

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Latam Hydro LLC and CH Mamacocha S.R.L.

v.

Republic of Peru

(ICSID Case No. ARB/19/28)

PROCEDURAL ORDER No. 4

On the Production of Documents referred to in the Parties' Privilege Logs

Members of the Tribunal

Prof. Albert Jan van den Berg, President of the Tribunal
Prof. Dr. Guido Santiago Tawil, Arbitrator
Prof. Raúl E. Vinuesa, Arbitrator

Secretary of the Tribunal

Ms. Ana Constanza Conover Blancas

Assistant to the Tribunal

Ms. Emily Hay

3 May 2021

Procedural Order No. 4

I. INTRODUCTION

1. On 23 March 2021, following exchanges between the Claimants and the Respondent (collectively, the “**Parties**”), the Parties submitted an application to the Tribunal to decide on production of documents. The Parties’ applications were filed in a Redfern Schedule format, as described in Sections 15.2 to 15.4 of Procedural Order No. 2.
2. On 1 April 2021, the Tribunal issued Procedural Order No. 3 (“**PO 3**”), ruling on the Parties’ respective requests for document production. Paragraph 5 of PO 3 provides as follows:

In respect of documents withheld or redacted on the basis of privilege or other alleged confidentiality, also by **13 April 2021** the Parties shall produce a privilege log identifying any documents or redactions in respect of which a claim of privilege is asserted and the legal basis for such claim. In the event that the receiving Party disputes a claim of privilege identified in the privilege log, it may apply to the Tribunal by **20 April 2021**, following which the Tribunal shall issue further directions.
3. Following an agreed extension of time as confirmed by the Tribunal, on 21 April 2021 the Parties filed their respective privilege logs, and applied to the Tribunal with respect to disputed claims of privilege.
4. In this Procedural Order No. 4, the Tribunal decides upon the disputed claims of privilege, as set out below.

II. PARTIES’ REQUESTS

5. Claimants request that Respondent be ordered to produce all documents currently designated as privileged or confidential in its privilege log.
6. Respondent requests the following with respect to Claimants’ privilege log and document production:
 - *rechace la invocación de privilegio de las Demandantes correspondiente a los Documentos No. 2 (Memorandum a Greinvest) y 5 (Hoja de Cálculo) identificados en el registro de privilegio y confidencialidad de las Demandantes y ordene la exhibición de esos documentos; y*
 - *ordene a las Demandantes proporcionar un índice de los documentos exhibidos que permita identificar cuáles documentos corresponden a cada solicitud del Perú.*

Procedural Order No. 4

III. APPLICABLE STANDARD

7. Article 43 of the ICSID Convention provides, in relevant part, that “[e]xcept as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence ...”
8. ICSID Arbitration Rule 34(2) further provides, in part, that the Tribunal “may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts...”
9. ICSID Arbitration Rule 34(3) states that:

The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.
10. Procedural Order No. 2 dated 13 May 2020 (“**PO 2**”) set out the applicable rules for the document production phase. In accordance with ¶ 15.3 of PO 2, the Parties were able to object to the production of documents on a number of bases, including “compelling legal impediment, privilege, confidentiality or political sensitivity”.
11. Pursuant to ¶ 16.9 of PO 2:

In all other matters regarding the receipt of evidence that are not covered by this Procedural Order or others issued by the Tribunal, this procedure may be guided by the IBA Rules on the Taking of Evidence in International Arbitration, approved on 29 May 2010 by Resolution of the IBA Council.
12. Under Article 9 of the IBA Rules on the Taking of Evidence in International Arbitration (“**IBA Rules**”), the Tribunal shall exclude from production any document for a number of reasons, including under Article 9(2)(b): “legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable”. This language, as well as other possible exclusions under Article 9(2) of the IBA Rules, largely mirrors the possible objections listed in ¶ 15.3 of PO 2, and neither Party has suggested that there is any significant difference between the two.
13. In considering issues of legal impediment or privilege, Article 9(3) of the IBA Rules further provides that:

. . . 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:

Procedural Order No. 4

- (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
 - (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;
 - (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;
 - (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and
 - (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.
14. To determine the existence of a legal impediment or privilege, the Tribunal shall therefore apply the provisions of PO 2, as supplemented by the IBA Rules, to decide upon the Parties' respective requests. In doing so, the Tribunal notes that it is constituted under international law, and as such must respect general principles of international law in the conduct of international arbitration proceedings. This includes the Tribunal's duty to uphold due process, as well as the need to maintain fairness and equality as between the Parties, in the specific circumstances of this case. Where provisions of national law have been invoked by the Parties as the basis for a privilege claimed, the Tribunal shall also be guided by the wording and rationale of these provisions when reaching its decisions under PO 2 and the IBA Rules.

IV. TRIBUNAL'S ANALYSIS

15. In this Section, the Tribunal sets out the issues that have arisen with respect to the Parties' privilege logs and document production, including references to their respective positions, and decides upon those matters. To the extent that the Tribunal does not set out in detail every argument made by the Parties, those arguments have been closely reviewed by the Tribunal and can be considered subsumed herein.
- A. Claimants' Privilege Log and Document Production**
16. Claimants have filed a privilege log comprising 8 items. Respondent challenges the claim of privilege with respect to items 2 and 5.

Procedural Order No. 4

(i) Item 2

17. Claimants assert attorney-client privilege under Articles 9.2(b) and 9.3(a) of the IBA Rules (see ¶¶ 12-13 above). The subject matter of the document is described as “Memorandum describing the RER and Distributed Generation regimes and providing potential hydroelectric investment opportunities based on applicable Peruvian laws”.
18. In Respondent’s view, based on the description of the document, Claimants have failed to demonstrate that the Memorandum in question contains legal advice. In particular, Respondent argues that the subject matter concerns a business opportunity, and the simple fact that it was communicated by a lawyer does not mean that legal advice was given.
19. The Tribunal is satisfied, based on Claimants’ description of the document, that it was created in connection with and for the purpose of providing or obtaining legal advice, and as such that the document should be excluded from production under Article 9(2)(b) of the IBA Rules. In particular, the document describes the relevant resources and generation regimes and includes advice about investment opportunities “based on applicable Peruvian laws”.

(ii) Item 5

20. Claimants claim “attorney work product” privilege under Articles 9.2(b) and 9.3(a) of the IBA Rules (see ¶¶ 12-13 above). The subject matter of the document is described as “[s]preadsheet summarizing applicable provisions of Peruvian law to the RER Program, as well as draft flow charts providing analysis of the RER Program’s procedure under Peruvian law”.
21. Respondent argues that the claim of privilege over this document is without basis, because (i) Claimants have not attempted to identify a legal authority covering the supposed privilege invoked for “attorney work product”, what this category of privilege covers, and why the spreadsheet falls within it; and (ii) the spreadsheet is not covered by attorney-client privilege (which was not claimed), because the subject matter only describes a summary of legal provisions and flow charts analysing the RER program procedure.
22. The Tribunal is satisfied, based on Claimants’ description of the document, that it was created in connection with and for the purpose of providing or obtaining legal advice, and as such that the document should be excluded from production under Article 9(2)(b) of the IBA Rules. In particular, the document includes summaries of provisions of Peruvian law by legal counsel, and analyses the relevant resource program’s procedure “based on applicable Peruvian laws”.

(iii) Document Production

23. Respondent contends that the procedural conduct of Claimants in the document production phase is inconsistent with best practices in investment arbitration. In this regard,

Procedural Order No. 4

Respondent states that Claimants have disclosed more than 1000 documents without identifying the number of the document request to which each corresponds. Nor have Claimants provided an index allowing Peru to identify which documents respond to which request. According to Respondent, this conduct by Claimants hinders progress in these proceedings and increases Respondent's arbitration costs.

