

IN THE MATTER OF AN ARBITRATION UNDER THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT SIGNED ON 27 AUGUST 1993 (THE “BIT”)

- and -

UNCITRAL ARBITRATION RULES 1976

- between -

MURPHY EXPLORATION & PRODUCTION COMPANY - INTERNATIONAL

“Claimant”

and

THE REPUBLIC OF ECUADOR

“Respondent,” and together with Claimant, the “Parties”

PROCEDURAL ORDER NO. 3

Tribunal:

Mr. Yves Derains

Professor Kaj Hobér

Professor Bernard Hanotiau (Presiding Arbitrator)

Registry:

Permanent Court of Arbitration

Secretary to the Tribunal:

Sarah Grimmer

I. PROCEDURAL BACKGROUND

1. By e-mail of 25 October 2014, Respondent notified the Tribunal on behalf of both Parties that (1) the Parties had agreed to exchange between themselves legal authorities not previously submitted in this arbitration for use in connection with arguments at the hearing; (2) Claimant had agreed to provide Respondent with copies of exhibits not previously submitted in this arbitration for use in connection with cross-examinations; and (3) both Parties reserved their right to raise objections to the Tribunal with respect to such legal authorities and exhibits.
2. In the same e-mail, the Tribunal was advised that notwithstanding requests from Respondent to Claimant to make Messrs. George Michael Shirley and Ignacio Herrera available for cross-examination at the hearing scheduled for 17-21 November 2014 in Washington, DC, they were, respectively, “not available to testify” and “not willing to appear” at the hearing.
3. By letter dated 29 October 2014, Respondent requested Claimant to withdraw the testimony of Mr. Shirley (submitted as CEX-152, *i.e.*, a copy of Mr. Shirley’s witness statement submitted by Claimant in the ICSID Arbitration) and Mr. Herrera (in the form of two witness statements dated 17 September 2012 and 14 March 2013) from the record, failing which, it requested an order from the Tribunal striking their testimonies for Claimant’s failure, without good cause or valid reason, to produce the affiants for cross-examination.
4. On 5 November 2014, the Parties exchanged their additional legal authorities and Claimant submitted its additional exhibits to Respondent.
5. On 6 November 2014, Respondent objected to the production of all but two of Claimant’s new exhibits and all of its legal authorities.
6. By letter dated 11 November 2014, Claimant rejected Respondent’s request that it withdraw from the record the testimonies of Messrs. Shirley and Herrera and opposed Respondent’s request that they be struck from the record.
7. In a separate letter of 11 November 2014, Claimant requested the Tribunal to reject Respondent’s demand that its additional legal authorities and exhibits not be admitted in these proceedings.

8. A pre-hearing telephone conference call was held on 12 November 2014 to discuss, among other things, the above matters. With the agreement of the Parties, the conference call was conducted by the Presiding Arbitrator alone. A transcript of the conference call was circulated to all counsel and the full Tribunal the morning of 13 November 2014.
9. The full Tribunal has considered the positions of the Parties as set out in their correspondence listed above as well as during the conference call.

II. ANALYSIS AND DECISIONS OF THE TRIBUNAL

a. Respondent's request to strike the testimony of Messrs. Shirley and Herrera from the record.

10. It is Respondent's position that as Claimant has failed, without valid reason, to produce Messrs. Shirley and Herrera for cross-examination, the Tribunal should strike their testimony from the record forthwith and order the Claimant to exclude any reference to their witness statements.
11. Claimant submits that the Tribunal should not strike their testimony from the record at this stage, but rather assess it along with all the other evidence presented by the Parties, according to the weight the Tribunal sees fit, bearing in mind that neither individual accepted to appear for cross-examination at the hearing.
12. Procedural Order No. 1 provides that:
 - 4.7. Being duly informed of the date of the hearings, the parties will immediately after the receipt of this Order, or at least, as quickly as possible, inform their potential witnesses of these dates to secure their presence at the hearings and avoid any disruption of the procedural calendar.
 - 4.8. Where the witness should ultimately not be able to attend for a valid reason, the Tribunal shall hear the parties on this issue and decide after taking into account all relevant circumstances, including the parties' legitimate interests, what weight should be given to the testimony of said witness, if any.
 - 4.9. The admissibility, relevance, weight and materiality of the evidence offered by a witness or a party shall be determined by the Tribunal.
13. The Tribunal notes Respondent's position that, according to Procedural Order No. 1, para. 4.8, the Tribunal is only free to decide on the weight to be given to a non-attending witness's testimony if the witness fails to attend for a *valid* reason. Respondent submits that this provision does not apply here as Claimant has provided no valid reason for the non-attendance of either individual.

14. The Tribunal notes that both Messrs. Shirley and Herrera are now retired from Murphy International. According to Claimant, it made efforts to have both men appear before the Tribunal for cross-examination at the hearing but, despite those efforts, neither individual accepted to attend. The Tribunal finds no reason not to accept Claimant's account. While the Tribunal notes Respondent's interpretation of para. 4.8 of Procedural Order No.1, it does not accept that Claimant has failed to show non-attendance for a valid reason. Moreover, the Tribunal is mindful of the broad provision at para. 4.9 of Procedural Order No. 1 which empowers the Tribunal to determine the "admissibility, relevance, weight and materiality of the evidence offered by a witness or a party".
15. The Tribunal considers that the more prudent approach at this stage of the arbitration is to reject Respondent's request to strike the testimony of Messrs. Shirley and Herrera from the record, but rather to assess its relevance, weight and materiality along with that of all the other evidence presented by the Parties, bearing in mind the reasons given for non-appearance and that the testimony will have gone untested by cross-examination.
 - b. Respondent's objection to the production of Claimant's additional legal authorities and exhibits.**
16. Respondent objects to the admission of Claimant's additional legal authorities and exhibits on the grounds that they are voluminous, could have been submitted earlier, are not responsive to "new" issues, and cause Respondent prejudice.
17. Claimant submits that the Parties were never restricted to submitting only documents responsive to "new" issues and points out that, except for one, Respondent is the author of, a party to, or a contemporaneous recipient of all the additional exhibits. Claimant argues that Respondent cannot claim prejudice by the submission of documents with which it is intimately familiar.
18. Claimant also offers to identify the portions of the documents that it intends to rely on at the hearing to the Respondent in advance of the hearing.
19. Having considered the arguments of the Parties, the Tribunal determines that the additional legal authorities of both Parties as well as the additional exhibits of Claimant should be admitted.
20. In light of the proximity in time of the hearing, the Tribunal considers that Claimant should identify to Respondent the portions of the additional exhibits upon which it intends to rely during the hearing by **Friday, 14 November 2014**.

21. The Tribunal also determines that Respondent may file additional exhibits that are responsive to the additional exhibits submitted by Claimant by **Sunday, 16 November 2014**. Should Respondent choose to do so, it shall also identify, at the time of submission, the specific portions of any new responsive exhibits upon which it intends to rely.
22. The Tribunal shall also explore with the Parties at the hearing the opportunity to comment on any additional exhibits and legal authorities in post-hearing submissions.

Done at The Hague on 13 November 2014,



Professor Bernard Hanotiau
Presiding Arbitrator
(On behalf of the Tribunal)