

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Standard Chartered Bank (Hong Kong) Limited

v.

United Republic of Tanzania

(ICSID Case No. ARB/15/41)

PROCEDURAL ORDER NO. 6a

**TRIBUNAL'S DECISIONS ON THE CLAIMANT'S APPLICATION DATED 17
NOVEMBER 2017 RELATING TO THE RESPONDENT'S DISCLOSURE
OBLIGATIONS UNDER PO 5a**

Members of the Tribunal

Professor Lawrence Boo, President of the Tribunal
David Unterhalter SC, Arbitrator
Dr. Kamal Hossain, Arbitrator

Secretary of the Tribunal

Aurélia Antonietti

15 January 2018

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I. BRIEF PROCEDURAL BACKGROUND

1. On 11 September 2017, the Tribunal issued Procedural Orders 5a (“**PO 5a**”) and 5b (“**PO 5b**”) on production of documents by the Respondent, respectively the Claimant.
2. On 6 October 2017, the Respondent delivered to the Claimant various documents as well as a cover letter from its counsel listing the documents produced and an affidavit from Professor James E Mdoe, acting Permanent Secretary at the Ministry of Energy and Minerals of the Respondent, dated 29 September 2017 (the “**Affidavit**”).
3. On 2 November 2017, the Respondent filed an application relating to the Claimant’s disclosure obligations under PO 5b (the “**Respondent’s Application**”). The Tribunal deals with the Respondent’s Application in a separate Procedural Order No. 6b.
4. On 7 November 2017, the Claimant informed the Tribunal that it also intended to make an application to the Tribunal in respect of the Respondent’s document production, and proposed to do so by 17 November 2017, its resources being currently focussed on preparing its Reply Memorial.
5. On 16 November 2017, the Tribunal took note that the Claimant also intended to serve an application by 17 November relating to the Respondent’s disclosure obligations under PO 5a. The Tribunal noted that these applications were not steps anticipated in the procedural timetable or in POs 5a and 5b, but that it would nevertheless await the Claimant’s application, which shall be served by 17 November 2017, and make appropriate directions thereafter.
6. On 17 November 2017, the Claimant served an application relating to the Respondent’s disclosure obligations under PO 5a (the “**Claimant’s Application**”), by which it complained that the Respondent’s production was deficient, and requested the Tribunal to order the Respondent, by such date as the Tribunal considers reasonable in the circumstances:¹
 - (i) to file and serve on the Claimant a revised or supplemental affidavit which complies with the terms of PO 5a;
 - (ii) to procure a search of any documents held by the Respondent’s former counsel

¹ Claimant’s Application, para. 23-24.

(Hunten & Williams LLP and Mkono & Co) which may be responsive to the orders made in PO 5a;

- (iii) to complete, as a matter of urgency, any ongoing searches for documents in response to PO 5a; and
 - (iv) to produce to the Claimant any further documents as may be located which are responsive to the orders set out in PO 5a.
7. On 21 November 2017, the Tribunal directed *inter alia* that the Claimant shall respond to the Respondent's Application by 1 December 2017, that the Respondent shall respond to the Claimant's Application by 2 January 2018 and that no rejoinder would be permitted by either party.
8. On 2 January 2018, the Respondent filed its response to the Claimant's Application (the "**Respondent's Response**"), and requested the Tribunal to reject it.²
9. These directions contain the Tribunal's decisions on the Claimant's Application. In reaching its decision, the Tribunal has considered the Claimant's grounds for requests in the Claimant's Application and the annexes thereto, as well as the Respondent's Response and the annexes thereto.

II. PARTIES' ARGUMENTS AND TRIBUNAL'S ANALYSIS

10. The Claimant complains that, while the Respondent was ordered to produce documents in relation to 11 of the Claimant's 19 requests, the Respondent produced only 22 documents, which were responsive to only 6 of those requests. According to the Claimant, it is in contrast to the Claimant's own production, which involved reviewing over 12,000 documents and 450 hours of work by a team of 17 lawyers and paralegals, and producing 312 documents in addition to substantial repeat production of documents already previously produced to Tanesco or the Respondent in earlier proceedings.³
11. The Respondent, on the other hand, objects to these assertions and contends that it has made "a rigorous, good faith effort to locate responsive documents" and that "this effort is still ongoing".⁴ It also notes that unlike the Claimant, it has made available all

² Respondent's Response, p. 7.

³ Claimant's Application, para. 5-6.

⁴ Respondent's Response, p. 1-2.

responsive documents it has located with no redactions. The Respondent also produces further documents that came to light during the ongoing searches, which are listed at page 6 of the Respondent's Response.⁵

A. Documents held by the Respondent's previous counsel

12. The Claimant seeks an order from the Tribunal requiring the Respondent to procure and search documents held by its former counsel Hunton & Williams LLP and Mkonon & Co.⁶
13. The Claimant contends that the Respondent has not conducted a search by its previous counsel Hunton & Williams LLP and Mkonon & Co or ask them to provide documents which may be responsive to the orders in PO 5a. According to the Claimant, documents held by the Respondent's previous counsel should be considered to be under the control of the Respondent and as a result, the searches carried out by the Respondent did not encompass all documents within the Respondent's control.⁷
14. The Claimant also argues that it is significant that the Respondent omitted to request documents from its former counsel for several reasons. In particular, in the Affidavit, the failure to produce a number of documents is justified on the basis that they cannot be found, and that some of them are as old as 20 years. However, it is likely that the Respondent's former counsel, and in particular the international law firm Hunton & Williams LLP, maintain sophisticated document management systems, and therefore, where documents exist and have been in the possession of the Respondent, but cannot be found any more, it is possible that the Respondent's former counsel would be able to locate them. Also, Hunton & Williams LLP have acted for the Respondent and Tanesco for 20 years and it is possible that older documents would remain on their files.⁸
15. The Claimant also contends that, to the extent that records are held by former counsel electronically, a search should be cost-efficient and would not impose unreasonable burden on the Respondent. Also, there is a likelihood that the additional searches will lead to further responsive documents.⁹

⁵ Respondent's Response, p. 2 and 6.

⁶ Claimant's Application, para. 11 and 23b.

⁷ Claimant's Application, para. 7-8.

⁸ Claimant's Application, para. 9.

⁹ Claimant's Application, para. 10-11.

16. The Respondent denies that it need to request documents from its previous counsel. It contends that documents in the possession of Hunton & Williams LLP and Mkono & Co. were provided to the Attorney General’s Office in 2014 following the expiration of their retainer and that any documents once retained by their former counsel cannot be regarded as within the Respondent’s control. According to the Respondent, the Claimant has failed to show that the definition of “control” can be extended to the records of former advisers which are not instructed any more, and such an interpretation would be unreasonable because former counsel would be under no obligation to spend unpaid time searching for relevant documents. Further, in the present case, such archives would purportedly cover a 20-year period and contain documents already transmitted to the Respondent in the past. The Respondent also confirms that its searches have included all documents received from its former counsel.¹⁰

Tribunal’s Decision

17. The Tribunal agrees that the Respondent’s obligation to disclose extends to documents which are in their possession or control. However in the case of documents with former lawyers Hunton & Williams LLP and Mkono & Co (the “**former GoT lawyers**”), the Tribunal is not persuaded that the Respondent (in particular given the change of administration and the fact that some documents stretched back some 20 years to 1997) could still be considered to be in “control” in that it is still in a position to oblige the former GoT lawyers to undertake a search of the documents which are responsive to the Requests to which the Tribunal had made orders for their production.
18. Notwithstanding this, the Respondent has not indicated if it had enquired of the former GoT lawyers if such documents existed and if they would be agreeable to make them available. The Tribunal believes this could have been done.

B. Affidavit filed by the Respondent

19. The Claimant seeks an order from the Tribunal requiring the Respondent to file and serve a revised or supplemental affidavit complying with the provisions of PO 5a.¹¹

¹⁰ Respondent’s Response, p. 2-3.

¹¹ Claimant’s Application, para. 18 and 23a.

20. The Claimant refers to paragraph 3 of PO 5a, which provides as follows:

“If the respective party is unable to produce a document so ordered, it (by an individual with primary responsibility for the instruction, coordination and supervision of the search for relevant documents) shall affirm an affidavit deposing to the reasons why the documents so ordered to be produced are not able to be disclosed. If appropriate, the affidavit should also state what searches were made and by whom and, in relation to any documents or categories of documents which are said never to have existed or, if they existed, cannot now be identified or found, give a full explanation of what documents within the categories sought are likely to have been brought into existence, what systems were in place for the retention and recovery of documents, and why documents which may have existed can no longer be found.”

21. According to the Claimant, the Affidavit does not comply with this provision, as it does not explain what searches were conducted but merely asserts that “thorough searches” have been conducted, does not give any explanation of “what documents within the categories sought are likely to have been brought into existence” and does not give a full explanation of the systems which were in place for the retention of and recovery of documents.¹² The Claimant also contends that it would have been appropriate for the Affidavit to contain further detail as to the nature of the searches carried out and the likelihood of any of the requested documents having existed. Without such information, it would be impossible for the Claimant or the Tribunal to evaluate whether the Respondent has indeed made the searches it alleges.¹³

22. The Respondent, on the other hand, contends that the Affidavit is compliant with the requirements of PO 5a. It is signed by an individual with primary responsibility for the searches, and explains the reasons why some of the documents ordered to be produced could not be retrieved. In addition, PO 5a does not prescribe a particular degree of specificity and only recommends that the Affidavit contain additional information if appropriate. According to the Respondent, no further degree of specificity is appropriate in the present case in addition to the information contained in the Affidavit. The Respondent also alleges that it has made a good faith and extensive effort to comply with its document production obligations, and that the Affidavit has been sworn in by

¹² Claimant’s Application, para. 13.

¹³ Claimant’s Application, para. 16.

Professor James E Mdoe, who was the highest authority at the Ministry of Energy and Minerals, the main ministry that supervises this arbitration who deposed that he had caused searches to be made at –

“the President’s Office, the Prime Minister’s Office, the Ministry of Justice and Constitutional Affairs, the Ministry of Finance and Planning, the Attorney General’s Chambers, the Clerk of the National Assembly, the Ministry of Foreign Affairs and East African Cooperation, the Bank of Tanzania, the National Audit Office, the Business Registrations and Licensing Agency (BRELA), the Registration of Insolvency Trusteeship Agreement (RITA) and TANESCO.”¹⁴

23. In these circumstances, it would not be appropriate to “look behind” the confirmations provided in the Affidavit.¹⁵

Tribunal’s Decision

24. The Tribunal notes that the deponent Professor Mdoe, was, at the time the searches were conducted, the highest representative of the MEM as the Minister’s position was vacant. Although he had not stated “what searches were made and by whom”, he had named the entities where the searches were sought. He also deposed that documents were kept in “hard copy form only generically organised per matters and years, usually with no index”. He explained that “Over the last year, many officials were replaced and we have been so far unable to trace all the people who were originally responsible for making and archiving the requested documents.” In their Response to the Claimant’s Application, the Respondent also made further disclosure as a result of its ongoing searches responsive to Request 15 of PO 5a.
25. It appears to the Tribunal that the Respondent’s current administration is working under much constraints and are making efforts to comply with the Tribunal’s orders. The affidavit of Professor Mdoe expressed the best efforts made to ferret out the documents it is directed to disclose. The Tribunal sees no requirement to direct a further affidavit to be sworn on behalf of the Respondent.

¹⁴ Respondent’s Response, p. 4.

¹⁵ Respondent’s Response, p. 4-5.

C. Ongoing searches

26. The Claimant draws the Tribunal's attention to the Respondent's assertion in correspondence that searches were currently still ongoing.¹⁶ The Claimant contends that this demonstrates disregard by the Respondent for its obligations, as it was obliged, according to PO 4 and 5a, to search for and produce documents by a certain deadline, originally 2 October 2017, which was later extended to 6 October 2017 by the Tribunal. While it accepts that documents which were not located by either party may be discovered during the proceedings and that in such circumstances they shall be produced, the Claimant notes that counsel for the Respondent appear to be asserting that searches specifically related to documents ordered in PO 5a were still in progress.¹⁷ Therefore, the Claimant seeks an order from the Tribunal requiring the Respondent to complete the searches which counsel for the Respondent have indicated are ongoing as a matter of urgency and produce any further responsive documents located in the course of such searches.¹⁸
27. The Respondent contends that the Claimant cannot have it both ways by complaining that the Respondent had not produced the relevant documents and at the same time protest the speed at which the Respondent is conducting the searches. According to the Respondent, the fact that searches are still ongoing is a reflection of the difficulties in retrieving documents as highlighted in the Affidavit and previous correspondence. The Respondent also notes that the ongoing searches have allowed it to locate additional documents, which it produced to the Claimant by separate correspondence. A list of newly produced documents appears at pages 6 and 7 of the Respondent's Response.¹⁹

Tribunal's Decision

28. The Tribunal notes that the Respondent is continuing its searches and had in the response to this application made further disclosure of documents responsive to Request 15 of PO 5a. The Tribunal understands this as the Respondent's efforts to comply with its disclosure obligations and the delay is a reflection of the constraints and difficulties it is now under. However, compliance with disclosure timelines in unscheduled drips is

¹⁶ Claimant's Application, para. 19 and Annex 4 to Claimant's Application.

¹⁷ Claimant's Application, para. 20-21.

¹⁸ Claimant's Application, para. 22 and 23c and d.

¹⁹ Respondent's Response, p. 5-7.

undesirable and disruptive of the process. In this regard the Tribunal would direct that the Respondent deploy all efforts to complete its disclosure by 28 February 2018. As a consequence of this, the Procedural Timetable would be adjusted accordingly.

III. ORDERS

29. The Tribunal therefore makes the following orders:

- a. The Respondent shall immediately enquire of Hunton & Williams LLP and Mkono & Co, its former lawyers, if any document exist which may be responsive to any of the Requests as ordered in Procedural Order 5a. If any be made available, the Respondent shall (subject to any claim for privilege), disclose the same.
- b. No Order is made on the Claimant's application for a supplemental affidavit to be served by the Respondent.
- c. The Respondent be granted up to 28 February 2018 to complete its disclosure as directed in Procedural Order 5a and as amended herein.

On behalf of the Tribunal

[signed]

Lawrence Boo
President of the Tribunal

Date: 15 January 2018