24. The Tribunal expects both Parties to act in good faith and cooperate with each other in order to complete the production process as smoothly and efficiently as reasonably possible. While the Tribunal understands the potential benefit of an index and identification of the documents corresponding to each request, the Tribunal does not consider it appropriate to impose such mechanisms absent Party agreement. The Tribunal therefore rejects Respondent's request for an order in this respect.

B. Respondent's Privilege Log

25. Respondent has filed a privilege log identifying 29 documents corresponding to Claimants' document requests in respect of which privilege, legal impediment or confidentiality is claimed. Claimants challenge all of the documents identified in the log.
26. At the outset, Claimants argue that Respondent only now attempts to justify the basis of its privilege claimed, which it did not do during the Redfern Schedule process. Claimants request that Respondent's arguments be rejected as untimely. Claimants further submit that Respondent has made new privilege assertions which were not asserted at the appropriate time during the Redfern schedule process, and these should also be rejected.
27. The Tribunal considers Respondent's arguments submitted together with its privilege log to fall within the Tribunal's direction to identify the documents in respect of which a claim of privilege is asserted and the legal basis for such a claim, under ¶ 5 of PO 3. The Tribunal shall therefore give consideration to Respondent's arguments accompanying its privilege log below, and addresses the specific points made about the claim of attorney-client privilege at ¶¶ 49-50 below.
28. With respect to the new claim of privilege in relation to the confidentiality of one document, the Tribunal likewise does not consider this claim to be untimely, since it was made together with the submission of the privilege log, and Claimants have had the opportunity to comment thereon. The Tribunal shall consider this claim at ¶ 55 below.

(i) Deliberative process privilege

29. Respondent claims deliberative process privilege under Article 9(2)(b) and 9.3(a) of the IBA Rules and Article 17(1) of Revised Law No. 27806, the Law of Transparency and Access to Public Information, approved by Supreme Decree No. 021-2019-JUS

Procedural Order No. 4

(“**Transparency Law**”),¹ for documents corresponding to Claimants’ Requests Nos. 1, 7, 10, 11, 15 (two documents), 17 and 25.

30. Article 17(1) of the Transparency Law provides:

The right of access to public information shall not be allowed with respect to the following:

1. Information containing advice, recommendations or opinions rendered as part of the deliberative and consultation process conducted prior to government decision-making, unless such information is publicly available. Once the decision is adopted, this exception will cease to apply if the Public Administration chooses to make express reference to such advice, recommendations or opinions.

. . . .

31. The Tribunal considers the deliberative process privilege to be a “legal impediment or privilege” covered by Article 9(2)(b) of the IBA Rules.
32. The Parties disagree on the interpretation of Article 17(1) of the Transparency Law, and on the meaning of certain decisions issued by Peru’s *Tribunal de Transparencia y Acceso a la Información Pública* (“**Transparency Law Tribunal**”) in application of that Law.
33. This Tribunal shall not encroach upon the jurisdiction of the Peruvian Transparency Law Tribunal with respect to the application of the Transparency Law, but shall be guided by the wording and rationale for the Transparency Law in deciding whether a specific document should be excluded from production under Article 9(2)(b) of the IBA Rules.
34. The Tribunal has carefully considered the Parties’ respective positions, as well as the provisions of the Transparency Law and the decisions of the Transparency Law Tribunal referred to by the Parties.²
35. Based on the legal authorities provided and submissions made, the Tribunal notes as follows:
 - (i) Article 3 of the Transparency Law sets out the principle of openness of public information in Peru, by which “[a]ll acts and decisions by the entities described herein shall be subject to the principle of openness of public information”, and “[a]ll information held by the State shall be presumed to be public, except as expressly provided for in Article 15 hereof”.

¹ C-211, Transparency Law.

