

**PCA CASE NO. 2013-15**  
**IN THE MATTER OF**  
**AN ARBITRATION UNDER THE RULES OF THE**  
**UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW**

**SOUTH AMERICAN SILVER LIMITED**  
**CLAIMANT**

**v.**

**THE PLURINATIONAL STATE OF BOLIVIA**  
**RESPONDENT**

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**CLAIMANT'S OPPOSITION TO BOLIVIA'S REQUEST FOR *CAUTIO JUDICATUM SOLVI* AND  
DISCLOSURE OF INFORMATION**

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December 14, 2015

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## I. INTRODUCTION

1. SAS responds to Bolivia's request that this Tribunal order SAS to post US\$ 2.5 million in security for costs, and its request that SAS disclose the identity of its third-party funder and the terms of its funding agreement.<sup>1</sup>

2. Investment tribunals uniformly have held that orders of security for costs should only be issued in extreme and exceptional circumstances. Several investment tribunals have also held that the risk of an unpaid, adverse costs award due to a claimant's poor financial condition or the existence of third-party funding does not warrant an order of security for costs. And the only investment tribunal that has ever issued security for costs did so primarily because of the claimant's notorious history of failing to pay prior costs awards. Most of these investment tribunals have reached these conclusions under the ICSID Convention, which empowers tribunals to issue interim measures if "the circumstances so require." Tribunals operating under the 2010 UNCITRAL Rules—which requires that the risk of harm to the requesting party "substantially outweigh" the risk of harm to the party against whom the measures are imposed—have reached similar holdings.

3. Bolivia's request of security for costs fails for at least four, separate reasons: 1) SAS does not have a history of unpaid, prior adverse costs awards, 2) SAS's current financial condition is a result of the State measures at issue in this arbitration, 3) SAS's engagement of a third-party funder does not warrant security for costs, and 4) Bolivia has failed to argue, much less establish, that the speculative risk of an unpaid, adverse costs award substantially outweighs the certain, immediate harm that an order of security for costs would impose on SAS. Thus, SAS requests that the Tribunal reject Bolivia's request of security for costs.

4. As to SAS's funding agreement, in the interests of transparency, SAS proposes to disclose the identity of its third-party funder, but asks the Tribunal to reject Bolivia's request that SAS disclose the terms of its funding agreement. Disclosing the identity of SAS's funder will allow the Tribunal and Bolivia confirm that no conflicts exist between the relevant parties in this arbitration. At the same time, the terms of SAS's funding agreement are irrelevant to the issues in dispute in this arbitration. Those terms also contain confidential and commercially sensitive information, and SAS would suffer prejudice if those terms were disclosed.

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<sup>1</sup> Tribunal Letter to the Parties, Oct 12, 2015 (setting Dec. 14, 2015 as the date for SAS to respond to Bolivia's Request for *Cautio Judicatum Solvi* and Disclosure of Information, Oct. 8, 2015).

## II. SECURITY FOR COSTS ARE ONLY WARRANTED IN EXTREME CIRCUMSTANCES—IN PARTICULAR, WHEN A PARTY HAS A HISTORY OF PRIOR, UNPAID AWARDS FOR COSTS.

5. In its submission, Bolivia cites Article 17(1) of the UNCITRAL Rules as the source of this Tribunal’s authority to order Claimant to post security for costs.<sup>2</sup> Article 17(1) provides that “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.”<sup>3</sup> As is plain from its text, that article does not empower the Tribunal to order security for costs. Rather, the relevant article under the UNCITRAL Rules—which Bolivia does not cite or discuss in its submission—is Article 26. That article provides that the arbitral tribunal may grant interim measures and includes as an example an order to “Provide a means of preserving assets out of which a subsequent award may be satisfied...”<sup>4</sup> This example clearly applies to circumstances where a respondent has wasted, or is about to waste, assets that could be used to satisfy an award against it. It does not apply to a situation where, like here, a respondent makes a speculative assertion that a claimant may not be able to satisfy an adverse cost award in a straightforward case of expropriation without compensation. Article 26 also sets forth the standard that a party requesting an interim measure must satisfy:

The party requesting an interim measure under paragraphs 2(a) to (c) shall satisfy the arbitral tribunal that:

- (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.<sup>5</sup>

6. In their treatise on the UNCITRAL Rules, David Caron and Lee Caplan explain that the second element of this standard (*i.e.*, that there is a reasonable possibility that the

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<sup>2</sup> Bolivia’s Request for *Cautio Judicatum Solvi* and Disclosure of Information, Oct. 8, 2015, ¶ 10.

