

**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”)**

---

**PROCEDURAL ORDER NO. 22**

---

*Tribunal*

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

**June 30, 2016**

## I. Introduction

1. By letter dated June 17, 2016, South American Silver Limited (“**SAS**” or the “**Claimant**”) requested the Tribunal to exclude from the record Sections 5.1 and 5.2.1 of the Rejoinder of the Plurinational State of Bolivia (“**Bolivia**” or the “**Respondent**”), as well as the following legal authorities: RLA-238, RLA-240 to RLA-242 and RLA-246 to RLA-248 (“**SAS’ Request**”).<sup>1</sup> Alternatively, the Claimant requested to be allowed to submit new legal authorities to rebut the arguments made by the Respondent in those sections.<sup>2</sup>
2. By letter dated June 17, 2016, the Respondent, in turn, requested the Tribunal’s authorization to submit certain documents (“**Bolivia’s Request**”).<sup>3</sup> In said letter, Bolivia also: (i) informed the Tribunal that it was willing not to submit a request for public and media access to the Hearing considering the procedural and logistical challenges that it would imply, notwithstanding its nonconformity with the fact that Procedural Order No. 1 had decided that the Hearing be closed to the public;<sup>4</sup> (ii) requested that the Tribunal and counsel for Claimant advise whether they wish to proceed with an expert inspection (as offered by the Respondent in a communication dated June 8, 2016) of the original blank pages signed by members of the COTOA-6, the authenticity of which –according to the Respondent– had been questioned by the Claimant;<sup>5</sup> and (iii) updated the Tribunal on the situation of certain documents that had been requested to the Canadian authorities, noting that some of these documents would be facilitated by Canada the following week, and reserving its right to request a new authorization from the Tribunal to submit those documents.<sup>6</sup>
3. On June 20, 2016, the Tribunal invited each of the Parties to submit comments on the other Party’s request.
4. By letters of June 22, 2016, the Parties submitted their respective comments. Bolivia opposed SAS’ Request.<sup>7</sup> SAS, on its part: (i) noted that Bolivia did not request that the Hearing be open to the public, noting further that it does not agree that the Hearing be open (citing Article 28(3) of the UNCITRAL Rules), and reserving its right to oppose any future request from the Respondent in that regard;<sup>8</sup> (ii) in respect of Bolivia’s Request, it agreed to the inclusion of some documents and objected to the inclusion of others;<sup>9</sup> (iii) declined Bolivia’s invitation to the expert inspection, and argued that the Tribunal should reject it too, because the documents concerned were not part of the record neither in their original versions nor in copies;<sup>10</sup> and (iv) with respect to the documents requested to the Canadian authorities, the Claimant requested the Tribunal to reject any request from Bolivia to introduce new documents in the record on the basis that the 20-day limit prior to the commencement of the Hearing established in paragraph 6.4 of Procedural Order No. 1 had already elapsed.<sup>11</sup>

---

<sup>1</sup> Claimant’s letter dated June 17, 2016, pp. 1-2.

<sup>2</sup> Claimant’s letter dated June 17, 2016, p. 2.

<sup>3</sup> Respondent’s letter dated June 17, 2016, pp. 3-7.

<sup>4</sup> Respondent’s letter dated June 17, 2016, pp. 2-3.

<sup>5</sup> Respondent’s letter dated June 17, 2016, p. 8.

<sup>6</sup> Respondent’s letter dated June 17, 2016, p. 8.

<sup>7</sup> Respondent’s letter dated June 22, 2016, p. 1.

<sup>8</sup> Claimant’s letter dated June 22, 2016, pp. 1-2.

<sup>9</sup> Claimant’s letter dated June 22, 2016, pp. 2-4.

<sup>10</sup> Claimant’s letter dated June 22, 2016, p. 4.

<sup>11</sup> Claimant’s letter dated June 22, 2016, p. 4.

