

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Pawlowski AG and Projekt Sever s.r.o.

v.

Czech Republic

(ICSID Case No. ARB/17/11)

PROCEDURAL ORDER NO. 2

Members of the Tribunal

Prof. Juan Fernández-Armesto, President of the Tribunal
Mr. John Beechey, CBE, Arbitrator
Prof. Vaughan Lowe, QC, Arbitrator

Secretary of the Tribunal

Ms. Anna Holloway

Assistant to the Tribunal

Ms. Mélanie Riofrio Piché

14 August 2018

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WHEREAS

1. This arbitration arises between Pawlowski AG and Projekt Sever s.r.o. [**“Claimants”**] and the Czech Republic [**“Respondent”**] under the Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, which entered into force on August 7, 1991 [the **“BIT”**]. Claimants and Respondent shall be jointly referred to as the **Parties**.
2. On February 13, 2018, the Arbitral Tribunal issued Procedural Order [**“PO”**] No. 1.
3. Paragraph 16 of the PO 1 provides that the document production phase shall be conducted in accordance with a procedural order issued by the Arbitral Tribunal after consultation with the Parties.
4. On July 11, 2018, the Tribunal circulated a draft PO 2 on document production, seeking the Parties’ comments. The Parties submitted their positions on August 2, 2018.
5. The following Procedural Order sets out the Tribunal’s decisions after consultation with the Parties.

PROCEDURAL ORDER NO. 2

6. The document production phase, if requested by any Party, shall proceed in accordance with the Procedural Calendar attached as Annex A to the PO 1.

1. DOCUMENTS

7. The Parties agree to be guided by the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) [**“IBA Rules”**] for the production of documents in this arbitration.

8. The “Definitions” section of the IBA Rules includes the following definition of document:

“‘*Document*’ means 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”.

9. The same definition will be used in this Order and must be used by the Parties in their requests for document production.

2. REQUEST FOR DOCUMENT PRODUCTION

10. Each Party shall prepare a Document Production Schedule [**“DPS”**], using the draft model attached hereto as Annex I. For each Document (or category of Documents) a single Document Request shall be completed. Document Requests shall be numbered sequentially. The Parties are kindly requested to adhere to the word limit defined for each cell in the draft model.

11. Each Party will deliver its DPS to the Secretary of the Tribunal, without copying the Tribunal. The Secretary of the Tribunal shall deliver each Party’s DPS to the other Party upon receipt of both Parties’ DPSs or, at latest, the next business day.

12. Each requested Document must meet the following requirements [**“R”**]:

2.1 “R1”: IDENTIFICATION OF EACH DOCUMENT OR DESCRIPTION OF A NARROW AND SPECIFIC CATEGORY¹

13. The description must be in sufficient detail to identify the requested Document.

14. If the request is for a category of Documents, the following additional requirements must be met:

- a clear and well defined characterization of a narrow and specific category must be provided;
- an explanation of the putative existence of the category must be provided;

¹ Art. 3.3 (a) (i) and (ii) IBA Rules.

- the name of the person, authority or entity which has issued the category of Documents must be provided;
- the initial and the final date of the period during which the Documents belonging to the category were issued must be identified.

15. Any request which does not comply with these requirements shall be rejected *in limine*.

2.2 “R2”: RELEVANT AND MATERIAL²

16. The requesting Party must prove that the Documents are relevant to the case and material to its outcome by identifying the specific paragraph in the submission, witness statement or expert report for which evidentiary support by way of document production is requested.

17. Any request which does not comply with this requirement shall be rejected *in limine*.

18. Documents

- referred to in other Documents that have already been submitted,
- mentioned in witness statements or in expert reports, or
- relied upon by experts to prepare their expert reports (but excluding working papers used by experts),

will, as a general rule, be considered relevant.

19. When ruling on any contested document production request and weighing the Parties’ explanations and arguments, the Tribunal will consider the general principle that document production requests should not be used to put the other party to proof. That is to say, a Party should not use document production requests to disprove allegations for which the counterparty bears the burden of proof, since failure to discharge this burden will by itself lead to dismissal of the allegation.

2.3 “R3”: NOT IN THE POSSESSION, CUSTODY OR CONTROL OF THE REQUESTING PARTY³

20. The requesting Party must aver that the Documents sought are not in its possession, custody or control, and explain why it assumes that the Documents are in the possession, custody or control of the counterparty. The request will be rejected if the Documents are located in the premises or under the control of a third party to which the requesting Party has access.

3. OBJECTIONS

21. The IBA Rules provide for a number of objections to the production of Documents. In addition to alleging a failure to satisfy any of the previously established requirements

² Arts. 3.3 (b) and 9.2 (a) IBA Rules.

³ Art. 3.3 (c) (i) and (ii) IBA Rules.

(R1 to R3), a Party may raise the following objections to a request for production [“O”]⁴:

3.1 “O1”: LEGAL OR SETTLEMENT PRIVILEGE⁵

22. A requested Party may invoke privilege with regards to Documents prepared by or addressed to counsel, containing legal advice, and given or received with the expectation that such Documents would be kept confidential.
23. In general, a Document needs to meet the following requirements in order to be granted special protection under legal privilege⁶:
 - The Document has to be drafted by a lawyer acting in his or her capacity as lawyer;
 - A relationship based on trust must exist as between the lawyer (in-house or external legal advisor) and the client;
 - The Document has to be elaborated for the purpose of obtaining or giving legal advice;
 - The lawyer and the client, when giving and obtaining legal advice, must have acted with the expectation that the advice would be kept confidential in a contentious situation.
24. A requested Party may also invoke privilege regarding Documents prepared in connection with settlement negotiations⁷, including
 - oral or written statements submitted to the other side during negotiations,
 - internal Documents prepared specifically for negotiations, and
 - drafts or final versions of any settlement agreements.
25. In case an objection under O1 is raised, the requested Party must (at the time it delivers the non-contested Documents) choose between one of the following options:
 - to deliver to the requesting Party a “**Privilege Log**”, drafted in accordance with Annex II, identifying the Documents affected, or
 - to deliver to the counterparty the requested Documents with the privileged information redacted, or
 - to request a reasonable confidentiality undertaking from the counterparty.

⁴ Art. 3.5 IBA Rules.

⁵ Art. 9.2 (b) IBA Rules.

⁶ *Vito G. Gallo v. The Government of Canada*, NAFTA-UNCITRAL, Procedural Order No. 3, April 8, 2009, para. 47.

⁷ Art. 9.3 (b) IBA Rules.

26. Any discussion regarding the extent and appropriateness of the Privilege Log, of the redaction or of the confidentiality undertaking will be settled by the Tribunal.

3.2 “O2”: PRODUCTION IS UNREASONABLY BURDENSOME⁸

27. The requested Party may object to the production of Documents on the basis that it would impose an unreasonable burden. In making its decision, the Tribunal will weigh time and cost of producing the Documents against their expected evidentiary value. The Tribunal may also reduce the scope of production to avoid unreasonable burden.

3.3 “O3”: LOSS, DESTRUCTION OR INEXISTENCE⁹

28. The requested Party may object to the production of Documents if it shows, with reasonable likelihood, that they have been lost or destroyed, or do not exist for other reasons.

3.4 “O4”: TECHNICAL OR COMMERCIAL CONFIDENTIALITY¹⁰

29. A Party may request that a Document should not be produced, alleging compelling grounds of technical or commercial confidentiality.

30. In case an objection under O4 is raised, the requested Party must (at the time it delivers the non-contested Documents) choose between one of the following options:

- to deliver to the requesting Party a Privilege Log, drafted in accordance with Annex II, identifying the Documents affected, or
- to deliver to the counterparty the requested Documents with the confidential information redacted, or
- to request a reasonable confidentiality undertaking from the counterparty.

31. Any discussion regarding the extent and appropriateness of the Privilege Log, of the redaction or of the confidentiality undertaking will be settled by the Tribunal.

3.5 “O5”: SPECIAL POLITICAL OR INSTITUTIONAL SENSITIVITY¹¹

32. A Party may request that a Document should not be produced, alleging compelling grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution).

33. In case an objection under O5 is raised, the requested Party must (at the time it delivers the non-contested Documents) choose between one of the following options:

- to deliver to the requesting Party a Privilege Log, drafted in accordance with Annex II, identifying the Documents affected, or

⁸ Art. 9.2 (c) IBA Rules.

