

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”)**

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**PROCEDURAL ORDER NO. 15**

**Decision on the Claimants’ Application for a Partial Award  
and the Respondent’s Second Request for Security for Costs**

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*Tribunal*

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

**November 12, 2021**

## I. Background

1. Section 11.2 of the Terms of Appointment, dated December 18, 2018, provides as follows:

The PCA will review the adequacy of the deposit from time to time and, at the request of the Tribunal, may invite the Parties to make supplementary deposits. The Tribunal will request that the Parties make supplementary deposits in equal amounts, without prejudice to the final decision of the Tribunal as to the allocation of costs.

2. 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.

3. 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 (the “**First SFC Request**”); 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.
4. 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 First SFC Request. In their submission, the Claimants further advised that they had “no disclosures to make based on Procedural Order No. 1”.
5. On July 9, 2019, the Tribunal issued its Decision on the Respondent’s Application for Termination, Trifurcation and Security for Costs (the “**First Decision on SFC**”), in which the Tribunal, *inter alia*, rejected the Respondent’s application for security for costs.
6. At the pre-hearing conference held on March 18, 2021, and with the Tribunal’s leave, the Parties made certain comments regarding 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 for Disclosure**”). The Claimants submitted their response to the Application for Disclosure on March 29, 2021.
8. Also on March 29, 2021, the Tribunal requested the Parties to make a supplementary deposit of USD 500,000 (*i.e.*, USD 250,000 each Party) no later than April 28, 2021 (the “**First Supplementary Deposit**”), in order to ensure sufficient funds for the Oral Hearing on Jurisdiction and Liability (the “**Hearing**”) and the preparation of the Tribunal’s ruling on Jurisdiction and Liability.
9. On April 1, 2021, the Tribunal issued its Procedural Order No. 12, in which the Tribunal (i) took note of the Claimants’ statement that there was no funding agreement, whether in writing or oral,

with a third-party funder; and (ii) declined the remaining requests included in the Application for Disclosure.

10. On April 8, 2021, the Respondent informed that it “cannot make any further deposits of public funds unless and until Claimants provide appropriate security for Bolivia’s costs.”
11. On April 9, 2021, the Tribunal invited the Claimants to make a substitute payment of the Respondent’s share of the First Supplementary Deposit, as well as their own share (*i.e.*, USD 500,000 in total), without prejudice to any consequences that may arise from the Respondent’s decision not to make further deposit payments in this case.
12. On April 20, 2021, the PCA confirmed receipt of USD 250,000 from the Claimants, representing their share of the First Supplementary Deposit. On the same day, the Claimants submitted certain comments regarding the Respondent’s decision not to make any further deposit payments and reaffirmed their willingness and ability to advance the remainder of the total amount of the First Supplementary Deposit, should the Tribunal require it following the Hearing.
13. The Hearing was held by videoconference between May 17 and May 22, 2021.
14. On May 26, 2021, the Tribunal noted that the Respondent’s share of the First Supplementary Deposit remained unpaid and requested the Claimants to make a substitute payment of the Respondent’s share of such deposit, in order to ensure sufficient funds for the preparation of the Tribunal’s upcoming ruling.
15. On June 24, 2021, the PCA confirmed receipt of USD 250,000 from the Claimants, representing a substitute payment of the Respondent’s share of the First Supplementary Deposit. On the same day, the Claimants submitted further comments on the Respondent’s decision not to make further deposit payments, reserving their right to seek relief from the Tribunal in that respect and noting that they had made the substitute payment without prejudice.
16. On August 12, 2021, the Tribunal requested the Parties to make an additional supplementary deposit of USD 400,000 (*i.e.*, USD 200,000 each Party) (the “**Second Supplementary Deposit**”) in order to ensure sufficient funds for the continued preparation of the Tribunal’s upcoming ruling. It also invited the Respondent to revisit its decision not to make further deposit payments and inform the Tribunal accordingly.
17. On August 19, 2021, the Respondent confirmed “that it cannot make any further deposit payments in this case unless and until Claimants provide appropriate security for Bolivia’s costs.”
18. On August 20, 2021, the Tribunal invited the Claimants to make a substitute payment of the Respondent’s share of the Second Supplementary Deposit (*i.e.*, USD 200,000) pursuant to Article 43(4) of the UNCITRAL Rules, without prejudice to any consequences that may arise from the Respondent’s decision not to make any further deposit payments.
19. On September 13, 2021, the Claimants submitted certain comments concerning the Respondent’s refusal to pay the Second Supplementary Deposit, reserving their right to seek relief from the Tribunal in this respect, “including Claimants’ right to submit an application to the Tribunal for a partial award seeking reimbursement by Bolivia of the substitute payments made by Claimants and all costs associated with Bolivia’s failure to make its payments as per the Tribunal’s orders.”

20. On September 15 and 17, 2021, the PCA confirmed receipt of two USD 200,000 payments from the Claimants, representing, respectively, their own share and the substitute payment of the Respondent's share of the Second Supplementary Deposit.
21. On September 30, 2021, the Claimants' submitted their Application for a Partial Award on Respondent's Obligation to Pay its Share of the Advance on Costs (the "**Application for a Partial Award**").
22. On October 2, 2021, and further to the Tribunal's invitation for comments on the Application for a Partial Award, the Respondent requested (i) additional time to respond to the Application for a Partial Award, such that its submission be due no later than October 22, 2021; and (ii) a one-day virtual hearing for oral argument on the Application for a Partial Award.
23. On October 4, 2021, the Tribunal advised that (i) it had decided to extend the deadline for the Respondent to submit its comments on the Application for a Partial Award until October 15, 2021; and (ii) it saw no need to hold a hearing on the Application for a Partial Award and thus rejected the Respondent's request in this respect.
24. On October 15, 2021, the Respondent submitted its Reply to Claimants' Application for a Partial Award and Request for Security for Costs (the "**Reply on Partial Award and SFC Request**").
25. On October 29, 2021, and at the Tribunal's invitation, the Claimants submitted their Opposition to Respondent's Second Request for Security for Costs (the "**Opposition to SFC Request**").

