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")

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PROCEDURAL ORDER NO. 4
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Tribunal

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

January 26, 2015

I. Introduction

1. By letter dated January 12, 2015, the Respondent requested (the "Request") that the Tribunal order the Claimant to

   "produce immediately the following documents:

   – The calculation sheets (the "Calculation Sheets") which served as basis for the "Tables" and "Figures" in the expert reports of Roscoe Postle Associates Inc. ("RPA") and FTI Consulting Canada ULC ("FTI") listed as items 7, 8, 15, 16 and 17 of Annex 1 to Bolivia's letter dated December 19, 2014 (the "Tables/Figures"); and

   – The financial statements (the "F.S.") which served as basis to South American Silver Corp. ("SASC") for the preparation of its financial statements on which FTI has relied– as contained in annex 4 to FTI's report."[1]

2. Items 7, 8, 15, 16 y 17 of Annex 1 (Requested Documents) to Bolivia's letter dated December 19, 2014, to which the Respondent refers in its Request, are reproduced below:[2]

	Category	Requested Document	Reference	Comments
7.	Calculation sheets basis of the RPA Report	The calculation sheet (in native format) on which are based the results shown in Table 12-1	Table 12-1, p. 12-5 of the RPA Report	This table is supposedly based on information that should appear in Annex 2 to the RPA Report. Nevertheless, to arrive at the results of Table 12-1 from the data in Annex 2, RPA must have made calculations which are not included in Table 12-1 of its Report.
8.	Calculation sheets basis of the RPA Report	The calculation sheet (in native format) on which are based the results shown in Table 12-2	Table 12-2, p. 12-6 of the RPA Report	This table shows results, but not the manner in which those results were reached.
15.	Calculation sheets basis of the RPA Report	Electronic version (in native format) of the valuation models used by FTI for its valuation report of September 23, 2014 (the "FTI Report") to calculate (i) the compensation, and (ii) the impact of a hypothetical delay in the project.	E.g. Figures 1, 18 and 21 of the FTI Report	For instance, Figure 1, entitled "Summary of Damages (USD Millions)", Figure 18, entitled "Project FMV Conclusion" and Figure 21, entitled "Restitution Damages Conclusions and Sensititvity [sic] Analysis", are in pdf format, not allowing to see the calculations through which those figures were reached or to verify the calculations in an efficient manner.
16.	Calculation sheets basis of the RPA Report	Electronic versions (in native format) of the files used to calculate the amounts in Figures 22 ("Pre-Award Interest Calculation: Scenario 1 (Expropriation)") and 23 ("Pre-Award Interest Calculation: Scenario 2 (Restitution)")	Figures 22 and 23 of the FTI Report	Figures 22 and 23 show the results of calculating pre-award interests in two different scenarios (compensation and restitution). Both of them have been submitted in pdf format, not allowing to see the calculations through which those figures were reached or to verify the calculations in an efficient manner.
17.	Calculation sheets basis of the RPA Report	Electronic version (in native format) of the file used to calculate the amounts in Figure 27, entitled "SASC's Bolivia Costs"	Figure 27 of the FTI Report	Figure 27 has been submitted in pdf format, not allowing to verify the calculations in an efficient manner.

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[1] Tribunal's translation.
[2] Tribunal's translation.

3. On January 13, 2015, the Tribunal acknowledged receipt of the Request and invited the Claimant to present its comments on the Request by January 16, 2015.

4. On January 16, 2015, the Claimant replied, objecting to the Request.

II. Position of the Parties

A. *Respondent's Position*

5. The Request refers to two types of documents: (i) the electronic versions in native format of the Tables/Figures of the FTI and RPA reports (denominated "Calculation Sheets" by the Respondent); and (ii) the financial statements used to prepare the FTI Report.

6. The Respondent alleges that these documents "served as a basis for the preparation of the RPA and FTI expert reports, and, therefore, a complete version thereof in their native format should have been (and must be) provided to the Respondent".[3]

7. Regarding the Calculation Sheets, the Respondent submits, *inter alia*, that the Tables/Figures provided in the respective expert reports "show nothing but the alleged results that [the experts] reached",[4] but they do not allow "Bolivia to take cognizance of the basis on which [the experts] relied to reach [those] results",[5] and that the PDF format of the Calculation Sheets "would considerably hinder their review (for instance, because they would not allow to see the formulae used for the calculations) and would unnecessarily increase the costs and time for Bolivia's defense".[6] The Respondent also alleges that submitting the native files of the Calculation Sheets would be consistent with the terms of Procedural Order No. 1.

