

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC

v.

Democratic Republic of Timor-Leste

(ICSID Case No. ARB/15/2)

PROCEDURAL ORDER NO. 4
DECISION ON DOCUMENT PRODUCTION

Members of the Tribunal

Professor Gabrielle Kaufmann-Kohler, President

Mr. Stephen Jagusch, Arbitrator

Professor Campbell McLachlan QC, Arbitrator

Secretary of the Tribunal

Ms. Lindsay Gastrell

Assistant to the Tribunal

Mr. Rahul Donde

21 October 2016

I. PROCEDURAL BACKGROUND

1. In accordance with the procedural rules set out in Procedural Order No. 1 (“PO1”) and the revised Procedural Calendar of 18 May 2016, the Parties were to exchange document production requests (limited to documents relevant to the Respondent’s Preliminary Objection to Jurisdiction and Request for Bifurcation of 19 May 2016) on 2 September 2016. They were to either produce responsive documents or object to their production by 16 September 2016. If any objections were made, they were to reply to those objections by 29 September 2016. The last communication was to be copied to the Tribunal, which was to decide on those objections on or about 20 October 2016.
2. The Parties exchanged their document requests on 5 September 2016, produced certain responsive documents and objected to the production of others on 19, 20 September 2016 and 4 October 2016. They conveyed their objections to the Tribunal only on 7 October 2016.

II. APPLICABLE STANDARDS

3. This arbitration is governed by (i) the ICSID Convention, (ii) the 2006 ICSID Arbitration Rules (the “Arbitration Rules”), and (iii) PO1.
4. Under the ICSID Convention and the Arbitration Rules, the Parties are free to choose the applicable procedure, including the procedure of taking evidence. In this respect, Article 16 of PO1 contains the following rules in respect of document production:

“16. Production of Documents

Convention Article 43(a); Arbitration Rules 24 and 33-36

16.1. Within the time limit set in Annex A, a Party may request another Party to produce documents or categories of documents within the other Party’s possession, custody or control. Such a request for production shall identify each document or category of documents sought with precision, using a Redfern Schedule as attached in Annex B, in both Word and .pdf format, specifying why the documents sought are relevant to the case and material to its outcome.

16.2. Within the time limit set in Annex A, the other Party shall either produce the requested documents or, using the Redfern Schedule provided by the first Party, set forth its objections to the production sought.

16.3. Within the time limit set in Annex A, the requesting Party shall reply to the other Party's objections in that same Redfern Schedule. The reply shall be limited to answering specific objections regarding (i) legal impediment, privilege, confidentiality or political sensitivity and/or (ii) unreasonable and/or over-burdensome nature of the production and other fairness-related considerations.

16.4. On or around the date set in Annex A, the Tribunal will, in its discretion, rule upon the production of the documents or categories of documents sought having regard to the legitimate interests of the other Party and all of the surrounding circumstances.

16.5. Documents shall be produced directly to the requesting Party without copying the Tribunal. Documents so produced shall not be deemed on record unless and until the requesting Party subsequently files them as exhibits in accordance with §17 below.

16.6. In addition, the Tribunal may at any time order a Party to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2). In that case, the documents shall be submitted to the other Party and to the Tribunal in accordance with §17 below and shall be deemed on record."

5. Where the Parties have not agreed on the applicable procedure, a tribunal can establish the applicable procedure. Article 43 of the ICSID Convention and Rule 34(2) of the Arbitration Rules grant a tribunal the power to order 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 [...]"

6. Finally, paragraph 25.1 of PO1 provides that the Tribunal may seek guidance from, but shall not be bound by the IBA Rules on the Taking of Evidence in International Arbitration (2010) (hereinafter the "IBA Rules"). 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”.

7. Accordingly, the Tribunal will apply the following standards to rule on the Parties' 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 purposes of this Order, the term “relevance” encompasses both the notions of 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 the Parties made so far. This *prima facie* assessment does not preclude a different assessment at a later time 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 and upon reasoned application, the Tribunal will weigh 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.

III. DECISION

8. For the foregoing reasons, the Tribunal:

- a. Decides each document production request as stated in the last column of the completed version of the Redfern Schedules that are attached as Annexes A (Claimants' Request for Documents) and B (Respondent's Request for Documents) hereto. These Annexes form an integral part of the present Procedural Order;
- b. As a consequence, and in accordance with the Procedural Calendar, directs the Claimants to produce all documents responsive to the Respondent's amended Request 6(a) on or before **10 November 2016**;
- c. Notes that the Claimants are attempting to retrieve documents responsive to the Respondent's document requests 2(a)-(e), 3(a)-(g), 4(a)-(b), 5(a)-(b), 7(a)-(d). The Claimants are to notify the Respondent of their investigations into the disused server by **28 October 2016**, after which the Respondent may revive these requests;
- d. Reminds the Parties that any documents produced by the Parties shall be communicated to counsel; they shall not be communicated to the Tribunal at this stage;
- e. Orders each Party to provide an index of the documents produced with a reference to the respective document production request. Each Party shall also state whether (i) it has produced all responsive documents in its possession, custody or control, (ii) whether responsive documents had previously been submitted as evidence, or (iii) whether no such documents exist;
- f. Notes that the documents produced shall not be considered part of the record, unless and until one of the Parties submits them as exhibits with their forthcoming submissions.

Date: 21 October 2016

On behalf of the Tribunal

[signed]

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal