

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. 10

Tribunal

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

January 11, 2016

I. Procedural Background

1. On October 8, 2015, the Plurinational State of Bolivia (the “**Respondent**” or “**Bolivia**”) submitted to the Tribunal its Request for *Cautio Judicatum Solvi* and Disclosure of Information (the “**Request**”).
2. By letter dated October 9, 2015, the Tribunal invited South American Silver Limited (the “**Claimant**” or “**SAS**”) to submit any comments on the Request, by October 16, 2015.
3. By letter of the same date, the Claimant, making reference to the fact that its Reply was due on November 30, 2015, requested an extension, until December 14, 2015, to submit its comments on the Request.
4. By letter dated October 12, 2015, the Tribunal granted the extension requested by the Claimant.
5. In light of the extension granted, by letter of the same date, Bolivia requested, *inter alia*, the suspension of the procedural calendar for the submission of its Rejoinder until the Tribunal decides on the Request and SAS grants the security requested.
6. By letter dated October 13, 2015, SAS objected Bolivia’s request to extend the time limit for the submission of its Rejoinder.
7. By letter dated October 15, 2015, the Tribunal, *inter alia*, invited Bolivia to submit comments on SAS’ letter of October 13, 2015.
8. By letter dated October 20, 2015, Bolivia insisted on the suspension of the time limit for the submission of its Rejoinder.
9. By letter dated November 12, 2015, the Tribunal decided to maintain February 29, 2016, as the date for the submission of Bolivia’s Rejoinder.
10. In accordance with the time limit fixed by the Tribunal, on December 14, 2015, SAS responded to the Request opposing it (the “**Opposition to Request**”).

II. Position of the Parties

11. The Tribunal summarizes below the arguments and positions of the Parties concerning the Request. The Tribunal has taken into consideration all the arguments and evidence submitted by the Parties. The fact that a particular argument or a specific evidence is not mentioned in the summary does not mean that the Tribunal has not considered it.
 - A. *Summary of Bolivia’s Request and SAS’ Response*
 - a. Bolivia’s Request
12. Bolivia requests the Tribunal to order the Claimant to “provide a *cautio judicatum solvi* for an amount of at least US\$ 2.5 million to ensure the full payment of an award on costs against the Claimant, according to Article 42(1) of the Arbitration Rules [UNCITRAL 2010].”¹ Bolivia

¹ Request, ¶ 42 (a).

requests that the *cautio judicatum solvi* is granted by means of a first-demand bank guarantee or a bank deposit.²

13. Bolivia further requests the Tribunal to order the Claimant to “disclose the identity of the funder of this arbitration, as well as the terms of the funding agreement signed with him”³.

b. SAS’ Response

14. The Claimant objects the Request considering that “[a]n order of security for costs in this proceeding is unnecessary and would be grossly disproportionate. It would impose a significant financial hurdle to the pursuit of a non-frivolous claim and frustrate access to justice.”⁴
15. SAS requests the Tribunal to reject both the request of security for costs as well as all of the requests for information regarding SAS’ engagement of a third-party funder except for an order limited to requiring SAS to disclose the name of its third-party funder.⁵

B. *Respondent’s Position*

16. Bolivia states that the Tribunal is empowered to order a *cautio judicatum solvi* pursuant to Art. 17(1) of the 2010 UNCITRAL Arbitration Rules (the “**UNCITRAL Rules**”) and Procedural Order No. 7.⁶
17. According to Bolivia, the key element to grant the *cautio judicatum solvi* consists of establishing the existence of a proven risk that “Claimant would not reimburse Respondent for its incurred costs, be it due to Claimant’s unwillingness or its inability to comply with its payment obligations.”⁷
18. Bolivia invokes three circumstances that, in its view, correspond to situations for which the *cautio judicatum solvi* was created, and which have been accepted by investment arbitration tribunals: (i) the Claimant is a Bermuda shell company with no economic activity or assets, which is only used by the real investor (South American Silver Corporation or SASC) to improperly attempt to obtain protection under the Treaty; (ii) SASC has publicly announced that it will run out of funds by the end of year 2015; and (iii) the costs of the Claimant in this arbitration are being funded by a third party, which confirms SAS’ inability to bear the costs of this arbitration.⁸
19. Bolivia notes that the Claimant is a “shell company” with no economic activity or assets, and which only exists for the purpose of “treaty shopping” and tax savings.⁹
20. Bolivia affirms that SAS has refused to disclose any information related to its activities, assets and finances, and has been unable to produce any of its own financial statements, but only the consolidated financial statements of SASC, which do not allow differentiating Claimant’s assets or the investments in the Project. The only corporate documents on the record regarding SAS

² Request, ¶ 42 (a) (i) y (ii).

