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 ARIBTRATION RULES 2010

- between -

GLENCORE FINANCE (BERMUDA) LIMITED

(the "Claimant")

- and -

THE PLURINATIONAL STATE OF BOLIVIA

(the "Respondent", and together with the Claimant, the "Parties")

PROCEDURAL ORDER NO. 3

Tribunal

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

Registry

Permanent Court of Arbitration

31 January 2018

I. PROCEDURAL BACKGROUND

1. By letter dated 18 December 2017, the Claimant informing the Tribunal that on 12 December 2017, it had received a notice from the Respondent's counsel advising that Bolivia had filed on 6 December 2017, an application for discovery pursuant to section 1782 of the United States Code, Title 28 in the United States District Court for the Eastern District of Virginia (the "**Section 1782 Application**") seeking testimony and documents from Mr. Gonzalo Sánchez de Lozada y Sánchez de Bustamante ("**Mr. Sánchez de Lozada**"), former President of Bolivia and a third party to this arbitral proceeding, in connection with this arbitration.

2. By letter dated 20 December 2017, the PCA acknowledged receipt of the Claimant's letter and invited the Respondent to respond.

3. By letter dated 27 December 2017, the Respondent submitted its comments on the Claimant's letter, opposing the application contained therein.

II. THE PARTIES' POSITIONS

A. CLAIMANT'S POSITION

4. The Claimant notes that the Respondent did not provide the Tribunal with any notice of these parallel foreign proceedings while claiming that "[p]rior notification of a party's intent to submit a section 1782 application is not only considered a matter of common courtesy in international arbitration, but a pre-requisite to being able to initiate such discovery applications before a United States court".[1] Hence, the Claimant argues that the Respondent "has undermined the Tribunal's authority over the present dispute in open disregard to the arbitral procedure established with the consent of the Parties".[2]

5. The Claimant argues that Article 3.9 of the IBA Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules on Evidence**") establishes the procedure for a Party to obtain documents from a non-party, and that this procedure has not been followed by the Respondent.[3] Moreover, the Claimant submits that the Section 1782 Application fails to meet the fundamental

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1 Claimant's letter dated 18 December 2017, p. 2.

2 Claimant's letter dated 18 December 2017, p. 2.

3 Claimant's letter dated 18 December 2017, pp. 3-4.

requirements set out in Article 3.3 of the IBA Rules on Evidence, as the document requests are either:

> (i) impermissibly broad and vague;
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> (ii) not relevant to the dispute or material to its outcome;
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> (iii) relating to documents already in Bolivia's possession; or
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> (iv) relating to documents which may be obtained through the appropriate and agreed-upon document request mechanisms available in this arbitration.[4]

6. Furthermore, the Claimant asserts that such application is premature since the Parties have not yet engaged in the document production process available in this proceeding and Section 1782 discovery will generate unnecessary added costs for both Parties.[5]

7. Accordingly, the Claimant requests that the Tribunal issue an order:

> 1. Requiring Bolivia to withdraw or alternatively stay its Section 1782 Application until the appropriate time, after it has exhausted the document production process agreed by the Parties and ordered by the Tribunal in this arbitration; and in any event,
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> 2. Declaring inadmissible any evidence (including oral and/or transcribed testimony) obtained outside of these proceedings without the Tribunal's prior authorization, in disregard of the procedural orders and rules applicable in this arbitration.[6]

B. RESPONDENT'S POSITION

8. The Respondent argues that Mr. Sánchez de Lozada has information that is relevant to this dispute, and is otherwise beyond the jurisdiction of the Tribunal. The Respondent notes that the specific procedures for discovery set forth in Procedural Order No. 1 are limited to discovery requests between the Parties, while Mr. Sánchez de Lozada is a third party to this arbitration.[7]

9. The Respondent points out that it filed its Section 1782 Application "under exigent circumstances – caused largely by unexpected events in separate proceedings" which made "initiating a procedure to ask the Tribunal to assist Bolivia in the taking of evidence from Mr. Sánchez de Lozada […] not a viable option (let alone a required course of action)".[8] The Respondent filed its application after different claimants which have threatened to bring a different arbitration

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4 Claimant's letter dated 18 December 2017, pp. 4-5.

5 Claimant's letter dated 18 December 2017, pp. 5-7.

6 Claimant's letter dated 18 December 2017, p. 7.

7 Respondent's letter dated 27 December 2017, p. 2.

8 Respondent's letter dated 27 December 2017, p. 2.

against Bolivia filed their own Section 1782 application seeking discovery from Mr. Sánchez de Lozada. Given his advanced age and health, the Respondent claims that "there is a significant risk that the U.S. District Court would be unwilling to subject him to two rounds of document discovery and depositions, and that he might be unavailable at a later date to respond to a Section 1782 petition".[9] The Respondent also notes that it promptly informed the Claimant only four business days after its filing, and also informed the Tribunal through its Statement of Defense submitted on 18 December 2017.[10]

10. The Respondent asserts that Claimant's request for the Tribunal to order the Respondent to withdraw or stay its Application and to pre-emptively declare any evidence thereby obtained inadmissible "has no basis and is an unprecedented and impermissible limitation on a parties' right of self-defence".[11] According to the Respondent, Section 1782 is designed to address the precise situation at issue, namely, the acquisition of information from a non-party.[12] The Respondent adds that neither prior notification nor consent of the Tribunal is a "pre-requisite" to filing a Section 1782 Application before U.S. courts under U.S. civil procedure rules or the rules governing this arbitration, including the Terms of Appointment, Procedural Order No. 1, or the IBA Rules on Evidence.[13] In any event, it would be for the Tribunal to determine their admissibility and weight in this arbitration.[14]

11. Nevertheless, in the event that the Tribunal was to accept Claimant's argument that the Tribunal's prior consent is necessary, the Respondent requests such consent for the Section 1782 Application to proceed.[15]

12. The Respondent therefore requests that the Tribunal reject the Claimant's request.[16]

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9 Respondent's letter dated 27 December 2017, p. 4.

10 Respondent's letter dated 27 December 2017, pp. 4-5.

11 Respondent's letter dated 27 December 2017, p. 5.

12 Respondent's letter dated 27 December 2017, pp. 6-8.

13 Respondent's letter dated 27 December 2017, pp. 7-8.

14 Respondent's letter dated 27 December 2017, p. 8.

15 Respondent's letter dated 27 December 2017, p. 10.

16 Respondent's letter dated 27 December 2017, pp. 10-11.

III. ANALYSIS OF THE TRIBUNAL

13. After considering the arguments of the Parties, the Tribunal:

- is unable to see any legal basis for requiring prior notice from the Respondent, or leave from the Tribunal, to be able to initiate the procedure at issue (including Article 3.9 of the IBA Rules on Evidence);

- is not convinced, on the basis of the submissions and evidence before it, that the Section 1782 Application would undermine or necessarily adversely affect the manner in which this arbitration is conducted; and

- takes note of and, will give full effect to, the Respondent's assertion that: "[i]f the U.S. District Court allows any of Bolivia's discovery – and if Mr. Sánchez de Lozada produces any documents and/or gives any deposition testimony – it will then be for this Tribunal to determine the admissibility and weight to be given to such evidence in this arbitration."

IV. DECISION

14. For these reasons, the Tribunal decides to decline Claimant's requests, without prejudice to the Tribunal's determination of the admissibility or weight of any testimony or evidence which may be derived from such discovery.

Prof. Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal