

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”)

SEPARATE OPINION OF PROF. FRANCISCO ORREGO VICUÑA

Tribunal

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

Separate opinion of arbitrator Orrego Vicuña

This opinion is intended to express, first of all, admiration for the efficient and thorough analysis conducted by the President of the Tribunal of such significant and complex issues. The opinion of this arbitrator largely concurs with that of the presiding arbitrator, in particular on jurisdiction and admissibility. However, there are some aspects on which I find it impossible to concur and I must express my discrepancies.

I start with a comment on the assessment of the facts. Undoubtedly, these facts are, to some extent, confusing and difficult to evaluate, but even then, the undersigned would have reached a different conclusion. The Award substantially relies upon the premise that the social unrest in the Project area originated with the Claimant's conduct, attributing to the Respondent a lesser degree of responsibility. Undoubtedly, the Claimant had shortcomings in its program for communications with the indigenous communities, which were intended to be fixed over time. However, it cannot be overlooked that the State is responsible for maintaining public order, in particular when it founds a good part of its arguments on the exercise of police powers. Yet, public order was scarcely and on many occasions insufficiently maintained.

The local conflicts resulted in the reversion to the State's original ownership of the mining authorizations awarded to the investor, whereupon COMIBOL was put at the helm of the project. However, the State's interest in intervening and ultimately reverting ownership was manifest even before the abovementioned social unrest. There is thus a serious discrepancy between the scale of the local situation and the national policy determinations.

Notwithstanding that Article 5 of the Treaty does not provide for proportionality as a core guarantee towards the investment, the undersigned has no doubt that a literal interpretation contrary to the spirit of the rule would be untenable, since proportionality is an element underlying various of the difficulties that would ensue and the damages claimed. Those elements do not appear to be compatible with the systemic interpretation invoked by the Respondent under the Vienna Convention on the Law of Treaties, which is aptly dismissed in the Award. Neither is the "clean hands" doctrine a principle of international law, something that has not been shown in this case and that the Tribunal dismisses as well.

The main disagreement of the undersigned relates to the conclusions on expropriation since, in my opinion, the reasons for expropriation are considerably broader than the non-payment of compensation to the expropriated investor. That is unequivocally a highly important reason, but an analysis of Article 5 as a whole reveals several other elements comprised in the guarantee that are contradicted by the reversion undertaken. Indeed, the same Article also provides for a requirement of public purpose, social benefit and due process for the reversion, which are all intrinsically linked with the lawfulness of the expropriation.

Evidently, the requirement of public purpose for the legality of an expropriation cannot be deemed to have been duly met. It can hardly be accepted that public purpose is met by merely local measures, since the subject of the interest in question must be the national community as a whole, something which has not been shown by the Respondent. On the contrary, the dissatisfaction of indigenous communities in many places in Bolivia, including the resort to violence, has not ceased, such that the public purpose of the reversion seems more like an excuse to justify the expropriation than a measure of national scope. The social benefit of the expropriation also cannot be considered satisfied for the indigenous communities in the project area, whose situation of poverty and ill health remains unabated. An updated study of the social situation in the area might have been helpful to clarify the various allegations, but the Tribunal is not aware of any such study in existence or having been undertaken.

Public authorities, mainly local ones, occasionally sought a dialogue and an agreement was pursued with the communities, but nothing came of it. As a result, alternative measures were rightly considered which did not bear fruit either, although the Claimant cannot be held liable for this since, as already mentioned above, the duty of the State to maintain public order cannot be ignored. Therefore, the Tribunal has adequately concluded that the Respondent cannot invoke a State of Necessity or the exercise of police powers in this case. The eventual resort to alternative measures which could have ensured proportionality and reasonableness was indeed duly analyzed by the Tribunal, but a difference of opinion persists in this regard.

Similarly, the Award fails to acknowledge other crucial aspects of a lawful expropriation, such as due process, which is reduced in the end to an eventual right to claim a specific amount without acknowledging any right to participate in the decision to expropriate. In a case in which purported understandings were reached between the parties, the Claimant's views on the conclusions reached by the public authorities are wholly ignored, and so too is the potential futility or impracticability of resorting to domestic courts. In short, compliance with due process is reduced to mere symbolism devoid of objective review.

The situation is similar in regard to the Fair and Equitable Treatment standard and its relationship to the investor's legitimate expectations, a subject matter in which the Award reproaches some of the Respondent's conducts but does not find any violation of the Treaty. This Treatment is so central to the infringement of rights that it has often been understood as an alternative to expropriation, but whose results are not necessarily different with respect to compensation to be provided. In this regard, the Award dismisses conduct that may be considered irreconcilable with the treatment required, in particular in respect of its transparency and consistency.

The sections of the Award which reject the claims for full security and protection are equally questionable, given that this a case in which the personal safety of the investor company's officials has been infringed, which together with the factors previously discussed may amount to a lack of legal protection for the investment made. The Award also rejects the claims for unreasonable or discriminatory measures or the possibility of a violation of the national treatment standard.

