

IBA Task Force on Privilege in International Arbitration – List of Tribunal Decisions

No.	Case Name	Excerpt of Tribunal Decision	Notes
Issue 1: Choice of Substantive Law Governing Privilege			
1.	<p><i>Global Telecom Holding S.A.E. v. Canada</i>, ICSID Case No. ARB/16/16</p>	<p><u>“In selecting the law of the jurisdiction with the closest connection to the situation, the Tribunal is mindful of IBA Article 9(3)(c) which recommends that the tribunal takes into account when considering issues of legal privilege, the expectation of the parties and their advisors at the time the legal privilege is said to have arisen. The Tribunal considers that, of the many connecting factors that could be considered to establish a claim to legal privilege, the law of the jurisdiction of the counsel’s bar of call is the more convincing because it is the more predictable at the time when privilege attaches. Every other factor could be incidental or manipulatable. Often, that law will be the one prevailing in the home jurisdiction of the relevant counsel, as pointed out in the Commentary to article 9 of the IBA Rules. As Canada submits, Dutch law would be expected to apply in relation to asserting privilege on communications between Vimpelcom and its in-house counsel, and Egyptian law would be expected to apply to communications between GTH and its in-house counsel. The above should remain constant even where counsel offering the legal advice is based in a different jurisdiction from her bar of call or from the place where the recipient of the advice is situated. In such a case, the law applicable to privilege in the jurisdiction where counsel is admitted and which allows counsel to extend the relevant legal advice, should apply as being the closest to the Parties’ expectation at the relevant time. This is because legal privilege attaches to the rules of professional secrecy that rest on the admission to the bar rather than to the client receiving the advice. Accordingly, the Tribunal declines to follow Canada’s submission to the contrary. If there are limitations to that privilege, counsel is expected to so indicate to her client given that the client is entitled to assume that it can transmit protected information to its counsel.</u></p> <p><u>Upholding the law of counsel’s bar of call in relation to legal advice given by counsel pursuant to her admission to that bar is all the more convincing given that lawyers practicing across borders can be disciplined before their bar of call if they infringe their ethical obligations when rendering legal services outside of their home jurisdiction. Referring to the relevant bar rules pursuant to which counsel is offering the particular legal advice over which privilege is claimed likewise sets aside the risk of confusion or of unpredictability if counsel were to be admitted to legal practice in several jurisdictions.</u></p> <p><u>The presumption that the applicable law is the law of the bar of call of counsel asserting legal privilege under which the disputed communication was issued, may be set aside in favour of</u></p>	<p>Law Applicable to Legal (Attorney-Client) Privilege</p>

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		<p><i>another national law if it is established that, in the specific circumstances, that the other national law presents a manifestly closer connection with the situation. The Arbitral Tribunal found no such evidence in the Parties' submissions in relation to Claimant's assertion of legal privilege in respect of in-house counsel's communications."</i> (Procedural Order No. 5, Annex A, pp. 13-14.)</p>	
2.	<p><i>Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru, ICSID Case No. ARB/19/28</i></p>	<p><i>"Respondent claims attorney-client privilege under Articles 9(2)(b) and 9(3)(a) of the IBA Rules 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 under international law <u>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.</u>"</i> (Procedural Order No. 4, ¶¶ 43, 47, 50.)</p>	<p>Reference to IBA Rules on the Taking of Evidence in International Arbitration, as well as municipal law</p>
3.	<p><i>Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6</i></p>	<p><i>"There were three main issues before the Tribunal:</i></p> <ul style="list-style-type: none"> <i>- Whether Claimants had failed to follow the appropriate proceedings for filing their Privilege Log;</i> <i>- Whether the attorney-client privilege extended to in-house counsel; and</i> <i>- Whether Claimants properly asserted settlement privilege over the Privileged Documents.</i> <p><i><u>To decide such issues, the Arbitral Tribunal applied international law and, alternatively municipal law, as pleaded by the Parties.</u></i></p> <p><i>The Tribunal adopted the following decisions:</i></p> <p><i>First, it decided that while Claimants had not strictly complied with the Tribunal's instructions in PO No. 2 concerning privilege-based objections, this departure from the established procedure had not caused Respondent irreparable harm. The Tribunal found that Respondent had been given ample opportunity to contest Claimants' objections by submitting comments on Claimants' Privilege Log, which the Tribunal had analysed in order to reach its decision. As a consequence, the Tribunal decided not to dismiss in limine Claimants' objections based on privilege.</i></p> <p><i>Second, as to the merits of the objections, the Tribunal found that legal privilege extended not only to communications with outside counsel, but also to communications with in-house</i></p>	<p>Reference to principles of international law and municipal law</p>

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		<p><i>lawyers and found no evidence suggesting that Claimants had waived legal or, to the extent relevant, settlement privilege.</i></p> <p><i>Third, the Tribunal directed Claimants' lead counsel (i) to submit an affidavit confirming that each of the Privileged Documents met all of the privilege requirements identified by the Tribunal and (ii) immediately to produce all the relevant documents that did not." (Award, ¶¶ 113-118.)</i></p>	
4.	<p><i>Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1</i></p>	<p><i>"[T]he Tribunal decided that it was not minded to <u>take into account deliberative process privilege, attorney-client privilege, attorney work-product doctrine privilege (or any other privilege or like impediment)</u> as a matter of any applicable national law or rules of law, but rather <u>as one or more factors falling within Article 9(2) of the IBA Rules.</u>" (Procedural Order No. 8, ¶ 14.)</i></p> <p><i>"The Tribunal considers that Article 9(3)(c) of the IBA Rules sufficiently provides for recognition of the expectations of the Parties and their advisers at any material time, as does Article 9(3)(e) of the IBA Rules on the need to maintain fairness and equality as between the Parties. The Parties' reliance upon US law suggests both their expectations and the elements required to maintain fairness and equality between them. Nonetheless, as explained above, as an international arbitration tribunal, the Tribunal bases its decision <u>directly upon the exercise of its discretionary powers under the IBA Rules and the ICSID Arbitration (Additional Facility) Rules, rather than national rules of law . . .</u>" (Procedural Order No. 8, ¶ 21.)</i></p>	<p>Reference to IBA Rules on the Taking of Evidence in International Arbitration and procedural rules</p>
5.	<p><i>Philip Morris Asia Limited v. The Commonwealth of Australia, PCA Case No. 2012-12</i></p>	<p><i>"The Tribunal is aware of the jurisprudence of NAFTA and other tribunals regarding privilege to which both Parties have referred. While the Tribunal agrees that taking into account such other jurisprudence is indeed helpful and appropriate, the present procedure under the Treaty between Australia and Hong Kong, referring to the UNCITRAL Rules, <u>must be examined in light of its own specific factual and legal circumstances, which differ in various ways from the cases addressed by other courts and tribunals.</u></i></p> <p><i>In particular, the Tribunal considers that, in a dispute between a private company and a State, the different scopes of Article 9(2)(b) of the IBA Rules, which can be relied upon by both Parties in this dispute, and of Article 9(2)(f) of the IBA Rules, which can essentially be relied upon only by the Respondent in the present case, should be applied in such a way that neither side is put at a disadvantage regarding privilege claims. With regard to 'home-</i></p>	<p>Reference to IBA Rules on the Taking of Evidence in International Arbitration and procedural rules</p>

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		<p><i>oriented’ privilege justifications relying on ethical rules and standards in the home jurisdiction of a party or its counsel, Article 9(2)(b) of the IBA Rules refers to the ethical rules that are ‘determined by the Tribunal to be applicable’ and Article 9(2)(f) of the IBA Rules refers to such sensitivity grounds ‘that the Tribunal determines to be compelling’. In light of this, <u>the Tribunal concludes that, while the home rules of either Party might provide useful analogies, they cannot provide the basis for the Tribunal’s decision or can be otherwise determinative in the present case.</u></i> (Procedural Order No. 12, ¶¶ 4.5-4.6.)</p>	
6.	<p><i>Global Gaming Philippines LLC and GGAM Netherlands BV v. Bloomberry Resorts and Hotels Inc. and Sureste Properties Inc.</i></p>	<p>The Tribunal ordered that “<i>the law that gives the greatest protection to privilege to both parties shall apply</i>” (quoting Procedural Order 7). The Tribunal placed emphasis on the need for procedural equality between the Parties and, accordingly, its directions in PO 7 ensured that the Parties were on an equal footing in respect of applying the same principles of privilege. (Partial Award on Liability, ¶¶ 24-25.)</p>	<p>Application of most protective national law</p>
7.	<p><i>William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada</i>, PCA Case No. 2009-04</p>	<p><i>“In accordance with NAFTA Articles 1131(1) and 1120(2), <u>the Tribunal will apply any relevant provisions of NAFTA, international law, and the UNCITRAL Rules in resolving the Disputing Parties’ disagreement regarding their privilege claims. As the Disputing Parties note, the Tribunal has previously decided that the IBA Rules on the Taking of Evidence in International Commercial Arbitration of 1999 (“IBA Rules”) serve as guidelines in this arbitration. The Tribunal further observes that other NAFTA tribunals have considered national law, as well, for guidance on matters of privilege.</u></i></p> <p><i>While NAFTA and the UNCITRAL Rules are silent on the specific issue of privilege, Article 15 of the UNCITRAL Rules provides that “the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.” Likewise, Article 9.2(b) of the IBA Rules leaves it to the Tribunal to determine the legal rules applicable to solicitor-client privilege and work product privilege.</i></p> <p>[...]</p> <p><i>The Disputing Parties share the view that the standard set forth by the NAFTA tribunal in Vito Gallo v. Canada is appropriate for evaluating solicitor-client privilege claims in this case. The Gallo tribunal determined that a document is protected by solicitor-client privilege if:</i></p> <ul style="list-style-type: none"> • ‘The document has to be drafted by a lawyer acting in his or her capacity as lawyer; 	<p>Reference to principles of international law and procedural rules; both parties agreed that in determining attorney-client privilege, the Tribunal should apply a four-part test previously established by another tribunal.</p>

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		<ul style="list-style-type: none"> • A solicitor-client relationship based on trust must exist as between the lawyer (in-house or external legal advisor) and the client; • The document has to be elaborated for the purpose of obtaining or giving legal advice; • The lawyer and the client, when giving and obtaining legal advice, must have acted with the expectation that the advice would be kept confidential in a contentious situation.” <p>(Procedural Order No. 12, ¶¶ 17-18, 21.)</p>	
8.	SMT Ltd. v. Fremak Industries, Inc., ICC Case No. 19499/CYK	<p>“Third, the Tribunal ruled, in accordance with the IBA Rules, on ISMT’s challenges to Fremak’s privilege log consisting of 69 documents. Both Parties agreed that, pursuant to Articles 9.2(b) and 9.3 of the IBA Rules, the Parties’ privilege challenges should be analyzed under New York law. Thus, as both Parties pleaded New York law, even though Singapore is the <i>lex fori</i> in this arbitration, the Tribunal also addressed ISMT’s challenges to Fremak’s privilege log under New York law to show that, if it did apply, the result was the same as under the IBA Rules. Accordingly, the Tribunal granted ISMT’s application to the extent that Fremak was ordered to produce (1) those emails for which it asserts attorney-client privilege in its privilege log because Mr. Haigh and THL Metals are agents of Fremak; and (2) those documents for which it asserts trial preparation privilege in its privilege log because the documents were created in anticipation of litigation.” (Partial Final Award, ¶ 38.)</p>	Reference to IBA Rules on the taking of Evidence and application of the governing law of the agreement / substantive law or, in the absence of such choice, application of the law determined by the applicable conflict of law rules
9.	Gran Colombia Gold Corp. v. Republic of Colombia, ICSID Case No. ARB/18/23	<p>“To avoid subsequent disputes over the scope of applicable privilege, and to maintain equality of treatment as between the Parties, <u>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.</u> Moreover, while the Canada-Colombia Free Trade Agreement (the “FTA”) references national law when referring to issues of privilege, <u>neither Party has demonstrated to date that any national law which potentially is relevant in this case</u></p>	Reference to IBA Rules on the Taking of Evidence in International Arbitration and procedural rules

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		<i>to determinations about legal privilege adopts any definition that differs significantly from the one used in the IBA Rules.</i> " (Procedural Order No. 11 on the Parties Requests for Documents, 28 September 2021, ¶ 7.)	
10.	<i>Glamis Gold v. United States of America, UNCITRAL</i>	<p><i>"The Tribunal recognizes that, in international arbitration, procedural matters such as the applicability of privileges and the form of objections to such assertions can be set out by the agreement of the Parties. The Parties in their submissions, and at the hearing, appear to agree that the privilege law of the United States should be looked to by the Tribunal for guidance as to the law of privilege to be applied in this arbitration. The Parties, however, disagree as to which jurisdiction of the United States reference should be made. Claimant points to the law of the D.C. Circuit or federal common law which it views as most reflecting the expectations of the Parties, while Respondent favors those principles that are common among the jurisdictions, noting that Claimant could have as easily filed a suit in the courts of the State of California, or in the Federal Court in Nevada.</i></p> <p>[...]</p> <p><i>Thus the Tribunal has reviewed the case law of numerous United States jurisdictions—including California and the District of Columbia, neither of which were found to be outliers—and attempted to identify general consensus between courts that might be helpful in defining what the Parties would reasonably expect to apply in this situation. The Tribunal then used this information, combined with its knowledge of and appreciation for the differences between court proceedings and international arbitration, to craft standards that can assist the Parties in assessing their claims of privilege and their objections to such claims."</i> (Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, ¶¶ 19-20)</p>	The Tribunal applied an autonomous standard based on the Parties' agreement to use US law.
11.	<i>Joshua Dean Nelson v. United Mexican States, ICSID Case No. UNCT/17/1</i>	<p><i>"Claimants allege privilege under two different legal standards: (i) the US attorney-client privilege and the work product doctrine and; (ii) Mexico's professional secret ("secreto profesional"). The Parties' submissions indicate that these standards have different scopes.</i></p> <p><i>The Commentary on the IBA Rules suggests that the need to protect fairness and equality among the parties may arise when the approach to privilege in their home jurisdictions differs. In this case, the Tribunal is concerned that applying different standards on the matters of privilege could affect the balance and equality of treatment of the Parties. Such difference in treatment could result, on the one hand, in Claimants not having to produce communications between them and their US legal counsel while Respondent, in a subsequent rounds of Claimants' document production requests, being obliged to produce</i></p>	The Tribunal applied the law that provides the highest standards on protection.

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		<p><i>communications with Mexican legal counsel; but on the other, could result in Claimants having to produce documents not subject to confidentiality in Mexico, but which production may result in violation of applicable US law. This would create <u>a clear imbalance in the treatment of the Parties in these proceedings.</u></i></p> <p><i><u>Based on Article 9(3) and the Commentary on the IBA Rules the Tribunal considers that the appropriate balance is reached by applying, amongst the rules at stake, the highest standards on protection which, for purposes of this case are the USA's rules on attorney-client privilege and work product doctrine ("US law"). The Tribunal will not apply the Mexican rules on professional secret because applying this standard could affect the fairness and equality between the Parties and disregard Mr. Joshua Dean Nelson and Mr. Jorge Luis Blanco's expectations at the time the legal advice was provided.</u></i>" (Procedural Order No.5, ¶¶ 16-17,19)</p>	
12.	Vito G. Gallo v. The Government of Canada, PCA Case No. 2008-03	<p><i>"Canada points out that the UNCITRAL Arbitration Rules, which govern the proceedings, are silent on determinations of legal privilege, and that the IBA Rules, which are to provide guidance on the admissibility and assessment of evidence, leave it to the Arbitral Tribunal to determine the legal rules applicable to privilege. In this situation, Canada suggests that the applicable legal rules on privilege be Canadian law, since this arbitration concerns legal advice being provided by Canadian counsel to Canadian clients in Canada.</i></p> <p><i>The Arbitral Tribunal has reviewed the Parties' allegations and, taking into consideration Art. 1131(1) NAFTA, decides that <u>international law applies.</u> But this is not the end of the matter for, as shall be seen, the Tribunal is of the view that domestic legal concepts of solicitor-client privilege are recognized and protected by international law. In addition, the Arbitral Tribunal will also consider Art. 9.2(b) and (f) of the IBA Rules (applicable by virtue of the parties' agreement reflected in para. 41 of Procedural Order no. 1) and it will take into consideration Canadian case law to the extent that it conforms to international practice."</i> (Procedural Order No. 3, ¶¶ 38, 41.)</p>	The Tribunal in this NAFTA arbitration applied international law.
13.	Cambodia Power Company v. Kingdom of Cambodia and Electricité du Cambodge, ICSID Case No. ARB/09/18	<p><i>"The Tribunal finds that International Law governs the question of the admissibility of Mr. Lobit's evidence in this Arbitration. In applying International Law, the Tribunal finds that questions of impediment, privilege, agency, confidentiality and fiduciary duties, that have been relied upon by CPC, are governed by Californian law. In reaching its determinations on the Claimant's application, the Tribunal considers that it may be guided, as agreed by the Parties, by the IBA Rules on the Taking of Evidence in International Commercial Arbitration."</i> (Decision on the Claimant's Application to Exclude Mr. Lobit's Witness Statement and Derivative Evidence, ¶ 1)</p>	The Tribunal applied international law in reaching the conclusion that Californian law governs

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			questions of privilege.
14.	<i>Lone Pine Resources Inc v. Canada</i> , ICSID Case No. UNCT/15/2	“As to legal privilege and professional secrecy under Article 9(2)(b) of the IBA Rules, the Parties also agree on the general test expressed by the decision in <i>Gallo v Canada</i> .” ((Procedural Order on Withheld and Redacted Documentation, ¶ 5)	The parties agreed to use the test established in <i>Vito Gallo v. Canada</i> with regards to questions of legal privilege.
15.	<i>Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex")</i> , ICSID Case No. ARB/10/11	<p>“The documents of which the Respondents seek production were generated by an investigative service provider in Canada to a Canadian law firm retained by a Canadian company related to a Canadian investigation. The issue of privilege thus is clearly linked to Canada. The Tribunal noted in particular that the lawyer-client relationship on which the Claimant relies is between a Canadian law firm and its Canadian client. The question whether and to what extent this relationship is covered by legal privilege thus clearly is subject to Canadian law.</p> <p><i>The Parties, too, in their argument on the question of privilege rely on Canadian law. The Claimant asserts specifically that the issue is governed by Canadian law. The assertion is not contested by the Respondents who rely on Canadian jurisprudence.</i></p> <p><i>The Tribunals therefore consider the issue under the law of Canada.</i>” (Procedural Order No. 22, ¶¶ 22-24)</p>	The Tribunal found implied party consent to apply Canadian law to questions of privilege.
Issue 2: Procedures for the Parties to Assert and Challenge Claims of Privilege			
16.	<i>Global Telecom Holding S.A.E. v. Canada</i> , ICSID Case No. ARB/16/16	Both parties submitted letter briefs to the Tribunal to explain their claims of privilege and to object to privilege claimed by the other party. Subsequently, the parties also submitted a <u>Stern Schedule</u> setting out their respective positions on disputed issues of privilege over various categories of documents withheld. (Procedural Orders No. 4, 5 & 6)	Procedures for Asserting Claims of Privilege
17.	<i>Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania</i> ,	“The Respondent contends that the Privilege Log is incomplete and does not comply with standards applicable in international arbitration. According to the Respondent, a privilege log should contain a description of the document, its date, author and any recipients, and should explain what privilege is invoked and why. The Respondent complains that the Claimant provided only some of the requirements in its Privilege Log, i.e. the date of the document, the sender and recipient’s e-mail addresses and what type of privilege is invoked, but failed	Level of detail for privilege logs

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	ICSID Case No. ARB/15/41	<p><i>to give any description of the subject matter of the documents, and did not provide any explanation ‘as to a specific type of privilege that applies to the relevant document.’ The Respondent further complains that the Claimant did not specify the identity and position, or role of the people copied in the relevant communications and did not explain whether a recipient is merely copied or is an actual addressee of the communication.</i> (. . .)</p> <p><i>[T]he Tribunal intends to give each party the initial benefit of its assertion to privilege as there is not practical purpose or economic sense for the Tribunal to examine each of such assertions.</i></p> <p><i>Having looked into the Privilege Log and the Index of New Documents (Annexes 01 and 02 to the Respondent’s Application), the Tribunal is satisfied that both indexes sufficiently set out the respective assertions of privilege in respect to each of the documents listed. They are fully compliant with the direction made in Procedural Order 5b. No further direction for a “privilege log” more specifically requested by the Respondent would be required. (Procedural Order No. 6b, ¶¶ 10, 14-16.)</i></p>	
18.	<i>Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6</i>	<p><i>“The Tribunal also specified that, in asserting legal or settlement privilege over a requested document, the requested Party could <u>opt either to identify the document in a ‘Privilege Log’ or to deliver the document to the requesting Party with the privileged information redacted Drawing on the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration, 2010 (the ‘IBA Rules’), the Tribunal laid down criteria and procedural requirements for document production in some detail, requiring the production of Redfern schedules in which requests for production and opposition based on, for example, legal or settlement privilege could be made.</u>” (Decision on Annulment, ¶ 90.)</i></p> <p><i>“On 6 March 2018, the Arbitral Tribunal provided guidance as to how to proceed:</i></p> <p><i><u>‘The challenge to any Redacted Document or to any Privilege Log Documents must be done on a document-by-document basis. Thus, the Tribunal cannot entertain Colombia’s general Request for Relief either for all the Redacted Documents or for all the Privilege Log Documents.</u></i></p> <p><i>In order to solve this incident in the quickest and most efficient way possible, the Tribunal suggests that the Parties confer and try to reach an agreement on any disputed document.</i></p>	Procedures for Asserting/Challenging Claims of Privilege

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		<p><i>If, having made the appropriate good faith efforts to find a solution, it cannot be reached, the Tribunal will gladly solve any requests on a document-by-document basis.” (Award, ¶ 105.)</i></p>	
19.	<p><i>Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1</i></p>	<p><i>“The Tribunal there decided (inter alia) that as regards the privilege or privileges invoked or to be invoked by the Claimants and the Respondent, each side should prepare a <u>privilege log</u> identifying, by reference to any ordered document or (if not an identified document) any narrow and specific category of documentation, the particular privilege invoked by that side in relation to such document or documentation.</i></p> <p><i>The Tribunal also decided that <u>the requesting Party should have an opportunity to respond in writing to such privilege log, with the responding Party being afforded a brief opportunity to reply to such response, also in writing.</u></i></p> <p><i>The Tribunal further requested the Parties to consult amongst themselves with a view to agreeing upon a <u>time-table for the exchange of these privilege logs, further submissions and certifications.</u>” (Procedural Order No. 8, ¶¶ 3-5.)</i></p> <p><i>“[T]he Parties simultaneously exchanged their replies to objections to privilege and provided such completed privilege logs to the Tribunal. Each privilege log was accompanied by a letter dated 11 June 2013.” (Procedural Order No. 8, ¶ 11.)</i></p>	<p>Procedures for Asserting/Challenging Claims of Privilege</p>
20.	<p><i>Philip Morris Asia Limited v. The Commonwealth of Australia, PCA Case No. 2012-12</i></p>	<p><i>“[T]he Parties shall exchange <u>privilege logs</u> listing any associated documents that a Party wishes to withhold on grounds of legal impediment or privilege or special political or institutional sensitivity. Such privilege logs shall (i) identify the author, recipient, document type and document date; (ii) contain the title, subject line and a brief description of the subject matter, without disclosing any possible privileged content; and (iii) provide a brief explanation as to why the document is believed to be privileged or otherwise not subject to production.” (Procedural Order No. 10, ¶ 2.)</i></p> <p><i>“[T]he Parties shall exchange any objections that they may wish to raise in respect of the other Party’s privilege claims, without copying the Tribunal... [T]he Parties shall have an opportunity to respond to the other Party’s objections, without copying the Tribunal... [T]he Parties shall <u>submit any unresolved objections to privilege claims to the Tribunal for a decision</u>” (Procedural Order No. 10, ¶¶ 4-6.)</i></p>	<p>Level of detail for privilege logs</p>

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21.	<i>Cambodia Power Company v. Kingdom of Cambodia and Electricité du Cambodge</i> , ICSID Case No. ARB/09/18	In order to object to “ <i>specific communications about which</i> ” a witness has testified or to which the Respondent has referred “ <i>on the basis that the communication itself is subject to attorney-client privilege,</i> ” the Claimant shall “ <i>particularise any objection it may have to the use of each of the documents</i> ” and “ <i>identify by means of a Redfern Schedule, with reasons, any specific passages in Mr. Lobit’s 1st witness statement that are said to refer to communications that are covered by attorney-client privilege.</i> ” (Decision on the Claimant’s Application to Exclude Mr. Lobit’s Witness Statement and Derivative Evidence, ¶¶ 3-4.)	Procedures for Asserting/Challenging Claims of Privilege
22.	<i>Vale S.A. v. BSG Resources Limited</i> , LCIA Case No. 142683	“ <i>Before the deadline for the production of documents, the Parties shall confer and come to an agreed procedure for the content and format of any necessary privilege logs. Privilege logs shall only be sent to the Tribunal if, after consultation between the Parties, the Parties require some intervention or additional ruling by the Tribunal.</i> ” (Second Decision on Document Production, ¶ 184.)	Procedures for Asserting/Challenging Claims of Privilege
23.	<i>Global Philippines LLC and GGAM Netherlands BV v. Bloomberry Resorts and Hotels Inc. and Sureste Properties Inc.</i>	The Tribunal ordered <u>the Parties to assert attorney-client privilege by justifying to each other the existence of the attorney-client relationship and the basis for redactions.</u> The tribunal would decide any pending issues. (Partial Award on Liability, ¶ 24.)	Procedures for Asserting/Challenging Claims of Privilege
24.	<i>ConocoPhillips Company, formerly known as Tosco Corporation v. HDI-Gerling Industrie Versicherung AG, formerly known as Gerling Knozern Allgemeine Versicherungen</i>	“ <i>To the extent that [Claimant] asserts any privilege as the basis for withholding any of the documents covered, [Claimant] should list such documents on a privilege log with appropriate identifying information. In addition, [Claimant] should supply [Respondent], in a form that would be admissible in evidence, any factual material in the documents withheld that reflect relevant admissions by [Claimant] as well as any data or factual evidence related to the need to determine the reasonability of the settlements reached, including the methodology utilized in determining the allocations agreed.</i> ” (Order No. 1 Concerning Cross-Motions to Compel and Tosco Motions for Partial Summary Judgment, ¶ 23.)	Procedures for Asserting/Challenging Claims of Privilege
25.	<i>Galway Gold v. Republic of Colombia</i> , ICSID Case No. ARB/18/13	“ <i>In respect to the documents requested by the Respondent under numbers 2, 3, 4, and 5 of their Stern Schedule Request, the Claimant is instructed to submit by 26 February 2021 to the Respondent, copying the Arbitral Tribunal, a “privilege log” relating to such documents that are in its possession, custody or control that are responsive to the document request of the Respondent, but are being withheld from disclosure by the Claimant based on its</i>	Procedures for Asserting/Challenging Claims of Privilege

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		<p><i>assertion of a legal privilege (such as attorney-client privilege). In the event that the Respondent disputes a claim of privilege identified in the privilege log, it may submit the objections by 5 March 2021. The Tribunal will then decide on whether the requested production is justified. <u>The “privilege log” should take the form of a table, where each row corresponds to a document that has been withheld on the basis of legal privilege. In the various columns, each row should contain, at a minimum, the following information about the document: the author or sender, the addressee or recipient, the date of creation or transmission, the nature of the legal privilege and a description sufficient to identify the document. The information in the privilege log should be adequate for the Tribunal to evaluate for each withheld document the validity of the legal privilege that the Claimant has asserted, without compromising the information that is claimed to be subject to the relevant privilege.</u>” (Procedural Order No. 2, ¶ 11)</i></p>	
26.	<p><i>Gran Colombia Gold Corp. v. Republic of Colombia, ICSID Case No. ARB/18/23</i></p>	<p><i>“For avoidance of doubt, <u>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.</u></i></p> <p><i>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. <u>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.</u>” (Procedural Order No. 11 on the Parties Requests for Documents, 28 September 2021, ¶¶ 8-9.)</i></p>	<p>Procedures for Asserting/Challenging Claims of Privilege</p>
27.	<p><i>Glamis Gold v. United States of America, UNCITRAL</i></p>	<p><i>“In order to complete this determination, the Tribunal requests the following from the Parties:</i></p> <p><i>a. <u>From Respondent, a description of any renewed challenges to Claimant’s withheld documents—if any remain—with an explanation for such challenges provided on a</u></i></p>	<p>Procedures for Asserting/Challenging Claims of Privilege</p>

No.	Case Name	Excerpt of Tribunal Decision	Notes
		<p><i>document-by-document basis, preferably in a table or log format that is easily tied to the privilege log provided to it by Claimant. Should Respondent not seek any further documents from Claimant, please inform the Tribunal of such. The Tribunal requests such information by February 8, 2006.</i></p> <p><i>b. From Claimant, a challenge to Respondent's assertions of privilege on a document-by-document basis. The Tribunal recognizes the arguments of invalidity and out-weighting that Claimant asserted with respect to three categories of documents generally in its January 16, 2006 letter. In order to enable the Tribunal to examine the validity of claims of privilege on a document-by-document basis, however, the Tribunal requests that Claimant relate each argument to each challenged document with an adequate degree of specificity. Therefore, the Tribunal requests a log or table easily tied to the privilege logs provided to it by Respondent listing each document that Claimant still seeks with an explanation of how the assertion of privilege is incorrect or invalid with respect to that document, or why Claimant's need is so great for that document that this need outweighs Respondent's interest in withholding the document. In addition, if it does not present a large additional burden for Claimant, the Tribunal would like a list of all documents arranged by the arguments against their privileged nature. The Tribunal requests such documents by February 15, 2006" (Procedural Order, No. 8, ¶ 10)</i></p>	
28.	<i>Nord Stream 2 AG v. European Union, PCA Case No. 2020-07</i>	<p><i>"The Tribunal has generally rejected the Respondent's objections based on privilege under Article 9.2(b) of the IBA Rules due to the <u>failure identify the specific document(s) or portion(s) thereof containing privileged information</u>, as well as the legal basis for the assertion of privilege. Similarly, the Tribunal has rejected certain objections based on political or institutional sensitivity under Article 9.2(f) of the IBA Rules due to the <u>failure to identify the precise information that is considered politically or institutionally sensitive as well as the legal basis upon which it should be so classified.</u>" (Procedural Order No. 5 (Document Production), ¶ 10)</i></p>	Lack of adequate or specific information on objections based on privilege
29.	<i>Air Canada v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/17/1</i>	<p><i>"In relation to Respondent's Redfern Schedule:</i></p> <p><i>a. Claimant shall, in relation to Respondent's Requests Nos 4 and 6, <u>submit a privilege log in relation to documents that may be protected by legal privilege in line with the principles of Article 9(2)(b) and 9(3) of the IBA Rules by 20 September 2018. Respondent shall provide its comments to such log by 28 September 2018. The Tribunal shall decide by 5 October 2018(Respondent's Redfern Schedule, page 12, Request No. 4 and page 16, Request No. 6).</u>" (Award, ¶ 56)</i></p>	Procedures for Asserting/Challenging Claims of Privilege
30.	<i>Fouad Alghanim & Sons Co. for General Trading</i>	<p><i>"If either party objects to the production of any responsive document on the grounds of legal impediment or privilege in terms of Article 9(2)(b) of the IBA Rules, they are to <u>particularize</u></i></p>	Procedures for Asserting/Challenging

