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")

DECISION ON THE RESPONDENT'S APPLICATION FOR TERMINATION, TRIFURCATION AND SECURITY FOR COSTS

Tribunal

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

July 9, 2019

TABLE OF CONTENTS

I. PROCEDURAL BACKGROUND

1. By Notice of Arbitration dated January 31, 2018 (the "**Notice of Arbitration**"), Julio Miguel Orlandini-Agreda ("**Mr. Orlandini**") and Compañía Minera Orlandini Ltda. ("**CMO**") commenced arbitration proceedings against the Respondent pursuant to Article IX of 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, entered into force on June 6, 2001 (the "**Treaty**").

2. On January 17, 2019, counsel for the Claimants informed the Tribunal that Mr. Orlandini had passed away on January 1, 2019.

3. The Tribunal held a first procedural meeting on January 29, 2019 (the "**First Procedural Meeting**"), following which the Tribunal issued Procedural Order No. 1 dated February 4, 2019. Procedural Order No. 1, among other things, fixed a procedural calendar leading to a Decision on Bifurcation. In its cover letter circulating Procedural Order No. 1, the Tribunal made the following observation regarding the procedural calendar:

> In light of the passing of Mr. Orlandini, the Tribunal has resolved not to invite any submissions from the Parties until the personal representative of Mr. Orlandini's estate is formally appointed. Accordingly, the Procedural Calendar set forth in Annex 1 first requires the Claimants to (i) promptly inform the Tribunal and the Respondent of the appointment of a personal representative of Mr. Orlandini's estate; (ii) provide a power of attorney evidencing the authority of counsel for the Second Claimant to also represent the First Claimant in this arbitration; and (iii) provide a declaration from the appointed personal representative ratifying all submissions made by the Second Claimant in these proceedings prior to such appointment.

4. Procedural Order No. 1 included two other provisions that are relevant to this Decision. First, Section 11 (Third Party Funding) of Procedural Order No. 1 reads:

> 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.

5. In turn, Section 14 (Issuance of Procedural Order No. 1) of Procedural Order No. 1 provides:

> 14.1 This Procedural Order No. 1 is issued subject to the legal representative of Mr. Orlandini's estate ratifying the actions taken so far in this arbitration by the Second Claimant.

> 14.2 The Second Claimant shall bear any costs of arbitration, as defined in Article 40 of the UNCITRAL Rules, that may arise from the legal representative of Mr. Orlandini's estate not ratifying the actions taken by the Second Claimant in this arbitration.
>
> 14.3 The dispositions in this Procedural Order are without prejudice to the rights of Respondent to challenge the representation or the standing of either Claimant or to raise any other objections to the jurisdiction of the Tribunal.

6. On March 6, 2019, the Respondent submitted its Response to the Notice of Arbitration (the "**Response**").

7. On March 8, 2019, following consultations with the Parties, the Tribunal issued Procedural Order No. 3 (Procedural Calendar), which reads, in relevant part, as follows:

> 4. Having carefully considered the Parties' proposed calendar scenarios, the Tribunal has determined that the Procedural Calendar shall be as set out in Annex 1 to this order.
>
> 5. The schedule for the phase of the proceedings following the Decision on Bifurcation shall be fixed in accordance with Scenario 1 or 2 of Annex 1 to this order, as applicable, after the issuance of the Decision on Bifurcation.

8. By letter dated March 25, 2019, counsel for the Claimants (i) informed the Tribunal that Mrs. Francees Rosario de la Vía de Orlandini ("**Mrs. Orlandini**"), who is Mr. Orlandini's widow, had been formally appointed to serve as personal representative of Mr. Orlandini's estate; (ii) submitted a copy of an order issued on March 21, 2019 by the Probate Division of the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County (the "**Miami-Dade Court**") ordering that "FRANCEES ORLANDINI [be] appointed personal representative(s) of the [estate of Mr. Orlandini]" (the "**Miami-Dade Court Order**");[1] (iii) submitted a copy of a power of attorney dated March 22, 2019, granted by Mrs. Orlandini to Mr. David M. Orta of Quinn Emanuel Urquhart & Sullivan LLP, Mr. Bernardo A. Wayar Caballero of Wayar & Von Borries Abogados S.C. and any lawyer working with them; and (iv) submitted a declaration dated March 22, 2019 and signed by Mrs. Orlandini stating that "[i]n my capacity as the Personal Representative of the Estate of Julio Miguel Orlandini-Agreda, I hereby ratify and approve all actions taken thus far in this arbitration by Quinn Emanuel Urquhart & Sullivan LLP and by the

[1] *In Re: Estate of Julio M. Orlandini-Agreda*, Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Case No. 19-000371 CP, Order Admitting Will to Probate & Appointing Personal Representative(s), March 21, 2019 (**R-17**).

law firm of Wayar & Von Borries S.C. in Bolivia as well as by Compañía Minera Orlandini Ltda."[2] This letter included the following request for relief:

> In light of the foregoing, Claimants respectfully request that the Tribunal declare that:
>
> (i) the undersigned counsel are duly authorized to represent the Estate of Julio Miguel Orlandini-Agreda, the First Claimant, in this arbitral proceeding for all consequent purposes;
>
> (ii) Section 14.2 of Procedural Order No. 1 is now moot; and
>
> (iii) the Respondent's Request for Bifurcation of the Proceedings is due by April 24, 2019, should the Respondent wish to file one.

9. By letter dated April 1, 2019, the Tribunal fixed a schedule for submissions on the Respondent's Request for Bifurcation, and confirmed that it would decide the Claimants' requests, as set out in their letter of March 25, 2019, no later than in its Decision on Bifurcation.

10. On April 24, 2019, the Respondent submitted its *Solicitud de Terminación, Trifurcación y Cautio Judicatum Solvi* (the "**Respondent's Triple Application**").

11. By letter dated April 27, 2019, the Tribunal invited the Claimants to respond to all matters addressed in the Respondent's Triple Application within the deadline set forth in Procedural Order No. 3 for the filing of the Response to the Request for Bifurcation of the Proceedings.

12. By letter dated May 23, 2019, the Claimants alleged "that the Respondent, through the Bolivian National Service of Pension Funds ("**SENASIR**" for its acronym in Spanish), has taken serious and harmful retaliatory actions against the Claimants in Bolivia as a reprisal for having filed this arbitration."

13. On May 24, 2019, the Claimants submitted their Opposition to the Application for Termination, Trifurcation and Security for Costs (the "**Claimants' Opposition**").

14. By letter dated June 7, 2019, the Respondent provided a response to the Claimants' letter of May 23, 2019.

15. By letter dated June 14, 2019, the Claimants responded to the Respondent's letter of June 7, 2019.

---

[2] Declaration of Francees Rosario de la Vía de Orlandini, dated March 22, 2019 (Annex D to Letter from the Claimants to the Tribunal dated March 25, 2019).

II. BACKGROUND OF THE DISPUTE

16. The Claimants' claims relate to two mining concessions over the Antequera River in Bolivia known as *Veneros San Juan* and *Pretoria* (the "**Antequera River Concessions**")[3] and 46 other concessions in an area known as *Mina Totoral* (the "**Mina Totoral Concessions**", and, together with the Antequera River Concessions, the "**Concessions**").[4]

17. According to the Claimants, the dispute concerns the purported expropriation of the Concessions and other related properties in Bolivia through the concerted actions of the Bolivian administrative mining authority (*Superintendente Departamental de Minas*);[5] the Bolivian mining agency and registry (*Servicio Nacional de Geología y Técnico de Minas*);[6] the Bolivian Judiciary (in particular, the Judiciary's actions in connection with labor proceedings against CMO referred to as the "**Martínez Case**"),[7] the State-owned Mining Company of Bolivia (*Corporación Minera de Bolivia*, "**COMIBOL**")[8] and certain private entities and individuals.[9] The Claimants allege that the actions undertaken by the Respondent's instrumentalities purported to deprive CMO of its Concessions and other related property in Bolivia to favor COMIBOL and its corporate joint-venture partners, in breach of the Claimants' rights under Bolivian law, the Treaty and international law.[10]

18. The Respondent argues that (i) the Claimants have failed to establish the scope of their mining rights over the Antequera River Concessions and to prove that works were actually carried out in that area;[11] (ii) the Claimants have no right to request that the Tribunal review the decisions of the Bolivian courts in the Martínez Case;[12] and (iii) none of the State measures underlying the Claimants' claims constitute a breach of the Treaty, international law or Bolivian law.[13]

---

3 Notice of Arbitration, para. 24.

4 Notice of Arbitration, para. 26.

5 Notice of Arbitration, paras. 45, 53-55, 60.

6 Notice of Arbitration, para. 65.

7 Notice of Arbitration, paras. 87, 92, 121.

8 Notice of Arbitration, paras. 53, 63.

9 These include Glencore International, Sinchi Wayra S.A., Compañía Minera San Lucas S.A., former CMO workers and Ms. Cristina Wanderley da Silva (s*ee generally* Notice of Arbitration, paras. 17, 22, 70, 75, 78, 87- 88, 103).

10 Notice of Arbitration, para. 5.

11 Response, paras. 35-41.

12 Response, paras. 42-45.

13 Response, paras. 49-50.

III. THE RESPONDENT'S REQUEST FOR TERMINATION, SUSPENSION AND TRIFURCATION

1. THE RESPONDENT'S POSITION

19. The Respondent has advanced four objections to the Tribunal's jurisdiction, relevantly summarized below (**A**).[14] Flowing from the first of these jurisdictional objections, the Respondent requests that the Tribunal order the termination of these proceedings or, in the alternative, their suspension (**B**).[15] If the Tribunal decides for the proceedings to continue, the Respondent requests that the proceedings be trifurcated (**C**).[16]

A. The Respondent's Jurisdictional Objections

20. The Respondent first objects to the Tribunal's jurisdiction *rationae personae* (**a**). Second, the Respondent argues that the Claimants have failed to prove that they possess a "covered investment" in the Antequera River Concessions as per Article I(e) of the Treaty (**b**). Third, the Respondent submits that the Claimants have failed to prove that they have made an investment in the Concessions (**c**). Fourth and lastly, the Respondent claims that its conduct in the Martínez Case does not constitute a *prima facie* violation of the Treaty for denial of justice (**d**).

a) *Rationae Personae* Objection

21. The Respondent objects to the Tribunal's jurisdiction *rationae personae* on the basis that Mr. Orlandini, his successors and CMO do not hold US nationality under the terms of the Treaty, and, as such, they are not entitled to bring a Treaty claim.[17] The Tribunal refers to this objection as the "***Rationae Personae* Objection**".

22. First, the Respondent posits that the Treaty does not extend its protections to dual US-Bolivian investors.[18] According to the Respondent, Article I of the Treaty defines "company",[19] "company

---

14 Respondent's Triple Application, paras. 15-18. *See infra* paras. 20 *et seq*.

15 Respondent's Triple Application, para. 53.

16 Respondent's Triple Application, paras. 14, 86-101.

17 Respondent's Triple Application, para. 16. *See also* para. 34: "*En contraste, las pruebas contemporáneas demuestran que el Sr. Orlandini se presentó, a lo largo de su vida, ante Bolivia y los órganos del Estado, como un nacional boliviano (nunca fue, por lo tanto, un 'nacional' de los Estados Unidos en los términos del Tratado)*".

18 Respondent's Triple Application, paras. 21-27.

19 Treaty Article I(a) provides: "'company' means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association, or other organization" (**C-1**).

of a Party",[20] "national" of a Party[21] and "covered investment"[22] in such a way as to require that Bolivian companies be controlled by a US national in order to constitute an "investment" for the purposes of the Treaty.[23] The Respondent also reads Article IX of the Treaty through the prism of Article 31 of the 1969 Vienna Convention on the Law of Treaties (the "**VCLT**") as restricting the Tribunal's jurisdiction to disputes involving "a Party and a national or company of the other Party",[24] thus excluding dual nationals.[25] Finally, the Respondent considers that Treaty Article IX(4) imports the jurisdictional requirements set forth in Chapter II of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**"), and contends that these requirements apply irrespective of the dispute resolution forum selected by the investor.[26] The Respondent recalls that these requirements encompass the prohibition for investors to bring a claim against their State of nationality (explicitly referring to dual nationals) set out in Article 25 of the ICSID Convention.[27]

23. Second, the Respondent contends that dual nationals must prove that the nationality on which they rely when bringing a claim is the dominant one "both at the date of the alleged injury and at the time of submission of the claim."[28]

---

20 Treaty Article I(b) reads: "'company of a Party' means a company constituted or organized under the laws of that Party" (**C-1**).

21 Treaty Article I(c) states: "'national' of a Party means a natural person who is a national of that Party under its applicable law" (**C-1**).

22 Treaty Article I(e) provides: "'covered investment' means an investment of a national or company of a Party in the territory of the other Party" (**C-1**).

23 Respondent's Triple Application, paras. 21-22.

24 Treaty Article IX(1), (**C-1**).

25 Respondent's Triple Application, para. 23.

26 Respondent's Triple Application, paras. 24-26. Treaty Article IX(4) provides, in relevant part, that: "[e]ach Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice of the national or company under paragraph 3 (a)(i), (ii), and (iii) or the mutual agreement of both parties to the dispute under paragraph 3 (a)(iv). This consent and the submission of the dispute by a national or company under paragraph 3 (a) shall satisfy the requirement of […] Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties to the dispute." (**C-1**).

27 Respondent's Triple Application, para. 27. Article 25 of the ICSID Convention provides, in relevant part, that: "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State […] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre"; where "'[n]ational of another Contracting State' […] does not include any person who on either date also had the nationality of the Contracting State party to the dispute" but includes "any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention" (**RLA-5**).