5. By unsolicited letter of June 24, 2016, the Respondent: (i) responded to the Claimant's comments related to the admission of one group of documents included in Bolivia's Request;<sup>12</sup> and (ii) regarding the proposed expert inspection, stated that the documents in question were already in the record having been included as photographs in paragraph 104 of Respondent's Rejoinder and in paragraph 15 of Witness X's Witness Statement.<sup>13</sup>
6. The Tribunal invited the Claimant to submit its comments on the Respondent's unsolicited letter of June 24, 2016.
7. By letter of the same day, the Claimant reiterated its opposition to the admission of the documents referred to in the Respondent's communication of June 24, 2016,<sup>14</sup> and its position that the blank pages allegedly signed by members of COTOA-6 were not in the record<sup>15</sup>.

## II. The Parties' Positions on SAS' Request

### *The Claimant's Position*

8. The Claimant submits that the Respondent, in breach of paragraph 6.3 of Procedural Order No. 1, introduced in its Rejoinder two new arguments to which the Claimant did not have the opportunity to respond. Specifically, in respect of the legality of the reversion of the mining concessions, the Respondent argued that: (1) it does not constitute an international wrongful act because there was a "state of necessity," and (2) it does not constitute an expropriation because the State was exercising its police powers.<sup>16</sup> The Claimant states that neither of these two arguments, nor the accompanying legal authorities, were submitted with the Counter-Memorial and that, hence, the Claimant has not had the opportunity to respond to them.<sup>17</sup> In SAS' opinion, there is no reason for these allegations not to have been submitted by Bolivia with its Statement of Defense, and therefore, respect to due process and equality of the Parties justify its request that such elements be excluded from the record of the arbitration.<sup>18</sup> Consequently, the Claimant requests that Sections 5.1 and 5.2.1 of the Respondent's Rejoinder and legal authorities RLA-238, RLA-240 to RLA-242 and RLA-246 to RLA-248 be stricken from the record.<sup>19</sup>
9. Alternatively, should its request be denied, the Claimant requests that it be allowed to submit the following legal authorities in response, pursuant to paragraph 6.4 of Procedural Order No. 1:<sup>20</sup>
  - (i) CLA-201 - Excerpts of the 175-page *Report of the International Law Commission on the Work of its 32nd Session* (5 May - 25 July 1980);
  - (ii) CLA-202 - A. Reinisch, "Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases?" (2007), 8(2) *The Journal of World Investment & Trade* 191;
  - (iii) CLA-203 - J. Crawford, "Revising the Draft Articles on State Responsibility" (1999), 10(2) *The European Journal of International Law* 435; and

---

<sup>12</sup> Respondent's letter dated June 24, 2016, pp. 1-2.

<sup>13</sup> Respondent's letter dated June 24, 2016, pp. 1 and 3.

<sup>14</sup> Claimant's letter dated June 24, 2016.

<sup>15</sup> Claimant's letter dated June 24, 2016, p. 2.

<sup>16</sup> Claimant's letter dated June 17, 2016, p. 2.

<sup>17</sup> Claimant's letter dated June 17, 2016, p. 2.

<sup>18</sup> Claimant's letter dated June 17, 2016, p. 2.

<sup>19</sup> Claimant's letter dated June 17, 2016, p. 2.

<sup>20</sup> Claimant's letter dated June 17, 2016, pp. 2-3.

(iv) CLA-204 - *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, December 19, 2013.

10. In addition, the Claimant affirms that its request is timely given that it was presented within the 20-day period prior to the Hearing, as established in paragraph 6.4 of Procedural Order No. 1.

*The Respondent's Position*

11. The Respondent submits that SAS' Request is "manifestly untimely" (in the original, "*manifiestamente extemporánea*") because, according to the Respondent, there is no justification for the Claimant to have taken four months (from the submission of the Respondent's Rejoinder on March 21, 2016) to submit its objection.<sup>21</sup> The Respondent states that SAS' Request "can only be understood as an attempt to sabotage Bolivia's preparations and obstruct the proceedings".<sup>22</sup>
12. Furthermore, the Respondent argues that SAS' Request is unfounded since the "need to pacify the Mallku Khota area and put an end to the social conflict" and "the State's sovereign prerogatives to intervene in a situation of crisis" have been invoked as a defense since the Counter-Memorial.<sup>23</sup> The necessity had also been identified in the Reversion Decree.<sup>24</sup>
13. Lastly, the Respondent notes that the documents that the Claimant intends to submit do not meet the requirements of paragraph 6.4 of Procedural Order No. 1, for the concurrence of "exceptional circumstances" is lacking because these documents are of earlier date than that of the submission of the Claimant's Reply.<sup>25</sup>
14. The Respondent alleges that should the Tribunal decide to authorize the submission of these documents, it shall also (i) authorize the submission of the documents in Bolivia's Request, and (ii) authorize Bolivia to submit evidence in response to SAS' new evidence, pursuant to paragraph 6.4 of Procedural Order No. 1.<sup>26</sup>

### III. The Parties' Positions on Bolivia's Request

*The Respondent's Position*

15. On the basis of what it considers as exceptional circumstances, the Respondent requests the Tribunal's authorization to submit new evidence pursuant to paragraph 6.4 of Procedural Order No. 1. The Respondent submits that albeit Procedural Order No. 1 does not define the concept of "exceptional circumstances", such circumstances occur when the situation departs from the common rule or from the ordinary.<sup>27</sup>
16. First, the Respondent requests authorization to submit three new pieces of evidence relating to the contracting process PGE-ANPE-007/2016 which are of a later date than that of the submission of the Respondent's Rejoinder (the "**Evidence on the Contracting Process**").<sup>28</sup> According to the Respondent, this evidence complements the evidence submitted by SAS in relation to the

---

<sup>21</sup> Respondent's letter dated June 22, 2016, p. 1.

<sup>22</sup> Respondent's letter dated June 22, 2016, p. 2, *Tribunal's unofficial translation*.

<sup>23</sup> Respondent's letter dated June 22, 2016, p. 2, *Tribunal's unofficial translation*; Counter-Memorial, sections 6.1 and 6.2.1.3.

<sup>24</sup> Respondent's letter dated June 22, 2016, p. 2; C-4, Reversion Decree, p. 3.

<sup>25</sup> Respondent's letter dated June 22, 2016, p. 2, CLA-201 (of 1980), CLA-202 (published in 2007), CLA-203 (of 1999) and CLA-204 (of 2013).

<sup>26</sup> Respondent's letter dated June 22, 2016, p. 3.

<sup>27</sup> Respondent's letter dated June 22, 2016, p. 2.

<sup>28</sup> Respondent's letter dated June 17, 2016, p. 4.

- contracting process, and will allow the Tribunal to “asses the testimony of Witness X with knowledge of the reality of the facts”.<sup>29</sup> The Respondent contends that without them, the Tribunal would have “a biased and incomplete image” of this process.<sup>30</sup>
17. Second, the Respondent requests that it be authorized to submit the award in the case *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2 (the “**Copper Mesa Award**”), the issuance of which was made public by *Copper Mesa* on June 1, 2016. Recently, Bolivia obtained a copy of the award from the Republic of Ecuador, together with its authorization to communicate it to this Tribunal. According to Bolivia, the relevance of this award consists in that it contains “an important development on the valuation method for mining projects at an initial stage” and “considers the participation of the mining company in a social conflict that became violent and analyzes said conduct from the ‘clean hands’ perspective,” issues that are widely discussed in this arbitration.<sup>31</sup>
  18. Third, the Respondent requests authorization to submit the *Management’s Discussion & Analysis* published by *Tri Metals Mining Inc.* (previously *South American Silver Corporation*, SAS’ parent company) on May 6, 2016 (the “**MD&A 2016**”). This document would also be of later date than that of the submission of the Respondent’s Rejoinder; therefore, the Respondent would not have had the procedural opportunity to submit it. Moreover, according to the Respondent, it complements the evidence submitted by both Parties, who have already submitted the MD&A of May 11, 2011 (C-301) and those of the period 2013-2015 (R-148, R-151 to R-154, and R-223).<sup>32</sup> According to the Respondent, the admission of the MD&A 2016 “will allow the completion, for the benefit of the Tribunal, of the historical series of MD&As issued by *Tri Metals Mining Inc.*”<sup>33</sup> and “is relevant for this case because it contains the most up-to-date information about this arbitration that the Claimant’s parent company is communicating to the market.”<sup>34</sup>
  19. Fourth, Bolivia requests authorization to submit a document elaborated by RPA (the “**RPA Document**”) with the observations and risks that said expert identified when revising the estimate of the Project’s mineral resources carried out by GeoVector Management, Inc. (“**GeoVector**”). According to the Respondent, the RPA Document “shows that the estimate of the Project’s resources carried out by GeoVector is inflated and that the classification of resources it proposes is incorrect, which is in direct contradiction with what is stated by RPA in its reports” where RPA considered it “reasonable”.<sup>35</sup>
  20. The Respondent alleges that although the RPA Document was communicated by SAS during the document production phase, it was communicated (identified with Bate numbers 5508 and 5509) within a first group of 5860 pages of documents (Bates 1 to 5860) transmitted with no organization and intermixed. This would, according to the Respondent, explain why the latter could not timely identify the RPA Document.<sup>36</sup> Likewise, according to the Respondent, it being a document

