

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Gran Colombia Gold Corp.**

**v.**

**Republic of Colombia**

**(ICSID Case No. ARB/18/23)**

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**PROCEDURAL ORDER No. 4**

***Members of the Tribunal***

Ms. Jean Kalicki, President of the Tribunal

Professor Bernard Hanotiau, Arbitrator

Professor Brigitte Stern, Arbitrator

***Secretary of the Tribunal***

Ms. Ana Constanza Conover Blancas

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11 March 2020

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**I. PROCEDURAL BACKGROUND**

1. On 17 January 2020, the Tribunal issued Procedural Order No. 3. In its order, the Tribunal decided to hear the Respondent’s jurisdictional objection concerning denial of benefits (the “**DoB Objection**”) in a preliminary phase on the basis of an accelerated timetable, and invited the Parties to confer with respect to a Proposed Schedule for Accelerated Determination of the Bifurcated Jurisdictional Issue (“**Schedule**”).
2. By emails of 25 January 2020, the Parties informed the Tribunal of their agreement to the Tribunal’s Schedule.
3. On 6 February 2020, the Tribunal confirmed that the determination of the DoB Objection would take place in accordance with the Schedule, including 28-30 September 2020 as the applicable dates for a hearing on that bifurcated issue.
4. By letter of 13 February 2020, the Claimant requested the Tribunal to adopt certain procedural measures aimed at promoting the efficiency of the proceeding (“**Claimant’s Proposals**”).
5. On 21 February 2020, the Respondent filed observations on the Claimant’s Proposals, together with supporting documentation (“**Respondent’s Observations**”).
6. On 23 February 2020, the Claimant submitted further observations related to its request of 13 February 2020.
7. This Procedural Order sets out the Tribunal’s decision on the Claimant’s Proposals.

**II. PARTIES’ POSITIONS**

**A. The Claimant’s Position**

8. The Claimant requests the Tribunal to adopt the following three proposals to “mitigate any inefficiencies inherent in the bifurcation of this denial of benefits question, and enhance the Tribunal’s ability to ensure the timeliness and efficiency of the subsequent phase”:<sup>1</sup> *first*, to fix a date for a subsequent hearing on the merits, damages and remaining issues of jurisdiction (“**Main Hearing**”), provisional upon the Tribunal’s resolution of the DoB Objection; *second*, to fix an internal meeting or call of the Tribunal both before and after the hearing on the DoB Objection; and *third*, if the Tribunal upholds its jurisdiction over the DoB Objection, to issue a short-form communication to that effect and immediately order proceedings on the merits to resume, with the reasons for the decision to be communicated

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<sup>1</sup> Claimant’s Proposals, p. 1.

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at a later date. **Finally**, the Claimant proposes an updated procedural schedule for the Tribunal's consideration.

9. **First**, the Claimant proposes to reserve dates for a Main Hearing right away, contingent on the Tribunal's ruling on the DoB Objection. The Claimant contends that this would minimize delays that otherwise could be caused by the inability of the Parties, their counsel and the Tribunal to agree on dates before the end of 2022.<sup>2</sup>
10. **Second**, the Claimant submits that it would be beneficial for the Tribunal to schedule one meeting or call *before* the hearing on the DoB Objection and another one *after* such hearing, as follows:<sup>3</sup>
  - a. Before the hearing on the DoB Objection, a meeting or call could take place between 27 July and 28-30 September 2020, for the Tribunal to deliberate about the legal positions advanced by the Parties and provide advance guidance to the Parties regarding such hearing (including with respect to the length of the hearing and the factual or legal matters on which the Parties should focus).
  - b. Right after the hearing on the DoB Objection, a second meeting or call should take place for the Tribunal to deliberate.
11. **Third**, the Claimant proposes that, if the Tribunal rejects the Respondent's DoB Objection, it should so indicate even before communicating the reasons for its decision, order the next phase of the proceedings to begin immediately, and then communicate the reasons for its decision at a later date, either in a subsequent decision or in a final award.<sup>4</sup>
12. **Finally**, the Claimant submits for the Tribunal's consideration a procedural schedule for the remainder of the arbitration. According to the Claimant, the proposed schedule: **(a)** is based on the time intervals set out in Scenario 2 of Procedural Order No. 2; **(b)** assumes that the Tribunal will issue a decision rejecting DoB Objection on 30 October 2020 and that the reasons for such decision will be communicated to the Parties at a later time; and **(c)** assumes that the merits and damages claims will proceed in one phase.<sup>5</sup>

**B. The Respondent's Position**

13. The Respondent rejects the Claimant's underlying assumption that the DoB Objection will be resolved in the Claimant's favor. Nevertheless, "in a spirit of cooperation," it addresses each of the Claimant's Proposals, as summarized below.<sup>6</sup>

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<sup>2</sup> Claimant's Proposals, p. 2.