³ Request, ¶ 42 (b).

⁴ Opposition to Request, ¶ 41.

⁵ Opposition to Request, ¶ 42.

⁶ Request, ¶¶ 9-11.

⁷ Request, ¶ 12, citing *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs, August 13, 2014, ¶ 81, RLA-177.

⁸ Request, ¶ 13

⁹ Request, ¶ 14.

are a certificate of incorporation and a power of attorney granted by SAS to its lawyers, which indicates an address that, as it is usual in shell companies, belongs to a law firm.¹⁰

21. According to Bolivia, SASC was the one involved in the Project and who made the few investments in prospecting activities. In addition, the Claimant does not bear any of the costs of this arbitration; the costs are borne by SASC, and for the most part, by a hidden funder, and the guarantees in favor of the funder were also granted by SASC.¹¹
22. In relation to SASC's funds, Bolivia notes that SASC has acknowledged that it will run out of money at the end of 2015 and that its poor economic situation confirms the high risk of SAS not being able to bear a potential award on costs.¹² According to Bolivia, there is abundant evidence that SASC's financial situation is precarious and predicts an unyielding situation of insolvency.¹³
23. Bolivia analyses SASC's financial documents of the last years and argues that they show a significant reduction in SASC's available cash, reduction that should be analyzed in conjunction with the quarterly average expenditures of that company. From this analysis, Bolivia concludes that SASC will run out of cash by the end of 2015.¹⁴
24. Bolivia adds that SASC has contracted debts for the next five (5) years, equivalent to almost twice its available cash.¹⁵ According to Bolivia, SASC acknowledges that none of its projects produces income and that there is no certainty that they will do so in the near future¹⁶ and that, as acknowledged by SASC, there is no certainty that it will be able to raise funding.¹⁷ Therefore, Bolivia affirms that by the end of 2015, SASC would have run out of resources to meet its obligations and the Tribunal cannot wait until that moment has arrived to intervene and order SAS to guarantee the reimbursement of Bolivia's costs and expenses.¹⁸
25. In relation to the third-party funding, Bolivia argues that the Claimant's financial insufficiency is such that SASC itself has published that this arbitration is being financed by a third party.¹⁹ According to Bolivia, this confirms that neither the Claimant nor SASC have enough economic means to bear the costs and expenses of this arbitration, and, therefore, they will not be able to reimburse those of the State. The existence of the third-party funder, coupled with the economic difficulties of the Claimant and its parent company, creates, Bolivia affirms, a *prima facie* case for granting the *cautio judicatum solvi*.²⁰
26. According to Bolivia, there is no evidence whatsoever that the third-party funder is obliged to reimburse Bolivia's costs and expenses of this arbitration and, therefore, it is necessary to obtain information as to the terms of the funding of this arbitration.²¹ In any case, international case

¹⁰ Request, ¶ 15.

¹¹ Request, ¶¶ 16-17.

¹² Request, ¶¶ 19-20.

¹³ Request, ¶ 20.

¹⁴ Request, ¶¶ 21-22.

¹⁵ Request, ¶ 23.

¹⁶ Request, ¶ 24.

¹⁷ Request, ¶ 25.

¹⁸ Request, ¶ 26.

¹⁹ Request, ¶ 27.

²⁰ Request, ¶¶ 27-28.

²¹ Request, ¶ 29.

law and doctrine agree that the mere uncertainty as to the existence of the obligation to reimburse constitutes “compelling grounds for security for costs”.²²

27. Referring to the opinion of Gavan Griffith QC in the case *RSM v. Saint Lucia*, Bolivia submits that some arbitrators consider that in cases where a funder is involved, a presumption in favor of granting a *cautio judicatum solvi* exists. This means that the burden of proof is transferred to the funded party, who must prove why the *cautio judicatum solvi* should not be ordered.²³
28. Finally, to support its request of disclosure of the name of the third party funding the arbitration and the terms of the funding, Bolivia notes that the Tribunal must ensure the integrity of the arbitration and treat the Parties equally, and that the members of the Tribunal must be independent and impartial, being compelled to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.²⁴
29. Bolivia notes that the IBA Guidelines on Conflicts of Interest in International Arbitration, as revised in 2014, recognize that third-party funders should be equated with the funded party to verify the existence of conflict of interests, and that the funded party is obliged to disclose any relationship that exists between her (including third-party funders) and the arbitrators.²⁵ In application of said Guidelines, some tribunals have ordered to the funded party to disclose the identity of its funder and the terms of the funding agreement.²⁶
30. The disclosure of the terms of the funding agreement would enable, according to Bolivia, the determination of whether the Claimant’s claims in this arbitration have been assigned to the third-party funder, and whether the third-party funder has committed to pay for any potential order on costs against the Claimant for the costs and expenses that Bolivia has incurred and will continue incurring in this arbitration.²⁷

C. *Claimant’s Position*

31. SAS considers that Bolivia’s Request should be denied for four reasons: (i) SAS does not have a history of unpaid, prior adverse costs awards; (ii) SAS’ current financial condition is a result of the State measures at issue in this arbitration; (iii) the existence of a third-party funder does not warrant security for costs; and (iv) Bolivia has failed to establish that the speculative risk of unpaid, adverse costs award substantially outweighs the immediate harm that such a measure would impose on SAS.²⁸
32. According to the Claimant, “[i]nvestment tribunals uniformly have held that orders of security for costs should only be issued in extreme and exceptional circumstances” and “have also held that the risk of an unpaid, adverse costs award due to a claimant’s poor financial condition or the existence of third-party funding does not warrant an order of security for costs.”²⁹ The Claimant notes that “the only investment tribunal that has ever issued security for costs did so primarily because of the claimant’s notorious history of failing to pay prior cost awards.”³⁰

²² Request, ¶ 30.

²³ Request, ¶ 31.

²⁴ Request, ¶ 33.

²⁵ Request, ¶¶ 34-35.

²⁶ Request, ¶ 36.

²⁷ Request, ¶ 40.

²⁸ Opposition to Request, ¶ 3.

²⁹ Opposition to Request, ¶ 2.

³⁰ Opposition to Request, ¶ 2.

33. Claimant considers that the provision applicable to the Request is Art. 26 of the UNCITRAL Rules and not Art. 17(1) invoked by Bolivia. SAS submits that said Art. 26 results applicable in circumstances where one of the parties has wasted or is about to waste assets that may be needed to satisfy the costs fixed in the final decision. According to SAS, this is not the situation in this case, where Bolivia only makes a series of speculative assertions on SAS' financial impossibility to cover the costs of this arbitration, which is not sufficient for the Tribunal to order security for costs.³¹
34. SAS notes that, according to said Art. 26, the party requesting an interim measure under its paragraphs 2(a) to (c) shall convince the arbitral tribunal, on the one hand, that harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and, on the other hand, that there is a reasonable possibility that the requesting party will succeed on the merits of the claim, obviously without resulting in any pre-judgment by the tribunal.³²
35. As the second sentence of Art. 26(3)(b) provides that an arbitral tribunal should not pre-judge the merits of the claims when considering a request for interim measures, SAS notes that "while the Claimant considers that there is no reasonable possibility that Bolivia will succeed on its jurisdictional and merits defences, Claimant focuses this submission on the first element of the standard for interim measures under Article 26(3)."³³ SAS thus notes that Bolivia has not shown that the risk of an unpaid adverse costs award 'substantially outweighs' the harm that an order of security for costs would impose on SAS, affirming, in its turn, the contrary.³⁴ SAS then concludes that Bolivia's request for an order of security for costs falls far short of standard set forth under Art. 26 of the UNCITRAL Rules, and would impose on SAS greater harm than the one that could arise from the speculative risk of a potential unpaid costs award.³⁵
36. SAS remarks that the standard under the ICSID Rules for granting this type of interim measures is less demanding than the standard required under the UNCITRAL Rules, yet even then, every investment tribunal that has considered a security for costs request has held that such requests should only be granted in exceptional circumstances.³⁶
37. Citing multiple decisions of ICSID and UNCITRAL tribunals, SAS reiterates that the standard is high, that the existence of truly exceptional circumstances is warranted, and that the mere existence of financial difficulties and the risk of failure to pay do not justify a measure of this nature.³⁷ The Claimant makes reference to several arbitral decisions under the UNCITRAL Rules to establish that the mere existence of an unstable financial situation or the existence of a third party funding the arbitration are not reasons *per se* to order security for costs.³⁸
38. With respect to Bolivia's analysis of the tribunal's decision in *RSM v. Saint Lucia*, SAS considers that the tribunal did not adopt a less demanding standard, rather, the relevant party in that case was in such a situation that the existence of exceptional circumstances was proven because: (i) there was a history of failure to comply; (ii) the party admitted its lack of financial capacity to pay the costs of the arbitration; and (iii) admitted, but did not disclose, the existence

³¹ Opposition to Request, ¶ 5.

³² Opposition to Request, ¶ 5.

³³ Opposition to Request, ¶ 6.

³⁴ Opposition to Request, ¶¶ 33-35.

³⁵ Opposition to Request, ¶¶ 33-36.

³⁶ Opposition to Request, ¶¶ 7-8.

³⁷ Opposition to Request, ¶¶ 7-9.

³⁸ Opposition to Request, ¶¶ 8-16.

of a third-party funder.³⁹ Furthermore, Prof. Gavan Griffith admitted that security for costs should not be granted when the source of the claimant's financial difficulties is the measures alleged to be in breach of the investment treaty.⁴⁰

39. SAS concludes that the majority of investment tribunals have affirmed that to grant security for costs, exceptional circumstances are required, which, although alleged in several cases, were proven only in *RSM v. Saint Lucia*. For the foregoing reasons, SAS considers that Bolivia has no basis to request security for costs, nor does the Tribunal have basis to grant it.⁴¹
40. The Claimant notes, moreover, that its financial situation, argued by Bolivia, is a consequence of the decisions taken by Bolivia and which resulted in this arbitration. The illegal expropriation carried out by Bolivia severely damaged SAS' financial situation. To grant the measure Bolivia requests would be allowing it to benefit from its improper conduct. SAS argues that several investment tribunals have held that special-purpose companies are common in investment arbitration and, furthermore, that security for costs is inappropriate when a claimant's financial condition is alleged to be a result of the State measures at issue in the arbitration.⁴²
41. SASC is a viable company with assets in other parts of the world. Bolivia's reading of SASC's financial statements is out of context and also fails to take into account SASC's financial strength or other sources of income resulting from projects in other countries.⁴³
42. The Claimant also considers that the mere existence of a third party funding the arbitration is not a sufficient reason for an order of security for costs.⁴⁴ In SAS' opinion, the three sources cited by Bolivia to support its assertion that the international case law and doctrine agree that the mere uncertainty as to the existence of a third-party funder's obligation to reimburse constitutes '*compelling grounds for security for costs*' correspond to a minority view. The majority of international tribunals have stated the contrary in recent decisions, and on the contrary, the existence of a funder indicates that the claim is plausible on the merits.⁴⁵ SAS refers to numerous sources to argue that granting security for costs is possible only in exceptional circumstances, which are not present in this case.⁴⁶
43. SAS reiterates that the only investment tribunal that has ordered security for costs was the tribunal in *RSM v. Saint Lucia*, and it did so basically because there was a clear record of claimant's failure to pay previously awarded arbitration costs. The Claimant affirms that there is no precedent showing that it has failed to meet its payment obligations. SAS has complied with the payment of the costs arisen so far in this arbitration proceeding, and has never acted in a manner that could imply that it would not comply with its obligations.⁴⁷
44. With respect to Bolivia's request to order SAS to disclose the identity of its third-party funder and to disclose the terms of the funding agreement, SAS, "[i]n the interest of transparency and to address Bolivia's concern regarding conflict of interest, SAS proposes to disclose the name of its third-party funder".⁴⁸ Nevertheless, SAS refuses to disclose further information noting that

³⁹ Opposition to Request, ¶¶ 10-13.

⁴⁰ Opposition to Request, ¶ 12.

⁴¹ Opposition to Request, ¶ 22.

⁴² Opposition to Request, ¶ 24.

⁴³ Opposition to Request, ¶¶ 25-31.

⁴⁴ Opposition to Request, ¶¶ 31-32.

⁴⁵ Opposition to Request, ¶ 20.

⁴⁶ Opposition to Request, ¶¶ 17-19.

⁴⁷ Opposition to Request, ¶ 23.

⁴⁸ Opposition to Request, ¶¶ 37-38.

“the terms of SAS’s funding agreement are irrelevant to the issues in dispute in this arbitration and that the terms of that agreement are confidential, commercially sensitive, and that SAS and the funder would incur prejudice if the Tribunal ordered to disclose the terms of its funding agreement.”⁴⁹

III. The Tribunal’s Analysis

45. Security for costs (*cautio judicatum solvi*) is an instrument of English law that has been seen with certain reservations in arbitration in countries of other legal traditions. In investment arbitration, only in one case (*RSM v. Saint Lucia*), the tribunal (with two strong separate and dissenting opinions) granted security for costs because it found circumstances that merited it.
46. The doubts expressed by tribunals as regards security for costs concern: (1) the power of an arbitral tribunal to issue measures that are not expressly contemplated in the corresponding rules (as neither the UNCITRAL Rules nor the ICSID Rules expressly contemplate security for costs); (2) the fact that interim measures are issued to protect rights that are in danger, and (a) it could be arguable whether to obtain reimbursement of costs by the prevailing party in an arbitration is a right or a mere eventuality, given the uncertainty of the result and the discretion of tribunals to adjudicate costs, and (b) if it is a right, it is not clear whether it is a substantive one or a procedural one; (3) whether security for costs really fulfills the requirements of necessity and urgency of the measure which are proper of an interim measure; and (4) the difficulty in ordering a guarantee of payment of costs when there is no certainty on the results of the arbitration and, consequently; there could be pre-judgment.
47. The Tribunal considers, in light of the allegations of the Parties and based on the UNCITRAL Rules, that it is necessary to analyze four basic aspects to determine whether this Tribunal may, taking into account the particular circumstances of this case, order a measure as that requested by Bolivia: (i) the Tribunal’s powers to order security for costs; (ii) the Tribunal, in deciding a request for security for costs, cannot pre-judge the issues submitted to it for decision; (iii) the standard to grant security for costs; and (iv) whether the mere existence of a third-party funder is sufficient to grant security for costs.

a. Tribunal’s Powers to Grant Security for Costs

48. In the first place, the Tribunal must examine whether it has powers to order the measures requested.
49. The Parties seem to agree that the Tribunal has powers to grant security for costs, but disagree on the applicable rules and standards that the Tribunal must take into account to order the measure.
50. Bolivia invokes Art. 17(1) of the UNCITRAL Rules when requesting the security for costs. The Tribunal considers that a request for security for costs should be encompassed in the category of interim or provisional measures, provided for in Art. 26 of the UNCITRAL Rules. Therefore, the latter would be the relevant provision for the analysis of Bolivia’s request.
51. The power of a tribunal to order security for costs may derive from the applicable arbitration rules or *lex arbitri*. The UNCITRAL Rules do not provide expressly for the Tribunal’s powers to order security for costs, as powers different from the power to order interim measures under

⁴⁹ Opposition to Request, ¶ 40.

the above-mentioned Art. 26, or its general powers to conduct the arbitration pursuant to Art. 17(1) also mentioned above. The arbitration law of the seat does not provide expressly for the Tribunal's power to order security for costs.⁵⁰

52. However, several decisions of arbitral tribunals in investment arbitrations, both under the ICSID Rules as well as the UNCITRAL Rules, confirm that arbitral tribunals are empowered to order security for costs.⁵¹ The Parties cite those decisions and seem to agree that this Tribunal has powers to order the measure.

b. The Tribunal, in Reviewing a Request for Security for Costs, Cannot Pre-judge the Issues Submitted for Decision

53. Bolivia notes that “[t]he Claimant is a Bermuda shell company with no economic activity or assets, which is only used by the real investor (SASC) to attempt, improperly, to obtain protection under the Treaty”⁵².
54. Art. 26(3)(b) of the UNCITRAL Rules, concerning interim measures, provides that, to order the measure, it is necessary to determine that “[t]here is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.”
55. The Tribunal considers that it cannot order the measure requested by Bolivia on the basis of the allegation that SAS is a Bermuda shell company, with no economic activity or assets, which is only used by the real investor (SASC) to attempt, improperly, to obtain protection under the Treaty, because so doing would imply pre-judging Bolivia's jurisdictional objections. This specific issue (whether SAS is or not the real investor) is one of the central questions in the jurisdictional discussion, on which Parties' submissions are pending, including Bolivia's Rejoinder, which submissions will enable the Tribunal to analyze the possibilities of success of this defense.
56. On this respect, the Tribunal shares the view of *Rurelec v. Bolivia*, in which it was stated that “[i]t is also unwise to risk even the most minor prejudgment of the case [...] Such determinations are therefore best avoided unless absolutely necessary to come to a decision on the request for interim measures, which is not the case here.”⁵³

⁵⁰ Dutch Code of Civil Procedure, Book Four - Arbitration, English translation available on the website of the Dutch Arbitration Institute:

<http://www.nai-nl.org/downloads/Text%20Dutch%20Code%20Civil%20Procedure.pdf>

⁵¹ See, for example, *Libananco Holdings Co. Limited v. Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, June 23, 2008, ¶ 57; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, October 28, 1999; *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. El Salvador*, Decision on El Salvador's Application for Security for Costs, September 20, 2012, ¶ 45; *Víctor Pey Casado & Fundación Presidente Allende v. Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, September 2, 2001, ¶ 88; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg & RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Costs, October 14, 2010, ¶ 5.16.

⁵² Request, ¶ 14.

⁵³ *Guaracachi America, Inc. & Rurelec v. Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14, March 11, 2013, ¶ 8.

c. The Standard to Grant Security for Costs: Necessity and Urgency of the Measure

57. According to Art. 26 of the UNCITRAL Rules, an arbitral tribunal may order interim measures as provided in its Para. 2(a) to (c) if the tribunal is convinced that, on the one hand, harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and, on the other hand, that there is a reasonable possibility that the requesting party will succeed on the merits of the claim, without pre-judgment by the tribunal.
58. The Tribunal already noted that it cannot, with the elements at hand, decide on Bolivia's jurisdictional objection, which objection is also the basis of the request for security for costs.
59. In relation to the necessity and the urgency of the measure, investment arbitration tribunals considering requests for security for costs have emphasized that they may only exercise this power where there are extreme and exceptional circumstances⁵⁴ that prove a high real economic risk for the respondent and/or that there is bad faith on the part from whom the security for costs is requested. Except for the case of *RSM v. Saint Lucia*, arbitral tribunals in investment cases have refused to order security for costs.
60. In *RSM v. Saint Lucia*, invoked by Bolivia, the arbitral tribunal noted that a significant number of ICSID tribunals have accepted that an arbitral tribunal may order security for costs "provided exceptional circumstances exist".⁵⁵ The extraordinary or exceptional circumstances that said tribunal found, and which it considered proved the necessity and urgency of the measure, were the following: in two ICSID cases involving the same investor (*RSM v. Granada*, ICSID Cases Nos. ARB/05/14 and ARB/10/6), it failed to comply with its payment obligations: (a) in the first case, it did not pay the advances requested by ICSID and the arbitration was suspended and finally terminated due to the lack of payment, and where, at the end, Grenada paid ICSID,⁵⁶ and (b) in the second case, it failed to comply with the award and the order to pay the arbitration costs to Grenada.⁵⁷ On the basis of these two cases and the precedent of RSM's behavior, the tribunal concluded that there was material risk that RSM would not want to or could not pay costs should Saint Lucia prevail in the arbitration.

⁵⁴ RLA-177, *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, August 13, 2014, ¶ 75 (citing *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, April 6, 2007, ¶ 32); CLA-168, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures, September 6, 2005, ¶ 38; RLA-57, *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, ¶ 175; RLA-132, *Occidental Petroleum Corporation & Occidental Exploration and Production Company v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, August 17, 2007, ¶ 59; CLA-169, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg & RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Costs, October 14, 2010, ¶ 5.17; CLA-170, *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. El Salvador*, Decision on El Salvador's Application for Security for Costs, September 20, 2012, ¶ 44; CLA-171, *Burimi S.R.L. & Eagle Games SH. A. v. Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, May 3, 2012, ¶ 34.

⁵⁵ *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, August 13, 2014, ¶ 52.

⁵⁶ *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, August 13, 2014, ¶ 78.

⁵⁷ *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, August 13, 2014, ¶¶ 79-80.

