

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. 5

Tribunal

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

19 March 2019

A. PROCEDURAL HISTORY

1. Paragraph 9.1 of Procedural Order No. 1 establishes that “[a]fter consultation with the Parties, the Tribunal shall issue, for each hearing, a procedural order convening the meeting, establishing its place, time, agenda, and all other technical and ancillary aspects.”
2. In accordance with the Tribunal’s letter dated 23 May 2018 and the enclosed Revised Procedural Calendar, the Tribunal fixed the dates of the Hearing (the “**Hearing**”) from Monday, 20 May 2019 to Friday, 24 May 2019. However, following the pre-hearing conference call, the Tribunal has decided, on the basis of the pleadings filed by the Parties and the limited number of witnesses, that 4 days will suffice. Therefore, the Hearing will be held from Monday, 20 May 2019 to Thursday, 23 May 2019.
3. On 2 January 2019, the Parties received a draft of this Procedural Order and were invited to inform the Tribunal by 8 February 2019 whether they had reached an agreement on the issues here included. The Parties agreed on, and the Tribunal confirmed an extension of this time limit until 26 February 2019.
4. On 5 February 2019, the Parties notified which of the witnesses they respectively called to testify at the Hearing, in accordance with the revised Procedural Calendar.
5. On 6 March 2019, the Parties and the Tribunal held a pre-Hearing conference call.

B. LOCATION OF THE HEARING

6. The Hearing will take place at:

ICC Hearing Centre
112 avenue Kléber
75016 Paris
France

7. Break-out Rooms have been reserved for each Party and for the Tribunal.

C. DETAILS OF THE HEARING

1. Confidentiality

8. In accordance with paragraph 11.2 of Procedural Order No. 1, “[h]earings shall be held in camera and transcripts shall remain confidential unless the parties agree otherwise.”

2. List of Attendees

9. The members of the Claimant’s and the Respondent’s delegations are listed in **Annex A**.
10. Access to the Hearing room shall be limited to the members of the Tribunal, PCA staff, court reporters, interpreters, technical assistance personnel, Party representatives, Counsel, and any witnesses that have been called for examination (who would only be permitted access during their testimony and after having testified).
11. Each Party shall inform the Tribunal and opposing counsel on **Monday, 13 May 2019** of any additional members of their delegation that will be attending the Hearing.

3. Catering services for the Hearing

12. The PCA will arrange for snacks and refreshments to be provided during the breaks at the Hearing. The Parties will separately notify their requirements for their lunch.

4. Dates and Schedule of the Hearing

13. The Hearing is scheduled for 20 to 23 May 2019.
14. The Hearing will start at 9:00 every day and will end at 17:30. There will be a lunch break of one hour, and two 15 minute coffee breaks, one each in the morning and afternoon.
15. The schedule of the Hearing will be subject to any adjustments that the Tribunal finds necessary or appropriate throughout the Hearing.

5. Evidence and Demonstrative Exhibits

16. In accordance with paragraph 6.4 of Procedural Order No. 1, “[f]ollowing submission of the Reply and Rejoinder, the Tribunal shall not consider any evidence that has not been introduced as part

of the written submissions of the Parties, unless the Tribunal grants leave on the basis of a reasoned request justifying why such documents were not submitted earlier together with the Parties' written submissions or showing other exceptional circumstances. Should such leave be granted to one side, the other side shall have an opportunity to submit counter-evidence."

17. However, the Parties may submit additional legal authorities published since the date of their respective Reply and Rejoinder memorials, provided that the following procedure is observed:
 - a) The Party wishing to submit one or more new legal authorities shall consult the other Party as to whether there is agreement for such authorities to be submitted into the record;
 - b) If there is no such agreement, the Party wishing to submit one or more new legal authorities shall seek leave to do so from the Tribunal, motivating its request and without enclosing the legal authority. The other Party shall have the opportunity to comment on the request, following which the Tribunal will decide.
18. PowerPoint slides and demonstrative exhibits in aid of argument may be used by any Party during the Hearing, provided that those materials reflect and reference (with exhibit numbers) evidence on the record and do not introduce new evidence, directly or indirectly.
19. The Party using such PowerPoint slides or demonstrative exhibits shall provide them (i) in hard copy to the other Party, the members of the Tribunal, the PCA, the court reporter(s) and the interpreter(s) at the Hearing immediately prior to the respective presentation for which they are used, and (ii) in soft copy to the other Party, the members of the Tribunal and the PCA at the end of the Hearing day. Sufficient Copies (as defined below) shall be provided.
20. If either Party wishes to refer, at any time during the Hearing, to any evidence on the record obtained in the Section 1782 proceedings in the U.S. District Court for the Eastern District of Virginia [REDACTED], such Party shall inform the Tribunal and the other Party prior to making such reference, so that the appropriate measures may be taken in order to protect the confidentiality of such evidence.

6. Hearing Bundles

21. At the beginning of the examination of each witness, the Party examining the witness on direct will provide the witness with a copy of his or her witness statement(s) and will be at liberty to

enclose a copy of the annexes thereto. The Party cross-examining the witness will distribute copies of a witness bundle containing the exhibits upon which that Party will rely during its cross-examination, to the witness, the other Party (3 copies), as well as the Tribunal, the PCA (2 copies), the court reporters (2 copies), and interpreters (2 copies) (*Sufficient Copies*).

22. The Parties agree to create an electronic hearing bundle of all pleadings, exhibits and legal authorities submitted by the Parties to date, accessible from hyperlinked indices.
 - a) The Claimant will send the draft bundle to the Respondent for review no later than **Monday, 22 April 2019**. Respondent shall send its comments to Claimant no later than **Friday, 26 April 2019**.
 - b) The Claimant shall deliver the final version of the bundle to the Respondent on USB on **Friday, 3 May 2019** and will deliver copies to the Tribunal and the Tribunal Secretary on the first day of the Hearing.
23. Each Party may create a limited “core bundle” of exhibits on the record to be provided, in Sufficient Copies.
24. Each Party is to bring its own hard and/or soft copies of the pleadings and exhibits on the record for its use during the Hearing.

7. Witness Examination

25. Paragraph 7.4 of Procedural Order No. 1 establishes that: “[i]t shall not be improper for counsel to meet with witnesses and potential witnesses to establish the facts, prepare the witness statements, and prepare the examinations.”
26. At the Hearing, the examination of each witness shall proceed as follows:
 - a) the witness shall make a declaration of truthfulness;
 - b) although direct examination will have been given in the form of a written statement, the Party presenting the witness may conduct a brief direct examination limited to (i) making corrections to the written statement (if any), and (ii) responding to new matters arising out of Claimant’s Rejoinder on Jurisdictional Objections or Respondent’s Rejoinder on the Merits or evidence introduced into the record after the date of the last

statement of the relevant witness, with respect to which the witness has direct knowledge;

- c) the adverse Party may then cross-examine the witness on relevant matters that: (i) were addressed or presented in the witness statement or direct examination, (ii) were not addressed or presented in the witness statement but are or should be within the scope of the witness's direct knowledge, or (iii) go to the witness's credibility;
- d) the Party summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination;
- e) the Tribunal may examine the witness at any time, either before, during or after examination by any of the Parties; and
- f) The Parties shall make their best efforts to start and finish the examination of a fact witness on the same day. If the examination of a witness is interrupted and must continue in the following session, the witness shall remain sequestered, with appropriate instructions from the Tribunal, until the examination is completed.

- 27. The Tribunal shall, at all times, have complete control over the procedure for hearing a witness.
- 28. Unless the Parties agree otherwise, a factual witness shall not be present in the hearing room during the Parties' opening submissions or during the hearing of oral testimony, discuss the testimony of any other witness, or read any transcript, prior to his or her examination. Fact witnesses will be allowed to remain in the hearing room thereafter.
- 29. Once testimonies have begun, witnesses shall be isolated until they have completed their testimony and shall have no contact with the Party which put them forward, or that Party's Counsel, during any recesses or interruptions that may arise, unless otherwise permitted by the Tribunal.

