

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

INFINITO GOLD LTD.

CLAIMANT

v.

REPUBLIC OF COSTA RICA

RESPONDENT

ICSID Case No. ARB/14/5

PROCEDURAL ORDER No. 7

Members of the Tribunal:

Prof. Gabrielle Kaufmann-Kohler, President

Prof. Bernard Hanotiau, Arbitrator

Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal:

Ms. Luisa Fernanda Torres

Date: 1 July 2019

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I. PROCEDURAL BACKGROUND

1. On 27 June 2019, in accordance with Section 20 of Procedural Order No. 1 (“PO1”) and Annex A thereto, as updated on 7 February 2019 (“**Annex A**”), the President of the Tribunal (by delegation of her co-arbitrators) and the Parties held a telephone conference to discuss the preparation of the Hearing on the Merits (the “**Hearing**”).

2. The following persons participated in the conference call:

The Tribunal

- Professor Gabrielle Kaufmann-Kohler, President of the Tribunal
- Ms. Luisa Fernanda Torres, Secretary of the Tribunal
- Ms. Sabina Sacco, Assistant

The Claimant

- Eric Rauguth, Infinito Gold Ltd.
- Juan Carlos Hernández Jiménez, Industrias Infinito S.A.
- John Terry, Torys
- Myriam Seers, Torys
- Emily Sherkey, Torys

The Respondent

- Adriana González, Ministry of Foreign Trade
- Arianna Arce, Ministry of Foreign Trade
- Marisol Montero, Ministry of Foreign Trade
- Paolo Di Rosa, Arnold & Porter
- Patricio Grané, Arnold & Porter
- Timothy Smyth, Arnold & Porter

3. The conference started at 3:00 p.m. (CET) / 9:00 a.m. (EDT) and was adjourned at 3:33 p.m. (CET) / 9:33 a.m. (EDT).

4. The Tribunal and the Parties discussed the items set out in the draft of this procedural order circulated on 21 June 2019, and other matters raised by the Parties during the conference call.

5. An audio recording of the session was made and deposited in the archives of ICSID. The recording was subsequently uploaded to the case folder in the electronic file sharing system (“BOX”) established for the case for access by the Members of the Tribunal and the Parties.

6. On this basis, the Tribunal now issues this order in final form.

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II. DATE, VENUE AND SCHEDULE OF THE HEARING

7. The Hearing will take place from **22 to 25 July 2019**, possibly with 26 July morning to be held in reserve. It will be held at ICSID's facilities in Washington, DC.
8. ICSID has reserved breakout rooms for the Parties and for the Tribunal. The assignments will be communicated to the Parties by the ICSID Hearing Organization Team in due course.
9. The Hearing will start each day at 9 a.m. to finish at approximately 6 p.m., subject to any adjustment required by the course of the examinations, with one-hour lunch breaks and one 15-minute break during each half day.
10. The Hearing will be structured as follows:
 - Day 1 morning: Preliminary matters and oral arguments (see below)
 - Day 1 afternoon: Witness and expert examinations
 - Day 2: Witness and expert examinations
 - Day 3: Witness and expert examinations; possibly questions by Tribunal to be answered the next day
 - Day 4 morning: free for preparation of afternoon
 - Day 4 afternoon: Answers to Tribunal questions and closings (see below)
 - Day 5 morning: reserve.

III. DOCUMENTATION

11. Each Party shall provide to the Tribunal (3 copies), the Secretary of the Tribunal (1 copy), the Assistant of the Tribunal (1 copy), the court reporters (2 copies), the interpreters (1 copy), the opposing Party (2 copies), and the relevant witness or expert (1 copy):
 - a. *Core Electronic Hearing Bundle (USB)*. The Parties shall jointly prepare a single USB (PC and Macbook compatible) with a hyperlinked index, including all pleadings, witness statements, expert reports, exhibits and legal authorities on the record (in all the languages in which they have been filed). It shall not contain any document not previously filed. The USB shall be (i) dispatched to each Member of the Tribunal, the Secretary of the Tribunal, and the Assistant of the Tribunal **no later than 5 July 2019**; and (ii) additional copies shall be available for distribution at the Hearing to court reporters (2 copies) and the interpreters (1 copy). This USB will be used in lieu of the core bundle contemplated in Section 17.6 of PO1.
 - b. *Examination Bundles*. Witness and expert examination bundles to be provided at the beginning of examination. The party presenting the witness or expert shall

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provide a witness or expert bundle containing the witness or experts' statement(s). The party cross-examining the witness or expert shall provide a witness or expert bundle containing the documents on which the witness or expert will presumably be examined on. The examination bundles may be provided by way of USB keys, except for the copy for the witness (1 copy) and the interpreters (1 copy) which shall be in hard copy.

