

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. 17

Tribunal

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

April 29, 2016

I. Procedural History

1. By letter of April 27, 2016 (the “**Request**”), South American Silver Limited (“**SAS**” or the “**Claimant**”) addressed the Tribunal in relation to an issue that it considered “urgent and sensitive” concerning the submission of its Rejoinder on Jurisdictional Objections (the “**Rejoinder on Jurisdiction**”).¹ The Claimant addressed the situation that arose with the submission of two witness statements, regarding which it requested the Tribunal authorization to:
 - (i) Submit the two witness statements in redacted form so that any identifying information is removed;
 - (ii) Submit unredacted versions of the two witness statements to the Tribunal only; and
 - (iii) Make the witnesses available for questioning by the Tribunal only, in a secure location chosen by the Tribunal, but not revealed to Bolivia. SAS also proposes that none of the lawyers for either side be present during the examination.
2. The Claimant further requested the Tribunal to order Bolivia to abstain from continuing distributing confidential materials from this Arbitration and to ensure the safety of the two witnesses in case their identities are discovered.
3. By e-mail of April 27, 2016, and taking into consideration the potential impact of the Request on the submission of the Rejoinder on Jurisdiction, the Tribunal granted Bolivia opportunity to submit its comments on the Request until April 28, 2016.
4. By letter of April 28, 2016 (the “**Response**”), the Plurinational State of Bolivia (“**Bolivia**” or the “**Respondent**”) requested the Tribunal to reject the Request.

II. Position of the Parties

Claimant’s Position

5. SAS affirms that two members of the indigenous communities within the area of influence of the Malku Khota project have provided Claimant with sworn written testimony that is relevant to the Arbitration. However, these witnesses told the Claimant that they are fearful that one of Bolivia’s witnesses or persons affiliated with him may cause physical harm to them, their families or their property if their identities are disclosed in this proceeding.²
6. According to the Claimant, the concerns of its witnesses appear well-founded. On this point, SAS refers to a series of acts that it argues were carried out by one of Respondent’s witnesses and which were intended to intimidate and scare members of the Malku Khota community and the surrounding communities who provide testimonies against Bolivia in this Arbitration.³
7. Notwithstanding the foregoing, the Claimant indicates that, in the interest of justice, the two witnesses should be heard as they have knowledge bearing directly on the jurisdictional

¹ SAS’ letter to the Tribunal of April 27, 2016, p. 1.

² SAS’ letter to the Tribunal of April 27, 2016, pp. 1-2.

³ See SAS’ letter to the Tribunal of April 27, 2016, p. 2.

objection raised by Bolivia and the facts presented in a witness statement submitted by the Respondent with its Rejoinder.⁴

Respondent's Position

8. Bolivia notes that the Request is untimely and that this circumstance alone is sufficient to reject it *in limine*.⁵ The Respondent expressed its opposition to any attempt of SAS to submit its Rejoinder on Jurisdiction or accompanying documents beyond the date fixed by the Tribunal and notes that any extension or untimely submission of the unredacted witness statements should imply the rescheduling of the Hearing.⁶
9. In any case, the Respondent offers six additional reasons to justify the rejection of the Request.
10. First, the Respondent states that SAS does not cite to any rule or precedent that support the proposed procedure with respect to the two witnesses. Likewise, the Respondent submits that such procedure would prevent Bolivia from exercising its fundamental right to respond to the evidence submitted by the opposing party and, therefore, would violate its right to due process.⁷
11. Second, the Respondent argues that the submission of the two redacted witness statements, eliminating any information that would enable the identification of the witnesses, would prevent it from investigating the facts stated therein and controverting the testimonies.⁸
12. Third, Bolivia argues that Claimant has failed to prove the existence of a real risk of retaliation against the unknown witnesses. On the contrary, the Respondent states that SAS has taken advantage of the Request to make grave and unfounded accusations against one of its witnesses.⁹
13. Fourth, the Respondent states that the Request seems to anticipate that SAS would use its Rejoinder on Jurisdiction to respond to allegations that should have been answered in its Reply; in which case, Bolivia will request the exclusion of the testimonies. In this respect, Bolivia notes that to request the exclusion of said evidence, it should first see them in their entirety.¹⁰
14. Fifth, Bolivia argues that the Request would prevent it from responding the evidence submitted by the Claimant, opposing it to personal and direct knowledge of the facts that the witnesses in this case and other persons close to the Project would have.¹¹
15. Finally, Bolivia reiterates that should SAS fear for the integrity of its witnesses, it may request the corresponding provisional measures; in which case, it should submit evidence supporting its request.¹²

⁴ SAS' letter to the Tribunal of April 27, 2016, p. 2.

