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. 13

Tribunal

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

8 March 2021

A. PROCEDURAL HISTORY

- 1. Paragraph 9.1 of Procedural Order No. 1 provides 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. By letter dated 16 April 2020, the Tribunal fixed the dates of the Hearing (the "**Hearing**") from 5 to 9 October 2020 in Paris, while also provisionally reserving 29 March to 1 April 2021 as backup Hearing dates in case of need.
- 3. By respective e-mails of 16 July 2020, the Parties agreed to postpone the Hearing to the backup dates of 29 March 1 April 2021 and further agreed that the Hearing would take place, if necessary, by videoconference.
- 4. On 18 December 2020, the Parties notified which of the witnesses and experts they respectively called to testify at the Hearing.
- 5. On 3 February 2021, the Tribunal circulated a draft of this Procedural Order and invited the Parties' comments.
- 6. On 9 February 2021, given that the Hearing would necessarily take place by videoconference as a result of the COVID-19 pandemic, the Parties jointly requested the Tribunal to extend the hearing to include 28 March 2021.
- 7. On 11 February 2021, the Tribunal informed the Parties that it was prepared in principle to grant the extension requested by the Parties.
- 8. On 26 February 2021, the Parties and the Tribunal held a pre-hearing meeting by videoconference.

B. DETAILS OF THE HEARING

1. Confidentiality

9. 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. Videoconference Platform and Participants

- 10. The Hearing shall be held by videoconference using the *Zoom* videoconference platform. The log-in details for the videoconference shall be circulated by the PCA on the day prior to the commencement of the Hearing.
- 11. Access to the videoconference shall be restricted to the members of the Tribunal, PCA staff, court reporters, interpreters, technical assistance personnel, those witnesses and experts that have been called for examination, and the Parties' representatives (the "Participants"). No person other than the Participants shall be admitted to the videoconference, unless otherwise decided by the Tribunal upon request by any of the Parties.
- 12. Participants will join the videoconference through a "waiting room" to be managed by the PCA. In order to facilitate identification, Participants must join the videoconference showing a username that enables them to be readily identified and assigned to a breakout room (i.e., [T (for Members of the Tribunal), C (for Claimant, C/W for its fact witnesses and C/E for its experts) or R (for Respondent, R/W for its fact witnesses and R/E for its experts)] [First Name] [Last Name]). Any prospective Participant who cannot be identified shall not be granted access to the videoconference, unless otherwise decided by the Tribunal upon request by any of the Parties.
- 13. Private breakout rooms (within the main videoconference) will be made available for the exclusive use of the Tribunal and each Party and their witnesses. The Parties will make use of the breakout room functions within the Zoom videoconference platform to avoid delays associated with admission to the videoconference and to enable the Tribunal to promptly reconvene all Participants following breaks. Once admitted to the videoconference, and barring technical issues or other exceptional circumstances, Participants should remain connected throughout the Hearing day, including during breaks.
- 14. After having been identified by the PCA, Participants will be assigned to their appropriate breakout room until the hearing commences.
- 15. On 12 March 2021, each Party will provide to the Tribunal the list of the members of their delegation that will be attending the Hearing in the form of the list contained in <u>Annex 1</u> to this order. Each Party shall inform the Tribunal and opposing counsel on 19 March 2021 of any additional members of their delegation that will be attending the Hearing.

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- 16. The PCA shall record the Hearing in both audio and video. No other Participants shall record any part of the Hearing, unless otherwise decided by the Tribunal.
- 17. The PCA shall disable the Zoom built-in chat function, except for communications with the PCA acting as Zoom operator. Each Party will make separate arrangements for private communication with their respective teams during the Hearing by instant messenger or other appropriate means.
- 18. The Parties have agreed that the witnesses will testify using a kit provided by FTI Consulting (hereinafter "FTI") (the "FTI Kit"), the costs of which will be borne exclusively by the Claimant and will be excluded from the Tribunal's award of costs. The PCA shall coordinate with FTI for the dispatch of the FTI Kit to the fact witnesses and expert witnesses no later than 1 March 2021. The FTI Kit will include a laptop with two additional screens, 1 a headset with an integrated microphone, a mouse and an integrated webcam. By 26 February 2021, each Party must have informed the PCA of the number of FTI Kits its witnesses will need, indicating the postal addresses for their shipment. The Claimant has separately engaged FTI to provide "Trial Director" services during the examination of witnesses as well as during opening presentations, and will ensure that FTI has established a "Chinese wall" between the individual that will serve as "Trial Director" to Claimant and the individuals providing technological support for the FTI Kits.
- 19. The costs of the administration of the Zoom virtual Hearing by the PCA 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.

