

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. 11

Tribunal

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

5 May 2020

I. PROCEDURAL BACKGROUND

1. On 29 July 2019, the Tribunal issued Procedural Order No. 7, whereby it adopted the procedural calendar for the quantum phase of these proceedings.
2. By letter dated 6 March 2020, the Respondent requested an extension until 1 June 2020 of the deadline for the submission of its Rejoinder on Quantum. Following the Claimant's comments on the Respondent's extension request, by letter dated 14 March 2020, the Tribunal decided to extend the deadline for the Respondent to submit its Rejoinder on Quantum until 18 May 2020.
3. By letter dated 27 March 2020, the Tribunal consulted the Parties regarding their availability during certain dates in the fall to be reserved as backup hearing dates in the event that the scheduled hearing dates in July cannot go ahead as planned. After several exchanges, by letter dated 16 April 2020, the Tribunal confirmed 5-9 October 2020 as the new date for the hearing and provisionally reserved 29 March to 1 April 2021 as backup hearing dates in case of need.
4. By letter dated 23 April 2020, the Respondent requested that the Tribunal suspend this arbitration and, subsidiarily, requested an additional 8-week extension (until 13 July 2020) of the deadline to submit its Rejoinder on Quantum as a result of the COVID-19 pandemic (the "**Request**").
5. By letters dated 27 and 30 April 2020, the Claimant submitted its comments on the Respondent's Request.
6. By letter dated 4 May 2020, the Respondent replied to the Claimant's comments.

II. THE PARTIES' POSITIONS ON THE RESPONDENT'S REQUEST

A. THE RESPONDENT'S POSITION

7. The Respondent argues that the global circumstances resulting from the COVID-19 pandemic—including restrictions put in place in France, the United States, and Bolivia—have affected, and continue to affect, its ability to prepare its Rejoinder on Quantum.¹ In particular, the Respondent notes that Bolivia implemented pandemic-related measures as of 13 March 2020 and declared a

¹ Respondent's letter to the Tribunal dated 23 April 2020, p. 3.

full quarantine as of 21 March 2020, which is likely be extended given that the peak of the pandemic is expected to be reached only in the coming weeks.²

8. According to the Respondent, quarantine-related measures have severely hindered its ability to prepare the Rejoinder on Quantum and to gather evidence.³ For instance, many relevant files from the Colquiri Mine and the Tin Smelter are only available in hard copy and it is impossible to access them at present.⁴ In particular, the Respondent argues that it cannot access *ex post* data to respond to the Claimant's allegations, nor can it contact specialized personnel from Colquiri and Vinto to understand and contextualise such information.⁵ Furthermore, the Respondent avers that communications with Bolivia's witnesses and with one of its experts, who reside in Bolivia, have been very difficult due to the limitations of telecommunications infrastructure in some parts of the country.⁶ Likewise, physical exchange of hard copies of documents is also difficult.⁷
9. In addition to all of the above, the Respondent submits that the political circumstances which prompted the Respondent's prior request of 6 March 2020 "still have a bearing on Bolivia's ability to present its case in this arbitration".⁸
10. In the Respondent's view, the impact of the above-mentioned measures makes it impossible for it to comply with the current deadline.⁹ In such circumstances, the Respondent asserts that due process requires suspending the proceedings.¹⁰ In the alternative, the Respondent requests an

² Respondent's letter to the Tribunal dated 23 April 2020, pp. 3-4; Supreme Decree No. 4199 of 21 March 2020, **R-372**; Supreme Decree No. 4214 of 14 April 2020, **R-373**. The quarantine was in fact extended on 29 April 2020. See Respondent's letter to the Tribunal dated 4 May 2020, pp. 3-4; Supreme Decree No. 4229 of 29 April 2020, **R-390**.

³ Respondent's letter to the Tribunal dated 23 April 2020, pp. 3-4; Respondent's letter to the Tribunal dated 4 May 2020, p. 4.

⁴ Respondent's letter to the Tribunal dated 23 April 2020, p. 4; Respondent's letter to the Tribunal dated 4 May 2020, p. 4.

⁵ Respondent's letter to the Tribunal dated 23 April 2020, p. 4; Respondent's letter to the Tribunal dated 4 May 2020, p. 4.

⁶ Respondent's letter to the Tribunal dated 23 April 2020, p. 5; Respondent's letter to the Tribunal dated 4 May 2020, p. 4.

⁷ Respondent's letter to the Tribunal dated 23 April 2020, p. 5; Respondent's letter to the Tribunal dated 4 May 2020, p. 4.

⁸ Respondent's letter to the Tribunal dated 23 April 2020, pp. 1-2.

⁹ Respondent's letter to the Tribunal dated 23 April 2020, p. 6.

¹⁰ Respondent's letter to the Tribunal dated 23 April 2020, pp. 5-6.

eight-week extension of the deadline for its Rejoinder on Quantum (*i.e.* from 18 May 2020 until 13 July 2020).¹¹

11. According to the Respondent, any comparison between the time that the Claimant had to file its Reply on Quantum and the time that the Respondent has to file its Rejoinder on Quantum would be inapposite: “parity between the Parties cannot simply be measured by the number of days each would have had to make their final written submission on quantum”.¹² Moreover, the Respondent considers that its requested extension would not cause any prejudice to the Claimant given that the latter would still have 84 days until the new hearing dates to consider the Respondent’s last submission.¹³
12. Finally, the Respondent also distinguishes the present situation from that in the case of *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda v Plurinational State of Bolivia*, arguing that “the *Orlandini* tribunal only refused to suspend those proceedings because, as summarized by the tribunal, Bolivia had already been granted by the *Orlandini* tribunal a 30-day extension due to the effects of the COVID-19 pandemic.”¹⁴

B. THE CLAIMANT’S POSITION

13. The Claimant opposes the Respondent’s requests for a suspension or an extension of the deadline to submit the Respondent’s Rejoinder on Quantum.¹⁵
14. The Claimant notes that it agrees to a further extension until 1 June 2020 for the submission of the Respondent’s Rejoinder on Quantum, as well as to allow the Respondent to supplement its Rejoinder on Quantum subsequently with information that the Respondent is unable to access

¹¹ Respondent’s letter to the Tribunal dated 23 April 2020, p. 5.

¹² Respondent’s letter to the Tribunal dated 23 April 2020, p. 6.

¹³ Respondent’s letter to the Tribunal dated 23 April 2020, p. 6; Respondent’s letter to the Tribunal dated 4 May 2020, pp. 4-5.

¹⁴ Respondent’s letter to the Tribunal dated 4 May 2020, pp. 2-3; *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda v Plurinational State of Bolivia* (PCA Case No 2018-39), Procedural Order No 7, 10 April 2020, **CLA-259**, ¶ 34.

¹⁵ Claimant’s letter to the Tribunal dated 27 April 2020, p. 1. In support of its position, the Claimant submits a procedural order issued by the tribunal in another arbitration against Bolivia, which the Claimant regards as “directly relevant to the issues [...] put before the Tribunal” and whereby the tribunal in that arbitration denied a “nearly identical” suspension request. See Claimant’s letter to the Tribunal dated 30 April 2020; *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda v Plurinational State of Bolivia* (PCA Case No 2018-39), Procedural Order No 7, 10 April 2020, **CLA-259**.

until after 1 June 2020.¹⁶ In the Claimant's view, these accommodations should already provide the Respondent with the same opportunity as the Claimant had to complete its last written submission, and any further accommodations "are unnecessary and would violate the principle of equal treatment of the parties and unfairly disadvantage Claimant".¹⁷

