

UNOFFICIAL ENGLISH TRANSLATION

**PCA Case No. 2013-15**

**SOUTH AMERICAN SILVER LIMITED (BERMUDAS)**

**(Claimant)**

**v.**

**THE PLURINATIONAL STATE OF BOLIVIA**

**(Respondent)**

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**REQUEST FOR *CAUTIO JUDICATUM SOLVI*  
AND DISCLOSURE OF INFORMATION**

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**NOTE:** Unofficial English translation. The original language of Bolivia's Request is Spanish. In case of contradictions or inconsistencies between the Spanish and English versions, the Spanish version shall prevail.

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## 1. INTRODUCTION

1. The Plurinational State of Bolivia (“**Bolivia**” or the “**State**”<sup>1</sup>) hereby requests that the Tribunal order South American Silver Limited (“**SAS**” or the “**Claimant**”) to provide a *cautio judicatum solvi*, and to disclose the information related to the funding of its claim in this arbitration (the “**Request**”).
2. The Parties agreed for this arbitration to be governed by the Arbitration Rules of the United Nations Commission on International Trade Law (“**UNCITRAL**”) as revised in 2010 (the “**Arbitration Rules**”). Article 42 (1) of said Rules provides that “*The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case*”.
3. As Bolivia will demonstrate in this Request, there is a high risk that SAS will not have sufficient funds to reimburse the costs and expenses incurred by the State in its defense in this arbitration. This situation raises serious doubts regarding the possibility of enforcing an award that orders the Claimant to pay the costs of this arbitration.
4. It is unfair to require that Bolivia continue defending itself in a costly arbitration, at the expense of public funds, knowing that, when the time comes, SAS will not be able to reimburse the State for the expenses and costs incurred in this arbitration (even more so, regarding claims over which the Tribunal lacks jurisdiction or which are inadmissible).
5. In its Statement of Defense, Bolivia has demonstrated that the applicable Treaty<sup>2</sup> only protects the *direct* owner of the investment (which is not the Claimant) and, even if *indirect* ownership were protected, the owner would be the Canadian company *South*

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<sup>1</sup> Capitalized terms that are not expressly defined herein shall have the meaning conferred to them in the Memorial of Objections to Jurisdiction, Admissibility of Claims and Counter Memorial dated 31 March 2015 (the “**Statement of Defense**”).

<sup>2</sup> Treaty between the United Kingdom of Great Britain and Northern Ireland and Bolivia for the Promotion and Protection of Investments executed on 24 May 1988, **C-1**.

*American Silver Corporation* (at the present *Tri Metals Mining Inc.*) (“SASC”), and not the Claimant. In addition, the State demonstrated that SASC is a Canadian junior mining company that speculates on the Toronto Stock Exchange with early stage mining projects. As will be demonstrated in this Request, there are serious doubts about SAS’s financial capacity (and even of its parent company SASC) to reimburse Bolivia’s costs in this arbitration.

6. Moreover, due to its conduct in the establishment and execution of the investment, the State has also proved that SAS does not have *clean hands*, thus not deserving protection under the Treaty. SAS’s claims are, in any case, inadmissible.<sup>3</sup>
7. The public funds that Bolivia has allocated and will have to allocate for its defense in this arbitration should be devoted to the general interest and not to fund claims from insolvent claimants that fail outside of the jurisdiction of the Tribunal. If this occurs, at least, the State must be sure that the Claimant will be able to reimburse its costs and expenses, which in this case can only be attained by granting a *cautio judicatum solvi*. Otherwise, the State will become an “*unsecured creditor of the bankrupt for costs*”. As noted by the doctrine:

*[T]he respondent sued in arbitration by a claimant who has no money stands to lose in any event, [...]. If the respondent ignores the claim in arbitration, it is likely that an adverse award will be rendered. [...] On the other hand, if the respondent defends the action, this will be expensive. Without security for costs, the costs of defending the action may not be recoverable. The respondent in an arbitration commenced by a future bankrupt has only the choice of either to lose and become an award debtor or to become an unsecured creditor of the bankrupt for costs.*<sup>4</sup>

8. Finally, as Bolivia will explain in this Request, the Tribunal shall order the Claimant to disclose the identity of the funder of this arbitration, as well as the terms of the funding agreement signed, in order to protect the integrity of the proceeding (among others, to allow Bolivia to verify the absence of conflicts of interest). The importance

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<sup>3</sup> Please refer to sections 5.1 and 5.2 of the Statement of Defense for more details about Bolivia’s jurisdictional objections.

<sup>4</sup> W. Gu, *Security for Costs in International Commercial Arbitration*, 22(3) *Journal of International Arbitration* (2005), p.168 (emphasis added), **RLA-176**.

of complying with this duty of disclosure is acknowledged (and its performance has been mandated) by various international arbitral tribunals.

## **2. THE ARBITRAL TRIBUNAL HAS THE POWER TO ORDER A *CAUTIO JUDICATUM SOLVI***

9. There is no doubt that the Tribunal is empowered to order a *cautio judicatum solvi*.
10. This is acknowledged by Article 17(1) of the Arbitration Rules when stating that “[T]he arbitral 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.”
11. Furthermore, in Procedural Order No. 7, the Tribunal confirmed having this power when it allowed Bolivia to submit “a separate, duly justified request, if it so wishes, regarding the issue that it refers to as ‘funding of this Arbitration’, including a document request [...]”<sup>5</sup> The Claimant did not challenge said Order nor rebutted the references made by Bolivia - in Category 30 of its *Redfern* Schedule - to the *security for costs*.

## **3. THE TRIBUNAL MUST ORDER SAS TO CONSTITUTE A *CAUTIO JUDICATUM SOLVI* IN FAVOR OF BOLIVIA**

12. This case corresponds exactly to the situations (i) for which the *cautio judicatum solvi* was conceived and in (ii) which it has been granted by arbitral tribunals in matters of investment arbitration. The key element to grant the *cautio* consists in establishing the existence of a proven risk that “Claimant would not reimburse Respondent for its incurred costs, be it due to Claimant’s unwillingness or its inability to comply with its payment obligations”.<sup>6</sup>
13. As Bolivia already demonstrated in the Statement of Defense, and will prove hereunder, Claimant is a Bermuda *shell company* with no economic activity or assets,

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<sup>5</sup> Procedural Order No. 7, 21 July 2015, para. 26 (iv).

<sup>6</sup> *RSM Production Corporation v. Santa Lucia*, ICSID Case No. ARB/12/10, Decision on Santa Lucia’s Request for Security for Costs of 13 August 2014, para. 81, **RLA-177**.

which is only used by the real investor (SASC) to *attempt*, improperly, to obtain protection under the Treaty (3.1). On the other hand, and although SASC is not a party to this proceeding, SASC has publicly announced that it will run out of funds by the end of this year (3.2). Finally, the costs of the Claimant in this arbitration are being funded by a third party, which confirms SAS' inability to bear the costs of this arbitration and, *a fortiori*, the costs incurred by Bolivia, making it thus necessary that SAS provide a *cautio judicatum solvi* (3.3).

**3.1 The Claimant is a Bermuda *shell company* with no economic activity or assets, that is only used by the real investor (SASC) to *attempt*, improperly, to obtain protection under the Treaty**

14. The Claimant has no economic activity or assets, and only exists for the purpose of *treaty shopping* and tax savings. SAS is what is known as a "*shell company*".<sup>7</sup> There are, at least, three reasons to reach this conclusion:
15. *First*, despite Bolivia's persistence, SAS continues to refuse disclosing any information related to its activities, assets and finances. This is demonstrated by SAS' objections to Bolivia's document requests.<sup>8</sup> This is also demonstrated by the fact that SAS has not produced any of its own financial statements, but only the *consolidated financial statements* of SASC, which do not allow distinguishing Claimant's assets (if any) or the investments allegedly made by SAS in the Malku Khota project (the "**Project**").<sup>9</sup> To date, and despite Bolivia's requests, the only corporate documents on the record regarding SAS are a certificate of incorporation (of a single page)<sup>10</sup> and a power of attorney granted by SAS to its lawyers<sup>11</sup> (C-3). The latter document,

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<sup>7</sup> Marina Kinner & Leonard W. Vona, *Shell Companies* ("A *shell company* is an entity that has no active business and usually exists only in name as a vehicle for another company's business operations. In essence, shells company are corporations that exist mainly on paper, have no physical presence, employ no one and produce nothing"), **RLA-178**.

<sup>8</sup> See, for example, Claimant's objection to Bolivia's document requests under the categories 1 to 6 and 24 of Bolivia's *Redfern* Schedule.

