

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Latam Hydro LLC and CH Mamacocha S.R.L.

v.

Republic of Peru

(ICSID Case No. ARB/19/28)

PROCEDURAL ORDER No. 1

Members of the Tribunal

Prof. Albert Jan van den Berg, President of the Tribunal

Prof. Dr. Guido Santiago Tawil, Arbitrator

Prof. Raúl E. Vinuesa, Arbitrator

Secretary of the Tribunal

Ms. Ana Constanza Conover Blancas

15 April 2020

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I. PROCEDURAL BACKGROUND

1. By letter of 9 March 2020, the Respondent submitted an application for the Tribunal *(i)* not to read the Claimants' Notice of Intent nor the Request for Arbitration without first ruling on a request from the Respondent to expunge information from both documents which is said to be covered by a confidentiality agreement entered into between the Claimants and Peru's *Comisión Especial que representa al Estado en Controversias Internacionales de Inversión* on 5 December 2017 (the "**Confidentiality Agreement**"); and *(ii)* to order the Centre not to publish the Notice of Intent or the Notice of Arbitration on the ICSID website while the Respondent's request was pending before the Tribunal.
2. On 12 March 2020, the Tribunal granted one week to the Parties to confer and seek to agree on the confidentiality issues raised by the Respondent. The Tribunal also informed the Parties that, failing agreement: *(i)* the Respondent was allowed to submit an application to the Tribunal on 19 March 2020, indicating those parts of the documents which it considered to be in breach of the Confidentiality Agreement; *(ii)* the Claimants were allowed to reply to the Respondent's submission by 26 March 2020; and *(iii)* the Tribunal would decide upon any application following receipt of both Parties' views.
3. On the same date, the Tribunal informed the Parties that, pending any agreement of the Parties or application by the Respondent, the Tribunal would not review the Notice of Intent nor the Request for Arbitration, and ICSID would not publish the Notice of Intent nor the Request for Arbitration on its website pending resolution of this issue.
4. On 19 March 2020, the Respondent filed an application for the Tribunal *(i)* to order the expungement of those portions of the Notice of Intent and the Request for Arbitration which it considers that violate the Confidentiality Agreement, and *(ii)* not to take that information into account in its deliberations and determinations in this arbitration ("**Respondent's Application**").
5. On 26 March 2020, the Claimants filed a response to the Respondent's Application ("**Claimants' Response**").
6. On 27 March 2020, the Respondent requested leave from the Tribunal to reply to the Claimants' Response. The Claimants submitted observations on the Respondent's request on the same date. On 30 March 2020, the Tribunal invited the Respondent to reply to the Claimants' Response by 1 April 2020 and the Claimants to file rejoinder comments by 6 April 2020.
7. On 2 April 2020, the Respondent submitted a reply to the Claimants' Response ("**Respondent's Reply**").
8. On 6 April 2020, the Claimants submitted a rejoinder to the Respondent's Reply ("**Claimants' Rejoinder**").
9. This Procedural Order sets out the Tribunal's decision on the Respondent's Application.

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II. PARTIES' POSITIONS

A. The Respondent's Position

10. The Respondent requests the Tribunal to expunge certain information from the Claimants' Notice of Intent and the Request for Arbitration which it considers to have been included in violation of the Confidentiality Agreement, concerning statements and actions taken in the context of consultations and negotiation between the Parties related to the subject matter of this arbitration.¹
11. Separately, as a matter of procedure, the Respondent alleges that it was granted a shorter period than that granted to the Claimants to prepare its Reply which prevented it, *inter alia*, from submitting a witness statement with its Reply. Also, the Respondent argues that the Claimants have improperly submitted arguments concerning the merits of the dispute.²
12. The Respondent requests that the Tribunal grant its Application based on the following four main reasons: *first*, the Claimants' conduct violates the Confidentiality Agreement; *second*, the Claimants' conduct is contrary to the basic general principle that actions taken by one party in the context of negotiations should not be used against it by the other party in ensuing litigation; *third*, all of the proposed expurgations are covered by the Confidentiality Agreement; and *finally*, Claimants' objections to the Applications are groundless.
13. *First*, the Respondent submits that the Claimants' conduct violates the Confidentiality Agreement. It considers that the Claimants' inclusion in the Notice of Intent and the Request for Arbitration of statements or actions that were taken in the framework of the Parties' consultations and negotiations violates Clauses 4 and 8 of the Confidentiality Agreement.³
14. The Respondent disagrees with the Claimants' claim that the information at issue was publicly disclosed and was therefore exempted from obligations under the Confidentiality Agreement. In the Respondent's view, such interpretation ignores the first sentence of Clause 8 which expressly states that any kind of declaration or action taken in the course of the consultations and negotiation cannot be used by either party, under no circumstances and in no way in any other context, including any arbitration procedure, national or international.⁴

¹ Respondent's Application, p. 1.

² Respondent's Reply, pp. 2-3.

³ These clauses provide, in their relevant parts, as follows: "*las propuestas de cada Parte durante las Consultas y Negociación serán de carácter confidencial, no pudiendo ser utilizadas como medio probatorio en un posible arbitraje internacional a iniciarse en el futuro*" (Clause 4); and "*cualquier clase de declaración o comunicación, verbal o por escrito enviada por una Parte a la otra Parte o a terceros o acciones tomadas en el curso de las Consultas y Negociación no puede ni podrá ser usado, por cualquiera de las Partes, bajo ninguna circunstancia y de ninguna forma en cualquier otro contexto, incluyendo cualquier procedimiento de arbitraje, nacional o internacional, o cualquier otro procedimiento legal o litigioso*" (Clause 8).

⁴ Respondent's Application, p. 4; Respondent's Reply, pp. 19-20.

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15. **Second**, the Respondent claims that the Claimants' conduct is contrary to the basic general principle that actions taken by one party in the context of negotiations should not be used against it by the other party in ensuing litigation. Such conduct is also contrary to the principle of good faith, transparency and collaboration that should govern all negotiations.⁵ The Respondent argues that it does not seek to restrict the Claimants' right to present their case. However, the Claimants must respect their obligations under the Confidentiality Agreement as well as the aforementioned basic general principle. Therefore, they must not use as evidence in this arbitration statements and actions taken in good faith by the Respondent in the framework of consultations.⁶
16. In the Respondent's opinion, allowing the Claimants to use actions taken by the State in the context of the Parties' consultations and negotiations, despite the existence of a Confidentiality Agreement, would seriously impair a State's willingness to engage in negotiations with investors for fear that its actions could later be invoked against it.⁷
17. **Third**, the Respondent identifies three categories of information that, in its view, should be expunged from the Notice of Intent and the Request for Arbitration because they relate to statements or actions taken in the context of the Parties' consultations and negotiation in order to try to resolve the dispute. Such information is therefore protected from disclosure under Clauses 4 and 8 of the Confidentiality Agreement.⁸
18. Moreover, the Respondent disagrees with the Claimants' interpretation of Clause 2 of the Confidentiality Agreement. In the Respondent's view, although this Clause indicates that the agreement is binding upon the parties that signed it, actions by other State entities are protected by the Confidentiality Agreement insofar as they were taken in coordination with Peru's *Comisión Especial*, in the context of consultations aimed at settling the dispute.⁹
19. **Finally**, the Respondent claims that the remaining allegations made by the Claimants are unsupported. Among other arguments, the Respondent claims that the proposed deletions are consistent with the Confidentiality Agreement's purpose;¹⁰ that the Claimants' reliance in the IBA Rules on the Taking of Evidence in International Arbitration (2010) ("**IBA Rules**") is inapposite;¹¹ and that the Claimants made no reasonable efforts to resolve the dispute related to the Confidentiality Agreement.¹²
20. Based on the above, the Respondent requests the Tribunal to grant its Application and to order the Claimants to pay the Respondent's costs incurred in relation to this issue.

⁵ Respondent's Application, p. 1; Respondent's Reply, p. 3.

⁶ Respondent's Reply, p. 6.

⁷ Respondent's Reply, p. 26.

⁸ Respondent's Reply, pp. 6-16.

⁹ Respondent's Reply, pp. 10-11, 17.

¹⁰ Respondent's Reply, p. 20.

¹¹ Respondent's Reply, pp. 21-22.

¹² Respondent's Reply, pp. 24-26.

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B. The Claimants' Position

21. The Claimants request that the Tribunal reject the Respondent's Application for the following four main reasons: *first*, the proposed deletions are not covered by the Confidentiality Agreement; *second*, the Respondent offers no specific analysis or legal support for its proposed deletions; *third*, the Respondent improperly seeks to restrict the Claimants' right to present their case; and *finally*, the Claimants made all reasonable efforts to resolve this issue with the Respondent.
22. *First*, the Claimants submit that the deletions proposed by the Respondent are not covered by the Confidentiality Agreement because: (i) they include information, documents and admissions by entities and officials who are not privy to, or bound by, the Confidentiality Agreement; (ii) they fall outside the scope of the confidential consultations and negotiations and, thus, are not covered by the Confidentiality Agreement; (iii) the allegations and exhibits at issue were all publicly disclosed and, thus, were expressly exempted from obligations under the Confidentiality Agreement's public exception; (iv) the Confidentiality Agreement protects Claimants' right to bring its claims in the event the negotiations failed; and (v) the proposed deletions are inconsistent with the Confidentiality Agreement's purpose.¹³
23. Among other arguments, the Claimants submit that the proposed deletions concern statements and measures undertaken by non-parties to the Confidentiality Agreement which fall under the category of statements or activities by "any other agency or entity of the Peruvian State" and, as such, they are expressly excluded from the scope of the Confidentiality Agreement under Clause 2.¹⁴ Also, they do not constitute communications "exchanged" between the parties to the Confidentiality Agreement and thus fall outside the scope of Clause 3.¹⁵ The Claimants further allege that the proposed deletions concern statements and measures that were publicly accessible and that predate the Confidentiality Agreement, and are therefore excluded from the scope of the agreement under Clause 8.¹⁶
24. Furthermore, the Claimants argue that the proposed deletions should be rejected for the separate reason that they violate Claimants' right under Clause 7 of the Confidentiality Agreement to pursue claims against the Respondent in the event the negotiations failed.¹⁷ In addition, the Claimants allege that Respondent's interpretation (i.e. that all statements and actions taken after commencement of negotiations cannot be used in the arbitration) would

¹³ Claimants' Response, p. 2.

¹⁴ The English version of Clause 2 of the Confidentiality Agreement provides, in its relevant part, as follows: "The Parties acknowledge that this Agreement shall be solely binding on the Special Commission, Latam Hydro and Mamacocha [...] As a result, the effects of this Confidentiality Agreement and/or the scope of the Peruvian State's representation hereunder shall exclusively apply to the negotiations over the Dispute, and shall not extend to any other agency or entity of the Peruvian State" (Exhibit C-0023).

¹⁵ Claimants' Response, p. 6.

¹⁶ Claimants' Response, pp. 5, 10; Claimants' Rejoinder, pp. 2-4.

¹⁷ Claimants' Response, p. 11, citing the English version of Clause 7 of the Confidentiality Agreement which provides, in its relevant part, as follows: "The Parties hereby reserve their right to raise any jurisdictional defense or defense on the merits, and to assert any claims that they may deem appropriate or convenient" (Exhibit C-0023).

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have a chilling effect on any meaningful negotiations and would thus run counter to the Confidentiality Agreement's purpose of facilitating negotiations.¹⁸

25. **Second**, the Claimants submit that the Respondent has failed to offer any specific analysis or legal support for its proposed deletions. The Claimants argue that the Respondent fails to identify any legal standard, case law, or general principle of international or Peruvian law that supports its Application,¹⁹ "much less a 'compelling' [reason]" for excluding this evidence as required under Article 9.2(e) of the IBA Rules.²⁰ Instead, the Confidentiality Agreement's unambiguous terms contradict the Respondent's arguments.²¹
26. **Third**, the Claimants assert that the Respondent improperly seeks to restrict the Claimants' right to present their case. The Claimants argue that the allegations and exhibits that the Respondent seeks to delete are material to this arbitration, "supporting *more than half* of Claimants' claims under the Treaty and RER Contract" and their deletion "would significantly and improperly restrict Claimants' right to present their case."²² For instance, the Claimants argue that the proposed deletions include "key admissions from governmental actors concerning Respondent's liability" in this case.²³
27. **Finally**, the Claimants submit that they have made all reasonable efforts to resolve this issue with the Respondent. The Claimants mention that they requested the Respondent on several occasions to provide explanations and authority for its contention that they had improperly disclosed information covered by the Confidentiality Agreement, without success.²⁴
28. Based on the above, the Claimants request the Tribunal to dismiss the Respondent's Application and to order the Respondent to pay the Claimants' costs incurred in relation to this issue.

