

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ESPÍRITU SANTO HOLDINGS, LP AND LIBRE HOLDING, LLC
Claimants

v.

UNITED MEXICAN STATES
Respondent

(ICSID Case No. ARB/20/13)

PROCEDURAL ORDER NO. 15

Members of the Tribunal

Mr. Eduardo Zuleta Jaramillo, President of the Tribunal

Mr. Charles Poncet, Arbitrator

Mr. Raúl Emilio Vinuesa, Arbitrator

Secretary of the Tribunal

Ms. Elisa Méndez Bräutigam

7 June 2024

I. INTRODUCTION

1. From 8 to 12 April 2024, the Tribunal held the Hearing on Jurisdiction and Merits in this arbitration at ICSID's facilities in Washington D.C. (the "**Hearing**").
2. There are two pending matters arising from the Hearing, which the Tribunal addresses in this Procedural Order: (i) the Respondent's request to add new documents to the record, and (ii) the Tribunal's questions on issues discussed during the Hearing.

II. BACKGROUND

3. During the Hearing, on 10 April 2024,¹ the Respondent requested the Tribunal to admit 53 new documents into the case file. These documents are 53 certificates that were allegedly part of the Semovi file produced by the Respondent during the document production phase, in response to the Claimants' document request No. 1. The Claimants submitted what they consider to be the Semovi file with their Reply as exhibit C-168, which did not include the 53 certificates the Respondent now wishes to add to the record.
4. At the Hearing, the Tribunal instructed the Parties to confer regarding the Respondent's request but, after several exchanges, they were unable to agree on a resolution.
5. Consequently, on 8 May 2024, the Respondent formally submitted an application to add the 53 certificates to the case file pursuant to Section 16.3 of Procedural Order No. 1, together with an index listing the 53 certificates (the "**Additional Documents Request**").
6. On 17 May 2024, the Claimants filed their response to the Additional Documents Request, together with Annex A.
7. On 17 April and 17 May 2024, the Tribunal fixed 2 and 3 October 2024 as the dates for the hearing on closing submissions (the "**Closing Hearing**"). The Tribunal also announced that it would send to the Parties a list of questions on several issues debated at the Hearing for the Parties to discuss during the Closing Hearing.

III. POSITION OF THE PARTIES ON THE ADDITIONAL DOCUMENTS REQUEST

(1) Respondent's position

8. According to the Respondent, the Semovi file was not submitted by the Claimants as the Respondent produced it because the 53 certificates are missing from exhibit C-168.² The Respondent explains that the 53 missing documents are certificates issued by Semovi

¹ Tr. Hearing Day 3, 881 (ES).

² Respondent's Additional Documents Request, 10 May 2024, p. 1.

officials to attest that 53 documents found in the Semovi file sent to Mexico City's General Prosecutor's office in 2019 were faithful copies of the originals that remained at Semovi.³

9. The Respondent claims that it noticed that the documents were missing when it reviewed exhibit C-168 in light of the Claimants' allegations at the Hearing that the Respondent had manipulated the Semovi file.⁴ The Respondent notes that there is at least one certificate that the Claimants did not remove from the Semovi file when submitting it as exhibit C-168, demonstrating that the other 53 certificates were removed.⁵
10. The Respondent submits that this is a special circumstance insofar as the Respondent aims to rely on the 53 certificates in response to the Claimants' allegations made at the Hearing that the Semovi file had been manipulated, and there is therefore no other procedural opportunity to submit them. Also, in the Respondent's view, the 53 certificates are documents relevant and material to the outcome of the case.⁶

(2) Claimants' position

11. On 17 May 2024, the Claimants filed their response opposing the Additional Documents Request. The Claimants contend that they did not alter the Semovi file, and that they submitted it as exhibit C-168 as produced by the Respondent. According to the Claimants, the 53 certificates are documents that, despite being produced at the same time as the Semovi file, were not described as forming part of the Semovi file but rather "commented" on the Semovi file.⁷
12. The Claimants argue that the Respondent confirmed at all times that the Semovi file was comprised of only "455 pages" which is exactly the number of pages found in exhibit C-168, and that the Respondent never objected to the completeness of exhibit C-168.⁸ In this sense, the 53 certificates are not part of the Semovi file because they are unpaginated documents, and they were issued in 2019, after the relevant period of the Semovi file (i.e., 2016-2018).⁹
13. The Claimants further argue that the 53 certificates are irrelevant because they do not confirm the authenticity of the documents they certify, or whether any documents were removed from the Semovi file before it was produced to the Claimants. In addition, the

³ Respondent's Additional Documents Request, 10 May 2024, p. 2, ¶ 3.

⁴ Respondent's Additional Documents Request, 10 May 2024, p. 1.

⁵ Respondent's Additional Documents Request, 10 May 2024, p. 1.

⁶ Respondent's Additional Documents Request, 10 May 2024, p. 1.

⁷ Claimants' response, 17 May 2024, pp. 1-2.

⁸ Claimants' response, 17 May 2024, pp. 4-5.

⁹ Claimants' response, 17 May 2024, p. 2.

Claimants contend that the Respondent has had these documents in its possession since 2019 and decided not to introduce them into the record.¹⁰

14. Lastly, the Claimants submit that admitting the 53 certificates into the record at this stage would deprive them of their right to use them for their defense because they no longer can rely on them for the Hearing or cross-examinations. In addition, the Claimants caution that admitting the certificates would delay the proceeding because, given that the certificates attempt to certify that there are certain ink signatures in the Semovi file, the Claimants would need to inspect the originals that were allegedly certified to meaningfully respond to the new evidence.¹¹

IV. TRIBUNAL'S ANALYSIS ON THE ADDITIONAL DOCUMENTS REQUEST

15. It is undisputed that the Additional Documents Request has not been submitted within the procedural opportunities to present evidence envisaged in the procedural timetable. The Parties disagree on whether the Additional Documents Request is admissible at this stage of the proceeding.
16. Section 16.3 of Procedural Order No. 1 provides that “16.3. *Neither party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that special circumstances exist based on a reasoned written request followed by observations from the other party. 16.3.1. Should a party request leave to file additional or responsive documents, that party may not annex the documents that it seeks to file to its request. 16.3.2. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other party is afforded sufficient opportunity to make its observations concerning such a document.*”
17. The Tribunal must determine whether a “special circumstance” exists to justify the admission of the 53 certificates into the record. Procedural Order No. 1 does not define which situations can amount to a “special circumstance” justifying the introduction of new evidence outside the regular procedural opportunities granted to each Party. In the absence of such definition, the Tribunal finds in the IBA Rules and its Commentary a valuable guidance. The Commentary on the IBA Rules states that “*further Considerations of efficiency and good faith weigh in favour of giving a party a single opportunity to present its arguments and allowing additional opportunities only when it was not possible to make those arguments at the time.*”¹²

¹⁰ Claimants' response, 17 May 2024, p. 5.

¹¹ Claimants' response, 17 May 2024, pp. 5-6.

¹² Commentary on the 2010 IBA Rules on the Taking of Evidence in International Arbitration, p. 20.

