

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. 9

Tribunal

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

October 2, 2015

I. Background

1. On September 1, 2015, the Claimant (or “SAS”) sent a communication to the Tribunal requesting the reconsideration of the decision contained in Procedural Order No. 8 of August 26, 2015 (“PO No. 8”), concerning the classification of certain information as highly confidential (the “Request”). In PO No. 8, the Tribunal classified as Protected Information¹ only category 18 (iv) of Respondent’s *Redfern Schedule* of document requests (the “RDD”), because SAS had not provided enough evidence to convince the Tribunal that the information under categories 18 (i), 18 (ii), and 18 (iii) of the RDD should receive protection.
2. On September 2, 2015, the Tribunal invited Respondent (or “Bolivia”) to submit its comments on the Request, by September 10, 2015.
3. Also on September 2, 2015, by e-mail, Respondent requested the Tribunal to reject the Request *in limine*, and submitted that, should the Tribunal not accept the rejection *in limine*, but decide instead to accept the Request, Bolivia should be granted a week from the decision to respond to the above mentioned communication.
4. On September 11, 2015, the Tribunal refused Bolivia’s requested for rejection *in limine*, and invited Respondent to submit its comments exclusively on the arguments submitted by the Claimant in its Request, within a term of seven (7) days, i.e., by September 18, 2015.
5. On September 18, 2015, the Respondent submitted its comments on the Request.

II. The Parties’ Positions

A. Claimant’s Position

6. In its Request of September 1, 2015, SAS requests the Tribunal to reconsider certain aspects of its decision contained in PO No. 8, and in particular its decision to classify as Protected Information only some of the documents contained in category 18 of the RDD.
7. SAS states that, as it previously explained, the information contained in the documents under category 18 of the RDD is highly sensitive and virtually identical to the documents that the Tribunal has previously classified as Protected Information.
8. According to SAS, in Annex A of its communication of July 28, 2015 (“Annex A”) – prepared in response to Procedural Order No. 7 of July 21, 2015 (“PO No. 7”), where the Tribunal requested SAS to indicate which documents under category 18 of the RDD should be treated as confidential and the reasons for such confidentiality – SAS included a list of the documents that should be treated as Protected Information and provided the reasoning for the confidentiality of those documents.

¹ Protected Information is that which is covered by Procedural Order No. 2 of December 1, 2014 (“PO No. 2”), by Procedural Order No. 3 of January 14, 2015 (“PO No. 3”) and by the Protective Order enclosed thereto (the “Protective Order”).

9. Additionally, in said communication, SAS referred to the reasoning and the evidence already submitted with its communication of October 15, 2014, including the affidavit of Ralph Fitch. And it did so because, according to SAS, the *Metallurgical Processing Data* of Annex A is information of the same nature as that classified as Protected Information. In sum, SAS considers that this consists of identical information, and should be protected in the same manner.
10. According to SAS, in response to Bolivia's request for documents under categories 18 (i), 18 (ii), and 18 (iii) of the RDD, SAS described the information contained therein in the same manner it described the information classified as Protected Information in PO No. 2, precisely because they are documents of identical nature. According to SAS, being the description of the documents the same, the Tribunal should give them the same treatment.
11. SAS claims that the description and content of the *Metallurgical Processing Data* of Annex A, along with the affidavit of Mr. Fitch, SAS' reasoning contained in the letter of October 15, 2014, and the Tribunal's reasoning in PO No. 2 on the decision regarding the Protected Information, constitute sufficient reasons, arguments and evidence to conclude that the information under categories 18 (i), 18 (ii), and 18 (iii) of the RDD should also be classified as Protected Information. For the Claimant, it is clear that the data regarding metallurgical processes contained in Annex A is of the exact same nature as the reports classified as Protected Information in PO No. 2.
12. SAS adds that the way in which it described the reports on metallurgical tests by SGS Lakefield Research Limited ("SGS Lakefield") in Annex A demonstrates that they are the same metallurgical test reports already classified as Protected Information. They are test results obtained by SGS Lakefield, but covering different periods of time. The aforementioned documents are part of the same series of metallurgical test reports that involve the same process, the same tests, and the same laboratory. Each of these reports constitutes a "snapshot" of the evolution of the metal recovery process in the Malku Khota Project at a particular moment. The only difference is the date when the different tests were conducted.
13. SAS also notes that Annex A described summaries of SGS Lakefield's metallurgical tests and that, as summaries of such tests, they contain the same critical confidential information as the reports themselves and, therefore, they should be classified as Protected Information for the same reasons stated above.
14. Additionally, SAS submits that the document "Malku Khota Project Metallurgical Sample Description" also contains a description of the drill hole locations, information that the Tribunal classified as Protected Information in PO No. 2.
15. Finally, in relation to the petrology reports SAS described in Annex A, SAS notes that these documents contain the analysis and tests performed in the same samples described in the SGS Lakefield's reports and contain the same critical information as the reports, and hence, should be classified as Protected Information.
16. SAS concludes that it is not preventing Bolivia from reviewing the documents, but simply requesting that the conditions under PO No. 3 and the accompanying Protective Order be applied to them, because SAS firmly believes that, due to the similarities between both types of information, the latter should also be classified as Protected Information.