III. TRIBUNAL'S ANALYSIS

29. The Tribunal has reviewed Respondent's Application, including the proposed deletions from the Notice of Intent and the Request for Arbitration, as well as the Parties' respective comments on the Respondent's Application.
30. The Tribunal decides Respondent's Application on the basis of the terms of the Parties' Confidentiality Agreement.²⁵
31. The Respondent alleges that, contrary to the provisions of the Confidentiality Agreement, the Claimants have made reference to matters which formed part of its good faith efforts to

¹⁸ Claimants' Response, p. 12.

¹⁹ Claimants' Response, pp. 12-14; Claimants' Rejoinder, p. 7.

²⁰ Claimants' Response, p. 14 and fn. 46.

²¹ Claimants' Rejoinder, pp. 2-6.

²² Claimants' Response, p. 2 (emphasis in the original) and 15. *See also* Claimants' Rejoinder, p. 9.

²³ Claimants' Response, p. 3.

²⁴ Claimants' Response, p. 16; Claimants' Rejoinder, p. 9.

²⁵ Annex A to Respondent's Application (Spanish original); and Exhibit C-0023 (English translation).

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resolve the dispute. The Claimants deny that the Confidentiality Agreement precludes them from mentioning these matters, for a number of reasons. The proposed deletions by the Respondent relate to three main issues, being (i) the Governor of Arequipa's order withdrawing a lawsuit against Claimants' project; (ii) a proposed regulation by the Ministry of Energy and Mines (MINEM); and (iii) MINEM's decision to suspend the RER Contract to facilitate negotiations between the Parties. According to the Respondent, these acts all occurred in the context of the Consultation and Negotiation procedure and therefore may not be relied on by the Claimants.

32. For the Tribunal's consideration of these issues it is worth extracting Clause 8 of the Confidentiality Agreement in full:

The Parties agree that under no circumstances, and in no way, may any statement or communication, whether oral or written, from one Party to the other or to a third-party, or any action taken over the course of the Consultation and Negotiation procedure, including this Confidentiality Agreement, be used now or in the future by either Party in any other context, including any international or domestic arbitration proceedings, or any other legal or contentious proceedings before any domestic or foreign courts, whether pending or threatened to be commenced by the Parties. In this regard, the Parties agree to handle all information, representations and materials and/or documents created or disclosed during the course of the Consultation and Negotiation procedure in strict confidentiality, except for any information which is generally available to the public or which has come into the public domain for reasons other than a breach of this Confidentiality Agreement by either Party. The Parties accept that the provisions of this clause shall apply to all exchanges between them since the Consultation and Negotiation procedure commenced.

33. After close review of the Parties' submissions and the Confidentiality Agreement, the Tribunal finds the following:

- a. **Confidentiality of settlement negotiations:** The Tribunal takes allegations of confidentiality of settlement negotiations seriously. The Tribunal adheres to the principle of the confidentiality of settlement negotiations, and that settlement negotiations are understood to be conducted on a without prejudice basis. In this case, nevertheless, the Tribunal finds that the information sought to be excluded by the Respondent does not constitute confidential settlement information or documents.
- b. **Public documents and information:** A plain reading of Clause 8 above supports a view that there is no restriction on using information which has entered the public domain (without breach of the Agreement). The two sentences in Clause 8 are connected by "In this regard" ("*En ese sentido*"), which means that the carve-out of public documents applies to the first sentence. For this reason, the Parties did not agree

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to exclude information which is generally available to the public or which has come into the public domain from use in these arbitration proceedings. The Claimants cannot be prevented from making reference to such information in their submissions.

