

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Eco Oro Minerals Corp.

Claimant

v.

Republic of Colombia

Respondent

(ICSID Case No. ARB/16/41)

PROCEDURAL ORDER No. 13

Decision on the Claimant's Application dated 1 June 2022

Members of the Tribunal

Ms. Juliet Blanch, President of the Tribunal
Professor Horacio A. Grigera Naón, Arbitrator
Professor Philippe Sands, Arbitrator

Secretary of the Tribunal

Ms. Ana Constanza Conover Blancas

Assistant to the President of the Tribunal

Mr. João Vilhena Valério

27 June 2022

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I. PROCEDURAL BACKGROUND

1. On 9 September 2021, the Tribunal issued its Decision on Jurisdiction, Liability and Directions on Quantum (“**Decision**”).
2. In paragraph 920(4) of the Decision, the Tribunal posed certain questions to Eco Oro with regard to its case on damages (“**Questions**”). Eco Oro was ordered to file submissions responsive to the Questions and Colombia to file its submissions in response, if any. The possibility of a second round of sequential reply submissions was also foreshadowed.
3. Pursuant to paragraph 920(5) of the Decision, the Parties were invited to confer and to reach an agreement on the format and timetable for the additional submissions requested by the Tribunal in its Decision and to apprise the Tribunal of the terms of such an agreement by no later than 7 October 2021.
4. On 7 October 2021, the Parties informed the Tribunal that they were conferring on the format and timetable for the additional submissions requested by the Tribunal in accordance with paragraph 920(5) of the Decision and requested a brief extension to the deadline to apprise the Tribunal on the terms of their agreement until 11 October 2021. The Tribunal approved the extension on 7 October 2021.
5. On 11 October 2021, the Parties informed the Tribunal that they had agreed the following (“**Parties’ Agreement**”):

- “1. *The parties agree that they will file one round of written submissions as follows:*
 - a. *Claimant will file its First Submission within 120 days of the issuance of the Tribunal’s Decision on 9 September 2021;*
 - b. *Respondent will file its Response Submission 120 days from the date on which Claimant filed its First submission.*
2. *The parties agree that the filing of a second round of written submissions is optional:*
 - a. *Claimant may, at its discretion, file a Reply Submission within [a specified period] of the date on which Respondent filed its Response Submission. Claimant will indicate whether it intends to exercise its right of response within 14 days of the filing of Respondent’s Response Submission;*
 - b. *Insofar as Claimant has filed a Reply Submission, Respondent may, at its discretion, file a Rejoinder Submission within [a specified period] of the date on which Claimant filed its Reply Submission. Respondent will indicate whether it intends to exercise its right of response within 14 days of the filing of Claimant’s Reply Submission.*
 - c. *A party’s decision not to exercise its right of response does not imply that that party is in agreement with the*

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arguments and allegations put forward by the opposing party in its last written submission.

- d. The parties disagree on the deadlines for responsive submissions and will make separate proposals to the Tribunal in this regard.*
 - 3. The parties agree that their written submissions will only address the questions raised by the Tribunal in paragraphs 902, 913, 919 and 920 of the Decision, and in the case of any responsive submissions, the allegations put forward by the other party in its previous submission.*
 - 4. The parties disagree on whether additional evidence may be adduced with their submissions and will make separate proposals to the Tribunal in this regard.*
 - 5. The parties disagree on whether either party should have the right to request a hearing, and will make separate proposals to the Tribunal in this regard.*
 - 6. The parties shall send their respective proposals on the outstanding points referenced above to the ICSID Secretary only (without copying opposing counsel or the Tribunal) by COB on Tuesday 12 October 2021. The ICSID Secretary will then circulate both proposals simultaneously to the parties and the Tribunal.”*
6. On 12 October 2021, pursuant to paragraph 6 of the Parties’ Agreement, the Parties submitted their respective proposals on the outstanding points referenced in the Parties’ Agreement (i.e., paragraph 2(d) (deadlines for potential second-round submissions); paragraph 4 (submission of additional evidence); and paragraph 5 (right to request a hearing).
 7. On 21 October 2021, the Tribunal invited the Parties to submit brief responsive comments on each other’s proposals in relation to the procedural matters on which the Parties disagreed by 28 October 2021.
 8. On 28 October 2021, each Party filed its respective brief responsive comments on the opposing Party’s proposals in relation to the procedural matters on which the Parties disagreed.
 9. On 3 November 2021, the Tribunal issued Procedural Order No. 12 (On the Format and Timetable for the Additional Submissions Requested by the Tribunal in its Decision on Jurisdiction, Liability and Directions on Quantum) (“**PO12**”). In that Procedural Order, the Tribunal determined the following:
 - “38.1. Eco Oro will file its First Submission within 120 days of the issuance of the Tribunal’s Decision on 9 September 2021.*
 - 38.2. Colombia will file its Response Submission 120 days from the date on which Eco Oro filed its First Submission.*

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- 38.3. *Eco Oro may, at its discretion, file a Reply Submission within 90 days of the date on which Colombia filed its Response Submission. Eco Oro will indicate whether it intends to exercise its right of response within 14 days of the filing of Colombia's Response Submission.*
- 38.4. *Insofar as Eco Oro has filed a Reply Submission, Colombia may, at its discretion, file a Rejoinder Submission within 90 days of the date on which Eco Oro filed its Reply Submission. Colombia will indicate whether it intends to exercise its right of response within 14 days of the filing of Eco Oro's Reply Submission.*
- 38.5. *A Party's decision not to exercise its right of response does not imply that that Party is in agreement with the arguments and allegations put forward by the opposing Party in its last written submission.*
- 38.6. *The Parties agree that their written submissions will only address the questions raised by the Tribunal in paragraphs 902, 913, 919 and 920 of the Decision,²⁶ and in the case of any responsive submissions, the allegations put forward by the other Party in its previous submission.*
- 38.7. *The Parties may submit such additional evidence as the Parties each considers to be necessary in support of their further submissions addressing the Questions.*
- 38.8. *The Tribunal will determine whether an oral hearing will take place at the request of either of the Parties, such request to be made within 14 days from the date of the last written submission of the Parties. If the opposing Party does not consent to such application, it must make its reasoned objection within 14 days of the date on which the application is filed.*
- 38.9. *Subject to the provision in paragraph 38.8 above, following receipt of the Parties' additional submissions, the Tribunal will deliberate and proceed to render its award on damages."*
10. On 6 January 2022, the Parties informed the Tribunal that they had agreed to modify the procedural calendar for the filing of submissions addressing the Tribunal's Questions set out in its Decision.
11. On 10 January 2022, the Tribunal approved the Parties' agreement. Accordingly, (i) the Claimant was authorised to file its First Submission within 127 days of the issuance of the Tribunal's Decision of 9 September 2021 (i.e., by 14 January 2022); and (ii) the Respondent was authorised to file its Response Submission 127 days from the date on which Claimant filed its First submission (i.e., if Claimant filed its submission on 14 January 2022, by 23 May 2022).
12. On 15 January 2022, the Claimant filed its First Submission on the Tribunal's Questions of 9 September 2021, together with factual exhibits C-458 to C-461, legal authorities CL-217 to CL-230, a consolidated list of factual exhibits, and a consolidated list of legal authorities.

