

PCA Case No. 2018-39

**IN THE MATTER OF AN ARBITRATION UNDER THE TREATY BETWEEN THE
GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF
THE REPUBLIC OF BOLIVIA CONCERNING THE ENCOURAGEMENT AND
RECIPROCAL PROTECTION OF INVESTMENT, SIGNED ON APRIL 17, 1998 AND
ENTERED INTO FORCE ON JUNE 6, 2001**

- and -

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW, AS REVISED IN 2010/2013 (the “UNCITRAL Rules”)**

- between -

**1. THE ESTATE OF JULIO MIGUEL ORLANDINI-AGREDA
2. COMPAÑÍA MINERA ORLANDINI LTDA.**

(the “Claimants”)

- and -

THE PLURINATIONAL STATE OF BOLIVIA

(the “Respondent”, and together with the Claimants, the “Parties”)

PROCEDURAL ORDER NO. 2

Protocol on Confidentiality and Transparency

Tribunal

Dr. Stanimir A. Alexandrov (Presiding Arbitrator)
Professor Dr. Guido Santiago Tawil
Dr. José Antonio Moreno Rodríguez

March 8, 2019

I. Background

1. The Tribunal issued its Procedural Order No. 1 on February 4, 2019. Section 12.1 of Procedural Order No. 1 provides:

The Parties shall confer and propose to the Tribunal the terms of an appropriate order, consistent with Article 28(3) and Article 34(5) of the UNCITRAL Rules, that provides appropriate protection to business proprietary and other confidential information while ensuring transparency where confidentiality is not required.

2. On February 25, 2019, the Parties informed the Tribunal that they had failed to reach agreement on the terms of a confidentiality order in accordance with Section 12.1 of Procedural Order No. 1, and each submitted a confidentiality and transparency order proposal for the Tribunal to consider.

II. Analysis

3. Articles 28(3) and 34(5) of the UNCITRAL Rules prescribe that hearings shall be held *in camera* and awards shall not be made public unless the Parties agree otherwise. Aside from these two provisions, the UNCITRAL Rules are silent on questions of confidentiality and transparency of the proceedings. Failing an agreement between the Parties on this matter, and in accordance with Article 17(1) of the UNCITRAL Rules, it is for the Tribunal to decide the appropriate level of confidentiality and transparency that shall apply to this arbitration.
4. During the first procedural meeting, the Claimants favored a confidentiality regime, pointed out that a transparent proceeding would raise concerns for the safety of Mr. Orlandini's relatives still living in Bolivia and could result in confidential business and proprietary information being inappropriately divulged. The Respondent favored transparency and highlighted a series of factors favoring transparency, including the obligation of the officers of the *Procuraduría General del Estado* to divulge certain case-related information under Bolivian law, the exception set forth in Article 34(5) of the UNCITRAL Rules allowing disclosure of an award where disclosure is "required of a party by legal duty", and a trend favoring transparency in investor-State arbitration, including in three recent investment treaty arbitrations against Bolivia.
5. As noted in Section 12.1 of Procedural Order No. 1, the Tribunal is inclined to ensure transparency for every aspect of the proceedings where confidentiality is not necessary or is not prescribed by the applicable rules. In defining a confidentiality protocol under Article 17(1) of the UNCITRAL Rules, the Tribunal must also strive to accommodate the Parties' concerns regarding the publication of case documents, while also avoiding "unnecessary delay and expense" and providing "a fair and efficient process for resolving the [P]arties' dispute."
6. It can be gleaned from the Parties' proposed confidentiality orders that the Parties are in agreement on several aspects of the confidentiality and transparency of these proceedings, but disagreements remain on the publication of (i) the Parties' written submissions; (ii) the Tribunal's orders and other decisions; and (iii) executive summaries of the Tribunal's awards. The Tribunal addresses these matters *seriatim*.