28 Respondent's Triple Application, paras. 32-35.

24. On the basis of the above considerations, the Respondent claims that Mr. Orlandini's Bolivian nationality—which the Respondent alleges he has held from his birth[29]—excludes the Tribunal's jurisdiction over Mr. Orlandini's claims.[30] First, as a dual national, Mr. Orlandini would be precluded from resorting to Treaty Article IX.[31] Second, the Respondent refers to several documents on record showing, in its view, that Mr. Orlandini's Bolivian nationality was the dominant one, and thus could not have been considered a US national under the Treaty.[32]

25. In the Respondent's view, these considerations also exclude the Tribunal's jurisdiction over Mr. Orlandini's estate or his future heirs.[33] The Respondent first observes that it is still uncertain who Mr. Orlandini's future heirs or legatees may be.[34] The Respondent refers in this regard to Mr. Orlandini's Last Will and Testament (the "**Testament**"), which reads, in relevant part, as follows:

> I give all my Residuary Estate to the then serving trustee of the Julio Miguel Orlandini-Agreda Trust, created today prior to the execution of this Will (referred to in this Will as "my Revocable Trust"), as it now exists or may be amended after the execution of this Will, for administration under its terms. If the gift to that trust is ineffective for any reason, I give all my Residuary Estate to the trustee of my Revocable Trust upon the same terms and conditions set forth in that trust as of this date. I incorporate those terms by reference, but only for the purpose of this contingent gift.[35]

26. The Respondent notes that there is no information available concerning "the Julio Miguel Orlandini-Agreda Trust" (the "**JMO Trust**") or its ultimate beneficiaries.[36] Mrs. Orlandini could be the ultimate beneficiary of the JMO Trust, the Respondent notes, but the Claimants have conceded that she is a Bolivian national.[37] The Claimants have also failed to indicate whether Mr. Orlandini's claims have been passed on to a specific entity or person.[38] It is nonetheless certain, the Respondent avers, that "the Estate must be closed within 12 months" under the terms

---

29 Respondent's Triple Application, para. 31.

30 Respondent's Triple Application, para. 29.

31 Respondent's Triple Application, paras. 30-31.

32 Respondent's Triple Application, paras. 34-35; *Martínez et. al. c. CMO, Testimonio de poder general especial y suficiente que otorga el Sr. Miguel Orlandini Agreda en representación de la Compañía Minera Orlandini Ltda. en favor del Dr. Victor López Alcalá*, December 16, 1988, p. 9 (**R-19**); *Martínez v. CMO*, Judgment, December 22, 1989, p. C0000285 (**C-55**); *Martínez et. al. c. CMO, Testimonio de poder especial y suficiente que confiere la Compañía Minera Orlandini Ltda. en favor del Dr. Sixto Rojas Choque*, March 26, 1991, p. 5 (**R-18**).

33 Respondent's Triple Application, para. 37.

34 Respondent's Triple Application, para. 38.

35 Testament, Art. 3 (**R-23**).

36 Respondent's Triple Application, paras. 39, 44.

37 Respondent's Triple Application, para. 39.

38 Respondent's Triple Application, para. 39.

of the Miami-Dade Court Order, which might result in a yet unknown entity or individual claiming title over Mr. Orlandini's claims.[39]

27. Without this information, the Respondent asserts, the Tribunal is impeded from establishing its own jurisdiction at this stage, for three reasons.[40] First, the Tribunal cannot determine whether the continuous nationality requirement embedded in the Treaty has been fulfilled without first ascertaining who the beneficiaries and the managers of the JMO Trust are.[41] Second, the Respondent cannot determine whether it will deny the benefits of the Treaty to the beneficiaries of the JMO Trust under Treaty Article XII until their identity and nationality are determined.[42] Third, the Respondent may decide to submit further jurisdictional objections directed at the assignees of Mr. Orlandini's claims after his estate is closed.[43]

28. Finally, the Respondent submits that CMO has no standing to bring a claim against Bolivia under the Treaty because CMO is a company controlled by Bolivian nationals, and thus cannot qualify as a US "company" under Articles I(d), IX(4) and IX(8) of the Treaty.[44] According to the Respondent, this is again because Article IX(4) imports the jurisdictional requirements set forth in Chapter II of the ICSID Convention, including the prohibition for nationals of a respondent State and companies controlled by nationals of that State to bring claims against their State of nationality.[45]

29. As a result, upholding jurisdiction over CMO's claims would, in the Respondent's view, defeat the object and purpose of the Treaty and the intention of the Treaty Parties.[46] The Respondent refers to certain evidence on record showing, in its view, that CMO was controlled in its entirety by Mr. Orlandini and Ms. Jeannette Said de Orlandini (Mr. Orlandini's former partner), who are

---

39 Respondent's Triple Application, para. 40; Miami-Dade Court Order, p. 1 (**R-17**).

40 Respondent's Triple Application, para. 41 *et seq*.

41 Respondent's Triple Application, para. 42.

42 Respondent's Triple Application, paras. 43-44.

43 Respondent's Triple Application, para. 45.

44 Respondent's Triple Application, paras. 47-48.

45 Respondent's Triple Application, para. 48; C. Schreuer, *The ICSID Convention: A Commentary*, (2nd ed. 2009), Oxford University Press, paras. 826, 828 (**RLA-6**): "[t]he second clause of Art. 25(2)(b) [of the ICSID Convention] refers to 'foreign control' without specifying any nationality requirements in this respect. It is clear from the wording and from the context that control exercised by nationals of the host State is not 'foreign control' and that juridical persons controlled by such nationals are excluded from ICSID's jurisdiction." *See also supra* para. 22.

46 Respondent's Triple Application, para. 50; Treaty Preamble: "Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party." (**C-1**).

both Bolivian nationals.[47] According to the Respondent, this is also consistent with CMO's conduct before Bolivian authorities.[48]

30. Irrespective of the nationality of the owners of CMO, the Respondent posits that the Claimants have failed to prove that Mr. Orlandini held control over CMO at all relevant times. The Respondent considers that the ownership of CMO was, at least, "confusing", owing to (i) Mr. Orlandini's relatives bringing judicial proceedings against him to take over CMO;[49] (ii) Bolivian authorities taking control over CMO at certain stages;[50] and (iii) the recording of liens on CMO's shares.[51]

b) Covered Investment Objection

31. The Respondent argues that the Claimants' claims concerning the Antequera River Concessions fall outside the scope of the Tribunal's jurisdiction because the Claimants have failed to prove[52] that they constitute a "covered investment" under Articles I(e) and IX(1) of the Treaty.[53] The Tribunal refers to this objection as the "**Covered Investment Objection**".

32. The Respondent alleges that CMO's exploitation rights under the Antequera River Concessions were limited to the river bed, while the State measures that constituted an alleged expropriation in this case related only to the underground.[54] As a result, the Respondent claims, no "covered investments" made by the Claimants could have been affected by the State measures regulating the use of the underground of the Antequera River.[55]

---

47 Respondent's Triple Application, para. 49. This includes Mr. Orlandini's alleged 95% stake in CMO.

48 Respondent's Triple Application, para. 49.

49 Respondent's Triple Application, para. 51(a); *Protocolización del testimonio referente a la transferencia a título de compraventa de cuotas de capital de la CMO suscrita por la Sra. Gina Orlandini Agreda en favor del Sr. Miguel Orlandini Agreda*, July 3, 1984 (**R-24**).

50 Respondent's Triple Application, para. 51(b); *Martínez et.al. c. CMO, Decreto mediante el cual se designa a Jaime Montecinos Vargas como interventor*, December 10, 2003 (**R-27**).

51 Respondent's Triple Application, para. 51(c); Report of Property Rights Registry, August 29, 2006, column B (**C-68**).

52 Respondent's Triple Application, para. 56.

53 Respondent's Triple Application, paras. 54-55; Notice of Arbitration, para. 127.

54 Respondent's Triple Application, para. 57.

55 Respondent's Triple Application, paras. 56-60. The State measures allegedly dispossessing CMO of its rights in the Antequera River Concessions are the Decisions of the *Superintendente de Minas* dated April 20, 2000 (**C-25**) and May 9, 2007 (**C-33**). *See* Notice of Arbitration, paras. 45, 141.

33. The Respondent explains that the scope of the Antequera River Concessions is defined in a 1906 act that was deliberately not filed with the Notice of Arbitration,[56] and rejects the Claimants' reliance on certain certificates issued by the *Servicio Nacional Técnico de Minas* ("**SETMIN**") in 2000 because they do not address the nature or scope of the Claimants' rights under the Antequera River Concessions.[57]

c) Protected Investment Objection

34. The Respondent further rejects that Mr. Orlandini's shareholding in CMO or CMO's mining concessions and other property constitute investments protected by the Treaty.[58] The Tribunal refers to this objection as the "**Protected Investment Objection**".

35. The Respondent argues that the Treaty only protects "investments" that (i) are "covered" in the sense of Article I(d) and (e) of the Treaty; and (ii) constitute an investment in accordance with Article 25 of the ICSID Convention, which is incorporated into the Treaty via Article IX(4).[59] Under both of these instruments, the Respondent says, claiming ownership of an asset with economic value would not suffice to demonstrate the existence of an investment; an "economic aspect" or a "commitment of resources" must also exist.[60] Relying on *Orascom v. Argelia* and other ICSID and UNCITRAL investment cases, the Respondent submits that the "economic dimension" of the concept of investment requires that an investment encompass "(i) a contribution or allocation of resources, (ii) a duration, and (iii) risk, which includes the expectation (albeit not necessarily fulfilled) of a commercial return."[61]

36. Applying the above rationale to the instant case, the Respondent submits that the Claimants have failed to prove ownership of an investment pursuant to the Treaty and the ICSID Convention; first, because the issues raised in connection the *Rationae Personae* Objection preclude the existence of a "covered investment" owned by a US national;[62] and second, because the Claimants

---

56 Respondent's Triple Application, paras. 62-63; *Protocolización de los obrados relativos a la concesión de Veneros San Juan*, March 20, 1906 (**R-29**).

57 Respondent's Triple Application, para. 64; SETMIN Certificates of Final Inscription, March & October 2000 (**C-3**).

58 Respondent's Triple Application, para. 66.

59 Respondent's Triple Application, para. 67.

60 Respondent's Triple Application, para. 68; C. McLachlan *et al. International Investment Arbitration. Substantive Principles*, (2nd ed. 2017), Oxford University Press, para. 6.170 (**RLA-10**).

61 Respondent's Triple Application, para. 69; *Orascom TMT Investments S.a.r.l. c. Algeria*, ICSID Case No. ARB/12/35, Award, May 31, 2017, para. 370 (**RLA-26**).

62 Respondent's Triple Application, para. 71.

have failed to prove that they have made a longstanding economic contribution, borne any risk or sought to obtain a commercial profit with respect to the Concessions.[63]

d) Denial of Justice Objection

37. Lastly, the Respondent argues that its course of conduct in the Martínez Case, as characterized by the Claimants, does not amount to a *prima facie* violation of the Treaty for denial of justice.[64] The Tribunal refers to this objection as the "**Denial of Justice Objection**".

38. Relying on Judge Higgins' Separate Opinion in the *Oil Platforms* case and other decisions in investment cases, the Respondent contends that the Claimants must prove that the facts underlying their claims, as alleged, constitute a *prima facie* violation of the Treaty for the Tribunal to hold jurisdiction over those claims.[65]

39. According to the Respondent, the Claimants' contentions regarding the Martínez Case do not constitute a *prima facie* denial of justice because they refer exclusively to certain procedural decisions of Bolivian courts that have no bearing to international law.[66] Even if the Claimants' allegations were proven, the Respondent avers, the actions of Bolivian courts would amount, at most, to a defective application of Bolivian law, and not to a breach of the Treaty.[67]

40. The Respondent argues that Bolivian courts alone are competent to interpret Bolivian procedural law, while arbitral tribunals should refrain from acting as "appeal organs" for the systematic revision of domestic court decisions.[68]

B. Request for Termination or Suspension

41. The Respondent requests, in connection with its *Rationae Personae* Objection, that these proceedings be terminated without prejudice as per Article 36(2) of the UNCITRAL Rules.[69] The termination of the proceedings would be justified, in the Respondent's view, because it is evident

63 Respondent's Triple Application, paras. 72-74.

64 Respondent's Triple Application, para. 76.

65 Respondent's Triple Application, paras. 77-78; *Oil Platforms Case (Iran v. United States)*, International Court of Justice, Separate Opinion of Judge Higgins, December 12, 1996, paras. 29-30 (**RLA-33**); *Impreglio S.p.A. v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 2, 2005, para. 254 (**RLA-35**).

66 *See* Respondent's Triple Application, paras. 79-81.

67 Respondent's Triple Application, para. 84.

68 Respondent's Triple Application, paras. 82-83; G. G. Fitzmaurice, "The Meaning of Denial of Justice", *British Yearbook of International Law*, vol. 13 (1932), pp. 110-111 (**RLA-42**).

