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. 6
DECISION ON NON-DISPUTING PARTIES' APPLICATION

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

18 February 2019

I. INTRODUCTION

1. On 19 December 2018, Comité para la Defensa del Agua y el Páramo de Santurbán, the Center for International Environmental Law (CIEL), the Asociación Interamericana para la Defensa del Ambiente (AIDA), MiningWatch Canada, Institute for Policy Studies (IPS) - Global Economy Project and the Centre for Research on Multinational Corporations (SOMO) (together, the "**Petitioners**") applied for leave to file a non-disputing party submission in this arbitration (the "**Application**") pursuant to Annex 831 of the Free Trade Agreement between Canada and the Republic of Colombia signed on 21 November 2008 and which entered into force on 15 August 2011 (the "**FTA**" or "**Treaty**") and Article 37(2) of the ICSID Arbitration Rules in force as of 10 April 2006 (the "**Rules**"). The Arbitral Tribunal has considered the Application and, having deliberated, has decided as follows.

II. PROCEDURAL BACKGROUND

2. On 13 September 2017, the Petitioners wrote to the Tribunal advising that one or more of them anticipated submitting a request for leave to participate in the arbitration as *amici curiae* on the basis that "*the decision whether to permit the Angostura mining project to go ahead inspired intense public interest*" and requesting the Tribunal to (i) make available the documents submitted to or issued by the Tribunal by establishing procedures for contemporaneous (or as nearly as practicable) publication of proceeding materials, and (ii) establish a clear timetable for requesting leave for *amici* intervention, in order to avoid disrupting the proceedings.

3. Further to the Tribunal's invitation, on 22 September 2017 the Parties provided their comments on the Petitioners' letter.

4. The Claimant submitted firstly that "*the scope and procedure for the public disclosure of arbitration documents is a matter for the Tribunal to define in consultation with the*

parties" and secondly that it "*would be premature to set a deadline for applications for leave to present amicus curiae submissions prior to a first exchange of substantive pleadings between the parties.*"

5. The Respondent submitted that "*in principle*", the Tribunal did not need to implement any particular procedures for the publication of materials on the basis that the matter would be discussed during the First Session scheduled for 21 November 2017.

6. On 30 November 2017, the Tribunal issued Procedural Order No. 1, paragraph 25 of which established the following:

> 25. Submissions by a Non-Disputing Party
>
> *Arbitration Rule 37(2), Treaty Article 831 and Annex 831*
>
> 25.1 In accordance with Annex A: (i) an application to the Tribunal for leave to file a non-disputing party submission may be submitted no later than one month after the first exchange of pleadings on jurisdiction or merits, as applicable, between the Parties has taken place; and (ii) any non-disputing party submission must be filed no later than one month before the second exchange of pleadings on jurisdiction or merits, as applicable, begins.
>
> 25.2 The Parties will be granted an opportunity to submit observations in relation to any non-disputing party application for leave to file a non-disputing party submission, and to any non-disputing party submissions, as provided in Annex A.
>
> 25.3 In accordance with ICSID Arbitration Rule 37(2) and Article 831 of the Treaty, the Tribunal shall ensure that any non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either Party.

25.4 In the event that a non-disputing party is granted leave to make a submission, the Tribunal shall impose a deadline for such submission in accordance with § 25.3 above. The Tribunal shall likewise decide whether and to what degree a non-disputing party granted leave to make a submission shall be granted access to the pleadings submitted by the Parties, subject to the deletion of confidential information and excluding their supporting documentation (including exhibits, witness statements, and expert reports). Access to the pleadings shall be granted upon the execution of a non-disclosure agreement by the non-disputing party.

25.5 Non-disputing parties that demonstrate the same significant interest in the arbitration shall submit a joint submission.

25.6 An application to the Tribunal for leave to file a non-disputing party submission, and the filing of a submission, if allowed by the Tribunal, shall be made in accordance with ICSID Arbitration Rule 37(2), and Article 831 and Annex 831 of the Treaty.

7. In accordance with the procedural calendar set out in Annex A to Procedural Order No. 1, as amended by Procedural Order No. 4 dated 10 October 2018 and by Procedural Order No. 5 dated 21 December 2018:

(a) On 19 December 2018, the Petitioners filed their Application; and

(b) On 28 January 2018, the Parties filed their respective observations on the Petitioners' Application.

III. THE APPLICATION

8. The Petitioners seek the following in their Application:

(a) Permission to file a non-disputing party submission pursuant to Annex 831 of the FTA and Article 37 of the Rules;

(b) Access to documents pursuant to Article 830 of the FTA; and

(c) Permission to attend the oral hearings pursuant to Article 830 of the FTA.

A. THE PETITIONERS

9. The Application is submitted by a coalition of six community organisations and environmental and human rights non-profit organisations from Colombia, the United States, Canada and The Netherlands.

10. Comité para la Defensa del Agua y el Páramo de Santurbán is "*a social platform originated in the Department of Santander, Colombia with the goal of defending the páramo ecosystem from mining. The Comité is comprised of a diverse sector representation of civil society and was founded in 2009.*"

11. The Center for International Environmental Law (CIEL) is a U.S. non-profit organization based in Washington D.C., which "*has used the power of law to protect the environment, promote human rights, and ensure a just and sustainable society since 1989*". CIEL has "*supported the Comité para la Defensa del Agua y del Páramo de Santurbán and the Mesa Nacional frente a la Minería Metálica (El Salvador) in their efforts to protect their rights at judicial and non-judicial fora including arbitration. CIEL supported the complaint by the Comité to the accountability mechanism of the International Finance Corporation in alliance with international organizations.*"

12. The Asociación Interamericana para la Defensa del Ambiente (AIDA) is a "*non-profit organization founded in 1998 and registered in the U.S. AIDA is an international environmental law organization that works for the protection of threatened ecosystems in the hemisphere and the communities that depend on them. AIDA has worked for the protection of paramos, closely with the Comite and local communities, providing them legal advice free of charge, to protect the páramo. Among the international legal tools used, is that which relates to arbitration panels, national litigation, and investment protection agreements. AIDA supported the complaint presented by the community to the CAO.*"

13. MiningWatch Canada is "*a Canadian non-profit organization working to coordinate a public interest response given mineral policies and practices in Canada and globally that threaten the environment and community wellbeing. With affected communities, MiningWatch Canada carries out monitoring, analysis and advocacy to affect the behavior of industry and public decision-makers. This has included work on the arbitration suit between Pacific Rim Cayman LLC and El Salvador in coordination with US and Salvadoran organizations, as well as the conflict over Eco Oro Minerals' Angostura project with the Committee for the Defense of Water and Páramo of Santurbán in Bucaramanga, Colombia.*"

14. The Institute for Policy Studies (IPS) - Global Economy Project "*works with organizations around the word that are concerned by the increase in arbitration against states under the unjust and partial system of investor-state disputes. In particular, IPS focuses on the recent ICSID suits at the World Bank, cases that extractive industries initiate under investment protection clauses in trade and investment agreements when governments respond to the demands of their citizens and act to protect the environment.*"

15. The Centre for Research on Multinational Corporations (SOMO) is "*a critical, independent, not-for-profit knowledge center on multinationals based in the Netherlands. SOMO examines a wide variety of trade and investment mechanisms, analyzing their impact on society and sustainable development goals.* [SOMO] *advocate*[s] *for modern trade and investment policies that contribute simultaneously to social justice, sustainability, and just economic development. SOMO also supports communities in their complaints to non-judicial grievance mechanisms, including the complaint by the Committee for the Defense of Water and Páramo of Santurbán in Bucaramanga, Colombia to the grievance mechanism of the International Finance Corporation.*"

16. The Petitioners state that none of them have any affiliation with any disputing party.

B. SIGNIFICANT INTEREST

17. The Petitioners submit they have a significant interest in the arbitration, stating in the Application that "[t]*here is a strong civil society movement within and outside of Colombia concerned with the effects of the commercial activities of Eco Oro Minerals Corp. in relation to the Eco Oro gold mine. Colombian citizens have a lasting interest in the outcome of the dispute between* [the Claimant] *and the state of Colombia.*"

C. THE SUBJECT MATTER OF THE PROPOSED SUBMISSION

18. The Petitioners state that any submission they make will provide a "*unique contribution to the resolution of factual, legal and policy issues within the scope of the dispute. As the briefs are not yet publicly available,* [the Petitioners] *are currently unable to include the specific facts or law. Nevertheless,* [the Petitioners] *anticipate focusing on international law regarding human rights and particularly the right to live in a healthy environment.*"

IV. THE PARTIES' OBSERVATIONS

A. THE CLAIMANT'S OBSERVATIONS

19. The Claimant opposes the Application save that it accepts that, pursuant to the provisions of the FTA and of Procedural Order No. 1, the Petitioners are entitled to attend the oral hearings as Article 830(2) of the FTA and paragraph 21.8 of Procedural Order No.1 allow public access to hearings.

20. The Claimant posits the subject matter of the Petitioners' proposed submission would be beyond the scope of the dispute,[1] that the Petitioners do not bring a perspective,

[1] Claimant's Observations dated 28 January 2019, pp. 4 et seq.

particular knowledge or insight different from that of the Parties[2] and that they do not have a significant interest in the arbitration.[3]

B. THE RESPONDENT'S OBSERVATIONS

21. The Respondent does not object to the Application and "*considers that it would be appropriate for the Tribunal to allow it.*"

22. The Respondent asserts that the Petitioners have a significant interest in the proceeding, as "*the outcome of the proceeding may have a direct or indirect impact on the rights or principles* [they represent and defend]" and are "*capable of assisting the tribunal in better understanding a factual or legal issue related to the proceeding*".[4]

V. THE TRIBUNAL'S CONSIDERATIONS

A. REQUEST TO FILE A NON-DISPUTING PARTY SUBMISSION

23. Both Parties accept that the Tribunal has the discretion, upon consulting with the Parties, to allow a non-disputing party to make a submission pursuant to Arbitration Rule 37(2), provided that certain minimum criteria are met. Specifically, Arbitration Rule 37(2) states as follows:

> After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

[2] *Id.*, pp. 8 et seq.

[3] *Id.*, pp. 10 et seq.

[4] Respondent's Observations dated 28 January 2019, p. 3, section I.

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

24. Article 831 of the FTA further provides that:

Article 831: Submissions by a Non-Disputing Party

1. A Tribunal shall have the authority to consider and accept written submissions from a person or entity that is not a disputing party and that has a significant interest in the arbitration. The Tribunal shall ensure that any non-disputing party submission does not disrupt the proceedings and that neither disputing party is unduly burdened or unfairly prejudiced by it.

2. An application to the Tribunal for leave to file a non-disputing party submission, and the filing of a submission, if allowed by the Tribunal, shall be made in accordance with Annex 831.

25. Annex 831 of the FTA provides as follows:

Annex 831

Submissions by Non-Disputing Parties

1. The application for leave to file a non-disputing party submission shall:

(a) be made in writing, dated and signed by the applicant, and include the applicant's address and other contact details;

(b) be no longer than five typed pages;

> (c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);
>
> (d) disclose whether the applicant has any affiliation, direct or indirect, with any disputing party;
>
> (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;
>
> (f) demonstrate that the applicant has a significant interest and specify the nature of this interest in the arbitration;
>
> (g) identify the specific issues of fact or law in the arbitration that the applicant will address in its written submission;
>
> (h) explain why the Tribunal should accept the submission; and
>
> (i) be made in a language of the arbitration.
>
> […]

26. The Tribunal therefore turns to the three limbs which Arbitration Rule 37(2) requires it to consider amongst other things. The Tribunal finds it appropriate to consider these in the following order.

1. The subject matter of the proposed submission is beyond the scope of the dispute

27. In their Application, the Petitioners' only reference to the subject matter of their intended submission is as follows: "[…] *we anticipate focusing on international law regarding human rights and particularly the right to live in a healthy environment*". Whilst the Petitioners submit that they are currently unable to give more particularity as the briefs are not yet publicly available, as noted by the Claimant, certain of the arbitration documents are in fact publicly available, including the Claimant's Notice of Intent, Request for Arbitration, and Procedural Order No. 2 (which outlines the scope of the Parties' submissions as to jurisdiction). Indeed, as the Claimant further notes, the Petitioners refer to Procedural Order No. 4, so they must have been aware of the

existence and availability of Procedural Order No. 2, even had they chosen not to review it.

28. The Tribunal agrees with the Claimant's submission that "[r]*elevance to the actual scope of the dispute is a fundamental requirement for admission as amicus curiae.*"[5] The Claimant is not seeking restitution of its investment but compensation arising out of alleged breaches of the FTA, asserting that the Respondent's actions have prevented it from developing the Angostura Project. Accordingly, the Tribunal does not consider that the Petitioners have sought to show how generalised issues of human rights, and particularly the right to live in a healthy environment, may be said to relate to the scope of the specificities of this dispute.

29. In coming to this conclusion, the Tribunal first notes the generality of the assertion by the Petitioners and the total lack of any specificity from the Petitioners as to the relevance to the legal scope of the dispute. The Petitioners have not even sought to address how the matters they wish to raise could assist the Tribunal or the Parties in their work. The Tribunal further notes that the Respondent, in its observations, has not provided any further clarification, limiting its observation to a bald assertion that it "*considers the amici's stated area of intervention, that is the 'international law regarding human rights and particularly the right to live in a healthy environment' is a legal issue germane to the resolution of this dispute.*"[6]

30. Accordingly, the Tribunal does not find that the Petitioners have met even the most minimum requirements that would be needed to establish that issues of human rights, and particularly the right to live in a healthy environment, may be said to form a part of the scope of the dispute.

[5] Claimant's Observations dated 28 January 2019, para. 15.

[6] Respondent's Observations dated 28 January 2019, p.4, section B.

2. Assistance to the Tribunal

31. An *amicus* submission should assist the Tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties. The Tribunal will therefore only accept *amicus* submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience and independence to be of assistance in this case. The Tribunal notes with approval the decisions in both *Apotex v USA*[7] and *Bear Creek v Peru*[8] which require a petitioner to demonstrate a "*perspective, knowledge or insight*" that differs from that which has or will be provided by the international counsel and experts who have been retained by both parties.

32. The Tribunal notes that the Petitioners have not sought to explain in their Application what is the nature of their "*perspective, knowledge and insight*" other than merely to assert that it would be different to that of the disputing parties. Whilst the Respondent supports the Petitioners' Application, its observation is limited to the statement that it "*considers that the* [Petitioners'] *Application substantiates their significant relevant knowledge of the Santurbán páramo and attendant social and environmental issues.*"[9]

33. Given the Tribunal's determination in paragraph 30 above that the Petitioners have not established that issues of human rights and the right to live in a healthy environment could form a part of the scope of this dispute, we do not find that a knowledge of "*the Santurbán páramo and attendant social and environmental issues*" could, as such,

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[7] *Apotex Holdings Inc. and Apotex Inc. v United States of America* (ICSID Case No ARB (AF)/12/1), Procedural Order on the Participation of the Applicant, Mr Barry Appleton, as a Non-Disputing Party, 4 March 2013 (CL-133).

