PCA CASE NO. 2011-17

IN THE MATTER OF AN ARBITRATION UNDER

A. 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-

B. 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-

C. THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

-between-

1. GUARACACHI AMERICA, INC.
2. RURELEC PLC

(the "Claimants")

-and-

THE PLURINATIONAL STATE OF BOLIVIA

(the "Respondent," and together with the Claimants, the "Parties")

PROCEDURAL ORDER NO. 16
21 March 2013

A. CONFLICT INVOLVING CERTAIN OF CLAIMANTS' TECHNICAL CONSULTANTS

1. By letter dated 12 December 2012, the Claimants informed the Tribunal that Mercados Energéticos Consultores ("**MEC**") had ceased providing technical services to the Claimants' experts, Compass Lexecon. According to the Claimants, MEC, under Compass Lexecon's instructions, was responsible for running dispatch simulations that forecasted the spot prices which were used in the Claimants' expert's (Mr. Abdala's) damages model. The Claimants asserted that the reason that the firm withdrew from the present arbitration was that Bolivia, following the submission of the Claimants' Memorial, pressured the Inter-American Development Bank to exclude MEC from regional integration projects due to its participation in the present arbitration proceedings.[1] Finally, the Claimants informed the Tribunal that they had hired a replacement technical consultant to fulfill the role that MEC was forced to abandon and that this work would be incorporated into the materials accompanying the Claimants' Reply.

2. By letter dated 25 January 2013, the Respondent responded to the Claimants' allegations regarding MEC. The Respondent denied that any evidence existed to support the Claimants' assertions, and affirmed that it was false that Bolivia had forced MEC to resign.[2] Additionally, the Respondent emphasized that MEC withdrew from the present proceedings precisely after the submission of its Statement of Defense, where Bolivia noted the non-identification of the author of MEC's dispatch simulations.[3] Likewise, the Respondent stated that it was true that MEC had been excluded from a firm selection process for the elaboration of a project financed by the Inter-American Development Bank. However, Bolivia was not responsible for their exclusion. On the contrary, MEC's exclusion was due to the existence of conflicts of interest between the assignment to be fulfilled by the selected firm and the role that MEC was playing in the present arbitration. The latter meant that MEC did not meet the requirements set out in Inter-American Development Bank policy for the selection and hiring of consultants.[4] Finally, Bolivia denied that it had put any kind of pressure on MEC, especially considering that MEC was hired by the Bolivian Comité Nacional de Despacho de Carga ("**CNDC**") even after it revealed its participation in the present arbitration.[5]

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[1] The Claimants contended that Bolivia has been sanctioned for intimidation tactics in the past and, as an example, they cited *Quiborax S.A., Non Metallin Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) Decision on Provisional Measures, 26 February 2010.

[2] The Respondent affirmed that it was false that it had carried out any kind of intimidation tactics in the past. Furthermore, the Respondent contended that the *Quiborax* tribunal stated the opposite of what the Claimants contended.

[3] See Statement of Defense, ¶215.

[4] Bolivia explains that the services to be provided by the selected firm were the same that MEC was providing to Compass Lexecon. Therefore, two conflicts of interest arose: (i) MEC would benefit from multilateral financing when preparing a study that would include fundamental aspects of the present proceedings; and (ii) if MEC would have been selected, it would have access to Bolivian confidential information. See Policy for the selection and hiring of Consultants financed by the Inter-American Development Bank, Document GN-2350-9, section 1.9 (Annex 2).

[5] Bolivia also clarifies that the CNDC decided to temporarily suspend this hiring due to the passing of a new law.

3. By letter dated 3 March 2013, Bolivia requested that the Tribunal declare inadmissible the portions of Mr. Abdala's Reports which were produced initially by MEC and afterwards by Estudios de Infraestructura ("**EdI**"), the consulting firm replacing MEC, due to the non-identification of the experts who produced them and the failure to tender them as witnesses.[6]

4. By letter dated 14 March 2013, the Claimants contended that it was perfectly normal that the simulations were used as an input without the submission of a formal expert report from these consulting firms (in this case MEC or EdI). Indeed, the Claimants argued that it was precisely what Bolivia's own witness, Mr. Paz, had done. Mr. Paz relied upon dispatch simulations carried out by the CNDC for his own projections of pre-Nationalization spot prices. The CNDC has neither provided expert evidence, nor been offered by Bolivia as a witness subject to cross-examination. In any case, the Claimants asserted that the cross-examination of MEC or EdI with reference to their functions in the reports would yield nothing but a factual description of the assumptions that they were instructed to employ by Mr. Abdala. Thus, the Claimants contend that Mr. Abdala is prepared to address all the issues raised by the Respondent at the hearing regarding the work of MEC and EdI.

5. By letters dated 14 March 2013, both Parties submitted their lists of witnesses and experts called for examination at the hearing.

B. DECISION

6. Considering the Parties' comments and their respective lists of witnesses and experts which have been submitted, the Tribunal considers that, even though MEC and EdI followed Mr. Abdala's instructions, Mr. Abdala has not directly produced certain technical portions of his reports and may not be in a position to respond to certain questions that the Tribunal could consider relevant in the present case. Thus, the Tribunal deems that it would be useful to have representatives of EdI, MEC, and CNDC appear at the hearing.

7. In light of the above decision, the Tribunal orders the Claimants to take the measures necessary to ensure that a representative from EdI who participated in the elaboration of those portions that were incorporated into the Compass Lexecon Rebuttal Report, and on which Compass Lexecon has relied, appears at the hearing for cross-examination by the Respondent.

8. The Tribunal also orders the Respondent to take the measures necessary to ensure that a representative from the CNDC who participated in the production of the information used by both Parties' experts in their respective reports appears at the hearing so that the Tribunal can be apprised of the criteria used by the CNDC in a significant portion of the evidence submitted by the Parties.

9. Taking into account that the professional relationship between MEC and the Claimants has been terminated, the PCA will contact MEC so that a representative from MEC who participated in the elaboration of those portions that were incorporated into the Compass Lexecon Expert Report may appear at the hearing for cross-examination by the Respondent. To enable this to occur, the Claimants are requested to provide the PCA with the contact details of MEC as soon as possible. The expenses incurred in connection with the appearance of MEC's representative will be covered by the deposit held by the PCA.

[6] See Respondent's Rejoinder on the Merits, ¶14 where this request is also stated.

10. The Tribunal requests that the Parties confirm the attendance of the abovementioned representatives (from EdI and CNDC), and that the Parties provide the Tribunal and the PCA with the names and contact details of these representatives by **Monday, 25 March 2013**. The manner in which these additional witnesses will be examined and the Respondent's request regarding the admissibility of certain portions of Compass Lexecon's Reports will be further addressed during the conference call on 26 March 2013.

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

21 March 2013

José Miguel Júdice
(President of the Tribunal)