

PCA CASE NO. 2011-17

IN THE MATTER OF AN ARBITRATION UNDER

A. THE TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF BOLIVIA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

-and-

B. 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

-and-

C. THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

-between-

1. GUARACACHI AMERICA, INC.
2. RURELEC PLC

(the "Claimants")

-and-

THE PLURINATIONAL STATE OF BOLIVIA

(the "Respondent," and together with the Claimants, the "Parties")

PROCEDURAL ORDER NO. 17
27 March 2013

A. TELEPHONE CONFERENCE CALL: ISSUES ADDRESSED

1. By letters dated 26 March 2013, received before the commencement of the telephone conference call, both Parties presented their respective positions with respect to the conduct of the hearing.
2. During the conference call held on 26 March 2013 between the Tribunal, the Parties, and the PCA various issues were discussed, as set forth below together with the agreement reached by the Parties or, in the alternative, their disagreement:
 - a) Opening Statements¹: The Parties agreed that the Opening Statements would have a maximum duration of 3:15 hours. Nevertheless, it was agreed that flexibility would be maintained in this regard insofar as necessary to allow the Parties to finish their Opening Statements before the end of the first day of the hearing.
 - b) Transparency of the hearing²: The Claimants requested that the hearing not be video recorded. Additionally, the Claimants argued that, according to Procedural Order No. 1, no video recordings of the hearing had been agreed and that such was unnecessary, and its absence would not affect the transparency of the proceedings. Moreover, the Claimants contended that the video recordings could affect the security of their witnesses³ (as has happened before with other States), that costs would be saved by not video recording the hearing, that the transparency obligations undertaken by the Parties are limited to the transcripts and written statements of the Parties, and that Bolivian legislation on transparency of public servants should be disregarded given the international nature of the present proceedings.

For its part, the Respondent requested that the hearing be video recorded and that the video recordings be made available on the PCA website. Additionally, Bolivia asserted that the transparency of the hearing was not limited to only audio recordings and was broader. In that regard, the Respondent referred to Procedural Order No. 1, where it was set forth that the hearing would be open to the public. Therefore, the Respondent does not see a difference between video recording the hearing and opening the hearing to the public. Finally, the Respondent added that the assertions regarding the security of Claimants' witnesses were offensive and that Bolivia is not one of those "other States". Moreover, Bolivia contends that these allegations made no sense since all the written submissions are already published on the PCA website, that pursuant to the

¹ See Claimants' letter dated 26 March 2013, ¶7 and Respondent's letter dated 26 March 2013, ¶II.5.

² See Claimants' letter dated 26 March 2013, ¶5 and Respondent's letter dated 26 March 2013, ¶III.2.

³ Press Article "García: Nacionalizaciones general ingresos y utilidades para el país", La Razón, 23 February 2013, available at: http://www.la-razon.com/economia/Garcia-Nacionalizaciones-generan-ingresos-utilidades_0_1784821527.html.

Bolivian legislation, public servants are subject to transparency obligations, and that no additional costs will be incurred since the Respondent has offered to pay for the video recording itself.

- c) Closing Statements⁴: The Claimants requested that, instead of closing statements, Post-Hearing Briefs should be allowed and that this issue should be decided in advance of the hearing. The Claimants argued that there would be limited time to prepare the closing statements, especially in light of the three new witnesses that have been added (MEC, Edl and CNDC), and that the abovementioned closing statements would not be useful. Therefore, the Claimants consider that Post-Hearing Briefs would be more appropriate in order to avoid repetition, and in particular because the Post-Hearing Briefs could clarify any questions the Tribunal may have following the close of the hearing.

The Respondent requested on the contrary that closing statements be allowed or that the Tribunal reserve the possibility of having closing statement if sufficient time remains and otherwise that Post-Hearing Briefs be allowed if time is lacking. In addition, Bolivia contended that the Post-Hearing briefs are precisely a duplicative type of document. Moreover, the Respondent asserted that the closing statements could be prepared in a short time, considering that both Parties have a whole weekend in order to prepare them. The Respondent advocates for closing statements for two reasons: (i) they are useful to close the proceedings; and (ii) they avoid additional costs. In any case, Bolivia's position is flexible with respect to the Post-Hearing Briefs in case the Tribunal has any concerns or questions following the end of the hearing and considers that Post-Hearing Briefs could be useful to resolve these.