<sup>9</sup> See Annexes **FTI-4** and **FTI-10** corresponding to the consolidated financial statements of SASC, and footnotes 15, 16, 17, 20 and 38 (among many others) of the expert report submitted by FTI Consulting Canada ULC ("**FTP**") on 23 September 2014, **CER-1**.

<sup>10</sup> Certificate of incorporation of South American Silver Limited, **C-10**.

<sup>11</sup> Power of attorney granted by SAS on 23 April 2013, **C-3**.

interestingly, indicates that this “*Bermuda Exempted Company*” has its “*registered office located at Clarendon House, 2 Church Street, HM 11 Hamilton*”.<sup>12</sup> This address, as it is usual in *shell companies*, belongs to a law firm that advertises itself to the public as a “*Global Offshore Law Firm in Bermuda*”.<sup>13</sup>

16. *Second*, the Claimant does not bear any of the costs of this arbitration. According to information published by SASC, the costs are borne by SASC and it is our understanding that they are borne for the most part by a hidden funder. The guarantees in favor of the funder were also granted by SASC. As stated in SASC’s *Management’s Discussion & Analysis* published on 7 August 2015 (the “**MDA Q2**”):

*On May 23, 2013, the Company [SASC] entered into an agreement (the “Arbitration Costs Funding Agreement”) with a third party funder (the “Fund”) pursuant to which the Fund will cover most of SASL’s [South American Silver Limited] future costs and expenses related to its international arbitration proceedings against Bolivia. (...) Under the terms of the privileged Arbitration Costs Funding Agreement, the Company has given certain warranties.*<sup>14</sup>

17. *Third*, as Bolivia demonstrated in its Statement of Defense, SASC was the one involved in the Project and who made the few investments in prospecting activities, as evidenced by the fact they contracted with GeoVector for the preparation of the *Preliminary Economic Assessments*<sup>15</sup> and with Mr. Dreisinger for the metallurgical process.<sup>16</sup>
18. In short, SAS is a *shell company* that does not even have the means to undertake this arbitration. If Claimant sustains the opposite, it must and should be able to prove it. In light of the available evidence, there is a high risk that the Claimant may not be able to reimburse the costs and expenses incurred by the State in its defense.

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<sup>12</sup> *Id.*

<sup>13</sup> Screenshot of Conyers, Dill & Pearman’s website, **R-147**.

<sup>14</sup> MDA Q2, p.4 (emphasis added), **R-148**.

<sup>15</sup> *See Preliminary Economic Assessment Update, Technical Report for the Malku Khota Project of 10 May 2011, C-14.*

<sup>16</sup> *See Statement of Claim, para. 44.*

### 3.2 SASC itself has envisaged running out of funds by the end of 2015

19. As noted above, SASC is the one who invested in the Project, who funds a portion of this arbitration and who has maintained the hidden relationship with the funder. The poor economic situation of SASC, the only company with real operations, confirms the high risk of SAS not being able to bear a potential award on costs.
20. There is abundant evidence that SASC's financial situation is precarious and predicts an unyielding situation of insolvency. Indeed, the latest financial information published by SASC - on 30 June 2015<sup>17</sup> - shows that it will run out of money at the end of this year and will not have sufficient means to meet its obligations. As SASC acknowledged in its last annual statement, from this moment, the "*viability of the Company could be jeopardized.*"<sup>18</sup>
21. The examination of SASC's *Management's Discussion & Analysis* ("**MDA**") of the last years shows a significant reduction in SASC's available cash. While, in 2012, SASC had US\$ 24,242,113 available cash, by 30 June 2015, it only had US\$ 2,545,276 (*i.e.*, 10 times less). The decrease in each one of the years between 2012 and 2015 has been steep.<sup>19</sup>
22. The decrease of SASC's available cash must be viewed in conjunction with the quarterly average expenditures of the company. In the first quarter of 2015, SASC's expenses amounted to US\$ 1,055,244<sup>20</sup> and, in the second quarter, they amounted to

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<sup>17</sup> See SASC's Interim Consolidated Financial Statements of 30 June 2015, **R-149**; MDA Q2, **R-148**; TriMetals Mining Inc., *Annual Information Form 2014*, of 23 March 2015, **R-150**.

<sup>18</sup> TriMetals Mining Inc, *Annual Information Form 2014*, of 23 March 2015, p. 29, **R-150**.