3. Internet Connection and Devices

- 20. The Parties are responsible for ensuring that each of their representatives, witnesses, and experts connects to the video conference through a stable internet connection offering sufficient bandwidth and uses a camera, microphone, and speaker of adequate quality.
- 21. A dial-in telephone audio option shall be offered as a backup option for Participants experiencing difficulties with computer audio. Prior to the Hearing, the PCA will send to the Participants, the

The screens will project the following live content: (i) the first screen the video stream of the participants, (ii) the second screen the projection of slides or projection of documents during examination, and (iii) the third screen the cross-examination folder (during cross examination). The witnesses and experts will have control of the third screen and will be able to freely browse within the cross-examination folder and the documents contained therein.

court reporters and the interpreters the instructions for accessing a telephone conference system to be used as a temporary alternative in case of difficulty of a participant with the connection to the Zoom videoconference platform.

22. The PCA will conduct a testing session on 19 March 2021, from 13:00 to 15:00 (EST), during which the Parties, the court reporters and the interpreters shall participate. The attendance of each of the members of the Tribunal for such call is optional. Should one of the participants not attend said session, the PCA will reserve 25 March 2021, from 13:00 to 15:00 (EST) for a second session. The Parties may request additional testing sessions. The Parties will make every effort to have their witnesses and experts participate in the testing sessions. The PCA will coordinate with FTI separate training sessions with the witnesses to ensure they know how to use the FTI Kits and that they work well.

4. Technical Problems

- 23. Each Party shall designate, by no later than 12 March 2021, one of its representatives to act as videoconferencing contact person ("VC Emergency Contact Person") for purposes of addressing any technical incidents which arise during the videoconference.
- 24. The VC Emergency Contact Person shall be responsible for advising the Tribunal and the PCA on the videoconference if an essential Participant from their side is disconnected or otherwise cannot participate, such that the Tribunal is requested to suspend the Hearing. Otherwise, the VC Emergency Contact Person shall notify and address technical issues with Alejandra Martinovic of the PCA (tel: +31 61 511 1429; e-mail: amartinovic@pca-cpa.org), without interrupting the Hearing. Issues relating to the functioning of the FTI Kit shall be notified to Steve Schwartz (tel: + 1 917 992 1730; e-mail: steve.schwartz@fticonsulting.com), if by e-mail copying Jamey Johnson (e-mail: jamey.johnson@fticonsulting.com) and James Watkins (james.watkins@fticonsulting.com).
- 25. The Tribunal may temporarily or permanently suspend the Hearing if it deems the functioning of the videoconference system to be inadequate or likely to prejudice the due process rights of any of the Parties or the integrity of the proceeding. The Parties are asked to bear in mind that full recordings and transcripts of the Hearing will be available, mitigating the prejudice arising from the failure of any given Participant to be able to follow the entire Hearing.

5. Dates and Schedule of the Hearing

- 26. The Hearing will take place from Sunday, 28 March to Thursday, 1 April 2021.
- 27. The Hearing shall start and end each day as follows:

	UTC-10 (Honolulu)	UTC-6 (Mexico DF)	UTC-4 (New York, La Paz)	UTC+1 (London)	UTC+2 (The Hague, Paris)
Start	4:30	8:30	10:30	15:30	16:30
End	10:00	14:00	16:00	21:00	22:00

- 28. Every day there will be one 15-minute coffee break approximately 90 minutes after the beginning of that day's session, and a 30-minute meal break at a time to be determined at the convenience of the Tribunal.
- 29. All Participants in the Hearing shall join the videoconference at least 30 minutes in advance of the start of each day. All Participants shall remain connected to the videoconference at all times for the duration of the Hearing, including during breaks.
- 30. The schedule of the Hearing is set out in <u>Annex 2</u> to this order, subject to any adjustments that the Tribunal may make during the Hearing.

6. Evidence, Legal Authorities, and Demonstrative Exhibits

- 31. 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."
- 32. The Parties may submit additional legal authorities, provided that the following procedure is observed:
 - a) Authorities relating to the Parties' arguments on jurisdiction and the merits must have been published on or after 23 May 2019—i.e. the last day of the hearing on jurisdiction and the merits;

- b) Authorities relating to the Parties' arguments on quantum must have been published since the date of their respective Reply and Rejoinder memorials on quantum;
- c) The Parties will exchange proposals to include new legal authorities on the record not later than 3 March 2021;
- d) If there is a disagreement between the Parties in relation to subsections (a) or (b), the Party wishing to submit new legal authorities shall seek leave to do so from the Tribunal, with reasons for 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.
- 33. 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. The Claimant will send a draft bundle to the Respondent via secure file-sharing platform for review no later than 5 March 2021. Respondent shall send its comments to Claimant no later than 12 March 2021. The Claimant will deliver the final version of the bundle via secure file sharing platform to the Respondent, to the Tribunal and to the PCA by 24 March 2021.
- 34. 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. The Parties shall provide electronic copies of any demonstrative exhibits to be displayed during the Hearing by e-mail or secure file-sharing platform to the members of the Tribunal, the PCA, opposing counsel, the court reporters, and the interpreters at least 30 minutes prior to their use during the Hearing.
- 35. The presentation of any evidence, authority, or demonstrative exhibit shall be made through the screen-sharing function of the videoconference platform in order that the speaker and the relevant document can be seen simultaneously at all times.
- 36. 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 , 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.

7. Fact Witness and Expert Witness Examination

- 37. Paragraph 7.4 of Procedural Order No. 1 provides 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." Similarly, Paragraph 8.3 of Procedural Order No. 1 establishes that "[i]t shall not be improper for counsel to meet with experts and potential experts to discuss the expert reports and the examinations."
- 38. Unless the Parties agree otherwise, prior to his or her examination, a fact witness shall not be admitted into the videoconference, nor permitted to discuss the testimony of any other witness or read any transcript of the Hearing. Witnesses will be held in the videoconference waiting room until permitted by the Tribunal to enter at the time of their testimony. Expert witnesses shall not be sequestered for any part of the Hearing, except during their examination.
- 39. At the Hearing, the examination of each witness shall proceed as follows:
 - a) the witness shall make a declaration of truthfulness and affirm that no unauthorized person is present in the room with the witness or can communicate with the witness (and, if a fact witness, that the witness has not seen any part of the Hearing or read any transcript of the Hearing);
 - b) in relation to fact witnesses, 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 the Parties' respective Reply and Rejoinder memorials 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) in relation to expert witnesses, each expert may prepare a direct presentation that does not exceed 45 minutes. The time spent during the direct presentation of each expert shall be discounted from the total time allocated to each Party for examinations, as provided in paragraph 55 below.
 - d) if such a presentation is to be used by the expert, the relevant Party will submit, at least one hour prior to the beginning of said presentation, an electronic copy of the PowerPoint (or similar) presentation to the members of the Tribunal, the PCA, opposing counsel, the court reporters, and the interpreters in PDF format;