- d) Allocation of time for the examination of witnesses and experts⁵: Both Parties agree on the total number of hours for the examination of witnesses and experts (i.e. 24 hours). However, the Claimants consider that time should be equally distributed between the Parties, 50% for the Claimants and 50% for the Respondent (12 hours for each Party).

The Respondent considers that the distribution of time should be distributed proportionally according to the number of witnesses and experts to be cross-examined by each Party. Consequently, since Bolivia has double the number of witnesses and experts to cross-examine, the distribution should be 65% for Bolivia (i.e. 15,5 hours) and 35% for the Claimants (i.e. 8,5 hours).

- e) Experts⁶: The Parties agreed that the initial presentation of the experts and/or direct examination would last a maximum of 30 minutes, although some flexibility would be maintained in this regard.
- f) Presence of witnesses and experts during the hearing⁷: The Claimants requested that Mr. Earl be able to attend the Opening Statements as he is the Chief Executive of Rurelec and the first witness in order to testify. Additionally, pursuant to Procedural

⁴ See Claimants' letter dated 26 March 2013, ¶8 and Respondent's letter dated 26 March 2013, ¶¶II.2 y III.9.

⁵ See Claimants' letter dated 26 March 2013, ¶9 and Respondent's letter dated 26 March 2013, ¶III.5.

⁶ See Claimants' letter dated 26 March 2013, ¶11(a) and Respondent's letter dated 26 March 2013, ¶III.3(a).

⁷ See Claimants' letter dated 26 March 2013, ¶12 and Respondent's letter dated 26 March 2013, ¶III.4.

Order No. 1, the Claimants argue that all other witnesses can attend the hearing once they have finished their testimony.

The Respondent requested that the rule of sequestration of witnesses set forth in paragraph 13.7 of Procedural Order No. 1 be maintained for Mr. Earl. In this regard, the Respondent considers that Mr. Earl's role as Chief Executive of Rurelec is insufficient on its own to justify his ability to be present during the Opening Statements. Thus, Bolivia sees no reason why Mr. Earl should be exempted from the rule set forth in paragraph 13.7 of Procedural Order No.1, especially given that Bolivia's witnesses will not be present. Finally, Bolivia did not object to witnesses being present once they have finished their testimony.

- g) Submission of new documents by the Claimants⁸: The Claimants asserted that the Rejoinder on the Merits submitted by Bolivia had raised new issues. Therefore, the Claimants requested that they be allowed to submit a small number of new documents (between 10-15), in order to respond to these new issues. Moreover, the Claimants added that a response by Bolivia would not be necessary because the new documents would just complete a chain of correspondence.

The Respondent considered that Claimant's request was unacceptable since receiving new documents at this stage of the proceedings would be too late. Furthermore, it is expressly set forth in paragraph 14.1 of Procedural Order No. 1 that no documents would be admitted after the submission of the Rejoinder on the Merits. Bolivia added that the Claimants should have to explain why the Claimants were not able to submit the abovementioned documents previously, since it is not a question of quantity of documents, but of their relevance and content. The Respondent reserved all its rights in this regard.

- h) Electronic bundle prepared by the Claimants⁹: The Claimants offered to prepare an electronic bundle of the case file as a courtesy, and for no other reason than that they can provide a more technically useful file.

The Respondent objected to this electronic bundle prepared by the Claimants on the basis that it will lose a considerable amount of time reviewing its content without any assurance that it will be useful in the end or not.

Considering the above comments, the Tribunal decided that the Claimants would submit the electronic bundle to the Respondent according to their proposal, and this issue will be discussed by the Tribunal together with the Parties on the first day of hearing.

- i) Direct examination of the witnesses and experts: scope and time¹⁰: According to the principle of due process, the Claimants requested that the direct examination of witnesses not be time-limited (although they considered that 10 minutes might be enough). Furthermore, the Claimants requested that the new issues raised by the

⁸ See Claimants' letter dated 26 March 2013, ¶14 and Respondent's letter dated 26 March 2013, ¶III.7.

⁹ See Claimants' letter dated 26 March 2013, ¶16 and Respondent's letter dated 26 March 2013, ¶III.6.

¹⁰ See Claimants' letter dated 26 March 2013, ¶11 and Respondent's letter dated 26 March 2013, ¶III.3(a).

Rejoinder on the Merits be able to be addressed. Finally, the Claimants argued that both Parties might benefit from this request.

