

PCA Case No. 2016-39

**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, SIGNED ON 24 MAY 1988**

- and -

THE UNCITRAL ARBITRATION RULES

- between -

GLENCORE FINANCE (BERMUDA) LTD

(the “Claimant”)

- and -

THE PLURINATIONAL STATE OF BOLIVIA

(the “Respondent”, and together with the Claimant, the “Parties”)

PROCEDURAL ORDER NO. 8

Tribunal

Prof. Ricardo Ramírez Hernández (Presiding Arbitrator)
Prof. John Y. Gotanda
Prof. Philippe Sands

5 September 2019

I. PROCEDURAL BACKGROUND

1. On 31 May 2019, the Tribunal issued Procedural Order No. 6, wherein it decided to request that the Claimant produce to the Tribunal and to the Respondent, in accordance with paragraph 5.3 of Procedural Order No. 1 and Article 27(3) of the UNCITRAL Rules, [REDACTED]

2. Paragraph 8 of Procedural Order No. 6 provides as follows:

To the extent that the Claimant objects to producing any documents responsive to the categories mentioned above, or wishes to redact any portion of any particular document, it shall identify the grounds invoked for non-production or redaction with reference to Article 9(2) of the *IBA Rules on the Taking of Evidence in International Arbitration 2010*. The Respondent may comment thereafter within a period to be fixed by the Tribunal. The Tribunal shall then rule on any such objection or request for redaction.

3. By letter dated 24 June 2019, the Claimant submitted its response to the Tribunal's request to produce documents pursuant to Procedural Order No. 6, producing certain documents and submitting a privilege log in respect of certain documents withheld from production on the grounds of legal privilege.
4. On 3 July 2019, the Claimant submitted a supplemental privilege log in respect of certain further documents withheld from production on the grounds of legal privilege.
5. By letter dated 13 August 2019, the Respondent requested that the Tribunal order the Claimant:
 - a. To produce the exhibits [REDACTED] omitted from its production to date, exhibits 4, 5, 6, 8, 9, 11, 16, 17, 19, 20, and 22;
 - b. To disclose to Bolivia, without copying the Tribunal, an unredacted copy of [REDACTED]; and
 - c. To produce items 1, 2, 5, 7, 8, 14, 16, 21, 22, 82 and 84 of the Privilege Log.¹
6. By letter dated 19 August 2019, the Claimant provided its comments on the Respondent's letter dated 13 August 2019.

¹ Respondent's letter to the Tribunal dated 13 August 2019, p. 7.

7. By letter dated 23 August 2019, the Respondent provided its comments on the Claimant's letter dated 19 August 2019 and reiterated its request set forth in its letter dated 13 August 2019.
8. By letter dated 26 August 2019, the Claimant provided its comments on the Respondent's letter dated 23 August 2019 and produced "the documents that appear to correspond to the descriptions of Exhibits 6, 11, 16, 19 and 22 to [REDACTED], as well as Annex 2 to [REDACTED]." ²

II. ANALYSIS OF THE TRIBUNAL

9. Pursuant to paragraph 8 of Procedural Order No. 6, the Tribunal shall rule on any objection to production or request for redaction.
10. Pursuant to paragraph 6.1 of Procedural Order No. 1, the Tribunal may use the *IBA Rules on the Taking of Evidence in International Arbitration 2010* (the "**IBA Rules**") as an additional guideline when considering matters of evidence.

A. THE EXHIBITS TO [REDACTED]

11. The Respondent requests that Claimant be ordered to produce exhibits 4, 5, 6, 8, 9, 11, 16, 17, 19, 20, and 22 to the [REDACTED] ³
12. The Claimant has produced "documents that appear to correspond to the descriptions of Exhibits 6, 11, 16, 19 and 22 [REDACTED]." ⁴ As to the remainder of the exhibits to [REDACTED], the Claimant states that it has been unable to locate any documents corresponding to Exhibits 4, 8, 9, 17, and 20 following a diligent search of its records and those of its counsel. ⁵ Likewise, the Claimant has stated that it could not locate the final version of the document which corresponds to Exhibit 5 to [REDACTED]. ⁶

² Claimant's letter to the Tribunal dated 26 August 2019, enclosing an "Index of Claimant's Voluntary Production" (documents PO6-36 to PO6-40).

³ Respondent's letter to the Tribunal dated 13 August 2019, p. 7; Respondent's letter to the Tribunal dated 23 August 2019, pp. 5-6.

