

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ESPÍRITU SANTO HOLDINGS, LP AND L1BRE HOLDING, LLC
Claimants

v.

UNITED MEXICAN STATES
Respondent

(ICSID Case No. ARB/20/13)

PROCEDURAL ORDER NO. 9

Members of the Tribunal

Mr. Eduardo Zuleta, President of the Tribunal

Mr. Charles Poncet, Arbitrator

Mr. Raúl Emilio Vinuesa, Arbitrator

Secretary of the Tribunal

Ms. Elisa Méndez Bräutigam

November 15, 2022

I. INTRODUCTION

1. On July 22, 2022, the Parties submitted their completed Redfern Schedules to the Tribunal.
2. On August 4, 2022, the Tribunal rendered Procedural Order No. 4 concerning the Parties' respective objections to their requests for production of documents.
3. On October 24, 2022, the Claimants filed a motion to compel production of documents together with Exhibits 1 through 4 (the "**Motion**").
4. On October 25, 2022, the Tribunal invited the Respondent to comment on the Motion by October 28.
5. On October 28, 2022, the Respondent submitted its Response on the Motion together with Annexes 1 through 4.
6. On October 31, 2022, the Claimants sought leave to reply to the Respondent's response by November 2 (the "**Reply on the Motion**"). On the same day, the Tribunal granted the Claimants' request and invited the Respondent to submit a response by November 5 (the "**Rejoinder on the Motion**").
7. On November 2, 2022, the Claimants filed their Reply on the Motion and on November 5 the Respondent filed its Rejoinder on the Motion.

II. THE PARTIES' POSITIONS

A. THE CLAIMANTS' POSITION

8. The Claimants request that the Tribunal order the Respondent to produce the complete files relating to the Concession which are responsive to the Claimants' Document Request No. 1, as ordered by the Tribunal in Procedural Order No. 4, including "*all documents maintained by any and all SEMOVI administrative units, the complete file related to the Concession kept by the Dirección General del Servicio*

de Transporte Público Individual, the Dirección de Normatividad y Regulación de la Movilidad, and the “Órgano de Control Interno” (and any other relevant SEMOVI unit).¹ In their Reply on the Motion, the Claimants further request that the Tribunal reconsider its ruling on their Document Request No. 5 and order Mexico to produce all documents relating to the Concession in the possession, custody or control of the Órgano Interno de Control (“OIC”) in the Secretaría de Movilidad de la Ciudad de México (“SEMOVI”).²

9. The Claimants recall that in Procedural Order No. 4 the Respondent was ordered to produce “[t]he complete file or docket naming Lusad as a party from 2016 to 2018, as contained in the electronic and/or hard copy archives of the following entities: (i) the Secretaría del Medio Ambiente; (ii) the Secretaría de Desarrollo Económico; (iii) Semovi; (iv) Jefe de Gobierno de la Ciudad de Mexico, CDMX; and (v) the Secretaría de Economía.”³
10. According to the Claimants, the Respondent’s production responsive to their Document Request No. 1 is incomplete because Mexico only produced the formal file (*expediente*) relating to the Concession from one administrative unit within SEMOVI, the *Dirección General de Licencias y Operación del Transporte Vehicular* (“DGLyOTV”).⁴
11. The Claimants contend that the Respondent has filed various exhibits that evidence the incompleteness of its production because (i) they appear to be of a Concession file not included in the Respondent’s production, and (ii) they differ from the

¹ The Claimants’ Motion, October 24, 2022, pp. 1, 5; *see also* the Claimants’ Reply on the Motion, November 2, 2022, p. 2.

² The Claimants’ Reply on the Motion, November 2, 2022, p. 2.

³ The Claimants’ Motion, October 24, 2022, p. 1 *citing to* Procedural Order No. 4, Annex A - “Claimants’ Redfern Schedule.”