69 Respondent's Triple Application, paras. 5, 16, 46, 53.

that Mr. Orlandini, his successors and CMO do not fulfill the requirements to bring a Treaty claim against Bolivia.[70]

42. In the alternative, the Respondent opines that suspending the proceedings until the estate of Mr. Orlandini is closed by the Miami-Dade Court[71] would be a "pragmatic solution",[72] seeing that it is still uncertain who Mr. Orlandini's future heirs or legatees may be and the Tribunal is impeded from establishing its jurisdiction until their identity is determined.[73]

C. Request for Trifurcation

43. The Respondent requests that the proceedings be trifurcated as between jurisdiction, merits and quantum if the Tribunal decides for the proceedings to continue.[74]

44. First, the Respondent refers to considerations of elementary justice and procedural efficiency to support its trifurcation request.[75] Compelling a State to respond on the merits and quantum of claims over which no tribunal has established its jurisdiction is, in the Respondent's view, inherently unjust and contrary to basic principles of international dispute resolution.[76] This is because no sovereign State can be presumed to have consented to the jurisdiction of an international tribunal.[77] The Respondent also refers to instances in which investment tribunals have opted for bifurcation when addressing jurisdiction as a preliminary question would result in significant savings of work and costs.[78]

45. The Respondent posits that the standard for bifurcation applicable to its jurisdictional objections is that articulated in *Philip Morris Asia v. Australia*,[79] which it claims includes the following three

---

70 Respondent's Triple Application, para. 16. *See also supra* paras. 21 *et seq*.

71 Respondent's Triple Application, paras. 16, 40, 46, 53, 130. The Miami-Dade Court Order (**R-17**) provides: "[t]his Estate must be closed within 12 months, unless it is contested or its closing date is extended by court order."

72 Respondent's Triple Application, para. 40.

73 Respondent's Triple Application, para. 38. *See supra* para. 25 *et seq*.

74 Respondent's Triple Application, para. 86.

75 Respondent's Triple Application, para. 87.

76 Respondent's Triple Application, para. 88; H. Thirlway, "Preliminary Objections" in *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2006, para. 4 (**RLA-44**); S. Rosenne, *The world court: what it is and how it works*, 5th ed. (1995), Martinus Nijhoff Publishers, p. 99 (**RLA-45**).

77 Respondent's Triple Application, para. 88.

78 Respondent's Triple Application, paras. 89-91, D. Caron, L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, (2nd ed. 2013), Oxford University Press, p. 458 (**RLA-47**); *Philip Morris Asia Limited v. Australia*, PCA Case No. 2012-12, Procedural Order No. 8, April 14, 2014, para. 106 (**RLA-48**).

79 Respondent's Triple Application, para. 92.

guiding factors: (i) " [i]s the objection *prima facie* serious and substantial?;" (ii) "[c]an the objection be examined without prejudging or entering the merits?;" and (iii) "[c]ould the objection, if successful, dispose of all or an essential part of the claims raised?"[80]

46. The Respondent considers that the above standard for bifurcation is clearly met vis-à-vis its jurisdictional objections:[81]

(a) First, the Respondent sees its objections as "serious and substantial" because they require the Tribunal to address fundamental questions of public international law and interpretation of the Treaty,[82] such as the implications of Mr. Orlandini's dual nationality,[83] the standing of a company controlled by Bolivian nationals to bring a claim against Bolivia[84] and the scope of the Tribunal's power to scrutinize the actions of domestic Bolivian courts.[85]

(b) Second, the Respondent considers that the Tribunal can decide its jurisdictional objections without entering into analysis of 15 years of proceedings in the Martínez Case,[86] the decisions of the *Superintendente de Minas* in connection with the Antequera River Concessions[87] or whether the Respondent's actions constitute an expropriation.[88]

(c) Third, the Respondent argues that the *Rationae Personae* Objection, the Protected Investment Objection and the Denial of Justice Objection would, if upheld, dispose of the entirety of the dispute; while upholding the Covered Investment Objection would dispose of all claims raised in connection with the Antequera River Concessions.[89]

---

80 Respondent's Triple Application, para. 92; *Philip Morris Asia Limited v. Australia*, PCA Case No. 2012-12, Procedural Order No. 8, April 14, 2014, para. 109 (**RLA-48**).

81 Respondent's Triple Application, paras. 92-97.

82 Respondent's Triple Application, para. 93.

83 Respondent's Triple Application, para. 93(a).

84 Respondent's Triple Application, para. 93(b).

85 Respondent's Triple Application, para. 93(c).

86 Respondent's Triple Application, para. 94.

87 Respondent's Triple Application, para. 94; Decisions of the *Superintendente de Minas* dated April 20, 2000 (**C-25**) and May 9, 2007 (**C-33**).

88 Respondent's Triple Application, para. 95.

89 Respondent's Triple Application, para. 97.

47. Lastly, the Respondent contends that both the merits and the quantum phase of the arbitration would be significantly large and complex, if at all necessary. It therefore claims that trifurcating the proceedings would simplify the analysis of the dispute.[90]

2. THE CLAIMANTS' POSITION

48. The Claimants consider that the Respondent's request for termination or suspension of the proceedings is made in bad faith and with dilatory purposes, and request that it be rejected (**A**).[91] The Claimants also oppose the Respondent's request that jurisdiction and merits issues be decided separately, but do not object to the bifurcation of the proceedings with regard to quantum (**B**).[92]

A. Request for Termination or Suspension

49. The Claimants first argue that the Tribunal has already addressed and rejected the Respondent's request for termination or suspension of the proceedings:[93] the Tribunal and the Parties discussed the consequences of Mr. Orlandini's passing (including the need to terminate or suspend the proceedings) during the First Procedural Meeting, and the Tribunal later decided that the proceedings continue in Section 14 of its Procedural Order No. 1.[94] The Claimants also consider that they have "fully complied with all of the Tribunal's instructions" as set forth in that provision, which they infer is confirmed by the fact that the proceedings continued and a schedule for submissions on bifurcation was fixed.[95]

50. The Claimants note that they already identified Mrs. Orlandini as the sole heir of Mr. Orlandini,[96] and contend that the Tribunal has not requested any further clarifications regarding Mr. Orlandini's heirs or beneficiaries. As a result, the Claimants request that the Tribunal grant their outstanding requests, as set out in their letter of March 25, 2019, that the Tribunal confirm

---

90 Respondent's Triple Application, paras. 98-100; *Philip Morris Asia Limited v. Australia*, PCA Case No. 2012-12, Procedural Order No. 8, April 14, 2014, para. 106 (**RLA-48**).

91 Claimants' Opposition, paras. 3, 7-8, 34.

92 Claimants' Opposition, paras. 8, 120-121.

93 Claimants' Opposition, para. 8.

94 Claimants' Opposition, para. 10; Procedural Order No. 1, Section 14.

95 Claimants' Opposition, para. 12; Letter from the Tribunal to the Parties, February 4, 2019; Letter from the Claimants to the Tribunal, March 25, 2019.

96 Claimants' Opposition, para. 14; Audio recording of First Procedural Conference, January 29, 2019, 38:44-39:00.

that (i) counsel appointed by Mrs. Orlandini are authorized to represent the First Claimant; and (ii) Section 14.2 of Procedural Order No. 1 is now moot.[97]

51. The Claimants further reject that continuation of the arbitral proceedings has become "unnecessary or impossible" as per Article 36(2) of the UNCITRAL Rules following the passing of Mr. Orlandini.[98]

52. First, the Claimants consider that all applicable nationality requirements have been satisfied because Mr. Orlandini was a US national from birth until his passing,[99] and investment tribunals have consistently determined that the investor's nationality at the time of filing the claim "is what is germane to the Tribunal's jurisdiction."[100] The identities or nationalities of Mr. Orlandini's heirs or beneficiaries, according to the Claimants, are completely irrelevant to the Tribunal's jurisdiction[101] because the Treaty does not contain a continuous nationality requirement.[102] The Claimants argue that the authorities relied upon by the Respondent to support the existence of this requirement pertain to the diplomatic protection context, not to investor-State arbitration.[103] Even in that context, they note, the International Law Commission (the "**ILC**") has declined to adopt a blanket continuous nationality rule.[104]

53. Second, the Claimants reject that Mr. Orlandini's heirs could replace his estate for the purpose of determining the Tribunal's jurisdiction.[105] According to the Claimants, Mr. Orlandini's sole heir is Mrs. Orlandini,[106] who is duly qualified to prosecute Mr. Orlandini's claims on behalf of his

97 Claimants' Opposition, para. 16, fn. 8; Letter from the Claimants to the Tribunal, March 25, 2019. *See supra* para. 8.

98 Claimants' Opposition, para. 18.

99 Claimants' Opposition, para. 23.

100 Claimants' Opposition, paras. 21, 23-24; *Siag and Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, para. 503 (**CLA-1**).

101 Claimants' Opposition, para. 13; Respondent's Triple Application, paras. 38-39.

102 Claimants' Opposition, para. 20.

103 Claimants' Opposition, paras. 21-22; *Serafín García Armas and Karina García Gruber v. Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction, December 15, 2014, paras. 172-175 (**RLA-13**).

104 Claimants' Opposition, para. 22; Draft Articles on Diplomatic Protection with commentaries, United Nations International Law Commission (2006), p. 32 (**CLA-38**).

105 Claimants' Opposition, paras. 25, 27-28; *Siag and Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, para. 503 (**CLA-1**).

106 Claimants' Opposition, paras. 27, 29; Testament, Art. 2.2 (**R-23**).

estate[107] and is only participating in the present proceeding in a representative capacity, and not as a claimant herself.[108] It is therefore "entirely speculative and baseless", in the Claimants' view, whether other heirs or beneficiaries of Mr. Orlandini may appear before the Tribunal.[109]

54. The Claimants further consider the Respondent's request for further details concerning the JMO Trust to be "intrusive and unnecessary."[110] They submit that this information would be irrelevant for a denial of benefits defense, which in any event would be untimely as the dispute has already crystalized.[111] The Claimants repeat that, as provided in the Testament and confirmed by the attorney representing Mrs. Orlandini before the Miami-Dade Court (Ms. Kimberly A. Martínez-Lejarza), Mrs. Orlandini will be the trustee and sole beneficiary of the JMO Trust, as well as the recipient of the residuary estate.[112]

55. The Claimants consider that the Respondent has displayed an "insensitive" conduct and baselessly accused them of not abiding by the Tribunal's instructions.[113] Consequently, they submit that the Respondent's "delay tactics" should be punished and that "the Tribunal should assess the costs incurred by Claimants in responding to the Respondent's termination and suspension request."[114]

56. Lastly, the Claimants refer to Ms. Martínez-Lejarza's indication that the probate proceeding before the Miami-Dade Court will remain open until Mr. Orlandini's claims against Bolivia are fully resolved.[115] In the Claimants' view, this makes the Respondent's request for termination or suspension "nonsensical" and "impractical."[116]

---

107 Claimants' Opposition, para. 27; Miami-Dade Court Order (**R-17**); *In Re: Estate of Julio M. Orlandini-Agreda*, Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Case No. 19-000371 CP, Letters of Administration, March 21, 2019 (Annex B to Letter from the Claimants to the Tribunal dated March 25, 2019); Power of Attorney given by Francees Rosario de la Vía de Orlandini, March 22, 2019 (Annex C to Letter from the Claimants to the Tribunal dated March 25, 2019).

108 Claimants' Opposition, para. 26.

109 Claimants' Opposition, para. 29; Respondent's Triple Application, para. 40.

110 Claimants' Opposition, para. 30.

111 Claimants' Opposition, para. 30; *Masdar Solar & Wind Cooperatief U.A. v. Spain*, ICSID Case No. ARB/14/1, Award, May 16, 2018, para. 239 (**CLA-45**).

112 Claimants' Opposition, para. 30; Testament, Arts. 3, 11 (**R-23**); Statement of Ms. Kimberly A. Martínez-Lejarza, May 22, 2019 ("**Martínez-Lejarza Statement**"), para. 9 (**CWS-1**).

113 Claimants' Opposition, para. 31; Respondent's Triple Application, paras. 38, 46.

114 Claimants' Opposition, paras. 31-32.

115 Claimants' Opposition, para. 33; Martínez-Lejarza Statement, para. 11 (**CWS-1**).

116 Claimants' Opposition, para. 33.

B. Request for Trifurcation

57. The Claimants first address the applicable standard on bifurcation (**a**) and then explain how, in their view, the *Rationae Personae* Objection (**b**), the Covered Investment Objection (**c**), the Protected Investment Objection (**d**) and the Denial of Justice Objection (**e**) fail to meet that standard. Finally, they propose that the proceedings be bifurcated exclusively with respect to quantum (**f**).

a) Applicable Standard

58. The Claimants refer to Articles 17(1) and 23(3) of the UNCITRAL Rules as containing the applicable standard on bifurcation.[117] The "proper touchstone", the Claimants opine, is whether bifurcation would contribute to a "fair and efficient process."[118]

59. The Claimants reject the existence of a presumption in favor of bifurcation in Article 23(3) and the Respondent's proposition that deciding all issues in a single phase would be unfair and contrary to international law.[119] Tribunals in investor-state arbitrations often decide large and complex cases within a single phase, the Claimants note; but, in doing so, they do not "presume" that a State has consented to arbitration.[120] The Claimants consider the Respondent's reliance on the practice of the International Court of Justice (the "**ICJ**") to be "misplaced", since Article 79(5) of the ICJ Rules of Court provide for automatic bifurcation when preliminary objections are submitted.[121] Instead, the Claimants rely on the UNCITRAL Rules, which allow a tribunal to rule on jurisdictional pleas "either as a preliminary question or in an award on the merits." [122] In the Claimants' view, this provision embodies an existing practice of gathering of jurisdictional and merits issues in a single phase, which seeks to enhance efficiency and procedural economy.[123]

---

117 Claimants' Opposition, para. 36.

118 Claimants' Opposition, para. 37; *Guaracachi America, Inc. and Rurelec PLC v. Bolivia*, PCA Case No. 2011-17, Procedural Order No. 10, December 17, 2012, para. 9 (**CLA-2**).

