

PCA Case No. 2013-15

**IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE
GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN
IRELAND AND THE GOVERNMENT OF THE REPUBLIC OF BOLIVIA FOR THE
PROMOTION AND PROTECTION OF INVESTMENTS, DATED MAY 24, 1988**

- and -

THE UNCITRAL ARBITRATION RULES (AS REVISED IN 2010)

- between -

SOUTH AMERICAN SILVER LIMITED (BERMUDA)

(the “Claimant”)

- and -

THE PLURINATIONAL STATE OF BOLIVIA

(the “Respondent”, and together with the Claimant, the “Parties”)

PROCEDURAL ORDER NO. 14

Tribunal

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

April 1, 2016

I. Procedural History

1. By letter of March 10, 2016, the Plurinational State of Bolivia ("**Bolivia**" or the "**Respondent**") informed South American Silver Limited ("**SAS**" or the "**Claimant**" and, together with the Respondent, the "**Parties**") that, with its Rejoinder, it would submit the witness statement (the "**Testimony**") of a person that, according to the Respondent, actively participated in the Project (the "**Witness**").
2. In the aforementioned letter, the Respondent affirmed that, in his/her statement, the Witness would describe facts that might constitute criminal offenses in Bolivia and submit documents confirming such assertions.¹ According to Bolivia, when offering the Testimony, the Witness requested protection in fear of retaliation from SAS, CMMK or certain Indigenous Communities against him/her.² Consequently, Bolivia prepared a draft protective order (the "**Draft Protective Order**") that would contain the minimum conditions of protection necessary to prevent retaliation against the Witness and to allow Bolivia to present its case.³
3. In said communication of March 10, Bolivia requested the Claimant to inform whether it agreed to the terms of the Draft Protective Order and stated that, otherwise, it would request the Tribunal to adopt the corresponding protective measures in a procedural order.⁴ Likewise, Bolivia noted that if such determination was not adopted before the submission of its Rejoinder, Bolivia would submit the Testimony in a closed envelope to the Permanent Court of Arbitration (the "**PCA**") and would offer a redacted version to the Claimant.⁵
4. By letter of March 14, 2016, copying the Tribunal, SAS rejected Bolivia's proposal and noted that the Respondent intended to impose onerous conditions with the purpose of preventing SAS from rebutting a testimony which content and author were still unknown.⁶ Likewise, SAS noted that Bolivia's request was untimely and baseless, for the Respondent had failed to demonstrate that a risk of retaliation by SAS against the Witness existed.⁷ In addition, SAS assured Bolivia that it had no intention of interfering with its witnesses, nor could it do so because, as a consequence of the illegitimate expropriation, it no longer operated in Bolivia.⁸ Finally, SAS requested the Tribunal that, unless Bolivia reconsidered its position, it direct Bolivia to make a formal and sufficiently detailed application to enable the Claimant to respond adequately to Bolivia's request.⁹
5. On March 15, 2016, the Tribunal granted Bolivia until March 16, 2016, to submit any request for a protective order regarding the Witness. Likewise, it granted SAS until March 17, 2016, to comment on the request Bolivia submits. The Parties presented their respective submissions within the established time limit.

¹ Bolivia's communication to SAS of March 10, 2016, p. 1.

² Bolivia's communication to SAS of March 10, 2016, p. 1.

³ Bolivia's communication to SAS of March 10, 2016, p. 1.

⁴ Bolivia's communication to SAS of March 10, 2016, p. 1.

⁵ Bolivia's communication to SAS of March 10, 2016, p. 1. Subsequently, in its communication to the Tribunal of March 16, 2016, Bolivia confirmed that it would submit its Rejoinder on time and reserved its right to: (i) submit to the Tribunal the complete Rejoinder and the testimony of the witness at issue in a closed envelope; and (ii) submit a redacted version of the Rejoinder to SAS while the issue was decided. (See Bolivia's Communication to the Tribunal of March 16, 2016, footnote 4).

⁶ SAS' communication to Bolivia of March 14, 2016, p. 1.

⁷ SAS' communication to Bolivia of March 14, 2016, p. 1.

⁸ SAS' communication to Bolivia of March 14, 2016, p. 1.

⁹ SAS' communication to Bolivia of March 14, 2016, p. 2.

6. By letter of March 16, 2016 (the “**Request**”), Bolivia requested the Tribunal to: (i) adopt the protective order attached to the Request; (ii) order SAS to adhere to said protective order as an indispensable condition to receive a copy of the Testimony; and (iii) order SAS to keep the identity of the Witness and the Testimony confidential according to the terms and conditions provided in such protective order.¹⁰
7. By letter of March 17, 2016, SAS requested the Tribunal to reject the protective order proposed by Bolivia and order the Respondent to submit its Rejoinder together with all un-redacted witness statements and additional evidence by March 21, 2016.¹¹
8. By Procedural Order No. 13 of March 21, 2016, the Tribunal stated that with the information provided by the Parties in their written submissions, it was not in a position to take a decision on whether the Witness and the Testimony required the protection and confidentiality intended by Bolivia and, if so, what would be their scope.
9. Consequently, the Tribunal requested that Bolivia submit, only to the Tribunal, on the date fixed for the submission of the Rejoinder, *i.e.*, March 21, 2016, a complete un-redacted version of the Testimony. Upon reviewing the Testimony, the Tribunal would decide on the Request as appropriate.
10. By letter of March 21, 2016, and upon the Respondent’s request, the Tribunal clarified that the Respondent was to: (a) submit the Rejoinder on schedule, *i.e.*, March 21, 2016; (b) submit said Rejoinder to the Claimant, in a version redacted only in relation to those sections that contain references to the Testimony; and (c) submit to the Tribunal, on the date scheduled for the submission of the Rejoinder, a complete un-redacted version of the Rejoinder and together with it, a complete un-redacted version of the Testimony.
11. On March 21, 2016, the Respondent submitted (i) its redacted Rejoinder and accompanying documents for the Claimant, and (ii) its un-redacted Rejoinder and the Testimony to the Tribunal and the PCA.

II. Positions of the Parties

Respondent’s Position

12. According to the Respondent, the Tribunal’s authority to adopt these measures derive from Article 17(1) of the 2010 UNCITRAL Arbitration Rules (the “**UNCITRAL Rules**”) and Article 9(4) of the IBA Rules on the Taking of Evidence in International Arbitration (the “**IBA Rules**”).¹²

¹⁰ SAS’ communication to Bolivia of March 14, 2016, p. 4.

¹¹ SAS’ communication to Bolivia of March 14, 2016, p. 3.

¹² Bolivia’s communication to the Tribunal of March 16, 2016, p. 2.

13. In its Request, Bolivia specifies that the Testimony would confirm that CMMK and its employees incurred in unlawful actions and that they caused confrontations between the Indigenous Communities that, ultimately, would have forced the intervention of the State to pacify the area by means of the Reversion.¹³ Taking into consideration the content of the Testimony, the Witness would have expressed fear of the consequences of his/her Testimony, especially if it was made public.¹⁴
14. Regarding the arguments presented by SAS in its communication of March 14, Bolivia argues, first, that the conditions in the protective order are not onerous nor contrary to due process,¹⁵ for they would allow SAS, its counsel, experts and witnesses to know the identity of the Witness and rebut the Testimony.¹⁶ Bolivia adds that the protective order would be the only mechanism that would enable Bolivia to present its case freely and without interferences and, at the same time, enable SAS to rebut the evidence presented by Bolivia.¹⁷
15. Second, Bolivia notes that the request is not untimely, since it identified the Witness in a document provided by SAS in response to Bolivia's document production requests, the identity of the Witness not having been revealed by SAS or its witnesses previously.¹⁸
16. Third, the Respondent points out that SAS itself has requested and obtained protective orders with similar or even more onerous conditions.¹⁹
17. Fourth, Bolivia affirms that the standard SAS intends to impose by requiring proof that a risk of retaliation indeed exists, is groundless.²⁰ According to Bolivia, the fear expressed by the Witness would be enough to adopt the requested protective measures.²¹ Furthermore, the fact that SAS and CMMK allegedly no longer operate in Bolivia does not override the risk of retaliation, for various officers of said companies, which are also SAS' witnesses, would continue to be domiciled in Bolivia.²²
18. Finally, Bolivia notes that it would not be necessary to know the identity of the Witness and the content of the Testimony to reach a decision on the protective order given that Bolivia's request neither implies the acceptance of the content of the Testimony nor limits SAS' right to rebut it.²³ Nevertheless, should the Tribunal so request, Bolivia would be ready to submit a copy of the Testimony only to the Tribunal for the latter to examine it along with the protective order.²⁴

¹³ Bolivia's communication to the Tribunal of March 16, 2016, p. 1.

¹⁴ Bolivia's communication to the Tribunal of March 16, 2016, p. 2.

¹⁵ Bolivia's communication to the Tribunal of March 16, 2016, p. 2.

¹⁶ Bolivia's communication to the Tribunal of March 16, 2016, pp. 2-3.

¹⁷ Bolivia's communication to the Tribunal of March 16, 2016, p. 3.

¹⁸ Bolivia's communication to the Tribunal of March 16, 2016, p. 3.

¹⁹ Bolivia's communication to the Tribunal of March 16, 2016, p. 3.

²⁰ Bolivia's communication to the Tribunal of March 16, 2016, p. 4.

²¹ Bolivia's communication to the Tribunal of March 16, 2016, p. 4.

²² Bolivia's communication to the Tribunal of March 16, 2016, p. 4.

²³ Bolivia's communication to the Tribunal of March 16, 2016, p. 4.

²⁴ Bolivia's communication to the Tribunal of March 16, 2016, p. 4.

Claimant's Position

19. According to SAS, the protective order proposed by Bolivia would deprive the Claimant of its due process right by granting extraordinary protection to an unknown person that has not yet presented his/her testimony in the arbitration.²⁵
20. SAS considers that, contrary to the Respondent's suggestion, the protective order proposed by Bolivia represents an unacceptable restriction to SAS' rights in this arbitration.
21. In particular, SAS notes that the provisions in Clause 1 of the protective order proposed by Bolivia would prevent SAS from fully investigating the factual allegations that the Witness may present, seeking evidence from third parties to rebut the claims and gathering evidence regarding Bolivia's conduct in procuring the Testimony.²⁶ Likewise, SAS reaffirms that it has no intention of interfering inappropriately with any of the Respondent's witnesses and that the latter has not provided a shred of evidence that this is even remotely possible.
22. For its part, the restriction contained in Clause 2 is grossly overbroad, particularly in light of the provisions in articles 10.3 and 10.5 of Procedural Order No. 1 regarding the redaction of confidential or sensitive information and the confidentiality of witness statements.²⁷
23. SAS further notes that Clause 3 of the protective order proposed by Bolivia would imply an inequitable treatment of the Claimant given that said provision would prevent SAS from obtaining a copy of the transcript and the audio recording of the Testimony to use at the hearing and subsequent pleadings.²⁸ According to the Claimant, this would be fundamentally unfair in light of Article 17 of the UNCITRAL Rules by not treating the Parties equally and not giving reasonable opportunity of presenting their case at the appropriate stage of the proceedings, which is a fundamental principle of due process of law.
24. Finally, the Claimant notes that Clause 5 of the protective order proposed by Bolivia is inappropriate for it intends that SAS relinquish unknown rights it may have depending on the content or circumstances surrounding the undisclosed Testimony.²⁹
25. Additionally, the Claimant insists that Bolivia has not demonstrated that an actual risk of retaliation by SAS against the Witness exists. Contrary to Bolivia's contention, the standards proposed by SAS does exist and emerges from the decisions by the tribunals in *Caratube v. Kazakhstan* and *Libananco v. Turkey*, cited by the Respondent itself in its communication of March 10, 2016.³⁰ According to the Claimant, these tribunals adopted the corresponding decisions with respect to the exclusion of evidence or the adoption of an order on immunity on the basis of the existence of evidence regarding the circumstances that led to the respective requests.³¹ The egregious behavior of one of the parties that led the tribunals in those cases to adopt their decisions could not be alleged with respect to SAS in this case.³²

²⁵ SAS' communication to the Tribunal of March 17, 2016, p. 1.

²⁶ SAS' communication to the Tribunal of March 17, 2016, pp. 1-2.

²⁷ SAS' communication to the Tribunal of March 17, 2016, p. 2.

²⁸ SAS' communication to the Tribunal of March 17, 2016, p. 2.

²⁹ SAS' communication to the Tribunal of March 17, 2016, p. 2.

³⁰ SAS' communication to the Tribunal of March 17, 2016, p. 2.

³¹ SAS' communication to the Tribunal of March 17, 2016, p. 2. The Claimant states that in *Libananco*, the claimant accused Turkey of intercepting its communications with its counsel on the basis of documentary evidence and of Turkey's admission that it had done so (*Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, June 23, 2008, paras. 72 and 75). In *Caratube*, according to the Claimant, the tribunal considered that a memorandum of the Austrian Government referring to a

III. Tribunal's Analysis

26. Pursuant to Article 17(1) of the UNCITRAL Rules, applicable to this arbitration, the Tribunal has the authority to conduct the arbitration in such manner as it deems 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. Likewise, the IBA Rules, which serve as additional guide to the Tribunal,³³ provide that the latter has the power to adopt the necessary measures to permit evidence to be presented or considered subject to suitable confidentiality protection.³⁴
27. Furthermore, the Tribunal has the duty to preserve the integrity of the proceedings and avoid conducts or measures that aggravate the dispute between the Parties.
28. Paragraph 6.10 of Procedural Order No. 1 sets forth the circumstances under which a Party may request to the Tribunal that certain information be classified as “highly confidential”.
29. Section 10 of Procedural Order No. 1 (paragraphs 10.1 to 10.5) provides that the documents relating to the arbitration that may be published – documents that do not include, *inter alia*, the witness statements – and the possibility to redact the documents to be published so as to exclude any confidential or sensitive information.³⁵
30. Paragraph 10.5 of Procedural Order No. 1 provides that “[a]ll 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).”
31. Bolivia requests the Tribunal is: (i) that the identity of the witness whose protection is requested and the content of his/her statement be kept confidential; (ii) that the same may only be known by SAS’ counsel, witnesses and independent experts signing a confidentiality undertaking; (iii) that any reference to the Witness, the Testimony or the documents submitted by the Witness that may give away his/her identity be redacted from the public documents; and (iv) that SAS, its counsel, witnesses and independent experts commit to not retaliating against the Witness.³⁶
32. It is not for the Tribunal at this stage to assess the Testimony. Nor can the Tribunal, as a preliminary matter, explore with the Parties whether the fear that according to Bolivia the Witness has, and which is the basis of the Request, is well founded or not, for that would imply revealing the identity of the Witness without a decision on the Request, whose purpose is precisely to protect the identity of the Witness and the content of the Testimony from third parties.

witness’ dangerous situation was insufficient proof of Kazakhstan’s alleged threatening activity and dismissed the request for an order on immunity for going beyond the protections granted by Articles 21 and 22 of the ICSID Convention (*Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, June 5, 2012, para. 62).

³² SAS’ communication to the Tribunal of March 17, 2016, p. 3.

³³ Procedural Order No. 1, dated May 27, 2014, paragraph 6.1.

³⁴ Article 9(4) of the IBA Rules.

³⁵ Procedural Order No. 1, dated May 27, 2014, paragraph 10.3.

³⁶ Bolivia’s communication to the Tribunal of March 16, 2016.

33. Under the particular circumstances of this case, the Tribunal is to determine whether the Witness and the Testimony require additional protection to the one already envisaged in the UNCITRAL Rules, the IBA Rules and the procedural orders applicable to this arbitration considering, on the one hand, the identity of the Witness and the text of the Testimony and, on the other hand, the need to ensure the Parties' right to present their case.
34. Regarding sections (i) and (iii) in paragraph 31 *supra*, the Tribunal notes that they are situations expressly contemplated in paragraphs 10.3 and 10.5 of Procedural Order No. 1. Therefore, a special protection order would not be necessary for the Testimony referred to by Bolivia in its Request to be considered as confidential, nor for information contained therein, which may be considered as sensitive, to be redacted from the Testimony and from the documents and decisions that may refer to it.
35. In respect of the signing of a confidentiality undertaking by SAS' counsel, witnesses and independent experts as a condition to have access to the Testimony and accompanying documents (section (ii) in paragraph 31 *supra*), the Tribunal considers, (i) on the one hand, that whereas there is no proof or indication that the Witness may have been or may be subject to retaliation, in this particular case, the identity of the Witness and the content of the Testimony may be particularly sensitive if they were to be made public, thus deserving that some additional conditions be set to keep their confidentiality, and (ii) on the other hand, that the conditions proposed by Bolivia may affect the Claimant's right to defense in this arbitration. In particular, the decision on the Request must ensure that the Claimant is able to investigate the facts described by the Witness and seek evidence relating to the Testimony.
36. Finally, in relation to the petition that SAS, its counsel, witnesses and independent experts undertake not to retaliate against the Witness, as a condition to have access to the Testimony (section (iv) in paragraph 31 *supra*), the Tribunal considers, in addition to what has already been noted in paragraph 35 *supra*, (i) on the one hand, that it cannot impose on the Claimant, as suggested by the text in the Draft Protective Order proposed by Bolivia, a premature and general waiver of rights that it may have as a consequence of the Testimony and, (ii) on the other hand, that the restrictions contained in Procedural Order No. 1³⁷, and a limitation consisting in that the Testimony may not be used but in this arbitration and for purposes of the latter is enough to achieve the confidentiality and protection intended by Bolivia. Additionally, the Tribunal takes note of the declarations of SAS' counsel that SAS has no intention to interfere with Bolivia's witnesses.³⁸
37. Thus, with a view to ensuring Bolivia's right to present its defense appropriately in this arbitration, without impinging on SAS' rights, the Tribunal finds appropriate that a protective order be subscribed prior to SAS, its counsel, witnesses and experts having knowledge of the Witness' identity and the Testimony. Therefore, a Protective Order (the "**Protective Order**") is enclosed, which reflects the conditions to which the submission of the Testimony shall be subject.
38. The Tribunal may *ex officio* or at the request of either Party, revise the terms and duration of the Protective Order, should the circumstances so require.

³⁷ "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 a legal right (including in related proceedings between the same or related Parties)." Procedural Order No. 1, paragraph 10.5.

³⁸ SAS' communication to Bolivia of March 14, 2016, p. 1; SAS' communication to the Tribunal of March 17, 2016, p. 2.

39. Nothing in the present Procedural Order shall be interpreted as in any way modifying the burden or standard of proof in these arbitration proceedings, or precluding any subsequent application by either Party or any determination by the Tribunal regarding the admissibility, relevance, materiality or weight of the evidence offered in this arbitration in accordance with Article 27.4 of the UNCITRAL Rules.

Place of the Arbitration: The Hague, the Netherlands



Dr. Eduardo Zuleta Jaramillo
(Presiding Arbitrator)

On behalf of the Tribunal

Annex A

PROTECTIVE ORDER

Whereas on April 30, 2013, South American Silver Ltd. (“SAS” or “**Claimant**”) filed a Notice of Arbitration pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law of 2010 (the “**UNCITRAL Rules**”) against the Plurinational State of Bolivia (“**Bolivia**” or “**Respondent**”), commencing arbitration proceedings under the administration of the Permanent Court of Arbitration (PCA case No. 2013-15) (the “**Arbitration**”).

Whereas on March 16, 2016, Bolivia submitted a request for protection of the witness who has provided the witness statement marked as RWS-7 (the “**Witness**”) as well as his/her written and/or oral testimony (the “**Testimony**”).

Whereas by Procedural Order No. 14, the Tribunal granted the request for protection of the Witness and the Testimony, according to the terms set forth in such Procedural Order.

NOW, THEREFORE, THE TRIBUNAL HEREBY ORDERS AND THE PARTIES AGREE, by their respective counsel, that the Testimony 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 identity of the Witness and the Testimony shall be considered as highly confidential. The Testimony and the identity of the Witness shall be disclosed only to SAS’ counsel upon the signature of the Confidentiality Undertaking contained in Annex B of this Protective Order. SAS’ counsel may disclose the identity of the Witness and the relevant sections of the Testimony to (1) its independent experts and witnesses and (2) other persons, only insofar as may be necessary to investigate the facts described by the Witness, and to seek evidence relating to the Testimony. In either case, the disclosure may only be made after the signing of the Confidentiality Undertaking contained in Annex B of this Protective Order by the independent experts and witnesses or the other persons to whom the identity of the Witness is disclosed, or to whom access to the Testimony is given.
2. The Parties accept that any reference to the Testimony, the Witness, or to any other information that may allow the determination of the identity of the Witness shall be redacted from the documents of the Arbitration to be published by any medium or any means of communication. This includes, without limitation, all the memorials, exhibits, communications, and witness statements submitted by the Parties, as well as all procedural orders, awards, and decisions referring to the Witness or the Testimony. The Parties agree that, with a view to ensuring this confidentiality, any mention of, or reference to the Witness, shall be made using the formula “the Witness X”.
3. The Parties agree that the recording and the transcript of the Testimony provided to the Claimant shall only be consulted by SAS’ counsel, its independent experts and witnesses who have previously signed the Confidentiality Undertaking contained in Annex B of this Protective Order. Such copy(ies) shall be kept at a place to be agreed upon by the Parties and

informed to the Tribunal within five (5) days following the Procedural Order No. 14, and in the absence of an agreement, at the place determined by the Tribunal. The copy(ies) shall be destroyed upon conclusion of the Arbitration, or, if applicable, upon the issuance of the judgment that finally decides on any action for annulment of an award issued in the Arbitration, to the extent that the presentation of the Testimony is required under the law applicable to the action for annulment.

4. The Claimant, its counsel and witnesses (as well as their dependents) undertake to refrain from contacting or communicating with the Witness beyond his/her eventual examination at the hearing.
5. The Testimony shall be used, solely and exclusively, in this Arbitration and solely for purposes related to it.
6. This Protective Order is of indefinite duration and shall remain in full force and effect after the final conclusion of the Arbitration. At any time during this proceeding, the Tribunal may, on its own motion or at the request of either Party, modify or terminate the validity of the terms of this Protective Order.

SO ORDERED this April 1st, 2016.

Place of Arbitration: The Hague, the Netherlands.

The undersigned hereby declare knowledge and acceptance of the above Protective Order.

SOUTH AMERICAN SILVER LIMITED

THE PLURINATIONAL STATE OF
BOLIVIA

Counsel for the Claimant

Date:

Counsel for the Respondent

Date:

ANNEX B

Confidentiality Undertaking

The undersigned, _____, hereby acknowledges that he or she has read the Protective Order issued by the Tribunal through Procedural Order No. 14 in the matter of an arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law of 2010 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, [acting as Claimant’s witness] [acting as Claimant’s counsel], hereby agrees that he or she will not disclose the identity of the Witness or the details of the Testimony, as defined in the Protective Order, and that he or she will use such information in the manner provided for in the Protective Order and solely for purposes related to this Arbitration.

The undersigned, [acting as Claimant’s witness] [acting as Claimant’s counsel], hereby undertakes to refrain from approaching or attempting to communicate with the Witness.

The undersigned, [acting as Claimant’s witness] [acting as Claimant’s counsel], hereby undertakes to use the Testimony exclusively for the purposes of the Arbitration.

Signature: _____

Date: _____