---

<sup>29</sup> Respondent’s letter dated June 17, 2016, p. 4, *Tribunal’s unofficial translation*.

<sup>30</sup> Respondent’s letter dated June 17, 2016, p. 4, *Tribunal’s unofficial translation*.

<sup>31</sup> Respondent’s letter dated June 17, 2016, p. 5, *Tribunal’s unofficial translation*.

<sup>32</sup> Respondent’s letter dated June 17, 2016, p. 5.

<sup>33</sup> Respondent’s letter dated June 17, 2016, p. 5, *Tribunal’s unofficial translation*.

<sup>34</sup> Respondent’s letter dated June 17, 2016, p. 6, *Tribunal’s unofficial translation*.

<sup>35</sup> Respondent’s letter dated June 17, 2016, p. 6, *Tribunal’s unofficial translation*. See RPA Document, paras. 1, 2 and 7 stating the inaccuracy of the resources estimate, and **CER-2**, First RPA Report, p. 9-1. Bolivia states that in its page 9-4, Report RPA notes that it considers reasonable the classification of resources carried out by GeoVector.

<sup>36</sup> Respondent’s letter dated June 17, 2016, p. 6.

provided by the Claimant and generated by the latter's experts, the Claimant cannot allege ignorance or prejudice due to its submission at this stage of the proceedings.<sup>37</sup>

21. Additionally, the Respondent argues that SAS and its experts have recognized the relevance and pertinence of the RPA Document because, in their expert reports, RPA proposes a valuation of the Project based on the method of comparable transactions analysis through the *Metal Transactions Ratio*.<sup>38</sup> The Respondent explains that, according to this method, the market value of the Project ultimately depends on the economic value of its mineral deposit, and the value of the latter depends, in turn, of the resources that said deposit is estimated to have.<sup>39</sup> According to the Respondent, it is essential for the Tribunal to know the observations made by RPA on said estimate because the Claimant and its experts claim to have valued the Project based on it.<sup>40</sup>
22. Lastly, the Respondent requests authorization to submit the native files (in \*msg format) of exhibits R-247, R-248, R-250 to R-266, R-268 to R-276, and R-278 to R-294 (the "**Native Files**"), which correspond to e-mails between officers of CMMK and Witness X that are already in the record in a different format.<sup>41</sup> The Respondent justifies this request on the grounds that, "in its Rejoinder on Jurisdiction, and for the first time, SAS questioned the authenticity and completeness of some of these documents".<sup>42</sup> According to the Respondent, these documents would allow the Tribunal to review the evidence in its original format and confirm its authenticity.<sup>43</sup>
23. With respect to the Claimant's argument that the Native Files contain additional information that is not in the record,<sup>44</sup> the Respondent argues in its letter dated June 24, 2016, that this additional information allows for the verification that the documents introduced by Bolivia in \*.pdf format were not altered.<sup>45</sup> The Respondent also clarifies that it does not oppose to the exclusion from the record of the documents attached to the e-mails whose native files it wishes to submit.<sup>46</sup> Alternatively, the Respondent requests the admission in native format of only the e-mails "in exhibits R-272 and R-275 (those SAS characterizes as altered), with the understanding that SAS did not and will not object to the authenticity of the rest of the e-mails."<sup>47</sup>

#### *The Claimant's Position*

24. With respect to the Evidence on the Contracting Process, the Claimant does not oppose its admission.<sup>48</sup> However, the Claimant requests the Tribunal to order that the Respondent also provide the tender proposals submitted by Witness X and Ms. Nataly Bumuller Torres, the only other person to submit a proposal.<sup>49</sup> The Claimant notes that the *Procuraduría* has exclusive

---

<sup>37</sup> Respondent's letter dated June 17, 2016, p. 6.