No.	Case Name	Excerpt of Tribunal Decision	Notes
	<p><i>& Contracting and others v. Jordan</i>, ICSID Case No. ARB/13/38</p>	<p><u>that claim in a log which identifies the nature of the document, its date, and the basis of the claim of legal impediment or privilege, by 15 September 2015. That log must also, where appropriate, demonstrate why the impediment in question cannot be satisfied by means of appropriate confidentiality protections pursuant to Article 9(4) of the IBA Rules.</u> (Procedural Order No. 3, ¶ 4)</p>	<p>ging Claims of Privilege</p>
<p>Issue 3: Methods for the Tribunal to Decide on Claims of Privilege</p>			
<p>31.</p>	<p><i>Global Telecom Holding S.A.E. v. Canada</i>, ICSID Case No. ARB/16/16</p>	<p>The Tribunal decided the parties' claims of privilege on the basis of the Stern Schedules alone, with the caveat that the contesting party could bring a petition to have a Tribunal-appointed neutral expert or the Tribunal itself (with party agreement) to review the non-disclosed documents.</p> <p><u>"After reviewing Canada's arguments, the Tribunal declines to uphold a presumption that GTH acted deliberately to withhold responsive documents or that counsel representing GTH in this arbitration have fabricated groundless privilege arguments. Should any evidence to the contrary surface, it should be brought forthwith to the Arbitral Tribunal's attention at any stage of the proceedings for the appropriate measures to be taken.</u></p> <p><u>In particular, the Tribunal notes GTH's unqualified assertion that it only withheld "legal advice". The fact that in-house counsel delivering that advice might also hold non-legal responsibilities within the company as pointed out by Canada does not, of itself, justify an inference or a presumption that GTH's assertion is disingenuous or that GTH, or its counsel, sought to cover under a privilege blanket all communications of whatever nature, including business or strategic advice involving that in-house counsel. Specific evidence to the contrary is required to override the privilege claimed in this respect. The onus of providing such evidence falls on the contesting party, here Canada.</u></p> <p><u>It is open to Canada to petition the Arbitral Tribunal to apply Article 3.8 of the IBA Rules and organise the tendering by GTH of non-disclosed unredacted documents either to a Tribunal-appointed neutral expert or to the Tribunal itself (if the Parties so agree) to determine whether the alleged privilege is warranted. The allocation of the resulting costs will depend on the result of the determination.</u>" (Procedural Order No. 5, Annex A, pp. 27-28.)</p> <p>Subsequently, many documents remained in dispute, and the Tribunal appointed an independent expert to review the documents and decide, individually, whether each should be disclosed. (See Procedural Order No. 8 [Independent Expert Assessment on Privilege], Annex A.)</p>	<p>Presumption that privilege is properly claimed absent evidence to contrary; appointment of neutral expert</p>

No.	Case Name	Excerpt of Tribunal Decision	Notes
32.	<i>Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania</i> , ICSID Case No. ARB/15/41	<p><i>“While the Tribunal has given to each party the initial benefit of its assertion to privilege, the Tribunal would nevertheless investigate such an assertion if and when there are circumstances to suggest that documents are being improperly withheld or excessively redacted, amounting to an abuse of the right so asserted.</i></p> <p><i>Based on the arguments made on behalf of the Respondent, the Tribunal finds <u>no basis to suggest that the Claimant has abused this process.</u> If it subsequently transpires in the course of the full presentation of the evidence before the Tribunal that privilege could not be supported for any of the documents for which it is asserted, the Tribunal would direct further specific production or draw such inferences as may be appropriate.”</i> (Procedural Order No. 6b, ¶¶ 51-52.)</p>	Presumption that privilege is properly claimed absent evidence to contrary
33.	<i>Pristec Refining Technologies USA and others v. Pristec America and others</i> , AAA Case No. 01-22-0000-7497	<p><i>“In the first place, the Amended Arbitration Agreement placed strict limitations on the permitted discovery both in terms of time (“on an expedited basis”); scope (limited to questions regarding “authenticity, terms, execution and/or satisfaction”); and volume (interrogatories not to exceed 20 questions; notice to produce not to exceed 20 requests; notice to admit not to exceed 40 questions). These constraints evidence a clear intent that the matter proceed to an evidentiary hearing expeditiously, without the undue delay occasioned by resolving burdensome and time-consuming discovery disputes. And although the Amendment allowed for some relaxation, any accommodation is entirely within the discretion of the Arbitrator, and then only, to allow for a reasonably limited extension.</i></p> <p><i>Second, and just as significant, discovery has already been exchanged in this matter, with Laura having certified that he produced all non-privileged and relevant documents in his possession and having provided sworn answers to interrogatories along with a certificate of completeness. Facially at least, Laura’s objections to several of de Rubio’s discovery requests appear reasonably grounded in legitimate claims of privilege and over breadth, particularly with respect to those demands related to the ‘Glenwood Action’ that had been dismissed with prejudice, as well as those seeking confidential information pertaining to Laura’s legal representation of de Rubio’s family members. Of course, should these objections ultimately prove meritless, Laura will bear the consequences of non-production at the evidentiary hearing stage For these reasons, then, de Rubio’s motion to extend discovery is DENIED.”</i> (Arbitrator’s Ruling on Claimants’ Motion to amend Arbitration Demand and For Additional Discovery; and Third Party Respondent’s Motion to Extend Discovery and Compel Responses to Discovery Demands ¶¶ 24, 25.)</p>	Presumption that privilege is properly claimed absent evidence to contrary

No.	Case Name	Excerpt of Tribunal Decision	Notes
34.	<i>B-Mex, LLC Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States</i> , ICSID Case No. ARB(AF)/16/3	<p><i>“The purpose of the Privilege Expert Report was to assist the Tribunal in assessing (i) the merits of privilege/confidentiality claims by the QE Claimants over certain documents for which the QE Claimants and Mr. Taylor had offered conflicting descriptions in the privilege logs and (ii) the appropriateness of redactions made by the QE Claimants and contested by another Party.</i></p> <p><i>The Tribunal has, as it must, subjected the Privilege Expert Report to critical scrutiny. Having done so, the Tribunal is satisfied that the observations and findings set out in the Privilege Expert Report are clear and warrant no further inquiries of the Privilege Expert by the Tribunal.</i></p> <p><i>In the attached Annex A, the Tribunal sets out its rulings in respect of each of the documents and redactions that were referred to the Privilege Expert.”</i> (Procedural Order No. 17, ¶¶ 2-4.)</p> <p>Example of a ruling from Annex A: <i>“Taking into account the observation by the Privilege Expert that the QE Claimants’ description of the document as requesting legal advice from outside corporate counsel is fair, the Tribunal upholds the QE Claimants’ privilege claim.”</i></p>	Appointment of neutral expert
35.	<i>St. Marys VCNA, LLC v. The Government of Canada</i> , PCA Case No. 2012-19	<i>“[T]he Tribunal nominated Justice James Spigelman, AC, QC, to consider the privilege issues raised by the Respondent.”</i> (Consent Award, ¶ 13.) Justice Spigelman wrote a Report on Inadvertent Disclosure of Privileged Documents on whether certain documents were privileged and whether the privilege had been waived. (See Report on Inadvertent Disclosure of Privileged Documents by James Spigelman.)	Appointment of neutral expert
36.	<i>Hawaiian Host, Inc. v. Citadel Food Group Hawaii, LLC and Citadel Windbreak, LLC</i> , DPR Case No. 20-0538-A	<i>“During discovery, Hawaiian Host claimed that certain documents were privileged. After considering a motion to compel by Citadel, the Arbitrator found certain documents were not privileged and also ordered Hawaiian Host to produce (or supplement) a particular privilege log by September 1, 2021 After in camera review by the Arbitrator . . . , Hawaiian Host produced some 1,200 pages of documents approximately one month before the first scheduled day of the arbitration Many of those documents apparently were included in email strings that may have already been disclosed, or were redundant as redacted versions of other known documents The Arbitrator considered Hawaiian Host’s arguments that Citadel’s motion [to postpone the hearing] was ‘a desperate pretense to move the arbitration hearing,’ . . . and that the recently produced documents were, relatively speaking, not of</i>	Mentions in camera review This was an arbitration under the AAA Rules between two U.S. parties, which may explain the references to

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		<p><i>critical importance The Arbitrator knew the procedural posture of the case, the contents of the documents he had just reviewed in camera, and the context (within the framework of the arbitration as a whole) of the recent production of documents Under these circumstances, the scheduling of the arbitration hearing was clearly a matter of the Arbitrator’s discretion, as he would have had any number of reasons not to postpone its commencement.” (Order of the U.S. District Court for the District of Hawaii Granting Petitioner’s Motion to Confirm and Denying Respondents’ Counter-Motion to Vacate Arbitration Award, ¶¶ 54-56.)</i></p>	<p>other U.S. traditions in the arbitration like a motion to compel production of the documents in dispute.</p>
37.	<p><i>Major League Baseball Properties, Inc. v. Corporación de Televisión y Microonda Rafa, S.A., ICDR Case No. 01-17-0007-5412</i></p>	<p><i>“Telemicro also argues that the Arbitrator displayed “manifest disregard” for the law in awarding MLB attorneys’ fees Specifically, Telemicro argues that (1) the Arbitrator failed to consider Telemicro’s successful defense of a particular claim, which limited MLB’s recovery, and (2) the Arbitrator decided the attorneys’ fee award after reviewing MLB’s unredacted invoices in camera on an ex parte basis.</i></p> <p><i>(. . .)</i></p> <p><i>Telemicro cites no caselaw to suggest a manifest disregard of the law or fundamental unfairness with respect to the Arbitrator’s decision to review MLB’s invoices in camera over concerns of attorney-client privilege In fact, caselaw suggests the opposite: courts often review invoices and billing records in camera when calculating awards of attorneys’ fees and costs Thus, it cannot be said that the Arbitrator’s decision to review the records in camera amid concerns of attorney-client privilege constituted a manifest disregard of the law.” (Opinion and Order granting Motion for Summary Judgment and Confirming Arbitration Award ¶¶ 12, 14.)</i></p>	<p>Mentions <i>in camera</i> review</p> <p>This was an arbitration under the AAA Rules between a U.S. party and a Dominican party.</p>
38.	<p><i>Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1</i></p>	<p><i>“[T]his Tribunal considers that the Parties’ invocation of privilege in these arbitration proceedings relates not only to the non-production by the responding Party to a request for document production but also as a bar to the admission of such documentation into evidence by the requesting Party. Accordingly, <u>the Tribunal being a final judge of factual issues in these arbitration proceedings, it is inappropriate for the Tribunal to examine for itself, ex parte, any document or part of a document for which privilege is invoked by a responding Party, quite apart from any question of due process. The Tribunal has considered appointing an independent and impartial referee to examine the disputed documents and redactions under Article 3(9) of the IBA Rules or its inherent procedural powers (such a referee would not suffer from the same predicament as the Tribunal); but, from concerns as to efficiency,</u></i></p>	<p>Mentions <i>in camera</i> review</p> <p>Finds that it is inappropriate for the tribunal to conduct <i>in camera</i> review</p>

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		<i>time and cost, the Tribunal decided not to take that particular path in regard to this Order.</i> " (Procedural Order No. 8, ¶ 16.)	
39.	<i>Glamis Gold v. United States of America, UNCITRAL</i>	<p><i>"In addition, it [the Tribunal] outlined procedures by which the Parties were to explain their assertions of privilege and challenge those of the other party. These procedures included the eventual possibility of in camera review of the documents should the Parties be unable to resolve outstanding document production disputes. Included with these procedures was a timetable specifying the dates upon which each of the procedures was to be completed. This timetable was intentionally drawn up with short time periods so as to preserve the possibility of the Tribunal holding a hearing in this matter before the end of 2006."</i></p> <p><i>"In keeping with its November 17 Decision, the Tribunal views the next—and hopefully final—step in this production process as being its examination of the validity of claims of privilege on a document-by-document basis, as informed by the privilege logs submitted by the withholding party and the challenges raised by the requesting party."</i> (Procedural Order No. 8, ¶¶ 2, 10.)</p>	Mentions the possibility of <i>in camera</i> review
Issue 4: Scope of Privilege			
40.	<i>Caratube v. Kazakhstan (II), ICSID Case No. ARB/13/13</i>	<i>"On 26 August 2015, the Tribunal issued its decision on the admissibility of the Client-Attorney Email/the Non-Privileged Email. The Tribunal reconfirmed its earlier decision to afford privileged documents the utmost protection. On this basis, the Tribunal confirmed its decision that the Client-Attorney Email/the Non-Privileged Email should not be admissible as evidence and relied upon in this arbitration, subject however to the Claimants choosing to submit such documents to an independent expert for assessment."</i> (Award, ¶ 166.)	The Tribunal recognized attorney-client privilege.
41.	<i>Tidewater Investment SRL and Tidewater Caribe, C.A. v. Venezuela, ICSID Case No. ARB/10/5</i>	<i>"The Tribunal considers that, in principle, documents which it might otherwise be necessary to produce may legitimately be privileged from production if they consist of confidential documents made in connection with and for the purpose of providing or obtaining legal advice."</i> (Procedural Order No. 1 on Production of Documents (Procedural Order No. 1 on Production of Documents, ¶ 35.)	The Tribunal recognized attorney-client privilege.
42.	<i>Glamis Gold v. United States of America, UNCITRAL</i>	<i>"The Tribunal notes that the party asserting the privilege has the burden of proving that such privilege applies to each document but, after that showing is made, the burden shifts to the other party to contest the privilege. The Tribunal recognizes that, <u>when asserting this privilege, it is important to make clear that the attorney is indeed acting as such and providing legal advice, and is not acting as a policy-maker or corporate officer. Therefore, it is critical that, when invoking the privilege, the invoking party explain with sufficient specificity the role the attorney is taking.</u></i>	Attorney-client privilege also applies to government agencies.

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		<p><i>With respect to government attorneys, the Tribunal finds a <u>general consensus among courts that the attorney-client privilege applies equally to government agencies: "[i]n the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer."</u></i> The Tribunal finds the application of this consensus rule is appropriate to this Arbitration. [...] Communications between different government agencies should remain privileged to the extent that there is a "substantial identity of legal interests" within the different agencies in the particular subject matter of the communications." (Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, ¶¶ 23-24)</p>	
43.	<p><i>Apotex Holdings Inc. and Apotex Inc. v. United States of America</i>, ICSID Case No. ARB(AF)/12/1</p>	<p><i>"US Courts, as also courts in other common law countries, have long recognized that attorney-client privilege can extend beyond the traditional relationship between an individual attorney and an individual client. The privilege may thus attach to communications with third parties acting as agents of an attorney, when the purpose of their work is to facilitate the provision of legal advice by that attorney. This approach recognises that lawyers in modern times for complex disputes need technical, financial or other expert consultants to "translate" difficult issues in order properly to advise their clients. In the Tribunal's view, the critical question here is whether the principal purpose of the third-party communications was to provide for legal advice from the Regulatory Counsel to the Claimants."</i> (Procedural No. 8 on Document Production Regarding the Parties' Respective Claims to Privilege and Privilege Logs, ¶ 32)</p>	<p>Attorney client privilege can extend to third parties acting as agents of an attorney.</p>
44.	<p><i>Vito G. Gallo v. The Government of Canada</i>, PCA Case No. 2008-03</p>	<p><i>"Legal advice is recognised in most jurisdictions as having a privileged status and the right to invoke said privilege is considered to be a fundamental right. The rationale behind solicitor-client privilege is that lawyers are impaired from candidly offering their best advice to clients, and clients will not be able to speak freely with their lawyers, if the confidentiality of the communications is not guaranteed. For this reason, privilege from disclosure can be claimed for documents relating to the giving or seeking of legal advice.</i></p> <p><i>In general, a document needs to meet the following requirements in order to be granted special protection under solicitor-client privilege:</i></p> <ul style="list-style-type: none"> - <i>The document has to be drafted by a lawyer acting in his or her capacity as lawyer;</i> - <i>A solicitor-client relationship based on trust must exist as between the lawyer (in-house or external legal advisor) and the client;</i> - <i>The document has to be elaborated for the purpose of obtaining or giving legal advice;</i> 	<p>The Tribunal recognized attorney-client privilege.</p>

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		<p>- <i>The lawyer and the client, when giving and obtaining legal advice, must have acted with the expectation that the advice would be kept confidential in a contentious situation.</i>" (Procedural No. 3, ¶¶ 46-47)</p>	
45.	<p><i>Burlington Resources Inc. v. Republic of Ecuador</i>, ICSID Case No. ARB/08/5</p>	<p><i>"It is true that Ecuador argues that its ability to rely on the Suspension Plan during the liability phase was compromised by Burlington's allegedly wrongful invocation of privilege. However, that argument fails, since the Tribunal considers that the Suspension Plan is indeed privileged under the work product doctrine, as it was generated by in-house and outside counsel for Perenco for the purposes of ongoing arbitral proceedings. Accordingly, it could only have been produced once Perenco consented to lift the privilege."</i> (Decision on Reconsideration and Award, ¶ 121.)</p>	<p>The Tribunal recognized the work product doctrine in deciding what evidence is privileged.</p>
46.	<p><i>ACP Axos Capital GmbH v. Republic of Kosovo</i>, ICSID Case No. ARB/15/22</p>	<p><i>"As a general principle, the Tribunal accepts the widely recognized principle that legal advice provided by external legal counsel is covered by privilege and does not need to be justified. Therefore, the documents falling within this description of the legal privilege are excluded from production.</i></p> <p><i>However, the Parties have also asserted other types of privilege, as well as differing characterizations of legal privilege that do not fall within the above-stated definition. To the extent either Party wishes to rely on any privilege, other than the above-defined legal privilege, the source of the privilege must be specified and each category falling within that privilege must be identified.</i></p> <p><i>The same applies when a Party relies upon an expectation of confidentiality that is not based on privilege but arises under a contract with a third-party or otherwise.</i></p> <p><i>Documents containing partially privileged information or information partially confidential may be redacted with the claimed privilege or confidentiality clearly indicated. Documents withheld or redacted on grounds of privilege or confidentiality must be identified in a privilege log as seen in Appendix 3.</i></p> <p><i>Every reference to privilege or confidentiality in the Tribunal's decisions to the specific requests exclude only those documents that comply with the above decision."</i> (Procedural Order No. 2, ¶¶ 7-11.)</p>	<p>The Tribunal recognized legal privilege.</p>
47.	<p><i>Gabriel Resources Ltd and Gabriel Resources (Jersey) v. Romania</i>, ICSID Case No. ARB/15/31</p>	<p><i>"The Tribunal notes that it is undisputed that a requested document which is the subject of legal privilege shall be excluded from production. Indeed, pursuant to Article 9(2)(b) of the IBA Rules, the Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document for "legal impediment or privilege under the legal or</i></p>	<p>The Tribunal recognized attorney-client privilege.</p>

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		<p><i>ethical rules determined by the Arbitral Tribunal to be applicable”.</i> (Procedural Order No. 10, para. 44)</p> <p><i>“The Tribunal further notes that it is undisputed that written work product of counsel and direct communications with counsel are subject to attorney-client privilege. With respect to whether other documents are subject to attorney-client privilege or other legal privilege shall be for the Tribunal to decide in line with the aforementioned principles (see above para. 45 [referring to Article 9(3) of the IBA Rules]).”</i> (Procedural Order No. 10, para. 46).</p> <p><i>“Therefore, where a document contains statements subject to legal privilege, such document should be disclosed but with the relevant statements redacted (Article 9(2)(b) of the IBA Rules). [...]”</i> (PO No. 12, para. 25).” (Procedural Order No 13, ¶ 9)</p>	
48.	<i>Lone Pine Resources Inc v. Canada</i> , ICSID Case No. UNCT/15/2	<p><i>“As to legal privilege and professional secrecy under Article 9(2)(b) of the IBA Rules, the Parties also agree on the general test expressed by the decision in Gallo v Canada. The Tribunal considers that the same general test applies to both in-house and out-house counsel, within the private and public sector, as illustrated by the decision in Prichard v Ontario (Human Rights Commission). As a general approach, the Tribunal places on a similar footing “commercial or technical confidentiality” and “special political or institutional sensitivity” under Articles 9(2)(e) and 9.2(f) of the IBA Rules.³ Article 9(3) here plays no additional separate part in the Tribunal’s decisions, excepting Article 9(3)(d): see below.”</i> (Procedural Order on Withheld and Redacted Documentation, ¶ 5)</p>	Legal privilege extends to in-house and out-house counsel.