

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Rand Investments Ltd., William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand,
Robert Harry Leander Rand and Sembi Investment Limited**

v.

Republic of Serbia

(ICSID Case No. ARB/18/8)

PROCEDURAL ORDER NO. 4

DOCUMENT PRODUCTION

Members of the Tribunal

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal

Mr. Baiju S. Vasani, Arbitrator

Prof. Marcelo G. Kohen, Arbitrator

Secretary of the Tribunal

Ms. Anna Toubiana

Assistant to the Tribunal

Mr. Rahul Donde

7 August 2019

I. PROCEDURAL BACKGROUND

1. In accordance with the Procedural Calendar of 19 December 2018, on 21 June 2019, the Claimants and the Respondent exchanged their respective document production requests. They produced certain responsive documents thereafter and objected to the production of others on 12 July 2019. They replied to the objections on 26 July 2019. The Claimants supplied certain clarifications on 29 July 2019.
2. On this basis, this Order thus addresses the Parties' document requests.

II. DOCUMENT REQUESTS

A. Parties' Positions

3. The Parties' positions on the documents requested by their opposing Party are contained in the Redfern Schedules at Annex A (Claimants' Request for Documents) and B (Respondent's Request for Documents) hereto.

B. Analysis

1. Legal Framework

4. Under the ICSID Convention and the ICSID Arbitration Rules, the Parties are free to agree on the applicable procedure, including the procedure for taking evidence. In the absence of an agreement, the Tribunal has the power to rule on procedural matters. Specifically in respect of evidence, 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 [...].”

5. In accordance with this framework, Section 16 of Procedural Order No. 1 (“PO 1”) contains the following rules in respect of document production:

“16. Production of Documents

Convention Article 43(a); Arbitration Rules 24, 33 and 34

16.1. Upon the request of a Party filed within the time limit set in Annex A, each Party may request from the other Party a disclosure of documents or categories of documents within its possession, custody or control. Such a request for production shall identify each document or narrow category of documents sought with precision, in the form of a Redfern Schedule as attached in Annex B hereto, in both Word and .pdf format, specifying why the documents sought are relevant to the dispute and material to the outcome of the case.

16.2. Within the time limit set forth by Annex A, the other Party shall either produce the requested documents or, using the Redfern Schedule provided by the first Party, submit its reasons for its failure or refusal to produce responsive documents (objections).

16.3. Within the time limit set forth by Annex A, the requesting Party shall reply to the other Party’s objections in that same Redfern Schedule and at the same time submit the Word and .pdf copies of the Redfern Schedule to the Tribunal.

16.4. The Parties shall make no submissions in respect of the steps set out in §§ 16.1 to 16.3 above other than those incorporated in the Redfern Schedules.

16.5. On or around the date set forth by Annex A, the Arbitral Tribunal will, at its discretion, rule upon the production of the documents or categories of documents having regard to the legitimate interests of the Parties and all the relevant circumstances, including if appropriate the burden of proof.

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

16.7. In addition, the Arbitral Tribunal may order a Party to produce documents on its own initiative at any time. In that case, the documents shall be submitted to the other Party and to the Arbitral Tribunal in accordance with §17 below and shall be considered to be on record.

16.8. If a party fails to produce a document ordered by the Tribunal, the Tribunal may deem, in light of all circumstances including the reasons advanced by a party to explain its inability to produce any given document, that the document is adverse to the interests of that party.”

6. Furthermore, Section 21.1 of PO 1 provides that the Tribunal shall be guided by the IBA Rules on the Taking of Evidence in International Arbitration (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:

- a. Specificity: The request must identify each document or category of documents with precision.
- b. 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.

- c. 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.
- d. 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 the burden of proof, 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.

2. Analysis

8. The Tribunal's decision with respect to each disclosure request is stated in 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 Order.
9. In its decisions as stated in the Annex, the Tribunal addresses what it views as the most important reasons for its decision. Even if not explicitly mentioned, it goes without saying that the Tribunal has considered all of the Parties' arguments and objections.

III. DECISION

10. For the foregoing reasons, the Tribunal:
 - i. 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;
 - ii. Orders each Party to produce responsive documents by 23 August 2019 in accordance with the time period set in the Procedural Calendar. Documents shall be communicated directly to the requesting Party without copying the Arbitral Tribunal. The documents so communicated shall not be considered to be on record unless and until either Party subsequently files them as exhibits in accordance with PO 1;
 - iii. Where the Parties have accepted to voluntarily produce documents, they shall do so as soon as possible and in any event by 23 August 2019.

Date: 7 August 2019

On behalf of the Tribunal,

[signed]

Prof. Gabrielle Kaufmann-Kohler