

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ruby River Capital LLC

v.

Canada

(ICSID Case No. ARB/23/5)

PROCEDURAL ORDER NO. 4

Decision on Claimant's Requests for Document Production

Members of the Tribunal

Ms. Carole Malinvaud, President of the Tribunal

Mr. Barton Legum, Arbitrator

Prof. Zachary Douglas KC, Arbitrator

Secretary of the Tribunal

Mr. Benjamin Garel

30 November 2024

I. PROCEDURAL BACKGROUND

1. Pursuant to Section 15 of Procedural Order No. 1 (“PO1”) and the revised procedural calendar effective 6 June 2024, the Parties exchanged on 19 August 2024 simultaneous requests to produce documents in the form of a Stern Schedule. The Claimant’s Stern Schedule is divided into 39 categories of documents and the Respondent’s Stern Schedule into 60 categories of documents.
2. On 18 September 2024, the Parties exchanged their respective objections to the document production requests of the other Party, or produced documents in respect of which there were no objections.
3. On 27 September 2024, the Claimant requested that the Tribunal order the Respondent to refile its objections to the Claimant’s document production requests identifying and explaining its specific objections based on Article 9.2(b), (e) and (f) of the IBA Rules on the Taking of Evidence in International Arbitration if any, in relation to specific documents or categories of documents, in sufficient detail to allow the Claimant to respond and the Tribunal to rule on them.
4. On 3 October 2024, the Tribunal invited the Respondent to comment on the Claimant’s request dated 27 September 2024.
5. On 7 October 2024, the Respondent submitted its comments on the Claimant’s request dated 27 September 2024.
6. On 11 October 2024, the Tribunal invited the Parties to provide more specific responses when invoking confidentiality issues, including the grounds on which confidentiality is invoked (such as attorney-client privilege or security classification) and outlining proposed measures to protect sensitive documents, such as redactions, withholding documents, or restricting access (*e.g.*, “attorneys’ eyes only”). The Tribunal also provided an updated procedural calendar.
7. On 18 October 2024, the Respondent submitted detailed objections to the Claimant’s request for document production.

8. On 19 October 2024, the Claimant submitted its amended objections to the Tribunal regarding the Respondent's document production requests, which had previously been sent directly to the Respondent.
9. Pursuant to the revised procedural calendar effective 11 October 2024, the Parties filed their respective Stern Schedules with the Tribunal on 25 October 2024.
10. On 4 November 2024, the Respondent's submitted an application for the exclusion of Exhibits C-280 and C-281 together with related passages of the Claimant's Memorial and the Respondent's Counter-Memorial (the "Request for Exclusion").
11. On 5 and 13 November 2024, the Claimant objected to the Request for Exclusion.

II. SCOPE OF THE ORDER

12. In the interest of time, this Order only addresses the Claimant's document production requests since it will have to file the next submission, its Reply on the Merits and Counter-Memorial on Jurisdiction, by 6 March 2025.
13. The Tribunal will first determine the applicable standards and then issue its decision on the requests. The reasons for the Tribunal's decisions are incorporated into the Claimant's Stern Schedule, which is annexed to and made an integral part of this Order (Annex A).
14. In a subsequent Procedural Order to be issued as soon as possible, the Tribunal will address the Respondent's requests. An adjusted calendar for the production of documents shall also be issued.
15. This Order also addresses the Request for Exclusion.

III. APPLICABLE STANDARDS

16. This arbitration is governed by (i) the ICSID Convention, (ii) the 2006 ICSID Arbitration Rules (the "Arbitration Rules"), and (iii) the procedural rules set out in PO1.

17. Under the ICSID Convention and the Arbitration Rules, the Parties are entitled to determine aspects of the applicable procedure, including with respect to the taking of evidence. For instance, pursuant to paragraph 15.7 of PO1, the Parties agreed that the Tribunal shall be guided by Articles 3 and 9 of the 2020 IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”).
18. In addition, PO1, which was discussed with the Parties at the first session, contains certain rules on document production, of which the following are relevant to the present Order:
 - 15.1 Each party may request the production of documents from the other party.
 - 15.2 Each party will be permitted to file requests in accordance with the procedural timetable set out in **Annex B** to this Order. The requests, responses or objections to a request, the reply to the responses or objections to the requests, and the Tribunal’s decisions regarding objected requests shall be made in accordance with the procedural timetable set out in **Annex B** and shall be recorded in a “Stem” schedule in Word and PDF formats in the form of the template provided in **Annex C**.
 - 15.3 Requests for the production of documents shall identify in sufficient detail (including subject matter) particular documents or a narrow and specific category of documents that are reasonably believed to exist; and shall set forth, in respect of each document or category of documents requested, a statement as to why such materials are considered relevant to the case and material to its outcome.
 - 15.4 The parties shall not copy the Tribunal or the ICSID Secretariat on their correspondence or exchanges of documents in the course of the document production phase.
 - 15.7 Article 3 and 9 of the IBA Rules shall guide the Tribunal and the Parties regarding document production in this case. In particular, and in the spirit of the IBA Rules, the Tribunal will not allow “*discovery-style*” requests for document production that disregard the relevance and materiality principles of the IBA Rules
19. Where the Parties have not agreed on the applicable procedure, the Tribunal enjoys a discretion to establish the applicable procedure. Article 43 of the ICSID Convention and Rule 34(2) of the Arbitration Rules grant the Tribunal the power to order the Parties to produce documents in the following terms:

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence [...].