15. The Claimant notes that the Respondent already developed its arguments on damages in the Statement of Defence, and submits that most of the exhibits which accompanied the Reply on Quantum had been on the record for years.¹⁸ As to additional *ex post* information, the Claimant adds that the exhibits introduced by the Claimant with its Reply on Quantum consist of documents produced by the Respondent on document production.¹⁹ Thus, if there truly are additional documents to collect, the Claimant contends that this "strongly suggests that there were deficiencies in the document collection that Bolivia performed in 2019".²⁰
16. The Claimant further argues that the Respondent had several months after the submission of the Reply on Quantum and until the pandemic began in order to collect documents and contact its counsel, witnesses and experts.²¹ In any event, the Claimant affirms that "the pandemic has not prevented continued communications".²²

III. DECISION

17. Having taken into consideration the Parties' views on the Respondent's Request, the Tribunal does not consider that there is any sufficient basis on which to suspend these proceedings. As to the request for extension, on the one hand, the Tribunal cannot ignore the effects of the current global health crisis and, on the other hand, it must also ensure equal treatment (including equality of arms) and adhere to its duties to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the Parties' dispute in accordance with the UNCITRAL Arbitration

¹⁶ Claimant's letter to the Tribunal dated 27 April 2020, p. 1.

¹⁷ Claimant's letter to the Tribunal dated 27 April 2020, pp. 1, 4; citing G Born, *International Commercial Arbitration* (2nd ed., 2014) (Extract), **CLA-258**, pp. 2172-2173.

¹⁸ Claimant's letter to the Tribunal dated 27 April 2020, p. 2.

¹⁹ Claimant's letter to the Tribunal dated 27 April 2020, p. 2.

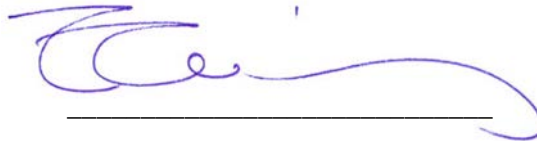
²⁰ Claimant's letter to the Tribunal dated 27 April 2020, p. 2.

²¹ Claimant's letter to the Tribunal dated 27 April 2020, pp. 2-3.

²² Claimant's letter to the Tribunal dated 27 April 2020, pp. 2-3.

Rules. Accordingly, it has decided to partially grant the request for an extension of the deadline to submit the Respondent's Rejoinder on Quantum.

18. The Tribunal grants the Respondent an extension until **Friday, 5 June 2020** to file its Rejoinder on Quantum. An amended procedural calendar is enclosed with this Procedural Order as **Annex 1**.
19. The Tribunal further observes that the Respondent may thereafter apply for leave from the Tribunal to submit into the record any additional documents or information which it was unable to obtain prior to the above deadline as a result of the COVID-19 pandemic.



Prof. Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal

ANNEX 1. REVISED PROCEDURAL CALENDAR FOR QUANTUM PHASE

Event	Party	Date
Simultaneous document production requests in the form of a Redfern Schedule (Annex 2, Procedural Order No. 2)	Both	23 August 2019
Objections to document production requests	Both	6 September 2019 (14 days as of Document production requests)
Replies to Objections to production and reasoned application for an Order on production of documents	Both	20 September 2019 (14 days as of Objections to production)
Tribunal's decision on Document production	Tribunal	30 September 2019 (10 days as of Replies to objections)
Production of undisputed documents and production of disputed documents pursuant to the Tribunal's decision on Document production	Both	14 October 2019 (14 days after Tribunal's decision on document production requests)
Claimant's Reply on quantum	Claimant	22 January 2020 (100 days after production of documents per Tribunal order)
Respondent's Rejoinder on quantum	Respondent	5 June 2020 (136 days after Claimant's Reply)
Submissions of the notifications to the witness and experts called to appear at Hearing	Both	6 July 2020 (31 days after Respondent's Rejoinder)
Pre-hearing conference call	All	September 2020
Hearing	All	5-9 October 2020 (exact length and days to be confirmed)