8. Language of the Proceedings, Simultaneous Interpretation, and Court Reporting

- 30. In accordance with paragraph 3.7 of Procedural Order No. 1, “[o]ral argument before the Tribunal shall be made in English or Spanish. Simultaneous interpretation shall be provided into the other language.”

31. In consultation with the Parties, the PCA has retained simultaneous interpretation services for the Hearing. The cost of interpretation services shall be borne equally by both Parties, out of the advance on costs paid by the Parties, subject to the Tribunal's award of costs.
32. In consultation with the Parties, the PCA has retained both English and Spanish court reporters. The cost of court reporting services shall be borne equally by both Parties, out of the advance on costs paid by the Parties, subject to the Tribunal's award of costs.
33. Court reporters are to provide use of LiveNote (in both English and Spanish). The Parties will separately notify their requirements regarding the number and languages of the LiveNote terminals each requires.
34. "Real time" court reporting services are to be provided, with same day transcript delivery (of both the English and the Spanish version) to the Tribunal and the Parties via email. The Parties shall receive an initial draft of the day's transcript first during the lunch break and subsequently at the conclusion of each Hearing day.
35. Audio recordings shall be made of the Hearing (in both English and Spanish) and provided to the Parties and the Tribunal. Audio shall be synced with the final transcripts.

9. Allocation of Time

36. The PCA will calculate the total time employed by each Party during the witness examinations using the chess-clock system, under the Tribunal's supervision.
37. Each Party will have a total of 8 hours to be allocated as it sees fit, and is free to use less if appropriate.
38. The chess-clock system will not apply to:
 - a) the Parties' opening statements, which shall not exceed 1 hour and 30 minutes each;
 - b) the Parties' closing arguments, which shall not exceed 1 hour each.
39. While the Tribunal reserves its right to intervene during the Hearing as it sees fit, it has decided that there will not be any particular "Tribunal time" allocated in advance. However, time spent by the Parties and witnesses responding to the Tribunal's questions shall not be counted against the Parties' time.

10. Opening Statements of the Parties

40. The opening statements of the Parties will take place on Monday, 20 May 2019 in the following order:
- a) Opening Statements of the Claimant for a maximum of 1 hour and 30 minutes;
 - b) Opening Statements of the Respondent for a maximum of 1 hour and 30 minutes.

11. Appearance Order of the Witnesses

41. The witnesses will be examined in the following order:
- a) Christopher Eskdale;
 - b) Eduardo Lazcano
 - c) Carlos Romero Bonifaz;
 - d) Héctor Córdova Eguivar;
 - e) Andrés Cachi Quispe;
 - f) Joaquín Mamani Chambi;
 - g) David Alejandro Moreira Velazquez.
42. The Tribunal instructs the Parties to make sure that the first two witnesses are available for examination on the first day of the Hearing in order to proceed to their examination after the Parties' opening statements.

12. Closing Statements

43. The closing statements will take place on Thursday, 23 May 2019 and will proceed as follows:
- a) Claimant's Closing Statements for 1 hour, followed by a break of 15 minutes;
 - b) Respondent's Closing Statements for 1 hour.

13. Post-Hearing Filings

44. The Tribunal will decide, after having consulted the Parties at the conclusion of the Hearing, whether any further written filings are needed and, if so, the content, format, length and timing.

14. Transcript Corrections

45. Parties are to exchange corrected versions of the Spanish and English versions of the transcript at a time to be agreed by the Parties (or, failing that, to be determined by the Tribunal) following the conclusion of the Hearing.
46. Parties are to submit to the Tribunal agreed corrected versions of the Spanish and English transcripts at a time to be agreed by the Parties following the conclusion of the Hearing.



Prof. Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal