

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Gavrilović and Gavrilović d.o.o.

v

Republic of Croatia

(ICSID Case No. ARB/12/39)

**PROCEDURAL ORDER NO. 3:
DECISION ON PARTIES' REQUESTS FOR DOCUMENT PRODUCTION**

Members of the Tribunal

Michael C. Pryles, President of the Tribunal

Stanimir A. Alexandrov, Arbitrator

Matthias Scherer, Arbitrator

Secretary of the Tribunal

Lindsay Gastrell

Assistant to the President of the Tribunal

Albert Dinelli

6 May 2015

1. By Procedural Order No. 2, the Tribunal ordered a procedure for each Party to serve on the other Party a request for production of documents. In response, the recipient was to provide the other Party with: (a) the documents in its possession, custody or control that were responsive to the request; and/or (b) a statement in writing of its objections to production, with reference to the objections listed in Article 9(2) of the International Bar Association Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”). Finally, the requesting Party was ordered to comment in writing on any response or objection made to production and file those submissions with the Tribunal, with a copy provided to the other Party.
2. For convenience, hereafter in this Order:
 - (a) the “Requesting Party” is the party seeking production of documents; and
 - (b) the “Objecting Party” is the party who objects to production of the documents sought.
3. On 17 April 2015, the Tribunal received from each of the Parties their submissions in the form of a Redfern Schedule. Those Schedules set out, in respect of each category of documents sought, the following matters:
 - (a) the relevance and materiality of that category according to the Requesting Party;
 - (b) the responses or objections from the Objecting Party in respect of that category; and
 - (c) the reply of the Requesting Party.
4. The objections set out in Article 9(2) of the IBA Rules are, of course, central to the resolution of the issues the subject of the Parties’ respective submissions. It is useful to extract it in full here:

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.

5. This Order is made pursuant to paragraph 5 of Procedural Order No. 2, by which the Tribunal is required to determine the issues raised by the Parties' submissions on production.
6. Having carefully considered the submissions of the Parties, the Tribunal has determined the Claimants' requests and Respondent's requests in, respectively, Annexures A and B to this Order.
7. Where the Tribunal has ordered production, it has rejected all of the objections to production the subject of Article 9(2) of the IBA Rules. Where, on the other hand, production has not been ordered, it has upheld one or more of those objections. Further, where the Objecting Party has made a positive assertion as part of its objection, such as, for example: (i) it has already provided all documents answering the category; (ii) there are no documents answering that category; or (iii) the relevant documents never existed, that assertion is noted.
8. For the sake of clarity, the Tribunal notes that in ruling on document production requests, the Tribunal has made certain preliminary determinations regarding the relevance of the

categories of documents sought. These determinations are based on the information provided, and are without prejudice to the Tribunal’s eventual assessment of the definitive relevance and/or materiality of the underlying facts.

9. The key used in Annexures A and B is explained by reference to the general principles below:

Code	Ruling	Explanation
A	Documents relevant, but futile to order production. Production <u>not</u> ordered.	The documents identified in the category are relevant to the case, but the Objecting Party has: (a) not located any documents responsive to this category in its possession, custody or control; (b) has produced the only documents responsive to this category in its possession, custody or control; or (c) any documents in its possession, custody or control have already been submitted as part of the arbitration. In those circumstances, noting the Objecting Party’s response, the Tribunal considers it futile to order production.
B	Documents relevant. Production ordered.	The documents identified in the category are relevant to the case, so production is ordered.
C	Documents relevant, and may be more in Objecting Party’s possession, custody or control. Production ordered.	The documents identified in the category are relevant to the case and, although some documents have been provided, it is appropriate that production be ordered so that all documents in the Objecting Party’s possession, custody or control are produced.
D	Documents relevant, but in Objecting Party’s possession, custody or control because they were provided to it by the	The documents identified in the category are relevant to the case. The Objecting Party only has in its possession, custody or control documents in this category because they have been produced to it by the Requesting Party. In such

Code	Ruling	Explanation
	<p>Requesting Party.</p> <p>Production <u>not</u> ordered.</p>	<p>circumstances, noting the Objecting Party's response, it is unnecessary to order production.</p>
E	<p>Documents relevant, but all are also in possession, custody or control of the Requesting Party.</p> <p>Production <u>not</u> ordered.</p>	<p>The documents identified in the category are relevant to the case.</p> <p>All relevant documents are also in the possession, custody or control of the Requesting Party. In such circumstances it would be unnecessarily burdensome to require their production. Production is, therefore, not ordered.</p>
F	<p>Documents may be subject to privilege.</p> <p>Production <u>not</u> ordered.</p>	<p>The Objecting Party makes a claim of privilege. In such circumstances, if those documents are relevant, the Objecting Party is required to provide to the Requesting Party a schedule of all documents said to be the subject of privilege, identifying the date of such documents, their author, their recipient and their subject. (For the avoidance of doubt, such descriptions should not, nor need not, extend to the disclosure of any privileged information.) If, after receipt of such schedule, the Requesting Party wishes to maintain its application for production, the Tribunal will rule on that application.</p>
G	<p>Time period too broad.</p> <p>Production <u>not</u> ordered.</p>	<p>The Requesting Party seeks documents over a time period that is too broad, having regard to the nature of the category of documents sought. To the extent that the Requesting Party wishes to maintain the request, it should narrow its request. Pending such request, production is not ordered.</p>
H	<p>Documents not relevant.</p> <p>Production <u>not</u> ordered.</p>	<p>The Tribunal is not satisfied that the category is sufficiently relevant to warrant an order for disclosure.</p>
I	<p>Documents the subject of other category or categories.</p>	<p>The category of documents, insofar as it is relevant, is merely a sub-set of another category or categories of documents sought, so an order for production is</p>

Code	Ruling	Explanation
	Production <u>not</u> ordered.	unnecessary.
J	Documents <u>not</u> sufficiently relevant because category is too broad. Production <u>not</u> ordered.	The Tribunal is not satisfied that the breadth of the category of documents is sufficiently relevant to the case to warrant the search which would be required of the Objecting Party. Production is, therefore, not ordered.
K	Narrowed request is appropriate. Production ordered.	The Requesting Party has narrowed the request in a manner that the Tribunal considers appropriate, so orders production of the category the subject of the (narrowed) request.
L	Documents provided to expert. Production ordered.	The Tribunal is satisfied that the category is appropriately the subject of a request, but only to the extent that any documents in this category were provided by the Objecting Party to an expert engaged by it whose evidence is filed in this proceeding. Thus, any documents so provided by the Objecting Party are to be produced.
M	Relevance not established. Production <u>not</u> ordered.	The Tribunal is not satisfied that the category is appropriately the subject of a request where the documents are not sufficiently specified to enable a finding that the category is relevant. To the extent that the Requesting Party wishes to maintain the request, it should narrow its request. Pending such request, production is not ordered.
N	<u>Not</u> relevant because supports opponent's case. Production <u>not</u> ordered.	The category of document sought seeks additional support for the Objecting Party's case. To establish the relevance of a category for disclosure, it is necessary that the Requesting Party requires the documents to successfully meet its burden of proof. A request which assists its opponent to prove its case is not a proper category of discovery.
O	No ruling required.	As the Objecting Party has said it will provide the relevant documents, no ruling by the Tribunal is sought, nor required.

10. The Tribunal has noted the following request of the Respondent with respect to several categories of documents:

[G]iven the risk of obstructive behaviour by the Claimants, the Respondent respectfully requests the Tribunal to order that the Claimants provide a sworn statement or affirmation declaring that a good faith and diligent search for documents has been made and giving details of the steps taken and individuals questioned in the course of the implied search.

The Tribunal sees no need to make the requested order. Each Party has an obligation to arbitrate in good faith, and the Tribunal trusts this obligation will be fulfilled in regard to the production of documents.

11. In accordance with Procedural Order No. 2, the Parties shall produce all documents ordered for production within three weeks of the date of this Order.
12. In addition, any further applications for disclosure emanating from the rulings the subject of Annexures A and B are to be filed within three weeks of this Order.

For and on behalf of the Tribunal,

[signed]

Michael Pryles
President of the Tribunal
Date: 6 May 2015

**ANNEXURE A:
CLAIMANTS' REQUEST FOR PRODUCTION OF DOCUMENTS**

Category	Ruling
1	Purchase Agreement to be produced as agreed; out-of-court settlement, E; otherwise, H
2	A
3	A
4	K, subject to F
5	N
6	N
7	B
8	N
9	G
10	B
11	B
12	B
13	N
14	N

Code	Ruling
A	Documents relevant, but futile to order production. Production <u>not</u> ordered.
B	Documents relevant. Production ordered.
C	Documents relevant, and may be more in Objecting Party's possession, custody or control. Production ordered.
D	Documents relevant, but in Objecting Party's possession, custody or control because they were provided to it by the Requesting Party. Production <u>not</u> ordered.
E	Documents relevant, but all are also in possession, custody or control of the Requesting Party. Production <u>not</u> ordered.
F	Documents may be subject to privilege. Production <u>not</u> ordered.
G	Time period too broad. Production <u>not</u> ordered.
H	Documents not relevant. Production <u>not</u> ordered.
I	Documents the subject of other category or categories. Production <u>not</u> ordered.
J	Documents <u>not</u> sufficiently relevant because category is too broad. Production <u>not</u> ordered.
K	Narrowed request is appropriate. Production ordered.
L	Documents provided to expert. Production ordered.
M	Relevance not established. Production <u>not</u> ordered.
N	<u>Not</u> relevant because supports opponent's case. Production <u>not</u> ordered.
O	No ruling required.

Category	Ruling
15	O
16	N
17	N
18	N
19	N
20	A
21	A
22	N
23	B
24	A, specifically noting that the Objecting Party asserts that it “has already provided the Claimants with the entire court file” relating to the identified proceedings.
25	N
26	J
27	L
28	J
29-62	B, noting the Requesting Party’s

Code	Ruling
A	Documents relevant, but futile to order production. Production <u>not</u> ordered.
B	Documents relevant. Production ordered.
C	Documents relevant, and may be more in Objecting Party’s possession, custody or control. Production ordered.
D	Documents relevant, but in Objecting Party’s possession, custody or control because they were provided to it by the Requesting Party. Production <u>not</u> ordered.
E	Documents relevant, but all are also in possession, custody or control of the Requesting Party. Production <u>not</u> ordered.
F	Documents may be subject to privilege. Production <u>not</u> ordered.
G	Time period too broad. Production <u>not</u> ordered.
H	Documents not relevant. Production <u>not</u> ordered.
I	Documents the subject of other category or categories. Production <u>not</u> ordered.
J	Documents <u>not</u> sufficiently relevant because category is too broad. Production <u>not</u> ordered.
K	Narrowed request is appropriate. Production ordered.
L	Documents provided to expert. Production ordered.
M	Relevance not established. Production <u>not</u> ordered.
N	<u>Not</u> relevant because supports opponent’s case. Production <u>not</u> ordered.
O	No ruling required.

Category	Ruling
	submission that “the request by nature is limited to the time period immediately before the initiation of the relevant proceedings, and to documents aimed by or towards the government body that took the decision to bring the relevant proceedings”.

Code	Ruling
A	Documents relevant, but futile to order production. Production <u>not</u> ordered.
B	Documents relevant. Production ordered.
C	Documents relevant, and may be more in Objecting Party’s possession, custody or control. Production ordered.
D	Documents relevant, but in Objecting Party’s possession, custody or control because they were provided to it by the Requesting Party. Production <u>not</u> ordered.
E	Documents relevant, but all are also in possession, custody or control of the Requesting Party. Production <u>not</u> ordered.
F	Documents may be subject to privilege. Production <u>not</u> ordered.
G	Time period too broad. Production <u>not</u> ordered.
H	Documents not relevant. Production <u>not</u> ordered.
I	Documents the subject of other category or categories. Production <u>not</u> ordered.
J	Documents <u>not</u> sufficiently relevant because category is too broad. Production <u>not</u> ordered.
K	Narrowed request is appropriate. Production ordered.
L	Documents provided to expert. Production ordered.
M	Relevance not established. Production <u>not</u> ordered.
N	<u>Not</u> relevant because supports opponent’s case. Production <u>not</u> ordered.
O	No ruling required.

**ANNEXURE B:
RESPONDENT'S REQUEST FOR PRODUCTION OF DOCUMENTS**

Category	Ruling
1	A
2	A
3	A
4	A
5	B
6	C
7	A
8	D
9	A
10	C
11	E
12	A
13	F, G
14	D
15	A
16	A

Code	Ruling
A	Documents relevant, but futile to order production. Production <u>not</u> ordered.
B	Documents relevant. Production ordered.
C	Documents relevant, and may be more in Objecting Party's possession, custody or control. Production ordered.
D	Documents relevant, but in Objecting Party's possession, custody or control because they were provided to it by the Requesting Party. Production <u>not</u> ordered.
E	Documents relevant, but all are also in possession, custody or control of the Requesting Party. Production <u>not</u> ordered.
F	Documents may be subject to privilege. Production <u>not</u> ordered.
G	Time period too broad. Production <u>not</u> ordered.
H	Documents not relevant. Production <u>not</u> ordered.
I	Documents the subject of other category or categories. Production <u>not</u> ordered.
J	Documents <u>not</u> sufficiently relevant because category is too broad. Production <u>not</u> ordered.
K	Narrowed request is appropriate. Production ordered.
L	Documents provided to expert. Production ordered.
M	Relevance not established. Production <u>not</u> ordered.
N	<u>Not</u> relevant because supports opponent's case. Production <u>not</u> ordered.
O	No ruling required.

Category	Ruling
17	Court filings, E; otherwise, H
18	C
19	I (see Category 18)
20	I (see Category 18)
21	I (see Category 18)
22	E
23	I (see Category 18)
24	J
25	J
26	J
27	J
28	J
29	A
30	A
31	K
32	A
33	A
34	K

Code	Ruling
A	Documents relevant, but futile to order production. Production <u>not</u> ordered.
B	Documents relevant. Production ordered.
C	Documents relevant, and may be more in Objecting Party's possession, custody or control. Production ordered.
D	Documents relevant, but in Objecting Party's possession, custody or control because they were provided to it by the Requesting Party. Production <u>not</u> ordered.
E	Documents relevant, but all are also in possession, custody or control of the Requesting Party. Production <u>not</u> ordered.
F	Documents may be subject to privilege. Production <u>not</u> ordered.
G	Time period too broad. Production <u>not</u> ordered.
H	Documents not relevant. Production <u>not</u> ordered.
I	Documents the subject of other category or categories. Production <u>not</u> ordered.
J	Documents <u>not</u> sufficiently relevant because category is too broad. Production <u>not</u> ordered.
K	Narrowed request is appropriate. Production ordered.
L	Documents provided to expert. Production ordered.
M	Relevance not established. Production <u>not</u> ordered.
N	<u>Not</u> relevant because supports opponent's case. Production <u>not</u> ordered.
O	No ruling required.

Category	Ruling
35	The final version of the 2002 IFC Business Plan, B; otherwise, A
36(iv)	O
36, apart from 36(iv)	L
37	L
38	L
39	M

Code	Ruling
A	Documents relevant, but futile to order production. Production <u>not</u> ordered.
B	Documents relevant. Production ordered.
C	Documents relevant, and may be more in Objecting Party's possession, custody or control. Production ordered.
D	Documents relevant, but in Objecting Party's possession, custody or control because they were provided to it by the Requesting Party. Production <u>not</u> ordered.
E	Documents relevant, but all are also in possession, custody or control of the Requesting Party. Production <u>not</u> ordered.
F	Documents may be subject to privilege. Production <u>not</u> ordered.
G	Time period too broad. Production <u>not</u> ordered.
H	Documents not relevant. Production <u>not</u> ordered.
I	Documents the subject of other category or categories. Production <u>not</u> ordered.
J	Documents <u>not</u> sufficiently relevant because category is too broad. Production <u>not</u> ordered.
K	Narrowed request is appropriate. Production ordered.
L	Documents provided to expert. Production ordered.
M	Relevance not established. Production <u>not</u> ordered.
N	<u>Not</u> relevant because supports opponent's case. Production <u>not</u> ordered.
O	No ruling required.