<sup>19</sup> See MDA of 28 March 2013, p. 5 (cash available at year-end 2012: US\$ 24,242,113), **R-151**; MDA of 20 March 2014, p. 10 (cash available at year-end 2013: US\$ 11,921,723), **R-152**; MDA of 23 March 2015, p. 12 (cash available at year-end 2014: US\$ 4,831,862), **R-153**; MDA Q2, p. 6 (cash available at the end of the second quarter of 2015: US\$ 2,545,276), **R-148**. In all cases, the information is under the section entitled "*Liquidity and Capital Resources*".

<sup>20</sup> Total spending is obtained by adding the following items (i) "*General Administrative Expenses*", equivalent to US\$ 547,354; (ii) "*Arbitration Expenses*", equivalent to US\$ 55,961; and (iii) "*Total Exploration Expenses*", equivalent to US\$ 451,929. See MDA 8 May 2015 (the "**MDA Q1**"), p. 7, **R-154**.



US\$ 1.220.241.<sup>21</sup> From both figures results a quarterly average expenditure of US\$ 1.137.742. Considering the cash available by 30 June 2015 and the average quarterly expenditure, simple arithmetic shows that SASC will run out of cash by the end of this year.<sup>22</sup>

23. In addition, SASC has contracted debts for the next five years equivalent to US\$ 4.964.000<sup>23</sup> (i.e., almost twice its available cash) for the rental of offices and its Escalones Project. Over US\$ 1.000.000 of said debt is due in less than 1 year, and more than US\$ 3.500.000 is due over the next 3 years. As seen in the MDA Q2:

	Total due over next 5 years	Payments Due by Period		
		Less than 1 year	1-3 years	3-5 years
Lease agreements for office premises (1)	\$164,000	\$146,800	\$17,200	\$nil
Option payments for Escalones (2)	\$4,800,000	\$900,000	\$3,500,000	\$400,000
<b>Total</b>	<b>\$4,964,000</b>	<b>\$1,046,800</b>	<b>\$3,517,200</b>	<b>\$400,000</b>

24. SASC acknowledges that none of its projects (Gold Springs and Escalones) produces income and that there is no certainty that they will do so in the near future. As stated in SASC's 2014 *Annual Information Form*:

*Each of Gold Springs and Escalones is still in the advanced exploration stage. Mineral exploration and exploitation involves a high degree of risk, which even a combination of experience, knowledge and careful*

<sup>21</sup> The MDA Q2 reflects the total expenses for the first half of 2015, equivalent to US\$ 2'275,485, which results from adding the following items (i) "General Administrative Expenses", equivalent to US\$ 1'071,341; (ii) "Arbitration Expenses", equivalent to US\$ 103,491; and (iii) "Total Exploration Expenses", equivalent to US\$ 1'100,653. See MDA Q2, p. 9-10, **R-148**. To obtain the expenses for the second quarter of 2015, we simply subtract from the total amount mentioned above (semiannual) that of the first quarter of 2015. This operation results in US\$ 2'275,485 - US\$ 1'055,244 = US\$ 1'220,241.

<sup>22</sup> This estimate is conservative since it is based on the quarterly average expenditure of 2015 and not on the average expenditure of previous years, much higher than the present. In 2012, the average quarterly expense was US\$ 3'000,000 approx. and, in 2014, was US\$ 2'000.000 approx. See SASC's MDAs for the various quarters of the years 2012 and 2014, available here: <http://www.trimetalsmining.com/investors/financial-statements/>.

<sup>23</sup> See MDA Q2, p. 7.

evaluation may not be able to avoid. Few properties that are explored are ultimately developed into producing mines.<sup>24</sup>

25. SASC needs to raise funds to meet its obligations and continue with its business. However, SASC acknowledges that there is no certainty that it will be able to raise funding (“[t]here is no assurance that the Company will be successful in raising additional funds in the future”<sup>25</sup>), so that “the viability of the Company could be jeopardized”<sup>26</sup>. As stated on page 29 of the *Annual Information Form* of 2014:

entitled to an interest in one or more of the assets of the Company. The Company’s capital resources are largely determined by the strength of the junior resource market, which has significantly weakened in recent years, and by the status of the Company’s projects in relation to these markets, and its ability to compete for investor support of its projects. There is no assurance that the Company will be successful in raising additional funds in the future. If the Company does not have the necessary capital to meet its obligations under its contractual obligations, the Company may have to forfeit its interest in properties or prospects earned or assumed under such contracts. In addition, if the Company does not have sufficient funds to pursue its exploration and development programs and other plans, the viability of the Company could be jeopardized.