61. With respect to the economic situation of the party requesting the security for costs, the standard established by arbitral tribunals, both in ICSID and UNCITRAL cases, when considering the lack of resources, varies, but is very high. Thus, for example, in *EuroGas v. Slovak Republic* (in a decision subsequent to that in *RSM v. Saint Lucia*), the tribunal rejected the request for security for costs reaffirming the decision of other tribunals (including of *RSM v. Saint Lucia*) that it is necessary to prove the exceptional circumstances, and that it had not been proven that the claimant had failed to make the payments in the arbitration or in other arbitrations, and noting also that neither the financial difficulties nor the fact of having third-party funding constitutes *per se* exceptional circumstances warranting security for costs.⁵⁸
62. In the same vein, the tribunal in *RSM v. Grenada* stated that the lack of assets or the existence of a special-purpose vehicle for the investment by themselves are not sufficient to order security for costs.⁵⁹
63. In sum, the general position of investment tribunals in cases deciding on security for costs is that the lack of assets, the impossibility to show available economic resources, or the existence of economic risk or difficulties that affect the finances of a company are not *per se* reasons or justifications sufficient to warrant security for costs.
64. In this case, Bolivia submits that security for costs must be granted due to SAS' lack of resources, which Bolivia explains as follows: (1) SAS has not disclosed information relating to its activities, assets and finances; (2) SAS has not provided any of its own financial statements, but only the consolidated financial statements of SASC, which do not allow differentiating its own assets; (3) the Claimant is not bearing any of the costs of this arbitration because, according to information published by SASC, the costs are borne by SASC and the funder; (4) it was SASC the one involved in the Project and who made the few investments in prospecting activities, which allows to conclude that SAS is a *shell company* without resources or assets; and (5) SAS'/SASC's financial document would allow to conclude that it will run out of cash by the end of 2015.
65. Contrary to Bolivia's allegations, none of these circumstances have been considered by investment tribunals, individually or collectively, as evidence of the existence of a risk that the other party (in this case SAS) does not want to or cannot pay. On the contrary, these arguments has been rejected by tribunal that have decided on the issue, and who, as noted before, have systematically set forth a high standard to grant this kind of measures.
66. In this case, there is no evidence of failure to comply by SAS before third parties, nor breach of obligations in this arbitration or other arbitrations, nor clear evidence that SAS does not want to or cannot pay. Even admitting Bolivia's interpretation of the Claimant's financial statements and conclude that SAS/SASC would end up with a financial problem by the end of 2015, that would imply, in the worst case, a cash flow difficulty but would not prove a total lack of funds or assets to pay, and even less of a situation of impossibility to pay.
67. In sum, Bolivia's analysis of SAS'/SASC's balances and other related accounting documents alone does not meet the high threshold set by investment tribunals (including of *RSM v. Saint Lucia*, cited by Bolivia) in so far as it does not show that SAS does not want to pay or has failed

⁵⁸ *EuroGas Inc. & Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 – *Decision on Requests for Provisional Measures*, June 23, 2015, ¶¶ 122-123.

⁵⁹ *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg & RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, *Decision on Respondent's Application for Security for Costs*, October 14, 2010, ¶ 5.19.

to comply, or that it has carried out acts from which the Tribunal can clearly and sufficiently conclude that SAS does not have the means to meet a potential costs award against it.

68. There is agreement that the standard to grant the measure is very strict, given that it shall be granted only in case of extreme and exceptional circumstances, for example, when there is evidence of constant abuse or breach that may cause an irreparable harm if the measure is not granted. This element is not proven in this case by Bolivia. There is no action of SAS in this arbitration, nor has it been proven with respect to other arbitrations, that meet this standard.

d. Third-Party Funding

69. For Bolivia, the existence of a third-party financing the arbitration is an indication that neither the Claimant nor SASC have sufficient economic resources to bear the costs and expenses of this arbitration⁶⁰, and there is no evidence that the third-party funder has assumed the obligation to reimburse Bolivia's costs and expenses in this arbitration⁶¹. Bolivia states that when there is evidence of the existence of a third-party funder, some arbitrators consider that there is a presumption in favor of ordering security for costs.⁶²
70. In addition, Bolivia considers that the identity of the funder should be disclosed to preserve the integrity of the arbitration given that there could be conflicts of interests between the funder and the arbitrators.
71. With respect to the first point, the Tribunal must establish whether the existence alone of a third-party funder financing the arbitration is a determining factor to decide whether to grant or not the request for security for costs.
72. Neither the UNCITRAL Rules nor the *lex arbitri* provide an answer to this question.
73. As a first approach, the decisions of investment tribunals that have awarded costs against claimants have affirmed that the existence of a third-party that finances the claimant is not, by itself, a factor that should be taken into account in the determination of costs⁶³. The Tribunal shares this approach and considers that it would not be consistent with such approach to consider the mere existence of a third-party funder as an exclusive factor to determine costs in an earlier stage of the proceedings, this is, in the evaluation of a request for security for costs.
74. It is true that, as Bolivia affirms, one of the arbitrators in *RSM v. Saint Lucia* suggested that the mere existence of a funder should be seen as a situation of exceptional circumstance and that the other party has the burden of proving the contrary, this is, to show that there is no exceptional case. However, the position of the majority was the opposite. Additionally, in the decision in *EuroGas v. Slovak Republic*, cited by Bolivia, and which is subsequent to *RSM v. Saint Lucia*, the tribunal stated that the mere existence of a third-party funder is not an exceptional situation justifying security for costs⁶⁴.

⁶⁰ Request, ¶28.

⁶¹ Request, ¶29.

⁶² Request, ¶31.

⁶³ *Ioannis Kardassopoulos & Ron Fuchs v. Georgia*, ICSID Cases Nos. ARB/05/18 y ARB/07/15, Award, March 3, 2010, ¶ 691; *RSM Production Corp. v. Grenada*, ICSID No. ARB/05/14, Annulment Proceeding, Order of the Committee Discontinuing the Proceeding and Decision on Costs, April 28, 2011, pp. 18–19, ¶ 68.

⁶⁴ *EuroGas Inc. & Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 – *Decision on Requests for Provisional Measures*, June 23, 2015, ¶ 123.

75. The Tribunal considers that while the existence of a third-party funder may be an element to be taken into consideration in deciding on a measure as the one requested by Bolivia, this element alone may not lead to the adoption of the measure.
76. The existence of the third-party funder alone does not evidence the impossibility of payment or insolvency. It is possible to obtain financing for other reasons. The fact of having financing alone does not imply risk of non-payment.
77. If the existence of these third-parties alone, without considering other factors, becomes determinative on granting or rejecting a request for security for costs, respondents could request and obtain the security on a systematic basis, increasing the risk of blocking potentially legitimate claims.⁶⁵
78. In sum, the existence of a funder is an element to take into account, but tribunals have been clear in that the existence of the funder alone is not sufficient to grant security for costs.
79. Concerning the second point, the disclosure of the name of the funder, the Tribunal considers that, for purposes of transparency, and given the position of the Parties, it must accept Bolivia's request of disclosure of the name of SAS' funder.
80. Finally, concerning the disclosure of the terms of the financing agreement entered into with the third-party funder, the Tribunal will reject such request.
81. Firstly, because, for the above-mentioned reasons, exceptional circumstances required to order security for costs are not present and the mere existence of the funder is not sufficient to order it. Therefore, it is not relevant under these particular circumstances to determine whether the third-party funder would assume or not an eventual costs award in favor of Bolivia.
82. Secondly, because no additional circumstances have been proven that, in the opinion of the Tribunal, warrant the modification of the decisions already taken concerning document production in the corresponding procedural phase.

B. Conclusion

83. The Tribunal cannot, in this stage of the proceeding, decide on Bolivia's jurisdictional objection. Bolivia's mere analysis of SAS' or SASC's balances and other related accounting documents, or the mere existence of a third-party funder do not meet the high threshold set forth by investment tribunals as they do not prove that SAS is in a situation where it does not want to pay, or that it has breached its obligations, or that it has carried out acts from which the Tribunal may clearly and sufficiently conclude that SAS does not have the means to comply with an eventual award on costs.
84. In the Tribunal's opinion, there is basis to order the disclosure of the name of the third-party funder, but not to order the disclosure of the agreement entered into with the third-party funder.

⁶⁵ *Gustav F.W. Hamester GmbH & Co. K.G. v. Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, ¶ 15.

IV. The Tribunal's Decisions

85. On the basis of the foregoing reasons, the Tribunal, unanimously, decides to:
- a. REJECT Bolivia's request for security for costs.
 - b. ORDER the Claimant to inform the Tribunal, **by January 19, 2016**, the name or names of the third-party funder(s) that have granted financing to the Claimant in this arbitration.
 - c. REJECT Bolivia's request to produce for the record the financing agreement between the Claimant and the third-party funder.

Place of the Arbitration: The Hague, the Netherlands



Dr. Eduardo Zuleta Jaramillo
(Presiding Arbitrator)

On behalf of the Tribunal