

Final Statement

MINERA CANDELARIA (LUNDIN MINING AND SUMITOMO) &
NATURAL PERSON (2020)

Non-official English translation

11 March 2024

CHILE'S NATIONAL CONTACT POINT FOR RESPONSIBLE BUSINESS CONDUCT | RESPONSIBLE BUSINESS CONDUCT
DEPARTMENT | UNDERSECRETARIAT OF INTERNATIONAL ECONOMIC AFFAIRS

FINAL STATEMENT

Minera Candelaria (Lundin Mining and Sumitomo) & Natural Person

Content

I. Introduction	3
II. Parts	3
a) Identification of the submitter	3
b) Identification of the company	3
III. Issues raised	3
b) Summary of the company's response	5
c) Submitter's reply	7
IV. NCP evaluation of the specific instance	7
a) Preliminary issues	7
b) Initial assessment	7
V. Conclusion.....	8

I. Introduction

1. Chile's National Contact Point for Responsible Business Conduct (NCP), implementing body of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (Guidelines), located in the Head of the Responsible Business Conduct Department of the Undersecretariat of International Economic Affairs (SUBREI), hereby issues its Final Statement, in the specific instance "Minera Candelaria (Lundin Mining and Sumitomo) & Natural Person (2020)".
2. The Final Statement describes the process and the results of the analysis of the specific instance to which it refers. It is based on information received from the parties and the steps taken by the NCP. If there was confidential information submitted to the NCP in the course of the procedure, it has not been disclosed in this statement. According to the NCP's rules of procedure, the NCP will always issue a Final Statement, which is public, whether or not it has been preceded by an Initial Statement or good offices.
3. The Final Statement marks the closure of the NCP procedure, without prejudice to the possibility of a follow-up stage.

II. Parts

a) Identification of the submitter

4. Natural person domiciled in Copiapó, Atacama Region (hereinafter, the submitter).

b) Identification of the company

5. Compañía Contractual Minera Candelaria (hereinafter Candelaria, CCMC or the company). It is a mining company with operations in the commune of Tierra Amarilla, Atacama Region. Its principal owner, with 80% ownership, is Lundin Mining Corporation (Lundin), a Canadian mining company, with operations in America and Europe, producing mainly copper, zinc, gold and nickel. The remaining 20% is owned by Sumitomo, a Japanese company with investments in a variety of sectors.

III. Issues raised

a) Summary of the specific instance request

6. On 17 June 2020, the submitter filed a specific instance request, in which it identifies alleged breaches of the Guidelines by Candelaria, which would relate to an alleged breach by CCMC of a sale and purchase agreement concluded between the submitter and the company, concerning a mining property.
7. The submitter states that in the early 1990s, after receiving different offers, it sold the mining property called "Roro 1/6" to Compañía Minera Ojos del Salado S.A., the legal predecessor of Compañía Contractual Minera Candelaria.
8. The contract provided for an initial payment to the submitter of USD\$150,000 plus a royalty payment of US\$3 for each tonne of mineralised rock mined and processed at the plant for 20 years. The submitter indicates that, according to very conservative estimates,

the agreed royalty alone could amount to approximately USD\$43,000,000.

9. The submitter points out that, since the beginning of the exploitation by Candelaria, the Roro 1/6 mining property started to be used as tailings dump and without being exploited, causing the royalty not to be applied.
10. By virtue of this, the submitter sued CCMC to declare the nullity of the contract of sale of the mining property, for alleged bad faith in its signing, as it considers that the company did not plan to comply with the royalty stipulated in the contract. The lawsuit - filed in the 2nd Civil Court of Copiapó (Rol C-20754-1995) - was accepted in the first instance and then revoked in the second.
11. It is indicated that, although the claim was finally rejected, CCMC expressly acknowledged - through its legal representative - that it acquires mining properties, such as Roro 1/6, in order to exploit them. In this way, the submitter considers that the exploitation of the mining property would take place in the future, when conditions make it possible.
12. On 9 August 2018, the submitter notes that it sent a letter to CCMC as a consequence of the announced expansion of the Candelaria mine, located in the area the Roro 1/6 mining tenement. The letter proposed to initiate discussions to agree on a mutually agreed protocol regarding the royalty and to offer as an option the waiver of the royalty in exchange for a payment to be agreed upon. It is mentioned that the company responded, through its legal representative, that *"having analysed the company's background, in our opinion, the conditions that must necessarily be met in order to accept your invitation are not met"*.
13. In addition to the above, the submitter noted the omission of the existence of the royalty in the report called "Technical Report". This report is a document periodically issued by Lundin (CCMC's parent company) to its shareholders. The submitter indicates that it has noticed this omission since the 2017 technical report, in circumstances where the 2014, 2015 and 2016 technical reports mentioned the royalty.
14. In view of the above, the submitter filed an action for forced compliance, with compensation for damages to the value of the royalty, before the 2nd Court of Copiapó (Rol C-2865-2018). This lawsuit is still ongoing, at the evidentiary stage. The submitter claims that it initiated the process due to Candelaria's bad faith in the execution of the contract, as it would have adopted the "strategy" of allowing time pass, in order to allege in the future the expiry of the royalty and thus exempt itself from its payment.
15. The submitter identifies alleged breaches by the company of the following chapters of the Guidelines:
 1. Chapter II. General Policies
 2. Chapter III. Disclosure.
16. With regard to paragraph 3 of Chapter II of the Guidelines (2011 edition), the submitter points out that the company has not fostered the development of close cooperation with a member of the local community, in this case, the submitter.
17. With regard to paragraph 7 of Chapter II of the Guidelines (2011 edition), the

the submitter mentions that Candelaria has not fostered a relationship of mutual trust between the parties, the response of its legal representative was terse and vague. This did not allow the parties to discuss the payment of the royalty or an eventual waiver payment and the situation of Roro 1/6 (when it will be exploited, why important mining and civil works have been carried out in it, etc.).

18. Regarding paragraph 8 of the Commentary on Chapter II of the Guidelines (2011 edition), the submitter indicates that controls by the parent companies (Lundin and Sumitomo) have failed by allowing abusive and unfair behaviour against the submitter. Furthermore, it mentions the serious omission of information - both to the shareholders and to the auditing company SRK - regarding royalties in the technical reports.
19. Finally, the submitter states that the company has failed to comply with the standards of the Guidelines with regard to disclosure of information (paragraphs 1, 2 and 4, Chapter III of the Guidelines; paragraphs 28 and 31, Comments on Chapter III, Guidelines 2011 edition). This infringement, according to the submitter, is due to the elimination and omission of the royalty in the Technical Reports for the years 2017 onwards, whereas the Technical Reports from 2014 to 2016 mentioned the royalty.
20. The expected outcome by the submitter through the NCP procedure is as follows:
 - a. To comply with the Guidelines, urging the company to comply with the contract. In this way, recognise and pay the stipulated royalty.
 - b. To communicate to both its shareholders and its external auditors - through Technical Reports or other means - the validity of the existing royalty on Roro 1/6, as well as the existence of the pending lawsuit in Chile.

b) Summary of the company's response

21. On 16 September 2020, a reply was received from the company stating that it had not breached the Guidelines and requesting that the specific instance request be dismissed outright, on the grounds that the matter was beyond the competence of the NCP, as it had already been settled by the courts. This letter also represents Sumitomo's position, as subsequently confirmed by Candelaria's General Counsel.
22. The company indicates that on 8 May 1989, the submitter entered into a purchase option contract with Compañía Minera Ojos del Salado S.A. (MINOSAL, Candelaria's legal predecessor). The purchase option provided for an advance payment of US\$ 99,000, which was paid by the company. The purchase price stipulated in the option was US\$ 1,249,000 plus a royalty of US\$ 0.75 per tonne.
23. On 26 April 1990, MINOSAL withdrew from the purchase option due to the negative results of the surveys conducted on the mining property, concluding that open pit mining was not profitable, although there was the possibility of studying the option of underground mining. The submitter kept US\$ 99,000 as damages for the withdrawal of the purchase option.
24. Candelaria mentions that after the withdrawal of MINOSAL, the submitter entered into purchase option contracts with Minera Deimos and then with Compañía Minera Sali Hochschild S.A. It adds that both options would have failed due to the withdrawal of these companies, because the surveys did not reveal the existence of minerals whose exploitation would be economically viable.