119 Claimants' Opposition, para. 37; Respondent's Triple Application, para. 88. *See supra* para. 44

120 Claimants' Opposition, para. 38; *Karkey Karadeniz Elektrik Uretim A.S. v. Pakistan*, ICSID Case No. ARB/13/1, Award, August 22, 2017 (**CLA-3**).

121 Claimants' Opposition, para. 38; Respondent's Triple Application, para. 88; Rules of Court (1978), International Court of Justice, Art. 79(5) (**CLA-5**).

122 Claimants' Opposition, para. 38; UNCITRAL Rules, Art. 23(3) (**CLA-32**).

123 Claimants' Opposition, para. 38; UNCITRAL Rules, Art. 23(3) (**CLA-32**).

60. The Claimants also refer to the three criteria considered in *Glamis Gold v. United States of America* as a standard often applied by tribunals when deciding bifurcation requests,[124] and note that the factors established in *Philip Morris v. Australia*, on which the Respondent relies, "involve substantially the same considerations."[125] The Claimants consider that, under either standard, all criteria are cumulative;[126] and even when all three requirements are met, the Tribunal may still "exercise its discretion to hear all issues in a single phase."[127]

61. Lastly, the Claimants submit that the Respondent's request for trifurcation should be rejected for reasons of procedural efficiency and fairness.[128] The Claimants note that the present proceedings have been pending for more than a year, and argue that dividing the proceeding into three phases would cause "outrageous delay and expense", an aspect that is oft-criticized in the arbitral community.[129] The Claimants finally note that the Respondent has failed to provide any precedent of a tribunal ordering trifurcation in an investor-State arbitration.[130]

b) *Rationae Personae* Objection

62. The Claimants submit that the *Rationae Personae* Objection is not substantial, raises issues that are intertwined with the merits and cannot justify bifurcation of the jurisdictional phase.[131]

63. First, the Claimants repeat their argument that the identity and nationality of Mr. Orlandini's heirs is irrelevant to the Tribunal's jurisdiction, and consider the Respondent's allegations in this regard to be frivolous and insubstantial.[132] The Claimants also highlight that CMO has independent standing as a Claimant in this arbitration,[133] which would make the Respondent's jurisdictional

---

124 Claimants' Opposition, para. 39; *Glamis Gold v. United States*, Procedural Order No. 2 (Revised), May 31, 2005, para. 12.c (**CLA-7**): "(1) whether the objection is substantial…; (2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase…; and (3) whether bifurcation is impractical…"

125 Claimants' Opposition, para. 40; *Philip Morris Asia Limited v. Australia*, PCA Case No. 2012-12, Procedural Order No. 8, April 14, 2014, para. 109 (**RLA-48**). *See supra* para. 45.

126 Claimants' Opposition, para. 40; *Glencore Finance (Bermuda) Limited v. Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2, January 31, 2018, para. 42 (**CLA-8**).

127 Claimants' Opposition, para. 41; *Glencore Finance (Bermuda) Limited v. Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2, January 31, 2018, para. 56 (**CLA-8**).

128 Claimants' Opposition, para. 42.

129 Claimants' Opposition, para. 42.

130 Claimants' Opposition, para. 43.

131 Claimants' Opposition, para. 45.

132 *See* Claimants' Opposition, para. 46. *See also supra* paras. 49 *et seq*.

133 *See infra* paras. 68 *et seq*.

objection regarding Mr. Orlandini's heirs incapable of disposing the dispute, making bifurcation unwarranted.[134]

64. Second, the Claimants claim that the Treaty does not exclude dual citizens, such as Mr. Orlandini, from the scope of protected "nationals":[135] Mr. Orlandini holds US nationality and is therefore a "natural person who is a national of [the US] under its applicable law" in accordance with Article I(c) of the Treaty.[136] Relying on *Serafín García Armas v. Venezuela*,[137] the Claimants argue that reading an exclusion of dual nationals into Treaty Article IX(1) would be tantamount to an impermissible revision of the text of the Treaty, which would be contrary to Article 31 of the VCLT[138] and would also contradict the Treaty's object and purpose in "promot[ing] greater economic cooperation," "stimulat[ing] the flow of private capital" and establishing a "stable framework for investment."[139]

65. The Claimants further reject the Respondent's attempt to import the exclusion of dual nationals in Article 25 of the ICSID Convention through Treaty Article IX(4).[140] The Claimants read this Treaty provision through the prism of Article 31 of the VCLT as simply clarifying that the standing consent to arbitrate given by the Treaty Parties constitutes a "written consent of the parties" (for purposes of Chapter II of the ICSID Convention) and an "agreement in writing" (for purposes of the 1958 New York Convention), which is standard treaty practice.[141] This provision, the Claimants claim, does not "covertly import requirements of the ICSID and New York Conventions",[142] and, if it did, it would "deprive claimants' choice of [the UNCITRAL] arbitral

134 Claimants' Opposition, para. 47.

135 Claimants' Opposition, para. 49; Notice of Arbitration, para. 7.

136 Claimants' Opposition, para. 50.

137 Claimants' Opposition, paras. 54-55; *Serafín García Armas and Karina García Gruber v. Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction, December 15, 2014, paras. 17-18, 23, 36, 158, 163-164, 199-200 (**RLA-13**).

138 Claimants' Opposition, paras. 51-57; Treaty Articles I(c) and IX(1) ("…an investment dispute is a dispute between a Party and a national or company of the other Party…") (**C-1**); *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion of the International Court of Justice, ICJ Reports, March 3, 1950, p. 8 (**RLA-4**).

139 Claimants' Opposition, paras. 57-58; Treaty Preamble (**C-1**); *Serafín García Armas and Karina García Gruber v. Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction, December 15, 2014, para. 199 (**RLA-13**).

140 Claimants' Opposition, paras. 56, 59-68; Treaty Article IX(4) ("This consent and the submission of the dispute by a national or company under paragraph 3 (a) shall satisfy the requirement of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties to the dispute…") (**C-1**); Art. 25(2) of the ICSID Convention (**CLA-49**).

141 Claimants' Opposition, paras. 62-64; North American Free Trade Agreement, Art. 1122 (**CLA-39**); *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, para. 133 (**CLA-13**).

142 Claimants' Opposition, paras. 62, 65.

forum guaranteed by the Treaty of *effet utile*."[143] The Claimants also consider the Respondent's reliance on the ICSID Convention to be frivolous because Bolivia denounced the ICSID Convention in 2007.[144]

66. Third, the Claimants reject the Respondent's proposition that a dominant and effective nationality test applies.[145] First, the Claimants read the plain text of Article I(c) of the Treaty as requiring that a natural person be a national under the laws of the pertinent Contracting Party to be considered a "national" for the purposes of the Treaty.[146] The Claimants highlight that this definition of "national" differs from comparable definitions in other treaties, which contain an express reference to the dominant and effective nationality test.[147] Second, the Claimants consider the Respondent's reliance on authorities from the diplomatic protection context to be improper because they are "are guided by a different logic" than investor-State arbitration.[148] This is because of the Treaty's standing as *lex specialis* in these proceedings.[149] The Claimants also criticize the Respondent's reliance on *Serafín García Armas v. Venezuela*, observing that the tribunal in that case found that the dominant and effective nationality test was irrelevant for the purpose of determining its jurisdiction *rationae personae*.[150]

67. The Claimants further argue that, if a dominant and effective nationality test applied, it would require "a full examination of Mr. Orlandini's time in Bolivia and the United States", raising issues that are intertwined with the merits.[151] The Claimants refer in this regard to *Ballantine v. Dominican Republic*, where the tribunal was required to apply the dominant and effective nationality test as per the governing treaty[152] and decided not to deal with this matter as a

143 Claimants' Opposition, paras. 66-67; *Serafín García Armas and Karina García Gruber v. Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction, December 15, 2014, paras. 193-196 (**RLA-13**).

144 Claimants' Opposition, para. 68.

145 Claimants' Opposition, paras. 69-72.

146 Claimants' Opposition, paras. 69, 73.

147 Claimants' Opposition, paras. 70-72; Dominican Republic-Central America-United States Free Trade Agreement, Art. 10.28 (**CLA-40**); *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, September 24, 2008, para. 101 (**CLA-12**).

148 Claimants' Opposition, para. 74.

149 Claimants' Opposition, para. 75; Draft Articles on Diplomatic Protection with commentaries, United Nations International Law Commission, 2006, Art. 17 (**CLA-38**).

150 Claimants' Opposition, para. 76; Respondent's Triple Application, para. 33, fn. 28; *Serafín García Armas and Karina García Gruber v. Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction, December 15, 2014, paras. 174-175, 200, 206 (**RLA-13**).

151 Claimants' Opposition, para. 78.

152 Claimants' Opposition, para. 79; Dominican Republic-Central America-United States Free Trade Agreement, Article 10.28 (**CLA-40**).

preliminary question owing to "the factual link between the merits and the objection".[153] In the instant case, the Claimants note, bifurcating jurisdiction and merits would require the Tribunal to examine, on two separate occasions, the same facts regarding the Parties' conduct in the Martínez Case and other related proceedings, and could lead to the Tribunal prejudging certain issues going to the merits if it issued a preliminary ruling that Mr. Orlandini acted only as a Bolivian national before Bolivian authorities.[154]

68. Fourth, the Claimants contend that CMO is entitled to bring claims in its own right against Bolivia.[155] This is because CMO was 95% owned and controlled by Mr. Orlandini (a protected US national). As such, the Claimants claim, CMO qualifies as a "covered investment" under Treaty Article I(e),[156] and shall be treated as a US company under Article IX(8),[157] regardless of how it presented itself before Bolivian authorities.[158] The Claimants also repeat their argument that the jurisdictional requirements of Article 25 of the ICSID Convention do not apply, and extend this consideration to CMO.[159]

69. The Claimants further submit that the relevant test for establishing CMO's standing in this arbitration is whether Mr. Orlandini held ownership or control "immediately before" the allegedly unlawful actions of the Respondent, and claim that this test is satisfied in the instant case.[160]

70. Finally, the Claimants argue that there is a "factual link" between the Respondent's arguments on the merits and its arguments regarding CMO's control[161] that tilts the balance against bifurcation.[162] The first limb of this "factual link" are the legal proceedings involving Mr. Orlandini's sister (which, the Claimants claim, did not affect Mr. Orlandini's control of

153 Claimants' Opposition, paras. 79-80; *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Procedural Order No. 2, April 21, 2017, paras. 21, 26, 28, 30 (**CLA-14**).

154 Claimants' Opposition, para. 82.

155 Claimants' Opposition, paras. 83-87.

156 Claimants' Opposition, para. 85; Treaty Article I(e) ("'covered investment' means an investment of a national or company of a party in the territory of the other Party") (**C-1**).

157 Claimants' Opposition, paras. 83, 85; Treaty Article IX(8) ("For purposes of Article 25(2)(b) of the ICSID Convention and this Article, a company of a Party that, immediately before the occurrence of the event or events giving rise to an investment dispute, was a covered investment, shall be treated as a company of the other Party.") (**C-1**).

158 Claimants' Opposition, para. 86.

159 Claimants' Opposition, para. 87; Respondent's Triple Application, para. 48.

160 Claimants' Opposition, paras. 88-90, Treaty Article IX(8) (**C-1**); *Link-Trading Joint Stock Company v. Moldova*, UNCITRAL, Final Award, April 18, 2002, para. 55 (**CLA-16**).

161 *See supra* para. 30.

162 Claimants' Opposition, para. 91; Respondent's Triple Application, para. 51.

CMO).[163] The second limb are the judicial interventions against CMO within the context of the Martínez Case, which, according to the Claimants, could not have affected Mr. Orlandini's control, since the role of the intervenor was only to oversee the management of the company.[164] Finally, the Claimants refer to the liens allegedly recorded on the shares of CMO, which would have had to be executed to affect the ownership of CMO.[165]

c) Covered Investment Objection

71. The Claimants consider that the Covered Investment Objection is not substantial, is directly intertwined with the merits and would not, even if upheld, dispose of the entirety of the dispute.[166]

72. According to the Claimants, the measures adopted by the Respondent's authorities denying their ownership of their mining rights, including in the Antequera River, concern "some of the central treaty breaches in this dispute."[167] In arguing that CMO did not have underground mining rights to *Veneros San Juan*, the Claimants claim, "Bolivia is in essence arguing that it did not commit an expropriation", which is an argument going to the merits.[168] In the Claimants' view, dealing with these issues in two phases would entail the repetition of witness and expert evidence on the same matters, as well as a risk of prejudging the merits while deciding on jurisdiction.[169]

73. As to the substance of the Covered Investment Objection, the Claimants consider that the SETMIN certificates are sufficient to prove the nature and scope of their rights in the Concessions, since they are directly referenced in the documents in the form of '*pertenencias*'.[170] In denying the Claimants' underground mining rights under the Antequera River Concessions, the Claimants claim, the Respondent has conceded that an expropriation occurred.[171]

163 Claimants' Opposition, para. 92.

164 Claimants' Opposition, paras. 93-94.

165 Claimants' Opposition, para. 95.

166 Claimants' Opposition, paras. 97-104.

167 Claimants' Opposition, paras. 97-98; Notice of Arbitration, paras. 59, 127.

168 Claimants' Opposition, para. 99.

169 Claimants' Opposition, paras. 100, 103.

170 Claimants' Opposition, para. 101; Notice of Arbitration, paras. 28-31; SETMIN Certificates of Final Inscription, March & October 2000 (**C-3**).

171 Claimants' Opposition, para. 102; Respondent's Triple Application, para. 57.

74. Finally, the Claimants note that their expropriation claim also encompasses their surface mining rights, and therefore the Covered Investment Objection could not, even if upheld, dispose of the dispute.[172]

d) Protected Investment Objection

75. The Claimants also consider the Protected Investment Objection to be insubstantial and intertwined with the merits, and thus incapable of justifying bifurcation.[173]

76. The Claimants submit that the Concessions and their shares in CMO "amply fall" within the definition of "investment" in Article I(d) of the Treaty.[174] The Claimants also consider the Respondent's application of the *Salini* factors to be "devoid of merit and insubstantial"; first, because Article 25 of the ICSID Convention does not apply in these proceedings, [175] and second, because importing the *Salini* factors would be contrary to the plain text of the Treaty and to the VCLT.[176]

77. The Claimants finally observe that, in considering the Protected Investment Objection, the Tribunal would irremediably come across factual and legal questions (such as the essential features of the Claimants' investments) that are closely linked with the merits of the case.[177]

---

172 Claimants' Opposition, para. 104; Notice of Arbitration, paras. 27-32.

173 Claimants' Opposition, para. 107.

174 Claimants' Opposition, para. 105. As per Treaty Article I(d), "'investment' of a national or company means every kind of investment owned or controlled directly or indirectly by that national or company, and includes investment consisting or taking the form of: (i) a company; (ii) shares, stock, and other forms of equity participation, and […] debt interests, in a company; (iii) contractual rights, […]; (iv) tangible property, including real property; and intangible property, including rights, […]; (v) intellectual property, […]; and (vi) rights conferred pursuant to law, such as licenses and permits"; while "[t]he list of items in (i) through (vi) above is illustrative and not exhaustive." (**C-1**).

175 Claimants' Opposition, paras. 108-109; *Guaracachi America, Inc. & Rurelec PLC v. Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, para. 364 (**CLA-4**).

176 Claimants' Opposition, para. 110. *See id.* at fn. 114. The Claimants refer to the "*Salini* factors", which the Tribunal understands concern the criteria considered in *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Morocco*, ICSID Case No. ARB/00/04, Decision on Jurisdiction, July 23, 2001, para. 52. The Tribunal notes that the Respondent has not relied on this decision in its submissions, but observes that it has referred to similar criteria as defined by other ICSID tribunals. *See* Respondent's Triple Application, paras. 68-69.

177 Claimants' Opposition, para. 111.

e) Denial of Justice Objection

78. The Claimants finally submit that the Denial of Justice Objection fails to meet all three factors in *Glamis Gold v. United States* and *Philip Morris v. Australia*.[178]

79. First, the Claimants contend that dealing with the Denial of Justice Objection as a preliminary question would lead to duplication of the analysis of the factual background of the Martínez Case.[179] Second, they claim this objection could not dispose of the whole dispute because the Notice of Arbitration refers to several violations of the Treaty and international law beyond the alleged denial of justice in the Martínez Case.[180] Third and last, the Claimants describe the Denial of Justice Objection as "frivolous" given the level of detail provided in the Notice of Arbitration regarding the alleged breaches.[181]

f) Bifurcation on Quantum

80. While the Claimants "strongly oppose separation of the jurisdictional and merits issues",[182] they request bifurcation of the quantum issues in a stand-alone phase where the experts' analysis could be focused on valuation aspects.[183]

81. However, if the Tribunal decides to examine the Respondent's jurisdictional objections as a preliminary question, the Claimants request that the Tribunal order the merits and quantum submissions to be heard together, such that the proceeding would not exceed two phases.[184]

178 Claimants' Opposition, para. 112.

179 Claimants' Opposition, paras. 113-114.

180 Claimants' Opposition, paras. 115-116; Notice of Arbitration, paras. 154, 159-160, 167, 181, 192-193. The Claimants refer to violations concerning expropriation, fair and equitable treatment, full protection and security, effective means, and national treatment and most favoured nation treatment.

181 Claimants' Opposition, para. 117.

182 Claimants' Opposition, paras. 118-120.

183 Claimants' Opposition, para. 121.

184 Claimants' Opposition, fn. 121.

IV. THE RESPONDENT'S APPLICATION FOR SECURITY FOR COSTS

82. As part of its Triple Application, the Respondent has requested that the Tribunal order the Claimants to (i) provide a USD 4 million security for its costs of arbitration, in the form of a guarantee payable on first demand or a deposit held in escrow by the PCA;[185] and (ii) disclose whether they use third party funding to cover the costs of the arbitration, and, if so, the identity of the third party funder and the terms of any third party funding agreement.[186]

1. THE RESPONDENT'S POSITION

83. The Respondent submits that the Tribunal is empowered to order security for costs, which it claims would be fully warranted in light of the events following the passing of Mr. Orlandini.[187] The Respondent first refers to the standard for the Tribunal to impose security for costs (**A**) and then explains why that standard is met in the instant case (**B**).

A. Applicable Standard

84. The Respondent asserts that the Tribunal has the power to order the Claimants to provide security for costs in favor of the Respondent under Articles 17(1)[188] and 26 of the UNCITRAL Rules.[189] This is evidenced, in the Respondent's view, by decisions in other investor-State arbitrations[190] and by Section 11 of Procedural Order No. 1, explicitly requiring the Parties to disclose the use of third party funding.[191]

85. The Respondent refers to an order in *Manuel García Armas v. Venezuela* as containing the applicable test for evaluating security for costs under Article 26 of the UNCITRAL Rules.[192] The four limbs of this test are: (i) whether there is, *prima facie*, a reasonable prospect that the Tribunal

185 Respondent's Triple Application, para. 130.

186 Respondent's Triple Application, para. 130.

187 Respondent's Triple Application, para. 102.

188 Respondent's Triple Application, paras. 104-105; D. Caron, L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, (2nd ed. 2013), Oxford University Press, p. 30 (**RLA-47**).

189 Respondent's Triple Application, paras. 103-110.

190 Respondent's Triple Application, paras. 106-107; *Manuel García Armas and others v. Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, June 20, 2018, para. 186 (**RLA-52**); *Sergei Viktorovich Pugachev v. Russia*, UNCITRAL, Partial Award, July 7, 2017, para. 372 (**RLA-53**); *South American Silver Limited (Bermuda) v. Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, January 11, 2016, para. 52 (**RLA-54**).

191 Respondent's Triple Application, para. 107; Procedural Order No. 1, Section 11.

192 Respondent's Triple Application, paras. 109-110; *Manuel García Armas and others v. Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, June 20, 2018, paras. 189, 191 (**RLA-52**). *See also RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, August 13, 2014, paras. 58, 71, 73, 79, 82 (**RLA-58**).

will issue an award in favor of the Respondent including its costs of legal representation (*fumus boni iuris*); (ii) whether harm not adequately reparable by an award of damages may be caused if the measure is not ordered; (iii) whether such harm would substantially outweigh the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (iv) whether the measure requested is of such urgency that it cannot be postponed until the issuance of the award.[193]

B. Circumstances Warranting Security for Costs

86. Applying the *Manuel García Armas v. Venezuela* test, the Respondent contends that the circumstances of the present case warrant a security for costs order in its favor.[194]

87. First, the Respondent submits that there is, *prima facie*, a reasonable prospect that the Tribunal will award the Respondent its costs of legal representation.[195] In this regard, the Respondent notes that the *Manuel García Armas v. Venezuela* tribunal considered that the respondent's objections concerning the dual nationality of the claimants were reasonable and substantiated for purposes of an application for security for costs.[196] In the Respondent's view, the same rationale applies to its jurisdictional objections *rationae materiae* and *rationae personae*.[197] The Respondent also notes that the Claimants have failed to provide an estimate of the amount they claim in this dispute, thus raising doubts about the reasonableness and credibility of the Claimants' case and the likelihood that an award will be issued in their favor.[198]

88. Second, the Respondent asserts that it would likely be precluded from recovering its legal costs if an award is issued in its favor.[199] This is because, in its view, there are "serious doubts" concerning the Claimants' ability to honor an award on costs or the existence of assets against which such an award could be enforced:[200] the amount of the residual estate that will be left after the closing of Mr. Orlandini's estate is still unclear, as are the finances of the JMO Trust[201] or the

193 Respondent's Triple Application, para. 109; *Manuel García Armas and others v. Venezuela*, PCA Case No. 2016-8, Procedural Order No. 9, June 20, 2018, para. 191 (**RLA-52**).

194 Respondent's Triple Application, para. 111.

195 Respondent's Triple Application, para. 112.

196 Respondent's Triple Application, para. 113.

197 Respondent's Triple Application, para. 114.

198 Respondent's Triple Application, para. 115; Notice of Arbitration, para. 198(2) ("an amount likely in the many hundreds of millions and possibly more").

199 Respondent's Triple Application, paras. 116-119; *Manuel García Armas and others v. Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, June 20, 2018, para. 225 (**RLA-52**).

200 Respondent's Triple Application, para. 118.

201 Respondent's Triple Application, para. 119; Testament, Art. 3 (**R-23**).

solvency of CMO[202] (which the Claimants themselves have noted has "no other meaningful assets" other than the Concessions and " the claims in this proceeding").[203] The Respondent also posits that the Claimants' credit history raises "legitimate concerns", seeing that Mr. Orlandini had been involved in several bankruptcy proceedings in the US and other proceedings concerning debts with his employees in CMO,[204] while CMO and its assets have been sequestered on several occasions.[205] The Respondent claims that these circumstances led it to invite the Claimants to disclose whether they are using third party funding, but note that the Claimants are yet to respond.[206]

89. Third, the Respondent submits that if its application for security for costs is not granted it will suffer substantially more harm than the Claimants would suffer if the application was granted.[207] Relying again on *Manuel García Armas v. Venezuela*, the Respondent argues that there is an actual risk that its representation and other costs will not be recoverable because it is unclear whether the Claimants are solvent or are using third party funding.[208] In contrast, an order requiring security for costs would, in the Respondent's view, cause no harm to the Claimants, since they have already assumed the risk of an adverse decision on costs.[209]

90. Lastly, the Respondent asserts that the requested measure cannot be delayed until a final award is issued. According to the Respondent, the urgency of its application lies in the increasing amount of funds destined to its legal representation in this proceeding.[210]

---

202 Respondent's Triple Application, para. 120.

203 Respondent's Triple Application, para. 120; Notice of Arbitration, para. 149.

204 Respondent's Triple Application, para. 121; Southern District Court of Florida, *Bankrupcy Petition # 91-15805-AJC filed by Debtor Miguel Orlandini-Agreda*, Docket Report (**R-1**); La Razón, *Mineros de Totoral están sin salario desde hace 10 meses*, December 10, 1991 (**R-2**).

205 Respondent's Triple Application, para. 121; *Martínez et.al. c. CMO, Decreto mediante el cual se designa a Jaime Montecinos Vargas como interventor*, December 10, 2003 (**R-27**).

206 Respondent's Triple Application, para. 122; Letter from the Respondent to the Tribunal, March 6, 2019; Procedural Order No. 1, Section 11.

207 Respondent's Triple Application, para. 123.

208 Respondent's Triple Application, para. 127; *Manuel García Armas and others v. Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, June 20, 2018, paras. 233, 235 (**RLA-52**).

209 Respondent's Triple Application, para. 128.

210 Respondent's Triple Application, para. 129.

2. THE CLAIMANTS' POSITION

91. The Claimants request that the Tribunal reject the Respondent's application for security for costs, since it fails to meet the general standard of extreme and exceptional circumstances (**A**) or the specific requirements set out in Article 26 of the UNCITRAL Rules (**B**).[211]

92. The Claimants have also provided the following clarification in response to Bolivia's request that they confirm whether they have secured third party funding for this arbitration:

> [] Bolivia's request that the Tribunal order the Claimants to confirm whether they have secured third-party funding is improper, as it is not in accordance with Procedural Order No. 1. Procedural Order No. 1 provides that the Parties have to send a written notice to the Tribunal if they have signed a third-party funding agreement to cover the costs of the arbitration. As long as this event does not occur, the Parties have no obligation to make any general disclosure of the kind that Bolivia is improperly seeking from the Claimants. Claimants have no disclosures to make based on Procedural Order No. 1, and Bolivia's request should be rejected.[212]

A. Applicable Standard

93. According to the Claimants, "security for costs is an extraordinary measure that is granted only in the most extreme and exceptional of circumstances,"[213] such as bad faith on the part from whom security for costs is requested, the likelihood of an irreparable damage or serious misconduct.[214] The Claimants deny that "[a] general doubt or concern for a party's inability to pay",[215] or "even financial distress and the risk that an adverse costs award will go unpaid"[216] could meet the standard applicable to a request for security for costs. According to the Claimants, the Respondent

---

211 Claimants' Opposition, paras. 124-126.

212 Claimants' Opposition, para. 188 (footnotes omitted).

213 Claimants' Opposition, para. 127.

214 Claimants' Opposition, paras. 130-131; *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, January 11, 2016, para. 59 (**RLA-54**); *Libananco Holdings Co. Limited v. 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. 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**).