The Respondent requested that witnesses and experts not be able to testify regarding new issues not addressed in their respective witness or expert Statements, and that direct examination be limited to a maximum of 10 minutes. In this regard, Bolivia asserted that, if the Claimants considered that new issues had been raised, they should submit a written submission prior to the hearing requesting the Tribunal's permission to discuss these new issues. However, the Respondent considered it surprising that the Claimants had not said anything until now, 23 days after receiving the Rejoinder on the Merits. Finally, the Respondent asserted that Bolivia would have only 24 hours to prepare questions on these new issues.

- j) Examination of MEC, EdI and CNDC: The Claimants asserted that, if representatives from MEC and EdI were required to appear at the hearing, a representative from CNDC should also appear in order to ensure equal treatment in the proceedings.

The Respondent stated that, if the Claimants disputed the accuracy of CNDC's calculations, then the Respondent agreed that representative from CNDC should attend (even though the Claimants had not previously disputed the abovementioned calculations). Likewise, Bolivia clarified that it had not requested the appearance of these three new witnesses, but that certain sections of the Compass Lexecon's Reports elaborated by these other experts be declared inadmissible.

Considering the above commentaries, the Tribunal decided that Procedural Order No. 16 was maintained.

- k) Lack of payment of de additional deposit by Bolivia: The Claimants pointed out that the Respondent had not made the payment of the additional deposit requested by the PCA within the established deadline.

The Respondent responded that Bolivia was in process of establishing the necessary arrangements in order to make the abovementioned payment, and that Bolivia will finally make it although it was not within the establish deadline set forth by the Tribunal. The representatives from Bolivia asserted that the above had been confirmed by letter to the PCA.

B. DECISION

3. Considering the above, the Tribunal needs to decide the abovementioned issues, with the exception of sections a), e), h) and j), which it does as follows:

- 1) Transparency of the hearing: The Tribunal considers that video recording the hearing is unnecessary since the publication of the written submissions, an audio recording of the hearing, and the final transcripts on the PCA website is sufficient to provide for transparency in the proceedings.
- 2) Closing Statements and Post-Hearing Briefs: The Tribunal considers that the Parties' closing statements constitute an important part of the hearing, and thus that there should be

closing statements by each side. In that regard, the Parties will have between 1:15 and 2:00 hours to make closing statements, depending on the time available on the last day of the hearing. Nevertheless, before the end of the hearing, the Tribunal shall decide whether Post-Hearing Briefs are needed and should be allowed as a complement to the Parties' closing statements.

- 3) Allocation of time: The Tribunal decides to allocate the time equally between the Parties (i.e. 50%/50%). However, the Tribunal will endeavor to be flexible in the event that one of the Parties, as may be the case for the Respondent, requires additional time.
- 4) Presence of witnesses and experts during the hearing: According to the general rule and what was set forth in Procedural Order No. 1, the Tribunal decides that neither Mr. Earl nor any of the other witnesses may be present in the hearing room for the opening statements and until they have finished their testimony, after which time they may remain and attend the hearing.
- 5) Submission of new documents by the Claimants: The Tribunal decides that the Claimants may submit their new documents by **Wednesday, March 27, 2013** (without these being admitted into the record), sending a copy to the Tribunal, the PCA, and Bolivia. Bolivia shall have the opportunity to provide any comments it may wish to submit with respect to the admissibility of these documents **by the end of Thursday, 28 March 2013**, following which the Tribunal shall examine the documents and decide whether to admit them. The Tribunal will issue a decision in this regard, taking into account all the circumstances of the present case and the proximity of the hearing, by **Friday, 29 March 2013**.
- 6) Direct examination of the witnesses and experts: scope and content: The Tribunal considers that the scope of the direct examination should be limited to the documents and witness and expert statements already submitted by the Parties, and that the Parties should not question the witnesses or experts regarding new issues. However, this decision is subject to the Tribunal conclusions following its assessment of the new documents that the Claimant is to submit. The Tribunal's decision in this respect shall also be made by **Friday, 29 March 2013**. In any event, direct examinations must comply with the rule set forth in Article 13.5 of Procedural Order No. 1.
- 7) Lack of payment of the additional deposit by Bolivia: The Tribunal requests that the Respondent inform the Tribunal and the PCA by **Monday, 1 April 2013** as to the date by which Bolivia will make the abovementioned payment, the deadline for which having expired over a month ago.

The co-arbitrators have approved this order, signed only by the President.

27 March 2013



José Miguel Júdece
(President of the Tribunal)