IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER CHAPTER 10 OF THE DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES (2010)

DAVID AVEN ET AL. V. THE REPUBLIC OF COSTA RICA
(UNCT/15/3)

PROCEDURAL ORDER No 4

Eduardo Siqueiros T., Presiding Arbitrator
C. Mark Baker, Arbitrator
Pedro Nikken, Arbitrator

Secretary of the Tribunal
Francisco Grob

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1 July, 2016

DECISION ON PARTIES' REQUESTS FOR PRODUCTION OF DOCUMENTS

A. Background

1. On September 10, 2015 the Arbitral Tribunal issued Procedural Order No. 1, based on the agreements reached among the Parties during the first session the Arbitral Tribunal held on September 3, 2015.

2. Under Section 20 (Production of Documents) of Procedural Order No. 1, it is contemplated that the Parties may request the production of documents. Section 20.1 provides that Articles 3 and 9 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) (the "IBA Rules") may guide the Tribunal and the parties regarding document production, while section 20.2 provides that the requests, responses or objections to a request, or the reply to the responses or objections to the request, and the Tribunal's decisions referred to in the section shall be recorded in a joint schedule in the form of a so-called "Redfern Schedule". Further, sections 21.3.2, 21.3.3 and 21.3.4 establish the process to be followed by the Parties to submit the request, produce or object, and if any request is pending, for the Parties to submit their completed "Redfern Schedules" to the Arbitral Tribunal.

3. Both Claimants and Respondent submitted in accordance with Section 21.3.2, their request for production of documents, and each Party either timely produced, or objected to the counterparty's request. On 17 June, 2016, Claimants and Respondent requested the Arbitral Tribunal to issue a decision with respect to the requests for production of documents in dispute.

4. In accordance with the authority that the Arbitral Tribunal has been granted by the Parties under Procedural Order No. 1, the Arbitral Tribunal issues this Procedural Order No. 4 and decides on those objections submitted:

   (a). By the Respondent with respect to the request for production submitted by Claimants; and
   (b). By Claimants in respect to the request for production submitted by the Respondent

B. Guiding Principles in the Decision of the Arbitral Tribunal

5. The reasoning pursuant on which the Arbitral Tribunal resolves each of the requests included in the attached Redfern Schedules is inserted in each of the petitions. The Redfern Schedules will formally be a part of this Procedural Order No. 4.

6. The process for the production of documents in this arbitration shall be governed, in addition to the terms established in Procedural Order No. 1 and this Procedural Order No. 4, by:

   (a). The UNCITRAL Arbitration Rules, as revised in 2010, except as modified by Section B of Chapter 10 of the Dominican Republic-Central America-United States Free Trade Agreement.
   (b). The IBA Rules.

7. Article 27 of the UNCITRAL Arbitration Rules contains the following principles in respect to evidence:

> ***Article 27***
> *1. Each party shall have the burden of proving the facts relied on to support its claim or defence.*
>
> *2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.*
>
> *3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.*
>
> *4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.*

8. In turn, the IBA Rules provide under Article 3(3) the requirements that any request of production of documents must contain:

> ***Article 3 Documents***
> ...
> *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.

9. Based on the above, the Arbitral Tribunal concludes that the request for production of documents in this Arbitration must:

    a. refer to documents or categories of documents identified with sufficient detail.
    b. identify each document or category of documents requested with sufficient precision.
    c. establish the relevance of the document.
    d. state the reasons why the requesting party assumes the documents requested are in the possession, custody or control of the other party.

10. In deciding the request for production of documents, the Arbitral Tribunal will decide in light of the *prima facie* relevance of the documents requested, considering the arguments made by the Parties in their respective memorials or other allegations to date, but in no case will the decisions adopted in respect to the production of documents imply any prejudice whatsoever with respect to the allegations of merits to which any request refers to, and the Arbitral Tribunal will be free to determine the relevance, materiality and weight of the evidence submitted in the Final Award.

11. For purposes of this Procedural Order, reference to a "document" shall have the same meaning as that assigned under the IBA Rules, i.e., " *a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means*".

12. As established in Article 27(1) of the UNCITRAL Arbitration Rules, each party shall have the burden of proving the facts relied on to support its claim or its defense.

13. Documents produced by the Parties in accordance with this Procedural Order will not be part of the file of this arbitration proceeding, unless submitted by the Parties in their respective Reply or Rejoinder Memorial to be submitted in accordance with the procedural calendar.

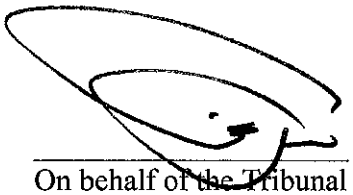
14. In any event, the Arbitral Tribunal shall consider the documents produced as part of the overall evidence to be submitted during the course of this arbitration, and will be subject to the analysis as to relevance, materiality and weight of all evidence submitted during the Arbitral Proceedings.

15. In accordance with the terms of the procedural calendar, as modified, each party shall produce those documents for which no objection is sustained by, or instruction issued by the Arbitral Tribunal, within three weeks of this Procedural Order No. 4, i.e., by 22 July 2016. The Parties shall confirm to the Tribunal having satisfied their document production obligations by the same date.

16. In respect to the documents requested by Respondent under number 1 of its Redfern Schedule Request, the Arbitral Tribunal understands that documents may not exist at this time because of the theft that Claimants state occurred at the Las Olas offices in the summer of 2012. However, in accordance with Article 27(3) of the UNCITRAL Arbitrations Rules, the Tribunal instructs Claimants to prepare, based on the information and recollection they may have, the line of Claimants' ownership from 2002 until present in Bosques Lindos de Esterillos S.A. and Mis Mejores Años, S.A., and to deliver such line of ownership by 22 July 2016 to the Tribunal, with a copy to Respondent.

17. In respect to the documents requested by Respondent under number 4 of its Redfern Schedule Request, Claimants are instructed to submit by 8 July, 2016 to the Arbitral Tribunal a "privilege log" relating to such documents that are in its possession, custody, or control that are responsive to the document requests of the Respondent, but have been withheld from disclosure by Claimant based on its assertion of a legal privilege (such as the attorney-client privilege). This will allow the Tribunal to decide on whether production is justified. The "privilege log" should take the form of a table, where each row corresponds to a document that has been withheld on the basis of a legal privilege. In the various columns, each row should contain, at a minimum, the following information about the document: the author or sender, the addressee or recipient, the date of creation or transmission, the nature of the legal privilege, and a description sufficient to identify the document. The information in the privilege log should be adequate for the Respondent to evaluate for each withheld document the validity of the legal privilege that the producing party has asserted, without compromising the information that is claimed to be subject to the relevant privilege.

Date: 1 July, 2016



On behalf of the Tribunal

Eduardo Siqueiros T.
Presiding Arbitrator