⁴ The Claimants’ Motion, October 24, 2022, p. 1.

documents the Respondent produced in response to their Document Request No. 1, which suggests that multiple versions and/or different Concession files exist.⁵

12. The Claimants submit that in *inter partes* correspondence the Respondent acknowledged that there does not exist a single *expediente* on the Concession within SEMOVI, that Concession-related documents are kept by multiple administrative units within SEMOVI, and that some of its exhibits were extracted from a Concession file held by the *Dirección General del Servicio de Transporte Público Individual* (“**DGSTPI**”), which the Claimants submit appears to contain at least 509 pages, as well as by the *Dirección de Normatividad y Regulación de la Movilidad*.⁶ The Respondent further confirmed that it had access to the Concession file held by the OIC.⁷ The Claimants contend that the Respondent failed to produce any of these files.⁸
13. In their Reply, the Claimants further posit that in its Response on the Motion Mexico admits that it did not produce documents on the Concession kept by different administrative units within SEMOVI claiming that they allegedly do not form part of the formal *expediente*.⁹ The Claimants submit that Mexico’s current position that there exists a single formal *expediente* is contradicted by its earlier allegations that there are several *expedientes* on the Concession in SEMOVI. According to the Claimants, all of these documents and files are responsive to their Document Request No. 1 and ought to be produced.¹⁰
14. Finally, the Claimants contend that “Mexico now tries to hide behind the Tribunal’s denial of Claimants’ Request No. 5” by claiming that some of its exhibits were taken from the OIC files which their Document Request No. 5 relates to.¹¹ The Claimants

⁵ The Claimants’ Motion, October 24, 2022, pp. 2-4.

⁶ The Claimants’ Motion, October 24, 2022, p. 4; the Claimants’ Reply on the Motion, November 2, 2022, p. 1.

⁷ The Claimants’ Motion, October 24, 2022, p. 5.

⁸ The Claimants’ Motion, October 24, 2022, p. 4.

⁹ The Claimants’ Reply on the Motion, November 2, 2022, p. 1.

¹⁰ *Id.*

¹¹ The Claimants’ Reply on the Motion, November 2, 2022, p. 2.

submit that in earlier correspondence Mexico had represented that these exhibits were not from the OIC but taken from a file kept by the DGSTPI. According to the Claimants, “Mexico must live with the prior representations it has made” and produce these documents.¹²

15. Further, the Claimants note that their Document Request No. 5 was dismissed because the Tribunal was not convinced of the relevance of the documents sought. Their relevance is now established, they say, given that the Respondent relies on OIC documents in support of its arguments and because their existence refutes Mexico’s contention as to the authenticity of several documents submitted by the Claimants as exhibits.¹³

B. THE RESPONDENT’S POSITION

16. The Respondent requests the Tribunal to dismiss the Claimants’ Motion and submits that it has produced the complete Concession file responsive to the Claimants’ Document Request No. 1 in accordance with Procedural Order No. 4.¹⁴ In its Rejoinder, the Respondent further requests that the Tribunal dismisses the Claimants’ request for reconsideration of the Tribunal’s ruling on their Document Request No. 5.¹⁵
17. The *expediente* on the Concession it produced, the Respondent says, is the file kept by the DGLyOTV.¹⁶ The Respondent submits that this administrative unit within SEMOVI is in charge of issuing concessions relating to taxi services in Mexico City, such as the Lusad Concession, and the only one entitled to keep a Concession file.¹⁷ This does not mean, however, that other administrative units within SEMOVI do not

¹² The Claimants’ Reply on the Motion, November 2, 2022, p. 2.

¹³ *Id.*

¹⁴ The Respondent’s Response on the Motion, October 28, 2022, pp. 1, 5; the Respondent’s Rejoinder on the Motion, November 5, 2022, p. 3.

¹⁵ The Respondent’s Rejoinder on the Motion, November 5, 2022, p. 3.

¹⁶ The Respondent’s Response on the Motion, October 28, 2022, pp. 2, 4-5.

¹⁷ The Respondent’s Response on the Motion, October 28, 2022, pp. 1-2; The Respondent’s Rejoinder on the Motion, November 5, 2022, p. 1.

receive and/or maintain documents relating to the Concession, even though they do not keep a formal *expediente*.¹⁸

