

**IN THE MATTER OF AN ARBITRATION UNDER**  
**1. THE TREATY BETWEEN THE GOVERNMENT OF THE UNITED**  
**STATES OF AMERICA AND THE GOVERNMENT OF THE**  
**REPUBLIC OF BOLIVIA CONCERNING THE ENCOURAGEMENT**  
**AND RECIPROCAL PROTECTION OF INVESTMENT**

**-and-**

**2. 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**

**-and-**

**THE UNCITRAL ARBITRATION RULES**

**-between-**

**1. GUARACACHI AMERICA, INC. (U.S.A.)**  
**2. RURELEC PLC (UNITED KINGDOM)**

**(the “Claimants”)**

**-and-**

**THE PLURINATIONAL STATE OF BOLIVIA**

**(the “Respondent,” and together with the Claimants, the “Parties”)**

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## **PROCEDURAL ORDER NO. 6**

August 30, 2012

### **A. RESPONDENT'S REQUEST AND GROUNDS FOR THE BIFURCATION OF THE PROCEEDINGS**

1. By letter of 9 August 2012, the Respondent requested the bifurcation of the arbitration to have the jurisdictional objections decided before the next steps of the proceedings, as previously decided through Procedural Orders n° 1, 2 and 3.
2. The Respondent presented the following grounds for the request:
  - a) Strong grounds for objecting to the Arbitral Tribunal's jurisdiction have been recently discovered by the Respondent.
  - b) Article 23(3) of the United Nations Commission on International Trade Law 2010 Arbitration Rules ("UNCITRAL Rules") grants the Arbitral Tribunal the possibility of addressing and deciding the jurisdictional objections as a preliminary question.
  - c) Reasons of efficiency, cost control and sound administration of justice favor bifurcation when issues of arbitrability/jurisdiction are invoked by one of the parties.
  - d) The Respondent set forth three principal jurisdictional objections:
    - a. The Claimants recognize in their Statement of Claim that the acquisition of their investment in *Empresa Eléctrica Guaracachi S.A.* ("Guaracachi") materialized by means of a Capitalization and License Contract, which acquisition contract includes an arbitral clause pursuant to which all disputes shall be settled by domestic arbitration in Bolivia. This clause has the effect of excluding the Tribunal's jurisdiction to the extent that the claims raised by Guaracachi are contractual in nature.
    - b. The applicable BIT includes a fork-in-the-road clause (articles IX(2) and IX(3)) and the Claimants accept that they have instituted legal proceedings in the state courts of Bolivia. In light of the above, the arbitration would be restricted to the sovereign decision of Bolivia related to the nationalization in respect of Guaracachi not submitted to the Bolivian courts.

- c. The relief sought by the Claimants is premature as it retains recourse available to it before the Bolivian courts. Such recourse must be exhausted when an investor has agreed to a particular dispute resolution method for its claims, has solicited the State's intervention to correct the allegedly wrongful conduct, or has submitted its claims the State's courts. In the present case, the final decisions of the Bolivian courts are yet to be issued, and the delay in issuing judgment is not undue under the circumstances.
  - e) Other jurisdictional objections might be raised in a jurisdictional phase of the proceedings, such as *ratione personae* objections, after possibly clarifying the rather complicated and unclear corporate structure of the Claimants after receiving documents to be requested to the Claimants related thereto.
  - f) The bifurcation of the proceedings is therefore the proper solution to avoid large expenses from the State's budget of the Respondent to defend itself on the merits, when it is clear that the arbitral tribunal lacks jurisdiction over a substantial portion of the relief sought.
3. The Respondent therefore formally requested the Arbitral Tribunal to order the bifurcation of the proceedings and submitted a proposed calendar for the first phase of the proceedings ending in March 2013 with the decision on jurisdiction.

#### **B. PROCEDURAL ORDERS N° 4 AND 5**

4. The Arbitral Tribunal decided, by Procedural Order n° 4, to grant the Claimants a period of 10 days to make submissions on Respondent's request.
5. By communication dated 23 August 2012, the Claimants requested an extension to the deadline set out in Section 5.a) of Procedural Order No. 4 until Monday, 27 August 2012. The Claimants requested the extension "in order to have an opportunity to consult with the Claimants' representatives with respect to the Respondent's request, in light of the summer holidays."
6. By Procedural Order n° 5, the Arbitral Tribunal granted an extension until the 27<sup>th</sup> August, as requested.