26. In short, by the end of the year, SASC will have run out of resources to meet its obligations. The Tribunal cannot wait until this happens to intervene. If the *cautio judicatum solvi* intends to be effective and serve a purpose, the Tribunal must intervene immediately and order its subsidiary SAS (the only Claimant in this arbitration) to guarantee Bolivia the reimbursement of its costs and expenses before Bolivia begins preparing its Rejoinder and the Hearing. Other international arbitral tribunals have done so in similar circumstances. As recently stated by the tribunal in *RSM v. Santa Lucia*:

*Thus, contrary to the situation in previous ICSID cases where tribunals have denied the application for security for costs (inter alia) because there was no evidence concerning the financial situation of the opposing party,*

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<sup>24</sup> See TriMetals Mining Inc, *Annual Information Form 2014*, of 23 March 2015, p. 30. (emphasis added), **R-150**.

<sup>25</sup> *Id.*, p. 29. Raising funds through equity also seems unlikely. *Id.*, p. 33 (“*The Company has never paid a dividend on its Common Shares and does not expect to do so in the foreseeable future. (...) Accordingly, it is likely that for the foreseeable future holders of Common Shares will not receive any return on their investment in the Common Shares other than possible capital gains*”).

<sup>26</sup> *Id.*, p. 29.

it has been established to the satisfaction of the Tribunal that Claimant does not have sufficient financial resources.<sup>27</sup>

**3.3 Claimant's costs in this arbitration are being funded by third-parties, which confirms its precarious financial situation and mandates the provision of a *cautio judicatum solvi***

27. Claimant's financial inability is such that, as published by SASC, this arbitration is being funded by a third-party.<sup>28</sup> The existence of such third-party is relevant for at least three reasons:

28. *First*, because it confirms that neither the Claimant nor SASC have enough economic means to bear the costs and expenses of this arbitration. If they do not have the means to cover their own costs and expenses, *a fortiori*, they will not be able to reimburse those of the State. The existence of the third-party funder - coupled with the economic difficulties of the Claimant and its parent company - creates a *prima facie* case for granting the *cautio judicatum solvi*. As stated by Gary Born:

Where security for costs may be ordered, tribunals typically consider the financial state of the party from whom security is requested, the extent to which third parties are funding that party's participation in the arbitration (while arguably remaining insulated from a final costs award) and the likely difficulties in enforcing a final costs award. Where a party appears to lack assets to satisfy a final costs award, but is pursuing claims in an arbitration with the funding of a third party, then a strong prima facie case for security for costs exists.<sup>29</sup>

29. *Second*, there is no evidence whatsoever that the third-party funder is obliged to reimburse Bolivia's costs and expenses in this arbitration. On the contrary, the evidence (and SAS' behavior) suggests that such obligation would not exist.<sup>30</sup> In

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<sup>27</sup> *RSM Production Corporation v. Santa Lucia*, ICSID Case No. ARB/12/10, Decision on Santa Lucia's request for *Security for Costs*, of 13 August 2014, para. 82, **RLA-177**.

<sup>28</sup> See MDA Q2, p. 4, **R-148**.

<sup>29</sup> Gary Born, *International Commercial Arbitration*, Wolters Kluwers (2014 2a Ed.), p. 2496 (emphasis added), **RLA-179**.

<sup>30</sup> The *IBA Rules on the Taking of Evidence in International Arbitration* were expressly incorporated in Section 5 of Procedural Order No. 1, concerning the "production of documents". These rules allow the Tribunal to "infer that such evidence would be adverse to the interests of that Party" "[if that party] fails, without a satisfactory explanation, to produce any Document requested in a Request to Produce" (Art. 9 (6)).

Category 30 of its *Redfern* Schedule, Bolivia justified its request for information as to the terms of the “*funding agreement*” for “*a potential award of costs in favor of Bolivia*”. Claimant merely replied that “*Claimant's funding arrangement are irrelevant and immaterial to this case.*” Being able to verify if the third-party funder is obliged to reimburse costs and expenses is another one of the reasons why Bolivia requests the production of information regarding the funding of this arbitration (see Section 4 *infra*).

