

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. 2**

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*Tribunal*

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

December 1, 2014

## I. INTRODUCTION

1. On October 15, 2014, Claimant filed an application (the “Application”) for the Tribunal to classify as “highly confidential” certain information described in Exhibit A to Annex A of this Procedural Order (the “Information”), relied upon by the Claimant’s expert Roscoe Postle and Associates, Inc. (“RPA”) in preparing its expert report dated September 16, 2014 (“RPA Report”).
2. On October 16, 2014, the Tribunal invited Respondent to submit comments as it deemed appropriate in regards to the Application by October 24, 2014.
3. On October 24, 2014, Respondent replied opposing the Application and requesting the Tribunal to reject it.

## II. POSITION OF THE PARTIES

### a. Summary of Claimant’s Position

#### i. Claimant’s position on the Application

4. The Application concerns two categories of information: (i) detailed drilling data for the Malku Khota mining project (the “Project”) and the detailed resource model developed based on this data (the drilling data and the resource model referred to collectively as the “Drilling Data”); and (ii) the metallurgical testing data leading to the development of a patented hydrometallurgical process for the recovery of silver, indium, gallium, gold, copper, lead and zinc (the “Testing Data”).<sup>1</sup>
5. According to Claimant, it would suffer significant harm if the Bolivian Government, Corporación Minera de Bolivia (“COMIBOL”) or any third-party were to obtain possession of the Information, which was developed by Claimant after spending years of hard labor and millions of dollars,<sup>2</sup> and which was only made available to RPA after signing a “*very strict confidentiality agreement*”.<sup>3</sup> Claimant alleges that Bolivia has attempted to improperly obtain the Information both before and after the alleged expropriation.<sup>4</sup>
6. Regarding the Drilling Data (which according to Claimant includes location, depth and angles of drilling holes), Claimant submits that this information would allow any party who possesses it to develop the Project during the pendency of this arbitration. In turn, making the Drilling Data available to Respondent would make implementation of a potential restitution award more difficult, as it would enable Respondent to entrench itself in the Project and would also make the Project less appealing to any potential buyers or joint venture partners.<sup>5</sup>
7. With respect to the Testing Data, Claimant argues that this information was used to develop and then patent protect a “*proprietary hydrometallurgical process*” that was tailored to exploit the

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<sup>1</sup> Claimant’s application, p. 2.

<sup>2</sup> Claimant’s application, p. 2.

<sup>3</sup> Declaration of Ralph G. Fitch, dated October 14, 2014 (“Fitch Statement”), para. 3.

<sup>4</sup> Claimant’s application, para. 2; Fitch Statement, paras. 3, 6.

<sup>5</sup> Claimant’s application, p. 2; Fitch Statement, para. 8.

Project.<sup>6</sup> Claimant submits that the patent itself describes the outcome of this testing work, but does not disclose the results of the analysis conducted on the mineral samples extracted from the Project area (*i.e.*, the Testing Data).<sup>7</sup> In Claimant's view, disclosing this data would "*encourage improper use of that information to attempt to circumvent and possibly undermine the patent protecting this invention*",<sup>8</sup> and would also deprive the Claimant of the opportunity to monetize its investment by negatively impacting its licensing value in the marketplace.<sup>9</sup>

**ii. Claimant's position on the measures of protection**

8. Claimant understands that Bolivia will elect to engage an expert to comment upon the RPA Report, and will want the expert to review the Information.<sup>10</sup> On the basis of this assumption, Claimant has submitted a draft protective order "*which provides for an independent expert retained by Bolivia to review the information in a manner that preserves its confidentiality.*"<sup>11</sup> This draft protective order outlines a protocol for the production of the Information, which comprises the following steps:
- a) *The expert retained by Bolivia must confirm his or her independence from the Bolivian government, its entities and instrumentalities, and companies owned or controlled by Bolivia including, but not limited to, COMIBOL and execute an undertaking confirming he or she will abide by the terms of the protective order;*
  - b) *South American Silver would then grant access to one full hard-copy set of the highly confidential information at issue to the expert retained by Bolivia for the sole purpose of commenting on the expert report submitted by RPA in this arbitration;*
  - c) *South American Silver would make the information available to the expert retained by Bolivia at a location designated by South American Silver in Denver, Colorado, Santiago, Chile or another location, outside of Bolivia, as agreed upon by the parties in consultation with the Tribunal, between 9:00 and 17:00 local time, Monday to Friday;*
  - d) *The expert retained by Bolivia would be allowed to review the highly confidential information at issue and take notes, but would not be allowed to remove, copy, photocopy, photograph, record, or transcribe that information in any manner whatsoever;*
  - e) *Representatives of the Arbitral Tribunal and/or South American Silver would be present before, during and after the review of the highly confidential informational at issue by the expert retained by Bolivia;*
  - f) *The information could be used solely for purposes related to this arbitration and, in particular, to comment on the RPA Report;*
  - g) *Bolivia will not pursue any efforts to obtain this information by any other means whatsoever, including through court or administrative actions; and*

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<sup>6</sup> Fitch Statement, para. 10.

<sup>7</sup> Fitch Statement, para. 9.

<sup>8</sup> Claimant's application, p. 2.

<sup>9</sup> Claimant's application, pp. 2-3; Fitch Statement, para. 11.

<sup>10</sup> Claimant's application, p. 3.

<sup>11</sup> Claimant's application, p. 3, referring to Claimant's application, Exhibit C, Protective Order Governing the Confidentiality of Certain Information.

h) *Counsel from Bolivia shall not be barred or restricted in any way from reviewing any expert report prepared by Bolivia's expert and providing advice to Bolivia in connection therewith, but counsel shall not seek to obtain access to the referenced confidential information.*

9. The draft protective order also provides for the Parties to submit any dispute arising from it to the Tribunal during the pendency of this arbitration, and to a sole arbitrator (to be appointed by the Secretary-General of the PCA) once this arbitration has concluded.<sup>12</sup>

## **b. Summary of Respondent's position**

### ***i. Respondent's position on the Application***

10. Respondent emphasizes that the Claimant has not fulfilled its burden to prove both the "highly confidential" nature of the Information and the need to protect it.<sup>13</sup> Bolivia notes that the basis for the Claimant's arguments is nothing but its bare assertions and, namely, those of its CEO, Mr. Ralph Fitch, which should suffice for the Tribunal to dismiss the Application.<sup>14</sup>
11. With respect to the Drilling Data, Respondent contends that Claimant's position is baseless as a matter of law. In the Respondent's view, Claimant purports to prevent Respondent from exploiting its natural resources, and seeks to make an argument on an alleged unjust enrichment prevail over Respondent's right to due process.<sup>15</sup> If any such unjust enrichment was ever to exist, Respondent submits, it could be easily remedied by means of an award on damages.<sup>16</sup>
12. As to the Claimant's application to classify the Testing Data as confidential, Respondent first characterizes the Claimant's argument as "circular" and "unreasonable" (Tribunal's translation)<sup>17</sup> because it holds that making available these data "*could severely undermine the efficacy of the patent [because] it would possibly undermine the patent.*" (Tribunal's translation)<sup>18</sup> Moreover, the Respondent notes that the Claimant has submitted no evidence regarding the so-called "patented process", and has put forward no argument as to why Bolivia would be interested in making use of such process.

### ***ii. Respondent's position on the measures of protection***

13. Respondent considers the Claimant's stance on confidentiality as a pretext to prevent Bolivia from presenting its case after due assessment of the evidence submitted by Claimant,<sup>19</sup> which is contrary to the applicable *lex arbitri*.<sup>20</sup>

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<sup>12</sup> Claimant's application, Exhibit C, Protective Order Governing the Confidentiality of Certain Information, para. 10.

<sup>13</sup> Respondent's letter dated October 24, 2014 (the "Respondent's comments"), p. 2 ("*no existe base legal o fáctica alguna para considerar los datos metalúrgicos y datos de perforación ... como 'altamente confidenciales' ... no aporta ninguna prueba*").

<sup>14</sup> Respondent's comments, p. 2.

<sup>15</sup> Respondent's comments, p. 2.

<sup>16</sup> Respondent's comments, pp. 2-3 ("*... éste podría ser reparado mediante una condena pecuniaria, pero en ningún caso impidiendo a Bolivia defenderse*").

<sup>17</sup> Respondent's comments, p. 3 ("*este argumento es circular ... carece de sentido*").

<sup>18</sup> Respondent's comments, p. 3, referring to Fitch Statement, para. 10 (literal quote: "*socavarían gravemente la eficacia de la patente [porque] socavaría la patente*").

<sup>19</sup> Respondent's comments, p. 2 ("*SAS pretende, simple y llanamente, impedir a Bolivia ejercer su derecho de defensa [ya que] [s]in el acceso a los datos con los que SAS pretende sustentar su reclamo, a través de RPA, Bolivia no podrá controvertir las pruebas invocadas por SAS y se vera impedido de presentar sus argumentos en violación de las garantías mínimas del debido proceso*").

