

**DECISION ON
CLAIMANT’S DOCUMENT PRODUCTION REQUESTS**

11 May 2020

Claimant’s Introduction:

Pursuant to paragraph 15 of the Procedural Order No. 1 dated 24 June 2019, Gran Colombia Gold Corp. (“Claimant”) requests the Republic of Colombia (“Colombia” or “Respondent”) to provide copies of the documents identified below (the “Request for Production of Documents”).

Following the guidance provided by Article 3.3(c) of the 2010 International Bar Association Rules on the Taking of Evidence in International Arbitration (“IBA Rules”), Claimant confirms that the documents requested are not in the possession, custody or control of Claimant and are assumed to be in the possession, custody or control of Colombia or have been provided to Colombia.

General Definitions¹

1. The terms “**Document**” and “**Documents**” are synonymous in meaning and include but are not limited to any and all writing(s), communication(s), picture(s), drawing(s), program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means, including the originals (and any drafts) and non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise.
2. The terms “**Attachment**” and “**Attachments**” are synonymous in meaning and include but are not limited to any and all Documents and/or information referenced in and/or annexed to the Document(s) responsive to any of the requests listed below.
3. The terms “**Correspondence(s)**” and “**Communication(s)**” are synonymous in meaning and mean the transmittal of information by any means, including but not limited to conversations, notes or recordings of conversations (including telephone conversations), letters, memoranda, electronic mail (email) messages, telegrams, Whatsapp messages and facsimile messages.

¹ In this Request for Production of Documents, Claimant adopts the definitions used in Claimant’s Counter-Memorial on Jurisdiction.

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Document Request No.	1
A. Documents or category of documents requested	Documents containing the “publicly available information” referenced by Colombia in the third paragraph of its letter of 31 May 2018 (Exhibit R-1).
B. Relevance and materiality: (1) paragraph reference to submissions (2) comments (3) statement concerning custody and control	<p>(1) Request for Bifurcation, ¶ 47; Memorial on Jurisdiction, ¶ 13.</p> <p>(2) The central issue in this phase of the proceedings is whether Colombia was justified in purporting to deny benefits as asserted in its letter of 31 May 2018. It is not apparent precisely what information Colombia purported to rely upon. The request is relevant and material to the outcome of the dispute.</p> <p>(3) Colombia stated in Exhibit R-1 that their conclusions regarding GCG’s status were reached after “analyzing” publicly available information, without specifying any sources.</p>
C. Summary of objections by disputing party to production of requested documents	<p>The documents requested are protected by legal professional privilege and litigation privilege. They are documents between counsel of record in this arbitration and their client, documents between counsel, and documents prepared at the instruction of counsel in anticipation of the present proceedings. Article 9(2) of the IBA Rules is clear that “[t]he <i>Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document</i>” by reason of “(b) <i>legal ... privilege</i>”.</p> <p>At any rate, the documents requested would be neither relevant to the dispute nor material to its outcome. The request is a non-starter:</p> <ol style="list-style-type: none"> 1. the Claimant makes the bald assertion that the “<i>information Colombia purported to rely upon</i>” is relevant and material to the outcome of the dispute, but fails to explain why. This total absence of justification means that the request must be rejected outright;

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	<p>2. upon review of the Claimant’s Counter-Memorial on Jurisdiction, it is clear that the Claimant makes no more than <i>in passim</i> references to the letter and advances no meaningful argument turning on the “<i>information Colombia ... relied upon</i>” in its letter of 31 May 2018. Certainly, the Claimant makes no argument that could plausibly be described as dispositive of or material to the outcome of the dispute;</p> <p>3. there is, in any event, no conceivable legal argument that the information relied upon in preparation of the 31 May 2018 letter is material to the outcome of this dispute. Article 813(2) of the Colombia/Canada FTA requires a showing that “<i>investors of a non-Party or of [Colombia] own or control [GCG] and [GCG] has no substantial business activities in the territory of [Canada]</i>”. There are no other legal requirements, and this is the exact showing made in Colombia’s Memorial on Jurisdiction. Precisely what information was relied upon in issuing the 31 May 2018 letter is legally irrelevant.</p> <p>The Claimant’s request fails under Article 3(3)(b) of the IBA Rules, which requires a showing of “<i>how the Documents requested are relevant to the case and material to its outcome</i>”.</p> <p>Finally, as the Claimant acknowledges, the requested documents are in the public domain.</p>
<p>D. Reply</p>	<p><i>First</i>, Respondent claims that the documents requested by Claimant are “protected by legal professional privilege and litigation privilege.” This is unavailing. In May 2018, Colombia said it denied benefits to GCG on the basis of allegedly “publicly available information.” (Exhibit R-1) Because Colombia describes this information as “publicly available,” it can’t possibly be privileged. Claimant seeks the Documents that evidence the “publicly available information” Colombia has repeatedly asserted provides its basis for denying GCG’s benefits of the Treaty.</p> <p><i>Second</i>, Respondent cannot simply invoke a blanket objection about “legal professional privilege and litigation privilege” without offering a justification. The burden is on Respondent to identify which</p>

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	<p>documents it believes should be privileged, specify the nature and scope of the privilege being claimed, then show how the nature and scope apply to those particular documents. In <i>ADF v United States</i>,² the tribunal noted this point, that a party using the claim of privilege in order to “withhold ... particular documents it should otherwise make available” has to justify each specific privilege being claimed. Respondent claimed its decision to deny benefits occurred after “analyzing” information that was “publicly available,” but without specifying which sources. It also has not bothered to specify the nature and scope of the privilege being claimed. Respondent should not be allowed to run behind vague assertions to avoid reasonable document disclosure. Ultimately, this is not a serious objection and should be given no weight.</p> <p><i>Third</i>, Colombia wrongly asserts that Claimant failed to explain the relevance and materiality of the requested documents to the outcome of the case. Claimant made its showing, in the first place, of “how the Documents requested are relevant to the case and material to its outcome,” according to Article 3.3(b) of the IBA Rules. (<i>See</i> Row B above under Request No. 1.) The documents are obviously relevant and material, because they were what Colombia allegedly relied on to deny benefits in the first place.</p> <p><i>Finally</i>, Colombia grants that Claimant acknowledges the Documents are in public domain. However, it’s unclear <i>where</i> in the public domain. What specific “publicly available information” did Colombia rely on to make its Denial of Benefits in 2018? Claimant has no way of locating the purported evidence Respondent claims to have found.</p>
E. Decision of the Tribunal	Request granted, insofar as it seeks only the information that the Respondent described in R-1 as “publicly available information” that it already had analyzed, related to the issues of ownership, control and substantial business activities. The Tribunal does not read the

² *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Procedural Order No. 3 Concerning the Production of Documents (4 October 2001), ¶ 18; *see also* its Award (9 January 2003), ¶ 38.

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	request as seeking (nor does the Tribunal grant any request for) any privileged communications assessing or reporting on the implications of such “publicly available information.”
Document Request No.	2
A. Documents or category of documents requested	Any other Documents, including their Attachments, on which the purported decision stated in Colombia’s letter of 31 May 2018 (Exhibit R-1) was based, including internal analysis of the “publicly available information” referenced in that letter.
B. Relevance and materiality: (1) paragraph reference to submissions (2) comments (3) statement concerning custody and control	(1) Request for Bifurcation, ¶ 47; Memorial on Jurisdiction, ¶ 13. (2) Please see the comment to request 1. The request is relevant and material to the outcome of the dispute. (3) Colombia asserts in Exhibit R-1 that it has “analyzed” publicly available information. Such analysis would ordinarily be reflected in certain internal memoranda or Correspondence.
C. Summary of objections by disputing party to production of requested documents	See objections to Request No. 1.
D. Reply	<i>See</i> Claimant’s Reply to Request No. 1.
E. Decision of the Tribunal	Request denied on the basis of privilege.

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Document Request No.	3
A. Documents or category of documents requested	The original photographs included by Colombia at ¶ 88 of its Memorial on Jurisdiction with all metadata included (which should reflect specific information like location and exact time at which such photographs were taken) and any other contemporaneous documents concerning such photographs, including the instructions given to the photographer and any Communications through which the photographs were transmitted after being taken.
B. Relevance and materiality: (1) paragraph reference to submissions (2) comments (3) statement concerning custody and control	<p>(1) Memorial on Jurisdiction, ¶ 88.</p> <p>(2) Respondent included photographs of GCG’s global headquarters in Toronto and registered office in Vancouver in its Memorial on Jurisdiction. The images were introduced without authentication or any information concerning them. Claimant requests further documents to place such images into historical context. The request is relevant and material to the outcome of the dispute.</p> <p>(3) Respondent incorporated those pictures in its Memorial on Jurisdiction.</p>
C. Summary of objections by disputing party to production of requested documents	<p>The documents requested are protected by litigation privilege. They are documents prepared at the instruction of counsel in anticipation of the present proceedings. Article 9(2) of the IBA Rules is clear that “[t]he Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document” by reason of “(b) legal ... privilege”.</p> <p>Further, the “original photographs included by Colombia at ¶ 88 of its Memorial on Jurisdiction” are not in the possession of the Respondent.</p> <p>Yet further, the documents requested are not, conceivably, relevant and material to the outcome of the dispute, as required by Article 3(3)(b) of the IBA Rules, and must also be rejected for this reason:</p>