<sup>3</sup> Claimant's Proposals, pp. 2-3.

<sup>4</sup> Claimant's Proposals, p. 3.

<sup>5</sup> Claimant's Proposals, pp. 3-5, fns. 1 and 3.

<sup>6</sup> Respondent's Observations, p. 1.

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14. **First**, the Respondent considers that it would be premature at this time to fix a procedural schedule for the remainder of the arbitration, including dates for a Main Hearing in case the Tribunal rejects the Respondent's DoB Objection.<sup>7</sup>
15. In the Respondent's view, the Claimant's proposed schedule does not take into account that, if there is a ruling rejecting the DoB Objection, the Tribunal still would be required to decide whether the subsequent phase should be bifurcated into merits and quantum phases. Such decision would be essential for the Respondent, as it needs to know if its submission should address quantum or not, for which it would have to begin public procurement procedures to engage quantum experts. Moreover, the Respondent considers that the 16 weeks for Respondent's Counter-Memorial contemplated in the Claimant's proposed schedule are insufficient: **(a)** to resolve the issue of potential bifurcation between merits and quantum; **(b)** for the Respondent to initiate a public tender procedure, select, engage and instruct quantum and industry experts; and **(c)** for those experts to render quality work product. The Respondent argues that such timeline is unrealistic and could seriously compromise its ability to defend its case.<sup>8</sup>
16. **Second**, the Respondent defers to the Tribunal on the matter of how and when it wishes to deliberate.<sup>9</sup>
17. **Third**, the Respondent objects to the Claimant's proposal that the Tribunal should provide the reasons of its decision on the DoB Objection only at a later stage. The Respondent submits that neither the Tribunal's Procedural Order, nor the ICSID Rules, nor the Free Trade Agreement between Canada and Colombia contemplate such possibility. Besides, even though previous tribunals have very rarely decided to postpone giving reasons to the parties, they have done so only in exceptional circumstances, none of which are present in this case.<sup>10</sup>
18. Furthermore, for considerations of transparency and freedom of information, a decision that does not include the reasons on which it is based, even if it is for a short period of time, would be unacceptable. The Respondent underscores that Colombian public institutions and citizens have the right to be fully informed of the decisions rendered against the State. For this reason, Procedural Order No. 1 provides that the procedural orders, decisions on jurisdiction and the award issued by the Tribunal shall be publicly available. Finally, the Respondent submits that any decision on jurisdiction issued by the Tribunal should comply with the requirements of Article 48(3) of the ICSID Convention, pursuant to which an award "shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based."<sup>11</sup>

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<sup>7</sup> Respondent's Observations, pp. 2-3.

<sup>8</sup> Respondent's Observations, p. 2.

<sup>9</sup> Respondent's Observations, p. 3.

<sup>10</sup> Respondent's Observations, p. 3.

<sup>11</sup> Respondent's Observations, pp. 3-4.

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**III. TRIBUNAL'S ANALYSIS**

19. The Tribunal begins by emphasizing its commitment to the efficient management of these proceedings. It was precisely because of such commitment that the Tribunal decided, in its Procedural Order No. 3, to accelerate the briefing and resolution of the DoB Objection to accomplish this procedural step earlier than had previously been contemplated in Procedural Order No. 2 in the event of bifurcation of jurisdictional issues. The Tribunal's decision in that regard enabled a hearing on the DoB Objection to be scheduled for late September 2020, whereas Procedural Order No. 2 originally had contemplated that any hearing on jurisdiction could not be held until sometime in the first quarter of 2021. As a result, the proceedings currently are *ahead* of the schedule originally envisioned under Procedural Order No. 2, not *behind* that schedule. The Tribunal intends to continue to adopt appropriate measures to facilitate the expeditious resolution of this dispute, while taking into account the Parties' need for sufficient time to prepare for the relevant written and oral submissions.
20. In this regard, the Tribunal addresses the Claimant's Proposals below in chronological order with regard to the stages of proceedings to which they relate.
21. First, with respect to conduct of the hearing on the bifurcated DoB Objection, the Tribunal affirms its intention to reserve appropriate time immediately after the hearing for a meeting among its members, to commence deliberations while the issues are fresh. The Tribunal however does not accept Claimant's proposal that the Tribunal deliberate in advance of the hearing in order to reach a collective view, and provide directions to the Parties, regarding the factual or legal matters on which they should focus during the hearing itself. The Tribunal considers it appropriate for the Parties to exercise their own judgment on which issues to emphasize during oral arguments, based on the written submissions exchanged, as well as whether to examine witnesses (if any) related to the DoB Objection. As is customary, of course, the structure of the hearing and the time allocations for each stage of the hearing will be discussed further with the Parties during a pre-hearing organizational conference call.<sup>12</sup>
22. Second, the Tribunal declines the Claimant's proposal that it issue in the first instance only a short-form decision on the DoB Objection, with reasons to be communicated later. While such a process may be appropriate on occasion for purely procedural issues, the Tribunal does not consider it appropriate for resolution of substantive jurisdictional or merits issues, particularly in the absence of Party agreement. The Tribunal nonetheless will exercise its best efforts to issue a fully reasoned decision on the DoB Objection in a time period appropriate to the complexity of the issues presented.
23. Third, with respect to any subsequent proceedings if the DoB Objection is not accepted, the Tribunal notes that the issue of a potential bifurcation between liability and quantum was not