² C-212, Transparency Law Tribunal, Resolution No. 0003344-2021-JUST/TTAIP, 22 February 2021; C-213, Transparency Law Tribunal, Resolution No. 004636-2020-JUS/TTAIP, 16 October 2020.

Procedural Order No. 4

- (ii) Article 18 of the Transparency Law states, in part, that “[a]ll cases listed in Articles 15, 16 and 17 shall be the only circumstances where the right of access to public information may be limited; therefore, these cases shall be restrictively interpreted, because they concern a limitation on a fundamental right. No exceptions to this Law shall be established under any lower-ranking rule.”
 - (iii) The Transparency Law Tribunal has held that the State must demonstrate “the existence of a compelling public interest to deny access to information”.³
 - (iv) The Transparency Law Tribunal has held, relying on a decision of the Constitutional Tribunal, that the burden of proving that information must be kept confidential is exclusively on the State.⁴
 - (v) The Transparency Law Tribunal has held that the privilege claimed must be “strictly necessary”, “the least restrictive measure possible” and “proportional”.⁵
36. The Tribunal accepts Respondent’s submission that there is a compelling public interest in maintaining the confidentiality of information containing advice, recommendations or opinions rendered as part of the deliberative and consultation process conducted prior to government decision-making. The Tribunal shares the view cited with approval by the Transparency Law Tribunal that this limitation on public access to information is intended to “protect the quality of governmental decisions, allowing officers to freely exchange ideas and comments, to express them in preliminary documents, and to analyze in internal debates the different courses of action without fear of public scrutiny”.⁶
37. Based on the foregoing, the Tribunal shall decide whether to uphold the disputed claims of deliberative process privilege under the IBA Rules, balancing the fundamental principle of openness of public information with the compelling public interest in preserving the privileged nature of specific advice, recommendations or opinions rendered as part of the deliberative process of government decision-making.
38. The Tribunal has reviewed each of the entries in Respondent’s privilege log in respect of which deliberative process privilege is claimed. The Tribunal is satisfied that each of the entries contains advice, recommendations or opinions rendered as part of the deliberative and consultation process conducted prior to government decision-making. The Tribunal considers in all the circumstances that the assertion of privilege under the IBA Rules is valid and compelling in relation to all of the documents in respect of which a claim is made, except for one (see ¶ 41 below).
39. The Tribunal notes that Claimants have argued, *inter alia*, that the allegedly protected “advice, recommendations or opinions” (i) have likely been made public due to the passage

³ C-212, p. 5.

⁴ C-212, p. 5; C-213, p. 5.

⁵ C-212, p. 4.

⁶ C-213, p. 6, *quoting* Úrsula Indacochea.

Procedural Order No. 4

of time (Request No. 1); (ii) are presumably contained in a subsequent government decision or document (Requests Nos. 1, 25); or (iii) are not privileged because a government decision or report on that issue is already public (Requests Nos. 10, 17, 25). The majority of the Tribunal does not consider these circumstances, on their own, sufficient basis to lift the privilege, in light of the purpose of deliberative process privilege to protect the free exchange of ideas and comments between government officials. The privilege does not automatically lose its relevance after the decision has been made. Nor is the majority of the Tribunal persuaded that the deliberative process privilege has been waived by Respondent (Request No. 15).

40. Having upheld the claim of privilege in relation to the above documents, and in light of the nature of the communications and the privilege, the Tribunal does not consider it appropriate to order disclosure subject to redactions.
41. The Tribunal does not find a valid claim of privilege in relation to the document identified as responsive to Claimants' Request No. 7 (Report No. GFE-USPP-23-2015), and orders disclosure of that document. The Tribunal notes that this document is expressly referred to in Claimants' Exhibit C-008, Addendum 1 to the RER Contract, 22 July 2015, which states:⁷

Said requirement was absolved through Official Document No. 1590-2015-OS-GFE and **Report No. GFE-USPP-23-2015**, via which OSINERGMIN [Organismo Supervisor de la Inversión en Energía y Minería (Supervisory Body for Investment in Energy and Mines)] issued a favourable opinion regarding the requested extension. (emphasis added)

42. The Tribunal considers that fairness and equality require disclosure of Report No. GFE-USPP-23-2015, for the reason that it has been specifically referred to by Respondent in the Addendum to the RER Contract. In this respect, the Tribunal finds that any privilege has been waived by virtue of affirmative use of the document, in accordance with Article 9(3)(d) of the IBA Rules. The Tribunal further notes that Article 17(1) of the Transparency Law provides for an exception to the deliberative process privilege in such circumstances.

(ii) Attorney-client privilege

43. Respondent claims attorney-client privilege under Articles 9(2)(b) and 9(3)(a) of the IBA Rules. Respondent submits that attorney-client privilege is a fundamental principle of international law, as well as under Article 2(18) of the Constitution of Peru⁸ and Article 17(4) of the Transparency Law. Attorney-client privilege is claimed for documents corresponding to Claimants' Requests Nos. 5, 8/9, 11, 15 (two documents), 17,

⁷ C-008, pp. 4-5.

⁸ EB-004, Article 2(18): "*Toda persona tiene derecho: . . . (18) A mantener reserva sobre sus convicciones políticas, filosóficas, religiosas o de cualquiera otra índole, así como a guardar el secreto profesional.*"

Procedural Order No. 4

18 (three documents), 19 (two documents), 20 (two documents), 21 (two documents), 28 (two documents), 29 (three documents), 31 and 32.

44. Article 17(4) of the Transparency Law provides:

The right of access to public information shall not be allowed with respect to the following:

. . . .

(4) Information prepared or obtained by the legal counsel or by the lawyers of Public Administration entities, where public dissemination might reveal the strategy to be adopted in the filing or defense of an administrative or judicial proceeding, or any other information protected by attorney-client privilege. This exception will cease to apply when the proceedings are concluded.

45. The Transparency Tribunal has made a number of findings and observations in its decisions applying Article 17(4) of the Transparency Law. In order to refuse access to a document under Article 17(4) of the Transparency Law, the following requirements must be fulfilled:⁹

1. The existence of certain information that has been created by or is in the possession of the [State] Entity, which information might contain, *inter alia*, reports, analyses, or recommendations;
2. The information has been prepared or obtained by legal advisors to or counsel for the Public Administration;
3. The information relates to the Entity's defense strategy; and,
4. The existence of a certain administrative or judicial proceeding in process in which the aforementioned strategy is deployed or applied.

46. As stated at ¶¶ 14 and 33 above, this Tribunal is deciding upon matters of privilege within the framework of international arbitration proceedings, applying the applicable procedural rules, and guided by the IBA Rules. This Tribunal does not step into the role of the Peruvian Transparency Tribunal.

47. The IBA Rules specifically provide in Article 9(3)(a) for the Tribunal to take into account "any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice". This provision reflects that attorney-privilege is a well-recognised principle

⁹ C-212, p. 6. See also C-213, p. 7, in similar terms.

Procedural Order No. 4

under international law. In this respect, the Tribunal subscribes to the view of the arbitral tribunal in *Carlos Rios y Francisco Rios v. Republic of Chile* that:¹⁰

Habiendo dicho eso, el Tribunal considera que el concepto de attorney-client privilege ha sido ampliamente aceptado en el derecho internacional y comparado, y ha sido incluso aplicado por tribunales internacionales sin referencia a normas de derecho interno. En este sentido, ciertos comentaristas han sostenido que los privilegios que se encuentran bien establecidos pueden considerarse como principios generales de derecho. En parte, ello es confirmado por el Artículo 9.3(a) de las Reglas de la IBA. . .

