

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. 18

Tribunal

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

May 6, 2016

I. Procedural History

1. By letter of May 1, 2016 (the “**Request**”), South American Silver Limited (“**SAS**” or the “**Claimant**”), taking into consideration the Tribunal’s decision in Procedural Order No. 17, requested the Tribunal to adopt a special procedure for the submission of two testimonies. Said procedure would imply:
 - a. the submission by the Claimant of redacted versions of the witness statements with its Rejoinder on Jurisdiction on May 2, 2016, and the simultaneous submission of their unredacted versions to the Tribunal Secretary;
 - b. the adoption of a protective order in the form enclosed to the Request;
 - c. the signature of confidentiality undertakings in the form enclosed to the Request to obtain access to the witness statements in question;
 - d. that at a time designated by the Tribunal, the Tribunal Secretary submit unredacted versions of the witness statements *only* to Bolivia’s external counsel from the Dechert firm, subject to the execution by Dechert of the protective order and the execution by the firm’s lawyers of the confidentiality undertaking not to disclose the identity of the two witnesses or any information that may lead to the discovery of their identities;
 - e. that Dechert provide the unredacted versions to specific members of the legal team of Bolivia at the *Procuraduria* who wish to review them and have executed confidentiality undertakings;
 - f. that at a location mutually agreed upon, which shall not be disclosed to anyone other than counsel for each Party, or *in camera* during the Hearing in a manner that protects the witnesses’ identities, outside counsel from Dechert may cross-examine the witnesses after a short direct examination by Claimant’s counsel. Any other lawyer who signed the undertaking may be permitted to be present for such cross-examination; and
 - g. that the transcript of the examination is redacted to remove any information regarding the witnesses’ identities.
2. By e-mail of May 2, 2016, SAS confirmed that the two witnesses in question agreed with the protocol proposed in its Request.
3. By e-mail of May 2, 2016, the Tribunal granted the Plurinational State of Bolivia (“**Bolivia**” or the “**Respondent**”) opportunity to submit its comments on the Request until May 5, 2016.
4. By letter of May 3, 2016 (the “**Response**”), Bolivia requested the Tribunal to reject the Request.

II. Position of the Parties

Claimant’s Position

5. The Claimant, albeit noting that it respects the Tribunal’s decision in Procedural Order No. 17, affirms that the procedure it proposes in its Request addresses the concerns of Bolivia and those expressed by the Tribunal in that order, while it recognizes the fundamental right of SAS to be heard.¹

¹ Request, p. 1.

6. SAS affirms that it submitted the request that resulted in the Tribunal's decision in Procedural Order No. 17 at the soonest possible opportunity, upon learning only that week that the witnesses were fearful for their personal safety as well as the safety of their families and property if Andrés Chajmi or his henchmen learned their identities.²
7. The Claimant explains next that as soon as it located these witnesses and confirmed their agreement to provide their testimonies, it met with them in order to discuss their views on Mr. Chajmi's witness statement.³ According to SAS, these meetings were very trying given the remote areas in which these witnesses live and their reluctance to meet.⁴ Finally, the witnesses agreed to provide their testimonies but on the condition that their identities be protected.⁵ The Claimant affirms that one of the witnesses informed that he/she was attacked by Mr. Chajmi's supporters, and both witnesses expressed their overwhelming fear of reprisals.⁶
8. In addition, SAS affirms that its initial request was submitted on the very same day it met with the witnesses for the first time, *i.e.*, April 27, 2016, as it was at that meeting that the witnesses asked that their identities be protected. SAS confirms that at no time it sought to delay its request.⁷
9. According to SAS, its original request took into account the witnesses' safety concerns trying to also minimize any potential inequality in the process. Given that the Tribunal rejected such proposal, the witnesses have agreed to the procedure now proposed by SAS in its Request.⁸
10. Moreover, with reference to Article 17(1) of the 2010 UNCITRAL Arbitration Rules (the "**UNCITRAL Rules**") and Article 9(4) of the IBA Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules**"), SAS argues that the circumstances of the case warrant that the Tribunal order the confidentiality protection requested and that SAS should not be deprived of the right to submit relevant evidence because one of Bolivia's witnesses poses a security threat to the safety of SAS' witnesses.⁹
11. SAS affirms that the proposed procedure gives Bolivia adequate opportunity to cross-examine the witnesses while protecting their identities. SAS adds that the proposed procedure is not unlike that followed in many jurisdictions for the questioning of minors or protected witnesses.¹⁰

Respondent's Position

12. Bolivia affirms that the Request is a clear disregard for Procedural Order No. 17 and that it refers to the same questions already decided by the Tribunal in that procedural order. According to Bolivia, this, and the fact that SAS does not provide any new fact or evidence that justify that the Tribunal revise its decision, would suffice for the Tribunal to reject the Request.¹¹
13. Moreover, Bolivia adds three additional reasons for the Tribunal to reject the Request.¹²

² Request, p. 2.

³ Request, p. 2.

⁴ Request, p. 2.

⁵ Request, p. 2.

⁶ Request, p. 2.

⁷ Request, p. 2.

⁸ Request, pp. 2-3; SAS' e-mail of May 2, 2016.

⁹ Request, p. 3.

¹⁰ Request, p. 3.

¹¹ Bolivia's letter of May 3, 2016, p. 1.

¹² Bolivia's letter of May 3, 2016, pp. 2-3.

- a. considering the time already passed in this arbitration, Bolivia argues that it is difficult to believe that SAS met the witnesses for the first time on April 27, 2016, and in any case, any witness statement SAS submits shall be in conformity with Procedural Orders Nos. 15 and 16; and, even if it was true that SAS' first meeting with the witnesses took place on April 27, 2016, Bolivia argues that this would only prove SAS' negligence, which does not justify the Tribunal's reconsideration of Procedural Order No. 17;
 - b. SAS has not provided evidence demonstrating that Mr. Chajmi or Bolivia represent a threat to the security of SAS' witnesses. In any event, Bolivia denies SAS' accusations regarding Mr. Chajmi; and
 - c. the confidentiality protocol proposed by SAS violates Bolivia's due process.
14. The Respondent, invoking Article 17 of the UNCITRAL Rules, affirms that accepting the conditions proposed by SAS would leave Bolivia in an unequal position to exercise its right of defense. According to Bolivia, due process requires that Bolivia can investigate the facts argued by SAS and that Bolivia's witnesses can respond during the Hearing to SAS' affirmations.¹³
 15. Bolivia adds that the protocol proposed by SAS would prevent it from investigating the facts referred to in the new witnesses' statements as Bolivia would not be able to discuss their content with its witnesses who have direct and personal knowledge of the facts. According to Bolivia, this would result in clear inequality and notes that while SAS' new witnesses have had access to Mr. Chajmi's statement and were able to respond to it, Bolivia would not be able to discuss the content of the new witness statements with Mr. Chajmi, which is unacceptable. Furthermore, while SAS' witnesses were able to respond to Bolivia's testimonies, the Respondent's witnesses would be prevented from responding to SAS' testimonies during the Hearing.¹⁴
 16. In addition, Bolivia opposes any suggestion that the new witnesses may not testify at the Hearing.¹⁵
 17. Finally, Bolivia argues that SAS cannot require Bolivia and its lawyers to take all necessary steps to protect the witnesses in the event their identities become known to Mr. Chajmi or anyone affiliated with him, and notes that any concern of the witnesses about their safety shall be brought to the knowledge of the relevant authorities in accordance with the law.¹⁶

III. Tribunal's Analysis

18. Pursuant to Article 17(1) of the UNCITRAL Rules, applicable to this Arbitration, the Tribunal has the authority to conduct the arbitration in such manner as it considers appropriate, provided that the Parties are treated with equality and that at an appropriate stage of the proceedings each Party is given a reasonable opportunity of presenting its case.
19. On its part, the IBA Rules, which serve as additional guideline to the Tribunal, provide that the Tribunal has the power to make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.

¹³ Bolivia's letter of May 3, 2016, p. 3.

¹⁴ Bolivia's letter of May 3, 2016, pp. 3-4.

¹⁵ Bolivia's letter of May 3, 2016, p. 4.

¹⁶ Bolivia's letter of May 3, 2016, p. 4.

20. Based on the foregoing, the Tribunal has reviewed the submissions of the Parties concerning SAS' Request dated May 1, 2016, relating to the procedure to submit and examine two witnesses whose witness statements were submitted in redacted form with its Rejoinder on Jurisdiction.
21. At first instance, the Tribunal finds no justification for SAS' delay in submitting the request for protection of the two witnesses. In fact, the Claimant submitted its first request merely five (5) days before the expiration of the time-period fixed for the submission of its Rejoinder on Jurisdiction, without providing any explanation on the reasons for not submitting that request before.
22. By Procedural Order No. 17, the Tribunal rejected the protection request submitted by the Claimant based on the reasons expressed therein.
23. The Claimant, in its letter submitted on May 1, 2016 -one day before the submission of its Rejoinder on Jurisdiction- insists on its protection request, invoking the reasons it had not to have submitted the request earlier and modifying the terms of the protection requested.
24. Beyond the fact that the Tribunal finds no sufficient justification for the submission of a protocol not discussed with the Respondent or the Tribunal one day before the expiration of the time-period fixed for the submission of the Rejoinder on Jurisdiction, the Tribunal does not agree with SAS' assertion that the protocol and the proposed protective order address the concerns of the Tribunal and guarantee Bolivia's right to present its case.
25. While the protocol and the protective order attempt to attenuate the conditions originally proposed by SAS and seem to follow the text of the Protective Order adopted by the Tribunal by Procedural Order No. 14, the Tribunal considers that, different from that Protective Order, the terms and conditions of the protective order proposed by SAS do not guarantee the right to due process.
26. In fact, under the protocol and the protective order proposed by SAS, the Tribunal would receive witness statements that, according to the Claimant, respond to Mr. Chajmi's statement. Nonetheless, Bolivia would not be able to, among others, (a) inform Mr. Chajmi about who are contesting his testimony, or in which terms; (b) share the witness statements with other witnesses of Bolivia who may have knowledge of the facts; (c) obtain information from Mr. Chajmi to cross-examine the witnesses; or (d) make inquiries on the information provided by the witnesses, which would imply that Bolivia would not have the possibility of rebutting these testimonies. This situation would give unfair advantage to SAS in this Arbitration, which would undermine Bolivia's right to due process.
27. Moreover, the proposed protocol and protective order would only enable the Tribunal to examine the two witnesses on the alleged acts of Mr. Chajmi, but would prevent Mr. Chajmi from commenting on the facts narrated by the two witnesses, which, according to the Claimant, contradict Mr. Chajmi.
28. In the Tribunal's view, the requested protocol and protective order would lead to inequality between the Parties on the possibility of presenting their case, would be disproportionate compared to other protective measures adopted in this Arbitration, and would undermine the Respondent's right to due process. Therefore the Tribunal finds no justification to adopt the procedure requested by SAS for the submission of the said testimonies and for the examination of the witnesses.

IV. Tribunal's Decision

29. For the foregoing reasons, the Arbitral Tribunal decides to reject the Request.

Place of the Arbitration: The Hague, the Netherlands



Dr. Eduardo Zuleta Jaramillo
(Presiding Arbitrator)

On behalf of the Tribunal