14. Respondent contends that, even if the Information were to be considered confidential, such hurdle would be more easily overcome through measures precluding Respondent from disclosing such information to third parties, and not by undermining the Respondent's right to present its case.<sup>21</sup>
15. Furthermore, should the Tribunal find that the Information is to be classified as "highly confidential", Respondent argues that imposing the conditions set forth in the Claimant's draft order would be abusive.<sup>22</sup> If adopted, the terms of the draft protective order would not allow Bolivia's representatives to access the Information, as this would only be made available to the Respondent's expert, in hard copy.<sup>23</sup> Respondent emphasizes that, under these conditions, Bolivia would have to prepare its defense with limited access to approximately 60 of the more than 1,800 pages of technical documents annexed to the RPA Report, and only through an expert with limited access to this essential Information.<sup>24</sup>

### III. CONSIDERATIONS OF THE TRIBUNAL

16. The Application is made pursuant to Section 6.10 of Procedural Order No. 1, which reads:

*Should a Party be requested to produce information it considers "highly confidential" or it otherwise wishes or is required to use such information in the proceeding (including but not limited to information to be supplied to an expert appointed by the Tribunal), that Party shall make an application to have that information classified as "highly confidential" by notice to the Tribunal, with a copy to the other Party. Without disclosing the information, the Party shall give in the notice the reasons for which it considers the information "highly confidential". The Tribunal shall determine whether the information is to be classified as "highly confidential" and should the Tribunal so determine, the Tribunal shall order any special measures of protection in the proceeding as it considers necessary and may decide the conditions under which, and the persons to whom, the highly confidential information may in part or in whole be disclosed, and shall require any person to whom the highly confidential information is to be disclosed to sign a confidentiality undertaking that the Tribunal considers as appropriate.*

17. Section 10 of Procedural Order No. 1 regarding confidentiality/transparency of this arbitration reads, in relevant part:

*10.5 All other information exchanged or submitted in this proceeding shall be confidential and not disclosed to any third party, except as authorized by the Tribunal or as necessary for a Party to pursue or defend a legal right (including in related proceedings between the same or related parties).*

18. In turn, Article 17(1) of the UNCITRAL Arbitration Rules (as revised in 2010) (the "UNCITRAL Rules") provides that:

*The arbitral tribunal may 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. The arbitral*

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<sup>20</sup> Respondent's comments, p. 4. The Respondent refers to Article 1039 of the Dutch Arbitration Act, which reads: "the parties shall be treated with equality. The arbitral tribunal shall give each party an opportunity to substantiate his claims and to present its case."

<sup>21</sup> Respondent's comments, p. 3 ("...no pasa por impedir a la contraparte ejercer su derecho de defensa, sino por adoptar salvaguardas que impidan que la información presentada en el arbitraje sea comunicada a terceros...").

<sup>22</sup> Respondent's comments, p. 3.

<sup>23</sup> Respondent's comments, p. 3.

<sup>24</sup> Respondent's comments, pp. 3-4.

*tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.*

19. Section 6.1 of Procedural Order No. 1 provides that the Tribunal may use as a guideline the IBA Rules on the Taking of Evidence in International Arbitration 2010 (the "IBA Rules"). Article 3(13) of the IBA Rules provides as follows:

*Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.*

20. Article 9(2)(e) of the IBA Rules provides that:

*The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons ... e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling.*

21. Section 6.10 of Procedural Order No. 1 provides that an application to treat information as highly confidential must meet the following requirements: (a) that the Party filing the application considers the information as "highly confidential"; (b) that the information is used in the proceedings; (c) that a Party makes the application by notice to the Tribunal, with a copy to the other Party; and (d) that, without disclosing the information, the Party gives in the notice the reasons for which it considers the information "highly confidential". In addition, Section 6.10 grants the Tribunal ample discretion to determine whether the information is to be classified as "highly confidential" without requiring a specific or heightened standard of proof.
22. The Application meets the aforementioned requirements. Claimant considers the Information as highly confidential; the Information has been used and will likely be used further in the proceedings; and Claimant filed the Application with the Tribunal with copy to Respondent.
23. In connection with the reasons given by Claimant to consider the Information as "highly confidential", which Respondent challenges and deems insufficient, the Tribunal considers that those reasons are sufficient and that pursuant to Procedural Order No. 1, there is no specific or heightened standard of proof to determine such sufficiency. First, it is clear that it is information in the possession of Claimant to which Respondent does not have access. Second, the Information is not in the public domain. Third, the Information may have industrial significance and may provide Claimant a competitive advantage in that it contains the data and know-how for the development of the Project. Last, but not least, Claimant treats the Information as confidential.<sup>25</sup>