- c. **Case on the merits:** One of the Respondent's concerns is that the Claimants characterise certain actions by the Respondent as admissions of responsibility, while the Respondent sees these actions as good faith efforts to resolve the dispute amicably.²⁶ In the Tribunal's view, this is a matter for the Tribunal to weigh when reaching its determinations, taking into account all the relevant circumstances in this case. The Tribunal emphasises that its decision on this Application is without prejudice to the Tribunal's determination of the respective merits of the Parties' cases.
- d. **Existence of the Negotiation and Consultation procedure:** As per Clause 4 of the Confidentiality Agreement, the existence of the Consultation and Negotiation procedure and the Confidentiality Agreement is not confidential. As such, mere reference to the existence of discussions between the Parties in the Claimants' submissions is not excluded. The Tribunal does not consider any of the matters flagged by the Respondent to be a confidential "proposal" made during that procedure within the meaning of Clause 4 of the Confidentiality Agreement.²⁷ Likewise, the Tribunal does not see any breach of the obligation in Clause 3 of the Confidentiality Agreement to "keep all matters related to the discussions, talks, documents and information held and/or exchanged between each other within the scope of the Consultation and Negotiation strictly confidential". The actions sought to be excluded by the Respondent are by third parties and do not disclose consultations or negotiations between the Parties.
- e. **Parties to the Confidentiality Agreement:** The Respondent seeks to strike out actions by third parties, i.e., the Governor of Arequipa and MINEM. The Tribunal finds this to be inconsistent with the plain wording of Clause 2 of the Confidentiality Agreement, which provides that it is "solely binding on the Special Commission, Latam Hydro and Mamacocha" and that "the effects of this Confidentiality Agreement and/or the scope of the Peruvian State's representation hereunder shall exclusively apply to the negotiations over the Dispute, and shall not extend to any other agency or entity of the Peruvian State..."
- f. **Actions covered by Clause 8:** The Respondent contends that "*cualquier declaración o acción que el Perú pueda haber realizado o tomado en el contexto de las Consultas y Negociación, con el fin de intentar solucionar amistosamente la controversia existente entre las Partes, no puede ser utilizada por las Demandantes en el presente arbitraje como fundamento de su posición y sus reclamos*".²⁸ The Tribunal finds this

²⁶ See, e.g., Respondent's Reply, p. 20.

²⁷ Clause 4 of the Confidentiality Agreement provides, in this regard, that "the Parties' proposals during the Consultation and Negotiation procedure shall be confidential, and may not be used as evidence in future international arbitration proceedings".

²⁸ Respondent's Reply, p. 7.

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reading of Clause 8 of the Confidentiality Agreement to be overly broad. Aside from the issue of public documents (see point “b” above), the language covering “any action taken over the course of the Consultation and Negotiation procedure” in Clause 8 must refer to actions taken by the Parties to the Confidentiality Agreement. This is because the Agreement is not binding on third parties, including other entities of Respondent (see point “e” above).

- g. **Matters prior to/outside the Confidentiality Agreement:** The Respondent proposes to exclude some matters that pre-date the Confidentiality Agreement, or are unrelated.²⁹ The Tribunal finds no basis for such deletions.

34. In light of the above, the Tribunal finds that the Respondent has not established a basis for any of the proposed deletions under the terms of the Confidentiality Agreement.

35. The Respondent has also raised some procedural issues, which are summarised below:

- a. **Timing of second round of comments:** The Respondent submits that it had less time than the Claimants for its second round comments. However, each Party was given three business days for the second round of comments. Respondent’s period was from Monday 30 March to Wednesday 1 April, and Claimants’ period was from Thursday 2 April to Monday 6 April. The weekend was not included for the purpose of calculating the days. Accordingly, the Tribunal finds that no prejudice was caused to either Party in this regard.
- b. **Witness statement in support:** The Respondent states that due to the tight timing of its comments, it was unable to provide a witness statement in support of its position, from an official who represented Respondent in the Consultation and Negotiation procedure. Since the Application turns on the interpretation of the Confidentiality Agreement, the Tribunal does not consider the witness statement to be necessary at this stage. The Respondent may submit any such evidence with its further submissions.

IV. ORDER

36. For the reasons set out above, the Tribunal decides as follows:

- (A) Respondent’s Application is rejected.
- (B) The Parties’ costs related to the Application are reserved for later determination.

²⁹ See, e.g., proposed deletions that include matters that occurred prior to the Confidentiality Agreement in ¶ 152 of the Request for Arbitration, and ¶¶ 20-21 of the Notice of Intent.

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- (C) The instruction not to publish the Notice of Intent and the Request for Arbitration on ICSID's website pending consideration of this Application is revoked.

[Signed]

Prof. Albert Jan van den Berg
President of the Tribunal
Date: 15 April 2020