

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Global Telecom Holding S.A.E.

v.

Canada

(ICSID Case No. ARB/16/16)

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

Members of the Tribunal

Prof. Georges Affaki, President of the Tribunal

Prof. Gary Born, Arbitrator

Prof. Vaughan Lowe, Arbitrator

Secretary of the Tribunal

Ms. Frauke Nitschke

1 June 2018

I. PROCEDURAL BACKGROUND

1. On 13 June 2017, the Tribunal issued Procedural Order No. 1, which sets forth the procedural rules governing this arbitration. The Procedural Timetable was attached as Annex A of Procedural Order No. 1 and set out a schedule for the document production phase of the proceeding.
2. In accordance with Section 15.1 of Procedural Order No. 1 and the Procedural Timetable, on 28 March 2018, each Party served on the other Party a request for the production of documents. Subsequently, each Party set forth its objections to the other Party's requests for documents.
3. On 2 May 2018, the Parties informed the Tribunal that they were in the process of discussing their document requests with a view to reaching agreement on additional points. The Parties jointly requested that the deadline to submit the document request schedules to the Tribunal be extended by ten days.
4. On 3 May 2018, the Tribunal confirmed the Parties' agreed extension. The Tribunal also informed the Parties that the date for the Tribunal's decision on document production would need to be extended, but that all other dates on the Procedural Timetable would be maintained.
5. On 14 May 2018, each Party submitted its document production schedule to the Tribunal.¹ Canada also submitted a cover letter and supporting documentation (Tabs 1-3).
6. On the following day, the Claimant submitted a further, unsolicited response to the Respondent's document requests. One of the Claimant's complaints was that the Respondent had failed to record all the concessions offered by the Claimant. The Claimant

¹ The Tribunal notes that the Claimant submitted its document requests in the form of a schedule with horizontal rows (Stern Schedule), as required by Section 15.2 and Annex B of Procedural Order No. 1. The Respondent, however, did not comply with Procedural Order No. 1 and filed a schedule with vertical rows, making the Tribunal's review of the Respondent's requests more cumbersome.

submitted a redline version of the Respondent's schedule to note such concessions (in the column reserved for the Tribunal's decision).

7. On 16 May 2018, the Respondent submitted an unsolicited reply to the Claimant's message of 15 May 2018.
8. In reaching its decisions on the Parties' document requests, the Tribunal has considered all the Parties' submissions. With regard to the Claimant's unsolicited communication of 15 May 2018, the Tribunal notes that Procedural Order No. 1 provides a procedure by which a Party may apply for leave to file an unscheduled submission or evidence (see Section 16.5), and that this procedure was not followed. The Respondent, in turn, filed its response of 16 May 2018 without first seeking leave from the Tribunal. Therefore, each Party has benefited from an equal opportunity to express its position on the Respondent's document requests, and this Order takes as basis both the Respondent's schedule and the Parties' subsequent comments. Nevertheless, the Tribunal underscores that it expects strict compliance with its procedural orders in the future.

II. APPLICABLE STANDARDS AND ANALYSIS

9. This arbitration is governed by (a) the ICSID Convention, (b) the ICSID Arbitration Rules, and (c) the Tribunal's procedural orders.
10. Under the ICSID Convention and the Arbitration Rules, the Parties and the Tribunal have significant freedom to determine the applicable procedure, including with respect to the production of documents.
11. The Parties agreed to a procedure for the production of documents in Section 15 of Procedural Order No. 1. In addition, Section 1.4 of Procedural Order No. 1 states as follows:

The Tribunal may seek guidance from, but shall not be bound by, the 2010 IBA Rules on the Taking of Evidence in International Arbitration, in particular with respect to:

(a) the exchange of documents (Article 3 of the IBA Rules, except that the confidentiality of documents shall be governed by a Confidentiality Order to be agreed by the parties);

[...]

(d) The admissibility and assessment of evidence (Article 9 of the IBA Rules).

12. Thus, in reaching the decisions contained in this Order, the Tribunal has considered, where appropriate, Article 9.2 of the IBA Rules on the Taking of Evidence in International Arbitration, which provides:

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.

13. Applying these standards, the Tribunal has deliberated and decided on each contested request as stated in the schedules that are attached as Annex A (the Claimant's Request for Documents) and Annex B (the Respondent's Request for Documents).

14. For the avoidance of doubt, the Tribunal confirms that it is not ordering the production of any document subject to legal privilege. In addition, the Tribunal notes that paragraphs 4

to 6 of the Confidentiality Order apply to documents produced in accordance with this Order.

III. DECISION

15. The Tribunal holds as follows:

- a. The Tribunal decides on each document production request as stated in the last column of Annex A and Annex B. These Annexes form an integral part of the present Order.
- b. In accordance with the Procedural Timetable (as revised), each Party shall produce all documents ordered to be produced by 17 July 2018. If such documents become available sooner, the Parties shall produce them on a rolling basis beginning on 15 June 2018.
- c. The documents produced shall not be communicated to the Tribunal at this stage and shall not be considered part of the record, unless and until one of the Parties submits them as exhibits to a submission.

On behalf of the Tribunal,

[signed]

Prof. Georges Affaki
President of the Tribunal
Date: 1 June 2018