

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

First Majestic Silver Corp.

v.

United Mexican States

(ICSID Case No. ARB/21/14)

PROCEDURAL ORDER NO. 2

Members of the Tribunal

Prof. Giorgio Sacerdoti, President of the Tribunal

Prof. Stanimir A. Alexandrov, Arbitrator

Prof. Yves Derains, Arbitrator

Secretary of the Tribunal

Ms. Sara Marzal

27 May 2022

Introduction

1. Within the extended due date of 25 April 2022, Claimant wrote at 11.59 PM an email to the ICSID Secretariat (Ms. Sara Marzal Yetano, Secretary of the Tribunal) stating that “[p]ursuant to §§ 13, 16-17, Annex A (Procedural Order), and Annex B (Electronic File Naming Guidelines) of Procedural Order No. 1, the Claimant hereby submits its Memorial. The evidence in support of the Memorial is being uploaded to the file sharing platform for this case.”
2. A few hours later, on 26 April 2022, at 3.16 AM, Claimant sent a further email to ICSID as follows:

“Dear Ms. Marzal,

This is to advise you that we will be sending you a substitute for the Claimant’s Memorial sent just before the May 25 deadline, with one that does not reflect some of the difficult technical issues we experienced using the Teams sharing platform when finalizing the Memorial.

We will not change the substantive contents of the Memorial. Rather, it is our aim to revise the layout, indentations, margins, duplications and some misplaced punctuations to improve its readability.

When we resend the Claimant’s Memorial, we will also provide a comparison version to the one already filed so that all of our changes in the revised version will be apparent.”

3. On that same day, at 8.37 PM, Claimant sent a further email to the Secretariat as follows:

“Dear Ms. Marzal,

I have attached the Claimant’s Memorial as per our previous correspondence.

Also attached is a comparison version to the version filed yesterday.

All of the supporting documentation have been uploaded and can be found in the ICSID Secretariat’s file sharing platform.”

4. On 16 May 2022, Respondent sent a two-page letter to the Secretariat pointing out that, in its view, on 26 April 2022 Claimant had uploaded new versions of the factual annexes, legal authorities, witness statements and experts’ reports. Specifically, Respondent pointed out that, while the original Report of Expert Sequeira comprised 81 pages, the second version was made of 256 pages. Referring to para.16 of Procedural Order No. 1 (“**PO1**”),

Respondent complained that Claimant had added the annexes to the Expert Report without the authorization of the Tribunal. Respondent asked that Claimant explain in detail each of the modifications made and that the Tribunal order Claimant to conform to the provisions of PO1.

5. On 20 May 2022, pursuant to leave from the Tribunal, Claimant sent by email its 4-page reply and explanation. Claimant alleges that it had technical and software problems to upload the annexes to the Expert Report of Mr. Siqueira which were in separate files, so that “*inadvertently*” these files had not been uploaded. Once this omission had been promptly detected, Claimant uploaded immediately also the annexes as part of the Expert Report. As a consequence, the Expert Report of Mr. Siquera which comprised 81 pages was expanded to 256. Changes to the resubmitted Memorial had been just typographic as had been announced.
6. To sum up, Claimant explains that it did not submit “*new evidence*”, because from Mr. Sequeira’s Report which referenced many of the annexes, it is clear that no additional evidence had been uploaded other than annexes which was had been prepared but had been omitted by mistake from the first uploading.

Decision

7. Having examined the submissions of the Parties summarized above, and reviewed the email correspondence and the material uploaded by Claimant in the Box on 25 and 26 April 2022, the Tribunal is convinced that the lack of uploading by Claimant of the annexes to the Expert Report of Mr. Sequeira appears in fact to be attributable to a technical omission, which can be explained by the complexity of uploading many heavy files and of checking within a short time the correctness and completeness of the operation. This omission can be considered excusable, although the Tribunal observes that a party having had 180 days, as asked by it, and an additional 30 days also as asked by it, to file its Memorial and annexes of its choice, should have avoided filing and uploading them just one minute (11.59 PM) before the deadline, in view of the complexity of the operation.
8. The Tribunal is convinced that the annexes and documents so uploaded were those that had been prepared to be uploaded together with the Expert Report and not additional documents, in breach of para. 16 PO1. In this respect too, the Tribunal notes – also as a guidance for the Parties should similar situations arise again – that a party should explain clearly to the Secretariat and the Tribunal the differences in the filings and ask authorization from the Tribunal, in conformity with any requirement of the relevant PO.
9. The Tribunal notes that it is uncontested, as had been announced by Claimant, that the second version of the Memorial differs from the first one only as to the correction of typos, addition of hyperlinks, and similar matters.
10. Finally, the Tribunal notes that the re-filing just after the first timely filing and a few hours after the deadline has not caused any prejudice to Respondent.

Order

11. In view of the above, the Tribunal:

- a) authorizes *a posteriori* the filing and uploading made by Claimant on 26 April 2022, rectifying the previous timely filing and uploading on 25 April 2022 of its Memorial with annexes;
- b) grants an extra day to Respondent to file its Counter-Memorial, which shall therefore be due on 25 November 2022, instead of 24 November 2022; and
- c) invites the Parties to organize in due time their respective filings, in order to respect the deadlines agreed and/or granted, taking into account any technical time-consuming complexity involved.

On behalf of the Tribunal,



Prof. Giorgio Sacerdoti
President of the Tribunal
Date: 27 May 2022