8. With respect to the F.S., the Respondent submits that "Annex 4 to the FTI Report includes condensed and consolidated financial statements of SASC",[7] noting that "the Claimant and/or FTI must have used the F.S. as a basis"[8] for the report.

B. *Claimant's Position*

9. The Claimant argues that the Respondent "improperly seeks to obtain documents that either do not exist, that neither [the Claimant] nor its experts relied upon in its Statement of Claim and Memorial, or documents that fall within the scope of the Document Production Phase provided for by Procedural Order No. 1 such that it is premature for Bolivia to request them at this time."

10. With respect to the Calculation Sheets, the Claimant submits that "the figures (Figures 1, 18, 21, 22, 23 and 27 of the FTI Report and Tables 12-1 and 12-2 of the RPA Report) referred to in Bolivia's letters are contained in the body of the RPA and FTI Expert Reports and do not constitute separate documents. They were provided […] in the format prescribed by Procedural Order No. 1."

11. The Claimant also alleges that "these tables set fort simplistic calculations, and for the more detailed ones, the formula for the calculation is set forth within the table itself." Therefore, the

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[3] Tribunal's translation.
[4] Tribunal's translation.
[5] Tribunal's translation.
[6] Tribunal's translation.
[7] Tribunal's translation.
[8] Tribunal's translation.

Claimant holds that "it would not be particularly difficult or expensive for Bolivia or its experts to input a few dozens numbers into a Word or Excel document if it wishes to do so."

12. With respect to the F.S., the Claimant submits that "FTI did not reply on any other financial statements that those exhibited in its expert report, and the financial statements exhibited are under no circumstance incomplete, condensed or abridged." Likewise, the Claimant affirms that it "is under no obligation to produce documents beyond those used by FTI to prepare its expert report," and that "[i]f Bolivia wishes to obtain additional documents, it will have the opportunity to request them during the Document Production Phase set forth under Procedural Order No. 1."

III. Analysis of the Tribunal

13. The Tribunal has revised in detail the Respondent's Request and the Claimant's response.

14. With respect to the Calculation Sheets, the Tribunal notes that figure 1 of page 4, and figures 22 and 23 of page 71 of the FTI Report result from basic calculations with information already included in the report itself. Therefore, the Tribunal is not convinced of the Respondent's argument that the failure to provide these documents in their native format considerably hinder their review or that it would unnecessarily increase the costs and time for the defense.

15. With respect to figures 18 of page 57, 21 of page 67, and 27 of page 99 of the FTI Report, the Tribunal opines that while they are tables showing figures that result from the application of not overly complex formulas or formulas indicated in the report itself, using information that derive from or are explained in the report, these documents in their native format would facilitate the work of the Tribunal and the Respondent. The Tribunal opines the same with respect to the tables 12-1 and 12-2 of pages 11 and 12 of the RPA Report.

16. Turning to the financial statements, the Tribunal notes that Bolivia's express request is to be provided with 'the financial statements which served as basis to SASC for the preparation of its financial statements on which FTI has relied'. The Tribunal considers that it is the Claimant's obligation to provide the Respondent with the same financial statements the Claimant gave to its experts for the preparation of the expert reports, without prejudice to the Parties' right to request further documents during the phase provided for that in the procedural calendar.

IV. The Tribunal's Decision

17. Now, therefore, the Tribunal:

    a. ORDERS the Claimant to provide the Respondent with the documents in their native format of figures 18 of page 57, 21 of page 67, and 27 of page 99 of the FTI Report, and tables 12-1 and 12-2 of pages 11 and 12 of the RPA report, by **January 30, 2015**;

    b. ORDERS the Claimant to provide the Respondent with the same financial statements the Claimant gave to its experts for the preparation of the expert reports by the same date indicated above; and

    c. REJECTS the remaining petitions of the Respondent in the Request.

Place of the Arbitration: The Hague, the Netherlands.

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Dr. Eduardo Zuleta Jaramillo
(Presiding Arbitrator)

On behalf of the Tribunal