215 Claimants' Opposition, paras. 132-133; Respondent's Triple Application, paras. 118-121.

216 Claimants' Opposition, paras. 132-133; *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**); *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, January 11, 2016, para. 67 (**RLA-54**).

bears the burden of proving[217] "clearly and sufficiently" that the Claimants are unable or unwilling to comply with a costs order.[218]

94. The Claimants reject the Respondent's reliance on *RSM Production Corporation v. St. Lucia*, where security for costs was granted because the claimant had proven financial difficulties and also had a track record of failure to pay adverse costs awards in prior proceedings.[219] In the Claimants' view, this stands in contrast with their "cooperative attitude" in the present proceeding, which they claim is evidenced by their timely payment of the first deposit and their agreement to cover any additional costs that could have resulted from the First Claimant not ratifying all the actions taken by the Second Claimant following the passing of Mr. Orlandini.[220] The Claimants note that it is actually the Respondent who, in what they consider was an attempt to "clean its hands", paid its share of the deposit only one day before submitting its application for security for costs.[221]

95. The Claimants finally request that the Tribunal decline to follow *Manuel García Armas v. Venezuela*. The Claimants assert that the tribunal in that case effectively reversed the burden of proof by ordering security for costs on the sole basis that a third party funding agreement existed and did not cover a costs award.[222] According to the Claimants, this decision "goes against the very essence of investor-State arbitration" and the standard established by numerous tribunals, creating a risk that "meritorious claims for which no alternative forum exists" will be stifled.[223]

---

217 Claimants' Opposition, para. 135; Respondent's Triple Application, para. 119; *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**).

218 Claimants' Opposition, para. 133; *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**); *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, January 11, 2016, para. 67 (**RLA-54**).

219 Claimants' Opposition, para. 136; *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, August 13, 2014, para. 82 (**RLA-58**); *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. 122 (**CLA-42**).

220 Claimants' Opposition, para. 137.

221 Claimants' Opposition, para. 138.

222 Claimants' Opposition, paras. 139-141; *Manuel García Armas and others v. Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, June 20, 2018, paras. 2, 242, 251 (**RLA-52**).

223 Claimants' Opposition, paras. 141-142; *Victor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, September 25, 2001, para. 86 (**CLA-34**).

96. In the Claimants' view, the Respondent's argument that "it has not been proven" that the Claimants, Mr. Orlandini's heirs or CMO can pay "a hypothetical adverse costs award in favor of Bolivia" fails to meet the "extreme and exceptional circumstances" standard.[224]

B. Circumstances Warranting Rejection of the Security for Costs Application

97. The Claimants assert that the Respondent also "bears the burden of proof to establish all of the requirements stated in Article 26 of the UNCITRAL Rules", and consider that none of those requirements are met in the present case.[225]

98. First, the Claimants claim that the Respondent has failed to establish a plausible defense on the merits.[226] The applicable standard in this regard is, according to the Claimants, whether the Respondent's defenses have a reasonable possibility of success,[227] which the Claimants deny.[228]

99. Second, the Claimants assert that the Respondent has failed to establish a likelihood to be awarded the costs of this arbitration,[229] and note that there is no "blanket right" to be awarded costs under Article 42 of the UNCITRAL Rules.[230] This is confirmed, the Claimants argue, by the practice of investment tribunals on the apportionment of costs.[231]

100. Third, the Claimants argue that the Respondent has failed to prove that they would be unwilling or unable to pay a costs award[232] and is improperly seeking to reverse the applicable burden of proof in this regard.[233] The Claimants contend that the Respondent relies on decades-old events that do not have any bearing on the Claimants' current solvency.[234] These include Mr. Orlandini's insolvency proceedings in the US from the early 1990s (which were filed by Mr. Orlandini

---

224 Claimants' Opposition, paras. 132-133; Respondent's Triple Application, paras. 119-120.

225 Claimants' Opposition, para. 145. The Claimants also clarify that Article 26 of the UNCITRAL Rules, and not Article 17, contains the applicable standard to decide this request. *See* Claimants' Opposition, paras. 128-129; Respondent's Triple Application, paras. 104-105.

226 Claimants' Opposition, paras. 146-151.

227 Claimants' Opposition, para. 147; Respondent's Triple Application, para. 112.

228 Claimants' Opposition, paras. 146, 148.

229 Claimants' Opposition, para. 149.

230 Claimants' Opposition, paras. 149-150; Respondent's Triple Application, para. 118.

231 Claimants' Opposition, para. 151; M. Hodgson, "Counting the Costs of Investment Treaty Arbitration", *Global Arbitration Review*, March 24, 2014, p. 6 (**CLA-30**).

232 Claimants' Opposition, paras. 152-163; Respondent's Triple Application, paras. 118-120.

233 Claimants' Opposition, paras. 152, 154; *Rachel S. Grynberg and others v. Grenada*, ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Costs, October 14, 2010, para. 5.17 (**CLA-25**); *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**).

234 Claimants' Opposition, paras. 155-157.

himself, were shortly dismissed, had no implication on CMO and never resulted in Mr. Orlandini being declared bankrupt);[235] and certain Bolivian proceedings for default and arrest warrant, which the Claimants allege refer to the Martínez Case and are strictly connected to the merits of the dispute.[236] Also in connection with the Martínez Case, the Claimants note that a security for costs order should not be granted on the basis of financial hardship caused by the State's actions that gave rise to the dispute.[237] Even if the Respondent's concerns were to be accepted, the Claimants note that proven financial difficulties do not necessarily warrant security for costs.[238] The Claimants finally submit that the Respondent's failure to make timely payment of the initial deposit should also be taken into consideration in assessing its request.[239]

101. Fourth, the Claimants contend that the Respondent has failed to prove that the risk of a potentially unpaid costs award "exceeds greatly" the harm of a security for costs order.[240] They contend that this risk is hypothetical, and in any event minor for a sovereign State, as compared to the "immediate and significant" harm that a security for costs order would entail for the Claimants.[241] The Claimants add that any financial difficulties on their side derive from the Respondent's unlawful actions,[242] and argue that granting the Respondent's application would further exacerbate this imbalance and distort the relevant standard in investor-State arbitration.[243]

---

235 Claimants' Opposition, para. 156; Southern District Court of Florida, *Bankruptcy Petition #: 91-15805-AJC filed by Debtor Miguel Orlandini-Agreda*, Docket Report, Filing #236, Order Dismissing Case, February 16, 1993 (**R-1**).

236 Claimants' Opposition, para. 157; Respondent's Triple Application, para. 121.

237 Claimants' Opposition, paras. 157-158; *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**); *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, August 12, 2014, Assenting Opinion (Gavan Griffith), para. 2 (**RLA-58**); *Gustav FW Hamester GmbH & CO KG v. Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, paras. 14, 17 (**CLA-31**).

238 Claimants' Opposition, paras. 159-160; *South American Silver Limited (Bermuda) v. Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, January 11, 2016, para. 63 (**RLA-54**); *Rachel S. Grynberg and others v. Grenada*, ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Costs, October 14, 2010, para. 5.19 (**CLA-25**).

239 Claimants' Opposition, paras. 161-162; W. Gu, "Security for Costs in International Commercial Arbitration" (2005), 22(3) *Journal of International Arbitration*, p. 38 (**CLA-33**).

240 Claimants' Opposition, paras. 164-167; *Burimi S.R.L. & Eagle Games SH. A v. Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 (Provisional Measures Concerning Security for Costs), May 3, 2012, para. 35 (**CLA-22**).

241 Claimants' Opposition, paras. 167, 170.

242 Claimants' Opposition, para. 168.

243 Claimants' Opposition, para. 169.

102. Fifth, the Claimants submit that the Respondent has failed to establish the existence of "a current or imminent risk of irreparable harm"[244] and merely refers to its purported right to recover the costs of the arbitration in the event of succeeding on the merits.[245] The Claimants insist that no such right to recover costs exists and that the alleged risk of harm is "speculative" and cannot give rise to urgency.[246] The Claimants also repeat their argument that the Respondent has failed to prove that they would resist or be incapable of facing enforcement of an adverse costs award.[247]

103. Sixth, the Claimants consider that upholding the Respondent's request for security for costs would be tantamount to pre-judging its jurisdictional objections, since this request is based on the circumstances of Mr. Orlandini's death and its concern about past events involving Mr. Orlandini, mostly relating to the Martínez Case.[248] The Claimants consider this to be contrary to Article 26(3)(b) of the UNCITRAL Rules,[249] and contend, relying on *Rurelec v. Bolivia*, that the Tribunal should follow a conservative approach to avoid the risk of prejudgment.[250]

104. Seventh, and lastly, the Claimants request that the Tribunal take into account the Respondent's overall conduct when assessing the Respondent's security for costs application. This conduct includes, first, the Respondent's alleged "harmful retaliatory measures" against CMO through SENASIR,[251] which, according to the Claimants, are "completely without legal support", reflect the Respondent's bad faith approach and could even amount to a further violation of the Treaty.[252] The Claimants also invite the Tribunal to assess Bolivia's conduct in two other investment arbitrations (*Rurelec v. Bolivia* and *South American Silver v. Bolivia*) where two tribunals rejected Bolivia's security for costs applications for reasons that, the Claimants argue, are largely similar

244 Claimants' Opposition, para. 171.

245 Claimants' Opposition, para. 172; Respondent's Triple Application, paras. 118, 129.

246 Claimants' Opposition, paras. 172-173; *Burimi S.R.L. & Eagle Games SH. A v. Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 (Provisional Measures Concerning Security for Costs), May 3, 2012, para. 40 (**CLA-22**).

247 Claimants' Opposition, para. 174.

248 Claimants' Opposition, paras. 176-180; Respondent's Triple Application, para. 102.

249 Claimants' Opposition, para. 176; D. Caron and L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed. 2013), p. 523 (**RLA-47**); *Guaracachi America, Inc. and Rurelec v. Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14, March 11, 2013, para. 8 (**RLA-57**).

250 Claimants' Opposition, para. 179; *Guaracachi America, Inc. and Rurelec v. Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14, March 11, 2013, para. 8 (**RLA-57**).

251 Claimants' Opposition, para. 182; Letter from the Claimants to the Tribunal, May 23, 2019. *See also supra* para. 12.

252 Claimants' Opposition, para. 183.

to their arguments in connection with this application.[253] The Claimants also believe there is a contradiction between (i) Bolivia's argument in those cases that the existence of a third party funder constituted a risk that the claimant(s) would not be able to pay an adverse costs award, and (ii) the Respondent's argument in this case that the absence of a third party funder would create the same risk.[254]

V. REQUESTS FOR RELIEF

105. The Respondent's request for relief is as follows:

> *Reservándose expresamente su derecho a presentar en el momento procesal oportuno objeciones adicionales, Bolivia solicita respetuosamente al Tribunal que:*
>
> - *Ordene la terminación* without prejudice *del procedimiento de conformidad con el artículo 36(2) del Reglamento CNUDMI;*
>
> - *En subsidio, suspenda el presente procedimiento a la espera de que la Corte del Condado de Miami Dade finalice la Sucesión;*
>
> - *Ordene que este procedimiento sea trifurcado para conocer y decidir las objeciones jurisdiccionales de Bolivia de forma previa y, si fuera necesario, el fondo de los reclamos de las Demandantes y el monto de cualquier compensación que el Tribunal considere oportuna en forma posterior; y*
>
> - *Ordene a las Demandantes constituir una* cautio judicatum solvi *por un valor de, al menos, US$ 4 millones para garantizar el pago íntegro de un laudo condenando a las Demandantes a las costas del arbitraje, conforme a lo dispuesto en el artículo 42(1) del Reglamento CNUDMI;*
>
> - *Bolivia solicita respetuosamente que, a elección del Tribunal, este ordene a las Demandantes:*
>
> i. *Entregar, en un plazo no superior a 15 días a partir de la decisión del Tribunal sobre esta Solicitud, una garantía bancaria a primer requerimiento por un monto de US$ 4 millones emitida por un banco de primer rango de los Estados Unidos o Canadá a favor de Bolivia actuando en la persona de la Procuraduría General del Estado Plurinacional de Bolivia, la cual deberá ser irrevocable y tener vigencia hasta 30 días después de emitido el laudo en este arbitraje; o*

---

253 Claimants' Opposition, paras. 184-185; *Guaracachi America, Inc. & Rurelec v. Bolivia*, PCA Case No. 2011-17, Request for *Cautio Judicatum Solvi*, February 12, 2013, paras. 3, 9, 15, 17, 26 (**CLA-37**); *Guaracachi America, Inc. & Rurelec v. Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14, March 11, 2013, para. 3 (**RLA-57**); *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Request for *Cautio Judicatum Solvi* and Disclosure of Information, October 8, 2015, paras. 14-15, 20, 30 (**CLA-17**); *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, January 11, 2016, para. 18 (**RLA-54**).

254 Claimants' Opposition, para. 187; Respondent's Triple Application, para. 127.

ii. Depositar, en un plazo no superior a 15 días a partir de la decisión del Tribunal sobre esta Solicitud, US$ 4 millones en la cuenta bancaria que la Secretaría de la Corte Permanente de Arbitraje designe al efecto para que el Tribunal disponga en su laudo final sobre su atribución.

- *Ordene a las Demandantes confirmar si gozan de algún financiamiento por terceros y, de ser así, revelar la identidad del financista, así como los términos del acuerdo de financiamiento suscrito con aquél; y*

- *Condene a las Demandantes al pago de las costas incurridas por Bolivia durante este incidente procesal.*[255]

(Tribunal's courtesy translation: "With express reserve of its right to submit further objections in due course, Bolivia respectfully requests that the Tribunal:

- Order the termination of the proceedings without prejudice pursuant to Article 36(2) of the UNCITRAL Rules;

- As subsidiary relief, suspend the current proceedings until the Miami-Dade Court closes the Estate;

- Order that this proceeding be trifurcated so that Bolivia's jurisdictional objections are heard and decided as a preliminary matter and, if necessary, the merits of the Claimants' claims and the amount of any compensation that the Tribunal may deem appropriate is determined at a later stage; []

- 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, as provided in Article 42(1) of the UNCITRAL Rules;

  - Bolivia respectfully requests that the Tribunal, at its choice, order the Claimants to:

    i. Provide, within 15 days from the date of the Tribunal's decision on this Request, a bank guarantee payable on first demand in the amount of USD 4 million and issued by a first-tier bank in the United States or Canada in favor of Bolivia acting through the *Procuraduría General del Estado Plurinacional de Bolivia*, which shall be irrevocable and in effect until 30 days after issuance of the award in this arbitration; or

    ii. Deposit, within 15 days from the date of the Tribunal's decision on this Request, USD 4 million in a bank account designated for this purpose by the Secretariat of the Permanent Court of Arbitration for the Tribunal to decide on its allocation in its final award.

