

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”, or “Bolivia”, and together with the Claimants, the “Parties”)

PROCEDURAL ORDER NO. 12

Decision on the Respondent’s Application of March 22, 2021

Tribunal

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

April 1, 2021

I. Background

1. On February 4, 2019, the Tribunal issued its Procedural Order No. 1 (“**PO 1**”). Section 11 (Third Party Funding) of PO 1 reads as follows:

11.1 The Parties shall submit a written notice disclosing the use of third party funding to cover the costs of this arbitration and the identity of the third party funder. Such notice shall be sent to the Tribunal once the third party funding agreement has been signed.

11.2 Each Party bears the ongoing duty to disclose any change in the information addressed in Section 11.1 occurred after the initial disclosure, including termination or withdrawal of the funding agreement.

2. On April 24, 2019, the Respondent submitted its *Solicitud de Terminación, Trifurcación y Cautio Judicatum Solvi*, requesting, *inter alia*, that the Tribunal (i) order the Claimants to provide security for costs in the amount of, at least, USD 4 million to guarantee full payment of an award requiring the Claimants to bear the costs of arbitration; and (ii) order the Claimants to confirm whether they are using any third party funding and, if so, to disclose the identity of the funder, as well as the terms of the funding agreement concluded with said funder.
3. On May 24, 2019, the Claimants submitted their Opposition to the Application for Termination, Trifurcation and Security for Costs, requesting, *inter alia*, that the Tribunal reject the Respondent’s application for security for costs. In their submission, the Claimants further advised that they had “no disclosures to make based on Procedural Order No. 1”.
4. On July 9, 2019, the Tribunal issued its Decision on the Respondent’s Application for Termination, Trifurcation and Security for Costs, in which the Tribunal, *inter alia*, rejected the Respondent’s application for security for costs.
5. On March 17, 2021, the Respondent requested an opportunity to address the Tribunal at the pre-hearing conference on “Claimants’ refusal to comply with paragraph 11.1 of Procedural Order No. 1, and the corresponding order that Bolivia will seek from the Tribunal in this regard”. On March 18, 2021, the Tribunal granted leave to the Respondent to address this matter at the pre-hearing conference, and also granted leave to the Claimants to respond.
6. On March 18, 2021, the Tribunal held a pre-hearing videoconference with the Parties, which, among other matters, addressed the Respondent’s contentions on the Claimants’ alleged non-compliance with Section 11.1 of PO 1.
7. On March 22, 2021, and as directed by the Tribunal, the Respondent submitted a written application “for an order compelling Claimants to disclose the circumstances in which their claims in this arbitration are being funded” (the “**Application**”).
8. On March 29, 2021, the Claimants submitted their response to the Application.

II. The Respondent’s Application

9. The Respondent explains that its Application is based on five factual circumstances that have been admitted in writing by the Claimants both before the Tribunal and before the Florida Probate Court. First, it notes that the Claimants have no assets and have had no assets for years, as confirmed by (i) the inventory of the Estate of Julio Miguel Orlandini-Agreda, which only listed as assets the claims submitted in this arbitration (at an “estimated fair market value” of

USD 0.00); and (ii) the Claimants' own admission in this arbitration that Compañía Minera Orlandini Ltda. ("CMO") has no assets.

10. Second, the Respondent observes that the Claimants' share of the advance on costs has been paid, and the Claimants have likewise incurred in attorneys' fees and other costs in connection with this arbitration. As such, it would be entitled to know, for instance, whether Counsel for the Claimants are working on a partial or full contingency basis or a conditional fee agreement.
11. Third, the Respondent asserts that such payments must have been facilitated or made on the Claimants' behalf by a third party, the identity of which has been withheld. It adds that Mr. Orlandini was in contact with a third party funder (Woodsford Litigation Funding) in July 2017.
12. Fourth, in the Respondent's view, the Tribunal's past observations regarding the Claimants' ability to pay the advance on costs were based on the Claimants' "misleading representations and on an incomplete evidentiary record", but it has since become apparent that the Claimants did not have any assets at the time the relevant payment was made.
13. Fifth, the Respondent posits that Mr. Orlandini "was a serial debtor and a serial defaulter" and was involved in numerous proceedings commenced by his creditors, while CMO similarly incurred multiple debts, causing its creditors to seek to auction off the company's assets on more than one occasion.
14. Having set out this factual context, the Respondent relies on four reasons to support its request for disclosure. First, it argues, referring to the IBA Guidelines on Conflicts of Interest in International Arbitration, that having knowledge of the existence and terms of the funding agreement is necessary to assess the nature and level of involvement of the third party funder in this case, which in turn "is necessary to ensure that all Parties to this case meet the basic jurisdictional requirements".
15. Second, the Respondent submits that the UNCITRAL Rules allow the Tribunal to request information from the Parties when it is justified with regard to the integrity of the proceedings or to protect the interests of a Party, noting that multiple international arbitral tribunals have indeed ordered disclosure of the identity of the third party funder and even of the terms of the third party funding agreement. Disclosure of such information, it explains, is necessary in order to determine whether there are any conflicts of interest, as well as consistent with the prevailing approach in modern international arbitration practice.
16. Third, the Respondent rejects the Claimants' interpretation of Section 11.1 of PO 1 that disclosure would be limited to signed funding agreements, since such interpretation would fail to mitigate or eliminate any of the risks that this provision was designed to avoid and thus allows the Claimants to circumvent its spirit.
17. Fourth, the Respondent contends that there is a "real risk" that the Claimants will be unable to satisfy an award on costs favorable to the Respondent, such that having knowledge of the terms of the funding agreement would enable it to assess whether a renewed request for security for costs should be explored.

18. In sum, the Respondent requests that the Tribunal order the Claimants to:
1. Reveal without delay the identity of the person(s) or entity(ies) that made the payment of Claimants' share of the advance on costs of these proceedings;
 2. If different from the foregoing, reveal without delay the identity of the person(s) or entity(ies) that made the payment of Claimants' other costs of these proceedings (such as expert fees, expenses, etc.), including whether Claimants' legal representation is undertaken on a partial or full contingency basis, or under a conditional fee agreement; and
 3. Disclose whether the person(s) or entity(ies) that made the payments in either (1) or (2) (or both) has a stake in the outcome of the case; and if it does, reveal the arrangement, if any, in case there is a cost award in favor of Bolivia.

III. The Claimants' Position

19. At the outset, the Claimants reiterate that they "have no third-party funding agreement to disclose under paragraph 11.1 of Procedural Order No. 1".
20. In any event, they assert that the scope of the disclosure sought by the Application goes beyond the Parties' obligation under Section 11.1 of PO 1 and international arbitration practice, underscoring that the engagement agreement between the Claimants and their counsel is privileged and confidential and thus not subject to disclosure. In fact, the Respondent itself did not envision Section 11.1 to include any kind of fee agreement when requesting its inclusion in PO 1, to the extent that such agreement does not add a "new" party to the proceeding which could create a conflict of interest.
21. The Claimants further submit that none of the factual circumstances invoked by the Respondent warrants granting its Application, recalling that they have demonstrated their willingness and ability to cover the costs of these proceedings and confirming that they will continue to do so in a timely manner. They claim that the Application is yet another attempt improperly to obtain private and confidential information about the Claimants, noting that the Tribunal has already rejected previous similar requests from the Respondent. In this vein, they dispute the Respondent's "speculation" based on a message sent by Mr. Orlandini to an executive of Woodsford Litigation Funding, insisting that they have no third party agreement to disclose in this respect. The Respondent would have also failed to identify any "misleading representations" by the Claimants, while it has relied on the very same circumstances it unsuccessfully invoked to request security for costs, meaning that no "new facts" would have emerged to warrant the Application.
22. Lastly, and notwithstanding their position that they have no disclosures to make under PO 1, the Claimants rebut the legal arguments advanced by the Respondent. First, they deny that the existence of a third party funding agreement may affect the jurisdiction of the Tribunal, observing that investment arbitration tribunals have uniformly retained jurisdiction despite the existence of third party funders considering that such funders were not parties to the arbitrations.
23. Second, the Claimants argue that disclosure of their fee agreement with their counsel is not required to determine if the members of the Tribunal have any potential conflicts of interest, reiterating that, unlike in the cases cited by the Respondent (in which disclosure of the terms of the agreement was not always ordered), there is no funding agreement to disclose in the instant case.

24. Third, the Claimants confirm that they have no disclosure to make under Section 11.1 of PO 1, including any “oral agreement” with a third party funder.
25. Fourth, they contend that there is no basis for the Respondent to establish that it will be entitled to any costs award and add that the factual circumstances underpinning its requests for security for costs and for document production (regarding the Claimants’ funding in this case), both of which were denied by the Tribunal, have not changed. The Claimants further note that, while the Respondent had previously contended that the lack of third party funding would create a risk that they would not be able to pay the Respondent’s costs, it now suggests that the presence of such an agreement could justify requesting security for costs, a reasoning that has been rejected by the Tribunal and numerous other tribunals.
26. For all these reasons, the Claimants request that the Tribunal reject the Application in its entirety.

IV. Analysis

27. The Tribunal notes that in its PO 1, Section 11, it ordered as follows:

11.1 The Parties shall submit a written notice disclosing the use of third party funding to cover the costs of this arbitration and the identity of the third party funder. Such notice shall be sent to the Tribunal once the third party funding agreement has been signed.

11.2 Each Party bears the ongoing duty to disclose any change in the information addressed in Section 11.1 occurred after the initial disclosure, including termination or withdrawal of the funding agreement.

28. In response to the Respondent’s application, the Claimants have confirmed that there is no third-party funding agreement, whether in writing or oral, with a third-party funder. In light of that statement, the Tribunal concludes that the Claimants are in compliance with Section 11 of PO 1.
29. The Tribunal does not believe that the Claimants should be required to disclose, at this juncture, the payment and billing arrangements with their counsel. Those arrangements may become relevant at the stage when the Tribunal will need to decide on the allocation of costs and legal fees.
30. The Tribunal notes that the Respondent’s request that the Claimants disclose the identity of the persons or entities who have covered the Claimants’ costs and fees in this arbitration is rendered moot, for the purposes of this Application, by the Claimants’ confirmation that there is no funding agreement with a third-party funder.

V. Decision

31. The Tribunal:
 - (i) Takes note of the Claimants’ statement that there is no funding agreement, whether in writing or oral, with a third-party funder.
 - (ii) Declines the remaining requests included in the Respondent’s Application.

Place of Arbitration: Paris, France



Dr. Stanimir A. Alexandrov
(Presiding Arbitrator)

On behalf of the Tribunal