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13. On 23 May 2022, the Respondent filed its Response Submission on the Tribunal's Questions of 9 September 2021, together with factual exhibits R-198 to R-273, legal authorities RL-188 to RL-197, and a consolidated list of exhibits and legal authorities.
14. On 1 June 2022, Claimant served a letter to the Tribunal, whereby it requested the Tribunal to (i) shorten the 90-day time period set for the filing of Reply submissions to 45 days; (ii) strike Colombia's new fact exhibits that do not relate to issues of remediation; and (iii) order Colombia to re-submit its First Submission in redacted form so as to omit all text and footnotes referring to or describing the offending documents (the "**Claimant's Application**").
15. The Claimant further made the following remarks and request:

"Pursuant to paragraph 38.3 of PO12, Claimant is scheduled to elect whether to exercise its right to make a Reply submission by 6 June 2022. The Tribunal's ruling on the present application may bear on Claimant's election. In the circumstances, Claimant therefore respectfully requests that the Tribunal revise Claimant's forthcoming deadline so that it may make its election by the later of 6 June or three business days following the Tribunal's ruling on the present application."
16. On 2 June 2022, the Respondent was invited to submit comments on the Claimant's Application by 15 June 2022.
17. On that same day, the Claimant made reference to the interim request made in its letter dated 1 June 2022 and requested the Tribunal's guidance in that regard in advance of 6 June 2022.
18. On 3 June 2022, the Tribunal confirmed its agreement to the Claimant's interim request to revise the forthcoming deadline set out at paragraph 38.3 of Procedural Order No. 12. Accordingly, the Claimant was allowed to elect whether to exercise its right to make a Reply submission by the later of 6 June or three business days following the Tribunal's ruling on the Claimant's Application.
19. On 10 June 2022, the Respondent served a letter to the Tribunal with its comments on the Claimant's Application (the "**Respondent's Response**"), whereby it objected to all the requests made by the Claimant therein.

II. THE PARTIES' POSITIONS

a. Request to amend the time-period for Reply Submissions

20. Eco Oro requests that the 90-day time-period set pursuant to paragraphs 32, 38.3 and 38.4 of PO12 for the filing of Reply submissions on the Tribunal's Questions be shortened to 45 days because the assumption on which the initial timetable was established—namely that the Parties would be submitting new expert testimony—has not held.¹

¹ Claimant's Application, Section 1.

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21. Eco Oro stresses that the principal reason for establishing “*a significant period of time*” for the Parties’ Reply submissions² has fallen away. In the interest of ensuring the efficiency of these proceedings, the Claimant considers that the time-period shall be shortened accordingly.
22. Colombia objects to what it considers to be “*a request to curtail the time available to Colombia to prepare its Rejoinder Submission*”.³ According to Colombia, in determining that 90 days was an appropriate time-period, the Tribunal observed that Colombia “*may require input and approval from multiple governmental agencies*” if “*further evidence*” is required. Therefore, there was no limitation to circumstances in which Colombia elected to file further expert evidence.
23. Colombia adds that it may still require the input and approval from multiple governmental agencies to respond to any Reply Submission and any additional evidence the Claimant may choose to file with it.
24. Finally, Colombia notes that the Claimant is already permitted to file any Reply Submission within 45 days (or earlier) should it wish to do so.

b. Request to strike Colombia’s fact exhibits

25. Eco Oro points out that 60 of Colombia’s 76 new factual exhibits submitted with its First Submission concern issues other than remediation. In Eco Oro’s view, PO12 has only granted Colombia permission to submit new factual evidence in connection with issues relating to remediation.⁴
26. Eco Oro stresses that new evidence could only be submitted if the Tribunal, in line with existing procedural orders, allowed a Party to submit additional evidence following a reasoned application followed by observations of the other Party.⁵
27. Eco Oro notes that Colombia did not seek permission for its “*belated submission of documentary evidence on non-remediation questions*”. Eco Oro highlights the fact that 45 of these remaining 60 documents pre-date the January 2020 hearing (or are otherwise undated)⁶ and that Colombia has offered no explanation why that evidence was not submitted during the written phase of the proceedings or prior to the hearing.
28. Eco Oro, therefore, requests that the Tribunal strike from the record all of Colombia’s new fact exhibits that do not relate to issues of remediation (specifically, all of Colombia’s

² PO12, paragraph 31.

³ Respondent’s Response, Section 2.

⁴ Claimant’s Application, Section 2.