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	<ol style="list-style-type: none">1. The request concerns the photographs at Figures 1-3 (¶ 88) of Colombia’s Memorial on Jurisdiction. Mr. Michael M. Davies, in his second witness statement (“Davies 2”), agrees that “<i>Figure 1 in Memorial on Jurisdiction (sic) shows GCG’s Vancouver office</i>” (¶ 34, Davies 2). Further, Mr. Davies does not dispute Figure 2 and, in fact, produced a materially identical photograph at Figure 3 of his own witness statement (¶ 36, Davies 2). As regards Figure 3 at ¶ 88 of Colombia’s Memorial on Jurisdiction, Mr. Davies acknowledges that the photograph could correspond the entrance door to GCG’s Toronto’s office “<i>while construction was going on in the unit</i>” (¶ 35, Davies 2). Mr. Davies then produces photographs that he contends reflect the likeness of the door at a subsequent stage (¶ 36, Davies 2). Mr. Davies goes no further than stating that the photograph at Figure 3 is “<i>outdated</i>”. There is no meaningful dispute as to the authenticity of Figures 1-3 produced by the Respondent;2. GCG’s allegation that “[t]he request is relevant and material to the outcome of the dispute” is, once more, bald assertion. The Claimant fails to explain how the requested documents are material to the outcome of the dispute, how they tie into the Claimant’s legal theory, or how “<i>plac[ing] such images into historical context</i>” would be dispositive of the dispute.
D. Reply	<p><i>First</i>, Claimant’s Reply to Objection No. 1 as to “privilege” apply <i>mutatis mutandis</i>.</p> <p><i>Second</i>, Colombia’s allegations that the original photographs in its Memorial on Jurisdiction “are not in the possession” of Colombia is absurd. If the “original photographs” are not in Colombia’s possession, why would Colombia include them in its Memorial without authenticating their origins? Colombia’s claim highlights the reasons why Claimant needs to see the photographs’ metadata and relevant Communications so it can understand the circumstances under which they were taken.</p> <p><i>Third</i>, Colombia wrongly asserts there is no meaningful dispute about the authenticity of Figures 1-3 produced by the Respondent. The reason Claimant needs the requested Documents is to show that</p>

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these photographs were not taken during the relevant time period, and misrepresent the Toronto office. Further, Respondent submitted Figures 1-3 without explaining their origins. Claimant needs the requested Documents to meaningfully assess Respondent’s claims. As Claimant pointed out in its Counter Memorial on Jurisdiction, “[t]o support its proposition, Colombia relied on images with no authentication of their origin or authorship, and no information about when and in what [manner] they were collected.”³ As Michael Davies confirms in his Second Statement, the pictures presented by Colombia do not at all resemble GCG’s offices, and at best are “misleading.”⁴ For instance, the most generous interpretation of Respondent’s Figure 3, supposedly representing GCG’s Toronto headquarters, is that it depicts the entrance during the brief period many years ago when renovation work was underway, prior to GCG staff occupying that new office space.⁵ The requested Documents are therefore relevant and material because they directly relate to the depiction at hand of GCG’s offices and business activities in Canada. Claimant needs the evidence behind when those images were taken and the circumstances under which they were taken. Otherwise, the images are entirely free of their necessary context and should be disregarded by the Tribunal.

Finally, in Colombia’s Request for Document Production, Colombia made a request similar to Claimant’s above. Respondent requested: “Documents, including photographs and floorplans, reflecting or describing GCG’s Toronto office, including its size, distribution and occupation by employees (including the location of their workspaces within the office), between October 2017 and 2 July 2018.”⁶ Claimant provided those documents, and it hereby requests Colombia do the same.

³ Claimant’s Counter Memorial on Jurisdiction, ¶ 48.

⁴ Second Witness Statement of Michael M. Davies, ¶ 33. *See also* Claimant’s Counter Memorial on Jurisdiction, ¶ 48.

⁵ Claimant’s Counter Memorial on Jurisdiction, ¶ 48.

⁶ Colombia’s Request for Production of Documents, Request No. 13.

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E. Decision of the Tribunal	<p>The Tribunal notes the Respondent’s representation that the “original photographs included by Colombia at ¶ 88 of its Memorial on Jurisdiction” are not in its possession. The Respondent nonetheless is directed to investigate with appropriate due diligence to determine (a) the dates on which the three photographs (Figures 1-3) were taken (which information shall be provided to Claimant), and (b) whether the original photographs, with metadata, can be obtained through the sources who provided the photographs for use in these proceedings (and if so, these materials should be produced). All of the additional requests are denied.</p>
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