

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. 7
ON DOCUMENT PRODUCTION**

Tribunal

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

July 21, 2015

I. Introduction

1. In accordance with the procedural calendar set forth in the PCA's letter dated June 19, 2015, and pursuant to paragraph 4.1 of Procedural Order No. 1, on July 7, 2015, the Parties referred their respective pending document production requests to the Tribunal for decision.
2. The requests were made on the basis of Section 5 of Procedural Order No. 1 and taking into account the 2010 IBA Rules on the Taking of Evidence in International Arbitration ("the IBA Rules").
3. The Tribunal has revised: (1) the Claimant's request for document production, the Respondent's objections and the Claimant's reply to said objections, which appear in the Redfern Schedule prepared by the Claimant (the "RDT"); (2) the Claimant's letter of July 7, 2015, with its comments on document production; (3) the Respondent's request for document production, the Claimant's objections and the Respondent's reply to said objections, which appear in the Redfern Schedule prepared by the Respondent (the "RDD"); and (4) the Respondent's letter of July 7, 2015, with its comments on document production.
4. Pursuant to Articles 17.1 and 27.3 of the UNCITRAL Arbitration Rules (as revised in 2010) (the "UNCITRAL Rules"), which govern this arbitration, the Tribunal enjoys wide discretion regarding document production. Likewise, pursuant to paragraph 5.3.6 of Procedural Order No. 1, the Tribunal may refer to the IBA Rules when deciding on document production requests.
5. In consideration of the foregoing, the Tribunal will: (i) address the basic general premises that serve as basis and motivate its decisions regarding the Parties' respective document production requests; and (ii) decide on each document production request in accordance with the terms of the RDT and the RDD annexed to this Procedural Order.

II. Basic Premises for Document Production in this Arbitration

6. The Tribunal considers that the following premises, which flow from Procedural Order No. 1 and Article 3 of the IBA Rules, are central to this decision:
 - (a) The Party requesting the production of a document must provide: (i) a description of each requested Document sufficient to identify it; or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist;
 - (b) Each Party must be in control of the relevant and material documents that will allow it to rebut the evidence submitted by the opposing Party;
 - (c) The Party objecting to a document production request on the basis of its confidentiality must identify with certainty and precision whether said document contains confidential information or is subject to privilege;
 - (d) The Party making a submission bears the burden of proving the facts supporting such submission.

- A. The Party requesting the production of a document must provide: (i) a description of each requested Document sufficient to identify it; or (ii) a description in sufficient detail**

(including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist

7. Pursuant to Section 5 of Procedural Order No. 1 and Article 3.3 of the IBA Rules, a request of document production shall contain, at least:

“a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner”.¹

8. According to the commentary to the IBA Rules, Article 3.3 is designed to prevent any “fishing expeditions”, and, at the same time, enable the Parties to request documents that may be identified with a reasonable specificity. Hence, Article 3 of the IBA Rules allows document production insofar as there are criteria that permit identification of a document or a narrow and specific category of documents.
9. In applying Article 3.3, which the Parties have referred to as the rule governing document production, the Parties have the obligation to provide the information necessary to identify the documents or the specific categories of documents. This means, in the Tribunal’s view, that a general description of the category of documents does not suffice; rather, it needs to be in sufficient detail, *i.e.*, reasonably limited regarding its subject matter, content and time, taking into account the current phase of the proceedings, the nature of the claims, and the objections thereto.

B. The Party making a submission bears the burden of proving the facts supporting such submission

10. Article 27.1 of the UNCITRAL Rules provides that “[e]ach party shall have the burden of proving the facts relied on to support its claim or defence”.

C. The Party objecting to a document production request on the basis of its confidentiality must identify with certainty and precision whether said document contains confidential information or is subject to privilege

11. The Tribunal has referred to the confidentiality of documents in paragraph 6.10 and Section 10 of Procedural Order No. 1, and sections 16 to 20 of Procedural Order No. 2.
12. Paragraph 6.1 of Procedural Order No. 1 provides that the Tribunal may use the IBA Rules as guide.
13. Article 3.13 of the IBA Rules provides as follows:

“Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth

¹ IBA Rules, Article 3.3(a)(ii).

the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.”

14. Paragraph 6.10 of Procedural Order No. 1 provides:

“Should a Party be requested to produce information it considers 'highly confidential' or it otherwise wishes or is required to use such information in the proceeding (including but not limited to information to be supplied to an expert appointed by the Tribunal), that Party shall make an application to have that information classified as 'highly confidential' by notice to the Tribunal, with a copy to the other Party. Without disclosing the information, the Party shall give in the notice the reasons for which it considers the information 'highly confidential'. The Tribunal shall determine whether the information is to be classified as 'highly confidential' and should the Tribunal so determine, the Tribunal shall order any special measures of protection in the proceeding as it considers necessary and may decide the conditions under which, and the persons to whom, the highly confidential information may in part or in whole be disclosed, and shall require any person to whom the highly confidential information is to be disclosed to sign a confidentiality undertaking that the Tribunal considers as appropriate.”

15. In turn, paragraph 10.5 of Procedural Order No. 1 provides:

“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 or defend a legal right (including in related proceedings between the same or related parties).”

16. Article 17.1 of the UNCITRAL Rules provides:

“Subject to these Rules, the Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.”

17. Finally, Article 9.2 (e) of the IBA Rules establishes:

“The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: [...] (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling”.

18. The Claimant has objected to the production of certain documents requested by the Respondent under Category 18 of documents requested by the Respondent in the RDD, noting that they include highly confidential information and that the protection of highly confidential information is a reason to exclude said information from document production.

19. Paragraph 6.10 of Procedural Order No. 1 referred to above clearly provides for the procedure to be followed if a party is requested to “produce information it considers 'highly confidential'”. The Party in question must not only request that the information be classified as highly confidential, but also “shall give in the notice the reasons for which it considers the information 'highly confidential'”.

20. On October 15, 2014, the Claimant requested that the Tribunal classify certain information as confidential and, after hearing the Parties, the Tribunal classified as highly confidential the information contained in Annex A to Procedural Order No. 2.
21. In its objections to Category 18 of the Document Request of the RDD, the Claimant neither provide the reason or reasons for the information contained in the Documents Requested under this Category to be classified as highly confidential, nor explains what is the information encompassed by Annex A to Procedural Order No. 2 that forms part of the Documents Requested in this production and which have been already provided to the Respondent. Similarly, the Claimant fails to indicate what are the relevant technical or commercial reasons based on which the Tribunal must exclude the Requested Documents under Category 18. The Claimant merely asserts that “*the requested documents contain highly confidential information*”.
22. The Tribunal will give the Parties an opportunity to comment on this particular point and will decide as appropriate thereafter.

III. Documents relating to the Funding of the Arbitration

23. The Respondent requests, under Category 30 of the Documents Requested in the RDD, the “agreement” referred to in the press release of May 24, 2013, and any documents related to its conclusion and performance. It also includes a non-exhaustive list of the documents relating to the conclusion and performance of said “agreement”.
24. The Claimant objects to the production noting that:

“Respondent’s purported justifications for its request are not connected in any manner to the merits or the outcome of this case.

Respondent does not offer any element of explanation suggesting the existence of any purported ‘conflict of interest with respect to The Funder’ or indicate how such conflict could possibly arise. Likewise, Respondent does not explain in any manner how the requested documents could have anything to do with the Tribunal’s decision to order payment of costs in this arbitration.

To the contrary, it is obvious that Claimant’s funding arrangement are irrelevant and immaterial to this case, and that Respondent’s request consists in little else than an unsubstantiated ‘fishing expedition.’

In sum, Bolivia did not—and cannot—explain how the requested documents could be sufficiently relevant to the case or material to its outcome to justify that Claimant be ordered to produce those documents (Art. 9.2(a) of the IBA Guidelines).

Under any circumstance, the requested documents contain confidential commercial information, whose disclosure would gravely prejudice Claimant beyond the damages already sustained as a result of Respondent’s expropriation of the Malku Khota Project (Art. 9.2(e) of the IBA Guidelines).

Based on the foregoing, Claimant objects to Respondent’s request.”

25. In turn, the Respondent insists on its production, noting that:

“[...] Bolivia tiene derecho a verificar si existe un conflicto con base en la información de SAS y los árbitros deben poder conocer la identidad de The Funder para confirmar la inexistencia de conflictos [...].

Primero, es precisamente el hecho de que Bolivia desconozca la identidad de The Funder y los términos de su acuerdo con SASC y/o SAS lo que justifica que los Documentos Solicitados le sean comunicados. Bolivia requiere dichos documentos para verificar que no existe un conflicto de intereses con las Partes, sus abogados o el Tribunal Arbitral.

Los Documentos Solicitados son entonces relevantes y sustanciales para garantizar la integridad y transparencia del presente arbitraje.

Segundo, los Documentos Solicitados son relevantes y sustanciales para verificar quiénes son las verdaderas partes interesadas del presente arbitraje. Las explicaciones de SAS son insuficientes respecto de los términos del acuerdo que ha celebrado con The Funder. Bolivia necesita esclarecer si, dentro de dichas condiciones, SAS ha acordado ceder algunas o todas sus pretensiones en el presente arbitraje a The Funder o a un tercero.

Tercero, los Documentos Solicitados son relevantes y sustanciales en relación con una eventual condena en costas a favor de Bolivia. Información publicada por TriMetals respecto de su actual condición financiera demuestra que la Compañía no cuenta con ingresos operativos y necesitará recurrir a financiación en el futuro cercano.

Además, en su informe de gestión (Management’s Discussion & Analysis) del primer trimestre de 2015, TriMetals ha informado que, según su acuerdo con The Funder, ‘The non-brokered funding is on a non-recourse basis’.

Bolivia requiere los Documentos Solicitados con el fin de esclarecer (i) si una condena en costas a favor de Bolivia será asegurada por The Funder y, en su caso, (ii) si una condena en costas a su favor podría ser asegurada por SAS, en vista de que The Funder no es parte del presente arbitraje.”

26. The Tribunal considers that:

- (i) Regarding the Documents Requested under Category 30 in the RDD, there seems to be a substantial disagreement between the Parties as to their understanding of the extent of this document production. While the Claimant seems to understand that the relevance and materiality of the Requested Documents in this production refers only to the merits of the case, the Respondent understands that all aspects of the integrity of the arbitration, any potential conflicts that may arise regarding *the Funder* and the effects of a potential award on costs against the Claimant are also encompassed.
- (ii) In its objection to production under this Category 30, the Respondent has submitted a new argument, which was not included in its initial justification for the production, which refers to the need to “*verificar quiénes son las verdaderas partes interesadas del presente arbitraje*”.
- (iii) In turn, the Claimant has objected to production noting that it concerns documents that contain commercial information which, if disclosed, would cause substantial prejudice to the Claimant, even beyond the damages claimed in this arbitration for the alleged expropriation of the Malku Khota Project. This objection has not been rebutted by the Respondent.

- (iv) The arguments put forward by the Respondent and the objections of the Claimant under Category 30 of the RDD go beyond the discussion on the relevance and materiality of the documents in the context of the dispute, or the even simpler discussion about the need to produce documents or lack thereof, which is the purpose of this phase. Consequently, the Tribunal considers that this is not the form or the procedural phase to deal with these matters. Therefore, the Tribunal will deny the production of the Documents Requested under Category 30, without prejudice to the Respondent submitting a separate duly justified request, if it so wishes, regarding the issue that it refers to as “*financiación del presente arbitraje*”, including a document request, in which case, the Tribunal will give the Claimant an opportunity to reply to such request and will decide as necessary.

IV. The Tribunal’s Decision

- 27. In light of the above, after having reviewed carefully the observations submitted by the Parties and having considered each request in light of the legitimate interest of the other Party and the reasonability of the burden to the other Party, taking into account all the relevant circumstances, including the fundamental principle of the integrity of the arbitral process, the Tribunal unanimously decides to:
 - (i) Accept, in accordance with the foregoing reasons and pursuant to the terms of this Procedural Order, the RDT and the RDD, the document production requests corresponding to Categories 1, 2, 3, 7, 8, 10 and 11 of the RDT, and Categories 1 to 17, inclusive, and 19 to 26, inclusive, of the RDD. Pursuant to the procedural calendar already established, each Party shall have until **August 31, 2015**, to produce to the other Party these documents.
 - (ii) The decision on Category 18 of RDD remains subject to the provided in the RDD for that Category.
 - (iii) Reject all remaining document production requests in accordance with the foregoing reasons and the terms of this Procedural Order, the RDT and the RDD.
- 28. In accordance with paragraph 5.4 of Procedural Order No. 1, the documents produced in accordance with this Procedural Order shall not be copied to the Tribunal and shall not be considered part of the evidentiary record unless and until a Party subsequently submits them to the Tribunal in their future submissions. Similarly, pursuant to paragraph 5.2.7 of Procedural Order No. 1, should a Party fail to produce documents as ordered by the Tribunal, the Tribunal shall draw the inferences it deems appropriate, taking into consideration all relevant circumstances.

29. The procedural calendar for the phase following that of document production shall be that established in the PCA's letter dated June 19, 2015.

Place of the Arbitration: The Hague, the Netherlands

A handwritten signature in black ink, consisting of a long horizontal stroke with a loop and a vertical stroke crossing it.

Dr. Eduardo Zuleta Jaramillo
(Presiding Arbitrator)

On behalf of the Tribunal