

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

LUPAKA GOLD CORP.
Claimant

v.

REPUBLIC OF PERU
Respondent

(ICSID Case No. ARB/20/46)

PROCEDURAL ORDER No. 5
Production of Disputed Documents

Members of the Tribunal

Prof. John R. Crook, President of the Tribunal
Mr. Oscar M. Garibaldi, Arbitrator
Dr. Gavan Griffith QC, Arbitrator

Secretary of the Tribunal

Ms. Luisa Fernanda Torres

29 July 2022

I. PROCEDURAL HISTORY

1. In Procedural Order No. 4 of 2 June 2002 (“**PO No. 4**”), the Tribunal set out decisions and directions regarding the Parties’¹ Requests for the Production of Documents, which were submitted to the Tribunal on 23 May 2022.
2. As specified in Paragraph 15.1 of Procedural Order No. 1 (“**PO No. 1**”), the Tribunal used the International Bar Association Rules on the Taking of Evidence in International Arbitration as adopted in 2020 (“**IBA Rules**” or “**Rules**”) as guidelines in assessing the Parties’ requests.
3. The Tribunal’s assessment was also informed by Article 835(7) of the Free Trade Agreement between Canada and the Republic of Peru (“**the FTA**”).
4. Article 9(5) of the IBA Rules authorizes tribunals to make arrangements to permit documents to be presented “subject to suitable confidentiality protection.” The Tribunal has made such arrangements in the form of Procedural Order No. 2 on Transparency/Confidentiality of 20 July 2021 (“**PO No. 2**”). It may make further arrangements as required.
5. In its responses to the Claimant’s Requests for Documents, the Respondent opposed certain requests on the ground that that the requested documents would reveal privileged policy-making deliberations; were exempt from disclosure under specified provisions of the Respondent’s domestic law; or would interfere with law enforcement.
6. In several paragraphs of PO No. 4, the Tribunal directed that, should the Respondent decline to produce otherwise responsive document(s), “it shall promptly prepare and submit to the Claimant and to the Tribunal a privilege log.” The Tribunal directed that,

¹ In this Order, the term “Parties” is used to refer to the Claimant and the Respondent in this proceeding, and the term “Party” is used to refer to either the Claimant or the Respondent. (The Tribunal is mindful that Chapter 8 of the Canada-Peru FTA refers to the Claimant and the Respondent together as the “disputing parties” and to either of them as a “disputing party.”) In this Order, the State signatories of the FTA (Canada and Peru) will be referred to as “FTA Party” or the “FTA Parties,” for clarity. (The Tribunal is also mindful that the Canada-Peru FTA refers to the States signatories to the FTA as “Party.”)

inter alia, the privilege log (a) identify the specific document(s) at issue; (b) precisely identify the legal provision(s) believed to preclude disclosure; and (c) explain why the document(s) could not be sufficiently protected through protective measures under PO No. 2.

7. As directed by the Tribunal, on 14 June 2022 the Parties were to produce documents responsive to requests for which there was no objection and other documents the Tribunal ordered to be produced.
8. However, the Respondent declined to produce two groups of documents, together amounting to 29 individual documents or groups of related documents that in its view should be exempt from disclosure. As directed in PO No. 4, the Respondent submitted a privilege log identifying the documents at issue, the reasons said to justify their non-disclosure, and indicating why protective measures under PO No. 2 were thought insufficient.
9. The Respondent's privilege log identified two distinct groups of documents. The first group, consisting of 11 documents or sets of documents, was addressed in Section II of the privilege log, captioned "Documents Withheld on the Basis of Confidentiality in Relation to Law Enforcement." The second group, consisting of 18 documents or sets of documents, was addressed in Section III of the privilege log, captioned "Documents Withheld on the Basis of Legal Privilege." The Section III documents were said by the Respondent to involve materials involving legal advice or preparation for litigation.
10. In cases in which a privilege log was submitted, Paragraph 14 of PO No. 4 provided that (a) the requesting Party shall have 14 days leave to apply to the Tribunal for an order "to compel production or for protection through protective measures", and (b) "[t]he requested Party shall then respond within seven days." Accordingly, by letter of 28 June 2022, the Claimant set out its objections to Respondent's withholding of the Section II documents. The Respondent submitted a letter in response on 5 July 2022.
11. On 8 July 2022, the Claimant sought leave to submit a 2-page letter by 12 July 2022 for the purpose of briefly commenting on Peru's letter. That same day, the Tribunal authorized

the Claimant to file brief comments as it requested, and authorized the Respondent to file any brief comments in response by Friday, 15 July 2022. The Tribunal stated that “no further submissions will be authorized concerning this issue.” Both Parties filed additional comments as authorized.

II. THE SECTION II DOCUMENTS

A. THE PARTIES’ POSITIONS

12. In its privilege log, the Respondent stated that it had not located any documents requiring withholding on the basis of deliberative privilege. The dispute between the Parties regarding the Section II documents therefore concerns only documents said to involve law enforcement.
13. Two of the Section II documents are said to relate to the Parán Community’s exploitation of the Invicta mine previously held by the Claimant. The remaining documents relate to an apparently unsuccessful attempt by police authorities on 14 December 2021 forcibly to remove Parán Community members from the mine site.²
14. In its privilege log, the Respondent justified the withholding of the Section II documents on the grounds that: (a) the withheld documents were exempt from disclosure because disclosure would impede law enforcement, contrary to Article 835(7) of the FTA; and/or (b) that they were subject to legal impediment or privilege or involved special political or institutional sensitivity and therefore should be withheld under Article 9(2) of the IBA Rules and in accord with the practice of other investment tribunals.
15. The Respondent urged that the Section II documents “include those prepared by law enforcement and intelligence agencies, whose publication would undermine local efforts of law enforcement because the investigations are ongoing and thus any disclosure of the relevant documents would potentially prejudice the criminal investigation.”³ The Respondent contended further that “such documents are prepared with an expectation of

² Claimant’s Letter, 28 June 2022, p. 1.

³ Respondent’s Privilege Log, ¶ 7.

privacy codified under Peruvian law” and were exempt from disclosure under Article 324.1 of Peru’s Criminal Procedure Code, which provides that “investigation[s] ha[ve] a reserved character. Only the parties may access the content of the investigation [...]”⁴ The Respondent also cited Peruvian Supreme Decree No. 021-2019-JUS “which provides at Article 16 thereof that ‘The right of access to public information may not be exercised with respect to information classified as reserved information.’” “Reserved information” includes “Police and Intelligence operations plans” and other matters.⁵

16. In its 28 June 2022 letter, the Claimant objected to non-disclosure of the Section II documents and asked the Tribunal to order their prompt production. The Claimant contended that: (a) the Respondent failed to prove that production of the withheld documents would impede law enforcement; (b) the provisions of national law cited by the Claimant as grounds for non-production are not applicable in this arbitration under the FTA, and some of the cited provisions do not in any event bar production; and (c) the Respondent, having previously produced several documents related to ongoing criminal investigations, had waived any claim to confidentiality.
17. In its 5 July 2022 letter in reply, the Respondent renewed its arguments. It urged that of the documents at issue, ten of the eleven sets “pertained to *ongoing criminal investigations* relating to the attempted execution of an *operational plan* by the Peruvian National Police (“PNP”), meant to facilitate the removal of the Parán Community and the closure of Invicta Mine on 14 December 2021 (a mere six months ago).”⁶ The Respondent contended that:

[D]isclosure of these documents would impede law enforcement in at least two critical ways: i) subvert ongoing PNP intelligence gathering and planning for the execution of a similar operational plan in the near future to effect the closure of the Mine; and ii) raise a variety of security issues in relation to local PNP forces themselves and their ability to carry out law enforcement effectively within the zone and in relation to the Parán Community.⁷

⁴ Id., ¶ 7.

⁵ Id., ¶ 6.

⁶ Respondent’s Letter, 5 July 2022, p. 4 (emphasis in original).

⁷ Id., p. 5.

18. The Respondent also renewed its arguments regarding (a) the provisions of its domestic law said to create both legal impediments to production and (b) conditions of special political or institutional sensitivity⁸ that in its view “would prevent disclosure of the relevant documents.”⁹ The Respondent pointed in this regard to the decisions of some other investment arbitration tribunals that have recognized the confidentiality of ongoing criminal proceedings.¹⁰
19. The Respondent’s maintained that protective measures under the Tribunal’s PO No. 2 would be insufficient to address the situation, *inter alia*, in light of “the depths of Claimant’s enmity and resentment both towards the Parán Community and Peruvian authorities.”¹¹ The Respondent darkly speculated that disclosure of the withheld documents could lead the Claimant to:
- [T]ake actions that would, directly or indirectly, i) subvert law enforcement efforts to execute a forthcoming police operation to close the Mine, and maintain order and security in the zone, ii) impede ongoing law enforcement investigations, or iii) prejudice Peru in ongoing, pending or future criminal prosecutions in relation to the 14 December 2021 events.¹²
20. In its final 12 July 2022 letter, the Claimant strongly disputed the Respondent’s accusation that it might abuse disclosed information to subvert law enforcement efforts, contending that the accusation “makes no sense.” The Claimant added, however, that “[s]hould the Tribunal feel it appropriate to nevertheless offer an additional measure of protection to the Withheld Documents, the Claimant respectfully suggests that they be produced on a ‘counsel eyes only’ basis.”¹³
21. In its final 15 July 2022 letter, the Respondent dismissed the idea of disclosing the disputed documents on a “counsel eyes only” basis. The Respondent insisted that this would “force Peru to violate its own domestic laws and potentially compromise sensitive criminal

⁸ Id., p. 6.

⁹ Id., pp 11-12.

¹⁰ Id., pp. 13-14.

¹¹ Id., p. 7.

¹² Id., pp. 7-8.

¹³ Claimant’s Letter, 12 July 2022, p. 2.

investigations,” and would be “a mere precursor to [the Claimant’s] application to the Tribunal” to release the documents to the Claimant.”¹⁴

B. THE TRIBUNAL’S ANALYSIS AND DECISION

22. In PO No. 4, the Tribunal ordered production of the types of documents listed in the Respondent’s Section II, thereby determining that those documents were relevant and material. Hence, relevance and materiality are not now at issue. The question is instead whether the Respondent has met its burden to establish that these documents should not be disclosed to the Claimant in the context of this arbitration.

23. The Tribunal recalls that this is an international investment arbitration with its legal foundation in the FTA, a treaty between Canada and the Republic of Peru. In Article 825 of the FTA, Canada and Peru both gave “consent[] to the submission of a claim to arbitration in accordance with the procedures set out in this Section.” Hence, there is an international legal obligation to engage in these proceedings in accordance with the procedures and standards established in the FTA.

24. FTA Article 835(7) provides in part:

As provided under Article 2202 (Exceptions - National Security) and Article 2204 (Exceptions - Disclosure of Information), the Tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party’s law protecting the deliberative and policy-making processes of the executive branch of government at the cabinet level [...] or which it determines to be contrary to its essential security.

25. The Respondent does not seek to withhold any documents involving government deliberations or policy-making, so that issue need not be considered. The Respondent also makes no claim that disclosure of any of the documents would be contrary to national security.

26. The issue before the Tribunal is, then, whether disclosure of the Section II documents to the Claimant in these proceedings “would impede law enforcement.” These words of the

¹⁴ Respondent’s Letter, 15 July 2022, pp. 2-3.

treaty must be interpreted in accordance with their ordinary meaning.¹⁵ In the Tribunal's understanding, the ordinary meaning of "would impede" imposes a significant burden on a party invoking Article 835. The claiming party must show that disclosure of a particular document in the circumstances would in fact delay, hinder, or block law enforcement activity.

27. The Tribunal addressed this aspect of the treaty's language in PO No.4:

The protection accorded by the provision applies where disclosure of particular information "would impede" law enforcement – not where it "could" or "might" do so. This means that potential claims to withhold documents on this basis stand to be assessed in light of the particular situation and documents involved. The fact that a Request touches upon past law enforcement activities in some manner should not automatically bring it within the scope Article 835(7) of the Canada-Peru FTA.¹⁶

28. In its privilege log, the Respondent contended that it should not be required to disclose documents that "would potentially prejudice ongoing criminal investigations" or "would potentially prejudice the criminal investigation."¹⁷ However, potential prejudice falls short of the Article 835 standard. As the Tribunal stated in PO No. 4, it is not enough that disclosure "could" or "might" impede law enforcement.
29. Further, as also stated in PO No. 4, whether production would impede law enforcement must take account of the surrounding context. Any production here would occur in a closely controlled arbitration proceeding operating in a framework of established rules that provide mechanisms for the protection of confidential material from inappropriate public disclosure.
30. The Tribunal notes in this regard the Respondent's argument to the effect that disclosure of the disputed documents to the Claimant might lead the Claimant to take some unspecified actions to subvert a future police operation, impede ongoing investigations, or

¹⁵ **RLA-0128**, Vienna Convention on the Law of Treaties, Art. 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

¹⁶ PO No. 4, ¶ 7.

¹⁷ Respondent's Privilege Log, ¶¶ 6 and 7.

somehow prejudice future prosecutions.¹⁸ The Claimant vigorously disputed this line of argument,¹⁹ and the Tribunal finds it unconvincing. Such speculation falls well short of the FTA's requirement of a showing that production "would impede" law enforcement.

31. The Tribunal concludes that the Respondent has not met its burden of demonstrating that production of the Section II documents to the Claimant in the context of this arbitral proceeding would impede law enforcement, as is required for Article 835 of the FTA to preclude production.
32. The Respondent also urged that the Tribunal should give effect to several provisions of its national law said to preclude production of the Section II documents. The Claimant questioned whether certain of these provisions in fact barred production in the context of this arbitration. However, the Tribunal need not seek to resolve this debate regarding the correct interpretation of the Respondent's national law.
33. In urging the Tribunal to give effect to the cited provisions of its national law, the Respondent pointed to Article 9 of the IBA Rules:

[...]

2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons:

[...]

(b) legal impediment or privilege under the legal or ethical rules determined by the Tribunal to be applicable (see Article 9.4 below);

[...]

(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public

¹⁸ Respondent's Letter, 5 July 2022, pp. 7-8.

¹⁹ Claimant's Letter, 12 July 2022, p. 2.

international institution) that the Arbitral Tribunal determines to be compelling;

[...]

4. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:

[...]

(c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen.

[...]

34. The Tribunal has carefully considered the provisions of Article 9 of the IBA Rules. However, it has been mindful that, under PO No. 1, the role of the IBA Rules in these proceedings is as “guidelines, insofar as they are consistent with the ICSID Convention and Arbitration Rules.”²⁰ The IBA Rules do not expand the restrictions on production established in Article 835 of FTA, nor do they supplant the Tribunal’s authority under Rule 34 of the ICSID Arbitration Rules to call on parties to produce documents, or parties’ related obligation to “cooperate with the Tribunal in the production of the evidence.”²¹
35. As the Tribunal stressed in PO No. 4, “these [...] proceedings have their legal foundation in the Canada-Peru FTA, not in the national legislation of either of the States party to the Canada-Peru FTA. The national legislation of either FTA Party does not directly apply.”²² Accordingly, the rules of Peru’s national law invoked by the Respondent do not apply in this arbitration. Moreover, the Respondent has not established that the documents listed in Section II involve compelling grounds of “special political or institutional sensitivity.”
36. Therefore, the Tribunal orders that the Section II documents be produced to the Claimant. However, in light of the concerns expressed by the Respondent, the Tribunal orders further

²⁰ PO No. 1, ¶ 15.1.

²¹ ICSID Arbitration Rule 34(3).

²² PO No. 4, ¶ 9.

that production be limited to named counsel of the Claimant only, upon counsel's undertaking to make no wider disclosure without leave of the Tribunal. The Parties are directed to consult regarding any necessary administrative arrangements that may be required to carry out this order.

III. THE SECTION III DOCUMENTS

37. The Respondent states that these documents:

[W]ere prepared by legal counsel for the purpose of giving and recording legal advice or in anticipation of litigation or arbitration. Accordingly, they are privileged under the principles of legal advice privilege and/or litigation privilege and attorney-client privilege and/or work product privilege, and are being withheld from production pursuant to Articles 9.2(b) and 9.4(a) of the IBA Rules.²³

38. In its letters of 28 June and 12 July 2022, the Claimant did not mention the Section III documents. The Claimant expressed no objection to their withholding and requested no action by the Tribunal.

39. As the Claimant has raised no objection to withholding of the Section III documents and has not requested action by the Tribunal, no ruling is required.

For and on behalf of the Tribunal,

_____[Signed]_____
Prof. John R. Crook
President of the Tribunal
Date: 29 July 2022

²³ Respondent's Privilege Log, Section III, p. 11, ¶ 12.