- c. Each document included in the Core Electronic Hearing Bundle or in the Examination Bundles shall be named with its respective Exhibit (C- or R-) or Legal Authority number (CL- or RL-). The bundle shall be accompanied with an index that cross-references to the corresponding Exhibit (C-or R-) or Legal Authority number (CL- or RL-). During the Hearing, the Parties shall refer to the documents by their corresponding Exhibit (C- or R-) or Legal Authority number (CL- or RL-).
12. The Parties may use demonstrative exhibits, *i.e.* exhibits that compile information that is in the record but present it in a different manner, and PowerPoint presentations or other visual aids, provided that such exhibits and presentations (i) identify the source in the record from which they are derived, (ii) do not contain information not in the record, and (iii) are filed in electronic format and in hardcopy immediately before their use. The electronic transmission shall be done both by email and by upload to the case folder in the electronic file sharing system ("BOX"), assigning the demonstrative exhibits a consecutive exhibit number. Hard copies shall be distributed to the persons and in the numbers specified in the preceding paragraph immediately prior to their use. This paragraph replaces Section 17.7 of PO1.
 13. Documents that do not form part of the record may not be presented at the Hearing unless otherwise agreed by the Parties or authorized by the Tribunal in exceptional circumstances.

IV. ORAL ARGUMENTS

14. The first day of the Hearing will start with the Parties' opening arguments, starting with the Claimant and followed by the Respondent. Opening arguments shall not exceed one hour per Party.
15. The Parties may use PowerPoint presentations or other visual aids during their oral arguments, subject to the rules set out in paragraph 12 above.
16. On the last day of the hearing, the Parties will answer questions put to them by the Tribunal and make brief closing arguments, answers and arguments not exceeding two hours, possibly followed by brief rebuttals of maximum 15 minutes each, to be granted upon leave from the Tribunal.

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V. EXAMINATION OF WITNESSES AND EXPERTS

17. *Applicable Rules.* The examination of witnesses and experts at the Hearing shall be conducted pursuant to the rules set forth in Sections 18 (Witnesses) and 19 (Experts) and 20.2 of PO1, subject to the changes contained in paragraph 18 below. For convenience, the rules relevant to the Hearing are reproduced here:

“18. Witnesses
Convention Article 43(a); Arbitration Rule 24, 35 and 36

[...]

- 18.7. It shall not be improper for counsel to meet witnesses and potential witnesses to establish the facts, or to help prepare the witness statements and examinations.
- 18.8. Each Party shall be responsible for securing the appearance of its own witnesses to the hearing, except when the other Party has waived cross-examination of a witness and the Tribunal does not direct his or her appearance.
- 18.9. The facts contained in the written statement of a witness whose cross-examination has been waived by the other Party shall not be deemed established simply by virtue of the fact that no cross-examination has been requested. Unless the Tribunal determines that the witness must be heard, it will assess the weight of the written statement taking into account the entire record and all the relevant circumstances.
- 18.10. Each Party shall be responsible for the practical arrangements, costs, and availability of any witness it offers. The Tribunal will decide upon the appropriate allocation of any related costs in the final award.
- 18.11. The Tribunal may call upon a Party to produce as a witness and/or invite to appear as a witness any person who may have knowledge of relevant facts and has not been offered as a witness by the Parties.
- 18.12. If necessary, the Tribunal in its discretion may allow a witness to be examined by videoconference and will issue appropriate directions to that effect.
- 18.13. The Tribunal may consider the written statement of a witness who provides a valid reason for failing to appear when summoned to a hearing, having regard to all the surrounding circumstances, including the fact that the witness was not subject to cross-examination. The Tribunal shall not consider the statement of a witness who fails to appear and does not provide a valid reason. For these purposes, it shall be understood that a witness who was not called to testify in person has a valid reason not to appear and that a witness whom the Tribunal has allowed to testify by videoconference has appeared at the hearing.
- 18.14. As a rule and subject to other arrangements during the pre-hearing telephone conference, fact witnesses shall be examined prior to expert witnesses, and the Claimant's fact (expert)

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witnesses shall be examined prior to the Respondent's fact (expert) witnesses.