48. The Tribunal therefore does not consider the concept of legal privilege to be limited to the conditions specifically enumerated in the Transparency Law, since the Tribunal must decide in all the circumstances of the present case, including the Tribunal's duty to uphold due process, fairness and equality between the Parties. In particular, the majority of the Tribunal does not consider the claims of attorney-client privilege to be limited to documents revealing the State's defence strategy in ongoing administrative or judicial proceedings. Under the IBA Rules, it is foreseen that there may be a need to protect the confidentiality of a document on the basis that it is created in connection with and for the purpose of providing or obtaining legal advice.
49. With respect to Claimants' argument that Respondent exclusively invoked attorney-client privilege under the Transparency Law, and may not rely on a broader claim of privilege than what was specified in its Redfern Schedule, the Tribunal notes that in its responses to Claimants' document requests, Respondent based its claim for attorney-client privilege on Articles 9(2)(b) and 9(3)(a) of the IBA Rules, and ¶ 15.3 of PO 2, in addition to the Transparency Law. In this regard, Respondent stated as follows, prior to setting out Article 17(4) of the Transparency Law:¹¹

2. El Perú invoca privilegio abogado-cliente sobre todos los Documentos solicitados por las Demandantes que contengan asesoría legal. Esos Documentos están protegidos bajo privilegio, de conformidad con el artículo 9.2(b) de las Reglas de la IBA y la sección 15.3 de la Resolución Procesal No. 2 emitida por el Tribunal el 13 de mayo de 2020 ("RP2").

3. El artículo 9.3(a) de las Reglas de la IBA explica que al evaluar la existencia de impedimentos legales o privilegio bajo el artículo 9.2(b), el Tribunal puede tomar en consideración "cualquier necesidad de proteger la confidencialidad de un Documento creado . . . en relación con o al efecto de proporcionar u obtener asesoramiento jurídico". En este sentido, documentos que contengan asesoría legal están protegidos bajo la confidencialidad abogado-cliente.

¹⁰ RL-182, *Carlos Rios y Francisco Rios v. República de Chile*, Caso CIADI No. ARB/17/16, Resolución Procesal No. 7, 4 de octubre de 2018, ¶ 26. Citations omitted.

¹¹ Claimants' Request for Production of Documents, p. 2.

Procedural Order No. 4

La categoría de privilegio abogado-cliente ha sido ampliamente reconocida en el ámbito de arbitraje internacional de inversión, y es explícitamente reconocido en la legislación peruana.

50. The Tribunal therefore considers that Respondent's claims for attorney-client privilege were made under the IBA Rules, as recognised in international investment arbitration, as well as under Peruvian law. The Tribunal does not consider that Respondent has waived its opportunity to avail itself of those privileges, nor has it impermissibly expanded its privilege claims by elaborating on those arguments in its privilege log.
51. The Tribunal has reviewed each of the entries in Respondent's privilege log in respect of which attorney-client privilege is claimed. The majority of the Tribunal is satisfied that each of the documents is created in connection with and for the purpose of providing or obtaining legal advice. The majority of the Tribunal considers in all the circumstances that the assertion of privilege under the IBA Rules is valid and compelling in relation to all of the documents for which attorney-client privilege is claimed, save for four exceptions (see ¶ 53 below).
52. Having upheld the claim of privilege in relation to the above documents, and in light of the nature of the communications and the privilege, the majority of the Tribunal does not consider it appropriate to order disclosure subject to redactions.
53. The Tribunal orders disclosure of the following documents in respect of which attorney-client privilege was claimed, but the Tribunal finds is lacking:
 - (i) Claimants' Request No. 17: Minutes of Meeting of the Special Commission dated 13 December 2017, "*en la cual se refleja la exposición del experto en derecho administrativo Juan Carlos Morón Urbina sobre las conclusiones de su informe legal sobre su análisis de ciertas decisiones emitidas por el Gobierno Regional de Arequipa, las mismas que son objeto de la controversia iniciada por las Demandantes.*" The Tribunal notes that the report of Dr. Morón Urbina referred to has been filed by Respondent in these proceedings (R-140). As such, the Tribunal considers that due process, fairness and equality between the Parties requires disclosure of these Minutes of Meeting, and that any privilege has been waived by virtue of affirmative use of Dr. Morón Urbina's report, in accordance with Article 9(3)(d) of the IBA Rules.
 - (ii) Claimants' Request No. 19: Report No. 635-2017-MEM/OGJ. This document has been produced to a third-party Peruvian citizen on 14 August 2020 under a request pursuant to the Transparency Law.¹² Accordingly, the Tribunal considers attorney-client privilege to have been waived by virtue of its disclosure, in accordance with Article 9(3)(d) of the IBA Rules.

