunities described above. However, SAS did not request leave of the Tribunal to introduce SME's Article before or at the Hearing based on the applicable provisions of Procedural Order No. 1, nor did it invoke or demonstrate any circumstance that would have prevented it from doing so before or at those opportunities.
25. For the above reasons, the Tribunal rejects SAS' Request.

**Place of the Arbitration: The Hague, the Netherlands**



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Dr. Eduardo Zuleta Jaramillo  
(Presiding Arbitrator)

On behalf of the Tribunal

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<sup>16</sup> Claimant's letter dated August 1, 2016, p. 2.