

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Gran Colombia Gold Corp.

v.

Republic of Colombia

(ICSID Case No. ARB/18/23)

PROCEDURAL ORDER No. 11

On the Parties' Requests for Documents

Members of the Tribunal

Ms. Jean E. Kalicki, President of the Tribunal
Professor Bernard Hanotiau, Arbitrator
Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal

Ms. Ana Constanza Conover Blancas

Assistant to the President of the Tribunal

Dr. Joel Dahlquist

28 September 2021

Procedural Order No. 11

A. Background

1. On 6 May 2021, the Tribunal issued Procedural Order No. 9 (“**PO9**”), including a revised procedural schedule for this Arbitration.
2. Pursuant to the procedural timetable set forth in PO9, the Parties exchanged document production requests, followed by responses and replies. The Parties’ completed schedules related to their respective document requests were submitted to the Tribunal, through the ICSID Secretariat, on 10 September 2021.
3. The Tribunal has duly considered the Parties’ respective positions. Its decisions on the Claimant’s requests are set out as Annex A accompanying this Procedural Order; its decisions on the Respondent’s requests are set out as Annex B also accompanying this Order.
4. The Parties’ submissions raised several issues beyond the scope of any individual document request. The Tribunal addresses those issues here rather than in the Annexes reflecting its rulings on individual requests, to avoid the need for undue repetition.

B. Nomenclature

5. First, the Tribunal notes a dispute between the Parties regarding nomenclature. The Respondent using the acronym “ASMs,” short for “artisanal and small-scale miners,” to refer to those it contends were “carrying out, or seeking to carry out mining exploitation activities without a mining title within the areas of the mining titles acquired by GCG.”¹ The Claimant objects to the term ASMs “to the extent it assumes or suggest that all” carrying out such activities are in fact “artisanal” or “small-scale”; the Claimant contends that many of the miners at issue have “mechanized and industrial operations.”

¹ Respondent’s Request for Production of Documents, Instructions, ¶ 2(c).

Procedural Order No. 11

The Claimant therefore prefers the label “illegal miners,” without reference to modality or scale of operations.²

6. At this juncture, the Tribunal prefers not to adopt any nomenclature that would appear to prejudge disputed issues, either as to the nature of the miners in question or as to the legality of their operations. The Tribunal therefore refers simply to “miners operating within the GCG areas without a mining title.”

C. Legal Privilege

7. Second, the Tribunal confirms that for purposes of both schedules, its production orders are understood to apply only to non-privileged material. To avoid subsequent disputes over the scope of applicable privilege, and to maintain equality of treatment as between the Parties, the Tribunal adopts the formulation reflected in Article 9(3)(a) of the IBA Rules, namely that the Parties need not produce documents (or portions of documents) that reflect communications “made in connection with and for the purpose of providing or obtaining legal advice.” This standard reflects a common sense understanding of legal privilege, rooted generally in considerations of fairness that are common to many legal traditions. Moreover, while the Canada-Colombia Free Trade Agreement (the “FTA”) references national law when referring to issues of privilege,³ neither Party has demonstrated to date that any national law which potentially is relevant in this case to determinations about legal privilege adopts any definition that differs significantly from the one used in the IBA Rules.
8. For avoidance of doubt, considerations of legal privilege are to be made with reference to particular passages of a document, and not extrapolated – unless appropriate – to entire documents. Thus, where only a portion of a document meets the definition set out above, the Parties are expected to produce the other portions of the document containing no privileged information.

² Claimant’s General Objections to Respondent’s Request for Production of Documents, ¶ 1.

³ See FTA Article 838(b) (referring to “information that is privileged ... from disclosure under the law of a Party”).

Procedural Order No. 11

9. For the time being, the Tribunal declines to order either Party to prepare a privilege log identifying details regarding each and every document or portion of document over which legal privilege is asserted. The Tribunal expects that counsel for both Parties will proceed in good faith in identifying privileged material according to the definition above. The Tribunal also expects that privilege determinations will be based on counsel’s own independent review of materials and not simply a deferral to their clients’ judgment regarding privilege issues. In these circumstances, and with no suggestion at this point of any special reason for not crediting representations by either side regarding privilege review, the Tribunal declines to order the Parties to prepare detailed logs of all documents or portions of documents withheld on that basis. The Tribunal reserves the right to revisit that issue if necessary.

D. Confidentiality

10. Third, beyond issues of legal privilege, the Tribunal notes that both Parties offer general objections about confidentiality, but without reference to any particular documents or any particular passages of documents.
11. Thus, the Claimant states a general objection to the Respondent’s requests, to the extent that any of those requests call for “confidential documents”⁴; the Respondent responds that “confidentiality is not, of itself, a valid ground for withholding documents under the IBA Rules.”⁵
12. At the same time, the Respondent objects to virtually every one of the Claimant’s requests, which often call for internal government documents, on the basis that some of “the requested documents *may* contain information that is subject to legal impediment under Colombian law,” on the basis that “documents recording the opinions and points of view expressed by public officials during their deliberations are confidential” under Article 19

⁴ Claimant’s General Objections to Respondent’s Requests for Production of Documents, ¶ 2.

⁵ Respondent’s Response to Claimant’s General Objections to Respondent’s Requests for Document Production, ¶ 4.

Procedural Order No. 11

of Law 1712 of 2014.⁶ The Claimant responds that (a) the case is governed by the FTA and not by Colombian law; (b) in any event, Article 19 of Law 1712 regulates *public* access to government files, not disclosure obligations in adjudicatory proceedings; and (c) another provision of Colombian law – Article 27 of Law 1437 of 2011 – specifically exempts adjudicatory proceedings from restrictions on access to confidential materials, provided that adjudicators take steps to ensure the confidentiality of information and documents made available in the course of their proceedings.⁷

13. The Tribunal does not consider the Parties' respective confidentiality objections to be the basis for any overarching restriction on disclosure for purposes of this case. It goes without saying that participants in an arbitral disclosure process – both private companies and governments alike – often find the disclosure process to be intrusive. The very nature of disclosure orders is that they require production of material that normally would not be shared outside of the company or the government, in the ordinary course of their activities and pursuant to their respective internal rules and protocols. However, the arbitral process to which they have consented involves procedures by which participants may be required to disclose internal materials to the other side and eventually to the Tribunal, in the service of a fair consideration of disputed issues in their appropriate context.

14. Moreover, nothing in the FTA suggests an intent to foreclose reasonable document production simply because it may require Parties to produce general categories of information that in other contexts would be treated as confidential. To the contrary, the FTA places a burden on a disputing party who claims confidentiality to make designations with particularity.⁸ It also addresses confidentiality concerns in another way, by restricting the Parties' dissemination of each other's documents beyond the confines of the

⁶ See, e.g., Respondent's Responses and Objections to Claimant's Document Request, Request No. 1 (emphasis added).

⁷ See, e.g., Claimant's Replies to Respondent's Responses and Objections to Claimant's Document Request, Request No. 1 and n. 9.

⁸ See FTA Article 830(1); Procedural Order No. 1, ¶ 24; Procedural Order No. 5, ¶ 14.

Procedural Order No. 11

arbitration.⁹ In Procedural Order No. 5, the Tribunal confirmed that to be a general ground rule for the case, and also has noted its authority under the FTA to establish specific procedures for the protection of *particular* confidential information, should that prove necessary.¹⁰ In these circumstances, the Tribunal declines to adopt either Party's general confidentiality objections to the other Party's document requests.

E. Counsel Representations Regarding Non-Existence of Responsive Documents

15. Fourth, the Tribunal relies on counsel's good faith and appropriate due diligence when representing, with respect to particular categories of requested documents, that no responsive documents exist. The Tribunal does not therefore enter orders of production that would serve no apparent purpose. Nonetheless, to the extent the opposing Party in response identifies specific reasons to suggest that such documents in fact may exist, the Tribunal expects counsel to double check its prior representation, recognizing that reasonable oversights on occasion may occur. Both Parties remain free to make any arguments in due course regarding inferences to be drawn from the existence or non-existence of certain documents, just as they remain free to make any arguments from the production or non-production of materials falling within the scope of an agreement or order to produce.

F. Duty of Reasonable Cooperation

16. Fifth, the Tribunal recalls that in Procedural Order No. 1, it specifically emphasized that the Parties' duty to act in good faith within the framework of the document production process required them "not only to formulate narrow and specific document requests in the first instance," but also "to cooperate in the process of achieving such formulations with respect to the other's requests." In consequence, the Tribunal directed each Party, when objecting to the other's requests on grounds of overbreadth or excessive burden, to

⁹ See FTA Article 850(3).

¹⁰ Procedural Order No. 5, ¶¶ 15-16.

Procedural Order No. 11

“indicate whether there is a narrower formulation with which it would be willing to comply.”¹¹

17. With respect to the obligation to try to assist in achieving narrower formulations of the other’s requests, the Tribunal notes that the Claimant made some effort; it stated its objections but indicated in a number of instances that, notwithstanding such objections, it would produce a subset of the materials requested. While the Claimant’s proposed narrowing did not necessarily result in agreement between the Parties – the Respondent in many cases maintained its requests as originally formulated – the effort nonetheless assisted the Tribunal in considering with more specificity the contours of the Parties’ disagreements regarding the proper scope of the requests.
18. By contrast, the Respondent did not agree to produce any of the materials requested by the Claimant, nor did it suggest any narrower formulations of the Claimant’s requests with which it would be willing to comply. In consequence, and as the Tribunal expressly sought to avoid through the process established in Procedural Order No. 1, the burden “of identifying alternative formulations that avoid excessive burden while still allowing production of documents that are relevant and material to the outcome of the case” was “shift[ed] entirely to the Tribunal.”¹² The Tribunal has made diligent efforts in this regard, seeking to narrow the requests where they appeared to be unnecessarily broad.

G. No Implied Decisions

19. Finally, the Tribunal reiterates its observation in Procedural Order No. 6, ¶ 6, that its decision on the Parties’ contested requests is not intended to provide an implied decision on any issue in dispute between the Parties. Accordingly, if a request is denied or granted in a modified fashion, that should not be taken as any indication as to the Tribunal’s views on the merits, and the Parties should not hereafter plead or allege that the Tribunal’s decision to uphold or deny a request was indicative of a position either in their favor or

¹¹ Procedural Order No. 1, ¶ 15.7.

¹² Procedural Order No. 1, ¶ 15.7.

Procedural Order No. 11

against them. If a request is denied, for example, that does not mean that the requested Party can consider that its own burden of proof has been discharged, and the Parties remain free to present any arguments they wish regarding the sufficiency of evidence presented. Moreover, if a Party refuses to produce documents on an issue for which it bears the burden of proof, notwithstanding a Tribunal order of such production, then such Party runs the risk of having the issue resolved in due course as not proven. The Parties are expected to bear this in mind in facilitating disclosure of relevant and material documents in compliance with the Tribunal's rulings.

On behalf of the Tribunal,

[Signed]

Ms. Jean Kalicki
President of the Tribunal