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<sup>12</sup> The Tribunal proposes that the pre-hearing organizational call be scheduled for 11 September 2020, beginning at 8 a.m. local time in Bogota, 9 a.m. local time in New York and Washington D.C., 3 p.m. local time in Brussels and Paris, and 9 p.m. local time in Singapore. The Parties are requested to confirm their availability for this call no later than 17 March 2020.

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raised at the First Session, and therefore was not addressed in Procedural Order Nos. 1 and 2, which contemplated plenary proceedings addressing liability and quantum issues in tandem. Nonetheless, in response to the Respondent's later raising of the issue, the Tribunal indicated in Procedural Order No. 3 that it intended to consult the Parties further, once the bifurcated jurisdictional issue was resolved, regarding "whether ... there may be sufficient efficiencies to warrant addressing issues of quantum only after a decision on liability is rendered," including "whether any adjustments may (or may not) be warranted to the basic briefing structure or intervals of time previously provided in Procedural Order No. 2."<sup>13</sup>

24. The Tribunal remains committed to this procedure, and suggests a presumptive (short) briefing schedule for this issue, running from the date of its decision on the DoB Objection (should that Objection not be accepted), with the onus on the Respondent to demonstrate why the procedural structure previously adopted should be adjusted. Specifically, two weeks after the Tribunal's decision, the Respondent shall file any application to defer quantum briefing, and two weeks thereafter, the Claimant shall file any response. The Respondent's application should also include any request in the alternative (*i.e.*, if quantum briefing is not deferred) to revisit the briefing intervals previously decided in Procedural Order No. 2, including a specific proposal for any modest adjustments that still takes into account the Tribunal's expressed desire to move forward efficiently with these proceedings. The Claimant's response should address any such application for schedule adjustments. The Tribunal will endeavor to decide these procedural issues within 10 days of the completion of briefing, and will issue a new procedural schedule to govern the next stage of proceedings.
25. Finally, given the number of contingencies involved, the Tribunal declines at this stage to fix a provisional hearing date for a Main Hearing, but will do so promptly upon resolution of the DoB Objection (should that Objection not be accepted) and any application regarding deferral of quantum. Given the not-insignificant intervals the Parties previously have requested for their written submissions in any merits stage of these proceedings, the Tribunal believes there will be enough advance notice at the outset of that stage to enable it then to offer reasonable windows of availability for a Main Hearing.

#### **IV. ORDER**

26. In accordance with the discussion above, the Tribunal hereby decides and orders that:
  - (a) the Claimant's proposal that the Tribunal plan for deliberations immediately following the hearing on the DoB Objection is accepted, but Claimant's proposal that the Tribunal deliberate preliminarily before that hearing, in order to provide directions to the Parties regarding the issues to be discussed during the hearing, is declined;

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<sup>13</sup> Procedural Order No. 3 dated 17 January 2020, ¶ 35.

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- (b) the Claimant's proposal that the Tribunal issue in the first instance only a short-form decision on the DoB Objection, with reasons to be communicated later, is declined;
- (c) the Respondent shall file any application to defer quantum briefing two weeks after the decision on the DoB Objection (should that Objection not be accepted), and the Claimant shall file any response two weeks thereafter, with both the application and the response also to address the issue of any schedule adjustments should quantum briefing not be deferred; and
- (d) Claimant's proposal to reserve dates now for a Main Hearing is denied, with the understanding that the relevant dates will be determined promptly after the Tribunal's decision on the issues in paragraph (c) above.

[Signed]

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Ms. Jean Kalicki  
President of the Tribunal  
Date: 11 March 2020