

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER THE
UNCITRAL ARBITRATION RULES (1976)**

Alberta Petroleum Marketing Commission

Claimant

v.

United States of America

Respondent

(ICSID Case No. UNCT/23/4)

PROCEDURAL ORDER No. 3
on
CLAIMANT'S REQUEST FOR REVISION
OF THE PROCEDURAL TIMETABLE

Members of the Tribunal

Prof. Campbell A. McLachlan KC, President of the Tribunal
Mr. Stephen L. Drymer, Arbitrator
Prof. Sean D. Murphy, Arbitrator

Secretary of the Tribunal

Ms. Aïssatou Diop

Assistant to the Tribunal

Mr. Jack L.W. Wass

11 June 2024

Whereas:

- (1) This arbitration was commenced by the Claimant's Notice of Arbitration received by the Respondent on 22 May 2023.
- (2) The Tribunal was constituted by agreement between the Parties on 9 August 2023.
- (3) On 21 October 2023, the Parties filed with the Tribunal a draft of Procedural Order No 1 (**PO No 1**), which set forth the matters on which they were agreed and those matters that required consideration at the First Procedural Session. Amongst the matters that were not agreed was the procedural timetable in Annex B: the Claimant proposed document production prior to the Memorial on the Merits; while the Respondent proposed document production after the Memorial on Preliminary Objections (if bifurcation were ordered).
- (3) The first procedural session was held on 30 November 2023 at which the Tribunal heard the Parties on the remaining unagreed issues on PO No 1, including the procedural timetable. Having heard the Parties' submissions, the President requested that they confer further on certain issues, including on whether agreement could be reached on the timetable.
- (4) The Terms of Appointment of the Tribunal were concluded by agreement between the Tribunal and the Parties on 6 December 2023.
- (5) On 8 December 2023, the Parties reverted to the Tribunal attaching a draft timetable that 'has been agreed to by the parties'. This timetable provided *inter alia* for a production of documents phase after the disposition of any request for bifurcation of preliminary objections.
- (6) A timetable substantially in this form was incorporated into Annex B 'Procedural Calendar' of PO No 1, which was issued by the Tribunal on 18 December 2023.
- (7) On the same date, the Tribunal invited the Parties to indicate by 27 December 2023 their availability for a hearing on jurisdiction from 8–10 September 2025 in the event that the Tribunal were to decide to bifurcate preliminary objections from the merits.
- (8) On 27 December 2023, both Parties confirmed their availability on those dates.
- (9) On 5 February 2024, the Tribunal issued Procedural Order No 2 (**PO No 2**) on Confidentiality.
- (10) On 16 April 2024, in accordance with the Procedural Calendar agreed between the Parties and set forth in Annex B of PO No 1, the Claimant filed its Memorial, together with supporting documents.
- (11) On 16 May 2024, in accordance with the Procedural Calendar agreed between the Parties and set forth in Annex B of PO No 1, the Respondent filed a Request for Bifurcation of Preliminary Objections.
- (12) On 22 May 2024, the Claimant filed a 'Request for Revision of the Schedule and Production of Documents' (**Request**).
- (13) On 28 May 2024, the Tribunal invited the Respondent to file, by Tuesday 4 June 2024, any response that it may wish to make to the Request.
- (14) On 4 June 2024, the Respondent filed its **Response** to the Request.

- (15) On 6 June 2024, the Claimant requested leave to file a short **Reply**.
- (16) On the same day, the Tribunal gave leave to the Claimant to file a Reply, the Claimant to submit a reply (maximum 4 pages) by Friday 7 June 2024, with leave to Respondent to rejoin (maximum 4 pages) by Monday 10 June 2024. It further provided that ‘[n]o further pleadings on Claimant’s Request will be received. The Tribunal will issue its decision on the Request forthwith thereafter. The Procedural Calendar set forth in Annex B to PO No 1 remains in full force and effect unless and until varied by subsequent order of the Tribunal.’
- (17) On 7 June 2024, the Claimant filed a Reply.
- (18) On 10 June 2024, the Respondent filed a Rejoinder.

Now therefore the Tribunal decides as follows:

1. The Tribunal has considered the Parties’ pleadings on the Request.
2. The *Claimant* submits that the inclusion of a document production phase at this stage, prior its submission of observations on the Respondent’s request for bifurcation, is necessary in order to enable the Claimant ‘to fully respond’ to the request for bifurcation’s position on the *ratione temporis* objection: Request, [25]. It accepts that the Respondent has also raised a second objection *ratione materiae*, which will have to be considered in any event. It proposes that, if production is ordered at this stage, a further document production phase during a bifurcated preliminary objections phase (if ordered) can ‘likely’ be avoided and that its new timetable does not create unnecessary delay: Request, [26].
3. The Claimant bases its Request on the alleged production by the United States in separate arbitral proceedings of documents that it claims relate to the preparation of the Canada-US-Mexico Agreement (**CUSMA**). It maintains that production of these documents in the present proceedings is necessary to preserve the equality of the Parties and submits that, in light of the document production ordered in other proceedings, the position has changed since PO No 1 was issued: Request, [20].
4. The *Respondent* replies that the Parties are agreed that the determination required of the Tribunal on bifurcation ‘does not require an evidentiary showing beyond *prima facie* substantiality’: Reply, [2]. It states that the objection *ratione temporis* that it invokes in its request for bifurcation relies on the ordinary meaning and object and purpose of Annex 14-CUSMA, which, it avers meets that standard: Reply, [3]. It submits that the Claimant’s proposal is premature, since it will have a full opportunity to seek document production in the event that bifurcation is ordered: Reply, [6]. It points out that the position taken in other arbitral proceedings is not relevant to the Tribunal’s determination of the proper course here; the requirement of equality does not require ‘that Claimant be put in an equal position with another claimant in another case’: Reply, [8].
5. In the Tribunal’s view, the Request must be rejected for the following reasons:
 - a. The Claimant, having previously sought preliminary document production, reached agreement with the Respondent on a Procedural Calendar now incorporated in Annex B of PO No 1 that provides for document production after disposition of the request for bifurcation (if ordered).
 - b. The existing timetable provides for an orderly consideration of preliminary objections, which will ensure the equality of the Parties to these proceedings. In

particular, in the event that bifurcation were to be ordered, it will require the Respondent to plead fully as to its preliminary objections (with the supporting evidence on which it relies), and the Claimant to file its responsive Counter-Memorial, before requests for document production.

- c. This sequence will ensure that any such requests, and any order thereon that may be required from the Tribunal, are made in light of the joinder of issues achieved by the detailed pleaded position of both Parties, and the documents voluntarily produced by each Party in support of that position.
- d. By contrast, the sequence that the Claimant seeks in its Request gives rise to a substantial risk of disruption of the orderly disposition of the proceedings. Neither Party has yet had the opportunity to plead its case on the preliminary objections in detail, and the Tribunal would not be in a position to make its own assessment, in the event of a dispute between them, as to the relevance and admissibility of any disputed categories of documents.
- e. The Tribunal is bound to assess these questions in light of the submissions of the Parties to this arbitration, and not (save to the extent that they may shed light on questions of law) by reference to submissions that may be made in other proceedings. It rejects the Claimant's submission that developments in another proceeding constitute a change of circumstances justifying the carefully constructed balance for the timetable achieved in the present proceeding.
- f. The Tribunal does not consider that the existing timetable exposes the Claimant to any material prejudice. Whatever the outcome on the Respondent's application for bifurcation, the Claimant will have a full opportunity to seek production of relevant documents at the appropriate time.

6. Accordingly, for the above reasons, the Tribunal now orders that:

- a. **The Claimant's Request is denied;**
- b. **The existing Procedural Calendar provided in Annex B to PO No 1 is maintained;**
- c. **Pursuant to that Calendar, the Claimant shall file its Observations on the Respondent's request for bifurcation of preliminary objections by 17 June 2024;**
- d. **Costs reserved.**

For the Tribunal

[signed]

Professor C A McLachlan KC
Presiding Arbitrator

11 June 2024