

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. 3

Tribunal

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

January 14, 2015

1. The Tribunal, by Procedural Order No. 2 dated December 1, 2014, classified as “highly confidential” certain information described in Exhibit A to Annex A of said Procedural Order No. 2 (the “Protected Information”), relied upon by the Claimant’s expert, Roscoe Postle and Associates, Inc. (“RPA”), in preparing its expert report dated September 16, 2014 (“RPA Report”).
2. By message of December 2, 2014, and pursuant to paragraph 10.3 of Procedural Order No. 1, the Secretary of the Tribunal requested the Parties to indicate by December 12, 2014, any redactions to Procedural Order No. 2 they considered necessary prior to its publication on the PCA’s website.
3. By letter dated December 12, 2014, the Respondent requested that the Tribunal reconsider paragraphs 5, 6, 7 and 8 of the Protective Order attached to Procedural Order No. 2 (the “Protective Order”) and order the Claimant to provide Bolivia’s counsel and independent experts with the original version (native files) of the documents listed in Exhibit A of the Protective Order, including the GEMS database that was provided to RPA (the “Request”). The Respondent, while acknowledging that the information classified as “*highly confidential*” deserves some degree of protection, argues that the conditions set forth in the Protective Order exceed those strictly necessary to protect the interests of South American Silver Limited (“South American Silver”) and impose undue restrictions and burdens on the Plurinational State of Bolivia (“Bolivia”), which affect its ability to present its case in this arbitration. In addition, in the Request, the Respondent indicates, *inter alia*, that:
 - (i) the documents relating to ‘Resources and Geology’ (points A to F of Exhibit A of the Protective Order) are databases or computer-generated three-dimensional models or maps;
 - (ii) Bolivia’s independent experts and counsel must have access to this information in its original electronic format (native files) in order to be able to confront the evidence submitted by the Claimant and used by RPA and FTI as the basis for their conclusions;
 - (iii) without access to the same GEMS database in its original electronic format, Bolivia’s counsel and expert will not be able to conduct their own analysis of the database nor to test the data verifications allegedly carried out by RPA;
 - (iv) Bolivia will not be able to analyze and contest the conclusions of RPA and FTI if its independent experts and counsel do not have access to the same information in the same format (GEMS native file) as used by RPA;
 - (v) Bolivia’s counsel and independent expert must have complete and practical access to the data used in the RPA Report, which are likewise the basis for FTI’s Valuation Report; and
 - (vi) the documents relating to “Metallurgy” also contain data necessary to create a geo-spatial model, to which Bolivia’s counsel and independent experts should have access in electronic format (native file).
4. On December 15, 2014, the Tribunal acknowledged receipt of the aforementioned letter, and granted the Claimant until December 18, 2014, to submit its comments on the Request.
5. On December 16, 2014, the Claimant requested that the Tribunal reject the Request, asserting that Bolivia had had an opportunity to present its comments on the request for a Protective Order submitted by South American Silver and had not mentioned the issues raised in the Request, and that, in any case, Procedural Order No. 2 did not restrict Bolivia’s rights. Notwithstanding, South American Silver, in order to expedite the process and allay Bolivia’s concerns, offered to make

available to Bolivia the Malku Khota Resources Model (Item B, Annex A to Procedural Order No. 2), in digital format, on a single computer, at the same location where it would make available the hard-copy of the Protected Information to the Respondent. Bolivia would have access to this information for as long as needed, but would not be permitted to make copies thereof.

6. The Tribunal considers that the Parties had ample opportunity to present their arguments with respect to the Protective Order requested by the Claimant by its letter dated October 15, 2014, and that the time-period which expired on December 12, 2014, was only for the Parties to indicate whether any part of Procedural Order No. 2 needed to be redacted for purposes of its publication. This time-period was not an opportunity to request modifications to Procedural Order No. 2 or the Protective Order attached thereto.
7. Nonetheless, after having considered the new arguments submitted by the Respondent and the Claimant's answer, the Tribunal believes that access to the Protected Information in electronic format, in addition to hard-copies, may in fact be necessary in order to allow a proper analysis of this information by Respondent's external counsel and experts and to enable them to carry out the corresponding verifications and comment on the RPA Report in this arbitration.
8. In any case, access to the Protected Information in electronic format must ensure the protection granted by the Tribunal by Procedural Order No. 2 in the terms set out therein. Therefore, this Procedural Order shall not be understood as authorizing the Respondent to obtain access to databases, maps or other information which form part of the Protected Information but which have not been reviewed by the Claimant's expert for purposes of preparing the RPA Report.
9. Therefore, the Tribunal, considering that the criteria set forth in Procedural Order No. 2 remain applicable, in particular with respect to the balance between the need to protect the Protected Information and the right of the Respondent to present its case, amends both the Protective Order and Procedural Order No. 2. For the sake of clarity, a new Protective Order that replaces in its entirety the Annex A of Procedural Order No. 2, is attached to this Procedural Order. This decision is adopted by majority, with the dissent of arbitrator Osvaldo Guglielmino. The dissent is attached to this Procedural Order No. 3.

Place of the Arbitration: The Hague, the Netherlands.



Dr. Eduardo Zuleta Jaramillo
(Presiding Arbitrator)

On behalf of the Tribunal

ANNEX A

PROTECTIVE ORDER

WHEREAS pursuant to Section 6.10 of Procedural Order No. 1, South American Silver Limited (“South American Silver” or “Claimant”) submitted on October 15, 2014, an application for the Arbitral Tribunal to classify the information described in Exhibit A to Claimant’s application as “highly confidential”, information which was relied upon by Claimant’s expert Roscoe Postle and Associates, Inc. (“RPA”) in preparing their expert report dated September 16, 2014 (“RPA Report”);

WHEREAS the experts to be potentially retained by the Plurinational State of Bolivia (“Bolivia” or “Respondent”) and Respondent’s counsel may need to access the Protected Information to comment on the RPA Report in this arbitration;

WHEREAS in Procedural Order No. 2, the Tribunal classified as “highly confidential” the information described in Exhibit A to this Protective Order (the “Protected Information”);

WHEREAS on December 12, 2014, the Respondent requested that the Tribunal reconsider the terms of the Protective Order attached to Procedural Order No. 2, and that on December 16, 2014, the Claimant submitted its comments on this request; and

WHEREAS by Procedural Order No. 3, the Tribunal modified Procedural Order No. 2 and the Protective Order attached thereto;

NOW, THEREFORE, THE TRIBUNAL HEREBY ORDERS that in the event Respondent appoints and retains an expert (“Respondent’s Expert”) to comment on the RPA Report and Respondent’s Expert requires access to the Protected Information, such access 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 Protected Information will not be disclosed by Claimant to the Bolivian government, its entities and instrumentalities, and companies owned or controlled by Bolivia including, but not limited to, Corporación Minera de Bolivia (“COMIBOL”), and will only be disclosed to counsel for the Respondent and to Respondent’s Expert under the limited terms ordered by the Arbitral Tribunal in this Protective Order issued pursuant to Procedural Order No. 2, as amended by Procedural Order No. 3.
2. Prior to receiving the Protected Information, Respondent’s Expert must confirm his or her independence from the Bolivian government, its entities and instrumentalities, and companies owned or controlled by Respondent including, but not limited to, COMIBOL, and execute a confidentiality undertaking in the form of Exhibit B hereto (“Confidentiality Undertaking”), confirming he or she will abide by the terms of this Protective Order and of Procedural Order No. 2, as amended by Procedural Order No. 3.

3. Prior to receiving the Protected Information, counsel for the Respondent must confirm that, with the exception of its representation as outside counsel of Bolivia, he or she is independent from the Bolivian government, its entities and instrumentalities, and companies owned or controlled by Respondent including, but not limited to, COMIBOL, and execute a Confidentiality Undertaking confirming that he or she will abide by the terms of this Protective Order and of Procedural Order No. 2, as amended by Procedural Order No. 3.
4. Counsel for the Respondent shall inform the Tribunal the name(s) of the person(s) who will review the Protected Information, each of which shall execute a Confidentiality Undertaking. Respondent must submit to the Tribunal and to Claimant all signed Confidentiality Undertakings.
5. Having received the signed Confidentiality Undertaking from counsel for the Respondent and from Respondent's Expert, South American Silver will grant access to one full copy of the Protected Information to counsel for the Respondent and to Respondent's Expert for the sole purpose of commenting on the RPA Report in this arbitration.
6. The full copy of the Protected Information shall be provided in hard-copy as well as in digital copy in its original format (native files) on a computer provided for this purpose by the Claimant.
7. The Claimant shall make the hard-copy and the digital copy of the Protected Information available to counsel for the Respondent and to Respondent's Expert at a location outside of Bolivia as agreed upon by the Parties in consultation with the Tribunal, or in the absence of an agreement between the Parties, at a location outside of Bolivia as determined by the Tribunal. The Information shall be made available for a period of time and during hours to be agreed upon by the Parties or, in the absence of such agreement, during the period of time and hours determined by the Tribunal, which shall be those that the Tribunal considers as reasonable to safeguard the Parties' due process rights.
8. Counsel for the Respondent and Respondent's Expert will be allowed to review the Protected Information and take notes, and verify and run verifications on the digital version of the Protected Information on the computer provided by the Claimant, but will not be allowed to remove, copy, photocopy, photograph, record, or transcribe the Protected Information in any manner whatsoever. Counsel for the Respondent and Respondent's Expert will have access to the information in digital format only on the computer provided by Claimant for these purposes. Counsel for the Respondent and Respondent's Expert may retain custody of such notes and verifications during the pendency of this arbitration but may not show them to anyone. Counsel for the Respondent and Respondent's Expert shall destroy any notes or verifications in their possession relating to any Protected Information within five days of the closure of the procedural record in this arbitration. Counsel for the Respondent and Respondent's Expert shall confirm in writing to the Tribunal that all copies of such notes and verifications have been destroyed.

9. During the review of the Protected Information by counsel for the Respondent and Respondent's Expert, the representatives of the Claimant may take all measures necessary or convenient to ensure compliance with this Protective Order and, in particular, to avoid that the Protected Information is removed, copied, photocopied, photographed, recorded, or transcribed. These measures may include the presence of representatives of the Claimant during the review of the Protected Information, provided that their presence does not interfere with the freedom counsel for the Respondent and Respondent's Expert should have to exchange opinions and prepare a defense.
10. The Protected Information shall be used solely for purposes related to this arbitration and, in particular, to comment on the RPA Report.
11. The Respondent shall not pursue any efforts to obtain the Protected Information by any other means whatsoever, including through court or administrative actions.
12. Nothing in this Protective Order shall limit Claimant in the use of its own documents, for any purpose, or from disclosing to any person documents, things, or information, regardless of whether such documents, things, or information are produced and designated as Protected Information in this arbitration.
13. In the event that Respondent inadvertently, or otherwise, comes into possession of any Protected Information, it shall refrain from copying, photocopying, photographing, recording, or transcribing that Protected Information in any manner whatsoever and take prompt steps to ensure that all known copies of such documents or information are returned promptly to Claimant.
14. Pursuant to Article 29 of the UNCITRAL Rules and Section 8.4 of Procedural Order No. 1, the Tribunal may, if it considers appropriate, appoint one or more experts to review the Information and to report to the Tribunal on issues determined by the Tribunal. The experts appointed by the Tribunal shall comply with the duties of confidentiality determined by the Tribunal in due course.
15. This Protective Order shall continue to produce full force and effect until the final conclusion of this arbitration (whether by final award or otherwise) or until such other time as determined by the Arbitral Tribunal.
16. Nothing in this Protective Order shall be taken as in any way modifying the burden or standard of proof in these arbitration proceedings or precluding any subsequent application by a Party or determination by the Tribunal regarding the admissibility, relevance, materiality or weight of the relevant information as evidence in this Arbitration in accordance with Article 27(4) of the UNCITRAL Rules.

17. This Protective Order may be signed in counterparts, collectively forming one composite signed document.

SO ORDERED this 14th day of January of 2015.

Place of Arbitration: The Hague, the Netherlands.



Dr. Eduardo Zuleta Jaramillo
(Presiding Arbitrator)

Prof. Francisco Orrego Vicuña

Mr. Osvaldo César Guglielmino
(with dissenting vote)

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

SOUTH AMERICAN SILVER LIMITED

THE PLURINATIONAL STATE OF BOLIVIA

Counsel for Claimant

Counsel for Respondent

On this ___ day of _____, 2015.

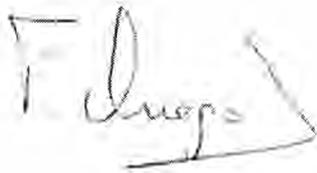
On this ___ day of _____, 2015.

17. This Protective Order may be signed in counterparts, collectively forming one composite signed document.

SO ORDERED this 14th day of January of 2015.

Place of Arbitration: The Hague, the Netherlands.

Dr. Eduardo Zuleta Jaramillo
(Presiding Arbitrator)



Prof. Francisco Orrego Vicuña

Mr. Osvaldo César Guglielmino
(with dissenting vote)

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

SOUTH AMERICAN SILVER LIMITED

THE PLURINATIONAL STATE OF BOLIVIA

Counsel for Claimant

Counsel for Respondent

On this ___ day of _____, 2015.

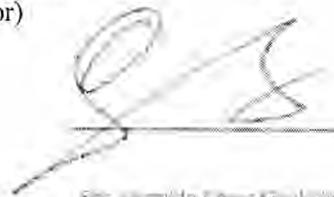
On this ___ day of _____, 2015.

17. This Protective Order may be signed in counterparts, collectively forming one composite signed document.

SO ORDERED this 14 day of January of 2015.

Place of Arbitration: The Hague, the Netherlands.

Dr. Eduardo Zuleta Jaramillo
(Presiding Arbitrator)



Mr. Osvaldo César Guglielmino

Prof. Francisco Orrego Vicuña

Mr. Osvaldo César Guglielmino
(with dissenting vote)

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

SOUTH AMERICAN SILVER LIMITED

THE PLURINATIONAL STATE OF BOLIVIA

Counsel for Claimant

Counsel for Respondent

On this ___ day of _____, 2015.

On this ___ day of _____, 2015.

EXHIBIT A

PROTECTED AND HIGHLY CONFIDENTIAL INFORMATION

Resources and Geology		
Ref.	Description	Content
A.	Malku Khota Graphic Drill Hole Logs	<p>Approximately 310 sheets prepared by South American Silver containing graphics and tables with the location and depth of the drill holes and metal assays from the drill core taken in different areas and sections of the Project Area.</p> <p>A sample was provided as part of RPA's exhibits.</p>
B.	Malku Khota Resource Model	<p>Three-dimensional modeling of the resource distribution of the mineral resources with respect to the Malku Khota Project (obtained from the results of the drilling program).</p>
C.	Vertical Section Drilling Data	<p>Approximately 20 sheets prepared by South American Silver indicating the different drilling angles and coordinates of the drill holes in different areas and sections of the Project Area.</p> <p>A sample was provided with RPA's expert report.</p>
D.	Malku Khota DDH Location	<p>3 charts prepared by South American Silver indicating the exact location, angles and depth of the diamond drill holes that were drilled in the Malku Khota Area.</p>

E.	Malku Khota Geochem Drilling Data	<p>Approximately 1500 pages prepared by South American Silver describing coordinates, elevation, azimuth, inclination and total depth of different samples taken from drill core in different areas and sections of the Project Area.</p> <p>A sample was provided with RPA's expert report.</p>
F.	Malku Khota Drill Hole Location and Surface Geochem Silver Value	<p>This map was prepared by South American Silver and provided as part of RPA's exhibits and only the longitudinal and latitudinal information was redacted.</p>
Metallurgy		
Ref.	Description	Content
C.	Malku Khota Project - Metallurgical Sample Description	<p>Table describing drill hole locations and descriptions of different metallurgical samples.</p>
D.	The Recovery of Silver, Indium and Gallium from Malku Khota Samples - Report 1 dated April 14, 2008 prepared by SGS Lakefield Research Limited, Ontario Canada	<p>Results and analysis of testwork conducted by SGS Lakefield Research Limited at the request of South American Silver in connection with the recovery of silver, indium and gallium from samples.</p>
E.	The Recovery of Silver, Indium and Gallium from Malku Khota Samples - Report 2 dated July 22, 2009 prepared by SGS Lakefield Research Limited, Ontario Canada	<p>Results and analysis of testwork conducted by SGS Lakefield Research Limited at the request of South American Silver on 12 composites of Malku Khota samples in connection with the recovery of indium and gallium using cyanide and acid-chloride leach systems.</p>

F.	The Recovery of Silver, Indium and Gallium from Malku Khota Samples- Final Report dated December 7, 2010 prepared by SGS Lakefield Research Limited, Ontario Canada	Results and analysis of various leach processes tested by SGS Lakefield Research Limited at the request of South American Silver in connection with a leach process capable of extraction of silver, indium and other base metals at minimum reagent consumption.
G.	The Recovery of Silver from Malku Khota Samples - Final Report dated March 30, 2011 prepared by SGS Lakefield Research Limited, Ontario Canada	Results and analysis of tests conducted by SGS Lakefield Research Limited at the request of South American Silver in connection with the recovery of silver from Malku Khota samples by heap leach and conventional cyanidation.

EXHIBIT B

Confidentiality Undertaking

The undersigned hereby acknowledges that he or she has read the Protective Order entered by the Arbitral Tribunal in the Matter of an Arbitration under the Rules of the United Nations Commission on International Trade Law 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, [having been designated an Expert] [acting as counsel to Respondent], hereby agrees that he or she will not disclose to the Plurinational State of Bolivia, its entities and instrumentalities, and companies owned or controlled by Respondent including, but not limited to, Corporación Minera de Bolivia ("COMIBOL") or any other third-party the Protected Information (as defined in the Protective Order attached to Procedural Order No. 3) and it will use such information in the manner provided for in the Protective Order and Procedural Order No. 2, as amended by Procedural Order No. 3, and solely for purposes related to this Arbitration and, in particular, to comment on the expert report submitted by Roscoe Postle and Associates, Inc., dated September 16, 2014, in this Arbitration.

Signature: _____

Dated: _____

Buenos Aires, January 14, 2015.-

Ref.: South American Silver v. Bolivia, UNCITRAL Case, PCA Case N° 2013-15

Partial Dissent to Procedural Order No. 3 and its Annex A, Protective Order

Dear colleagues and representatives of the parties:

Having attempted to reach an agreement with my colleagues of the Tribunal in this proceeding, I hereby express the reasons why we have failed to reach a unanimous decision on the text of Procedural Order (PO) No. 3 and its Annex A.

I, naturally, share the majority's view that, while the deadline of December 12, 2014 did not offer an opportunity to request modifications to Procedural Order No. 2 or to the Protective Order attached thereto, "access to the Protected Information in electronic format, in addition to hard-copies, may in fact be necessary in order to allow a proper analysis of this information by Respondent's external counsel and experts and to enable them to carry out the corresponding verifications and comment on the RPA Report in this arbitration" as noted in paragraph 7 of PO No. 3.

However, what concerns me is that in this PO No. 3 there is no explanation to the respondent that its fears as regards the alleged state of defenselessness in which it would be left pursuant to the Restrictive Order (RO) attached to PO No. 2, have no basis in light of paragraph 34, section (h), of Procedural Order No. 2 itself.

In fact, pursuant to said paragraph 34 (h), the tribunal foresaw the possibility that the potential expert designated by the respondent and its then potential external counsel, explain that the system designed does not allow them to perform their work adequately. In which case, "The Tribunal shall take the measures it considers appropriate taking into consideration the circumstances of the case". It is this provision which precludes the assertion that the respondent's right of defense has been undermined. This is because, if such a situation was to arise, the necessary modifications could be made to resolve it, as is the natural and obvious duty of the tribunal.

It seems clear that the tribunal, when agreeing on PO No. 2, failed to take into account that part of the information was in the form of digital three-dimensional computer-generated images or computer-generated maps. At least for myself, this is the case and I confess as much now. As for my colleagues, this is the inference that I draw from the change that they introduce now in the

former paragraph 5 of the RO of PO No. 2, now 6 of the RO of PO No. 3, to which they add, to the hard-copy, "[a] digital copy in its original format". The term "digital" also appears in the two subsequent new paragraphs.

Therefore, insisting on the limitation to "take notes" or "verify and run verifications on the digital version of the Protected Information on the computer provided by the Claimant" seems to me excessive and that will surely result in a waste of time. It does not seem that one needs even a basic understanding of this type of work to see that the provision of paragraph 34, section (h), that I referred to earlier, will in fact need to be put into operation by the tribunal sooner rather than later. With respect to the hard-copies, it seems plausible to me, given the large volume of information that would need to be recorded in such precarious form. However, we could wait, perhaps with unjustified optimism, for the opportunity when, in the end, the expert and/or counsel of the respondent inform us that the method was not as bad as it seemed or, as they believe now, that it was inadequate and that they satisfactorily explain the problem to us .

Now, given that this is about images on a computer, including three-dimensional ones, this scenario is potential but a practical certainty. I cannot imagine that it would be possible to review and prepare a defense adequately without having the facilities, and minimum and indispensable means to analyze data of such technical complexity and so relevant on a legal and quantum level.

I thus express the reasons for my conceptual dissent from Procedural Order No. 3 and its Restrictive Order attached thereto.



Prof. Armando Cesar Guglielmo