And:

The Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts [...].

20. Moreover, for the purposes of this Order, the following provisions of the IBA Rules are relevant:

(i) Article 3.3:

A Request to Produce shall contain:

(a) (i) a description of each requested Document sufficient to identify it, or

(ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;

(b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and

(c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and

(ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

(ii) Article 3.4:

Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.

(iii) Article 3.5:

If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3.

(iv) Article 3.7:

Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Article 9.2 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.

(v) Article 9.2:

The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:

- (a) lack of sufficient relevance to the case or materiality to its outcome;
- (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
- (c) unreasonable burden to produce the requested evidence;
- (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
- (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or

- (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

21. Accordingly, the Tribunal will apply the following standards to rule on the requests for production of documents:

- Specificity: The request must identify each document or category of documents with precision.
- Relevance: The request must establish the relevance of each document or category of documents to prove allegations made in the submissions. For the purposes of this Order, the term “relevance” encompasses both relevance to the dispute and materiality to its outcome. At this stage of the proceedings, the Tribunal is only in a position to assess the *prima facie* relevance of the documents requested, having regard to the factual allegations made so far. This *prima facie* assessment does not preclude a different assessment at a later point of the arbitration with the benefit of a more developed record.
- Possession, custody or control: The request must show that it is more likely than not that the requested documents exist, that they are not within the possession, custody or control of the requesting Party, and that they are within the possession, power or control of the other Party.
- Balance of interests: Where appropriate, the Tribunal will balance the legitimate interests of the requesting Party with those of the requested Party, taking into account all relevant circumstances, including any legal privileges applicable to certain types of communications, the need to safeguard confidentiality, and the proportionality between the convenience of revealing potentially relevant facts and the burden imposed on the requested Party.

IV. ORDER

A. WITH RESPECT TO THE REQUEST FOR EXCLUSION OF EXHIBITS C-280 AND C-281:

22. Having carefully considered the Parties’ submissions, the Tribunal has decided to deny the Respondent’s Request for exclusion for the following reasons.

23. First, the Request for exclusion is belated as those documents have been on record for a year.
24. Indeed, they were filed by the Claimant on 24 November 2023 together with its Memorial and commented upon by the Respondent on 15 July 2024. In the meantime, they were specifically identified by the Parties in the redacted version of the Claimant's Memorial jointly submitted by the Parties on 1 February 2024. Yet Respondent's application was filed a year later on 4 November 2024.
25. Second, unlike in the *Methanex* and the *EDF* cases cited by the Respondent, no evidence was presented establishing that the Claimant obtained these documents by violating a law. Indeed, those documents were obtained on the basis of information contained in responses to a request for documents dated 8 June 2022 filed pursuant to the Access to Information Act .
26. Turning now to the Respondent's Request for Exclusion of the documents under Article 9(2)(f) of the IBA Rules, and on the assumption that a general principle protecting the confidentiality of Cabinet deliberations applies to these documents, the Parties agree that a balancing exercise is to be carried out between the investor's interest in having the document on the record, and the government's interest in not producing the requested documents.
27. In the present case those documents appear to be *prima facie* relevant and material to the outcome of the case as they may shed light on the reason underlying the decision to deny the permit and to what extent that decision treated this project differently from other projects. Conversely the public interest in keeping these documents immune from publicity remains protected, as according to Procedural Order n°2, the Parties may redact sensitive information from the version of the award, orders or submissions published on the ICSID website, and have indeed agreed to proceed accordingly for Exhibit C-280 and C-281 together with related passages of the Claimant's Memorial and the Respondent's Counter-Memorial.
28. Finally, the Tribunal has noted that C- 280 was protected by a password and contained a reference across the document to "art. 33" which were indications that this document

had a specific status compared to other documents obtained via the Access to Information Act.

29. Although the Tribunal considers that it would have been preferable for the Claimant to have alerted the Respondent about this fact before it accessed this document by correctly guessing the password, the Tribunal does not consider that this conduct was so egregious as to justify the exclusion of the document by way of an implicit sanction. Moreover, the Claimant transparently answered how it identified the password for C-280 when it was later asked by the Respondent how it obtained access to the document.
30. The Claimant's requests for production of documents n° 11 and n°12, which directly relate to Exhibits C-280 and C-281, are decided in Annex A to this Procedural Order.