Given all of the above lacunae, it is hardly surprising that the standard of full reparation, or of fair market value pursuant to the Treaty, is not respected in the Award, which limits itself to investment costs as the applicable compensation standard and method, without even taking into account general and administrative costs. Thus, the expropriation effected is compensated only in a very limited fashion since it disregards the elements regarding the valuation of the investment as a project or the mining resources involved. As difficult as it is to estimate full compensation in light of the facts of the present case and the stage of project development, a reasonable approximation should at least be possible, especially if other Treaty violations are taken into account, which the undersigned considers to be relevant as sources of liability for the Respondent.

Nevertheless, the Award rightly rejects a reduction in the amount of compensation for the confidential information that the investor retains, nor does it accept to include only exploration costs in spite of the Respondent's claims in this regard. It is equally proper to apply the interest rate established by the Central Bank of Bolivia and for that interest to be compounded.

The final outcome of the Award is compensation in the amount of US\$ 18.7 million in circumstances in which the amounts under discussion ranged, in the opinion of the Claimant's experts, between US\$ 195.9 million and US\$ 922.2 million. In turn, investment costs, including general and administrative expenditures, amounted to US\$ 31.6 million according to the Claimant. The value of the project, in the opinion of the Respondent, ranged between US\$ 35.2

and US\$ 48.7. It should also be noted that the assessment of the costs incurred, based on the valuation conducted by Agencia Quality, auditors and public accountants, hired by the Respondent, as independent valuers, was US\$ 17,047,190, an amount comparable to the compensation established in the Award. However, it is important to note that a reduced compensation amount was not accepted on account of the value of the confidential information retained by the Claimant, as the Award aptly notes.

An overall assessment of the reasoning underlying the Award demonstrates that, in some areas, the approaches followed are considered reasonable by this arbitrator, while in other areas there is a tendency to overlook certain matters. This is particularly evident in the fact that the responsibility for the events in question is placed mostly on the Claimant's shoulders and only slightly on the Respondent. This translates, first, into failing to properly take into account the requirements of the Treaty and customary international law for the lawfulness of the expropriation, including the other Treaty standards governing that process. This, in turn, results in an amount of compensation well below that suggested by the information available and the experts' and valuers' reports. This arbitrator does not agree with this result.

It should also be noted that the members of the Tribunal had prolonged and intense discussions both in person and by conference-call, as well as by email, which allowed it to reach a consensus on several important issues addressed in this Award. Unfortunately, however, it was not possible to reach a unanimous decision. The differences of opinion arising from a detailed reading of this Award are sufficiently acute for the undersigned as to justify a dissenting opinion. These differences have already been explained above. Nevertheless, the undersigned arbitrator has decided to vote in favor of the Award. It is not the first time that a Tribunal faces the dilemma that a majority cannot be reached to take a decision, but the Tribunal is beholden to the UNCITRAL Rules, which govern its conduct and require a majority in all cases. The consequence is that a majority might never be attained, given that another arbitrator has already dissented from this Award. Absent such majority, the Award would remain in a state of suspension or hibernation, without the Presiding Arbitrator being able, under the terms of the UNCITRAL Rules, to decide without a majority.

The problem was aptly summarized by arbitrator Howard M. Holtzmann, who faced this situation more than once. In particular in the *Economy Forms Corp. v. Iran* case (*Economy Forms Corp. v. Islamic Republic of Iran*, Iran-United States Claims Tribunal, 1983, Concurring Opinion of Howard M. Holtzmann, Iran-United States Claims Tribunal Reports, 1984, at 55), the aforementioned arbitrator took a position with which the undersigned arbitrator fully agrees. He concluded his concurring opinion in that case as follows:

I concur in the Award in this case ... Why then do I concur in this inadequate Award, rather than dissenting from it? The answer is based on the realistic old saying that there are circumstances in which "something is better than nothing" ... Thus, in a three-member Chamber a majority of two members must join, or there can be no Award. My colleague having dissented, I am faced with the choice of either joining in the present Award or accepting the prospect of an indefinite postponement of any Award in this Case[. f]or ... arbitrators must continue their deliberations until a majority has been reached ... The deliberations in this case have continued long enough ... Neither the parties nor the Tribunal will, in my view, benefit from further delay.

Arbitrator Richard M. Mosk reached a similar conclusion in the *Granite State Machine Co. Inc v. The Islamic Republic of Iran* (*Granite State Machine Co. Inc. v. Islamic Republic of Iran*, Concurring Opinion of Richard M. Mosk, 1983, at 8, Iran-United States Claims Tribunal Reports, Vol 1, 1983, at 442). Arbitrator Holtzmann had again the same opinion in the *Starrett*

Housing Corp. v. Islamic Republic of Iran case, 1987, Concurring Opinion of Judge Holtzmann, Reports, Vol. 16 at 238).

The thorough analysis of practice and scholarly writings that have accompanied these and other cases demonstrates the complexities of the issue as well as the solutions offered in practice, with particular reference to the means of reaching a majority for the approval of an award (David D. Caron and Lee M. Caplan: *The UNCITRAL Arbitration Rules. A Commentary*, 2nd edition, 2013, Oxford University Press , 2015 y M. Pellonpää, “The Process of Decision-Making,” in D Caron and J Crook (eds), *The Iran-United States Claims Tribunal and the Process of International Claims Resolution* (2000) 238).

In light of the foregoing, the undersigned arbitrator concurs in the Award of the Presiding Arbitrator, while noting his differences of opinion for the record.