- e) each expert witness shall testify without conferring with anyone else during testimony;
- f) when an expert report is signed by more than one expert, all of the signatories shall be available to give testimony at the Hearing. However, the Party that submitted the report must designate one expert who shall lead the testimony. The lead expert shall, without conferring, designate the expert who is to answer each question. In any circumstance, only one expert shall provide an answer to each specific question;
- g) 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, or expert reports or direct presentation, in relation to quantum, (ii) were not addressed or presented in the witness statement or expert reports but are or should be within the scope of the witness's direct knowledge and are related to quantum, or (iii) go to the fact or expert witness' credibility. The cross-examination shall not re-examine any issue that was subject to the testimony of the relevant witness during the hearing on jurisdiction and the merits, other than those relevant to quantum. The Parties will seek to agree specific paragraphs of the witness statements that will be excluded from cross-examination;
- h) the Party summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination;
- i) the Tribunal may examine the witness at any time, either before, during or after examination by any of the Parties and the Parties shall be entitled to ask follow-up questions;
- j) the Parties shall make their best efforts to start and finish the examination of a witness on the same day. If the examination 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;
- k) witnesses must testify using the FTI Kit, which must be connected to a power source throughout the examination. The PCA will ensure that FTI provides live-time support and assistance to the witnesses when setting up and connecting their FTI Kit to the *Zoom* videoconference platform set up by the PCA; and
- during their examinations, the witnesses shall not have access to or review any devices other
 than those provided in the FTI Kit, and they must only use the headphones provided in the
 FTI Kit. Further, the witnesses shall not have access to or review any hard copy notes that

they may have prepared prior to their testimony; however, expert witnesses shall only be allowed to review their notes on the hard copy of their direct presentation and both the fact witnesses and experts shall only have access to unmarked hard copies of their witness statements or expert reports including the annexes thereto.

- 40. The Tribunal shall, at all times, have complete control over the procedure for hearing a witness.
- 41. During the course of an examination, counsel for the Party presenting the witness subject to examination may object to questions posed to the witness by the examining counsel provided that the objection is not argumentative or suggestive of an answer to a question posed to the witness, and is limited to what is necessary to state the grounds on which the objection is based.
- 42. It shall not be permitted for counsel to communicate with witnesses during their examination by any means other than communication on the record.
- 43. The Parties shall ensure that their witnesses connect to the virtual waiting room in advance of their testimony, subject to the limitations set forth in paragraph 38 above.
- 44. Each Party shall instruct its witnesses to testify from a quiet room, to the extent possible with a white or plain coloured background, avoiding light sources (such as windows) behind them. The Tribunal shall have the authority at any time during the examination of a witness to request the witness to reorient their camera, whether to provide a better angle, lighting, or to verify the surroundings or any materials available to the witness.
- 45. Cross-examining counsel will display the relevant documents through the screen-sharing function. To that purpose, the Parties shall communicate a complete cross-examination bundle (with an index) by e-mail or secure file-sharing platform to the PCA no later than 30 minutes prior to the start of the cross-examination of the relevant witness, for the PCA to upload it to the Hearing's platform and coordinate with FTI the uploading to the FTI Kit. The Parties agree not to share the electronic cross-examination bundle with the witnesses or experts subject to examination.

8. Appearance Order of the Witnesses

- 46. The fact witnesses will be examined in the following order:
 - a) Christopher Eskdale, Claimant's witness;

- b) Eduardo Lazcano, Claimant's witness;
- c) Ramiro Villavicencio Niño de Guzmán, Respondent's witness; and
- d) David Alejandro Moreira, Respondent's witness.
- 47. The expert witnesses will be examined in the following order:
 - a) Roscoe Postle Associates, Inc. ("RPA"), Claimant's mining expert;
 - b) SRK Consulting (U.S.), Inc. ("SRK"), Respondent's mining expert;
 - c) Compass Lexecon, Claimant's valuation expert; and
 - d) Quadrant Economics, LLC, Respondent's valuation expert.

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

- 48. 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."
- 49. The PCA shall retain 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.
- 50. Live transcripts of the hearing in English and Spanish shall be organized by the PCA and made available on a separate platform. 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. The PCA shall circulate the connection details for the transcript on the day prior to the start of the Hearing.
- 51. Participants are encouraged to use a second device or a second screen for viewing the transcript. Final transcripts will be circulated by e-mail at the end of each Hearing day. No later than 12 March 2021, the Parties shall notify the PCA of their respective distribution lists for the transmission of the transcripts by e-mail.