B. Respondent's Position

17. Bolivia notes that nothing in SAS' allegations in its Request merit that the Tribunal changes its decision. As the Tribunal correctly concluded in PO No. 8, the information under category 18 of the RDD is not confidential and should not be protected as such. Bolivia has repeatedly noted (and proved) this.
18. According to Bolivia, at least four reasons allow concluding that the information under category 18 of the RDD is not confidential.
19. Firstly, SAS initially prepared a list of allegedly confidential information (Exhibit A to Annex A of PO No. 2), for which SAS requested the Tribunal's protection. In this list, SAS did not include the information under category 18 of the RDD. SAS has not yet responded to this point. The fact that SAS had not initially requested the protection of the information under category 18 is conclusive evidence that the latter is different from the Protected Information, and does not have a confidential character. If this information were confidential, SAS would have included it – from the beginning– in Exhibit A of its communication of October 15, 2014, and it did not.
20. After quoting the reasons invoked by the Tribunal in paragraphs 25² and 28 of PO No. 8³, the Respondent notes that SAS did not respond to said reasons.
21. Secondly, the Respondent notes that even though SAS bears the burden of proving why each of the requested documents would have a confidential character, SAS again fails to provide (this time, with its Request) any evidence that may allow reaching such conclusion. SAS merely affirms, once again, that the information under category 18 of the RDD is similar to the Protected Information, despite the Tribunal having noted in PO No. 8 that the mere assertion that the information is similar is not enough.
22. Bolivia notes that in some cases, such as the petrographic analyses listed in Annex A, SAS does not explain what such analysis are, their relevance in the process of creation of the hydro-metallurgical patent, or how the patent would be affected should those analyses reach Bolivia's hands.

² PO No. 8, paragraph 25: "Paragraph 6.10 of Procedural Order No. 1 provides with respect to the moment when protection may be requested on the basis of confidentiality, '[s]hould a Party be requested to produce information it considers 'highly confidential' or it otherwise wishes or is required to use such information ...', the classification of information as highly confidential may be requested. Consequently, nothing prevents either Party from, when requested to produce a document or when in need of use of information it deems confidential, requesting that the information be classified as confidential, providing the reasons why it should be classified as such."

³ PO No. 8, paragraph 28: "SAS requested the classification of certain information as confidential from the beginning of the arbitration –on the basis that it was information with which it had developed patented information–, and it was SAS itself who prepared the Exhibit containing the information for which it was seeking that special protection. Such Exhibit is incorporated into the Protective Order. SAS confined the list of confidential information to the documents described in that Exhibit. The Tribunal finds now no plausible reason for SAS to have left out, when preparing an exhibit listing the information it considers so sensitive and delicate, what it now expects the Tribunal to include under such category and protection. Nor does the Tribunal find reasons for SAS not to have explained the relation or link between the documents it now wishes to have protected and those included in Exhibit A of the Protective Order so as to justify that it is equal or similar information. The mere contention that the information is equal or similar is not sufficient."

23. Thirdly, according to Bolivia, the information under category 18 of the RDD cannot be considered confidential because SAS has already revealed part of it by publishing – in 2009 and 2011 – the Preliminary Economic Assessments of the Project (“PEA”). According to Bolivia, reviewing the index of 2011 PEA – a public document – is enough to confirm that SAS has already revealed part of the information under category 18 to the general public.
24. The Respondent adds that the information under category 18 of the RDD concerns the analysis and the result of applying the acid, chloride and cyanide leaching techniques to the minerals of the Malku Khota Project, and SAS has revealed part of this information in the PEA. After quoting several parts of the PEA, Bolivia concludes that there is no doubt that SAS has revealed part of the information under category 18 of the RDD to the general public through the 2011 PEA, and that SAS has not denied this circumstance, affirmed by Bolivia in its communication of August 8, 2015.
25. The fourth and last reason invoked by Bolivia for the Request to be rejected is that the data that is part of the information under category 18 of the RDD, which SAS seeks to protect, were obtained after applying leaching techniques standard in this industry to minerals of the Malku Khota Project; therefore, any laboratory could reach the same results. It is not possible to develop the hydro-metallurgical process patented by SAS with these results.
26. Finally, Bolivia notes that the Tribunal shall guarantee, at all times, what Bolivia considers “indispensable minimal conditions” for its lawyers and independent experts to carry out an adequate revision and analysis of the Protected Information.

III. The Tribunal’s Analysis

27. The Tribunal refers, in the first place, to Articles 17.1 and 27.3 of the UNCITRAL Arbitration Rules of 2010 (“UNCITRAL Rules”), to paragraphs 6.10 and 10.5 of Procedural Order No. 1 of May 27, 2014 (“PO No. 1”), and to Procedural Orders Nos. 2, 3, 7, and 8, where the Tribunal has already referred to the issue of document production and to the Protected Information. Likewise, pursuant to paragraph 6.1 of PO No. 1, the Tribunal makes reference to Articles 3.13 and 9.2 e) of the IBA (International Bar Association) Rules on the Taking of Evidence in International Arbitration of 2010.
28. In paragraphs 1 to 8 of PO No. 8, the Tribunal recalled the background and circumstances preceding the issuance of that Order, and the Tribunal’s rejection to classify as Protected Information the documents contained under category 18 of RDD, with the exception of (a) the NORAM Report,⁴ which was subjected to the protection indicated in PO No. 2, PO No. 3 and the Protective Order; and (b) the document indicated under category 18 (iv), which was already part of the Protected Information. The Tribunal deems such background and circumstances as reproduced here given that the request it shall resolve is the eventual revision and modification of PO No. 8.

⁴ This is the “Sulphur Burning Acid Plant Study” prepared by NORAM Engineering and Constructors Ltd., dated May 3, 2012, included as the last document in Annex A.

29. In order to reach the decision contained in PO No. 8, the Tribunal reviewed in particular: (1) the Respondent's document production request, the Claimant's objections, and the Respondent's reply to such objections, contained in the RDD; (2) the Respondent's letter of July 7, 2015, with its comments on document production; (3) the Claimant's letter of July 28, 2015, with its request that certain information contained under category 18 of the RDD be classified as "highly confidential"; and (4) the Respondent's letter of August 8, opposing the Claimant's request of July 28, 2015.

30. The Tribunal disagrees with Bolivia's interpretation that the classification of information as "highly confidential" shall be requested from the beginning. As noted by the Tribunal in PO No. 8:

"Paragraph 6.10 of Procedural Order No. 1 provides, with respect to the moment when protection may be requested on the basis of confidentiality, "[s]hould a Party be requested to produce information it considers 'highly confidential' or it otherwise wishes or is required to use such information ...", the classification of information as highly confidential may be requested. Consequently, nothing prevents either Party from, when requested to produce a document or when in need of use of information it deems confidential, requesting that the information be classified as confidential, providing the reasons why it should be classified as such."⁵

31. Consequently, either Party may require, when requested to produce certain information, that such information be treated as "highly confidential", which was precisely the circumstance that occurred in this case.