## **II. The Claimants' Application for a Partial Award**

### a) The Claimants' Position

26. The Claimants begin by referring to the framework established by the Terms of Appointment, which "constitute a valid and binding contract between the Parties as to how these proceedings would be conducted", and provided for the Parties' obligation to make deposits in equal installments when so requested by the PCA or ordered by the Tribunal.<sup>1</sup> The Claimants recall that, while they timely paid their share of the initial deposit of advance on costs, the Respondent only did so after being granted two extensions, soon after which it submitted the First SFC Request.<sup>2</sup> They further reiterate some of their arguments to oppose the First SFC Request, as well as some of the reasons for which the Tribunal rejected it.<sup>3</sup>
27. The Claimants are also critical of the Respondent's refusal to pay its share of the First Supplementary Deposit, which, in their view, lacked evidence or justification, as it disregarded its contractual obligations in this case and flaunted the Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs and Procedural Order No. 12, whereby the Tribunal denied the Application for Disclosure.<sup>4</sup> By again refusing to bear its share of the Second Supplementary Deposit, the Claimants argue, the Respondent has ignored the Tribunal's unwillingness to grant its request for security for costs and has instead exercised "an improper

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<sup>1</sup> Application for a Partial Award, para. 5; Terms of Appointment, Sections 11.1-11.2; PO 1, para. 1.

<sup>2</sup> Application for a Partial Award, paras. 4, 6-7

<sup>3</sup> Application for a Partial Award, paras. 8-9.

<sup>4</sup> Application for a Partial Award, paras. 11-13.

‘self-help’ remedy”, with the objective to obstruct the advancement and issuance of the award in this proceeding.<sup>5</sup>

28. In light of the Respondent’s “bad-faith refusal to fulfill its financial obligations without any justifiable reason”, the Claimants submit that the Tribunal should issue a partial award ordering the Respondent to reimburse them for the USD 450,000, with interest, that they have paid in this respect, which is authorized by Article 34(1) of the UNCITRAL Rules and “supported by well-accepted arbitral practice”.<sup>6</sup> They note that an enforceable award is the only means to provide them with a legally protected method of recouping these funds now, and would also be without prejudice to the Tribunal’s ability to make a different order as to the allocation of fees and costs at the conclusion of the present phase of the proceedings and its upcoming ruling on jurisdiction and merits.<sup>7</sup>
29. The Claimants assert that the Respondent’s actions are in direct violation of the Tribunals directives of March 29 and August 12, 2021, as well as of the Respondent’s express agreements.<sup>8</sup> They explain that the Respondent has consented at least three times to pay half of the advances on costs throughout this proceeding, namely, by:
- (i) executing 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 (the “**Treaty**”), whereby the Respondent consented to arbitrate in accordance with the UNCITRAL Rules, which in turn enshrine, in Article 43(1), the principle that the parties bear the advance on costs in equal shares;
  - (ii) accepting Section 11 of the Terms of Appointment, in which the Respondent assumed and consented to its obligation to pay supplementary deposits in equal amounts pursuant to Article 43(2) of the UNCITRAL Rules; and
  - (iii) paying the first advance in the amount of USD 150,000 as requested by the Tribunal.<sup>9</sup>
30. The Claimants argue that international arbitral tribunals have frequently confirmed a party’s right to seek reimbursement from another party unwilling to pay its share of the advance on costs, as the obligation to pay such advance in equal shares forms an integral part of the arbitration agreement and the parties’ general duties towards each other, aside from being also recognized by arbitral jurisprudence.<sup>10</sup> They further stress that the purpose of Article 43(4) of the UNCITRAL Rules is to allow for the continuation of the proceedings by permitting a claimant to substitute a recalcitrant respondent’s share of the advance payments, while also noting that this provision does not and cannot discharge the defaulting respondent from its obligation to pay

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<sup>5</sup> Application for a Partial Award, paras. 19-20.

<sup>6</sup> Application for a Partial Award, paras. 21-24.

<sup>7</sup> Application for a Partial Award, paras. 39-40.

<sup>8</sup> Application for a Partial Award, para. 28.

<sup>9</sup> Application for a Partial Award, paras. 25-27; Treaty, Art. IX.3(a)(iii).

<sup>10</sup> Application for a Partial Award, paras. 29-31. *See, inter alia, SensorDynamics AG Entwicklungs- UND Produktionsgesellschaft and Fraunhofer-Gesellschaft zur Förderung der angewandten Forschung E.V.V. Memscoco LLC*, ICC Case No. 15072/JHN, Partial Award, June 18, 2008, paras. 85-86, 92, 95 (**Claimants’ Annex A**); *BDMS LIMITED v. RAFAEL ADVANCED DEFENCE SYSTEMS* [2014] EWHC 451 (Comm), paras. 42-43 (**Claimants’ Annex D**); *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea (I)*, ICSID Case No. ARB/14/22, Procedural Order No. 3, November 25, 2015, para. 59 (**Claimants’ Annex E**).

half of the advance of costs, since such interpretation would render that obligation “unenforceable and potentially meaningless in practice”.<sup>11</sup>

31. Even if the UNCITRAL Rules gave the Tribunal discretionary power to reallocate the advance on costs in an unequal manner, the Claimants contend, such approach would only be warranted “in exceptional circumstances”, in line with the standard applied by tribunals when considering to deviate from the principle of equal apportionment under the ICSID Arbitration Rules.<sup>12</sup> Not only has the Respondent failed to seek any order from the Tribunal in this respect, but it has also offered no “credible basis” for its refusal to make further deposits, particularly since ICSID cases confirm that the risk of non-payment alone or the Respondent’s internal budgetary decisions would not justify altering the allocation of the advance on costs.<sup>13</sup> The Claimants add that allowing the Respondent to unilaterally shift the burden to bear the total advance on costs on the Claimants under the present circumstances would set “a dangerous precedent in investor-state arbitration”.<sup>14</sup>
32. In conclusion, the Claimants request that the Tribunal:
- (i) ORDER Respondent to reimburse Claimants USD 450,000, plus pre- and post-Award interest at the rate of Respondent’s cost of debt/borrowing, compounded annually, representing costs incurred in connection with Respondent’s refusal to bear its equal share of the advance on costs of this arbitration;
  - (ii) ORDER Respondent to pay all of the costs and expenses in connection with this application, in particular all costs incurred in connection with Respondent’s refusal to comply with the Tribunal’s requests for a First and Second Supplementary Deposit, including the arbitrators’ costs and fees, as well as Claimants’ costs and legal expenses including, without limitation, the fees of their legal counsel, plus interest at a reasonable rate from the date on which such costs were/are incurred to the date of payment;
  - (iii) ORDER Respondent to make any future advanced deposits in equal shares; and[]
  - (iv) AWARD other such relief as the Tribunal may deem just and proper.<sup>15</sup>
- b) The Respondent’s Position

33. At the outset, the Respondent argues that Article 34(1) of the UNCITRAL Rules sets out the power of an arbitral tribunal to make separate awards on issues over which it already has the power to rule, but it is not an autonomous source of an alleged power to issue a partial award on

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<sup>11</sup> Application for a Partial Award, para. 32; *Daum Global Holdings Corp. v. Ybrant Media Acquisition, Ybrant Digital Limited, LGS Global Limited*, ICC Case No. 18445/CYK, Partial Award, March 6, 2013, paras. 49-50 (**Claimants’ Annex C**); *SensorDynamics AG Entwicklungs- UND Produktionsgesellschaft and Fraunhofer-Gesellschaft zur Förderung der angewandten Forschung E.V.V. Memsco LLC*, ICC Case No. 15072/JHN, Partial Award, June 18, 2008, para. 90 (**Claimants’ Annex A**).

<sup>12</sup> Application for a Partial Award, paras. 33-35; *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea (I)*, ICSID Case No. ARB/14/22, Procedural Order No. 3, November 25, 2015, paras. 64, 69-70 (**Claimants’ Annex E**).

<sup>13</sup> Application for a Partial Award, paras. 36-37; *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Decision on Respondent’s Request for Shifting the Costs of the Arbitration, March 4, 2015, paras. 42, 44-45, 47 (**Claimants’ Annex F**).

<sup>14</sup> Application for a Partial Award, para. 38.

<sup>15</sup> Application for a Partial Award, para. 41. *See id.* at 39.

costs advances, which the Respondent insists is not vested in tribunals constituted under the UNCITRAL Rules.<sup>16</sup> It notes that, in the event of a party's failure to pay its share of the advance on costs, Article 43(4) does not authorize the party paying the outstanding balance to then request a partial award of this kind or the Tribunal to grant such a request.<sup>17</sup> Similarly, Article 43 does not create a reciprocal obligation between the parties to an arbitration to pay their respective advances on costs, but merely establishes a condition precedent to the arbitration.<sup>18</sup> The Respondent adds that the Tribunal would only have the authority to decide, in the final award or in any other award, the final allocation of costs in accordance with Article 42 of the UNCITRAL Rules, meaning that any application for reimbursement of cost advances before the issuance of the award on jurisdiction, admissibility and merits is premature and unwarranted.<sup>19</sup>

34. In any event, the Respondent submits that the Claimants' application lacks merit and denies having refused to pay its share of the advance on costs without any justifiable reason or in bad faith.<sup>20</sup> First, it contends that it is not obliged under any set of rules "to finance the frivolous claims of a purported investor", explaining that it only stopped regular payments of the advance on costs after it had become undisputed the Claimants have no assets whatsoever and the Claimants refused to provide security for the Respondent's costs and to disclose information regarding their funding.<sup>21</sup> In particular, the Respondent reiterates that it is undisputed that it would not be able to recover any of the significant costs if the Tribunal were to grant the Claimants' application, seeing that (i) the Claimants do not have any assets, other than the potential proceeds of this arbitration; (ii) the timing and substance of the application further confirms the Claimants' "dire financial straits"; (iii) there is no evidence that the Claimants themselves made the payments of the advance on costs; and (iv) Mr. Orlandini was "a serial debtor and defaulter" and CMO reflected the same pattern of conduct, which came to light after the Respondent paid the first advance on costs.<sup>22</sup>
35. Second, the Respondent underscores that it has not breached any obligation to pay its share of the advance on costs because its position has always been that it is unable to make further payments "unless and until Claimants provide appropriate security for Bolivia's costs".<sup>23</sup>
36. Third, the Respondent opines that it is the Claimants, rather than the Respondent, who have breached their duty to arbitrate in good faith, noting that (i) at the very same time the Claimants confirmed that they had no third-party funding agreement, they were using the services of Black Cube, whose fees were covered by a third-party funder (Ofer Amir); and (ii) the Claimants have not submitted a single invoice issued to them by its counsel or experts, or any evidence of

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<sup>16</sup> Reply on Partial Award and SFC Request, paras. 9-10.

<sup>17</sup> Reply on Partial Award and SFC Request, paras. 11, 13.

<sup>18</sup> Reply on Partial Award and SFC Request, para. 14. *See A. Holding Gesellschaft HBH (Autriche) v B. SpA (Italie)*, ICC Case No. 12491/KGA/EC, Partial Award, June 1, 2004, pp. 3-4 [PDF] (**Respondent's Annex B**).

<sup>19</sup> Reply on Partial Award and SFC Request, paras. 15-16. *See Swedish Supreme Court, 3S Swedish Special Supplier AB v. Sky Park AB*, judgment rendered on December 29, 2000 in case T 5119-99, pp. 4-5 (**Respondent's Annex C**).

<sup>20</sup> Reply on Partial Award and SFC Request, paras. 18, 39.

<sup>21</sup> Reply on Partial Award and SFC Request, paras. 19-20.

<sup>22</sup> Reply on Partial Award and SFC Request, paras. 20-26. *See also id.* at 17.

<sup>23</sup> Reply on Partial Award and SFC Request, paras. 27-28 (emphasis omitted); *BDMS LIMITED v. RAFAEL ADVANCED DEFENCE SYSTEMS* [2014] EWHC 451 (Comm), para. 57 (**Claimants' Annex D**).

payment of such amounts, the only invoice of this kind being from Black Cube and for a lower amount than that stated by Dr. Avi Yanus at the Hearing.<sup>24</sup>

37. Fourth, the Respondent considers inapposite the ICSID and commercial arbitration decisions relied upon by the Claimants, since, in those cases, there was no evidence of the claimants' precarious financial situation, history of unpaid debts or inability to honor an adverse award on costs.<sup>25</sup>
38. Fifth, even if the Tribunal decided that the Respondent has an obligation to reimburse the cost advances, the Respondent is of the view that the Claimants' Application for a Partial Award should be refused because it constitutes a claim for specific performance which would impose "too heavy a burden" on the Respondent.<sup>26</sup>
39. Lastly, the Respondent contends that, in any event, a partial award on costs should not be made considering that it has put forward well-founded jurisdictional objections (*ratione personae, materiae, temporis* and *voluntatis*) and demonstrated that the Claimants' claims related to the *Martínez* case are meritless.<sup>27</sup>
40. In sum, the Respondent requests that the Tribunal dismiss the Application for a Partial Award.<sup>28</sup>

### III. The Respondent's Second Request for Security for Costs

#### a) The Respondent's Position

41. The Respondent refers to its First SFC Request and the Tribunal's decision thereon, claiming that "circumstances have changed dramatically" since then, such that a renewed request for an order of security for costs is warranted (the "**Second Request for SFC**").<sup>29</sup> In its view, if this request is not upheld, the harm to the Respondent will far outweigh any harm that such order may cause to the Claimants.<sup>30</sup>
42. First, the Respondent insists that the evidence on record confirms that the Claimants are not capable of honoring a future adverse award on costs and that the Estate of Mr. Orlandini has no assets other than the claims submitted in this arbitration (which have an "estimated fair market

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<sup>24</sup> Reply on Partial Award and SFC Request, paras. 29-35; Hearing Transcript, Day 2, 82:13-25, 83:1-7, 84:1-16 (Mr. Avi Yanus); Claimants' Costs Submission, 21 July 2021, Annexes A-D.

<sup>25</sup> Reply on Partial Award and SFC Request, para. 36. See *SensorDynamics AG Entwicklungs- UND Produktionsgesellschaft and Fraunhofer-Gesellschaft zur Förderung der angewandten Forschung E.V.V. Memsco LLC*, ICC Case No. 15072/JHN, Partial Award, June 18, 2008, paras. 76-82 (**Claimants' Annex A**); *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea (I)*, ICSID Case No. ARB/14/22, Procedural Order No. 3, November 25, 2015, paras. 78-79 (**Claimants' Annex E**); *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Decision on Respondent's Request for Shifting the Costs of the Arbitration, March 4, 2015, para. 43 (**Claimants' Annex F**).

<sup>26</sup> Reply on Partial Award and SFC Request, paras. 37-38; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012, para. 82 (**RLA-362**).

<sup>27</sup> Reply on Partial Award and SFC Request, paras. 40-45; *Scan Coin Industries AB v. Coinstar Inc.*, SCC Case No. V 032/2007, Separate Award on Costs, May 8, 2008, para. 70 (**Claimants' Annex B**).

<sup>28</sup> Reply on Partial Award and SFC Request, para. 64.

<sup>29</sup> Reply on Partial Award and SFC Request, paras. 46-47.

<sup>30</sup> Reply on Partial Award and SFC Request, para. 47.



value” of USD 0.00), which in turn is “exclusively the result of Claimants’ own *modus operandi* of incurring debts, refusing to honor them, and compelling their creditors to seek judicial enforcement against their assets”.<sup>31</sup>

43. Second, while the First Decision on SFC was largely premised on the Tribunal’s assumption that the Claimants had not engaged in any inappropriate behavior or bad faith actions, and on their non-disclosure of the use of third-party funding, the Respondent recalls that evidence to the contrary came to light during the Hearing, when Black Cube revealed the existence of the funder Ofer Amin.<sup>32</sup> The existence of a third-party funder, together with the fact that the funder has not provided coverage to protect the Respondent’s right to the reimbursement of costs in this proceeding, would justify that the Tribunal order a *cautio judicatum solvi* as the tribunal in *Manuel García Armas v. Venezuela* did.<sup>33</sup>
44. Third, the Respondent posits that this is a case of much more than simply an impecunious claimant, recalling that (i) the Claimants have an established track record of non-compliance with their debts, including by moving or hiding assets to avoid any potential exposure to its creditors; (ii) various examples have been provided of creditors who sought to enforce payment of Mr. Orlandini’s or CMO’s overdue debts and “were foiled by Claimants’ avoidance tactics”, such as the *Martínez* case; and (iii) CMO was placed under the administration of the State in the mid-1980s and a criminal complaint was filed for several crimes of economic nature.<sup>34</sup>
45. Fourth, the Respondent notes that an order for security would not cause any harm to the Claimants, since the cost of posting such security could easily be recovered as part of the Tribunal’s final decision on the allocation of costs and there is no risk that the Claimants may be unable to collect on a favorable costs award.<sup>35</sup>
46. Fifth and last, the Respondent underscores that the relief it seeks cannot wait for the issuance of the Tribunal’s final award, as it is urgent that at least some assurance be provided that the Respondent will be in a position to collect on a favorable costs award.<sup>36</sup>
47. For these reasons, and in addition to the dismissal of the Application for a Partial Award, the Respondent requests that the Tribunal:
  - Order Claimants to post security for Bolivia’s costs in the present arbitration, in an amount of, at least, US\$ 5 million, within 15 days of the Tribunal’s order, by either:

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<sup>31</sup> Reply on Partial Award and SFC Request, paras. 48-50; Procedural Order No. 8, July 27, 2020, Respondent’s Request 3(iii), pp. 315-316 [PDF]; In the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida Probate Division, In re: Estate of Julio M. Orlandini Agreda, Inventory, May 20, 2019, p. 2 (**R-463**).

<sup>32</sup> Reply on Partial Award and SFC Request, paras. 51-52; Hearing Transcript, Day 2, 82:13-25, 83:1-7 (Mr. Avi Yanus).

<sup>33</sup> Reply on Partial Award and SFC Request, paras. 53-55; Hearing Transcript, Day 3, 39:14-20 (Mr. Avi Yanus); *Manuel García Armas y otros c. la República Bolivariana de Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, June 20, 2018, para. 225 (**RLA-52**); *RSM Production Corporation v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia’s Request for Provisional Measures, December 12, 2013, para. 73 (**Claimants’ Annex G**).

<sup>34</sup> Reply on Partial Award and SFC Request, paras. 56-60.

<sup>35</sup> Reply on Partial Award and SFC Request, para. 61.

<sup>36</sup> Reply on Partial Award and SFC Request, para. 62.

- Providing an unconditional and irrevocable bank guarantee or letter of credit from a reputable international bank, pledged in favor of Bolivia and to be released on the order of the Tribunal; or
  - Making a deposit, pledged in favor of Bolivia, into an escrow account to be designated by the Permanent Court of Arbitration, under the sole control of the Permanent Court of Arbitration and direction of the Tribunal.
- Grant any other relief that the Tribunal deems appropriate.<sup>37</sup>

b) The Claimants' Position

48. The Claimants first recall the background of the First Decision on SFC, explaining that the circumstances that led to it “are exactly the same today”, as the current circumstances confirm the Claimants’ continuing willingness and ability to shoulder the costs of this arbitration to ensure its continuation.<sup>38</sup> As such, they submit that the Tribunal should reject the Respondent’s request because it (i) is based on misstatements; (ii) attempts improperly to reargue the merits of the case; (iii) does not meet the high standard governing security for costs; and (iv) unnecessarily increases the costs and aggravates this proceeding.<sup>39</sup>
49. The Claimants contend that security for costs is an extraordinary measure which is granted “in the most extreme and exceptional circumstances”, in line with Article 26 of the UNCITRAL Rules and the findings of various investment tribunals.<sup>40</sup> In particular, they emphasize that evidence of a party’s financial distress or use of third-party funding does not alone constitute exceptional circumstances justifying security for costs, such that this measure would be especially inappropriate when the claimant’s financial condition is allegedly the result of the State measures at issue in the arbitration.<sup>41</sup> As the requesting party, the Respondent bears the burden of establishing “extreme and exceptional circumstances”, as well as the requirements stated in Article 26 of the UNCITRAL Rules, including that (i) there is a reasonable possibility that it will succeed on its defenses, without pre-judgment by the tribunal; (ii) there is a reasonable possibility that it will receive a cost award in its favor; (iii) the Claimants are unwilling or unable to pay a costs award if granted; (iv) the harm prevented by the requested measure would substantially outweigh the countervailing burden of the Claimants; and (v) there is urgency justifying issuance of a security for costs order.<sup>42</sup> Adding that the Respondent’s conduct in this

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<sup>37</sup> Reply on Partial Award and SFC Request, para. 64. The Respondent further requests that the Tribunal “refrain from issuing its upcoming ruling on jurisdiction, admissibility and the merits, unless and until Claimants provide adequate security for Bolivia’s costs”. *See id.* at 63.

<sup>38</sup> Opposition to SFC Request, paras. 4-6. *See generally id.* at 7-13.

<sup>39</sup> Opposition to SFC Request, paras. 14, 40.

<sup>40</sup> Opposition to SFC Request, paras. 15-18; *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, January 11, 2016, para. 59 (**RLA-54**); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, June 23, 2008, para. 57 (**CLA-20**); *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador’s Application for Security for Costs, September 20, 2012, para. 45 (**CLA-21**).