<sup>38</sup> Respondent's letter dated June 17, 2016. 6.

<sup>39</sup> Respondent's letter dated June 17, 2016, p. 7.

<sup>40</sup> Respondent's letter dated June 17, 2016, p. 7. See **CER-5**, Second RPA Report, p. 5-11.

<sup>41</sup> Respondent's letter dated June 17, 2016, p. 7.

<sup>42</sup> Respondent's letter dated June 17, 2016, p. 7, *Tribunal's unofficial translation*, referring to the Claimant's Rejoinder on Jurisdiction, paras. 26 and 28.

<sup>43</sup> Respondent's letter dated June 17, 2016, p. 7.

<sup>44</sup> See *infra* para. 28.

<sup>45</sup> Respondent's letter dated June 24, p. 2.

<sup>46</sup> Respondent's letter dated June 24, p. 2.

<sup>47</sup> Respondent's letter dated June 24, p. 2, *Tribunal's unofficial translation*.

<sup>48</sup> Claimant's letter dated June 22, 2016, p. 2.

<sup>49</sup> Claimant's letter dated June 22, 2016, p. 2.

- control over these documents and argues that their inclusion in the record would provide a complete image of the process.<sup>50</sup>
25. Regarding the *Copper Mesa* Award, the Claimant notes that it is a confidential document the parties not having agreed that it be made public, and that even if they had, it would require the redaction of the references to a protected witness.<sup>51</sup> Based on the foregoing, the Claimant requests that this document not be included in the record until such agreement is obtained.<sup>52</sup>
  26. The Claimant does not oppose the admission of the MD&A 2016 considering its admission consistent with the terms of paragraph 6.4 of Procedural Order No. 1.<sup>53</sup>
  27. In relation to the RPA Document, the Claimant opposes its inclusion. The Claimant notes, first, that the Respondent cites it out of context.<sup>54</sup> Second, the Claimant contends that it provided said document to the Respondent on June 8, 2015, nine months before the presentation of the Respondent's Rejoinder.<sup>55</sup> The Claimant notes that not even the alleged disorder in which, according to Bolivia, the documents were provided would justify the Respondent's omission to submit this document with its Rejoinder.<sup>56</sup> The Claimant adds that it is irrelevant whether the document was transmitted by the Claimant and generated by its experts because it was available to the Respondent prior to the submission of its Rejoinder.<sup>57</sup>
  28. With respect to the Native Files, which the Claimant alleges were improperly obtained, the Claimant opposes its inclusion on the basis that they were available to the Respondent prior to the submission of its Rejoinder, and yet the latter did not submit them. Therefore, pursuant to 6.4 of Procedural Order No. 1, they cannot be added to the record now.<sup>58</sup> The Claimant notes that these exhibits were submitted with the Respondent's Rejoinder and the only opportunity for SAS to comment was in its Rejoinder on Jurisdiction.<sup>59</sup> The Claimant further argues that the Native Files contain additional information and, thus, their inclusion in the record would be an attempt from the Respondent to submit documents to respond to the Rejoinder on Jurisdiction, which shall not be allowed.<sup>60</sup>
  29. The Claimant further opposes the inclusion of exhibits R-272 and R-275 only, affirming that there is no need or justification therefor.<sup>61</sup> The Claimant states that the copy of exhibit R-272 that is in the record is complete and clarifies that its critique referred to how it had been incorporated to the body of the text of the Rejoinder.<sup>62</sup> Regarding exhibit R-275, the Claimant states that the entire chain of e-mails is complete in the record as exhibit C-318.<sup>63</sup>
  30. Lastly, making reference to the documents that would be provided to Bolivia by the Canadian authorities, the Claimant requests the Tribunal to reject any future request for their inclusion in

---

<sup>50</sup> Claimant's letter dated June 22, 2016, p. 2.

<sup>51</sup> Claimant's letter dated June 22, 2016, p. 2. See e-mail from Robert Wisner, Copper Mesa Mining's counsel dated June 20, 2016 included as an annex to Claimant's letter of June 22.

