

PCA Case No. 2023-37

IN THE MATTER OF AN ARBITRATION UNDER THE UNITED STATES-COLOMBIA
TRADE PROMOTION AGREEMENT, ENTERED INTO FORCE ON 15 MAY 2012
(the “TPA”)

and

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW, AS REVISED IN 2021 (the “UNCITRAL Rules”)

Between:

SEA SEARCH-ARMADA, LLC

(“Claimant”)

- and -

THE REPUBLIC OF COLOMBIA

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

PROCEDURAL ORDER NO. 4

Revised Procedural Calendar – Phase II

Arbitral Tribunal

Mr. Stephen L. Drymer (Presiding Arbitrator)

Mr. Stephen Jagusch KC

Dr. Claus Von Wobeser

Registry

Mr. José Luis Aragón Cardiel

Permanent Court of Arbitration

Tribunal Assistant

Ms. Dina Prokić

12 September 2024

DECISION ON RESPONDENT'S REQUEST, AND REVISED PROCEDURAL CALENDAR

1. On 8 April 2024, the Tribunal issued Procedural Order No. 3 (Procedural Calendar – Phase II).
2. By letter dated 8 August 2024 (bearing the letterhead of Colombia's National Agency for the Legal Defense of the State ("**ANDJE**") as well as of the law firms Gaillard Banifatemi Shelbaya Disputes LLP ("**GBS**") and Xstrategy LLP ("**Xstrategy**")) Respondent advised the Tribunal that ANDJE had engaged GBS and Xstrategy as external counsel to act alongside it in this arbitration.
3. In the same letter, Respondent set out a detailed request for an approximately 10-week extension, from 14 October 2024 to 23 December 2024, of the deadline for the submission of its Statement of Defense, as well as other revisions to the procedural calendar issued as Annex 1 to Procedural Order No. 3 dated 8 April 2024 ("**Request**").
4. As they were invited to do by the Tribunal, Claimant responded to Colombia's Request on 13 August 2024 ("**Response**"), to which Colombia replied on 19 August 2024 ("**Reply**").
5. Upon receipt of that submission, the last authorized by the Tribunal, the Tribunal reminded the Parties that the existing procedural calendar remained binding unless or until decided otherwise, and that the Parties' work should continue to proceed on that basis. The Tribunal also insisted that the Parties remained free to attempt to agree on a resolution of the matter in order to obviate a decision by the Tribunal that would likely be less susceptible of accommodating their respective concerns. As of this date, no such agreement has been notified to the Tribunal.
6. In deciding Respondent's Request, the Tribunal has carefully considered the Parties' respective positions, claims, proposed calendars and other supporting materials. It has in particular pored over the dates set out in the existing procedural calendar, as well as those proposed by the Parties in an effort both to accommodate to the extent possible each Party's legitimate concerns and interests and to ensure the continued fair and efficient conduct of the proceedings. The result of that exercise – the **Revised Procedural Calendar** – is issued as **Annex 1** to the present Decision.
7. The essence of Respondent's Request, as elaborated as well in its Reply, is two-fold: that its recently engaged external counsel require "appropriate time to familiarize [themselves] with the case materials" in order to take their place alongside the ANDJE and in particular to assist in the preparation of Colombia's Statement of Defense;¹ and that to enforce the existing procedural calendar would be unfair to Colombia in particular given what it calls the "surprise"

¹ Request, p. 2.

and the “completely unforeseeable” nature, volume and content of SSA’s 14 June 2024 Amended Statement of Claim (the “**Amended Statement of Claim**”).²

8. Claimant does not so much dispute the appropriateness of an extension of the deadline for Respondent to submit its Statement of Defense; it does, though, question the appropriateness of the approximately 10-week extension requested by Colombia, as well as the timing of the Request – coming as it does at this relatively advanced stage of the proceedings – and the knock-on effect on the remainder of the calendar. It also vigorously disputes the idea that its Amended Statement of Claim was in any way out of the ordinary in the circumstances.
9. For its part, the Tribunal fully agrees with Respondent that that “it is customary and entirely reasonable for new counsel to be accorded time to familiarize itself with a case”.³ This, notwithstanding SSA’s comment in correspondence between the Parties that the fact “[t]hat Respondent has decided to engage outside counsel now does not change the amount of time Respondent—which has been ably represented by its government lawyers throughout the proceedings to date—has had to prepare its submission”.⁴
10. The Tribunal also agrees with Colombia that the procedural calendar should ensure that the Parties are treated equally “in a ‘material sense’” and that “[m]aterial justice should prevail” over the agreed dates of the evidentiary hearing.⁵ This, notwithstanding both Parties’ efforts to preserve those dates in their respective proposals.
11. The Tribunal is as well very sensitive to the institutional and administrative factors described by Respondent related to personnel changes, internal decision-making and other matters reasonably affecting the selection of external counsel and the engagement of technical experts, as well as the timing of that process.
12. The Tribunal rejects, however, the suggestion – a central premise of the Request – that notwithstanding the involvement of experienced and manifestly talented counsel (as the Tribunal itself has had occasion to appreciate), the procedural calendar as agreed by the Parties in April 2024 enshrines “asymmetries” that require “correction” in order to prevent “grave violations of Respondent’s due process” and a potential “miscarriage of justice”.⁶
13. The existing procedural calendar in fact embodies the agreement of the Parties as to steps and dates, which agreement was accepted by the Tribunal as being fair and reasonable, as well as clear.
14. Also rejected is the suggestion – implicit in Respondent’s briefs – that Colombia (let alone Claimant) could reasonably have expected that, if the case survived Respondent’s preliminary

² Request, pp. 2-3.

³ Reply, p. 8.

⁴ Response, Annex B_004 (Email from Claimant to Respondent, dated 10 August 2024).

⁵ Reply, pp, 11, 12-13.

⁶ Reply, pp. 2, 8 *inter alia*.

objections, SSA's case on the merits would proceed on the basis of its 18 December 2022 "Notice of Arbitration and Statement of Claim", which totaled a mere 34 pages and was devoid of any expert evidence, among other things.

15. The Tribunal is unable to agree with Respondent that SSA's Amended Statement of Claim is a "*de novo*" submission.⁷ It is rather a foreseeable – if not expressly foreseen – amended and supplemented pleading that is in no way inappropriate in the circumstances of this case. It includes, among other things, the detailed briefing of facts and the presentation of evidence in support of those facts that, as repeatedly emphasized not only by the Parties but by the Tribunal itself on multiple occasions, was expressly deferred to the current stage of the proceedings. As such, Claimant's Amended Statement of Claim commands a detailed defense as described by Respondent including, most obviously, the input of its external counsel.
16. Perhaps most significantly for present purposes, the Tribunal accepts Respondent's counsel's representation that the crucial technical and expert evidence that will ground Colombia's defense on the merits will only be ready in December 2024.⁸
17. The Tribunal does not see that the issue ultimately concerns the "rationale [or] timing of the Respondent's request".⁹ The problem is rather a practical one, related to the fact that the length of the extension requested by Colombia to file its Statement of Defense (approximately 10 weeks, versus the three weeks apparently initially requested by it) combined with the other calendar amendments proposed by Respondent significantly shift the balance reflected in the procedural calendar agreed by the Parties. And from what the Tribunal is able to tell, it seems to do so primarily to SSA's detriment,¹⁰ which in the circumstances is unacceptable.
18. The Tribunal is confronted with what it considers to be two critically important dates: the agreed 25 November 2025 to 3 December 2025 hearing dates; and 23 December 2024, being the date on which Respondent says it can and will submit a Statement of Defense prepared with the input of external counsel and with the technical and other expert evidence that it says it has commissioned in order fully to respond to Claimant.
19. As regards the hearing dates, the Tribunal considers it imperative, if both feasible and fair, to maintain the agreed dates so as to avoid significant disruption and delay. This is apparently also the preferred choice of both Parties, and indeed Respondent notes that GBS' and Xstrategy's availability on the November-December 2025 dates was one of the factors considered in their engagement.¹¹
20. As for the extended deadline for the submission of Respondent's Statement of Defense, the Tribunal has already noted that it has no reason to doubt Respondent's representations.

⁷ Reply, p. 2.

⁸ Reply, p. 7.

⁹ Reply, p. 7.

¹⁰ See, e.g., Response, ¶12.

¹¹ Request, p. 2.

Irrespective of the causes of the bind in which Respondent says it finds itself, the Tribunal wishes to ensure, to the extent feasible and fair, that Colombia is able to present the defense that it says it can and will submit by 23 December 2024.

21. Fortunately, the Tribunal considers that both of those dates can be accommodated fairly and reasonably, even if likely not to the entire satisfaction of either Party.
22. In the circumstances and for the reasons expressed above, the Tribunal in its discretion **grants** Respondent's request for an extension until 23 December 2024 to submit its Statement of Defense, including any objection to the Tribunal's jurisdiction and/or counterclaim, with any Witness Statement(s) and Expert Report(s), and **orders** the other changes reflected in the *Revised Procedural Calendar – Phase II* enclosed with this Procedural Order as **Annex 1**.

PLACE OF ARBITRATION: LONDON, UNITED KINGDOM
DATE: 12 SEPTEMBER 2024

ON BEHALF OF THE TRIBUNAL



Mr. Stephen L. Drymer
(Presiding Arbitrator)

ANNEX 1: REVISED PROCEDURAL CALENDAR – PHASE II

Description	By	Days	Dates
<i>Initial Phase</i>			
Amended Statement of Claim with any Witness Statement(s) and Expert Report(s)	Claimant	100 (from the Parties' agreement – 6 March)	Friday, 14 June 2024
Statement of Defense, including any objection to the Tribunal's jurisdiction and/or counterclaim, with any Witness Statement(s) and Expert Report(s)	Respondent	192	Monday, 23 December 2024
Filing of any requests to intervene as <i>amicus curiae</i>	Prospective <i>Amicus Curiae</i>	21	Monday, 13 January 2025
Non Disputing Party Submissions + Filing of any <i>amicus curiae</i> brief	United States <i>Amicus Curiae</i>	24	Thursday, 6 February 2025
<i>Document Production Phase</i>			
Request to Produce	Claimant and Respondent	53 (from Statement of Defense)	Monday, 14 February 2025
Response and Objections to Request to Produce	Claimant and Respondent	14	Friday, 28 February 2025
Production of Non-Objected Documents	Claimant and Respondent	14	Friday, 14 March 2025

Response to Objections to Produce and reasoned applications for an order on production of documents in the form of a Redfern Schedule (Annex 2)	Claimant and Respondent	14	Friday, 28 March 2025
Decision on Request to Produce	Tribunal	14	Friday, 11 April 2025
Production as ordered	Claimant and Respondent	14 (from Decision on Request to Produce)	Friday, 25 April 2025
Written Pleadings			
Reply with any Reply Witness Statement(s) and Expert Report(s)	Claimant	84 (from document production)	Friday, 18 July 2025
Rejoinder with any Rejoinder Witness Statement(s) and Expert Report(s)	Respondent	74	Tuesday, 30 September 2025
Oral Pleadings			
Notification of witnesses and experts for the examination and the Hearing	Claimant and Respondent	37 before Hearing	Friday, 17 October 2025
Pre-hearing Organizational Meeting	All	TBD	TBD
Hearing	All	56 from Rejoinder	Tuesday, 25 November 2025 to Wednesday, 3 December 2025 (excluding Sunday, 30 November 2025) (in reserve)
Post-Hearing Submissions (if any)	Claimant and Respondent	TBD	TBD
Costs Submissions	Claimant and Respondent	TBD	TBD
Award	Tribunal	N/A	N/A