

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ruby River Capital LLC

v.

Canada

(ICSID Case No. ARB/23/5)

PROCEDURAL ORDER NO. 5

Decision on Respondent'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

20 December 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 amended objections 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.
12. On 30 November 2024, the Tribunal issued Procedural Order No. 4, addressing the Claimant's document production requests.

II. SCOPE OF THE ORDER

13. This Order addresses the Respondent's document production requests.
14. The Tribunal determined the applicable standards in Procedural Order No. 4. Those standards are for convenience recalled below, following which the Tribunal issues its decision on the requests. The reasons for the Tribunal's decisions are incorporated into the Respondent's Stern Schedule, which is annexed to and made an integral part of this Order (Annex A).

III. APPLICABLE STANDARDS

15. 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.
16. 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”).

17. 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 “Stern” 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

18. 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 [...].

19. 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.

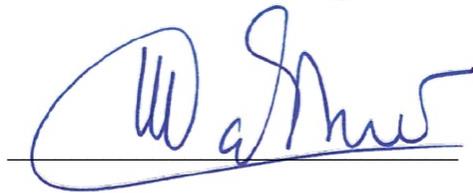
20. Accordingly, the Tribunal will apply the following standards to rule on the requests for production of documents:

- 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

21. The Claimant shall produce non-contested documents and documents identified by the Tribunal in Annex A within 31 days (i.e. 21 days as initially provided in Annex B to Procedural Order No. 1, plus 10 days to take into account the winter holidays break), i.e. by **20 January 2025**.

On behalf of the Tribunal,



Ms. Carole Malinvaud
President of the Tribunal
Date: 20 December 2024