⁵ Bolivia's letter to the Tribunal of April 28, 2016, p. 2.

⁶ Bolivia's letter to the Tribunal of April 28, 2016, p. 2.

⁷ Bolivia's letter to the Tribunal of April 28, 2016, p. 2.

⁸ Bolivia's letter to the Tribunal of April 28, 2016, p. 3.

⁹ Bolivia's letter to the Tribunal of April 28, 2016, p. 3.

¹⁰ Bolivia's letter to the Tribunal of April 28, 2016, p. 4.

¹¹ Bolivia's letter to the Tribunal of April 28, 2016, p. 4.

¹² Bolivia's letter to the Tribunal of April 28, 2016, p. 5.

III. Tribunal's Analysis and Decision

16. Pursuant to Article 17.1 of the UNCITRAL Rules, applicable to this Arbitration, the Tribunal has authority to conduct the arbitration in such manner as it considers appropriate, provided that the Parties are treated with equality and that at an appropriate stage of the proceedings each Party is given a reasonable opportunity of presenting its case.
17. Likewise, the IBA Rules, which serve as additional guideline for the Tribunal,¹³ note that the Tribunal has authority to make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.¹⁴
18. The Tribunal has, moreover, the duty to preserve the integrity of this proceeding and to prevent acts or measures that aggravate the dispute between the Parties.
19. Based on the foregoing, the Tribunal has reviewed the submissions of the Parties concerning SAS' request relating to the procedure to submit and examine two witnesses whose witness statements would be submitted with its Rejoinder on Jurisdiction.
20. In first place, the Tribunal notes that the Claimant has not provided any justification -and the Tribunal does not find it either- to submit this request merely five (5) days before the expiration of the time-period fixed for the submission of its Rejoinder on Jurisdiction.
21. To decide the Request, the Tribunal must balance its general power to adopt measures necessary to permit the taking of evidence with the Parties' right to due process and the opportunity of presenting their case in the Arbitration.
22. The procedure proposed by SAS would give it undue advantage in the Arbitration and would be contrary to the rules on taking of witness evidence of Procedural Order No. 1.
23. In fact, if the procedure proposed by SAS was followed, one of the Parties would be allowed to meet with two witnesses to hear and determine the relevant facts -including the possibility of assisting them in the preparation of the witness statements and examinations- while the other Party would only know the redacted versions of said witness statements and would have no right to know the identity of the witnesses, investigate fully the facts to which they refer to in their statements, respond to them, and cross-examine the witnesses.
24. In the opinion of the Tribunal, this would be a situation that would create a manifest inequality between the Parties in their opportunity of presenting their case, and would violate the Respondent's right to due process. Therefore, the Tribunal does not find a justification to adopt the procedure requested by SAS for the submission of said witness statements.
25. While the Arbitral Tribunal has adopted, during the course of this Arbitration, protective measures for documents and witnesses, taking into consideration the specific circumstances of each case and balancing the rights of the Parties, it cannot order a measure that, unlike the previous ones, would result in a disregard of Bolivia's right to due process.
26. Finally, the Tribunal reminds the Parties that pursuant to section 10.5 of Procedural Order No. 1, any information exchanged or submitted in this Arbitration shall be confidential and not disclosed to any third party, except in the circumstances described therein.

¹³ Procedural Order No. 1, dated May 27, 2014, para. 6.1.

¹⁴ IBA Rules, Art. 9.4.

IV. Tribunal's Decision

27. In view of the foregoing, the Arbitral Tribunal decides to reject the Request.

Place of the Arbitration: The Hague, the Netherlands



Dr. Eduardo Zuleta Jaramillo
(Presiding Arbitrator)

On behalf of the Tribunal