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<sup>25</sup> A number of arbitration rules and regulations have attempted to identify the features that certain information must display to be worthy of the protection granted by confidentiality. For example, Article 52 (Disclosure of Trade Secrets and Other Confidential Information) of the WIPO Arbitration Rules may provide a useful reference (emphasis added):

*(a) For the purposes of this Article, confidential information shall mean any information, regardless of the medium in which it is expressed, which is: (i) in the possession of a party; (ii) not accessible to the public; (iii) of commercial, financial or industrial significance; and (iv) treated as confidential by the party possessing it.*

*(b) A party invoking the confidentiality of any information it wishes or is required to submit in the arbitration, including to an expert appointed by the Tribunal, shall make an application to have the information classified as confidential by notice to the Tribunal, with a copy to the other party. Without disclosing the substance of the information, the party shall give in the notice the reasons for which it considers the information confidential.*

24. Even if Respondent is right when stating that the only evidence put forward by Claimant when advocating the sensitivity of this Information is Claimant's own statements, the nature of the Information itself, as described by Claimant, allows the Tribunal to conclude, after reasonable assessment, that it is worthy of some form of confidentiality protection. Moreover, as regards to the Testing Data, even though patents belong to the public domain, they do not disclose the specifics of the research that led to the birth of the invention. These areas are a potential source of trade secrets and, therefore, it would be reasonable to conclude they should also enjoy protection for the same reasons described above.
25. It seems to be a well-established principle that the arbitration should not be used by the parties to gain unauthorized access to confidential information, or access to trade secrets, and that such secrets may be protected by means of confidentiality measures. Such confidential information may include, e.g., research and development data, or information on sources of supply.<sup>26</sup>
26. Under Procedural Order No. 1, the Tribunal enjoys wide discretion in determining "*any special measures of [confidentiality] protection in the proceeding as it considers necessary*". Nonetheless, the importance of the confidentiality of the Information and the right of Respondent

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*(c) The Tribunal shall determine whether the information is to be classified as confidential and of such a nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality. If the Tribunal so determines, it shall decide under which conditions and to whom the confidential information may in part or in whole be disclosed and shall require any person to whom the confidential information is to be disclosed to sign an appropriate confidentiality undertaking.*

*(d) In exceptional circumstances, in lieu of itself determining whether the information is to be classified as confidential and of such a nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality, the Tribunal may, at the request of a party or on its own motion and after consultation with the parties, designate a confidentiality advisor who will determine whether the information is to be so classified, and, if so, decide under which conditions and to whom it may in part or in whole be disclosed. Any such confidentiality advisor shall be required to sign an appropriate confidentiality undertaking.*

*(e) The Tribunal may also, at the request of a party or on its own motion, appoint the confidentiality advisor as an expert in accordance with Article 55 in order to report to it, on the basis of the confidential information, on specific issues designated by the Tribunal without disclosing the confidential information either to the party from whom the confidential information does not originate or to the Tribunal.*

According to Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement"), an outstanding element of trade secrets is also the fact that they provide some sort of economic or competitive advantage to the person or business keeping them and any such advantage arises directly from not disclosing these secrets.

A "trade secret", according to the Black's Law Dictionary is:

*1. A formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors; information –including a formula, pattern, compilation, program, device, method, technique, or process- that (1) derives independent economic value, actual or potential, from not being generally known or readily ascertainable by others who can obtain economic value from its disclosure or use, and (2) is the subject of reasonable efforts, under the circumstance, to maintain its secrecy.*

*2. Information that (1) is not generally known or ascertainable, (2) provides a competitive advantage, (3) has been developed at the plaintiff's expense and is used continuously in the plaintiff's business, and (4) is the subject of the plaintiff's intent to keep it confidential.*

<sup>26</sup> Tobias Zuberbühler, Dieter Hofmann, Christian Oetiker, Thomas Rohner; *IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration*, Schulthess, 2012, re Article 9, p.180, para. 43, which reads: "Article 9(2)(e) [of the IBA Rules] restates the generally acknowledged principle that parties should not gain unauthorized access to trade secrets. Such confidential information includes for example: research & development information; recipes; information subject to banking secrecy; price calculations; sources of supply; distribution channels; agreement with suppliers and customers" (emphasis in the original text). See also 2014 ICC Arbitration Rules, Article 21.3 ("Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information"); and 2014 ICDR Arbitration Rules, Article 21.5 ("The tribunal may condition any exchange of information subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality").

to present its case should be weighed in determining the level of confidentiality to be established.<sup>27</sup>

27. In balancing these two interests, the Tribunal considers that the draft protective order presented by Claimant imposes excessive restrictions and burdens which could limit the adequate preparation of the case by Respondent. Such excessive restrictions and burdens refer, on the one hand, to the individuals to whom the Information would be made available, and, on the other, to the location, timeframe and form of access to the Information.
28. If Respondent decides to appoint an expert to comment on the RPA Report, such expert will not be representing or defending the interests of Respondent in this case.<sup>28</sup> The Respondent's right to due process must guarantee that its counsel has access to, and is allowed to analyze all evidence to be presented before the Tribunal. Otherwise, the Respondent's right to "substantiate its claims" or put forward its case could be undermined. Therefore in addition to the experts, the Information has to be made available to Respondent's counsel, subject to the terms of this Procedural Order.
29. As to the location, timeframe and form of access to the Information, the Tribunal will modulate the requirements so as to facilitate the work of the expert, and therefore the defense by counsel.
30. In any event, the Information can only be used by Respondent's expert and counsel in this arbitration and Respondent shall refrain from trying to access this information itself or from disclosing it should it ever become available to it.
31. Pursuant to Article 29 of the UNCITRAL Rules and Section 8.4 of Procedural Order No. 1, the Tribunal may, if it considers appropriate, appoint one or more experts to review the Information and to report to the Tribunal on issues determined by the Tribunal. The experts appointed by the Tribunal shall comply with the duties of confidentiality determined by the Tribunal in due course.
32. With respect to the post-arbitration dispute resolution mechanism set forth in paragraph 10 of the draft protective order submitted by Claimant, the Tribunal considers that the Parties may agree to the arbitration if they consider it appropriate, however, in the absence of the Parties' agreement, the Tribunal cannot order the adoption of such a mechanism which would go beyond its mandate.

#### **IV. DECISION OF THE TRIBUNAL**

33. Based on the above considerations, the Tribunal, pursuant to the UNCITRAL Rules and Section 6.10 of Procedural Order No. 1, classifies as "highly confidential" the Information, *i.e.*, (i) the detailed drilling data for the Malku Khota mining project and the detailed resource model developed based on this data; and (ii) the metallurgical testing data leading to the development of a patented hydrometallurgical process for the recovery of silver, indium, gallium, gold, copper, lead and zinc,<sup>29</sup> described in Exhibit A to Annex A of this Procedural Order.
34. Should Respondent appoint an expert to comment on the RPA Report and the expert requires access to the Information, such access shall be subject to the terms of the Protective Order

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<sup>27</sup> See Zuberbühler *et al.*, *Op. Cit.*, p. 180, fn. 795.

<sup>28</sup> Claimant itself acknowledges that any such expert would not be acting as an advocate for the Respondent when suggesting in its draft protective order that the Respondent's expert must "*confirm his or her independence from the Bolivian government* [and related entities]."

<sup>29</sup> Claimant's application, p. 2.



attached hereto and made part of this Procedural Order, which protective order contemplates the following steps:

- a) The expert retained by Respondent must confirm his or her independence from the Bolivian government, its entities and instrumentalities, and companies owned or controlled by Bolivia, including, but not limited to, COMIBOL, and execute an undertaking confirming he or she will abide by the terms of this Procedural Order and the attached Protective Order;
- b) Counsel for Respondent must confirm that, with the exception of its representation as outside counsel of Bolivia, he or she is independent from the Bolivian government, its entities and instrumentalities, and companies owned or controlled by Bolivia, including, but not limited to, COMIBOL, and execute an undertaking confirming that he or she will abide by the terms of this Procedural Order and the attached Protective Order;
- c) Counsel for Respondent shall inform the Tribunal of the name(s) of the person(s) who will review the Information, each of which shall execute an undertaking confirming that they will abide by the terms of this Procedural Order and the attached Protective Order. Respondent must submit to the Tribunal and to Claimant all signed Confidentiality Undertakings;
- d) Claimant will then grant access to one full hard-copy set of the Information to counsel for Respondent and to the expert retained by Respondent for the sole purpose of commenting on the RPA Report in this arbitration;
- e) Claimant will grant the above-mentioned access to counsel for Respondent and to the expert retained by Respondent at a location outside of Bolivia, as agreed upon by the Parties in consultation with the Tribunal, or in the absence of an agreement between the Parties, at a location outside of Bolivia as determined by the Tribunal. The Information shall be made available for a period of time and during hours to be agreed upon by the Parties, or in the absence of such agreement, during the period of time and hours determined by the Tribunal, which shall be those that the Tribunal considers as reasonable to guarantee the Parties' right to due process;
- f) Counsel for Respondent and the expert retained by Respondent will be allowed to review the Information and take notes, but will not be allowed to remove, copy, photocopy, photograph, record, or transcribe that Information in any manner whatsoever;
- g) Claimant's representatives would be present during the review of the Information by counsel for Respondent and the expert retained by Respondent;
- h) In the event that, during the review referred to in the preceding paragraphs: (a) any situation which may lead to or be considered as a breach of this Procedural Order and the attached Protective Order occurs; or (b) any situation that may impede Respondent's expert to perform its work adequately occurs, the Party that considers itself affected shall promptly inform the Tribunal by duly substantiated communication. The Tribunal shall take the measures it considers appropriate taking into consideration the circumstances of the case;
- i) The Information shall be used solely for purposes related to this arbitration and, in particular, to comment on the RPA Report;
- j) Claimant shall guarantee the availability of the Information for review by the Tribunal or by the expert(s) appointed by it during the pendency of this arbitration. The Information will be reviewed by the Tribunal or said experts appointed by the Tribunal at any moment that the Tribunal so decides; and

- k) Respondent shall not pursue any efforts to obtain the Information by any other means whatsoever, including through court or administrative actions.
35. Nothing in the above Procedural Order shall be taken as in any way modifying the burden or standard of proof in these arbitration proceedings or precluding any subsequent application by a Party or determination by the Tribunal regarding the admissibility, relevance, materiality or weight of the relevant information as evidence in this arbitration in accordance with Article 27(4) of the UNCITRAL Rules.

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



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Dr. Eduardo Zuleta Jaramillo  
(Presiding Arbitrator)

On behalf of the Tribunal

## ANNEX A

### **PROTECTIVE ORDER**

**WHEREAS** pursuant to Section 6.10 of Procedural Order No. 1, South American Silver Limited (“South American Silver” or “Claimant”) submitted on October 15, 2014, an application for the Arbitral Tribunal to classify the information described in Exhibit A to Claimant’s application as “highly confidential”, information which was relied upon by Claimant’s expert Roscoe Postle and Associates, Inc. (“RPA”) in preparing their expert report dated September 16, 2014 (“RPA Report”);

**WHEREAS** in Procedural Order No. 2, the Tribunal classified as “highly confidential” the information described in Exhibit A of this Protective Order (the “Protected Information”); and

**WHEREAS** the experts to be potentially retained by the Plurinational State of Bolivia (“Bolivia” or “Respondent”) and Respondent’s counsel may need to access the Protected Information to comment on the RPA Report in this arbitration;

**NOW, THEREFORE, THE TRIBUNAL HEREBY ORDERS AND THE PARTIES HEREBY AGREE**, through their respective counsel, that in the event Respondent appoints and retains an expert (“Respondent’s Expert”) to comment on the RPA Report and Respondent’s Expert requires access to the Protected Information, such access shall be subject to the terms and conditions set forth in this protective order (the “Protective Order”):

1. Subject to the terms and conditions hereunder, the Protected Information will not be disclosed by Claimant to the Bolivian government, its entities and instrumentalities, and companies owned or controlled by Bolivia including, but not limited to, Corporación Minera de Bolivia (“COMIBOL”), and will only be disclosed to counsel for the Respondent and to Respondent’s Expert under the limited terms ordered by the Arbitral Tribunal in Procedural Order No. 2.
2. Prior to receiving the Protected Information, Respondent’s Expert must confirm his or her independence from the Bolivian government, its entities and instrumentalities, and companies owned or controlled by Respondent including, but not limited to, COMIBOL, and execute a confidentiality undertaking in the form of Exhibit B hereto (“Confidentiality Undertaking”), confirming he or she will abide by the terms of this Protective Order and of Procedural Order No. 2.
3. Prior to receiving the Protected Information, counsel for the Respondent must confirm that, with the exception of its representation as outside counsel of Bolivia, he or she is independent from the Bolivian government, its entities and instrumentalities, and companies owned or controlled by Respondent including, but not limited to, COMIBOL, and execute a Confidentiality Undertaking confirming that he or she will abide by the terms of this Protective Order and of Procedural Order No. 2.
4. Counsel for the Respondent shall inform the Tribunal the name(s) of the person(s) who will review

the Protected Information, each of which shall execute a Confidentiality Undertaking. Respondent must submit to the Tribunal and to Claimant all signed Confidentiality Undertakings.

