



ICSID (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES)

ICSID Case No. ARB/10/23

TECO GUATEMALA HOLDINGS, LLC V. REPUBLIC OF GUATEMALA

PROCEDURAL ORDER NO. 1

16 December 2011

Tribunal:

[William W. Park](#) (Appointed by the investor)

[Claus von Wobeser](#) (Appointed by the State)

[Alexis Mourre](#) (President)

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Procedural Order No. 1

A. Procedural Background

1. On May 23, 2011, the first session of the Arbitral Tribunal took place by telephone conference.
2. In section 13 of the Minutes of the First Session, the parties agreed that Claimant's memorial on the merits would be notified on September 23, 2011 and that Respondent would announce on October 24, 2011 whether it would raise objections to jurisdiction.
3. In sections 13.3, 13.4, 14.1 and 14.2 of the Minutes of the First Session, the parties agreed that the procedural timetable would vary depending on the position of Respondent regarding the admissibility of the claims and the jurisdiction of the Arbitral Tribunal and such sections therefore provides for the alternative procedural schedules.
4. On September 23, 2011 Claimant filed its Claim on the merits
5. In a letter of October 24, 2011, Respondent confirmed that it would raise objections to the admissibility of the claim as well as to the jurisdiction of the Arbitral Tribunal, and announced that it would prefer to do so jointly with their defenses on the merits of the case rather to bifurcate the proceedings. In the same letter, the Respondent informed the Arbitral Tribunal that the parties had agreed on a new procedural schedule.
6. The new schedule proposed by the parties on October 23, 2011 provides the following regarding Respondent's request for documents:
 - Respondent will submit its document requests to Claimant on November 7, 2011.
 - If there are any disagreements, an application to the Tribunal in the form of a Redfern Schedule will be submitted on November 28.
 - Claimant will submit its comments on December 5, 2011.
 - Respondent will submit its observations on December 9, 2011.
 - The Arbitral Tribunal will make its order on or around December 19, 2011.
7. On October 31, 2011, the Arbitral Tribunal acknowledged reception of the letter of the Respondent and accepted the new procedural timetable agreed by the parties.
8. On November 29, 2011, according to an agreement between the parties to extend by one day the date of submission, Respondent submitted its application for document production in the form of a Redfern Schedule, as well as 7 annexes, including a "privilege log" (Annex 6).

9. On December 5, 2011, Claimant submitted its objections to Respondent's requests in the form of a Redfern Schedule.
10. On 9 December, 2011, Respondent submitted its rejoinder in the form of a Redfern Schedule.

B. Guiding Principles of the Arbitral Tribunal Decision

11. This Procedural Order deals with the Objections raised by Claimant to Respondent's Requests for document production. The reasoning for the Arbitral Tribunal's decision on each of Respondent's requests is included in the Redfern Schedule attached as "Exhibit A" to this Procedural Order. Exhibit A forms an integral part of this Procedural Order.
12. This arbitration is governed by:
 - a) The ICSID Convention
 - b) The ICSID Rules of Procedure for Arbitration Proceedings (The "Rules")
 - c) The Procedural rules issued by the Arbitral Tribunal in its Minutes of the First Session.
 - d) The IBA Rules on the Taking of Evidence in International Arbitration (29 May 2010), as a nonbinding guide to be used by the Arbitral Tribunal, according to the parties' agreement as recorded in section 14 of the Minutes of the First Session.
13. [Article 43\(a\) of the ICSID Convention](#) provides as follows:

"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"*
14. Rule 34 provides as follows:

"Evidence: General Principles

 - (1) *The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.*
 - (2) *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; and*
 - (b) *visit any place connected with the dispute or conduct inquiries there.*
 - (3) *The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph(2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.*

(4) Expenses incurred in producing evidence and in taking other measures in accordance with paragraph (2) shall be deemed to constitute part of the expenses incurred by the parties within the meaning of Article 61(2) of the Convention."

15. Section 14 of the Minutes of the First Session provides as follows:

"Document Production (ICSID Convention Article 43(a); Arbitration Rule 34)

- *The parties agree to consecutive requests for production.*
- *The parties anticipate one round of document discovery in the merits phase. If documents are requested by any party during any jurisdictional phase, requests will be limited to issues raised during that phase. The parties agree to apply the timetable set forth below to any document discovery during any jurisdictional phase, except that Respondent would make its requests prior to filing its Memorial on Jurisdiction and Claimant would make its requests prior to filing its CounterMemorial on Jurisdiction.*
- *The parties agree that where circumstances warrant, a party may request additional opportunities for document discovery and the Tribunal may grant such a request when it considers the request to be justified.*
- *The parties agree to use Redfern Schedules.*
- *All submissions concerning production of documents shall be filed simultaneously with its corresponding courtesy translations.*
- *The parties agree that the IBA Rules on the Taking of Evidence in International Arbitration may be referenced as a guide by the Tribunal in assessing requests for and objections to document discovery, but such Rules are not binding."*

16. On such basis, the arbitral Tribunal is of the opinion that the following standards should guide its reasoning:

(a) Every request for production must identify each document or a narrow and specific category of documents sought with precision;

(b) Every request for production must establish the relevance of each document or of each narrow and specific category of documents sought in such a way that the other party and the Arbitral Tribunal are able to refer to factual allegations in the submissions filed by the parties to date. The requesting party must therefore make it clear with reasonable particularity what facts/allegations each document (or category of documents) sought is intended to establish;

(c) The Arbitral Tribunal will only order the production of documents or category of documents which exist and are within the possession, custody or control of the other party. In case of dispute as to such condition, it is up to the requesting party to establish with sufficient probability that the condition is met;

(d) The Arbitral Tribunal shall also balance the request for production against the legitimate

interests of the other party, including any applicable privileges, unreasonable burden and the need to safeguard confidentiality, taking into account all the surrounding circumstances. Any claim that a document is privileged should identify with sufficient specificity the reason for such claim and identify sufficient relevant details to permit the Arbitral Tribunal to determine the claims; including the author, the addressee, the general subject matter and the date of the document in question.

17. At the present stage of the proceedings, the Tribunal will not be in a position to make any ruling on the ultimate admissibility, relevance or weight of the requested documents to the final determination of the parties' claims and defenses in this arbitration. Nor will the Arbitral Tribunal assess whether the documents requested relate to events that the requesting party has the burden of proving, as the assessment of the burden of evidence is as a matter of principle made in the award, not at the document production stage.
18. In any case, each party has the burden of proof as to each fact the existence or non-existence of which is essential to the claim for relief or defense asserted.
19. In view of the standards recalled above, the Arbitral Tribunal makes the orders specified in the "Tribunal's Decision" column of the attached Redfern Schedule,
20. All documents produced will not be sent to the Arbitral Tribunal and will only be part of the record if either party submits them as attachment to its next submission. The evidentiary value of those documents will be assessed together with the whole evidence produced and admitted in this arbitral proceeding.
21. The Arbitral Tribunal orders Claimant to warrant that it has satisfied the present order by Friday 6 January 2012 by producing all documents ordered that are in its possession, custody or control, based on a reasonable search.
22. The Arbitral Tribunal invites the parties to consult and agree on the modalities of the production of the documents ordered by the Arbitral Tribunal.