18. The Tribunal observes that, at the Hearing, a disagreement emerged between the Parties as to whether the Claimants submitted an altered version of the Semovi file as exhibit C-168. The core of this disagreement is whether the 53 certificates can be deemed part of the Semovi file produced by the Respondent, and therefore, if the Claimants presented an incomplete or altered version of the file by excluding such documents from exhibit C-168.
19. While the Claimants are right in that the Respondent had access to the 53 certificates from the outset of this arbitration, and chose not to submit them, and that it has had exhibit C-168 since the filing of the Reply, it is also true that these documents are not new or unknown to either Party, given that they have also been available to the Claimants since the document production phase. Also, these documents do not seem to add facts that are entirely new or unknown to either Party.
20. In this sense, while the Respondent has had sufficient procedural opportunities to submit the 53 certificates, the Tribunal observes that these documents may be relevant at this stage where the Parties have a clear disagreement, that was evident during the Hearing, as to the interpretation of what should be understood by the “Semovi file” and what documents it comprises. This disagreement, in turn, appears to bear some relation to the issue of completeness and/or authenticity of the documents submitted in this arbitration, which has been highly debated by both Parties.
21. Considering the foregoing, the Tribunal finds that, in the balance of probabilities, denying the introduction of the 53 certificates into the record would cause more prejudice than admitting them considering that they may be a relevant element for the Tribunal to assess highly-debated evidentiary matters in this arbitration.
22. Lastly, despite their late submission, the Tribunal observes that the Parties still have a reasonable timeframe to submit their views on the 53 certificates in writing and further discuss them at the Closing Hearing to be held from 2 to 3 October 2024.

V. THE TRIBUNAL’S QUESTIONS

23. As announced during the Hearing and on 17 April 2024, the Tribunal hereby conveys its questions on certain issues discussed at the Hearing. The Parties are invited to address these questions at the Closing Hearing:

(1) Questions on the process to obtain a concession under Mexican laws

1. Under Mexican law and practice:
 - a. Is it allowed for only one of the potential concessionaires to meet with the governmental authority in charge of the concession award process?

- b. If so, to what extent can the terms of a concession and a declaration of necessity be discussed with only one of the potential concessionaires?
2. When and by whom was contact initiated between Lusad and the Secretary of Economy or any other authority with decision-making powers in light of a future concession?
3. What is the chronology and who were the attendees of meetings held before the issuance of the Declaration of Necessity for the Substitution, Installation, and Maintenance of Taximeters for Individual Public Transport Service (Taxi) of Mexico City, formally published in Official Gazette No. 82 of 30 May 2016 (“**Declaration of Necessity**”)?
 - a. Refer to any notes taken during these meetings (if already on the file). If there are none, please explain why.
4. During the Hearing, it was stated that under Mexican law, and in the case of the Declaration of Necessity, applicants for a concession could meet certain technical requirements by showing that they were in process and that they were going to be obtained at a later stage:¹³
 - a. If so, was this an element taken into account when assessing the applications of the other applicants for a concession?
 - b. Why were the other applicants disqualified?
5. When were the Null Data¹⁴ and the instrument certification requirements (Taximeter certificate by the Secretary of Economy)¹⁵ first announced to applicants?
6. What are the requirements and the time-frame to obtain the certification of the measuring instrument (taximeter) by the Secretary of Economy?
7. Is there a minimum or maximum time that must elapse under Mexican law between the declaration of necessity, the granting of the concession, and the signing of the title?
8. What is the nature of the service that was intended to be provided under the Concession? A “public service” and a “concessionable” service under the Patrimonial Regime Law? A “public transport” service under the Mobility Law? A complimentary service?
9. What effect, if any, does the Foreign Investment Law (exhibit R-229), in general, and Article 6 of the Foreign Investment Law, in particular, have on this arbitration?

¹³ Tr. Hearing Day 2, 407: 8-19, Mr. Muñana’s examination (ES); Tr. Hearing Day 2, 356: 11-19, Mr. Muñana’s examination (ENG).

¹⁴ Tr. Hearing Day 2, 455: 9-20, Mr. Zayas’ examination (ES); Tr. Hearing Day 2, 386: 8-15, Mr. Zayas’ examination (ENG).

¹⁵ Tr. Hearing Day 2, 450–451, 522, Mr. Zayas’ examination (ES); Tr. Hearing Day 2, 383-384, Mr. Zayas’ examination (ENG).

(2) Questions on graphoscopy

10. Do the signatures on the reference documents FEBS-0017 to FEBS-0046 used in the Armenta-Bartolo Report comply with the homogeneity element?
11. Considering that the experts of both Parties, Messrs. Bartolo and Corral, seem to agree that a person does not always sign in the exact same way, how can compliance with the homogeneity element be assessed, and how can this element be measured?
 - a. Is there a minimum sample of documents needed to analyze homogeneity?
 - b. Is there a minimum percentage of homogeneity that must be found in the sample?
 - c. Which aspect is given prevalence to assess the degree of compliance with the homogeneity element, the size of the sample, or the percentage of homogeneity within the sample?
12. Does the fact that some documents do not comply with the homogeneity element imply that they are not unquestionable or indubitable?
 - a. Can reference documents be indubitable, but not comply with the homogeneity element?
 - b. In general terms, can a comparative graphoscopy examination be made between questioned documents and reference documents that are indubitable, but not homogeneous?
13. Mr. Bartolo asserts that if two signatures are identical, it necessarily means that one of them has been forged:¹⁶
 - a. If the signatures in FEBS-0014 and FEBS-0015 are identical, why is it concluded that both and not only one of them is forged?
 - b. In the reference documents (identified with the prefix FEBS) are there any other identical signatures?
14. Mr. Bartolo states that he did not attempt to obtain in-person signatures from the authors of the questioned documents, because, in his opinion, he had “sufficient and suitable” documents to make the comparison and the analysis.¹⁷

¹⁶ Tr. Hearing Day 4, 1097: 20-22, Mr. Bartolo’s examination (ENG).

¹⁷ Tr. Hearing Day 4, 1111: 16-17, Mr. Bartolo’s examination (ENG).

- a. Question for Mr. Bartolo and the Respondent: If the reference documents were being questioned by the Claimants' expert, why didn't Mr. Bartolo try to obtain the signatures of the relevant officials?

15. In the selection of the reference documents used by Mr. Bartolo:

- a. Question for Mr. Bartolo and the Respondent: Was the expert given free access to consult Semovi's files or was there a pre-selection by Mexico or Semovi, and if so, what did such pre-selection consist of?¹⁸

(3) Question on Mr. Zayas' Examination

16. During the Hearing, when asked whether he had pursued any action or initiated any proceeding against Semovi officials when he was allegedly "deceived to sign documents in November 2018",¹⁹ Mr. Zayas held that "our company, Lusad, provided complaints, criminal complaints for all this, brought criminal complaints for all these cases on 7 November 2018".²⁰

17. Which documents can support this affirmation and what developments, if any, have taken place after Lusad's "criminal complaint"?

¹⁸ Tr. Hearing Day 4, 1119-1120, Mr. Bartolo's examination (ENG).

¹⁹ Tr. Hearing Day 2, 491:2-5, Mr. Zayas' examination (ES); Tr. Hearing Day 2, 410:8-11, Mr. Zayas' examination (ENG).

²⁰ Tr. Hearing Day 2, 491:12-14, Mr. Zayas' examination (ES); Tr. Hearing Day 2, 410:15-16, Mr. Zayas' examination (ENG).

VI. DECISION

24. For the reasons indicated above, the Tribunal:
1. Grants the Respondent's request to add to the record the 53 certificates identified in the index accompanying its Additional Documents Request.
 2. Orders the Respondent to submit the 53 certificates to the Tribunal, the ICSID Secretariat, and the Claimants, by no later than **14 June 2024**.
 3. Grants leave to both Parties to simultaneously provide any comments they may have on the 53 certificates, including, to comment on whether they have an effect, if any, on the outcome of this case, by no later than **10 July 2024**. After these submissions, the Parties are invited to comment on the 53 certificates and the other Party's submission on the 53 certificates at the Closing Hearing.
 4. Invites the Parties to provide their answers and comments on the Tribunal's questions in **Section V** of this Procedural Order during the Closing Hearing.
 5. Defers the decision on costs to a later stage of the proceeding.

For and on behalf of the Tribunal,

[Signed]

Mr. Eduardo Zuleta Jaramillo
President of the Tribunal
Date: 7 June 2024