

BEFORE THE INTERNATIONAL CENTRE FOR THE
SETTLEMENT OF INVESTMENT DISPUTES

Case No. ARB(AF)/16/3

Between:

**Gordon G. Burr; Erin J. Burr; John Conley; Neil Ayervais; Deana Anthonie;
Douglas Black; Howard Burns; Mark Burr; David Figueiredo; Louis Fohn;
Deborah Lombardi; P. Scott Lowery; Thomas Malley; Ralph Pittman; Daniel
Rudden;
Marjorie “Peg” Rudden; Robert E. Sawdon; Randall Taylor; James H. Watson, Jr.;
B-Mex, LLC; B-Mex II, LLC; Oaxaca Investments, LLC; Palmas South, LLC;
B-Cabo, LLC; Colorado Cancún, LLC; Santa Fe Mexico Investments, LLC;
Caddis Capital, LLC; Diamond Financial Group, Inc.; EMI Consulting, LLC;
Family Vacation Spending, LLC; Financial Visions, Inc.; J. Johnson Consulting,
LLC;
J. Paul Consulting; Las KDL, LLC; Mathis Family Partners, Ltd.;
Palmas Holdings, Inc.; Trude Fund II, LLC; Trude Fund III, LLC; Victory Fund,
LLC**

Claimants

and

United Mexican States

Respondent

Procedural Order No. 2

1 February 2018

1. The Tribunal thanks the parties for their submissions regarding the three outstanding document disclosure issues identified in the Tribunal's letter dated 4 January 2018. The Tribunal sets out below its decision in respect of each of them.

1. Documents in SEGOB's custody

2. The first matter concerns Respondent's ability to complete a diligent search of SEGOB's archives in light of the consequences of the 19 September 2017 earthquake. By a letter dated 9 January 2018 enclosed with Respondent's letter dated 12 January 2018, SEGOB stated that: (i) its archives are kept solely in paper format, not electronically; (ii) those archives were originally kept at its offices at 84 Dinamarca; (iii) those offices were closed after the 19 September 2017 earthquake due to safety concerns; (iv) SEGOB personnel was provisionally moved to office space at 102 Londres; (v) the SEGOB archives were boxed and placed in a different, unidentified location; (vi) as of 9 January 2018, SEGOB personnel was in the process of relocating to yet another, unidentified building; (vii) SEGOB cannot provide any indication of when "normal" access to its archives will be restored because that decision corresponds to "other administrative units"; (viii) SEGOB was able to access various of its files for which procedures are presently ongoing.

3. As previously stated, the Tribunal appreciates the gravity of the 19 September 2017 earthquake and the human suffering and material harm caused by it. In light of the above explanations furnished by SEGOB, however, it does not appear to the Tribunal that Respondent should be able to postpone completion of its diligent search for responsive documents indefinitely.

4. The Tribunal notes in this regard that the archives were, as of 9 January 2018, boxed and accessible in a secure place and that SEGOB has been able to access at least some of them for ongoing matters. Searching the archives in connection with this arbitration in those circumstances would thus appear to be possible, albeit perhaps more burdensome.

5. To the extent the concern is one of unreasonable burden, the Tribunal notes that, at least as of 9 January 2018, SEGOB personnel had already started relocating to their new office space. It would seem reasonable to expect that SEGOB's archives would follow shortly thereafter and that "normal" access thus be restored. SEGOB's statement that it cannot say

when such “normal” access to its archives will be restored because that is a decision for other departments to take is in this regard unsatisfactory: Respondent, as a sovereign State, answers for the actions of all its organs and if SEGOB could not provide the answer, the Tribunal would have expected Respondent to elicit the answer from the competent department.

6. In light of the foregoing, the Tribunal directs Respondent to provide the Tribunal by 7 February 2018 with a proposed plan of action indicating (i) by when it will complete its diligent search of the SEGOB archives (taking into account the existing procedural timetable leading to a hearing in May 2018) and (ii) what steps it proposes to take to enable the conduct and completion of that diligent search. Upon receipt of Respondent’s proposed plan of action, the Tribunal will decide whether to request appropriate amendments to Respondent’s plan and/or whether to make any adjustments to the procedural timetable that may be required to ensure due process.

2. Respondent’s assertion of privilege

7. Claimant has challenged Respondent’s invocation of legal privilege for the documents listed in its privilege log on the basis that: the mere involvement of in-house legal personnel employed by the Government does not suffice to confer the protection of legal privilege; the communications for which Respondent has asserted privilege cannot constitute “*información reservada*” that the Government can withhold from disclosure under the LGTAIP and the LFTAIP; and Respondent has waived privilege by producing other communications from or to Government in-house legal personnel.
8. Respondent disagrees, arguing that: the communications in question were created for the purpose of providing legal advice; there should be no distinction as to whether the legal counsel involved was in-house or external; the communications from/to lawyers that it produced did not seek or provide legal advice and thus are not privileged and do not give rise to waiver; and the communications in question do constitute “*información reservada*” that the Government can withhold from disclosure under the LGTAIP and the LFTAIP.
9. The privilege log produced by Respondent identifies 10 documents and for each of them identifies a lawyer as its author. The parties are in agreement that in most legal systems

the mere fact of authorship by a lawyer is insufficient to confer legal privilege over a communication. Whether privilege attaches to the communication depends on whether it seeks or provides legal advice. That is also the central precept of Article 9.3(a) of the IBA Rules on the Taking of Evidence in International Arbitration (the *IBA Rules*)—on which both parties have placed reliance and which the Tribunal agrees provide useful guidance—pursuant to which due consideration is to be given to the “need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice”.

10. In the Tribunal’s mind, whether that legal advice is sought from or provided by an in-house lawyer as opposed to an external lawyer does not offer a relevant distinction for present purposes. As Article 9.3(e) of the IBA Rules rightly cautions, arbitral tribunals dealing with matters of privilege must consider “the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules”. To deprive a State litigant of the protection of legal privilege merely because the legal advice was sought from or provided by a Government-employed lawyer as opposed to external counsel is inimical to due process.
11. The Tribunal similarly believes that it cannot strip a document of the privilege that it is said to attract on the basis of the proposition that it is, in whole or in part, disclosable under the State’s freedom of information legislation where, as here, that proposition is hotly contested and no application has yet been made to the competent authorities under the relevant statutes. In those circumstances, whether or not in this instance the documents constitute “*información reservada*” under the LGTAIP and the LFTAIP is not a matter for the Tribunal to prejudge.
12. The Tribunal is also not persuaded by Claimant’s argument that Respondent waived privilege by producing certain documents authored by lawyers. Respondent has explained, and Claimant has agreed,¹ that the disclosed documents do not seek or obtain legal advice

¹ Claimant’s letter dated 14 December 2017, p. 5 (stating that “Claimant denies” that the disclosed communications are privileged).

and therefore are not privileged. There is no basis for the Tribunal to impute a waiver to Respondent in those circumstances.

13. The sole remaining question then is whether Claimant has established a basis for justifiable doubts as to the propriety of Respondent's privilege call, such that the Tribunal should order further steps of inquiry. One option, proposed by Claimant in the alternative, would be to have the Tribunal itself review the documents. In the Tribunal's view, however, that remedy risks poisoning the well and must be avoided whenever possible.² The other option, which has the virtue of avoiding that risk of contamination, would be to appoint a privilege expert as envisaged in Article 3(8) of the IBA Rules.
14. The Tribunal, however, does not consider that any such further steps of inquiry are called for in this instance. Claimant has not established a basis for justifiable doubts as to the propriety of Respondent's privilege calls such that the appointment of a privilege expert could be warranted. The appointment of a privilege expert cannot be automatic upon a privilege call being challenged. Beyond a bald contention of impropriety, elements must be present in the record that warrant such further scrutiny of the integrity of the privilege call (and arguably of counsel making that call). Here, the Tribunal has not identified any such elements. The number of responsive documents for which privilege is asserted is limited. The subject matter descriptions provided by Respondent in its privilege log are not of a nature to arouse suspicion that Respondent or its counsel are sailing close to the wind. On the contrary, on the face of those descriptions, the documents do appear to convey advice from their lawyer authors.
15. In light of the foregoing, the Tribunal declines to order the relief sought by Claimant in its letter of 14 December 2017.

² As the Commentary to the IBA Rules explains, "[i]t is generally preferable that the arbitral tribunal not review any such documents [over which an objection grounded on privilege has been raised] itself because ... if after reviewing the document the arbitral tribunal upholds the objection, it could not eliminate its knowledge of the document once it had been reviewed ..."

3. Request 29

16. In its 14 and 26 December 2017 letters, Claimant contended that Respondent had failed to produce all documents responsive to this request and requested that Respondent “thus be ordered to produce any further document they have in response to Claimant’s Request 29 ... [and] [i]f they have none, they should so certify.
17. In its responses, Respondent submitted that it had conducted a diligent search and confirmed that it was not able to identify any other responsive documents.
18. The remainder of the parties’ exchanges pertain to the merits of their arguments on jurisdiction and as such attract no observations from the Tribunal at this stage.
19. Respondent having confirmed that it has not found any other responsive documents, there is no further relief for the Tribunal to grant at this time. It will of course be open to the parties to argue what, if any, consequences should attach to Respondent’s aforementioned confirmation, but that is not a matter for decision before the Tribunal at this juncture.

On behalf of the Tribunal,



Dr. Gaëtan Verhoosel
President of the Tribunal