- 18.15. At the hearing, the examination of each witness shall proceed as follows:
 - 18.15.1. The witness shall make the declaration specified at Arbitration Rule 35(2).
 - 18.15.2. The Party who has presented the witness may briefly examine the witness for purposes of asking introductory questions, including to confirm and/or correct that witness's written statement, and to address matters which have arisen after such statement was drafted ("direct examination").
 - 18.15.3. The adverse Party may then cross-examine the witness on matters which are relevant and of which the witness has direct knowledge but not limited to matters addressed in that witness's written statement ("cross-examination").
 - 18.15.4. The Party who has presented the witness may then re-examine the witness with respect to any matters arising out of the cross-examination ("redirect examination").
 - 18.15.5. The Tribunal may examine the witness at any time, either before, during or after examination by one of the Parties.
 - 18.15.6. The Tribunal may order two or more witnesses to be examined concurrently ("witness conferencing").
- 18.16. Subject to a different agreement by the Parties or a different ruling by the Tribunal, a fact witness shall not be present in the hearing room during oral testimony and arguments, or read transcripts of oral testimony or argument, prior to his or her examination.
- 18.17. The Tribunal shall, at all times, have complete control over the procedure for hearing a witness. The Tribunal may in its discretion:
 - 18.17.1. Limit or refuse the right of a Party to examine a witness when it appears that a question has been addressed by other evidence or is irrelevant; or
 - 18.17.2. Direct that a witness be recalled for further examination at any time.

19. Experts
Convention Article 43(a); Arbitration Rules 24, 35 and 36

[...]

- 19.4. The rules set forth in §18 above shall apply by analogy to the evidence of Party- and Tribunal-appointed experts, with the following specifications:
 - 19.4.1. Before giving oral evidence, the expert shall make the declaration specified at Arbitration Rule 35(3).

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19.4.2. After consultation with the Parties, the Tribunal may also request non-legal experts to give a presentation lasting no longer than thirty minutes before the start of their cross-examination summarizing their methodology and conclusions.

19.4.3. Subject to a different agreement by the Parties or a different ruling by the Tribunal, the limitation at §18.16 shall not apply to expert witnesses.

[...]

20. Organization of the Hearing

[...]

20.2. A Party's witness or expert who has not been called for cross-examination by the other Party or as a result of an order from the Tribunal shall not testify at the hearing, except upon approval of Tribunal on the basis of a reasoned request from the relevant Party."

18. *Presentations by legal experts.* Legal experts shall be authorized to make presentations in lieu of direct examinations not exceeding 15 minutes. These presentations may summarize their conclusions and address matters which have arisen after the report was drafted.

19. *Presentations by non-legal experts.* Non-legal experts shall be authorized to make presentations in lieu of direct examinations not exceeding 30 minutes.

20. *Sequence of Witnesses and Experts.* The witnesses and experts shall be heard in the following order:

Mr. Rauguth

Mr. Peschke

Ms. Araya Ortiz

Ms. Calzada Miranda

Ms. León Feoli

FTI Consulting

Credibility

VI. TIME ALLOCATION

21. Section 21.5 of PO1 provides that "[i]n principle, each Party shall have an equal time allocation to examine witnesses and/or experts at the hearing, subject to adjustments if due process so requires."

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22. Considering 2 days and 4.5 hours for witness/expert examinations (see paragraph 10 above and Annex A hereto) at 6 hours/day as time for Parties (once breaks, procedural and Tribunal time, are deducted) yields 16.5 hours. Taking into consideration the higher number of cross-examinations to be conducted by the Respondent, but also the fact that making a case/defense is not a strict arithmetic matter, the Parties have agreed that the Claimant will have a time allocation of 7 hours and 15 minutes and the Respondent of 9 hours and 15 minutes.
23. The Tribunal may grant brief time extensions if it were necessary and the remaining time allows it.
24. Time spent during witness examinations will be allocated in the following manner:
 - a. Time spent on direct and re-direct examination shall be counted toward the time allocation of the Party presenting the witness or expert.
 - b. Time spent on cross-examination shall be counted toward the time allocation of the Party conducting the cross-examination.
 - c. Time spent on expert conferencing (if any) shall be split evenly among the Parties.
 - d. Questions from the Tribunal, answers to those questions, and procedural interventions by the Tribunal shall not be counted against either Party's time.
25. The Secretary of the Tribunal shall keep a record of each Party's use of time in accordance with the chess clock method and shall report at the end of each day.

