

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. 9

Respondent’s Request of February 16, 2021

Tribunal

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

February 21, 2021

I. Background

1. On April 10, 2020, the Tribunal issued Procedural Order No. 7, amending the procedural calendar of the arbitration. Procedural Order No. 7 fixed the deadline for submission of the Respondent's Rejoinder on February 25, 2021.
2. Following consultations with the Parties, on February 16, 2021, the Tribunal scheduled a pre-hearing conference for March 18, 2021. The Tribunal also invited the Parties to confer and attempt to agree on the issues of the conduct of the Hearing on Jurisdiction and Liability, and to inform the Tribunal of the outcome of their discussions no later than March 11, 2021.
3. Also on February 16, 2021, the Respondent requested "(i) the procedural opportunity to seek document production from Claimants on the basis of the substantial body of new evidence enclosed with Claimants' Reply...and (ii) a one-month extension of the time-limit for the submission of Bolivia's Rejoinder" (i.e. until March 25, 2021) (the "**Request**").
4. On February 19, 2020, the Claimants filed their comments on the Request.

II. The Respondent's Request

5. The Respondent's Request is premised on three different grounds. *First*, the Respondent submits that the Claimants have belatedly filed together with their Reply (i) the first expert report on U.S. law of Professor Peter Spiro (**CER-8**); (ii) the first witness statement of Dr. Avi Yanus (**CWS-8**), and (iii) the first witness statement of Luz Marina Gutiérrez Reguerin (**CWS-9**). According to the Respondent, most of such evidence could and should have been filed together with the Statement of Claim. As regards the consequences arising from the late filing of evidence, the Respondent recalls that the Claimants were granted an opportunity to seek document production from Bolivia's constitutional law expert, Mr. Arturo Yáñez Cortes, which was submitted only three weeks following the filing of the Statement of Defense.
6. In particular, the Respondent cites difficulties in addressing "the 10 audio recordings of interviews of five individuals carried out, without their knowledge or consent, by undercover agents of the business intelligence firm B.C. Strategy UK Ltd." ("**Black Cube**"), which are appended to Dr. Yanus' statement. The Respondent claims that contacting and interviewing those five individuals, as well as 12 other persons who are named in the recordings, is requiring considerable time and resources, and some of those persons are yet to be located. The Respondent is also critical of the fact that three of those interviews predate the Statement of Claim and two were carried out one month after its filing.
7. In turn, the Respondent is of the view that the expert report of Professor Spiro, which is centered on Mr. Orlandini's purported acquisition of U.S. nationality at the time of his birth in the U.S., should have been filed together with the Statement of Claim, seeing that Claimants first alleged that Mr. Orlandini was a U.S. national in that pleading.
8. *Second*, the Respondent asserts that the preparation of the Rejoinder "has been hindered by the period of political and institutional transition which the State has undergone since the presidential election held on 20 October 2019 and following the restoration of an elected government after the October 2020 elections." The resulting "political and social turmoil" and changes in high-level public positions (including in the leadership of the *Procuraduría General del Estado*), according to the Respondent, have created difficulties when searching for relevant documentation and persons, transmitting instructions to counsel and allocating resources to the Respondent's defense in this case.

9. *Third*, the measures taken to prevent the spread of COVID-19 in Bolivia have added “an additional layer of difficulty” to the Respondent’s efforts to locate and interview relevant persons. The Respondent notes that most potential witnesses do not reside in La Paz, while some of them are elderly individuals who are unfamiliar with remote-working technology.
10. *Lastly*, the Respondent considers that the relief it requests “neither affects the dates reserved for the Oral Hearing on Jurisdiction and Liability (17-21 May 2021), nor causes prejudice to Claimants.”
11. The Respondent’s request for relief is as follows:

For all the above reasons, Bolivia respectfully requests the Tribunal to (i) extend the time-limit for the filing of its Rejoinder by one month, from 25 February to 25 March 2021, and (ii) provide Bolivia with the opportunity to seek disclosure from Claimants, on the basis of the witness statement of Dr. Avi Yanus and the audio recordings enclosed therewith, according to the following calendar:

- Bolivia’s request for documents: within 5 days from the Tribunal’s decision on the present application;
- Claimants’ production of the requested documents and/or objections thereto (if any): within 7 days from Bolivia’s request for documents; and
- Bolivia’s application to the Tribunal for an order compelling Claimants to disclose the requested documents (if any): within 5 days from Claimants’ objections (if any).

III. The Claimants’ Position

12. The Claimants request that the Tribunal reject the Request, which they consider is an attempt by the Respondent “to force an unfair procedural calendar to obtain more time to prepare its Rejoinder than was given to Claimants to prepare their Reply and further reduce Claimants’ time to prepare for the Hearing to the detriment of Claimants’ rights to due process and fair procedure.”
13. In respect of the Respondent’s assertions regarding COVID-19, the Claimants recall that the Respondent has already submitted three extension requests that were motivated by the pandemic, the last of which was rejected on April 29, 2020, at which time the Tribunal noted that any additional extension request “should not be based on the general situation arising out of the COVID-19 pandemic.” In this regard, the Claimants also cite Procedural Order No. 7, in which the Tribunal recognized that “that the proceeding can move forward, albeit with some delay, in a socially responsible manner by adapting to the new reality of communicating remotely.” According to the Claimants, it was for these reasons that they rejected an *inter partes* proposal from the Respondent to extend the deadline for the filing of the Rejoinder, since such proposal was solely based on the delays arising from the current health crisis.
14. The Claimants also reject that the changes in leadership within the Bolivian government and the resulting political turmoil could justify another extension. They recall, in this regard, that the Respondent raised the exact same argument in connection with the 2019 election and obtained relief for that reason. Further, in the Claimants’ view, any “institutional knowledge” that the Respondent may require for its defense in this case should have been obtained in the three years during which these proceedings have been pending.
15. Finally, the Claimants consider that the Respondent’s request for an extension and for additional discovery “would violate Claimants’ due process rights and the principle equality of arms” for three reasons. *First*, the Parties agreed, and the Tribunal confirmed, that there would only be one round of document production during the phase on jurisdiction and liability. In this regard, the

Claimants consider that their request for disclosure of materials concerning the expert report of Mr. Arturo Yáñez Cortés is not analogous to the Request, since the Claimants' request was based on the Respondent's failure to file the said report together with its Statement of Defense.

16. *Second*, the Claimants claim that all evidence filed with their Reply responds to or rebuts matters raised in the Statement of Defense, as required under Section 7.3 of Procedural Order No. 1, and as such cannot be characterized as "new evidence". They further observe that Black Cube conducted its investigations from June 2019 until November 2020, that is, until well after the filing of the Statement of Claim. In particular, the Claimants claim that 8 out of the 11 interviews conducted by Black Cube were conducted after that filing. The Claimants observe that the Respondent did not seek documents from them concerning their allegations of corruption and conspiracy within the Bolivian government during the document production phase.
17. As to the expert report of Professor Spiro, the Claimants note that it was prepared to address the Respondent's contention in its Statement of Defense that Mr. Orlandini, while born in the U.S., would not have automatically become a U.S. citizen.
18. Finally, the Claimants note that the Respondent has provided no reasons why the witness statement of Luz Marina Gutiérrez Reguerin was filed belatedly, and note that in any event such statement testifies to the events that occurred just one month before the Claimants' filing of their Reply.
19. *Third*, the Claimants consider that granting the Request would be prejudicial to their due process rights. They observe, in particular, that the Request has been filed one week before the Rejoinder is due, and granting it would create an improper imbalance, since it "would leave Claimants with *less than two months* to analyze Bolivia's Rejoinder and prepare for the Hearing, while Bolivia will have had *five months and fifteen days* to analyze Claimants' Reply and prepare for the Hearing from the date of Claimants' submission of the Reply" (emphasis in the original).

IV. Analysis

20. The Tribunal begins with the timing of the Respondent's application. The Claimants' Reply is dated November 26, 2020. The Respondent has failed to explain why it waited until February 16, 2021, less than 10 days before the deadline for its Rejoinder, to seek an extension and leave to file a document production request.
21. Further, the Tribunal is not persuaded that an extension is warranted because of either the difficulties caused by the COVID pandemic or the political situation in Bolivia. The COVID pandemic has been an unfortunate reality for about one year. The Parties have had ample opportunity to adjust to this new reality. If the Respondent encountered specific and unforeseen problems in that regard, it should have raised them earlier. As to the political situation, political and institutional transitions are not uncommon in democracies where they happen as a matter of course. Moreover, changes at the helm of the relevant institutions do not erase the institutional knowledge of the working level staff and the Respondent has not argued otherwise.
22. Finally, the Tribunal is not persuaded that the expert report on U.S. law of Professor Peter Spiro (**CER-8**) and the witness statement of Luz Marina Gutiérrez Reguerin (**CWS-9**) have been filed belatedly. They appear responsive to arguments made by Respondent in the Statement of Defense and the Tribunal does not consider their submission with the Reply improper.

23. The witness statement of Dr. Avi Yanus (**CWS-8**) is another matter. Respondent argues that Dr. Yanus' witness statement encloses 10 audio recordings of interviews of five individuals, which total almost 16 hours of material, and, throughout their course, at least 12 other persons are named. Regardless of the Respondent's belated application, the Tribunal cannot rule out that the Respondent may need more time to process the Yanus Witness Statement and the accompanying materials and may legitimately seek the production of documents in that regard.
24. The Tribunal therefore is willing to grant the Respondent an extension that would allow it to process the materials accompanying the Yanus Witness Statement and to submit document production requests on that basis. The Tribunal notes that granting the Respondent leave to submit document production requests does not pre-judge in any way the Tribunal's decision on whether to grant or deny any such requests. The Tribunal further notes that any document production requests must be strictly limited to the content of the Yanus Witness Statement and the accompanying materials.
25. Having rejected the Respondent's grounds on seeking an extension except with respect to the matters arising out of the Yanus Witness Statement, the Tribunal believes that a one-month extension is unwarranted. Further, the Tribunal wishes to preserve not only the hearing dates but also the date fixed for the pre-hearing conference, which is March 18, 2021.
26. Therefore, the Tribunal is willing to grant Respondent a two-week extension for the filing of its Rejoinder, i.e., by March 11, 2021, one week before the pre-hearing conference. Within that time, any issues arising out of the document production requests must be resolved. The Tribunal will grant the Respondent 3 days from the date of this Order to address its document production requests to the Claimants, 3 days to the Claimants to respond, and 3 days for the Respondent to apply to the Tribunal for the resolution of any disputes arising of the document production requests.

V. Order

- The Respondent shall submit its Rejoinder by no later than March 11, 2021.
- The Respondent shall present to the Claimants document production requests arising strictly from the Yanus Witness Statement and the accompanying materials within 3 days of the date of this order.
- The Claimants shall respond to such requests within 3 days of receiving them.
- The Respondent shall seek the Tribunal's decision on any disputed document production requests within 3 days of receiving the Claimants' response.
- The Amended Procedural Calendar for the Phase on Jurisdiction and Liability shall be amended accordingly and shall be as set out in **Annex 1** to this order.

Place of Arbitration: Paris, France



Dr. Stanimir A. Alexandrov
(Presiding Arbitrator)

On behalf of the Tribunal

Annex 1: Amended Procedural Calendar for the Phase on Jurisdiction and Liability

Description	By	Days	Dates
<i>Initial Phase on Jurisdiction and Liability</i>			
Step 1: Statement of Claim, with any Witness Statement(s) and Expert Report(s)	Claimants	129 days from Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs	November 15, 2019
Step 2: Statement of Defense, including any objection to the Tribunal's jurisdiction and/or counterclaim, with any Witness Statement(s) and Expert Report(s)	Respondent	173 days from Step 1	May 6, 2020
<i>Document Production Phase on Jurisdiction and Liability</i>			
Step 3: Request to Produce Documents	Claimants and Respondent	21 days from Step 2	May 27, 2020
Step 4: Production of Non-Objected Documents and Objections to Produce	Claimants and Respondent	33 days from Step 3	June 29, 2020
Step 5: Response to Objections to Produce and reasoned applications for an order on production of documents in the form of a Redfern Schedule (Annex 2 of Procedural Order No. 1)	Claimants and Respondent	14 days from Step 4	July 13, 2020
Step 6: Decision on Request to Produce Documents	Tribunal	14 days from Step 5	July 27, 2020
Step 7: Production as ordered	Claimants and Respondent	31 days from Step 6	August 27, 2020

Description	By	Days	Dates
<i>Written Pleadings on Jurisdiction and Liability</i>			
Step 8: Reply with any Reply Witness Statement(s) and Expert Report(s)	Claimants	91 days from Step 7	November 26, 2020
Step 9: Rejoinder with any Rejoinder Witness Statement(s) and Expert Report(s)	Respondent	105 days from Step 8	March 11, 2021
Step 10: Notification of witnesses and experts for the examination at the Hearing	Claimants and Respondent	18 days from Step 9	March 29, 2021
<i>Oral Pleadings on Jurisdiction and Liability</i>			
Step 11: Pre-hearing Conference	All	7 days from Step 9	March 18, 2021
Step 12: Oral Hearing on Jurisdiction and Liability	All	60 days from Step 11	May 17-21, 2021
<i>Post-Hearing Pleadings on Jurisdiction and Liability</i>			
Step 13: Post-Hearing Briefs (TBD)	Claimants and Respondent	TBD	TBD
Step 14: Award on Jurisdiction and Liability	Tribunal	TBD	TBD

[***the schedule for the next phase of the proceedings shall be fixed, if necessary, once the Tribunal issues its Award on Jurisdiction and Liability***]