#### **C. CLAIMANT'S ANSWER TO THE BIFURCATION REQUEST**

7. The Claimants lodged their Response to the Respondent's request for bifurcation on 27 August 2012, opposing said request and demanding that the Respondent comply with the timetable established in Procedural Order No. 3, under the following grounds:
- a) The bifurcation request is a dilatory tactic in complete disregard of the Respondent's procedural agreement, reached between both Parties and communicated to the Tribunal on 29 September 2011, which gave rise to Procedural Order No. 1.
  - b) The Parties' procedural agreement (notably the extensive five month period for Respondent's filing of their Statement of Defense) was made under the assumption that the parties would not bifurcate jurisdictional objections, the Respondent failed to timely raise the bifurcation issue, choosing to address the matter only on 9 August 2012, when the submission deadline for the Statement of Defense is 14 September 2012.
  - c) The Claimants argue that bifurcation would not achieve any gain in efficiency or economy, since it will not prevent adjudication on the merits on the majority of the claims.
  - d) Further, bifurcation is particularly inappropriate since the Respondent's jurisdictional objections cannot be divorced from the merits of the dispute; therefore, bifurcation would lead the Tribunal to address the same facts and arguments twice. This could undermine procedural fairness since there may be a particular danger of prejudging issues before the parties had the opportunity of addressing them in full.
  - e) The Claimants also dispute Respondent's argument regarding their claims being contractual in nature, asserting that "[t]he core claim in this arbitration is the most sovereign of all acts: that Bolivia nationalized Guaracachi without prompt, adequate and effective compensation, in violation of Article III of the US Treaty and Article 5(1) of the UK Treaty".
  - f) The Claimants further state that, unlike Respondent's cited case law, the claims underlying this arbitration are "*based upon the State's illegal seizure of assets, unfair and unjustified alteration of the regulatory regime, and other abuses of sovereign powers*".
  - g) The Claimants also reject the Respondent's arguments relating to the "fork-in-the-road" provision, stating that there is no identity between the claims made in the judicial proceedings and the claims made in the present arbitration, notably the Claimants sustain that they have "*never pursued local remedies of any kind (whether*

*contractual or under the Treaties) for the expropriation of Guaracachi or for Bolivia's manipulation of the regulatory framework for spot prices".*

- h) The Claimants also object to the "premature claims" argument, stressing that, even if said ripeness objection would preclude jurisdiction under the US Treaty, the same would survive under the UK Treaty, rendering the pendency of a case before the Bolivian Supreme Court irrelevant to this Tribunal's jurisdiction.
  - i) The Claimants further state that under the Treaties there is no requirement of exhaustion of local remedies before claims can be brought to international arbitration.
8. The Claimants request, in light of the above summarized arguments, that the Arbitral Tribunal decide against Respondent's request to Bifurcate and order Respondent to file its Statement of Defense on 14 September 2012 in accordance with the timetable established in Procedural Order No. 3.

#### **D. RELEVANT FACTORS FOR THE ARBITRAL TRIBUNAL'S DECISION**

- a) The Arbitral Tribunal considers that, without full information not yet available about the positions of the Parties, it will be impossible, or at least very difficult, to decide on the request for bifurcation;
- b) The efficiency of proceedings is paramount to a fair arbitral process, and both parties paid tribute to this intention;
- c) To suspend at this stage the calendar of submissions, defined through common agreement by Procedural Order n°1 as amended by Procedural Orders n° 2 and 3, is not necessary for the deeper analysis of the grounds for and against bifurcation and will undermine the efficiency of the arbitral process;

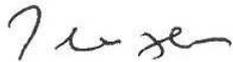
#### **E. DECISION**

- a) The calendar of submissions, defined through common agreement by Procedural Order n°1 as amended by Procedural Orders n° 2 and 3, is maintained and therefore Respondent shall file its Statement of Defense on 14 September 2012, and the other Submissions will follow as and in accordance with the defined calendar;
- b) On 14 September 2012, either as part of its Statement of Defense or in a separate Memorial on Jurisdiction, the Respondent shall set forth in full its objections to the jurisdiction of the Arbitral Tribunal;

- c) On 15 October 2012, the Claimants shall file a Counter-Memorial on Jurisdiction;
- d) On 31 October 2012, the Respondent may file a Reply on Jurisdiction;
- e) If a Reply has been filed, the Claimants may file a Rejoinder on Jurisdiction on 15 November 2012;
- f) Once the Parties have fully pleaded the jurisdictional issues, as set forth in the above calendar, the Tribunal will decide whether (i) to bifurcate the proceedings and hold specific hearings on the jurisdictional issues, (ii) to refuse the requested bifurcation and therefore to decide on its own jurisdiction following the scheduled hearings on the merits, or (iii) to decide on its jurisdiction without the need for any hearing;
- g) To allow the possibility referred under f) (iii) above, and in accordance with Article 17(3) of the UNCITRAL Rule 2010, Parties are requested to state on their Memorial and Counter-Memorial whether they would request an oral hearing on jurisdiction, even if the Arbitral Tribunal considers it unnecessary.

The co-arbitrators have approved this order, signed only by the President.

August, 30, 2012



José Miguel Júdece  
(President of the Tribunal)