25. The company states that, following these withdrawals, the submitter returned to negotiate with MINOSAL, being fully aware that the viability of an eventual exploitation of the mining property was uncertain, given the failure of its three previous attempts to sell it.
26. In the new negotiation with MINOSAL, the sale and purchase agreement arose that allowed the acquisition of the Roro 1/6 mining property. A fixed price of US\$ 150,000 was agreed and with the possible right (royalty), in the event that the mining property was exploited, to obtain an additional payment if the operation was financially viable for MINOSAL. This purchase was executed by public deed dated 11 June 1991.
27. The agreed royalty was US\$ 3 per metric tonne of mineralised material extracted from the Roro 1/6 mining tenement and processed in a beneficiation plant. The royalty would last for a period of 20 years from the commencement of mining (date of first sale of concentrate).
28. Thus, Candelaria argues that it assumed the risk of buying a mining property that would potentially not generate profits from its exploitation and the submitter the risk of not receiving the royalty payment, in case the company could not exploit Roro 1/6.
29. Candelaria stresses that the dispute submitted to the NCP has been resolved by the courts of justice, with the effect of *res judicata*. This is due to the lawsuit before the 2nd Civil Court of Copiapó (Rol C-20754-1995), in which the submitter requested the nullity of the contract and which was brought before the Supreme Court, which rejected the claim. Furthermore, the company mentions that the submitter's claims in its new lawsuit are based on the same arguments that were presented in the previous lawsuit, in 1995, in which the submitter's claim was rejected.
30. As for the allegation that Candelaria acted in bad faith, the company states that it has not exploited the mining property because the economic, technical and operational conditions to do so profitably do not exist. In this way, it rejects the claim that Candelaria had employed a "strategy" of letting time pass in order to later argue that the royalty had lapsed.
31. Regarding the argument that the company has violated paragraph 3 of Chapter II of the Guidelines (2011 edition), the company points out that the submitter does not belong to the local community because he was born in a different place and does not live in the commune of Tierra Amarilla. Furthermore, it stresses that this paragraph of the Guidelines points to the generation of labour capacities in the local community, an issue that it does not see as directly related to the matter under discussion.
32. Regarding the argument that the company would have violated paragraph 7 of Chapter II of the Guidelines (2011 edition), the company defends itself by indicating that the letter sent by the then Legal Manager of Candelaria only expresses a legitimate position, based on judicial and enforceable rulings. Thus, the submitter could not expect Candelaria to accede, without question, to its requests.
33. Regarding the allegation that the company would have violated paragraphs 1, 2 and 4 of Chapter III of the Guidelines (2011 edition), the company points out that it has not omitted information in the Technical Reports. It expresses that these reports are drawn up by external auditors from SRK Consulting who, at the time,

included contracts in which royalties were agreed, without distinguishing whether or not the conditions for the accrual of royalties had been fulfilled. With this, it was noted that, in the case of the Roro 1/6 mining property, the condition was not verified within the maximum legal term and, consequently, the right and the correlative obligation of payment did not arise and, therefore, the royalty was no longer included in the technical reports.

c) Submitter's reply

34. In response to Candelaria's disclaimer dated 16 September 2020, the submitter stated the following on 04 December 2020:

- a. That the final judgment of the trial Rol C-20754-1995, before the 2nd Civil Court of Copiapó, did not produce *res judicata* with respect to the new trial Rol C-2865-2018, conducted by the same court.
- b. That the royalty would still be in effect.
- c. That the royalty would constitute a part of the agreed price for the sale of Roro 1/6.
- d. That the exploitation of the Roro 1/6 mining property would be economically profitable from 2015. This would be based on some concrete facts, such as: the existence and development of the G-17 gallery and the Environmental Qualification Resolution that extended the exploitation of Candelaria - underground - until 2030, expressly covering the underground exploitation of Roro 1/6.
- e. That Candelaria would have an obligation to exploit Roro 1/6. According to the submitter, although the royalty is a condition of the contract, which depends on when the property is exploited, it does not exempt Candelaria from its duty to fulfil the agreement in good faith.