⁹ Art. 9.2 (d) IBA Rules.

¹⁰ Art. 9.2 (e) IBA Rules.

¹¹ Art. 9.2 (f) IBA Rules.

- to deliver to the counterparty the requested Documents with the confidential information redacted, or
 - to request a reasonable confidentiality undertaking from the counterparty.
34. Any discussion regarding the extent and appropriateness of the Privilege Log, of the redaction or of the confidentiality undertaking will be settled by the Tribunal.

3.6 “O6”: PRODUCTION WOULD AFFECT THE FAIRNESS OR EQUALITY OF THE PROCEDURE¹²

35. Documents will not be ordered to be produced when the Tribunal finds considerations of procedural economy, proportionality, fairness or equality of the Parties that it determines to be compelling.

4. PROCEDURE

4.1 DPS RESPONSE

36. On the date identified in the Procedural Calendar, each Party shall return directly to the Secretary of the Tribunal, for simultaneous release to the Parties upon receipt from both Parties or, at latest, the next business day, the initial DPS, indicating which requests the Party will voluntarily comply with, and which requests it rejects [**“DPS Response”**],
- arguing that such requests do not meet any or some of the Requirements R1 through R3; or
 - raising one or more of the Objections O1 through O6.

37. On the next business day, each Party shall produce all **“Non-Contested Documents”** which have been requested. Non-Contested Documents shall only be delivered to the requesting Party, without copying the Tribunal members, the Secretary of the Tribunal or the Assistant to the Tribunal. The requesting Party may marshal any of these Non-Contested Documents as evidence with the following written submissions.

4.2 DPS RESPONSE TO OBJECTIONS

38. On the date identified in Procedural Calendar, the requesting Party shall file a response to the Objections O1 through O6 raised by the counterparty. The requesting Party may withdraw or limit its requests on account of the Objections raised. The requesting Party may additionally object to the extent and appropriateness of the Privilege Log or the redaction of Documents produced by the counterparty.
39. The requesting Party shall formalize its response in the DPS [**“DPS Response to Objections”**].
40. For the avoidance of doubt, the requesting Party shall refrain from replying to the arguments raised by the requested Party regarding Requirements R1 to R3.

¹² Art. 9.2 (g) IBA Rules.

41. On that same date, each Party shall submit its DPS (including its own requests, the objections of the counterparty, its own responses to the objections and the counterparty's Privilege Log) to the Tribunal.

4.3 DECISION ON DPS

42. The Tribunal will endeavour to issue its decision by the date established in the Procedural Calendar. Such decision will be formalized in the requesting Party's DPS.

4.4 PRODUCTION OF REMAINING DOCUMENTS AND AFFIDAVITS

43. Each Party shall produce all "**Contested Documents**", in compliance with the decision adopted by the Tribunal, on the date established in the Procedural Calendar. Contested Documents shall only be delivered to the counterparty, without copying the Tribunal. The receiving Party may marshal any of such Contested Documents as evidence with the following written submissions.

44. On the same date, each Party will deliver to its counterparty and to the Tribunal, the following "**Affidavits**":

- a first Affidavit signed by the chief legal officer of such Party drafted in accordance with Annex III and
- a second Affidavit signed by the head external legal counsel to such Party drafted in accordance with Annex IV.

45. If a Party, without satisfactory explanation, and in contravention of the Tribunal's instructions, fails to produce a Document, the Tribunal may infer that such Document is adverse to the interest of that Party. Likewise, if a Party absent satisfactory explanation fails to deliver any of the Affidavits, the Tribunal will make appropriate inferences.

5. ALLOCATION OF COSTS

46. In its decision on costs, the Tribunal will make a special allocation of costs with regard to the Document production exercise, taking into consideration the reasonableness of requests and Objections, each Party's willingness to produce the Documents under its control and the relative success of each Party.

47. The Parties shall identify separately in their statements of costs those incurred in preparing their DPS Requests and DPS Responses, and those incurred in the search and delivery of requested Documents.

[signed]

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Juan Fernández-Armesto
President of the Tribunal

Date: 14 August 2018