¹² Exhibit A to Claimants' Objections to Respondent's Privilege Log, 21 April 2021.

Procedural Order No. 4

- (iii) Claimants' Request No. 20: Report No. 221-2018-MEM/OGJ. This document has been produced to a third-party Peruvian citizen on 14 August 2020 under a request pursuant to the Transparency Law.¹³ Accordingly, the Tribunal considers attorney-client privilege to have been waived by virtue of its disclosure, in accordance with Article 9(3)(d) of the IBA Rules.
- (iv) Claimants' Request No. 21: Report No. 630-2018-MEM/OGJ. This document has been produced to a third-party Peruvian citizen on 14 August 2020 under a request pursuant to the Transparency Law.¹⁴ Accordingly, the Tribunal considers attorney-client privilege to have been waived by virtue of its disclosure, in accordance with Article 9(3)(d) of the IBA Rules.

(iii) Confidentiality

54. Respondent claims confidentiality in relation to a document responsive to Claimants' Request No. 24, as follows:

Oficio No. 712-2018-GRA/ ARMA elaborado por Benigno Erick Sanz Sanz, Gerente de la Autoridad Regional Ambiental del Gobierno Regional de Arequipa, enviado a Ricardo Ampuero Llerena, Presidente de la Comisión Especial. El Oficio responde al Oficio No. 194-2018-EF/ CE-36, adjuntando los documentos solicitados en un sobre cerrado, precisando que la información tiene carácter confidencial.

55. Based on the description provided, the Tribunal is unable to find a compelling legal impediment, privilege, confidentiality or political sensitivity under PO 2 or the IBA Rules. Other than the fact that the communication has been marked confidential, the Tribunal is not able to ascertain the confidential nature of the subject matter or documents referred to. The Tribunal therefore orders disclosure of this item of Respondent's privilege log.

V. ORDER

56. The Tribunal has carefully considered the applications of the Parties. As set out above, the Tribunal orders disclosure of the following documents recorded in Respondent's privilege log:
- (A) Claimants' Request No. 7: Report No. GFE-USPP-23-2015 dated 23 February 2015.
 - (B) Claimants' Request No. 17: Minutes of Meeting of the Special Commission dated 13 December 2017.

¹³ Exhibit A to Claimants' Objections to Respondent's Privilege Log, 21 April 2021.

¹⁴ Exhibit A to Claimants' Objections to Respondent's Privilege Log, 21 April 2021.

Procedural Order No. 4

- (C) Claimants' Request No. 19: Report No. 635-2017-MEM/OGJ dated 20 December 2017.
 - (D) Claimants' Request No. 20: Report No. 221-2018-MEM/OGJ dated 1 March 2018.
 - (E) Claimants' Request No. 21: Report No. 630-2018-MEM/OGJ dated 27 June 2018.
 - (F) Claimants' Request No. 24, Official Notice No. 712-2018-GRA/ ARMA dated 2 August 2018.
57. Respondent shall produce to Claimants the documents ordered by the Tribunal by **Monday, 10 May 2021**.
58. The majority of the Tribunal maintains all other claims of privilege identified in the Parties' respective privilege logs and excludes those documents from document production in this arbitration.

On behalf of the Tribunal,

[Signed]

Prof. Albert Jan van den Berg
President of the Tribunal
Date: 3 May 2021