⁴ Claimant's letter to the Tribunal dated 26 August 2019, enclosing an "Index of Claimant's Voluntary Production" (documents PO6-36 to PO6-40).

⁵ Claimant's letter to the Tribunal dated 26 August 2019, p. 5; Claimant's letter to the Tribunal dated 19 August 2019, p. 2.

⁶ Claimant's letter to the Tribunal dated 26 August 2019, p. 2, fn 9; Claimant's letter to the Tribunal dated 19 August 2019, p. 4.

13. Considering that the Claimant has confirmed that the remaining exhibits to the [REDACTED] requested by the Respondent are not in its possession, custody, or control within the meaning Article 3 of the IBA Rules, the Respondent's request is rejected. However, the Claimant remains under an obligation to produce any further documents corresponding to those missing exhibits to [REDACTED] that it might locate in the future.

B. THE ANNEXES TO [REDACTED]

14. The Respondent requests that the Claimant be ordered to produce all annexes or enclosures to [REDACTED] ⁷
15. The Claimant has produced a document that corresponds to the description of Annex 2 to [REDACTED] ⁸ and conveyed that, in the absence of any descriptions for other annexes to [REDACTED] it was unable to locate any other documents that may have been annexed to [REDACTED]. ⁹
16. Considering that the Claimant has confirmed that no further annexes or enclosures to [REDACTED] exist or are not in its possession, custody, or control within the meaning Article 3 of the IBA Rules, the Respondent's request is rejected. However, the Claimant remains under an obligation to produce any further annexes or enclosures to [REDACTED] that it might locate in the future.

C. THE PRIVILEGE LOG

17. The Respondent requests that the Claimant be ordered to produce items 1, 2, 5, 7, 8, 14, 16, 21, 22, 82, and 84 of the Privilege Log.¹⁰ The Respondent also requests that the Claimant be ordered to produce an unredacted copy of [REDACTED].¹¹

⁷ Respondent's letter to the Tribunal dated 23 August 2019, pp. 3-5; Respondent's letter to the Tribunal dated 13 August 2019, p.s 4-5; Respondent's letter to the Claimant dated 26 July 2019 (**R-365**), p. 3.

⁸ Claimant's letter to the Tribunal dated 26 August 2019, enclosing an "Index of Claimant's Voluntary Production" (documents PO6-36 to PO6-40).

⁹ Claimant's letter to the Tribunal dated 26 August 2019, p. 6.

¹⁰ Respondent's letter to the Tribunal dated 13 August 2019; Respondent's Letter to the Tribunal dated 23 August 2019.

¹¹ Respondent's letter to the Tribunal dated 13 August 2019, pp. 5-7; Respondent's letter to the Claimant dated 26 July 2019 (**R-365**), p. 4.

18. The Claimant objects to such requests, arguing that such documents are protected by legal privilege.¹² The Claimant has, however, agreed to “an *in camera* review (by the Tribunal only) of these documents (to the extent that they can be located), provided it is understood and accepted that such disclosure does not operate a waiver of any of the privileges invoked with respect to these or any other documents.”¹³

III. DECISION

19. In light of the above, having considered each request and having taken into account the comments submitted by the Parties and other relevant circumstances, the Tribunal decides to:
- a) deny the requests for an order for the production of Exhibits 4, 5, 8, 9, 17, and 20 to [REDACTED] and any further annexes or enclosures to [REDACTED]
 - b) deny, as set out in **Annex 1**, the requests for an order for the production of items 1, 2, 5, 7, 8, 14, 16, 21, 22, 82, and 84 of the Privilege Log and an unredacted copy of [REDACTED]; and
 - c) invite the Respondent to indicate by no later than **Thursday, 12 September 2019** whether it requests that the Claimant’s produce an unredacted copy of [REDACTED] or any of the documents in the Privilege Log for an *in camera* review by the Tribunal.



Prof. Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal

¹² Claimant’s letter to the Tribunal dated 26 August 2019, pp. 3-6, Annex A; Claimant’s letter to the Tribunal dated 19 August 2019, pp. 3-6, Annex A; Claimant’s letter to the Respondent dated 1 August 2019 (**R-366**).

¹³ Claimant’s letter to the Tribunal dated 19 August 2019, p. 6; Claimant’s letter to the Tribunal dated 26 August 2019, p. 6.