<sup>3</sup> **CLA-130**, UNCITRAL Rules (2010), Article 17(1).

<sup>4</sup> *Id.*, at Article 26.

<sup>5</sup> *Id.*, at Article 26(3).

requesting party will succeed on the merits) concerns an implicit requirement that a tribunal have at least a prima facie basis for jurisdiction and that a requesting party's case not be "clearly without merit."<sup>6</sup> At the same time, as the second sentence of Article 26(3)(b) provides, an arbitral tribunal should not pre-judge the merits of the claims when considering a request for interim measures. Caron and Caplan and numerous investment tribunals have also confirmed this rule.<sup>7</sup> Thus, while Claimant considers that there is no reasonable possibility that Bolivia will succeed on its jurisdictional and merits defenses, Claimant focusses this submission on the first element of the standard for interim measures under Article 26(3) (*i.e.*, that the harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measures are granted).<sup>8</sup>

7. Several investment tribunals operating under the ICSID Arbitration Rules have considered requests of security for costs. The standard for granting interim measures under the ICSID Arbitration Rules is less demanding than the standard required under the UNCITRAL Rules. Article 47 of the ICSID Convention provides that a tribunal may recommend provisional measures "if it considers that the circumstances so require...to preserve the respective rights of either party" whereas the UNCITRAL Rules provide that the tribunal must determine that harm not adequately reparable by an award of damages is likely and that such harm "substantially outweighs" the harm likely to be imposed upon the party against whom the measures are imposed.<sup>9</sup>

8. Yet even under the less demanding ICSID standard, every ICSID Tribunal that has considered a "security for costs" request has held that such requests should only be granted

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<sup>6</sup> **CLA-164**, David Caron and Lee Kaplan 523, *THE UNCITRAL ARBITRATION RULES, A COMMENTARY* (2d ed. 2012).

<sup>7</sup> *Id.*; **CLA-165**, *Chevron Corp. & Texaco Petroleum Co. v. Ecuador*, PCA Case No. 2009-23, Order for Interim Measures, Feb. 9, 2011 ¶ 19; **CLA-166**, *Guaracachi America, Inc. and Rurelec v. Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14, Mar. 11, 2013, ¶ 8.

<sup>8</sup> For Claimant's detailed response to Bolivia's jurisdictional and merits defenses, see Claimant's Reply to Respondent's Counter-Memorial on the Merits and Response to Respondent's Objections to Jurisdiction and Admissibility, Nov. 30, 2015.

<sup>9</sup> **CLA-167**, ICSID Convention art. 47. Rule 39 of the ICSID Arbitration Rules also addresses Provisional Measures, but it does not elaborate upon or deviate from the standard set forth in Article 47 of the ICSID Convention.

in exceptional circumstances.<sup>10</sup> For instance, the *Libananco v. Turkey* Tribunal stated that “[o]nly in the most extreme cases [should] the possibility of granting security for costs...be entertained at all.”<sup>11</sup> The *Commerce Group v. El Salvador* Tribunal stated that security for costs can only be granted in exceptional circumstances, “for example, where abuse or serious misconduct has been evidenced.”<sup>12</sup> And except for the recent *RSM v. St. Lucia* decision, every ICSID Tribunal has rejected “security for costs” requests.

9. Several of these investment tribunals have also specifically held that a claimant’s financial distress and the risk that an adverse costs award will go unpaid does not justify ordering security for costs. For instance, the *Burmi v. Albania* Tribunal held that mere financial difficulties are not sufficient to justify granting the Respondent security for costs.<sup>13</sup> And the *RSM v. Grenada* Tribunal stated:

In an ICSID arbitration, it is also doubtful that a showing of an absence of assets alone would provide a sufficient basis for such an order. First, as was pointed out in *Libananco*, it is far from unusual in ICSID proceedings to be faced with a Claimant that is a corporate investment vehicle, with few assets, that was created or adapted specially for the purpose of the investment. Second, as was noted by the *Casado* Tribunal, it is simply not part of the ICSID dispute resolution system that an investor’s claim should be

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<sup>10</sup> **RLA-177**, *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs, Aug. 13, 2014, ¶ 75 (citing *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5, Decision on Provisional Measures of April 6, 2007, ¶ 32); **CLA-168**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order of the Tribunal on the Claimant’s Request for Urgent Provisional Measures, Sept. 6, 2005, ¶ 38; **RLA-57**, *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures of Mar. 21, 2007, ¶ 175; **RLA-132**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures of Aug. 17, 2007, ¶ 59; **CLA-169**, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6), Decision on Respondent’s Application for Security for Costs of Oct. 14, 2010, ¶ 5.17; **CLA-170**, *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, Decision on El Salvador’s Application for Security for Costs, Sept. 20, 2012, ¶ 44; **CLA-171**, *Burimi S.R.L. and Eagle Games SH. A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, May 3, 2012, ¶ 34.

<sup>11</sup> **CLA-172**, *Libananco Holdings Co. Limited v. Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, June 23, 2008, ¶ 57.

<sup>12</sup> **CLA-170**, *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador’s Application for Security for Costs, Sept. 20, 2012, ¶ 45.

<sup>13</sup> **CLA-171**, *Burmi S.R.L. and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, May 3, 2012, ¶ 41.

heard only upon the establishment of a sufficient financial standing of the investor to meet a possible costs award.<sup>14</sup>

10. In its submission, Bolivia quotes the *RSM v. St. Lucia* Tribunal and asserts that 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>15</sup> That assertion is inconsistent with the decisions of numerous investment tribunals, and it is an incorrect and misleading characterization of the tribunal’s holding in *RSM v. St. Lucia*.

11. The *RSM v. St. Lucia* Tribunal did not adopt a less demanding standard than any prior ICSID Tribunal. Rather, RSM was the exceptional claimant that met that extreme standard. And it met that demanding standard because of three unique findings: a) a history of failing to pay final adverse costs awards in prior ICSID arbitration proceedings and in prior U.S. litigation proceedings, b) an “admitted lack of financial capacity,” and c) an admitted, but undisclosed third-party funder.<sup>16</sup> The *RSM v. St. Lucia* Tribunal expressly stated that these three holdings considered “cumulatively” were the “difference between the present proceeding and previous ICSID arbitrations in which the request for security for costs was in every case denied.”<sup>17</sup> In other words, it took the repeated conduct of RSM—a notoriously abusive litigant—to justify an order of security for costs.

12. Even Professor Gavan Griffith in his controversial “assenting opinion” in *RSM v. St. Lucia* opined that “security for costs” should not be awarded when the reason for a Claimant’s financial difficulties are the State measures alleged to have breached the investment treaty:

That the claimant does not have funds to meet cost orders if unsuccessful is not reason to make orders for security. Commonly, this situation is contended to arise from the matters of complaint, and it would be inconsistent with the BIT entitlements for such

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<sup>14</sup> **CLA-169**, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6), Decision on Security for Costs, Oct. 14, 2010, ¶ 5.19.

<sup>15</sup> Bolivia’s Request for *Cautio Judicatum Solvi* and Disclosure of Information, Oct. 8, 2015, ¶ 12.

<sup>16</sup> **RLA-177**, *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs, Aug. 13, 2014, ¶ 86.

<sup>17</sup> *Id.*

financial issues arising from lack of funds to derogate from the investor's treaty entitlements.<sup>18</sup>

13. The reasoning behind Prof. Griffith's opinion is straightforward: to allow a State to demand security for costs every time there is a risk that an adverse costs award might go unpaid would frustrate access to justice and close the courthouse doors on potentially meritorious claims. Indeed, a State could simply seize all of a company's assets and then demand in the subsequent arbitration that the now-bankrupt claimant post multi-million dollar securities for costs on the grounds that the company lacks assets and thus might be unable to satisfy an adverse costs award.

14. The existence of a third-party funder does not alter this analysis. For instance, the *EuroGas v. Slovak Republic* Tribunal noted that "as regularly held by ICSID arbitral tribunals" security for costs should only be granted in "exceptional circumstances," and that tribunal discussed the *RSM v. St. Lucia* Decision. Contrary to Bolivia's assertion, that tribunal did not interpret the *RSM v. St. Lucia* Decision's holding as being that the "key element" is a "proven risk" of an unpaid costs award. Rather, as Claimant articulated above, that Tribunal interpreted the holding as being that a combination of factors—including, in particular, a history of unpaid costs awards—satisfied the very high standard required to warrant security for costs.

[T]he underlying facts in [the *RSM v. St. Lucia*] arbitration were rather exceptional since the claimant was not only impecunious and funded by a third party, but also had a proven history of not complying with cost orders. As underlined by the arbitral tribunal, these circumstances were considered cumulatively.<sup>19</sup>

15. The *Eurogas* Tribunal then expressly held that financial difficulties and third party funding do not justify security for costs.

The Tribunal is of the view that financial difficulties and third party-funding—which has become a common practice—do not

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<sup>18</sup> **RLA-177**, *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, Aug. 13, 2014, Assenting Opinion, ¶ 2; **CLA-173**, Christopher Bogart, *Why the majority got it wrong on security for costs*, Global Arbitration Review, Sept. 25, 2014; **CLA-174**, Alison Ross, *A storm over St. Lucia*, Global Arbitration Review, Oct. 25, 2014.

<sup>19</sup> **CLA-175**, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 – Decision on the Parties' Requests for Provisional Measures, June 23, 2015, ¶ 122.



necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs.<sup>20</sup>

16. Tribunals operating under the 2010 UNCITRAL Rules have reached similar holdings. For instance, the *Hesham Tallat M. Al-Warraq v. Indonesia* Tribunal held that claimants are not required to prove that they can pay an adverse costs award: “the Claimant is not required to demonstrate sufficient financial standing to meet a possible adverse costs award, or to provide security for such a sum, as a precondition of pursuing an investor-state arbitration.”<sup>21</sup> And the *Rurelec v. Bolivia* Tribunal rejected Bolivia’s argument that the mere existence of third party-funding warrants security for costs: “Respondent has not shown a sufficient causal link such that the Tribunal can infer from the mere existence of third party funding that the Claimants will not be able to pay an eventual award of costs rendered against them, regardless of whether the funder is liable for costs or not.”<sup>22</sup>

17. In its submission, Bolivia cites Gary Born’s Treatise on international commercial arbitration, a one-page article by Jean Kalicki from 2006, the *RSM v. St. Lucia* tribunal, and the “Assenting Opinion” of Gavan Griffith in *RSM v. St. Lucia* as support for its assertion that “international case law and doctrine agree that the mere uncertainty as to the existence of [a third party funder’s] obligation to reimburse constitutes ‘*compelling grounds for security for costs.*’”<sup>23</sup>

18. Bolivia’s assertion is incorrect for several reasons. First, “international case law” does not agree with that assertion. Several recent investment tribunals that have held that third-party funding does not warrant security for costs regardless of whether the funder is under an obligation to pay for an adverse costs award.<sup>24</sup> And no investment tribunal has ever held that third-party funding or uncertainty as to whether the funder must pay an adverse costs award

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<sup>20</sup> **CLA-175**, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 – Decision on the Parties’ Requests for Provisional Measures, June 23, 2015, ¶ 123.

<sup>21</sup> **CLA-176**, *Hesham Talaat M. Al-Warraq v. Indonesia*, UNCITRAL Rules (2010), Award on Respondent’s Preliminary Objections to Jurisdiction and Admissibility of the Claims, June 21, 2012, ¶ 109.

<sup>22</sup> **CLA-175**, *Guaracachi America, Inc. and Rurelec v. Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14, Mar. 11, 2013, ¶ 7.

<sup>23</sup> Bolivia’s Request for *Cautio Judicatum Solvi* and Disclosure of Information, Oct. 8, 2015, ¶¶ 28-31 (italics in original).

<sup>24</sup> **CLA-175**, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 – Decision on the Parties’ Requests for Provisional Measures, June 23, 2015, ¶ 123; **CLA-166**, *Guaracachi America, Inc. and Rurelec v. Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14, Mar. 11, 2013, ¶ 7.

warrants security for costs. As discussed above, the *RSM v. St. Lucia* Tribunal did not endorse Bolivia's assertion. That Tribunal held that it was a combination of factors and, in particular, a history of failing to pay adverse costs awards that justified an order of security for costs.<sup>25</sup> Gavan Griffith endorsed Bolivia's assertion, but he did so in a (criticized) "Assenting Opinion" precisely because his co-arbitrators on the *RSM v. St. Lucia* Tribunal did not agree with him.<sup>26</sup>

19. Second, the doctrine that Bolivia cites articulates an unpersuasive, minority view. The sparse reasoning of the three authorities that Bolivia cites is that third-party funders are acting opportunistically because they seek to profit from a successful award, but allegedly face no risk if a claimant's case fails. An "arbitral hit and run" as Ms. Kalicki puts it or, in the words of Mr. Griffith's Assenting Opinion, such funders are "mercantile adventurers" who "embrace the gambler's Nirvana: Heads I win, and Tails I do not lose."<sup>27</sup> This reasoning fails to appreciate that third-party funders always assume significant risks even if they do not assume an obligation to pay an adverse costs award. They may spend several million dollars funding a case and will lose all of it if the claimant's case fails even without assuming liability for an adverse costs award. Losing millions of dollars is not "Tails I do not lose."

20. At the same time, the existence of a third-party funder signals that a claimant's case likely has merit, and, at a minimum, is not frivolous. Third-party funders are sophisticated actors, and they are not in the business of funding cases without thoroughly analyzing the merits of the claims and defense of the case. They perform due diligence, including obtaining the legal opinions of independent law firms regarding the merits of a claimant's case and choose to fund only after determining that there is a reasonable likelihood of success to warrant assuming significant financial risks. Requiring the third-party funder to assume responsibility for an adverse costs award simply requires the funder to assume even more risk, which alters their financial analysis in a manner that makes the (already expensive) funding even more expensive for the claimant. Thus, we are faced with the circumstance about which several authorities have

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<sup>25</sup> **RLA-177**, *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, Aug. 13, 2014, ¶ 86.

<sup>26</sup> See, e.g., **CLA-173**, Christopher Bogart, *Why the majority got it wrong on security for costs*, Global Arbitration Review, Sept. 25, 2014; **CLA-174**, Alison Ross, *A storm over St. Lucia*, Global Arbitration Review, Oct. 25, 2014.

<sup>27</sup> **RLA-180**, J.E. Kalicki, *Security for Costs in International Arbitration*, Transnational Dispute Management, Vol. 3, No. 5; **RLA-177**, *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, Aug. 13, 2014, Assenting Opinion, ¶¶ 13-14.

expressed concern: allowing a respondent to impose significant financial barriers on claimants with non-frivolous claims who allege that the measures at issue in the arbitration placed them in the difficult financial position in which they find themselves.

21. Third-party funding is just that: a funding mechanism. From the Respondent's perspective, it is no different than other funding mechanisms a claimant might employ, such as obtaining a line of credit from a bank or issuing bonds or agreeing to a contingency fee with their lawyers. Yet no one suggests that in those circumstances the bank or bondholders or lawyers should assume responsibility for a respondent's adverse costs award.

22. In short, these numerous authorities demonstrate that security for costs should only be granted in extreme and exceptional circumstances. Investment jurisprudence is uniform in holding that the risk of an unpaid costs award alone does not warrant security for costs and the majority (and better) view is that the existence of third-party funding does not alter this conclusion—especially if the claimant's financial condition is alleged to have been caused by the State measures at issue in the arbitration. Special-purpose companies are not treated differently from any other claimant. Every investment tribunal except for one has rejected respondents' requests of security for costs and the only tribunal that ordered security for costs affirmed that the standard is high and exceptional. The key holding that warranted an order of security for costs was not a claimant's financial distress or third-party funding. Rather, it was a notorious history of repeatedly failing to pay prior adverse costs awards.

### **III. BOLIVIA'S REQUEST OF SECURITY FOR COSTS LACKS MERIT**

#### **A. SAS DOES NOT HAVE A HISTORY OF UNPAID PRIOR ADVERSE COSTS AWARDS**

23. Bolivia's request of security for costs fails for at least four, independent reasons. First, SAS has never failed to pay a prior adverse costs award. It has made every payment required in this arbitration on time. It has never and is not currently acting in an abusive manner or engaged in serious misconduct and Bolivia has not alleged otherwise. For this reason alone, this Tribunal should reject Bolivia's request of security for costs.

#### **B. SAS'S FINANCIAL CONDITION IS A RESULT OF BOLIVIA'S ILLEGAL EXPROPRIATION**

24. SAS is a special-purpose, holding company. Its primary assets are the shares of the companies that, in turn, directly owned the investment at issue in this arbitration. Bolivia's illegal, uncompensated expropriation severely damaged SAS's financial condition. To allow

Bolivia to require security for costs would constitute allowing Bolivia to benefit from its improper conduct. As discussed above, several investment tribunals have held that special-purpose companies are common in investment arbitration and that security for costs is inappropriate when a claimant's financial condition is alleged to be a result of the State measures at issue in the arbitration.<sup>28</sup>

25. Further, Bolivia is wrong when it asserts that "SASC itself has envisaged running out of funds by the end of 2015."<sup>29</sup> In support of this assertion, Bolivia quotes the phrase "viability of the company could be jeopardized" in SASC's Annual Information Form to give the impression that there is an alarming situation with the company.<sup>30</sup> Yet this phrase is extracted from a section in the document in which the company cautions its investors about all possible risks and uncertainties that are company and industry specific (many of which will never materialize).<sup>31</sup> In that section, the company warns investors regarding the risks of earthquakes, explosions, terrorist attacks, and landslides. SASC has included the same or similar "financial risk disclosure" language in its Annual Information Form every year since the company was incorporated and went public.<sup>32</sup> In fact, what would be odd and unusual is a mining company that did not include such language in its disclosure statements to investors no matter how strong its financials at any given moment.

26. Next, Bolivia notes that SASC had around US\$ 24 million in available cash in 2012 and only around US\$ 2.5 million in June 2015 and asserts, based on two data points, that SASC's "quarterly average expenditure" is around US\$ 1.13 million. Thus, according to Bolivia, SASC will run out of cash by the end of this year.<sup>33</sup> Bolivia's analysis is flawed. The reduction in cash from 2012 to 2015 was due to voluntary funding of the Company's exploration programs in projects in Chile and the United States. Bolivia's analysis assumes that the Company will spend the same amount of cash in future quarters without regards to the fact that

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<sup>28</sup> **CLA-172**, *Libananco Holdings Co. Limited v. Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, June 23, 2008, ¶ 57; **RLA-177**, *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, Aug. 13, 2014, Assenting Opinion, ¶ 2.

<sup>29</sup> Bolivia's Request for *Cautio Judicatum Solvi* and Disclosure of Information, Oct. 8, 2015, § 3.2.

<sup>30</sup> *Id.*, ¶ 20.

<sup>31</sup> **R-150**, TriMetals Mining Inc., *Annul Information Form 2014*, Mar. 23, 2015 at 27-35.

<sup>32</sup> **C-297**, *See e.g.*, South American Silver Corp., Annual Information Form, March 25, 2009 at 40.

<sup>33</sup> Bolivia's Request for *Cautio Judicatum Solvi* and Disclosure of Information, Oct. 8, 2015, ¶ 21.

future spending is at Management's discretion. SASC can eliminate or significantly reduce most of its exploration and general and administrative expenditure. Exploration budgets are seasonal and are not even-trended from quarter to quarter. SASC defines its annual budgets based on availability of cash resources and the high likelihood of future financings.

27. Bolivia asserts that its estimate of SASC's "quarterly average expenditure" is conservative because it used data points in 2015 instead of 2012, when SASC's average quarterly expenditure was US\$ 3 million and 2014, when it was US\$ 2 million. These figures do not prove that Bolivia's estimate is conservative. Rather, they prove SASC's point that SASC's expenditures vary. SASC controls its quarterly expenditures. They are based on exploration budgets that are determined based on available cash resources. Moreover, SASC's quarterly expenditures in 2012 were high in part because Bolivia expropriated the investment at issue in this arbitration. As a result, SASC incurred: a) severance costs to lay off many employees and executives, b) contract termination costs with vendors working on the Malku Khota project, and c) other costs related to exiting Bolivia. SASC will not incur those costs in the future, which again shows that SASC's expenditures vary significantly from quarter to quarter.

28. Bolivia asserts that SASC has "contracts debt" over the next five years that exceeds its current available cash.<sup>34</sup> These are not "debts." The vast majority of the "payments" that Bolivia cites are "option payments" that SASC does not have to incur. As the document that Bolivia cites explains, "The Company is contractually obliged to make these payments only and as long as it is willing to exercise its option to acquire the Esacalones property."<sup>35</sup> Bolivia also cites "lease agreements for office premises," yet the very document that Bolivia cites also explains that SASC is recovering most of these costs by subletting its prior main office in Vancouver.<sup>36</sup>

29. Bolivia notes that SASC's current projects do not generate income and again quotes standard risk disclosure language that SASC includes in all of its reports to investors and Bolivia uses it as evidence that there is a serious risk that SASC will run out of funds to meet its

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<sup>34</sup> Bolivia's Request for *Cautio Judicatum Solvi* and Disclosure of Information, Oct. 8, 2015, ¶ 23.

<sup>35</sup> **R-148**, TriMetals Mining Inc. Second Quarter Ended June 30, 2015 Management's Discussion & Analysis, Aug. 7, 2015 at 7.

<sup>36</sup> *Id.*

obligations by the end of this year.<sup>37</sup> Bolivia's assertion ignores several points. As noted above, SASC has significant control over what expenditures it does and does not incur. Further, small mining exploration companies like SASC (known in the industry as the "Juniors") conduct discovery, exploration, and development of mineral projects. Those activities do not generate immediate income. Instead, they generate significant income when the projects become operational or when sold to a major mining company. Investors do not invest in Junior exploration companies expecting immediate income generation and dividend payments. They invest in good management that can discover, explore, and develop new projects.

30. Bolivia's arguments also ignore that an exploration company's financial strength is not limited to its cash, but includes the properties in which it has an interest. SASC owns the Escalones Project in Chile and the Gold Springs Project in Nevada. The most recent resource estimate for Escalones includes, among others, indicated resources of 1.9 billion pounds of copper at a copper equivalent grade of 0.38% and inferred resources of 4.7 billion pounds of copper at a copper equivalent grade of 0.40%.<sup>38</sup> The Gold Springs Property Preliminary Economic Assessment Update confirms that the Measured plus Indicated geologic model mineral resource is 30,046,000 tonnes at 0.45 g/t gold and 9.6 g/t silver for a contained 434,000 troy ounces of gold and 9,296,000 troy ounces of silver plus an Inferred Mineral Resource of 20,887,000 tonnes at 0.34 g/t gold and 6.9 g/t silver for an additional 225,000 troy ounces of gold and 4,613,000 troy ounces silver using a 0.2 g/t gold cutoff.<sup>39</sup> SASC could use these valuable assets to provide further liquidity if needed, and Bolivia cannot deny the significant value of these exploration properties.

31. Moreover, even if Bolivia could prove the contrary, numerous investment tribunals have held that a claimant's financial distress and a consequential risk of an unpaid adverse costs award does not justify an order of security for costs.<sup>40</sup>

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<sup>37</sup> Bolivia's Request for *Cautio Judicatum Solvi* and Disclosure of Information, Oct. 8, 2015, ¶ 24.

<sup>38</sup> **C-298**, Hard Rock Consulting, LLC., *NI 43-101 Mineral Resource Amended Technical Report, Resource Estimate on the Escalones Porphyry Copper Project*, July 11, 2014, § 1.4.

<sup>39</sup> **C-299**, Terre Lane, Rick Moritz & Kurt Katsura, *Preliminary Economic Assessment Update, Gold Springs Property, Utah/Nevada, USA*, Aug. 12, 2015, § 1.5.

<sup>40</sup> *See, e.g., CLA-171, Burmi S.R.L. and Eagle Games S.H.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, May 3, 2012, ¶ 41; **CLA-169**, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Decision on Security for Costs, Oct. 14, 2010, ¶ 5.19.

**C. SAS’S ENGAGEMENT OF A THIRD-PARTY FUNDER DOES NOT WARRANT SECURITY FOR COSTS**

32. As the *Eurogas* Tribunal held, third-party financing is common in investment arbitration, and does not warrant security for costs.<sup>41</sup> Similarly, the *Rurelec* Tribunal rejected Bolivia’s request of security for costs even though the claimants in that arbitration engaged a third-party funder.<sup>42</sup> Bolivia relies on a minority position in the doctrine. No investment tribunal has ever adopted that position and neither should this Tribunal.

**D. THE SPECULATIVE RISK OF AN UNPAID ADVERSE COSTS AWARD DOES NOT SUBSTANTIALLY OUTWEIGH THE CERTAIN HARM OF SECURITY FOR COSTS**

33. Bolivia’s request of security for costs fails even if all of the incorrect factual allegations in its submission were actually true. As noted several times in this submission, Article 26 of the UNCITRAL Rules provides that the party requesting an interim measure of security for costs establish that the harm it will likely suffer if such measures are not ordered “substantially outweigh” the harm that will likely be imposed on the other party. In its submission, Bolivia focusses exclusively on arguments attempting to show that it will likely suffer harm in the form of an unpaid, adverse costs award if this Tribunal does not order SAS to post security for costs. At no point in its submission does Bolivia even attempt to show that the risk of an unpaid adverse costs award “substantially outweighs” the harm that an order of security for costs would impose on SAS. Since Bolivia, as the requesting party, bears the burden of satisfying the Tribunal that this element is met, this omission alone warrants rejecting Bolivia’s request.<sup>43</sup>

34. In any event, the remote risk to Bolivia of an award of costs, let alone an unpaid adverse costs award, does not substantially outweigh the harm that would be imposed on SAS. The potential harm to Bolivia is speculative for at least three reasons. First, it assumes that Bolivia will prevail on either its jurisdictional or its merits defenses. Second, it assumes that the Tribunal will also issue an award of costs in favor of Bolivia. In its submission, Bolivia notes

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<sup>41</sup> **CLA-175**, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 – Decision on the Parties’ Requests for Provisional Measures, June 23, 2015, ¶ 123.

<sup>42</sup> **CLA-166**, *Guaracachi America, Inc. and Rurelec v. Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14, Mar. 11, 2013, ¶ 7.

<sup>43</sup> **CLA-130**, UNCITRAL Rules (2010), Article 26(3) (“The party requesting an interim measure...shall satisfy the arbitral tribunal that....”).

Article 42(1) of the UNCITRAL Rules, which provides that “in principle” the unsuccessful party should pay the costs of the arbitration. Yet that same Article also clarifies that the Tribunal retains discretion not to apply the “Loser Pays” principle.<sup>44</sup> And, as reflected in a recent article in the *International Arbitration Reporter*, parties in investment arbitration (both respondents and claimants) often do not obtain all of the costs they incur even when they obtain a costs award.<sup>45</sup> Third, Bolivia’s request assumes that SAS will fail to pay an adverse costs award.