5. Having received the signed Confidentiality Undertaking from counsel for the Respondent and from Respondent's Expert, South American Silver will grant access to one full hard-copy set of the Protected Information to counsel for the Respondent and to Respondent's Expert for the sole purpose of commenting on the RPA Report in this arbitration.
6. The Claimant will make the Protected Information available to counsel for the Respondent and to Respondent's Expert at a location outside of Bolivia as agreed upon by the Parties in consultation with the Tribunal, or in the absence of an agreement between the Parties, at a location outside of Bolivia as determined by the Tribunal. The Information shall be made available for a period of time and during hours to be agreed upon by the Parties or, in the absence of such agreement, during the period of time and hours determined by the Tribunal, which shall be those that the Tribunal considers as reasonable to guarantee the Parties' right to due process.
7. Counsel for the Respondent and Respondent's Expert will be allowed to review the Protected Information and take notes, but will not be allowed to remove, copy, photocopy, photograph, record, or transcribe the Protected Information in any manner whatsoever. Counsel for the Respondent and Respondent's Expert may retain custody of such notes during the pendency of this arbitration but may not show them to anyone. Counsel for the Respondent and Respondent's Expert will destroy any notes in their possession relating to any Protected Information within five days of the closure of the procedural record in this arbitration. Counsel for the Respondent and Respondent's Expert will confirm in writing to the Tribunal that all copies of such notes have been destroyed.
8. The representatives of the Claimant will be present during the review of the Protected Information by counsel for the Respondent and Respondent's Expert.
9. The Protected Information shall be used solely for purposes related to this arbitration and, in particular, to comment on the RPA Report.
10. The Respondent shall not pursue any efforts to obtain the Protected Information by any other means whatsoever, including through court or administrative actions.
11. Nothing in this Protective Order shall limit Claimant in the use of its own documents, for any purpose, or from disclosing to any person documents, things, or information, regardless of whether such documents, things, or information are produced and designated as Protected Information in this arbitration.
12. In the event that Respondent inadvertently, or otherwise, comes into possession of any Protected Information, it shall refrain from copying, photocopying, photographing, recording, or transcribing that Protected Information in any manner whatsoever and take prompt steps to ensure that all known copies of such documents or information are returned promptly to Claimant.

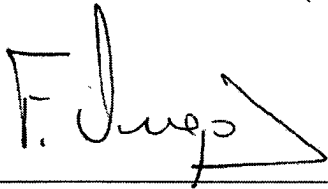
13. Pursuant to Article 29 of the UNCITRAL Rules and Section 8.4 of Procedural Order No. 1, the Tribunal may, if it considers appropriate, appoint one or more experts to review the Information and to report to the Tribunal on issues determined by the Tribunal. The experts appointed by the Tribunal shall comply with the duties of confidentiality determined by the Tribunal in due course.
14. This Protective Order shall continue to produce full force and effect until the final conclusion of this arbitration (whether by final award or otherwise) or until such other time as determined by the Arbitral Tribunal.
15. Nothing in this Protective Order shall be taken as in any way modifying the burden or standard of proof in these arbitration proceedings or precluding any subsequent application by a Party or determination by the Tribunal regarding the admissibility, relevance, materiality or weight of the relevant information as evidence in this Arbitration in accordance with Article 27(4) of the UNCITRAL Rules.

SO ORDERED this 1<sup>th</sup> day of December of 2014.

Place of Arbitration: The Hague, the Netherlands.



\_\_\_\_\_  
Dr. Eduardo Zuleta Jaramillo  
(Presiding Arbitrator)



\_\_\_\_\_  
Prof. Francisco Orrego Vicuña



\_\_\_\_\_  
Mr. Osvaldo César Guglielmino

The undersigned hereby consent to the entry of the above Protective Order.

SOUTH AMERICAN SILVER LIMITED

THE PLURINATIONAL STATE OF BOLIVIA

\_\_\_\_\_  
Counsel for Claimant

\_\_\_\_\_  
Counsel for Respondent

On this \_\_\_ day of \_\_\_\_\_, 201\_.

On this \_\_\_ day of \_\_\_\_\_, 201\_.