[8] *Bear Creek Mining Corporation v Republic of Peru* (ICSID Case No ARB/14/21), Procedural Order No. 5 Regarding the Association of Human Rights and Environment of Puno, Peru (DHUMA), and Dr. Carlos López PhD, Senior Legal Adviser to the International Commission of Jurists Application to File a Written Submission, 21 July 2016 (CL-136) and Procedural Order No. 6 Regarding the Application by the Columbia Center on Sustainable Investment (CCSI) to File a Written Submission, 21 July 2016 (CL-135).

[9] Respondent's Observations dated 28 January 2019, p. 4, section B.

assist the Tribunal in determining this dispute, in a manner that goes beyond the likely submissions of the Parties.

3. Significant Interest

34. The Tribunal agrees with the decision in *Apotex v USA* that a significant interest must comprise "*more than a 'general' interest in the proceeding. For example, the applicant must demonstrate that the outcome of the arbitration may have a direct or indirect impact on the rights or principles the applicant represents and defends*".[10] The Petitioners rely on two grounds to substantiate their claim to have a significant interest: (1) because of the "*strong civil society movement*" which is concerned with the effects of the Claimant's commercial activities with respect to the Eco Oro gold mine and (2) that Colombian citizens have a lasting interest in the outcome of this dispute. The Petitioners do not expand on why this gives them – or any of them – a significant interest. In its observations, the Respondent merely submits that the Tribunal's decision on the merits will directly concern the communities that the Petitioners represent and that the arbitration concerns Colombia's rights to protect the environment and its water resources.[11] In this regard, the limited and open-textured wording of the Application is not sufficient to establish that any such interest has been shown in connection with the specifics of the dispute that is before this Tribunal.

35. Accordingly, on the basis of the strikingly limited Application, the Tribunal does not find that the Petitioners have met the requirements of Arbitration Rule 37(2) and Annex 831 of the FTA, or even sought to meet those requirements. Those provisions impose on a petitioner a duty to set out reasoned arguments, and none are sufficiently present.

[10] *Apotex Holdings Inc. and Apotex Inc. v USA* (ICSID Case No ARB (AF)/12/1), Procedural Order on the Participation of the Applicant, Mr Barry Appleton, as a Non-Disputing Party, 4 March 2013 (CL-133), para. 38.

[11] Respondent's Observations dated 28 January 2019, p. 3, section A.

36. On the basis of the materials adduced, the Tribunal therefore declines the Petitioners' Application to file a non-disputing party submission.

B. REQUEST FOR ACCESS TO DOCUMENTS

37. As the Tribunal has determined that the Petitioners should not be granted leave to make a submission, the Tribunal finds that the Petitioners should not be granted leave to access the arbitration documents.

C. REQUEST TO ATTEND HEARINGS

38. Article 830(2) of the FTA provides as follows:

> Hearings held under this Section shall be open to the public. The Tribunal may hold portions of hearings *in camera* to the extent necessary to ensure the protection of confidential information. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.

39. Paragraph 21.8 of Procedural Order No. 1 further provides as follows:

> In accordance with Article 830(2) of the FTA, hearings shall be open to the public. The Tribunal may hold portions of hearings *in camera* to the extent necessary to ensure the protection of confidential information. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the parties. Pursuant to Article 827(2) of the FTA, Canada, as the other Contracting Party to the Treaty, shall have the right to attend any hearings. Upon written notice to the disputing parties, the Government of Canada may make oral and written submissions to the Tribunal on a question of interpretation of the Treaty.

40. Considering the provisions referred to above, the Petitioners have the right to attend the oral hearings as these shall be open to the public.

VI. DISPOSITIF

41. Based on the foregoing, the Tribunal makes the following orders:

1. The Application to file a non-disputing party submission is denied.

2. The Application to obtain access to documents is denied.

3. The Tribunal confirms that the Petitioners have the right to attend the oral hearings as, pursuant to Article 830(2) of the FTA and to paragraph 21.8 of Procedural Order No. 1, such hearings are open to the public.

4. There shall be no order as to costs.

On behalf of the Tribunal,

[Signed]

Mrs. Juliet Blanch
President of the Tribunal
Date: 18 February 2019