35. In contrast to Bolivia’s speculative risk of harm, the harm that an order of security for costs would impose on SAS would be immediate and significant. Investor-State arbitration is a very expensive process even before taking into consideration the costs required to provide several million dollars in security. Thus, the speculative risk of future harm to Bolivia does not “substantially outweigh” the immediate harm that an order of security for costs would impose on SAS.

36. Put simply, Bolivia’s request for an order of security for costs falls far short of standard set forth under Article 26 of the UNCITRAL Rules.

#### **IV. SAS SHOULD NOT BE ORDERED TO DISCLOSE THE TERMS OF ITS FUNDING AGREEMENT**

37. Bolivia asks the Tribunal to order SAS to disclose the identity of its third-party funder and to disclose the terms of that funding agreement. Bolivia’s alleged reasons for this request are that it needs to determine: a) whether the funding agreement creates any conflicts of interest, b) whether SAS has “assigned” its claims, and c) who is the “real party in interest” in this arbitration.<sup>46</sup>

38. In the interest of transparency and to address Bolivia’s concern regarding conflicts of interest, SAS proposes to disclose the name of its third-party funder. Disclosing the name of that entity alone will enable all parties to determine whether any relationship exists

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<sup>44</sup> **CLA-130**, UNCITRAL Rules (2010), Article 42(1) (“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.”); **CLA-177**, *Detroit International Bridge Company v. Canada*, PCA Case No. 2012-25, Award on Costs, Aug. 17, 2015, ¶ 48 (“[A]n arbitral tribunal has near total discretion to allocate costs of arbitration pursuant to Article 42(1) of the UNCITRAL Arbitration Rules.”).

<sup>45</sup> **CLA-178**, Luke Eric Peterson, *Canada continues to fall short of recovering legal expenses despite NAFTA victories; Arbitrators deem hours spent on recent DIBC case as excessive*, *Investment Arbitration Report*, Nov. 17, 2015 (discussing four recent investment cases in which Canada prevailed and noting that “Canada’s successful recoupment of [arbitration] costs has been quite limited in recent cases.”).

<sup>46</sup> Bolivia’s Request for *Cautio Judicatum Solvi* and Disclosure of Information, Oct. 8, 2015, ¶¶ 34-39.



between the relevant parties in this arbitration. Assuming that no relevant relationships exist, there is no need to disclose any further information.

39. Bolivia's alleged concern regarding "assignments" and "real parties in interest" lacks merit. SAS is the real party in interest in this arbitration and it has already provided evidence that it owned the investment that Bolivia expropriated. SAS represents that it has not "assigned" its claim to anyone. Indeed, "assigning claims" is not a normal practice in third-party funding arrangements and Bolivia offers no evidence or even speculative reasoning as to why SAS would have assigned its claim.

40. When opposing Bolivia's request for SAS's funding agreement during the "document production" process, SAS noted that the terms of SAS's funding agreement are irrelevant to the issues in dispute in this arbitration and that the terms of that agreement are confidential, commercially sensitive, and that SAS and the funder would incur prejudice if the Tribunal ordered SAS to disclose the terms of the funding agreement.<sup>47</sup> The Tribunal rejected Bolivia's request without prejudice to renew the request in a subsequent submission.<sup>48</sup> At the same time, the Tribunal noted that Bolivia had failed to address or rebut SAS's assertion that it would suffer prejudice if ordered to disclose the terms of its funding agreement.<sup>49</sup> In its recent submission, Bolivia renews its request for these documents, yet still makes no effort to address SAS's concern.

## **V. CONCLUSION**

41. An order of security for costs in this proceeding is unnecessary and would be grossly disproportionate. It would impose a significant financial hurdle to the pursuit of a non-frivolous claim and frustrate access to justice.

42. SAS requests that the Tribunal reject Bolivia's request of security for costs. SAS also requests that the Tribunal reject all of Bolivia's requests for information regarding SAS's engagement of a third-party funder except for an order limited to requiring SAS to disclose the name of its third-party funder.

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<sup>47</sup> Procedural Order No. 7 on Document Production, July 21, 2015, ¶ 26.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* ("This objection has not been rebutted by the Respondent.").

43. SAS also requests that the Tribunal award costs to SAS, including attorneys' fees, in having to respond to Bolivia's application filed October 8, 2015, and filed to harass SAS and force it to respond to Bolivia's application while, at the same time, preparing its Reply due on November 30, 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'H. Burnett', with a long horizontal flourish extending to the right.

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