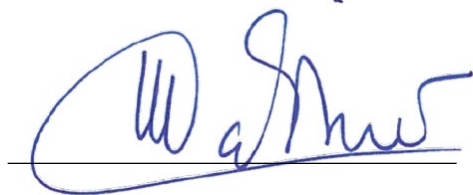
B. WITH RESPECT TO THE CLAIMANT'S APPLICATION TO RULE ON THE RESPONDENT'S RESERVATIONS OF RIGHT TO OBJECT TO PRODUCTION OF SPECIFIC DOCUMENTS BASED ON POLITICAL SENSITIVITY (ARTICLE 9.2 (F) OF THE IBA RULES)

31. The Tribunal acknowledges the Claimant's application of 25 October 2024 concerning the Respondent's reservation of a right to object to the production of specific documents based on political sensitivity (Article 9.2 (f) of the IBA Rules). The Claimant correctly notes that the Respondent has made this reservation in 32 out of 39 requests, where the Respondent has otherwise agreed to produce documents (subject to other reservations).
32. Having carefully considered the Claimant's application, the Tribunal has concluded that it is not in a position to issue a ruling on a possible objection by the Respondent in the absence of: (a) confirmation that the Respondent is in fact asserting such an objection; (b) information concerning precisely what documents are the object of such an objection; (c) the precise grounds for such an objection with respect to each document; and (d) the factual context provided by the privilege log or/et unredacted portions of the documents concerned.
33. The Tribunal therefore denies the Claimant's requests in Requests n° 1 to 10, 13 and 14, 16 to 22, 24 and 25, 27, 29, 30 to 39 that the Tribunal:
 - i) hold that the requested documents are not protected under Article 9.2(f) of the IBA Rules; and

- ii) direct the Respondent not to withhold or to seek to redact the relevant and allegedly politically sensitive portions of the documents at issue on the basis of para. 15.8 of Procedural Order No. 1 or otherwise.
34. The Tribunal nonetheless provides the following guidance to the Parties.
35. As the above-referenced paragraph of the IBA Rules provides, a tribunal may exclude documents from production only on “*grounds of special political or institutional sensitivity ... that the Arbitral Tribunal determines to be compelling; ...*” The mere fact that a document is internal to a public organ does not establish special political sensitivity. A Party making such an assertion must not only articulate the points stated in items (a) through (d) above but state compelling grounds to justify the political or institutional sensitivity.
36. In that respect the Tribunal reminds the Parties that according to Procedural Order n° 2 on Transparency and Confidentiality, confidential or protected information may be redacted from the award, orders, decisions or written submissions otherwise published on the ICSID website.
37. The Parties have been aware from the outset of these proceedings that in accordance with paragraph 15.8 of Procedural Order No. 1 they will be required either to produce a privilege log for any documents withheld or to produce redacted versions of such documents stating the grounds for redacting. The Respondent has had since 18 September 2024 to consider what documents, within those that it had otherwise agreed to produce, may be withheld on the basis of privilege or other grounds. The Tribunal considers that the Respondent may be called upon to produce privilege logs and/or redactions, therefore, within a relatively brief period of time from the date of this order.
38. As a consequence, and in order to limit any disruption of the agreed calendar, pursuant to paragraph 15.8 of Procedural Order No. 1 the Tribunal directs the Respondent to file its privilege log together with redacted versions of documents identifying the grounds for redacting **within 7 business days** from the date of this Procedural Order i.e. by **10 December 2024**.

39. The Claimant is then directed to make any request for an order that the Respondent produce documents withheld from production or redacted pursuant to the preceding subparagraph (i.e., identified in a privilege log or redacted) **within 7 business days** i.e. by **19 December 2024**.
40. The Respondent is then directed to file any opposition to such a request **within 4 business days** i.e. by **26 December 2024**.
41. At all stages the Parties are strongly encouraged to try to narrow by agreement any issues for resolution by the Tribunal concerning document production.
42. The Tribunal will decide such requests **within 10 business days** i.e. by **9 January 2025**.
43. The Respondent shall produce the documents ordered by the Tribunal in Annex A **within 4 business days** of such order i.e. by **15 January 2025**.
44. The Respondent shall produce the documents not withheld from production (as ordered by the Tribunal in Annex A or voluntarily) **on a rolling basis beginning 13 December 2024 and completing no later than 20 December 2024**.
45. An amended calendar reflecting the above decisions is annexed in Annex B.

On behalf of the Tribunal,



Ms. Carole Malinvaud
President of the Tribunal
Date: 30 November 2024