30. In any case, international case law<sup>31</sup> and doctrine<sup>32</sup> agree that the *mere* uncertainty as to the existence of the obligation to reimburse constitutes “*compelling grounds for security for costs*”.
31. *Third*, because in the cases where a funder is involved, some arbitrators consider that a presumption in favor of granting a *cautio judicatum solvi* exists. The burden of proof is transferred to the funded party, who must prove why the *cautio* should not be ordered. As indicated by Gavan Griffith QC in the case *RSM v. Santa Lucia*:

*My determinative proposition is that once it appears that there is a third party funding of an investor's claims, the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs orders should not be made.*<sup>33</sup>

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<sup>31</sup> As the tribunal stated in *RSM v. Santa Lucia*: “Moreover, the admitted third party funding further supports the Tribunal's concern that Claimant will not comply with a costs award rendered against it, since, in the absence of security or guarantees being offered, it is doubtful whether the third party will assume responsibility for honoring such award. Against this background, the Tribunal regards it as unjustified to burden Respondent with the risk emanating from the uncertainty as to whether or not the unknown party will be willing to comply with a potential costs award in Respondent's favor”, *RSM Production Corporation v. Santa Lucia*, ICSID Case No. ARB/12/10, Decision on Santa Lucia's Request for Security for Costs of 13 August 2014, para. 83 (emphasis added), **RLA-177**.

<sup>32</sup> J.E. Kalicki, *Security for Costs in International Arbitration*, Transnational Dispute Management, Vol. 3, No. 5 (“A twist on this scenario is where the claimant's arbitration fees and expenses are being covered by a related entity or individual who stands to gain if the claimant wins, but would not be liable to meet any award of costs that might be made against the claimant if it lost. This scenario has been called “arbitral hit and run”, and described by arbitrators and commentators alike as particularly compelling grounds for security for costs”) (emphasis added), **RLA- 180**.

<sup>33</sup> *RSM Production Corporation v. Santa Lucia*, ICSID Case No. ARB/12/10, Concurring Opinion of Gavan Griffith on the Decision on Saint Lucia's Request for Security for Costs of 13 August 2014, para. 18 (emphasis added), **RLA-177**.

32. For these reasons, the Tribunal shall order the Claimant to provide a *cautio judicatum solvi* to Bolivia in the terms mentioned in section 5 *infra*.

#### 4. CLAIMANT MUST DISCLOSE THE IDENTITY OF THE FUNDER AND THE TERMS OF THE FUNDING AGREEMENT

33. The Tribunal must ensure the integrity of the arbitration and treat the Parties equally, allowing them to exercise their rights.<sup>34</sup> Likewise, the members of the Tribunal must be independent and impartial, being compelled to “*disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.*”<sup>35</sup>

34. A conflict of interest between the arbitrators and the Parties would endanger such principles. This issue is exacerbated when there are third-party funders who have an economic interest in the arbitration and even make strategic decisions in the proceeding. Third-party funders, therefore, should be equated to the parties to verify the absence of a conflict of interest.

35. The *IBA Guidelines on Conflicts of Interest in International Arbitration* (the “**Guidelines**”), as revised in 2014, recognize this issue when they (i) equate the third-party funder with the funded party and (ii) require the funded party to disclose any relationship that exists between her (including third-party funders) and the arbitrators. Standards 6(b) and 7(a) provide, respectively, that:

*If one of the parties is a legal entity, any legal or physical person having (...) a direct economic interest in (...), the award to be rendered in the arbitration, may be considered to bear the identity of such party (emphasis added).*

*A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (...) or between the arbitrator and any person or entity with a direct economic*

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<sup>34</sup> Arbitration Rules, Article 17(1) (“*Subject to these Rules, 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 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”.) (emphasis added).*

<sup>35</sup> Arbitration Rules, Article 11.

*interest in (...) the award to be rendered in the arbitration. The party shall do so on its own initiative at the earliest opportunity.*<sup>36</sup>

36. Based on the Guidelines, various tribunals have ordered the funded party to disclose the identity of its funder, as well as the terms of the agreement. The first was recently ordered in the case *Eurogas v. Slovakia*:

<sup>37</sup>

Funder. We think that the Claimants should disclose the identity of the third-party funder, and that third-party funder will have the normal obligations of confidentiality.

37. Similarly, the Tribunal in *Muhammet v. Turkmenistan* ordered the disclosure of the identity of the third-party funder and the terms of the funding agreement:

<sup>38</sup>

8. The tribunal has decided that Claimants should disclose whether their claims in this arbitration are being funded by a third-party/parties, and if so, the names and details of the third party funder(s) and the terms of that funding. The Tribunal's decision is based on the following factors.

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<sup>36</sup> Standards 6 (b) and 7 (a) of the IBA Guidelines on Conflicts of Interest in International Arbitration (emphasis added). Although the Guidelines are not binding (soft law), they are often used as they reflect international best practices. As noted in *ICS Inspection v. Argentina*, “Although the IBA Guidelines have not binding status in the present proceedings, they reflect international best practices and offer examples of situations that may give rise to objectively justifiable doubts as to an arbitrator’s impartiality or independence”, *ICS Inspection v. Argentina*, PCA Case 2010-9, Decision on the Challenge to Arbitrator Stanimir A. Alexandrov of 17 December 2009, para. 2 (emphasis added), **RLA-181**. The usefulness of the Guidelines has also been acknowledged by the highest courts. As stated by the Swiss Supreme Court in its decision on 20 March 2008, “[s]uch guidelines [...] are a precious instrument [...] and such an instrument should not fail to influence the practice of arbitral institutions and tribunals”, Swiss Supreme Court, Decision 4A\_506/20071 of 20 March 2008) (emphasis added), **RLA-182**.

<sup>37</sup> *Eurogas et al. v. Slovakia*, ICSID Case No. ARB/14/14, Transcript of the hearing of, 17 March 2014, P145:L1-4 (emphasis added), **RLA-183**.

<sup>38</sup> *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Decision of 12 June 2015, para. 8 (emphasis added), **RLA-184**.

38. As evidenced by these decisions, and confirmed by Article 17(1) of the Arbitration Rules, the Tribunal has the power to order Claimant to disclose the identity of the funder and the terms of the funding agreement. Only in this way, Bolivia will be able to confirm whether there are (or not) conflicts of interest that jeopardize the integrity of this arbitration and, therefore, of the future award.<sup>39</sup>
39. The disclosure of the terms of the funding agreement will allow verifying at least two fundamental aspects:
- a. On one hand, who the real interested parties in this arbitration are. Indeed, the information requested is necessary for Bolivia to confirm whether – as part of the funding agreement – Claimant has assigned some or all of its claims in this arbitration to the third-party funder; and,
  - b. On the other hand, if the third-party funder committed to pay for any potential order on costs against SAS. Given SAS’s proven lack of financial resources, this verification will reveal whether there are additional sources for the reimbursement of the costs and expenses that Bolivia has incurred and will continue incurring in this arbitration.
40. In view of the foregoing, the Tribunal must order Claimant to disclose the identity of its funder and the terms of the funding agreement.

## **5. RELIEF SOUGHT**

41. For the foregoing reasons, Bolivia respectfully requests the Tribunal to:
- a. Order Claimant to provide a *cautio judicatum solvi* for an amount of at least US\$ 2.5 million to ensure the full payment of an award on costs against the Claimant, according to Article 42(1) of the Rules of Arbitration.

The amount of US\$ 2.5 million has been conservatively calculated based on the costs and expenses that Bolivia, in its experience in similar cases, has paid and

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<sup>39</sup> As noted by Bolivia under category 30 of its *Redfern* Schedule (in the “*Reply to Claimant Objections*” column), SAS has not confirmed the absence of conflicts of interest between the Parties, their lawyers or the Tribunal and the funder.

will have to pay for administrative expenses, professional fees, arbitrators' expenses, miscellaneous expenses (travel, communications and other expenses, including those of a 10 days hearing), expert fees, experts and witnesses expenses, and the fees of its external counsel Dechert LLP.

Bolivia respectfully requests that, at the discretion of the Tribunal, Claimant is ordered to:

- i. Deliver, within a period not exceeding 15 days, a first-demand bank guarantee for an amount of US\$ 2.5 million issued by a first class bank of the United States or Canada in favor of Bolivia acting in the person of the Attorney General Office of the Plurinational State of Bolivia (*Procuraduría General del Estado*), which shall be irrevocable and remain in force until 30 days after the award in this arbitration is rendered; or
  - ii. Deposit, within a period not exceeding 15 days, US\$ 2.5 million in the bank account that the Secretariat of the Permanent Court of Arbitration designates to this effect, for its allocation by the Tribunal in its final award.
- b. Order the Claimant to disclose the identity of the funder of this arbitration, as well as the terms of the funding agreement signed with him.
42. This Request is submitted without prejudice to the objections to the jurisdiction of the Tribunal and with express reservation of all of Bolivia's rights.

Respectfully submitted on behalf of the Plurinational State of Bolivia