<sup>41</sup> Opposition to SFC Request, paras. 19, 27. *See, inter alia, EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 – Decision on the Parties’ Requests for Provisional Measures, June 23, 2015, para. 123 (**CLA-42**); *Hesham Talaat M. Al-Warraq v. Indonesia*, UNCITRAL, Award on Respondent’s Preliminary Objections to Jurisdiction and Admissibility of the Claims, June 21, 2012, para. 109 (**CLA-18**).

<sup>42</sup> Opposition to SFC Request, paras. 19-20. *See, inter alia, Rachel S. Grynberg and others v. Government of Grenada*, ICSID Case No. ARB/10/6, Decision on Respondent’s Application for Security for Costs,

proceeding is also relevant in assessing its request, the Claimants conclude that such request fails to meet any of the relevant requirements.<sup>43</sup>

50. First, they assert that the Respondent has identified no exceptional and extreme circumstances, as it has “repackage[d]” the circumstances submitted in its First SFC Request and other memorials, while the alleged new circumstances have been known by Respondent for at least several months and have not been established to be exceptional and extreme.<sup>44</sup> The argument that the Claimants are not capable of honoring a future adverse award on costs, which the Claimants describe as “misleading and absurd”, has been consistently rejected by the Tribunal, particularly in light of the Claimants’ continued willingness and ability to cover their share of the costs in these proceedings.<sup>45</sup> The Claimants opine that an award of security for costs would only reward the Respondent for its violations of domestic and international law and the Treaty, and argue that the Respondent’s characterizations of Mr. Orlandini are unsupported and not a new circumstance, but rather an attempt to relitigate the merits of the case.<sup>46</sup> They repeat that they “do not have a third-party funder or a third-party funding agreement to disclose under Section 11 of [PO] 1”, explaining that Black Cube’s own funding arrangement of its costs is irrelevant and has not been inherited by the Claimants.<sup>47</sup> In their view, it is the Respondent who has engaged in inappropriate behavior, dilatory tactics and bad faith actions “with its reiterated attempts to delay and obstruct the continuation of this proceeding and to increase costs, which it is not paying, with baseless and unnecessary incidents”.<sup>48</sup>
51. Second, the Claimants criticize that the Respondent’s request comes belatedly and at a very late stage, while it presents no track record of non-payment of costs awards, improper behavior or dilatory tactics, and only repeats the arguments from prior submissions concerning the Respondent’s version of events that occurred twenty or more years ago.<sup>49</sup>
52. Third, the Claimants opine that the Respondent will not prevail on the merits of the case and has otherwise not conducted itself in a manner that would merit a costs award under any circumstances, noting that the Respondent has failed to establish or even argue that there is a reasonable possibility of the contrary.<sup>50</sup>

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October 14, 2010, para. 5.17 (**CLA-25**); *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, January 11, 2016, para. 57 (**RLA-54**); *Guaracachi America, Inc. & Rurelec v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14, March 11, 2013, paras. 7-9 (**RLA-57**).

<sup>43</sup> Opposition to SFC Request, paras. 21-22; W. Gu, “Security for Costs in International Commercial Arbitration” (2005) 22(3) *Journal of International Arbitration*, p. 38 (**CLA-33**).

<sup>44</sup> Opposition to SFC Request, paras. 23, 32.

<sup>45</sup> Opposition to SFC Request, paras. 24-26; First Decision on SFC, paras. 144, 147. The Claimants further note that the Respondent has only cited the inventory of Mr. Orlandini’s estate in Florida in this regard, insisting that, under basic accounting principles in the United States (GAAP), the value of a contingent claim should be reported as zero, until it is paid.

<sup>46</sup> Opposition to SFC Request, paras. 27-28.

<sup>47</sup> Opposition to SFC Request, paras. 29-30.

<sup>48</sup> Opposition to SFC Request, para. 31.

<sup>49</sup> Opposition to SFC Request, para. 33.

<sup>50</sup> Opposition to SFC Request, para. 34.

53. Fourth, in the Claimants' view, the Respondent has not met its burden of demonstrating that they would or could not satisfy a costs award.<sup>51</sup>
54. Fifth, they contend that the burden of posting security for costs would compound that which the Claimants have already borne by covering Respondent's unpaid share of the advance on costs, stressing that the history of this proceeding and the Respondent's "recalcitrance" show that it will not comply with an award on costs in favor of the Claimants.<sup>52</sup> Conversely, they observe, the Respondent would face no harm if security for costs were not granted.<sup>53</sup>
55. Sixth, the Claimants dispute the alleged urgency of the Respondent's request, since it is premised upon "new circumstances" allegedly disclosed between mid-2019 and the Hearing, and suggest that the request was devised *post hoc* further to undermine this proceeding and to manufacture a response to the Application for a Partial Award.<sup>54</sup>
56. Seventh, the Claimants posit that the timing of this request is prejudicial to their rights and this proceeding, claiming that the Respondent should not be permitted to use it to relitigate its case on the merits at this late stage in the arbitration.<sup>55</sup>
57. Eight and last, the relief of security for costs would be foreclosed by the Respondent's bad faith and unclean hands in this proceeding, as reflected in the Respondent's persistent refusal to pay its own share of the costs of the arbitration and its request being apparently designed to manufacture a response to or retaliate for filing the Application for a Partial Award.<sup>56</sup>
58. In conclusion, the Claimants submit that an order for security for costs is unjustified in the present circumstances, stressing that they have satisfied their financial obligations in these proceedings and will continue to do so, while such an order would impose a significant hurdle to their pursuit of access to justice.<sup>57</sup> Accordingly, the Claimants request that the Tribunal:
  - (a) Reject Respondent's Second Request for security for costs;
  - (b) Order Respondent to pay all of Claimants' costs incurred in responding to Respondent's Second Request for security for costs;
  - (c) Reject all of Respondent's remaining requests for relief; and

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<sup>51</sup> Opposition to SFC Request, para. 35.

<sup>52</sup> Opposition to SFC Request, para. 36. The Claimants further recall that, in its First Decision on SFC, the Tribunal already rejected the Respondent's assumption that the requested "extraordinary relief" would not harm them.

<sup>53</sup> Opposition to SFC Request, para. 36.

<sup>54</sup> Opposition to SFC Request, para. 37.

<sup>55</sup> Opposition to SFC Request, para. 38; *Guaracachi America, Inc. & Rurelec v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14, March 11, 2013, para. 8 (**RLA-57**); *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10 (Security for Costs), January 11, 2016, para. 56 (**RLA-54**).

<sup>56</sup> Opposition to SFC Request, para. 39. *See, inter alia*, Christine Sim, 'Security for Costs in Investor-State Arbitration', in William W. Park (ed), *Arbitration International*, (© The Author(s); Oxford University Press 2017, Volume 33 Issue 3), pp. 427-495, p. 488 (**Claimants' Annex B**).

<sup>57</sup> Opposition to SFC Request, paras. 40-41.

(d) Order such other relief as the Tribunal may deem just and proper.<sup>58</sup>

#### IV. Analysis

##### a) The Claimants' Application for a Partial Award

59. The Tribunal begins its analysis with the question whether it has the authority to issue a partial award as requested by the Claimants. Pursuant to Article 34(1) of the UNCITRAL Rules, “[t]he arbitral tribunal may make separate awards on different issues at different times.” There is nothing in this provision that limits the Tribunal’s powers to issue a partial award regarding the Respondent’s obligation to pay its share of the advance on costs. The Tribunal’s powers in that regard would only be circumscribed by the scope of the Tribunal’s jurisdiction. Article 43 of the UNCITRAL Rules grants tribunals broad authority to fix amounts payable as advances on costs and to require that the parties pay them in equal shares. Moreover, pursuant to Article 42(2) of the UNCITRAL Rules, a tribunal has the power to allocate costs (not just advance payments) in a partial award prior to entering the final award in a case. The Claimants’ Application for a Partial Award thus falls squarely within the Tribunal’s jurisdiction.
60. The Tribunal, therefore, rejects the Respondent’s argument that Article 34(1) of the UNCITRAL Rules is not a proper basis for the Tribunal’s power to issue a partial award on costs advances. The Tribunal further disagrees with the Respondent’s argument that Article 43(4) of the UNCITRAL Rules does not authorize the Claimants to request a partial award on cost advances or the Tribunal to grant such a request.
61. Next, the Tribunal agrees with the Claimants that the purpose of Article 43(4) of the UNCITRAL Rules is to allow for the continuation of the proceedings by permitting a claimant to substitute a recalcitrant respondent’s share of the advance payments; however, Article 43(4) does not and cannot discharge the defaulting respondent from its obligation to pay half of the advance of costs if so ordered by a tribunal. The Claimants are also correct that the Respondent has failed to seek any order from the Tribunal altering the allocation of the advance on costs.
62. Further, the Tribunal is not persuaded by the Respondent’s argument that it has the right to decline to pay its share of the advance on costs because the Claimants’ claims are frivolous or meritless while the Respondent’s jurisdictional objections are well-founded. Such determinations will be made by the Tribunal in its final award; the Respondent cannot proceed to act as if the Tribunal has already drawn such conclusions. The Tribunal is also unpersuaded that the Respondent has the right to decline making the requested advance payments because “it is undisputed that it would not be able to recover any of the significant costs if the Tribunal were to grant the Claimants’ application.” The question whether the Claimants are impecunious has been dealt with, and will be dealt with below, in the context of the Respondent’s Second Request for SFC. It is not open to the Respondent to withhold advance payments based on its own view of the Claimants’ ability or inability to cover the Respondent’s costs – this determination is for the Tribunal to make, and it is not for the Respondent to resort to a “self-help” type of conduct.
63. The Tribunal notes that the Respondent’s further arguments in that regard also focus on the Claimants’ alleged impecuniousness. Therefore, the Respondent’s opposition to the Claimants’ Application for a Partial Award depends on the Tribunal’s ruling in favor of the Respondent on its Second Request for SFC.

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<sup>58</sup> Opposition to SFC Request, para. 42.