<sup>52</sup> Claimant's letter dated June 22, 2016, p. 3.

<sup>53</sup> Claimant's letter dated June 22, 2016, p. 3.

<sup>54</sup> Claimant's letter dated June 22, 2016, p. 3.

<sup>55</sup> Claimant's letter dated June 22, 2016, p. 3.

<sup>56</sup> Claimant's letter dated June 22, 2016, p. 3.

<sup>57</sup> Claimant's letter dated June 22, 2016, p. 3.

<sup>58</sup> Claimant's letter dated June 22, 2016, p. 4.

<sup>59</sup> Claimant's letter dated June 22, 2016, p. 4.

<sup>60</sup> Claimant's letter dated June 22, 2016, p. 4.

<sup>61</sup> Claimant's letter dated June 24, 2016, p. 1.

<sup>62</sup> Claimant's letter dated June 24, 2016, p. 2.

<sup>63</sup> Claimant's letter dated June 24, 2016, p. 2.

the record given that the time period set forth in paragraph 6.4 of Procedural Order No. 1 for the exceptional inclusion of new evidence has expired.<sup>64</sup>

#### **IV. The Tribunal's Analysis and Decisions**

##### **a) On SAS' Request**

31. Para. 6.4 of Procedural Order No. 1 provides as follows:

*“Following submission of the Reply and Rejoinder, 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. Should such leave be granted to one side, the other side shall have an opportunity to submit counter-evidence. The Tribunal shall not admit any evidence that has been available to the Party pretending to introduce it prior to the submission of its written pleadings, or, even if not available prior to the submission, when the introduction is requested less than 20 days prior to the Hearing.”*

32. Pursuant to this provision, the Tribunal will only authorize the introduction of new evidence when an exceptional circumstance occurs, this is, a circumstance out of the ordinary, an uncommon circumstance. But, in addition, it is required that the evidence had not been available to the Party attempting to introduce it prior to the submission of its written pleadings as set forth in the procedural calendar, and even if it was not available, it is required that the request be submitted no less than 20 days prior to the Hearing.

33. With respect to SAS' Request, the Tribunal notes that while it is true, as the Claimant affirms, that the arguments proposed by the Respondent in Sections 5.1 and 5.2.1 of its Rejoinder were only developed by the Respondent in said submission, Bolivia is right in considering that there is no basis for the Claimant to have taken four months to submit this objection. The Claimant had already objected to the inclusion of certain sections of Bolivia's Rejoinder based on their late submission and some of such objections were accepted by the Tribunal. Therefore, these new objections should have been submitted together with the objections already submitted by the Claimant. Therefore, the Tribunal rejects SAS' Request to strike Sections 5.1 and 5.2.1 of Bolivia's Rejoinder and legal authorities RLA-238, RLA-240 to RLA-242 and RLA-246 to RLA-248.

34. With respect to legal authorities CLA-201 to CLA-204, considering that they are texts that could serve to illustrate the Tribunal on the issues debated in this arbitration, the Tribunal, in exercise of its power to conduct the proceedings pursuant to Article 17(1) of the UNCITRAL Rules, orders their incorporation to the record.

##### **b) On Bolivia's Request**

35. First, the Tribunal takes note that –contrary to what it stated during the pre-Hearing conference– Bolivia has indicated that it will not submit a request for the Hearing to be open to the public. In that regard, the Tribunal recalls that this arbitration is governed by the UNCITRAL Rules that establish, in Article 28, paragraph 3, that “[h]earings shall be held in camera unless the parties agree otherwise”. In the same vein, Procedural Order No. 1, paragraph 10.1, provided that “hearings shall be held in camera unless the Parties agree otherwise.” The Tribunal notes that SAS has opposed to the Hearing being open to the public; thus, there is no agreement of the Parties

---

<sup>64</sup> Claimant's letter dated June 22, 2016, p. 4.



to modify paragraph 10.1 of Procedural Order No. 1 and paragraph 13 of Procedural Order No. 21, pursuant to which the Hearing shall be held *in camera*.