52. Audio recordings shall be made of the Hearing (in both English and Spanish) and provided to the Parties and the Tribunal no later than 5 April 2021. Audio shall be synced with the final transcripts and uploaded to the folder created for this purpose.

10. Allocation of Time

- 53. Each Party shall have up to a maximum of 75 minutes for opening statements.
- 54. The PCA will calculate the total time employed by each Party during the examination of witnesses using the chess-clock system, under the Tribunal's supervision. A single chess-clock will account for all examination time, including the time spent in the direct presentation of expert witnesses.
- 55. Each Party shall have a total of 9 hours for examinations of witnesses to be allocated as it sees fit.
- 56. The Parties agree that there will be no closing statements.
- 57. The Tribunal reserves its right to intervene during the Hearing as it sees fit. Time spent by the Parties and the witnesses responding to the Tribunal's questions shall not be counted against the Parties' time.

11. Post-Hearing Submissions

58. The Tribunal will decide, after having consulted the Parties at the conclusion of the Hearing, the content, format, length and timing of the post-hearing briefs.

12. Transcript Corrections

59. The Parties shall exchange proposed corrections to the transcripts and then submit agreed corrected versions of the Spanish and English transcripts at a time to be agreed by the Parties following the conclusion of the Hearing.

13. Etiquette

60. All Participants without an active role at any given moment should mute their own audio and turn off their video.

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- 61. Participants should join the Hearing from a location without background noise and with adequate lighting. Participants should also consider using a headset (headphones with integrated microphone) of good quality.
- 62. In order to facilitate the accurate interpretation and transcription of the Hearing, the Parties should, insofar as possible, circulate any speaking notes to the court reporters and interpreters prior to the start of each relevant session. Participants are also encouraged to speak slowly and with pauses between sentences.
- 63. The above provisions on etiquette may be adjusted or supplemented by the Tribunal, in consultation with the Parties, in the course of the Hearing.

Prof. Ricardo Ramírez Hernández

(Presiding Arbitrator)

On behalf of the Tribunal

<u>ANNEX 1 – LIST OF PARTICIPANTS</u>

Claimant

Breakout room	Name	Position	Affiliation	E-mail	Tel.
	[Name]	[Position]	[Affiliation]	[<mark>E-mail</mark>]	[Tel.]
	[Name]	[Position]	[Affiliation]	[E-mail]	[Tel.]

Respondent

Breakout	First Name	Position	Affiliation	E-mail	Tel.
room					
	[<mark>Name</mark>]	[Position]	[Affiliation]	[<mark>E-mail</mark>]	[<mark>Tel.</mark>]
	[<mark>Name</mark>]	[Position]	[Affiliation]	[<mark>E-mail</mark>]	[Tel.]

Tribunal

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

PCA

Martin Doe Rodríguez, Senior Legal Counsel Ivana Dahl Muukkonen, Assistant Legal Counsel Alejandra Martinovic, Case Manager

Interpreters

Silvia Colla Daniel Giglio

Court Reporters

David Kasdan Dante Rinaldi

ANNEX 2 – TENTATIVE HEARING SCHEDULE

1. Sunday, 28 March:

- a) Claimant's Opening Statement
- b) Respondent's Opening Statement
- c) Christopher Eskdale, Claimant's witness

2. Monday, 29 March

- a) Christopher Eskdale (continued, if applicable)
- b) Eduardo Lazcano, Claimant's witness
- c) Ramiro Villavicencio, Respondent's witness

3. Tuesday, 30 March:

- a) Ramiro Villavicencio (continued, if applicable)
- b) David Moreira, Respondent's witness
- c) RPA, Claimant's mining expert

4. Wednesday, 31 March:

- a) RPA (continued, if applicable)
- b) SRK, Respondent's mining expert
- c) Compass Lexecon, Claimant's valuation expert

5. Thursday, 1 April:

- a) Compass Lexecon (continued, if applicable)
- b) Quadrant Economics, Respondent's valuation expert