**EXHIBIT A**

**PROTECTED AND HIGHLY CONFIDENTIAL INFORMATION**

<b>Resources and Geology</b>		
<b>Ref.</b>	<b>Description</b>	<b>Content</b>
<b>A.</b>	Malku Khota Graphic Drill Hole Logs	<p>Approximately 310 sheets prepared by South American Silver containing graphics and tables with the location and depth of the drill holes and metal assays from the drill core taken in different areas and sections of the Project Area.</p> <p>A sample was provided as part of RPA's exhibits.</p>
<b>B.</b>	Malku Khota Resource Model	Three-dimensional modeling of the resource distribution of the mineral resources with respect to the Malku Khota Project (obtained from the results of the drilling program).
<b>C.</b>	Vertical Section Drilling Data	<p>Approximately 20 sheets prepared by South American Silver indicating the different drilling angles and coordinates of the drill holes in different areas and sections of the Project Area.</p> <p>A sample was provided with RPA's expert report.</p>
<b>D.</b>	Malku Khota DDH Location	3 charts prepared by South American Silver indicating the exact location, angles and depth of the diamond drill holes that were drilled in the Malku Khota Area.

<b>E.</b>	Malku Khota Geochem Drilling Data	Approximately 1500 pages prepared by South American Silver describing coordinates, elevation, azimuth, inclination and total depth of different samples taken from drill core in different areas and sections of the Project Area.  A sample was provided with RPA's expert report.
<b>F.</b>	Malku Khota Drill Hole Location and Surface Geochem Silver Value	This map was prepared by South American Silver and provided as part of RPA's exhibits and only the longitudinal and latitudinal information was redacted.
<b>Metallurgy</b>		
<b>Ref.</b>	<b>Description</b>	<b>Content</b>
<b>C.</b>	Malku Khota Project - Metallurgical Sample Description	Table describing drill hole locations and descriptions of different metallurgical samples.
<b>D.</b>	The Recovery of Silver, Indium and Gallium from Malku Khota Samples - Report 1 dated April 14, 2008 prepared by SGS Lakefield Research Limited, Ontario Canada	Results and analysis of testwork conducted by SGS Lakefield Research Limited at the request of South American Silver in connection with the recovery of silver, indium and gallium from samples.
<b>E.</b>	The Recovery of Silver, Indium and Gallium from Malku Khota Samples - Report 2 dated July 22, 2009 prepared by SGS Lakefield Research Limited, Ontario Canada	Results and analysis of testwork conducted by SGS Lakefield Research Limited at the request of South American Silver on 12 composites of Malku Khota samples in connection with the recovery of indium and gallium using cyanide and acid-chloride leach systems.



<p><b>F.</b></p>	<p>The Recovery of Silver, Indium and Gallium from Malku Khota Samples- Final Report dated December 7, 2010 prepared by SGS Lakefield Research Limited, Ontario Canada</p>	<p>Results and analysis of various leach processes tested by SGS Lakefield Research Limited at the request of South American Silver in connection with a leach process capable of extraction of silver, indium and other base metals at minimum reagent consumption.</p>
<p><b>G.</b></p>	<p>The Recovery of Silver from Malku Khota Samples - Final Report dated March 30, 2011 prepared by SGS Lakefield Research Limited, Ontario Canada</p>	<p>Results and analysis of tests conducted by SGS Lakefield Research Limited at the request of South American Silver in connection with the recovery of silver from Malku Khota samples by heap leach and conventional cyanidation.</p>

**EXHIBIT B**

**Confidentiality Undertaking**

The undersigned hereby acknowledges that he or she has read the Protective Order entered by the Arbitral Tribunal in the Matter of an Arbitration under the Rules of the United Nations Commission on International Trade Law captioned PCA Case No. 2013-15, South American Silver Limited v. the Plurinational State of Bolivia (the "Arbitration"), that he or she understands the terms thereof, and that he or she agrees to be bound by such terms.

The undersigned, [having been designated an Expert] [acting as counsel to Respondent], hereby agrees that he or she will not disclose to the Plurinational State of Bolivia, its entities and instrumentalities, and companies owned or controlled by Respondent including, but not limited to, Corporación Minera de Bolivia ("COMIBOL") or any other third-party the Protected Information (as defined in the Protective Order attached to Procedural Order No. 2) and it will use such information in the manner provided for in the Protective Order and Procedural Order No. 2 and solely for purposes related to this Arbitration and, in particular, to comment on the expert report submitted by Roscoe Postle and Associates, Inc., dated September 16, 2014, in this Arbitration.

Signature: \_\_\_\_\_

Dated: \_\_\_\_\_