⁵ Eco Oro makes reference to PO12, paragraphs 16, 20-21, 31, 34-36, 38, and Sections III(a)-(c); Procedural Order No. 1, Sections 17.3 and 23.1; Procedural Order No. 10, Sections 19 and 40; and Procedural Order No. 11, Section 5.

⁶ According to Eco Oro, these 45 exhibits include exhibits R-198 through R-236, R-267 through R-273, as well as R-265 and R-266 which are maps created by the ANM for the purposes of Colombia’s First Submission on the basis of information that predates the January 2020 hearing.

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new fact exhibits other than R-221, R-223, R-237, R-239, R-241 to 247, R-249, R-253, R-259, R-264, R-268, which are those on which it relies in addressing the Tribunal's two questions on remediation (Questions M and N)). The Claimant also requests that the passages in Colombia's First Submission describing the "*inadmissible new factual exhibits*" be deleted and that Colombia be ordered to re-submit its First Submission in redacted form so as to omit all text and footnotes referring to or describing the offending documents.

29. Colombia, in turn, posits that the Tribunal should reject the Claimant's request to strike the Respondent's further documents and associated parts of Respondent's Submission from the record.

30. According to Colombia:

(i) the Tribunal's order in paragraph 38.7 of PO12 is clear and unequivocal when granting both Parties the right to "*submit such additional evidence as the Parties each considers to be necessary in support of their further submissions addressing the Questions*";

(ii) the history of the Parties' submissions leading up to PO12 makes clear that the Tribunal rejected the Claimant's position that further evidence should be limited to the issue of remediation, and in fact accepted the Respondent's submission that there should be no such restriction; and

(iii) even if there were any basis for Claimant's purported "*understanding*" of PO12, which Colombia denies, it would be prejudicial to Colombia to exclude the further factual evidence adduced by Colombia and to require Colombia to redact its Response Submission, whereas no prejudice to Claimant would be caused by admitting the documents.

31. Colombia further notes that, in addition to the 16 documents submitted in relation to the issue of remediation (Questions M and N), Colombia submitted documents relevant to Questions B, C, E, F, G and L.

III. ANALYSIS

a. Deadlines for potential second-round submissions

32. The Tribunal's decision to grant the Parties a significant period of time (90 days) was premised upon the possibility of expert evidence being adduced. This is reflected in paragraphs 31 and 35 of PO12.

33. Considering that both Parties have confirmed that no additional expert evidence will be adduced, the Tribunal considers that it would be reasonable and time-efficient to reduce the time-period for the filing of any Reply submissions on the Tribunal's Questions to 45 days.

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b. Submission of additional evidence

34. Having regard to paragraph 38.7 of PO12, the Tribunal considers that on its plain meaning it was reasonable for the Respondent to have proceeded as it has.
35. The Tribunal therefore rejects the Claimant's request to strike the Respondent's further documents and associated parts of Respondent's Submission from the record.
36. In order to ensure equality of arms between the Parties, and to ensure that the Claimant's different interpretation of the provisions of PO12 does not unduly disadvantage it, the Tribunal invites the Claimant's comments, by no later than 30 June 2022, on whether it wishes to submit additional evidence limited to that which is responsive to evidence submitted by Respondent pursuant to paragraph 38.7 of PO 12.

IV. ORDERS

37. Having considered the Parties' positions with regard to the procedural matters upon which the Tribunal's determination is required, the Tribunal hereby orders the following:
 - 37.1. The time-period for the filing of any Reply submissions on the Tribunal's Questions under paragraphs 38.3 or 38.4 of PO12 is reduced to 45 days.
 - 37.2. The Claimant's request to strike the Respondent's further documents and associated parts of Respondent's Submission from the record is rejected.
 - 37.3. By no later than three business days following the date of this Procedural Order (i.e., 30 June 2022), the Claimant is invited to comment on whether it wishes to submit additional evidence.

On behalf of the Tribunal,

[Signed]

Ms. Juliet Blanch
President of the Tribunal
Date: 27 June 2022