VII. CLOSED HEARING

26. Pursuant to the Section 21.6 of PO1, "the hearing shall be closed to the public, with the exception of a non-disputing party that may be admitted in accordance with the ICSID Arbitration Rules." Pursuant to Sections 53 and 54(e) of PO5, the Tribunal dismissed APREFLOFAS's request to attend the Hearing.

VIII. LOGISTICAL MATTERS

A. Attendees

27. The Parties shall provide a list of the persons who will attend for each side (including counsel, party representatives and witnesses/experts) by **1 July 2019**.

B. Language

28. Pursuant to Section 12.7 of PO1, the Hearing shall be interpreted simultaneously in its entirety into English and Spanish. Oral arguments may thus be delivered in English or in Spanish, and witnesses and experts may testify in either language.

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29. The testimony of a witness called for examination during the hearing who prefers to give evidence other than in the English or Spanish languages shall be interpreted simultaneously into both languages. There are no witnesses or experts who will testify in a language other than English or Spanish.
30. The ICSID Secretariat will arrange for interpretation services to be provided during the Hearing.

C. Transcripts and Sound Recordings

31. Pursuant to Section 22 of PO1, the Hearing shall be sound recorded and transcribed verbatim in real time in English and Spanish using LiveNote or similar software.
32. Pursuant to Section 22.2 of PO 1, electronic transcripts shall be provided to the Parties and the Tribunal on a same-day basis. Sound recordings shall be provided within 7 business days from the end of the Hearing.
33. Pursuant to Section 22.3 of PO1, the Parties shall attempt to agree on any corrections to the transcripts within 30 days of the later of the dates of the receipt of the sound recordings and transcripts. The agreed corrections may be entered by the Parties in the transcripts ("revised transcripts"). The Tribunal shall decide upon any disagreement between the Parties and any correction adopted by the Tribunal shall be entered by the Parties in the revised transcripts.
34. The ICSID Secretariat has arranged for sound recording and for court reporting services. The details will be communicated to the Parties by the ICSID Hearing Organization Team in due course.

D. Other Logistical Matters

35. The ICSID Secretariat Hearing Organization Team will liaise with the Parties on other logistical aspects (set up of the hearing room, catering, etc.).

IX. POST-HEARING PROCEEDINGS

36. Pursuant to Section 23.1 of PO1, at the conclusion of the Hearing the Tribunal will determine, in consultation with the Parties, whether it will require further submissions on specific issues.
37. No additional evidence may be produced after the Hearing, except with leave from or on the request of the Tribunal.
38. At the end of the Hearing, the Tribunal will issue directions on the Parties' statements of costs.

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On behalf of the Tribunal,

[Signed]

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal

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ANNEX A
HEARING AGENDA
(22-26 July 2019)

Day 1: Monday, 22 July 2019

TIME	PROCEDURAL STEP
9-9:15am	Procedural matters
9:15-10:15am	Claimant's opening
10:15-10:30am	Break
10:30-11:30 am	Respondent's opening
11:30-1:00pm	Cross-examination of Fact Witnesses
1-2pm	Lunch
2:3-4:45pm	Cross-examination of Fact Witnesses
3:45-4pm	Break
4-6pm	Cross-examination of Fact Witnesses [and cross-examination of Legal Experts, if there is time]

Day 2: Tuesday, 23 July 2019

TIME	PROCEDURAL STEP
9-11am	Cross-examination of Legal Experts
11-11:15am	Break
11:15am-1pm	Cross-examination of Legal Experts
1-2pm	Lunch
2-3:45pm	Cross-examination of Legal Experts
3:45-4pm	Break
4-6pm	Cross-examination of Legal Experts

Day 3: Wednesday, 24 July 2019

TIME	PROCEDURAL STEP
9-11am	Cross-examination of Damages Experts
11-11:15am	Break
11:15am-1pm	Cross-examination of Damages Experts
1-2pm	Lunch
2-3:45pm	Cross-examination of Damages Experts
3:45-4pm	Break
4-6pm	Cross-examination of Damages Experts
6-6:15 pm	Determination of start/end time for Day 4

Day 4: Thursday, 25 July 2019

TIME	PROCEDURAL STEP
Morning	Free for preparation of closing arguments
1-3pm	Claimant's closing/Answers to Tribunal's questions
3-3:15pm	Break
3:15-5:15pm	Respondent's closing/Answers to Tribunal's questions
5:15-6pm	Rebuttal and Sur-rebuttal, if any Procedural matters/closing remarks

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Day 5: Friday, 26 July 2019 – RESERVE DAY

TIME	PROCEDURAL STEP
	Break
	Lunch
	Break