7. First, regarding the publication of the Parties' written submissions, the Tribunal considers that a blanket transparency order would not meet the Claimants' concern regarding the inappropriate dissemination of confidential information. While redactions to the Parties' submissions would suffice to overcome this concern, the Tribunal is also conscious of the need to avoid placing on the Parties, and the Tribunal, an excessive burden potentially creating "unnecessary delay and expense". The Tribunal has therefore decided to allow each Party to publish its own written submissions in this arbitration, subject to consultation with the other Party on any redactions deemed necessary to protect business proprietary and other confidential information. The Tribunal nonetheless reserves its powers to revisit this decision at a later stage after having reviewed written submissions made by the Parties and formed a better view of the amount and nature of the confidential information they contain.
8. Different considerations apply to the publication of the Tribunal's orders and other decisions. By their own nature, tribunal orders are less likely to contain confidential information. Here, in the Tribunal's view, transparency considerations would outweigh any delay or expense that might result from applying redactions to the Tribunal's decisions prior to their publication. Thus, the Tribunal has decided to order publication of its orders and decisions, following consultations with the Parties on the level of redaction required.
9. Finally, the Tribunal considers that publishing an executive summary of any of its awards, after due consultation with the Parties, is also consistent with "ensuring transparency where confidentiality is not required." This is to be understood notwithstanding the Parties' right to agree to the publication of any award as per Article 34(5) of the UNCITRAL Rules.
10. Bearing in mind these considerations, the Tribunal sets a Protocol on Confidentiality and Transparency in **Annex 1** to this Procedural Order No. 2.

III. Issuance of Procedural Order No. 2

11. The determinations set out in Section 14 of Procedural Order No. 1 shall apply, *mutatis mutandis*, to this Procedural Order.

Place of Arbitration: Paris, France



Dr. Stanimir A. Alexandrov
(Presiding Arbitrator)

On behalf of the Tribunal

Annex 1: Protocol on Confidentiality and Transparency

Whereas Section 12.1 of Procedural Order No. 1 provides:

The Parties shall confer and propose to the Tribunal the terms of an appropriate order, consistent with Article 28(3) and Article 34(5) of the UNCITRAL Rules, that provides appropriate protection to business proprietary and other confidential information while ensuring transparency where confidentiality is not required.

Whereas on February 25, 2019, the Parties informed the Tribunal that they had failed to reach agreement on the terms of a confidentiality order in accordance with Section 12.1 of Procedural Order No. 1, and each submitted a confidentiality and transparency order proposal for the Tribunal to consider;

Whereas Article 17(1) of the UNCITRAL Rules reads:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

Now the Tribunal issues the following Protocol on Confidentiality and Transparency:

- a) Pursuant to the agreement of the Parties, the PCA shall publish the existence of the arbitration, the names of the Parties, counsel representing the Parties and the members of the Tribunal on its website. The PCA shall provide an advance draft of the contents of any webpage relating to the arbitration to the Tribunal and the Parties for their approval prior to publication on its website.
- b) Pursuant to Article 28(3) of the UNCITRAL Rules, hearings shall be held *in camera* and hearing transcripts shall remain confidential unless the Parties agree otherwise.
- c) The Terms of Appointment, procedural orders and other decisions of the Tribunal shall be made public on the PCA's website, subject to redactions where necessary to protect business proprietary and other confidential information. Prior to publication, the Tribunal shall set a time limit in which the Parties shall give notice, jointly or separately, that they seek redactions in such documents.
- d) Either Party may publish its own written submissions (excluding accompanying exhibits, witness statements or expert reports and any other accompanying documents), subject to the following procedure:
 - (i) Promptly following submission of a written pleading to the Tribunal by a Party, that Party shall inform the other Party of its intention to publish that pleading.

- (ii) The Parties shall then seek agreement, to the greatest extent possible, on the redaction of any information they deem confidential, or information the disclosure of which could jeopardize the conduct of a fair and efficient arbitration. All correspondence or documents exchanged in the course of this process shall not be copied to the Tribunal. If the Parties fail to reach an agreement, they shall submit any disputed redactions to the Tribunal.
 - (iii) Any information designated for redaction by a Party shall be kept confidential and treated as confidential, unless the Tribunal, at the request of the other Party, determines that it shall not be redacted.
- e) Pursuant to Article 34(5) of the UNCITRAL Rules, awards shall only be made public with the consent of all Parties. If the Parties do not agree on the publication of an award, the Tribunal may prepare and publish an executive summary of the proceedings, following consultations with the Parties. The Tribunal shall remain constituted for this purpose.
- f) Save otherwise indicated in this Protocol, all information exchanged or submitted in these proceedings shall be confidential and not disclosed to any third party, except as authorized by the Tribunal or as necessary for a Party to pursue or defend a legal right (including in related proceedings between the same or related parties).
- g) The Tribunal will retain full authority to determine all issues concerning confidentiality and transparency and the implementation of this protocol, including the disclosure of any information about the arbitration.