- 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; and

- Order the Claimants to bear the costs incurred by Bolivia in the course this procedural issue.")

255 Respondent's Triple Application, para. 130.

106. The Claimants' request for relief is as follows:

> For the foregoing reasons, Claimants respectfully request that the Tribunal:
>
> (a) Reject the Respondent's request for termination or suspension of the proceedings and proceed with scheduling the next phase of the arbitration;
>
> (b) Declare that the undersigned counsel are duly authorized to represent the Estate of Julio Miguel Orlandini-Agreda, the First Claimant, in this arbitral proceeding for all consequent purposes;
>
> (c) Declare that Section 14.2 of Procedural Order No. 1 is now moot;
>
> (d) Reject the Respondent's request for trifurcation of the proceedings, and bifurcate only quantum considerations in a separate phase (keeping all merits and jurisdictional submissions together in a single phase);
>
> (e) Reject the Respondent's application for security for costs;
>
> (f) Order the Respondent to pay all of Claimants' costs incurred in responding to the Respondent's request for termination or suspension of the proceedings and the Respondent's application for security for costs;
>
> (g) Reject all of the Respondent's remaining requests for relief; and
>
> (h) Order such other relief as the Tribunal may deem just and proper.[256]

[256] Claimants' Opposition, para. 190.

VI. TRIBUNAL'S ANALYSIS

107. The Tribunal has considered and analyzed carefully the positions and the arguments of the Parties relating to the Respondent's Triple Application. The Tribunal will proceed to analyze below the three different parts of the Respondent's Application.

1. RESPONDENT'S APPLICATION FOR TERMINATION OR SUSPENSION

108. The Respondent has advanced four jurisdictional objections. The Respondent submits that the first of these objections (*rationae personae*) alone results in a manifest lack of jurisdiction. On that basis, the Respondent requests that these proceedings be terminated without prejudice pursuant to Article 36(2) of the UNCITRAL Rules.[257] The Claimants object to this request.

109. Neither Party has argued that the Tribunal lacks the powers to terminate the proceedings. Indeed, such power is derived, *inter alia*, from Article 36(2) of the UNCITRAL Rules, which states:

> If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so.

110. Pursuant to this provision, the Tribunal has the power to terminate the proceedings for any reason not mentioned in para. 1 of Article 36 (which deals with settlement of the dispute) if the continuation of the proceedings becomes unnecessary or impossible. The Tribunal understands the Respondent to be arguing that the continuation of the proceeding is unnecessary or impossible because of the Tribunal's manifest lack of jurisdiction.[258]

111. The difficulty the Tribunal has with the Respondent's argument is that the Tribunal must decide that it lacks jurisdiction at this initial stage of the proceedings without having been fully briefed on the Respondent's jurisdictional objections. Due process requires that the Parties be granted an opportunity to be heard on the matters pertaining to the Tribunal's jurisdiction and to fully present their arguments on the jurisdictional objections advanced by the Respondent.

112. To be clear, there may be situations where the lack of jurisdiction is manifest. ICSID jurisprudence addresses the existence of a manifest lack of jurisdiction because of the provision in Article 36(3)

---

257 Respondent's Triple Application, paras. 3, 5, 16, 46, 53.

258 *See* J. Paulsson, G. Petrochilos, *UNCITRAL Arbitration* (2017), Kluwer Law International, pp. 333-334 (noting that "impossible" may include a situation where the tribunal finds that it lacks jurisdiction over the dispute and, as a result, decides to terminate the proceedings). *See also* D. Caron, L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, (2nd ed. 2013), Oxford University Press, pp. 788-789.

of the ICSID Convention allowing ICSID's Secretary-General to decline to register a request for arbitration if the dispute is manifestly outside of the jurisdiction of the Centre, , as well as because of ICSID Arbitration Rule 41(5), which provides for an expedited procedure if a claim is "manifestly" without legal merit. ICSID jurisprudence also addresses amply the meaning of the term "manifest" in the context of annulment proceedings pursuant to Article 52 of the ICSID Convention, which allows annulment of an ICSID award in case the tribunal has manifestly exceeded its powers.

113. This Tribunal does not operate under the ICSID Convention and does not need to engage in an analysis of ICSID case law to determine the meaning of the term "manifest." It is sufficient for present purposes to rely on the meaning of the term "manifest" in authoritative English or Spanish language dictionaries, where it is described as "evident," "obvious," "readily perceived by the eye or the understanding."[259] It is nevertheless helpful to note that ICSID tribunals and *ad hoc* committees have referred to "manifest" as "obvious by itself,"[260] "self-evident" rather than the product of interpretations,[261] "plain on its face" rather than susceptible to argument,[262] or "textually obvious."[263]

114. The Tribunal is not in a position to conclude that it lacks jurisdiction in a manner that is "evident," "obvious" or "readily perceived by the eye or the understanding," nor that it is "plain on its face" rather than susceptible to argument, or "textually obvious." Such would be the case, for example, if the Claimants relied on a treaty that did not exist or if the applicable treaty explicitly excluded investor-State arbitration.

115. Here, by contrast, the Claimants have vigorously disputed the Respondent's jurisdictional objections and advanced arguments that those objections are not meritorious. To conclude that it manifestly lacks jurisdiction, the Tribunal must dismiss the Claimants' arguments off-hand, i.e., it must conclude that the Claimants' arguments manifestly lack merit. Without prejudging in any way the strength of the jurisdictional objections advanced by the Respondent, the Tribunal

---

259 *See for example,* Merriam-Webster Dictionary, Shorter Oxford English Dictionary; *Diccionario de la Real Academia Espanola* (defining "*manifiesto*" as "*descubierto, patente, claro*").

260 *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador),* ICSID Case No. ARB/01/10, Decision on Annulment, January 8, 2007, para. 36.

261 *Wena Hotels Limited v. Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, February 5, 2002, para. 25.

262 *CDC Group plc v. Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, June 29, 2005, para. 41.

263 *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, June 5, 2007, para. 40.

believes that it is not in a position to rule on those objections at this stage. The Tribunal needs to hear from the Parties their fully developed arguments on the jurisdictional objections before it can reach any conclusion with respect to its jurisdiction.

116. In that sense, the continuation of the arbitration proceedings is both necessary and possible within the terms of Article 36(2) of the UNCITRAL Rules. It is necessary because the Tribunal needs to be fully briefed by the Parties on the Respondent's jurisdictional objections. Further, the continuation of the proceedings is possible because the Tribunal is not in a position, at this stage, to conclude that it lacks jurisdiction.

117. The Tribunal, therefore, must decline the Respondent's application to terminate the proceedings for manifest lack of jurisdiction.

118. The Respondent argues, in the alternative, that the proceedings must be suspended until the estate of Mr. Orlandini is closed by the Miami-Dade Court.[264] In the view of the Respondent, this would be a "pragmatic solution,"[265] given that it is still uncertain who Mr. Orlandini's future heirs or beneficiaries may be. The Respondent further argues that the Tribunal is not in a position to establish that it has jurisdiction until the identity of those heirs or beneficiaries is determined,[266] which would then allow the Tribunal to determine whether they meet the relevant jurisdictional requirements.

119. In response, the Claimants advance essentially three arguments. First, according to the Claimants, the investor's nationality at the time of filing the claim "is what is germane to the Tribunal's jurisdiction"[267] and, therefore, the identities or nationalities of Mr. Orlandini's heirs or beneficiaries are "irrelevant to the Tribunal's jurisdiction."[268]

---

264 Respondent's Triple Application, paras. 16, 40, 46, 53, 130. The Miami-Dade Court Order (**R-17**) provides that "[t]his Estate must be closed within 12 months, unless it is contested or its closing date is extended by court order".

265 Respondent's Triple Application, para. 40.

266 Respondent's Triple Application, para. 38. *See supra* para. 25 *et seq*.

267 Claimants' Opposition, paras. 21, 23-24; *Siag and Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, para. 503 (**CLA-1**).

268 Claimants' Opposition, para. 13; Respondent's Triple Application, paras. 38-39.

120. Second, according to the Claimants, after Mr. Orlandini's passing, his claims have remained with his estate; and Mrs. Orlandini is duly qualified to prosecute Mr. Orlandini's claims on behalf of his estate[269] as a duly authorized representative of Mr. Orlandini's estate. The Claimants point out that, as confirmed by Ms. Martínez-Lejarza, the attorney representing Mrs. Orlandini before the Miami-Dade Court, Mrs. Orlandini will be the trustee and sole beneficiary of the JMO Trust, as well as the recipient of the residuary estate.[270] On this basis, the Claimants also assert that the identity of Mr. Orlandini's heirs is irrelevant.

121. Third, the Claimants assert that the probate proceeding before the Miami-Dade Court will remain open until Mr. Orlandini's claims against Bolivia are fully resolved.[271] Therefore, in the Claimants' view, the suspension of the proceedings would be "impractical."[272]

122. Similarly to the application for termination, the Respondent's request for a suspension requires that the Tribunal rule on matters on which it has not been fully briefed. The Tribunal must give the Parties full opportunity to submit evidence and present arguments on matters such as: (i) the existence of a requirement of continuous nationality and its potential application to the facts of this case; (ii) the relevance, if any, of the identity of Mr. Orlandini's heirs or the beneficiaries of the JMO Trust; or (iii) the relevance of the probate proceeding before the Miami-Dade Court and whether such proceeding can conclude before the disposition of Mr. Orlandini's (and his estate's) claims in this arbitration.

123. The Tribunal is not in a position to rule definitively on any of those, or other relevant, matters without hearing further from the Parties. Moreover, because the Tribunal needs to hear further from the Parties, the disposition of those matters at the current stage may affect one or the other Party's due process rights. The questions raised by the Parties need to be fully aired before this Tribunal. A suspension of the proceedings would not achieve that objective.

124. Finally, the Tribunal is reluctant to suspend these proceedings in light of the possibility that the probate proceeding before the Miami-Dade Court may not be closed until Mr. Orlandini's claims

---

269 Claimants' Opposition, para. 27; Miami-Dade Court Order (**R-17**); *In Re: Estate of Julio M. Orlandini-Agreda*, Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Case No. 19-000371 CP, Letters of Administration, March 21, 2019 (Annex B to Letter from the Claimants to the Tribunal dated March 25, 2019); Power of Attorney given by Francees Rosario de la Vía de Orlandini, March 22, 2019 (Annex C to Letter from the Claimants to the Tribunal dated March 25, 2019).

270 Claimants' Opposition, para. 30; Testament, Arts. 3, 11 (**R-23**); Martínez-Lejarza Statement, para. 9 (**CWS-1**).

271 Claimants' Opposition, para. 33; Martínez-Lejarza Statement, para. 11 (**CWS-1**).

272 Claimants' Opposition, para. 33.

against Bolivia are resolved by this Tribunal. In such a scenario, the suspension of these proceedings would not only be impractical but place the Claimants in a situation of legal limbo and this would impede the process of rendering justice. To the extent that such a possibility exists, the suspension of these proceedings is not justified.

125. The Tribunal thus concludes that it cannot, at this stage, grant the Respondent's alternative application to suspend the arbitration proceedings. The Tribunal notes that the Respondent is not precluded from renewing its application for suspension if in the course of the arbitration proceedings evidence emerges that a suspension would better serve the interests of justice.

2. THE RESPONDENT'S APPLICATION FOR TRIFURCATION

126. At the outset, the Tribunal notes that the Parties agree to a separate stage of the proceedings dedicated to damages in case the Tribunal finds jurisdiction and liability. In light of that agreement, the question the Tribunal needs to decide is whether to hear the matters related to its jurisdiction and the matters related to the Respondent's liability in two separate stages or together, in one stage.

127. The Tribunal further notes that the Parties do not disagree materially with respect to the applicable criteria for bifurcating jurisdiction from liability/merits. For example, the Respondent relies on the decision of the tribunal in *Philip Morris v. Australia* to identify three criteria for bifurcation: (i) whether the jurisdictional objections are *prima facie* serious and substantial; (ii) whether the jurisdictional objections are intertwined with the merits; and (iii) whether the jurisdictional objections, if granted, are capable of disposing of the whole case or an essential part of the case.[273] The Respondent also refers to the decision of the tribunal in *Philip Morris v. Australia* to point out that a tribunal's decision on bifurcation must take into consideration the matter of efficiency, i.e., the savings of costs and time that may result from bifurcation.[274]

128. The Claimants have also relied on the criteria articulated by the tribunal in *Philip Morris v. Australia* and on the (very similar) criteria articulated by the tribunal in *Glamis Gold v. United States*.[275] The Tribunal will also rely on those criteria in its analysis and consideration of the application for bifurcation of the Respondent's jurisdictional objections.

---

273 Respondent's Triple Application, para. 92.

274 Respondent's Triple Application, para. 90.

275 Claimants' Opposition, paras. 39-40.

129. The Tribunal is, however, reluctant to engage in an analysis of whether the jurisdictional objections advanced by the Respondent are serious and substantial. As discussed in the Tribunal's analysis of the application for termination, the Tribunal believes that it is premature to form a view on the seriousness of the objections. Therefore, at this stage of the proceedings, the Tribunal is not prepared to rule that the jurisdictional objections advanced by the Respondent are not serious or not substantial and deny bifurcating them on that basis.

130. The Tribunal further believes that at least some of the jurisdictional objections, if granted, are capable of disposing of the entire case or of an essential part of the case. Therefore, the Tribunal cannot deny bifurcating the jurisdictional objections on that basis either.

131. In the view of the Tribunal, therefore, the key question is whether the jurisdictional objections are intertwined with the merits (more specifically, with the questions of liability). The Tribunal believes that they are.

132. For example, while the *ratione personae* objections relating to Mr. Orlandini's nationality may seemingly require only an analysis of legal matters, the Tribunal's task would be more complicated if the Tribunal were to find eventually that it needs to decide on Mr. Orlandini's "dominant and effective" nationality. Such an inquiry would inevitably lead the Tribunal into an investigation of factual matters relating to Mr. Orlandini's actions in relation to his business and his investments in Bolivia. Further, an analysis of the *ratione materiae* objections would require a factual analysis of what rights the Claimants acquired, how, when, etc., which would also inevitably lead the Tribunal to delve into facts that would also be relevant to liability.

133. The problem that arises out of situations where the jurisdictional objections are, at least in some respects, intertwined with the merits, is two-fold. First, evidence, such as documents and witness testimony, relevant to the determination of jurisdiction would also be relevant to the determination of liability. Thus, assuming the Tribunal finds jurisdiction, the Tribunal will have to review the same or substantially the same evidence in the next phase of the proceedings, dedicated to liability. Such an overlap would not contribute to the efficient conduct of the proceedings. It will hardly be efficient if the same documents would have to be reviewed twice, the same witnesses would have to be heard twice, etc.

134. Second, and perhaps more significantly, such overlap of evidence may result in due process concerns. At the jurisdictional stage, the Tribunal will need to make certain findings of fact. To the extent that the same facts are also relevant to liability, and if the Tribunal reaches that stage,

the Tribunal may have prejudged some of the issues of fact without having heard (at the jurisdictional stage) all the relevant evidence, which will only become fully available to the Tribunal at the liability stage.

135. In light of its conclusion that the jurisdictional objections raised by the Respondent are, at least with respect to significant matters of fact, intertwined with the merits, the Tribunal concludes that bifurcation of the jurisdictional objections is not warranted and that they should be heard together with the matters of liability.

136. The Tribunal further believes that its decision not to bifurcate jurisdiction from liability is not at variance with the goal of conducting efficient proceedings. When jurisdictional objections are raised, there is always the possibility that the tribunal declines jurisdiction. In a unitary proceeding, such a result would lead to inefficiency in that the parties will have also spent time and resources arguing the merits. This possibility has to be weighed against the inefficiency of the tribunal finding jurisdiction after a separate jurisdictional stage and only then proceeding to the merits. When seeking to determine which of the two alternatives is more likely to result in a more efficient proceeding, tribunals take into consideration, among other matters, the time, cost and fees associated with the presentation of the parties' case on damages, the engagement of damages experts, etc., which typically constitutes part of the merits stage.

137. Here, however, the Claimants do not oppose bifurcation of the damages stage if jurisdiction and liability are heard together. A non-bifurcated stage of jurisdiction and liability would not be as time-consuming and expensive as a non-bifurcated proceeding that also includes damages. If the Respondent prevails on jurisdiction, additional time and cost will have been spent (unnecessarily) on presenting the case on liability; however, that additional cost will be less, possibly significantly so, than the typical case that includes damages.

138. Moreover, trifurcation of the proceedings into jurisdiction, liability and quantum, as requested by the Respondent, would result (assuming the Claimants are successful on jurisdiction and liability) in three sequential stages of the proceedings. The Tribunal finds that this would materially prolong the duration of the proceedings, delay the final disposition of the dispute and cause increased costs.

139. Thus, the Tribunal has to balance the possibility that the case may be dismissed on jurisdiction after a separate jurisdictional stage without engaging in the matters of liability and damages against the possibility that the case will proceed to three separate stages resulting in considerable

length and increased cost of the proceedings.[276] In light of the totality of the circumstances as currently known by the Tribunal, and in particular (i) the Tribunal's conclusion that the jurisdictional objections are intertwined with the merits, and (ii) the Parties' agreement to bifurcate damages, the Tribunal believes that hearing jurisdiction and liability together is more likely to contribute to the efficient conduct of the proceedings.

3. THE RESPONDENT'S APPLICATION FOR SECURITY FOR COSTS

140. The Tribunal begins with the applicable standard. The views of the Parties differ somewhat in that regard. The Respondent refers to a four-limb test: (i) whether there is, *prima facie*, a reasonable prospect that the Tribunal will issue an award in favor of the Respondent including its costs of legal representation (*fumus boni iuris*); (ii) whether harm not adequately reparable by an award of damages may be caused if the measure is not ordered; (iii) whether such harm would substantially outweigh the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (iv) whether the measure requested is of such urgency that it cannot be postponed until the issuance of the award.[277]

141. According to the Claimants, security for costs is "an extraordinary measure" that is granted only "in the most extreme and exceptional of circumstances."[278] In the Claimants' view, "[a] general doubt or concern for a party's inability to pay",[279] or "even financial distress and the risk that an adverse costs award will go unpaid"[280] is not sufficient. For the Claimants, the burden is on the Respondent to prove that the Claimants are unable or unwilling to comply with a costs order.[281]

142. The Tribunal is reluctant to opine, at this stage of the proceedings, on whether there is a reasonable prospect of an award of costs in favor or against either Party. To the extent that there is a

---

276 A third possibility would be that that the Tribunal deals first with jurisdiction alone and then (assuming it finds jurisdiction) hear liability and quantum together. The Tribunal believes that hearing jurisdiction and liability first and quantum later (if necessary) is most likely to contribute to the efficient conduct of the proceedings.

277 Respondent's Triple Application, para. 109; *Manuel García Armas and others v. Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, June 20, 2018, para. 191 (**RLA-52**).

278 Claimants' Opposition, para. 127.

279 Claimants' Opposition, paras. 132-133; Respondent's Triple Application, paras. 118-121.

280 Claimants' Opposition, paras. 132-133; *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**); *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, January 11, 2016, para. 67 (**RLA-54**).

281 Claimants' Opposition, para. 133; *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**); *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, January 11, 2016, para. 67 (**RLA-54**).

reasonable prospect of an award of costs against the Claimants, there is also a reasonable prospect of an award of costs against the Respondent. Any pronouncement by the Tribunal on the matter at this stage would be premature. Therefore, the Tribunal cannot issue a ruling on the Respondent's application for security for costs on the basis of whether it is reasonable, or not, to expect that there would be an award of costs against the Claimants.

143. That, however, does not mean that a tribunal would be precluded from ordering security for costs at an early stage of the proceedings if such an order is compelled by other factors. The Tribunal believes that such factors 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.[282]

144. The Tribunal observes 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.

145. Further, the Tribunal agrees that a balancing test must be applied when considering the potential harm to a respondent resulting from the non-payment of a cost award and the potential harm to a claimant resulting from an order of security for costs. The potential harm to a respondent, i.e., the inability to recover its costs pursuant to a cost award, if no security for costs is ordered, must be weighed against the potential harm to a claimant, taking into account that: (i) providing security involves costs of its own; (ii) a claimant should not be required to pay a "fee" for the right to

282 *See for example*, *Libananco Holdings Co. Limited v. Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, June 23, 2008 (**CLA-20**); *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs, September 20, 2012 (**CLA-21**); *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, January 11, 2016 (**RLA-54**); *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14, Procedural Order No. 3 – Decision on the Parties' Requests for Provisional Measures, June 23, 2015 (**CLA-42**); *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, August 13, 2014 (**RLA-58**).

submit a claim (in addition to the filing fees and advance payments);[283] and (iii) a claimant's financial distress may be caused by the respondent's actions that are the subject of the dispute, etc. All these circumstances may play a role in striking the right balance when assessing the potential harm to a claimant or to a respondent.

146. In applying those tests, the Tribunal takes into account the following factors. First, the Claimants have paid their share of the advance payment. There is no evidence that the Claimants experienced financial difficulties in making that payment. Second, pursuant to Section 14.2 of Procedural Order No. 1, the Second Claimant was to "bear any costs of arbitration, as defined in Article 40 of the UNCITRAL Rules, that may arise from the legal representative of Mr. Orlandini's estate not ratifying the actions taken by the Second Claimant in this arbitration." Although this event did not arise, the Second Claimant's acceptance of the Tribunal's ruling does not evidence reluctance or inability to make the payments necessary for the conduct of the proceedings. On the contrary, it demonstrates the Claimants' willingness to shoulder the necessary financial burden to ensure the continuation of the proceedings. Third, the Claimants have not engaged in any abuse, serious misconduct, inappropriate behavior, dilatory tactics or bad faith actions during the course of these proceedings.

147. The Parties have presented extensive arguments with respect to the financial situation of the Claimants and their financial ability, or inability, to comply with a potential costs award. The Tribunal does not believe that it is necessary, at this stage, to engage in further analysis of the Claimants' financial situation. As a factual matter, as noted in the preceding paragraph, the Claimants have demonstrated their willingness and ability to cover their share of the costs of these proceedings. As a legal matter, this Tribunal is of the view that financial distress, in and of itself, does not provide a sufficient basis for ordering security for costs. In that sense, the Tribunal agrees with the tribunal in *EuroGas v. Slovakia* that "financial difficulties and third party-funding—which has become a common practice—do not necessarily constitute *per se* exceptional circumstances justifying that the Respondent be granted an order of security for costs."[284]

---

283 *See for example, Burimi S.R.L. and Eagle Games SH.A v. Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, May 3, 2012, para. 41 ("Even if there were more persuasive evidence than that offered by the Respondent concerning the Claimants' ability or willingness to pay a possible award on costs, the Tribunal would be reluctant to impose on the Claimants what amounts to an additional financial requirement as a condition for the case to proceed.") (**CLA-22**).

284 *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**).

148. The Tribunal does not need to opine on the significance of third-party funding for an order of security for costs. Pursuant to Section 11 of Procedural Order No. 1, the Parties are required to "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." This has not happened and, thus, any discussion of the relevance of third-party funding to these proceedings is, at this stage, unnecessary.

149. It is worth noting, in this context, that the decision of the tribunal in *Manuel García Armas v. Venezuela*, which the Parties have discussed extensively in their respective submissions, is distinguishable from the situation in this case for a number of reasons. Like this Tribunal, the *Manuel García Armas* tribunal agreed that the appropriate test is the existence of "exceptional circumstances." It concluded, however, that such circumstances existed in that case as a result of the combination of third-party funding and the insolvency (or the lack of proof of solvency) of the claimants.[285] On that basis, the *Manuel García Armas* tribunal found that, on balance, the claimants' harm (in providing security for costs through their third-party funder) did not outweigh the potential harm to Venezuela.[286] Whether one agrees with the *Manuel García Armas* tribunal or not, the situation in the present case is different, as discussed above, and the Tribunal is therefore not persuaded that exceptional circumstances exist.

150. Finally, the Tribunal agrees that the urgency of an order of security for costs is a matter to be duly taken into consideration. However, the Tribunal is not persuaded by the Respondent's arguments on urgency. The argument advanced by the Respondent is that it will continue to incur costs and fees, the amounts of which will increase as the proceedings advance.[287] There is no sufficient evidence, however, that the financial situation of the Claimants is such that an order of security for costs is urgent. In particular, there is no evidence that the Claimants may be in a position to provide security for costs today but would lose that ability in the future. The Tribunal notes that the Respondent is of course free to renew its application should the circumstances change.

151. On balance, for all the reasons discussed above, the Tribunal is not persuaded that circumstances exist that warrant an order of security for costs.

---

285 *Manuel García Armas and others v. Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, June 20, 2018, para. 250 (**RLA-52**).

286 *Manuel García Armas and others v. Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, June 20, 2018, para. 233 (**RLA-52**).

287 Respondent's Triple Application, para. 129.

VII. DECISION AND ORDERS

152. For the foregoing reasons, the Tribunal:

(a) Rejects the Respondent's request for termination or suspension of the proceedings;

(b) Rejects the Respondent's request for trifurcation of the proceedings;

(c) Bifurcates the proceedings into a stage of jurisdiction and liability to be followed, if necessary, by a stage on damages and quantum;

(d) Invites the Parties to seek to reach an agreement on the schedule for the next stage of the proceedings (jurisdiction and liability) that is consistent with the non-bifurcated timetable set out under Scenario 1 of Annex 1 to Procedural Order No. 3, dated March 8, 2019, and inform the Tribunal of their agreement (or their respective views) by **Tuesday, July 23, 2019**;

(e) Rejects the Respondent's application for security for costs;

(f) Defers to a later stage its decision on the costs and fees relating to the stage of the proceedings dealing with the Respondent's Triple Application;

(g) Declares that Section 14.2 of Procedural Order No. 1 is now moot;

(h) Declares that counsel for the Second Claimant are duly authorized to represent the First Claimant, the Estate of Julio Miguel Orlandini-Agreda, in these arbitral proceedings; and

(i) Rejects all other claims and requests for relief in this stage of the proceedings.

Dated: July 9, 2019

Place of Arbitration: Paris, France

Dr. Stanimir A. Alexandrov
(Presiding Arbitrator)

On behalf of the Tribunal