18. The Respondent contends that the exhibits it submitted were not “cherry-picked” from an exclusive file on the Concession, different from the one it already produced, but rather stem from files on general correspondence kept by SEMOVI.¹⁹ In this regard, the Respondent submits that it has not refused to produce documents located in these files of general correspondence and has indeed produced them where relevant.²⁰
19. As to Concession-related documents held by the DGSTPI, the Respondent contends that, as part of a reorganization in 2019, the DGLTyOTV took over the DGSTPI’s functions, and, thus, should be considered the same administrative unit. According to the Respondent, it is precisely the Concession file from the DGLTyOTV (formerly the DGSTPI) that it has already produced.²¹
20. Finally, the Respondent submits that two of the exhibits the Claimants rely on to infer the existence of a 509-page file on the Concession were documents from the OIC. According to the Respondent, the OIC is a regulatory unit which is in charge of supervising SEMOVI’s actions and which is independent from SEMOVI. The Respondent points out that the Claimants had requested OIC documents under their Document Request No. 5, which the Tribunal dismissed in Procedural Order No. 4. Therefore, the Respondent is under no obligation to produce Concession-related documents held by the OIC.²²
21. As to the Claimants’ request for reconsideration of the Tribunal’s ruling on their Document Request No. 5, the Respondent submits that the Claimants should not be

¹⁸ The Respondent’s Response on the Motion, October 28, 2022, p. 2.

¹⁹ The Respondent’s Response on the Motion, October 28, 2022, p. 3.

²⁰ The Respondent’s Rejoinder on the Motion, November 5, 2022, p. 2.

²¹ The Respondent’s Rejoinder on the Motion, November 5, 2022, pp. 1-2.

²² The Respondent’s Response on the Motion, October 28, 2022, p. 3.

entitled to rely on documents that were produced to make allegations they failed to make at the appropriate procedural time.²³

III. CONSIDERATIONS

22. In Procedural Order No. 4 the Tribunal partially granted Document Request No. 1 of the Claimants' Redfern Schedule and ordered the Respondent to produce "[t]he complete file or docket naming Lusad as a party from 2016 to 2018, as contained in the electronic and/or hard copy archives of the following entities: (i) the Secretaría del Medio Ambiente; (ii) the Secretaría de Desarrollo Económico; (iii) Semovi; (iv) Jefe de Gobierno de la Ciudad de Mexico, CDMX; and (v) the Secretaría de Economía."²⁴
23. The Respondent contends that there is only one file or docket (*expediente*) of the Concession that is kept by the DGLyOTV, an administrative unit within SEMOVI which is in charge of issuing concessions relating to taxi services in Mexico City, such as the Lusad Concession. Even though other entities may have correspondence related to the Concession, DGLyOTV is the only one entitled to keep a Concession file. This does not mean, however, that other administrative units within SEMOVI do not receive and/or maintain documents relating to the Concession, even though they do not keep a formal *expediente*.²⁵ The file kept by DGLyOTV has been submitted by the Respondent in response to the Tribunal's order of production.
24. While the Tribunal sees no need to duplicate the production of identical documents, files or dockets merely because they may be held by different entities, given the restructuring of entities alleged by the Respondent and the issues resulting from such restructuring in connection with document production, the Tribunal needs to be certain that all necessary steps have been taken to comply with its order of production

²³ The Respondent's Rejoinder on the Motion, November 5, 2022, p. 4.

²⁴ The Claimants' Motion, October 24, 2022, p. 1 *citing to* Procedural Order No. 4, Annex A - "Claimants' Redfern Schedule."

²⁵ The Respondent's Response on the Motion, October 28, 2022, p. 2.

contained in Procedural Order No. 4, and particularly with respect to the decision related to the Document Request No. 1 of the Claimants' Redfern Schedule.

25. With respect to the request for reconsideration of the Tribunal's decision related to documents under the Claimants' Document Request No. 5, the Tribunal finds no valid reason at this time to reopen the allegations and requests on document production.

IV. DECISION

26. Based on the aforementioned considerations the Tribunal:
- a. Orders the Respondent to confirm on or before **November 29, 2022** that it has undertaken a search in good faith of the documents referred to under paragraph 22 above and that the only "*complete file or docket naming Lusak as a party from 2016 to 2018*" is the one kept by DGLyOTV, an administrative unit within SEMOVI.
 - b. Denies the Claimants' request to reconsider the Tribunal's decision related to their Document Request No. 5 of the Claimants' Redfern Schedule.

[Signed]

Eduardo Zuleta Jaramillo
President of the Tribunal
Date: November 15, 2022