32. The Tribunal agrees with Bolivia in that the fundamental issue considered by the Tribunal in PO No. 8 to reject SAS' request for treatment as Protected Information of the majority of the information under category 18 of the RDD, has not been addressed.

33. Indeed, in order to resolve the objection raised by SAS to Bolivia's document production request, and specifically the objection to category 18 of the RDD, the Tribunal requested SAS to inform which documents under category 18 of the RDD, that had not yet been provided to Bolivia, should be treated as confidential, stating the reasons for their alleged confidentiality. In its response, SAS alleged that the information requested to be classified as confidential was "including or similar" to the information the Tribunal has already classified as such, but, as noted by PO No. 8, SAS did not submit any argument or evidence in support of that assertion.

34. In paragraph 28 of PO No. 8, the Tribunal noted [emphasis added]:

"SAS requested the classification of certain information as confidential from the beginning of the arbitration –on the basis that it was information with which it had developed patented information–, and *it was SAS itself who prepared the Exhibit containing the information for which it was seeking that special protection*. Such Exhibit is incorporated into the Protective Order. *SAS confined the list of confidential information to the documents described in that Exhibit. The Tribunal finds now no plausible reason for SAS to have left out, when preparing an exhibit listing the information it considers so sensitive and delicate, what it now expects the Tribunal to include under such category and protection*. Nor does the Tribunal find reasons for SAS not to have explained the relation or link between the documents it now wishes to have protected and those included in Exhibit A of the Protective Order so as to justify that it

⁵ PO No. 8, paragraph 25.

is equal or similar information. The mere contention that the information is equal or similar is not sufficient.”

35. In its Request, SAS claims that: (a) the form in which it described the metallurgical testing reports of SGS Lakefield in Annex A demonstrates that these are the same metallurgical testing reports already classified as Protected Information, and that these are testing data of SGS Lakefield but covering different time periods; (b) Annex A describes the abstracts of metallurgical testing of SGS Lakefield and that, being abstracts of such testing, contain the same critical confidential information contained by the reports themselves; (c) the document “Malku Khota Project Metallurgical Sample Description” contains a description of the drill hole locations, which information the Tribunal classified as Protected Information in PO No. 2; and (d) the petrology reports contain analysis and testing of the same samples that are in SGS Lakefield reports and contain the same critical information of the reports.
36. On this matter, the Tribunal observes that the Exhibit that is part of PO No. 2 and PO No. 3 refers to specific SGS Lakefield reports, identified with their exact date. The SGS Lakefield reports for which SAS is now seeking to extend the Protective Order are reports that, as noted by SAS, cover “different time periods”. These reports, considering their dates, were in SAS’ possession when it submitted its initial request for classification of information as “highly confidential” on October 15, 2014. Neither in the objections to Bolivia’s document request, nor in the communication of July 28, 2015, nor in the Request – although the Tribunal explicitly referred to this issue in PO No. 8 – does SAS provide an explanation as to why, when preparing an exhibit listing the information it considers so sensitive and delicate, SAS left out what it now expects the Tribunal to qualify as Protected Information.
37. SAS’ assertion that its description of the documents in Annex A demonstrates that they are the same testing reports is neither sufficient nor persuasive. It was SAS itself who prepared the Exhibit of the Protective Order and submitted it to the Tribunal, and did not include the reports for which it is now requesting protection. It is SAS itself who now accepts that these are reports issued on dates different from the reports identified in Exhibit A of the Protective Order. They are, it is reiterated, reports that were in SAS’ possession when it prepared what today is the Exhibit of the Protective Order, and reports that SAS did not include as information to be covered by the Protective Order.
38. SAS also fails to explain the reasons why it expects to include in the Protective Order information that was – at least partially – included and referred to in the PEA, a public document.
39. As to the abstracts of the metallurgical testing data of SGS Lakefield, these shall be protected to the extent that they are abstracts of reports specifically included in the Protective Order, but not, for the aforementioned reasons, if they are abstracts of reports not covered by the Protective Order.
40. With respect to the document “Malku Khota Project Metallurgical Sample Description”, to the extent that it contains a description of the drill hole locations, which information the Tribunal classified as “highly confidential” in PO No. 2, such specific information shall be subject to the terms of the Protective Order.
41. Lastly, regarding the petrographic reports, the Tribunal concurs with Bolivia that SAS fails to explain what these analyses are, or their relevance in the process of creation of the hydrometallurgical patent, or how the patent could be affected by Bolivia possessing these analyses. However, to the extent that these analyses contain information of those SGS Lakefield

reports specifically classified by the Protective Order as “highly confidential”, that specific part of the petrographic report shall be subject to the Protective Order.

42. Finally, the Tribunal shall refer to each one of Bolivia’s so called “*indispensable minimum conditions for Bolivia’s counsel and independent experts to carry out proper review and analysis of Privileged Information in order to ensure Bolivia’s due process*” [Tribunal’s translation].
43. The first condition is that “*Bolivia’s counsel and independent experts should have unlimited access to a hard copy and a digital copy (native files) of the Information under Category 18 in the Data Room*” [Tribunal’s translation]. Procedural Orders Nos. 2, 3, 7, and 8 note that Bolivia’s counsel and independent experts shall have such access to the hard copy and the digital copy, and there is no limitation. Obviously, the Data Room shall have a schedule to be agreed upon by the Parties and, failing such an agreement, defined by the Tribunal, and which shall ensure access for Bolivia’s counsel and independent experts to carry out their work.
44. The second one indicates that “*the Data Room shall be located in the place agreed by the Parties on September 9, 2015 (i.e., in Roscoe, Postle & Associates, Inc.’s (RPA) office, located in Union Blvd., Suite 505, Lakewood, CO 80228)*” [Tribunal’s translation]. The Parties have defined the location of the Data Room by mutual agreement and that is where all the information under category 18 of the RDD that the Tribunal has classified as Protected Information should be located, as well as the Protected Information under PO No. 2, PO No. 3, and the Protective Order.
45. The third one notes “*the Data Room shall be available for Bolivia’s counsel and independent experts until, at least, the end of the Hearing*” [Tribunal’s translation]. The Tribunal confirms that the information referred to above shall be available in the Data Room until the end of the Hearing.
46. The fourth one indicates that “*in addition to the Information under Category No. 18, the Data Room shall contain all Protected Information under PO 1 [sic], PO 2 and the Protective Order*” [Tribunal’s translation]. The Tribunal ruled on this issue in paragraph 44 above.
47. The fifth and last one refers that in accordance with “*paragraph 35 of PO8, Bolivia’s counsel and independent experts may ‘transcribe the information for themselves and are not limited to merely taking notes, and they may also transcribe that information in their own computers.’ Likewise, Bolivia’s counsel and independent experts should be able to copy information in their own computer (for purposes of review and analysis) and to capture screen shots*”. [Tribunal’s translation]. This issue was confirmed by paragraph 35 of PO No. 8 and does not require any ruling from the Tribunal.

IV. The Tribunal’s Decisions

48. On the basis of the reasons mentioned above in this Procedural Order, the Tribunal decides to:
 - a. Confirm Procedural Order No. 8 of August 26, 2015, in all its terms.
 - b. Confirm as already included in the Protected Information of PO No. 2, PO No. 3, and the Protective Order:
 - i) The abstracts of metallurgical testing of SGS Lakefield included under category 18

of the RDD, but only to the extent that they are abstracts of the reports explicitly included in Exhibit A of the Protective Order.

- ii) The sections of the document “Malku Khota Project Metallurgical Sample Description” that contain a description of the drill hole locations, but only to the extent that they are abstracts of the reports explicitly included in Exhibit A of the Protective Order.
- iii) The sections of petrography reports that contain information of the SGS Lakefield reports, but only to the extent that they are the reports explicitly identified in Exhibit A of the Protective Order.

Place of the Arbitration: The Hague, the Netherlands



Dr. Eduardo Zuleta Jaramillo
(Presiding Arbitrator)

On behalf of the Tribunal