64. Finally, the Tribunal disagrees with the Respondent's argument that the Claimants' Application for a Partial Award should be denied because it constitutes a claim for specific performance. Whether or not a tribunal's order to make advance payments is characterized as an order for specific performance, the Tribunal is empowered to make such an order as discussed above.
65. Having said that, the Tribunal is of the view that an essential element is missing from the Claimants' argument in support of its Application for a Partial Award. The Claimants have failed to substantiate why it is necessary *at this stage* to issue a partial award requiring that the Respondent make the requisite advance payments. Both Parties agree that the Tribunal has the authority to allocate the costs of the arbitration, as well as the Parties' costs and fees, in its final award. Indeed, it is common ground between the Parties that the Tribunal enjoys broad discretion with respect to that matter, including pursuant to Article 42(1) of the UNCITRAL Rules. The Claimants have not made a persuasive case that covering the Respondent's share of the advance payments imposes on them a burden that would be too onerous to bear.
66. In light of the above, the Tribunal believes that a ruling on costs, including a potential order that the Respondent reimburse the Claimants for the Respondent's share of the advance payments (or any other disposition relating to the costs and fees incurred in this arbitration) can and should be made in the Tribunal's final award – including, if necessary, an appropriate interest rate.
67. On the basis of the above, the Tribunal dismisses the Claimants' Application for a Partial Award.
- b) The Respondent's Second Request for Security for Costs
68. In its First Decision on SFC, the Tribunal determined that the factors relevant to its determination would include: (i) a claimant's track record of non-payment of cost awards in prior proceedings; (ii) a claimant's improper behavior in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings; (iii) evidence of a claimant moving or hiding assets to avoid any potential exposure to a cost award; or (iv) other evidence of a claimant's bad faith or improper behavior. The Tribunal also observed that other factors, such as third-party funding or a claimant's serious and proven financial difficulties, may also play a role in the assessment of whether security for costs should be ordered. However, those factors should be assessed in the context of all other relevant circumstances and would typically not, in and of themselves, constitute a sufficient basis for such an order.<sup>59</sup>
69. The gist of the Respondent's Second Request for SFC is that "circumstances have changed dramatically" since its First SFC Request. The Respondent asserts that the evidence on record confirms that the Claimants are not capable of honoring a future adverse award on costs because, *inter alia*, the Estate of Mr. Orlandini has no assets other than the claims submitted in this arbitration. The Respondent further argues that evidence of the existence of a third-party funder was revealed by Black Cube during the Hearing. Next, the Respondent asserts that the Claimants have an established track record of non-compliance with their debts and avoiding payment to creditors, as confirmed during the Hearing.
70. Separately, the Respondent argues that an order for security would not cause any harm to the Claimants and that the relief it seeks cannot wait for the issuance of the Tribunal's final award; the matter, says the Respondent, is urgent because currently there is no assurance that the Respondent will be in a position to collect on a favorable costs award.

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<sup>59</sup> See Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, July 9, 2019, paras. 143-144.

71. The Claimants oppose the Respondent's request. The vast majority of the Claimants' arguments, however, focus on the same matters that the Respondent invoked in its First SFC Request. The Tribunal has already ruled on that request and the Claimants' related arguments and does not believe it should repeat its conclusions here. Instead, the Tribunal will address the question whether any newly-arisen circumstances and new evidence emerged at the Hearing require that the Tribunal reconsider its previous decision.
72. In the Tribunal's view, none of the evidence that emerged subsequent to the Tribunal's First Decision on SFC has affected the factors (listed in para. 68 above) that the Tribunal found relevant for its determination.
73. Indeed it was revealed at the Hearing that a third-party funder covered the fees of Black Cube. No evidence emerged, however, that a third-party funder covered the Claimants' counsel's legal fees and the Claimants' arbitration costs, including the advance payments made by the Claimants to cover their own share, as well as for the Respondent's share, of those payments. Moreover, as the Tribunal ruled in its earlier First Decision on SFC, the existence of a third-party funder may play a role but is not dispositive for granting security for costs, particularly if the other factors are not present.
74. Further, various arguments were advanced at the Hearing regarding the value of the Estate of Mr. Orlandini and its legal and financial situation. The Tribunal is still in the process of evaluating those arguments; nevertheless, the Tribunal does not share the Respondent's view that the evidence proffered at the Hearing in that context demonstrates a dramatic change of circumstances requiring that the Tribunal reconsider its earlier decision.
75. With respect to the Claimants' alleged misbehavior, the Tribunal considers this assertion as an important part of the Respondent's case, *i.e.*, as an important part of its substantive defense against the Claimants' claims. The Tribunal is reluctant to rule on this matter before it has reached its conclusions and ruled on the matter in its final award.
76. Finally, the Tribunal takes seriously the Respondent's assertion that the Claimants have an established track record of non-compliance with their debts and of avoiding payment to creditors. This is, however, still a matter disputed between the Parties, on which the Tribunal has not made a final determination. Moreover, there is no evidence that the Claimants have been engaged in any effort to strip themselves of assets in order to avoid an adverse cost award in this arbitration.
77. The fact remains that the Claimants have continued making advance payments to cover the costs of this arbitration, including covering the Respondent's share of those advances on costs. As the Tribunal observed in its First Decision on SFC, this is not a case where the Claimants have a record of non-payment of advances on costs, cost orders, or awards. The payment or non-payment by the Claimants of certain debts and court judgments in Bolivia is a matter of dispute between the Parties, which is an important part of both the Claimants' claims and the Respondent's defenses. The Tribunal cannot reconsider its First Decision on SFC on the basis of such allegations before it has made a final determination on the key matters in dispute between the Parties in this case.
78. Finally, the Respondent's arguments that an order for security would not cause any harm to the Claimants and that the relief it seeks cannot wait for the issuance of the Tribunal's final award are not new. They have already been addressed by the Tribunal in its First Decision on SFC and no new evidence has emerged that would affect the Tribunal's earlier analysis and conclusions on this point.

79. In light of the above, the Tribunal dismisses the Respondent's Second Request for SFC.

**V. Decision**

80. The Claimants' Application for a Partial Award is dismissed.

81. The Respondent's Second Request for SFC is dismissed.

82. The Tribunal defers to a later stage its decision on costs and fees relating to the Claimants' Application for a Partial Award and the Respondent's Second Request for SFC.

**Place of Arbitration: Paris, France**



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Dr. Stanimir A. Alexandrov  
(Presiding Arbitrator)

On behalf of the Tribunal