

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”)

PROCEDURAL ORDER NO. 8

Tribunal

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

August 26, 2015

I. Introduction

1. In response to a request by the Claimant, South American Silver Limited (“SAS”), of October 15, 2014, after inviting comments from the Respondent (or “Bolivia”), on December 1, 2014, the Tribunal issued Procedural Order No. 2 classifying as “highly confidential” the information described in Exhibit A to Annex A of said procedural order (“Protected Information”), and establishing a series of measures to protect such information and to regulate the form of access by Respondent’s counsel and independent experts to that information.
2. At the request of the Respondent, and after inviting additional comments from the Claimant, the Tribunal modified Procedural Order No. 2 through Procedural Order No. 3 of January 14, 2015, in respect to the modalities of access to the Protected Information.
3. In accordance with the established procedural calendar, on July 7, 2015, the Parties referred their respective pending document production requests to the Tribunal for decision. In response to the request for documents in Category No. 18 of Bolivia’s Redfern Schedule (“Information under Category 18”), SAS indicated that some of the information mentioned therein had already been provided to Bolivia and that some could be provided but under the protection of Procedural Order No. 3 and the Protective Order attached thereto (“Protective Order”).
4. On July 21, 2015, the Tribunal issued Procedural Order No. 7 with its decisions on the document production requests. With regard to the Information under Category 18, the Tribunal fixed a deadline for SAS to indicate: “(a) which information of that requested by the Respondent in this Category No. 18 has been already provided to the Respondent and its experts; and (b) in a detailed manner, which of the Requested Documents in this Category No. 18 that have not already been provided to the Respondent or its experts are those that allegedly contain highly confidential information, and the reasons for such confidentiality.”
5. In response, by letter dated July 28, 2015, SAS requested that the information contained in some of the documents corresponding to the Information under Category 18 be classified as “highly confidential” (the “Request”). In addition, it requested that such information be protected from disclosure to Bolivia, COMIBOL or any third party, and that counsel and experts of Bolivia and Bolivia be ordered to abide by the protocol set forth in Procedural Order No. 3 and the Protective Order for their review. For that purpose, SAS enclosed to its letter a table in which it noted (a) the Information under Category 18 that it had already provided to Bolivia, and (b) the Information under Category 18 that it requests be classified as “highly confidential”, and to which it requests that the Protective Order be applied.
6. By letter dated August 1, 2015, the Tribunal invited Bolivia to comment on the Request, by August 8, 2015.

7. Bolivia submitted its letter dated August 8, 2015, opposing the Request. Bolivia opposed both that the Information under Category 18 be classified as “highly confidential”, and that the scope of Procedural Orders Nos. 2 and 3 and of the Protective Order be extended to this information. Additionally, Bolivia referred to situations that occurred during access to the Protected Information, and requested the Tribunal that certain conditions for access be respected, including confirmation that its independent experts are authorized to take “*all notes they deem appropriate –be they verbatim or not– of the protected information.*” [Tribunal’s translation]
8. Without leave of the Tribunal, SAS submitted a letter dated August 10, 2015, noting that Bolivia’s letter of August 8 exceeded the scope of what had been requested by the Tribunal, and that Bolivia was referring to the conditions of the production of highly confidential documents, which had already been decided by the Tribunal in Procedural Orders Nos. 2 and 3. SAS further submitted that such conditions were carefully balanced so as to guarantee the confidentiality of the information while giving access to Bolivia’s outside counsel and experts.

II. The Parties’ Positions

A. The Claimant’s Position

9. The Claimant makes reference to its initial request of October 15, 2014, for the classification of documents as highly confidential, and refers to the explanations therein to justify its position.
10. The Claimant states that the Information under Category 18 consists exclusively of documents identified as “Testing Data” in SAS’s request of October 15, 2014, and in Procedural Orders Nos. 2 and 3, and includes or is similar to the information SAS requested be classified as “highly confidential” on that occasion.
11. Then, invoking the same reasons advanced in its request of October 15, 2014, SAS requests that the Protective Order be extended to the Information under Category 18 that has not yet been provided to Bolivia.
12. The Claimant states that those reasons include that SAS would suffer considerable harm if Bolivia, COMIBOL or any third party were to obtain possession of the information, which was developed by the Claimant after spending years of hard labor and millions of dollars, and which was only made available to RPA after signing a very strict confidentiality agreement. Said information was used to develop and then patent protect a proprietary hydrometallurgical process that was tailored to exploit the Malku Khota mining Project, and while the patent describes the outcome of the testing work, it does not disclose the results of the analysis conducted on the mineral samples extracted from the Project area. Therefore, disclosure of this data would encourage improper use of that information and would deprive SAS of the opportunity to monetize its investment.
13. In addition, in the table in Annex A of its Request, with regard to the last document in the table, “Sulphur Burning Acid Plant Study”, prepared by NORAM Engineering and Constructors Ltd., dated May 3, 2012 (“NORAM Report”), SAS notes that it contains a strict confidentiality agreement because it involves NORAM’s proprietary technology.

14. SAS notes that, in its letter dated December 12, 2014, the Respondent had questioned some aspects of the mechanism for the review of the Protected Information of Procedural Order No. 2, but not the Tribunal's decision to classify the Protected Information as "highly confidential"; a decision that was confirmed by Procedural Order No. 3.
15. SAS further notes that it voluntarily offered to make available to the Respondent's counsel and experts the Information under Category 18 that had not yet been produced, in accordance with the procedure set forth in Procedural Order No. 3 and the Protective Order.

B. The Respondent's Position

16. Bolivia opposes the Claimant's Request and states that, bearing the burden of proof, SAS has not demonstrated that the Information under Category 18 is confidential. According to Bolivia, SAS has already revealed part of this information by publishing the Preliminary Economic Assessments (PEA) of the Project in 2009 and 2011, and Bolivia states that this information would not be sufficient to undermine the patent and put it at risk, as the Claimant alleges.
17. In addition, Bolivia maintains that since confidentiality undertakings were signed, it was not necessary to establish the restrictions on the review of the Protected Information set forth in Procedural Orders Nos. 2 and 3, and the Protective Order. Bolivia states that the Data Room increased the costs and times for Bolivia, and hindered the preparation of its Statement of Defense.
18. *Inter alia*, Bolivia complains of having access to only one full copy of the Protected Information, in hard and electronic copies, which caused that only one person at a time could work with the information. Bolivia further notes that there were delays in installing the necessary software in the computer provided by SAS. Likewise, according to Bolivia, the location of the Data Room and the limitations to the note-taking hindered the review. Bolivia contends that these difficulties created an unjustifiable imbalance between the Parties.
19. Therefore, Bolivia requests that, should the Tribunal classify the Information under Category 18 in question as "highly confidential", certain conditions, called by Bolivia "indispensable minimal conditions", be guaranteed so as to enable Bolivia's counsel and independent experts to carry out an adequate review and analysis of this information, and guarantee Bolivia's due process rights.
20. These conditions are (i) that the Data Room is located in the office of Bolivia's independent experts, (ii) that Bolivia's independent experts have unlimited access to a hard copy and a digital copy (native files) of the information, and that they are allowed to use their own computers to review and analyze the information, with the possibility of copying the information to their computers therefor, and of taking any notes they deem pertinent in their computers, and (iii) that this Data Room be available for Bolivia's independent experts until the end of the hearing. Regarding point (ii), Bolivia complains that the supervisor of the Data Room (appointed by SAS), during the review of the Protected Information, arguing that paragraph 8 of the Protective Order prohibited copying, recording or transcribing the Protected Information, forbade Bolivia's experts from taking notes of the results of various individual tests.
21. Bolivia requests that the aforementioned conditions be likewise extended to the Protected Information under Procedural Orders Nos. 2 and 3, and the Protective Order.

22. Finally, Bolivia submits that the Tribunal should consider the actions of SAS when allocating the costs of the arbitration.

III. The Tribunal's Analysis

23. At the outset, the Tribunal makes reference to Articles 17.1 and 27.3 of the UNCITRAL Rules, to paragraphs 6.10 and 10.5 of Procedural Order No. 1, and to Procedural Orders Nos. 2, 3 and 7, where the Tribunal has already referred to the issue of document production and confidential documents. Likewise, pursuant to paragraph 6.1 of Procedural Order No. 1, the Tribunal makes reference to Articles 3.13 and 9.2.e) of the IBA (International Bar Association) Rules on the Taking of Evidence in International Arbitration of 2010.
24. The Tribunal has carefully reviewed the Parties' communications concerning the designation of certain information as "highly confidential", and the conditions for its review by Bolivia's counsel and experts.
25. Paragraph 6.10 of Procedural Order No. 1 provides, with respect to the moment when protection may be requested on the basis of confidentiality, "[s]hould a Party be requested to produce information it considers 'highly confidential' or it otherwise wishes or is required to use such information ...", the classification of information as highly confidential may be requested. Consequently, nothing prevents either Party from, when requested to produce a document or when in need of use of information it deems confidential, requesting that the information be classified as confidential, providing the reasons why it should be classified as such.
26. The Tribunal had already noted that should a Party request that certain information be classified as highly confidential, it "*shall give [...] the reasons for which it considers the information 'highly confidential'.*" The Tribunal had likewise observed that, in the objections to Category No. 18 of Bolivia's Redfern Schedule with its document requests, SAS had not provided the reason or reasons for the information contained in the requested documents within that Category to be classified as highly confidential. Nor had it specified the relevant commercial or technical reasons for which the documents requested under Category No. 18 should be protected under the Protective Order. SAS merely stated that "*the requested documents contain highly-confidential information*", and merely noted that it was willing to provide the information but under the protection of the Protective Order.
27. The Tribunal requested SAS to indicate which documents under Category No. 18 of Bolivia's Redfern Schedule with its document requests had not been provided to the Respondent, and which of those not-yet-provided documents should be treated as confidential, stating the reasons for their alleged confidentiality. In response, SAS merely alleged that the information that it now requests be classified as confidential is "including or similar" to the information the Tribunal already classified as such. SAS did not submit any argument or evidence in support of that argument.
28. SAS requested the classification of certain information as confidential from the beginning of the arbitration –on the basis that it was information with which it had developed patented information–, and it was SAS itself who prepared the Exhibit containing the information for which it was seeking that special protection. Such Exhibit is incorporated into the Protective Order. SAS confined the list of confidential information to the documents described in that Exhibit. The Tribunal finds now no plausible reason for SAS to have left out, when preparing an exhibit listing the information it considers so sensitive and delicate, what it now expects the

Tribunal to include under such category and protection. Nor does the Tribunal find reasons for SAS not to have explained the relation or link between the documents it now wishes to have protected and those included in Exhibit A of the Protective Order so as to justify that it is equal or similar information. The mere contention that the information is equal or similar is not sufficient.

29. The Tribunal considers that protection can be granted in respect of two documents. First, in respect of the document listed in Category No. 18 (iv) of Bolivia's Redfern Schedule with its document requests, as this document is a compilation of the results contained in the SGS Lakefiled's Final Report, dated March 30, 2011, which is already included in Exhibit A of the Protective Order. Second, in respect of the NORAM Report, included in the last column of Category No. 18 of Bolivia's Redfern Schedule with its document requests, regarding which SAS submits a new and convincing argument: that it is a document protected by a specific confidentiality agreement because it involves a third-party's proprietary technology.
30. With regard to the other documents in Category No. 18 of Bolivia's Redfern Schedule with its document requests that have yet not been provided to Bolivia, the Tribunal will not grant, for the reasons noted above, the requested confidentiality protection, nor will it extend the Protective Order to them.
31. With regard to Bolivia's complaint relating to the access to the Protected Information, the Tribunal notes that from Procedural Order No. 2, it advised that any difficulty that may be encountered in the review of the Protected Information should be communicated to the Tribunal so that corresponding corrective measures may be taken. Bolivia's letter of August 8, 2015, notes that there were disagreements with SAS and alleged difficulties for Bolivia's experts during the review of the Protected Information.
32. Neither the disagreements with SAS nor the difficulties that are now alleged were communicated to the Tribunal at that moment. Bolivia informed the Tribunal of "some" of such disagreements and difficulties only in the aforementioned letter of August 8, when Bolivia had already submitted its Statement of Defense, and during the exchanges concerning the Information under Category 18.
33. Thus, for example, Bolivia should have requested a ruling from the Tribunal on the interpretation of paragraph 8 of the Protective Order when the problem it now raises occurred. However, it did not do so at the time, nor at the time of submitting its Statement of Defense. Moreover, with only one exception –described in the following paragraph–, Bolivia's experts did not make any observations regarding the impossibility or obstacles in the review of the Protected Information. Only when the Tribunal asked for comments on SAS' request to classify information as confidential did Bolivia raise the difficulties it alleges had encountered.
34. The only observation made by one of Bolivia's experts (Dr. Dagdelen) is that he did not have access to the drill hole assay information and logs that were provided in paper form by SGS Laboratories (page 5 of Dr. Dagdelen's report). He does not explain why he did not have access, nor did he inform the Tribunal during his examination that he had any access problems, nor did Bolivia or its counsel request the Tribunal to take any measures, if he was indeed being denied access.
35. Bolivia requests the Tribunal to confirm that its experts can take any notes they deem appropriate –be they verbatim or not– with respect to the Protected Information. The Tribunal concurs with the Respondent's position, and confirms that Bolivia's experts, subject to their

confidentiality obligation, may transcribe the information for themselves and are not limited to merely taking notes, and they may also transcribe that information in their own computers, subject to the Protective Order and the Confidentiality Undertaking they have signed. Likewise, the Tribunal reiterates that the information about any alleged difficulties in the taking of evidence shall be communicated to the Tribunal in a timely manner.

36. Finally, the Tribunal notes that the Parties continue to disagree on the location of the Data Room. The Tribunal recalls that it had left this issue for the Parties to agree, and that in case they are unable to agree, they should inform the Tribunal to decide. If the Parties did not reach an agreement, as Bolivia seems to sustain, the Parties did not inform the Tribunal requesting a decision on the matter. The Tribunal reiterates the Parties obligation to cooperate in good faith in the taking of evidence, and to inform the Tribunal in a timely manner of any difficulties so it can adopt the corresponding measures.

IV. The Tribunal's Decisions

37. In view of the foregoing, the Tribunal decides to:
- a. Accept SAS' Request to classify as "highly confidential" information the NORAM Report, included in the last column of Category No. 18 of Bolivia's Redfern Schedule with its document requests, which shall thus form part of the Protected Information and the corresponding protection under Procedural Orders Nos. 2 and 3, and the Protective Order;
 - b. Confirm that the document indicated in Category No. 18 (iv) of Bolivia's Redfern Schedule with its document requests already formed part of the Protected Information;
 - c. Reject SAS' Request to classify as "highly confidential" information the other documents under Category No. 18 of Bolivia's Redfern Schedule that were not already part of the Protected Information;
 - d. Order SAS to disclose, in accordance with the sub-paragraphs a and b above, the Information under Category 18 that has not yet been disclosed, by **September 3, 2015**. Pursuant to paragraph 5.4 of Procedural Order No. 1, and paragraph 28 of Procedural Order No. 7, the documents produced in accordance with this Procedural Order shall not be copied to the Tribunal and shall not be considered part of the evidentiary record unless and until a Party subsequently submits them to the Tribunal in their future submissions. Similarly, pursuant to paragraph 5.2.7 of Procedural Order No. 1, should a Party fail to produce documents as ordered by the Tribunal, the Tribunal shall draw the inferences it deems appropriate, taking into consideration all relevant circumstances;
 - e. Confirm that Bolivia's experts, in reviewing the Protected Information, may take any notes they deem appropriate of the Protected Information, including transcribing to, and keeping information in their computers for the sole effects of the expert report;
 - f. Reject all other conditions for the review of the Protected Information requested by Bolivia in its letter of August 8, 2015;

- g. Reiterate that any allegations with regard to any problems and differences between the Parties during the review of the Protected Information shall be submitted to the Tribunal in a timely manner, while the review of the information is being conducted and not *a posteriori*; and
- h. Invite the Parties to agree on the location of the Data Room and jointly inform the Tribunal within 15 days, that is, by **September 10, 2015**. Should the Parties fail to reach an agreement, they shall inform, by the same date, of their respective proposals with their justifications, and the Tribunal will decide.

Place of the Arbitration: The Hague, the Netherlands



Dr. Eduardo Zuleta Jaramillo
(Presiding Arbitrator)

On behalf of the Tribunal