IV. NCP evaluation of the specific instance

a) Preliminary issues

35. The preliminary issue is whether the NCP has jurisdiction to hear the case.

36. To do so, two requirements must be verified: (1) the requested company must be a multinational enterprise, and (2) the events must have occurred in Chilean territory or, if they occurred in a foreign country without an NCP, the multinational enterprise must be Chilean.

37. Regarding the first requirement, the requested companies are multinational in nature, as they have entities in different countries and can coordinate their activities in all of them. Therefore, the first requirement is fulfilled.

38. As to the second requirement, the events occurred on Chilean territory. Thus, the second requirement is fulfilled and the NCP is competent to hear the case.

b) Initial assessment

39. In determining whether the issue raised merits further consideration, the NCP must establish whether the issue is bona fide and whether it relates to the Guidelines. In this context, the NCP takes into account the following criteria:

- a. The identity of the party concerned and its interest in the matter.
- b. Whether the issue raised in the specific instance request is material and justified.
- c. Whether the company's activities are linked to the issues raised in the specific instance.
- d. The relevance of concurrent legislation and procedures to the case, including court decisions.
- e. How similar or the same issues have been, or are being, addressed in other local or international processes.
- f. How similar. Whether the review of the specific instance will contribute to the purpose and effectiveness of the Guidelines.

40. With regard to the point made in the chapeau of the previous paragraph, that the NCP must establish whether the issue is related to the Guidelines, this criterion refers to whether the issue is within the scope of the instrument. In this case, the NCP has not been able to reach that conclusion, as the issue submitted to it would not be covered by the Guidelines' chapters, nor would it relate to sustainable development.

41. Furthermore, with regard to subparagraph "d" of the same paragraph, it is worth bearing in mind what is stated in paragraph 26 of the Commentary on the NCP Procedural Guidance (Guidelines, 2011 edition), which states that [...] *"NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned. NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised"*. In this case, there is a parallel proceeding before the ordinary courts, which does not in itself preclude further consideration of this case; however, it does not seem likely that the NCP can make a positive contribution to the resolution of the issue, as the parties are in very opposing positions and the matter is of an eminently contractual nature, for whose resolution the courts and the procedures governing them are far more appropriate.

42. Likewise, in relation to subparagraph "f" of paragraph 39, insofar as it refers to the review of the instance contributing to the purpose of the Guidelines, it is worth bearing in mind what is stated in paragraph 9 of the Preface of this instrument (Guidelines, 2011 edition), which clarifies the purpose of the Guidelines, as it states that *"The common aim of the governments adhering to the Guidelines is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimise the difficulties to which their various operations may give rise"*. Thus, in this case, it does not appear that the review of the instance can contribute to the purpose of the Guidelines. As has been said, we are in the presence of a matter of an eminently contractual nature, for the resolution of which the courts of justice and the procedures governing them are much more appropriate.

43. In view of the above, it is considered that there is no merit in giving further consideration to the issue raised.

V. Conclusion

44. In view of the above, the NCP issues this Final Statement, bringing the specific instance to a closure.

If the NCP offers its good offices or, in its Final Statement, makes recommendations to the company, this should in no way be interpreted as an assertion that the requested multinational has failed to comply with the Guidelines.

The Guidelines state that confidentiality shall be maintained during the course of the proceedings. Information and opinions provided in the course of the proceedings shall be kept confidential, unless the party concerned consents to the disclosure of such information or opinions or where non-disclosure would be contrary to the provisions of national law.

In accordance with the principle of transparency that governs the functions of the NCP, the final statements are published on the NCP's website and are translated into English and sent to the OECD Working Party on Responsible Business Conduct.

Before the Final Statement is issued, the parties are given the opportunity to comment on the draft statement, bearing in mind that the drafting of the statement is always the responsibility of the NCP, which will define the final version of the document.

Felipe Henríquez Palma

Chile's National Contact Point for the OECD Guidelines
Head, Responsible Business Conduct Department – (SUBREI)

Non-official English translation¹

¹ In case of discrepancy, the Spanish version of this Final Statement shall prevail.