

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. 11

On the Filing of Post-Hearing Briefs

Members of the Tribunal

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

Secretary of the Tribunal

Mrs. Ana Constanza Conover Blancas

Assistant to the President of the Tribunal

Mr. João Vilhena Valério

28 January 2020

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I. INTRODUCTION

1. With reference to the discussion on Day 5 of the January 2020 hearing (page 1576, line 6 *et seq.*), the Tribunal recalls the Parties' agreement to file a single post-hearing brief simultaneously. The Parties are requested to file their post-hearing briefs on **Friday, 28 February 2020**.
2. At the hearing, the Tribunal undertook to offer additional guidance regarding post-hearing briefs, which is set out below.

II. ORDER

3. The Parties are requested to address the following questions in their post-hearing briefs:

QUESTION 1 - The arbitral record incorporates references to decisions of the Colombian courts or to Colombian law in connection with matters apparently connected with disputed issues in this arbitration. What legal relevance should the Tribunal attribute to such references given the fact that the claims in this case have been made under international treaties/international law?

QUESTION 2 - Article 2201 of the Canada-Colombia Free Trade Agreement provides, *inter alia*, as follows:

“3. For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

- a. To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health;
- b. To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or
- c. For the conservation of living or non-living exhaustible natural resources.

4. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures relating to nationals of the other Party aimed at preserving public order, subject to the requirement that such measures are not applied in a manner that constitutes arbitrary or unjustifiable discrimination. *Without prejudice to the foregoing, the Parties understand that the rights and obligations under this Agreement, in particular the rights of investors under Chapter Eight (Investment), remain applicable to such measures.*”

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What is the effect of the second sentence of the exception in Article 2201(4) (as emphasised in italics), and its absence from the exception in Article 2201(3), on the application of Chapter Eight (Investment) to the rights of investors in relation to measures to which the Article 2201(3) exception is applicable? It would be helpful if the assessment could take into account other treaty practise of Canada and Colombia.

QUESTION 3 - What, if any, is the application and effect of the “*margin of appreciation enjoyed by national regulatory agencies when dealing with public policy determinations*” (ICSID Case No. ARB/10/7, *Phillip Morris v Uruguay*, Award, 8 July 2016 (Authority RL-102), ¶ 388) to the delimitation of the *páramo*?

QUESTION 4 - Both Colombian legal experts addressed Constitutional Court Decision C-339/02 of 7 May 2002 (Exhibit C-82) in their testimony on Day 4. In Decision C- 339/02, the Constitutional Court addresses a constitutional challenge against articles 3 (partially), 4, 18 (partially), 34, 35 (a) and (c) (partially), and 36 (partially) of the Mining Code 2001. This Decision, *inter alia*, provides as follows:

“[...]”

Article 34(1) prohibits mining exploitation and exploration works in such areas that are delimited and declared, in accordance with the regulations in force, as areas for the protection of renewable natural resources or the environment, or that expressly exclude mining activities. Up to this point, there are no objections to the provision, since it is in agreement with the principles set out in the Constitution for environmental and natural resource protection, which were discussed at the beginning of these recitals.

Article 34(2) indicates that excluded areas comprise the following: a) The system of national natural parks; b) regional natural parks, and c) reserve forest areas. The aim is to protect biodiversity, given the great importance that Colombia has worldwide, as acknowledged by the Court in analyzing the issue. The Court also explains that, besides the areas excluded in this Law, there may be others, whether already declared or to be declared as such in the future by the environmental authority.

Of course, excluded areas must be clearly geographically delimited by the environmental authority, in compliance with Article 5 of Law 99 of 1993. Provision is also made for cooperation by the mining authority in areas of mining interest, which is in keeping with the principle of priority protection of the country’s biodiversity, along with sustainable exploitation, in accordance with universal and sustainable development principles included in the Rio Declaration on Environment and Development dated June 1992, which was ratified by Colombia.

The Court considers it worth mentioning that the mining authority must cooperate with the environmental authority, but this duty of cooperation does not limit or condition the exercise of the powers of the environmental authority, which is the one authorized to establish excluded areas. Thus, the

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operative part will make the enforceability of Article 34(2) of Law No. 685 of 2001 subject to certain conditions.

[...]

When applying paragraph 3, one must follow the precautionary principle, a principle which can be understood with the expression “in dubio pro ambiente”. The same principle must be applied with respect to the fourth paragraph of article 34, in accordance with the principle number 25 of the Rio Declaration that states: “Peace, development and environmental protection are interdependent and indivisible”.

Assuming that Colombia is observing the precautionary principle referred to above — i.e., *in dubio pro ambiente* — so far as the delimitation of the *páramos* is concerned, does that have any impact on the consideration of its rights and obligations under international law?

Specifically, assuming that the fact that it has yet to delimit the *páramo* (see, e.g., Exhibit C-455) is legitimate and grounded on Colombia’s duty not to allow activities that pose a risk irreversibly to affect the environment and its natural resources, does that prevent Colombia from incurring any possible responsibility under international law in case it is established that the investors’ rights have been violated?

QUESTION 5 - In discussing Constitutional Court Decision C-35 both Colombian legal experts referred to the right of many parties affected by the decision to seek compensation from the lower courts. What domestic legal options were available to a diligent investor to obtain compensation after the Constitutional Court’s Decision C-35?

QUESTION 6 - The parties are further invited to make any further submissions they believe relevant, if and only to the extent they believe it would be helpful to the Tribunal, arising out of the evidentiary hearing which took place between 20 - 24 January 2020.

4. The Parties’ post-hearing briefs shall be submitted in accordance with the following terms:
 - a. 35-page limit, excluding cover page and including footnotes, appendices, figures, signing page, and prayer for relief.
 - b. Formatting instructions:
 - i. Electronic paper size: A4
 - ii. Margins: minimum 2.5 centimeters
 - iii. Font type and size: Times New Roman, 12 point
 - iv. Line spacing: single-spaced
 - v. Numbered paragraphs
 - vi. Footnotes in Times New Roman 10.5 point, single-line spacing

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5. The Parties should note that in preparing these final post-hearing submissions, no additional evidence or new facts should be adduced. The Parties should further note that no new allegations or novel legal submissions be included save other than with respect to the questions raised above by the Tribunal.

On behalf of the Tribunal,

[Signed]

Mrs. Juliet Blanch
President of the Tribunal
Date: 28 January 2020