

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. 14

Request to Strike the Wanderley Witness Statements from the Record

Tribunal

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

July 23, 2021

I. Background

1. The Respondent has submitted two witness statements by Ms. Cristina Wanderley da Silva in this arbitration, dated, respectively, May 6, 2020 (RWS-1) and March 10, 2021 (RWS-3).
2. On March 29, 2021, in accordance with the Amended Procedural Calendar set out in Annex 1 of Procedural Order No. 9, dated February 21, 2021, the Parties notified the witnesses and experts whom they intended to call for cross-examination at the Oral Hearing on Jurisdiction and Liability (the “**Hearing**”). Among other witnesses, the Claimants called Ms. Wanderley for examination at the Hearing.
3. On April 4, 2021, and after consulting with the Parties, the Tribunal established a tentative schedule for the Hearing, which foresaw, *inter alia*, the examination of Ms. Wanderley.
4. On May 14, 2021, the Respondent advised that Ms. Wanderley would not testify at the Hearing, “on the advice of her personal legal counsel”.
5. The Hearing was held by videoconference between May 17 and May 22, 2021 (the “**Hearing**”).
6. On July 7, 2021, the Claimants submitted their Post Hearing Brief, in which, *inter alia*, they requested that the Tribunal strike Ms. Wanderley’s witness statements from the record and draw the appropriate inferences, “including from the lack of evidence to support the false and defamatory statements about Claimants included in her statements” (the “**Request**”).
7. On July 21, 2021, the Respondent submitted its comments on the Claimants’ Request.

II. The Claimants’ Request

8. The Claimants note that Ms. Wanderley was the sole fact witness that the Respondent presented to support its allegations that Mr. Orlandini was a “serial fraudster” and a “serial debtor and defaulter”. Had she appeared at the Hearing, they assert, referring to the testimony of Mr. Gonzalo Blanco, they would have disproved her story about Mr. Orlandini and proved her involvement in some of the illegalities and Treaty breaches allegedly committed by the Respondent.
9. According to the Claimants, Ms. Wanderley’s “last-minute” refusal to testify was likely motivated by the significant criminal and civil liability for the “defamatory and false accusations” contained in her witness statements and her actions during the *Martínez* case, while the Respondent might have also “pressured” her not to testify. Invoking their due process rights and the principles of fairness and equality of arms, the Claimants contend that Ms. Wanderley did not provide “exceptional circumstances or valid reasons” for her non-appearance before the Tribunal, such that the Tribunal should strike and decline to consider her witness statements.

III. The Respondent’s Position

10. The Respondent opposes the Claimants’ Request and requests that the Tribunal assess the probative weight of Ms. Wanderley’s witness statements in light of the evidentiary record of this arbitration.
11. First, the Respondent observes that the Claimants have not disputed that the reason invoked by Ms. Wanderley for her non-appearance was valid, which, in accordance with paragraph 8.7 of

Procedural Order No. 1, would be sufficient for her witness statements to not be stricken from the record.

12. Second, the Respondent argues that the Claimants had “ample time and procedural opportunities” to show the Tribunal that Ms. Wanderley’s statements were incorrect, noting that none of the Claimants’ witnesses referred to her in their statements and that the Claimants have instead resorted to *ad personam* attacks and other “regrettable” and “unsupported” accusations.
13. Third and last, the Respondent submits that the Tribunal, rather than striking Ms. Wanderley’s statements, should weigh their evidentiary value. It notes that such solution (i) has been applied by other tribunals in instances where a witness summoned to testify at a hearing did not appear for a valid reason; and (ii) is consistent with the fact that the expert reports and witness statements of other experts and witnesses are not being stricken from the record even if the Respondent did not call them to be examined at the Hearing.

IV. Analysis

14. Having carefully considered the Parties’ respective positions, the Tribunal does not consider that the witness statements of Ms. Wanderley can be kept as part of the record.
15. First, the right to test through cross-examination the written evidence provided by a witness constitutes a fundamental due process right, of which the Claimants have been deprived. The deprivation of this right is even more significant in this case, where Ms. Wanderley has made statements in her written testimony that are highly prejudicial to one of the original claimants, Mr. Orlandini, and has levied serious accusations against him.
16. Second, Ms. Wanderley’s refusal to appear to testify at the Hearing on the advice of her personal legal counsel indicates that she wishes to avoid answering certain questions that might have been put to her during cross-examination or by the Tribunal. As the nature of such questions and why Ms. Wanderley is reluctant to answer them remain unclear, this cannot constitute a valid reason for failing to appear before the Tribunal.
17. Third, Ms. Wanderley’s refusal to appear to testify at the Hearing came at a very late point in time, namely, on the last business day prior to the commencement of the Hearing. Ms. Wanderley must have been made aware that she could be called for cross-examination much earlier, i.e., when she decided to submit her written testimony. She should have sought the advice of her attorney at that time. By deciding to submit written testimony, Ms. Wanderley has accepted the duty to appear to be cross-examined at the Hearing.
18. Finally, as to the inferences that should be drawn from Ms. Wanderley’s withdrawal, the Tribunal will decide in its award, and on the basis of its assessment and weighing of the value of the totality of the evidence, what inferences, if any, it will draw.

V. Order

19. For the reasons stated above, the Tribunal has decided as follows:
 - (i) The first witness statement of Ms. Cristina Wanderley da Silva, dated May 6, 2020 (RWS-1) and the second witness statement of Ms. Cristina Wanderley da Silva, dated March 10, 2021 (RWS-3), are hereby stricken from the record of the present arbitration; and

- (ii) All references in the Respondent's pleadings to the witness statements of Ms. Wanderley are hereby expunged from the record of this arbitration.

Place of Arbitration: Paris, France



Dr. Stanimir A. Alexandrov
(Presiding Arbitrator)

On behalf of the Tribunal