36. With respect to the inspection of the documents referred to in Bolivia's letter of June 17, the Tribunal observes that these are documents provided in photographic versions as part of Bolivia's Rejoinder and therefore it is not possible to affirm, as Claimant does, that they are documents that are not part of the record, at least in copy. Now, in view of the short period of time remaining before the Hearing, the Tribunal considers that in case the Claimant's objection to the authenticity of the documents persists, the issue will be dealt with at the closing of the Hearing.
37. With respect to the remainder of Bolivia's Request:
- (i) The Tribunal begins by noting that SAS has not objected to the inclusion in the record of the Evidence from the Contracting Process and the MD&A 2016 as it finds that these requests comply with the requirements of paragraph 6.4 of Procedural Order No. 1 regarding the existence of exceptional circumstances. Therefore, the Tribunal orders their incorporation to the record of the present arbitration;
  - (ii) Likewise, and considering that it may be relevant in the present arbitration, the Tribunal orders the Respondent to submit the bidding proposals presented by Witness X as well as by Ms. Nataly Bumuller Torres;
  - (iii) With respect to the *Copper Mesa* Award, the Tribunal finds that this is a decision issued under the 1976 UNCITRAL Arbitration Rules, not published on the PCA's website or on any public site. The Tribunal also observes that Article 32(5) of the 1976 UNCITRAL Arbitration Rules provides that an award may be made public only with the consent of both parties. Similarly, Article 34(5) of the UNCITRAL Rules (2010) provides that an award may be made public with the consent of all parties or if required by legal duty. Finally, the note submitted by SAS seems to confirm that for the *Copper Mesa* Award to be available to third parties, the consent of both parties to that arbitration is required. On the other hand, the Tribunal notes that the decision was issued after the submission of Bolivia's Rejoinder; hence, the exceptional circumstance provided for in Procedural Order No. 1 would be present. Consequently, the Tribunal will accept the inclusion in the record of the *Copper Mesa* Award to the extent that it is accompanied by evidence of consent of the parties in that arbitration for its delivery to the Parties in this arbitration;
  - (iv) With respect to the RPA Document, Bolivia accepts that it was communicated by SAS during the document production phase. This means that said document was available to the Respondent before the submission of its Rejoinder. Therefore, Bolivia could have submitted the RPA Document with its Rejoinder, but did not do so. Beyond an alleged disorder in the delivery of the document, which Bolivia only claims one year after its reception, Bolivia has not invoked any "exceptional circumstance" –as required by paragraph 6.4 of Procedural Order No. 1– that would justify accepting that the RPA Document is incorporated to the record at this stage of the proceedings. Therefore, the Tribunal does not authorize the inclusion of the RPA Document; and
  - (v) With respect to the Native Files, the Tribunal notes that they are documents that were in the Respondent's possession and which it could have submitted with its Rejoinder. The only exceptional circumstance that Bolivia seems to invoke is that "in its Rejoinder on Jurisdiction, and for the first time, SAS questioned the authenticity and completeness of some of these documents".<sup>65</sup> However, the only documents that seem to have been

---

<sup>65</sup> Respondent's letter dated June 17, 2016, p. 7, *Tribunal's unofficial translation*, referring to the Claimant's Rejoinder on Jurisdiction, paras. 26 and 28.

objected by the Claimant are exhibits R-272 and R-275. Nonetheless, concerning those exhibits, in its letter of June 24, 2016, SAS indicates that the copy of exhibit R-272 found in the record is complete and regarding exhibit R-275, it affirms that the entire e-mail chain is complete in the record as exhibit C-318.<sup>66</sup> There is thus no objection to the authenticity and completeness argued by the Respondent, and therefore, the exceptional circumstance that the Respondent seems to invoke does not exist. Therefore, the Tribunal rejects the inclusion of the Native Files.

38. Lastly, the Tribunal notes that paragraph 6.4 of Procedural Order No. 1, repeatedly cited by the Parties in their requests, provides that the “*Tribunal shall not admit any evidence ... when the introduction is requested less than 20 days prior to the Hearing*”. The Tribunal observes that such time period has expired and therefore, it will not admit additional requests of the Parties in this regard.

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



---

Dr. Eduardo Zuleta Jaramillo  
(Presiding Arbitrator)

On behalf of the Tribunal

---

<sup>66</sup> Claimant’s letter dated June 24, 2016, p. 2.