

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

ENCAVIS AND OTHERS

v.

ITALIAN REPUBLIC

ICSID Case No. ARB/20/39

**PROCEDURAL ORDER NO. 2
(on Document Production)**

Members of the Tribunal

Prof. Juan Fernández-Armesto, President of the Tribunal
Ms. Wendy Miles QC, Arbitrator
Mr. Alexis Mourre, Arbitrator

Secretary of the Tribunal

Ms. Ella Rosenberg

Assistant to the Tribunal

Ms. Alba Briones

May 21, 2021

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WHEREAS

1. This arbitration arises between Claimants¹, and Respondent, the Italian Republic [collectively, the “**Parties**”].
2. On May 21, 2021, the Arbitral Tribunal issued Procedural Order No. 1 [“**PO No. 1**”].
3. Paragraph 16.2 of PO No. 1 provides that, after consulting the Parties, the Tribunal shall issue a procedural order with specific instructions for document production.
4. On April 15, 2021 the Tribunal circulated a draft Procedural Order No. 2, on document production, seeking the Parties’ comments. The Parties submitted their comments on May 19, 2021.
5. The following Procedural Order sets out the Tribunal’s decisions after consultation with the Parties.

¹ (1) Alameda S.r.l.; (2) Casette S.r.l.; (3) Vallone S.r.l.; (4) MTS 4 S.r.l.; (5) Notaresco Solar S.r.l.; (6) Oetzi S.r.l.; (7) Solar Energy S.r.l.; (8) Sant’Omero Solar S.r.l.; (9) Fano Solar 1 S.r.l.; (10) Fano Solar 2 S.r.l.; (11) Centrale Fotovoltaica Santa Maria in Piana S.r.l.; (12) GE.FIN Energy Oria Division S.r.l.; (13) Centrale Fotovoltaica Camporota S.r.l.; (14) Centrale Fotovoltaica Treia 1 S.a.s. di Progetto Marche S.r.l.; (15) Piemonte Eguzki 2 S.r.l.; (16) Piemonte Eguzki 6 S.r.l.; (17) Ribaforada 3 S.r.l.; (18) Ribaforada 7 S.r.l.; (19) SP 07 S.r.l.; (20) SP 09 S.r.l.; (21) SP 10 S.r.l.; (22) SP 11 S.r.l.; (23) SP 13 S.r.l.; (24) SP 14 S.r.l.; (25) De-Stern 15 S.r.l.; (26) De-Stern 1 S.r.l.; (27) De-Stern 4 S.r.l.; (28) Polesine Energy 1 S.r.l. (29) Polesine Energy 2 S.r.l.; (30) Solar Farm FC1 S.r.l. (31) Solar Farm FC3 S.r.l.; (32) DE Stern 10 S.r.l.; (33) La Rocca Energy di CHORUS Solar 3. S.r.l. & Co. S.a.s.; (34) Treponti S.a.s. di CHORUS Solar S.r.l. & Co. S.a.s.; (35) Sun Time Renewable Energy di CHORUS Solar 3. S.r.l. & Co. S.a.s.; (36) Cagli Solar di CHORUS Solar Italia Centrale 5. S.r.l. & Co. S.a.s.; (37) CHORUS Solar Ternavasso Uno 1 S.r.l.; (38) Atlantis Energy di CHORUS Solar Italia Centrale 5. S.r.l. & Co. S.a.s.; (39) CHORUS Solar Nardó S.r.l.; (40) CHORUS Solar Torino Due S.r.l.; (41) Collecchio Energy S.r.l.; (42) CHORUS Solar Casarano S.r.l.; (43) CHORUS Solar Foggia Cinque S.r.l.; (44) CHORUS Solar Ternavasso Due S.r.l.; (45) CHORUS Solar Foggia Due S.r.l.; (46) CHORUS Solar Torino Uno S.r.l.; (47) CHORUS Solar Foggia Nove S.r.l.; (48) Energia & Sviluppo S.r.l.; (49) CHORUS Solar Foggia Otto S.r.l.; (50) Le Lame S.r.l.; (51) CHORUS Solar S.r.l. Foggia Quattro S.r.l.; (52) San Giuliano Energy S.r.l.; (53) CHORUS Solar Foggia Sei S.r.l.; (54) San Martino S.r.l.; (55) CHORUS Solar Foggia Sette S.r.l.; (56) Lux Energy S.r.l.; (57) CHORUS Solar Foggia Tre S.r.l.; (58) CHORUS Solar Matino S.r.l.

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6. The document production phase, if requested by any Party, shall proceed in accordance with the Procedural Timetable attached as Annex A to PO No. 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 a 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. REQUESTS FOR DOCUMENT PRODUCTION

10. The Parties shall submit 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.

11. The Parties are invited to limit the number of Document Requests per Party to 25.

12. Each Party will deliver its DPS directly to the counterparty, without copying the Tribunal.

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

A. “R1”: Identification of each Document or description of a narrow and specific category²

14. If the request is for a particular Document, the description must be in sufficient detail to identify the requested Document.

² Art. 3.3(a)(i) and (ii) IBA Rules.

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15. 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;
 - circumstantial evidence of the putative existence of the category must be marshalled,
 - the name of the person, authority or entity which has issued the category of Documents must be provided, and
 - the initial and the final date of the period during which the Documents belonging to the category were issued must be identified.
16. Any request which does not comply with these requirements shall be rejected *in limine*.
17. In order to assist the Parties, the Tribunal gives some examples of what shall not be considered a narrow and defined category of Documents:

“All documents and any correspondence exchanged internally or externally between the Claimant and any of the entities in its group structure, in relation to the construction of the mine.”

“All documents concerning Respondent’s decision not to renew Claimant’s license, including but not limited to internal emails, correspondence, analysis, memoranda, e-mails, or other reports, produced between 2006 and 2016.”

“Documents establishing the loss of significant future business of Claimant as a result of Law 4563, created between May 2015 and June 2018.”

“All resolutions of the Board of Directors or internal communications between Board members of Claimant or any entity within its group structure, discussing the decision to purchase the shares in Company X, created between January 2016 and January 2018.”

B. “R2”: Relevant and material³

18. The requesting Party must prove that the Documents are relevant to the case and material to its outcome and identify the specific paragraph in the submission for which evidentiary support by way of document production is requested.
19. Any request which does not comply with this requirement shall be rejected *in limine*.

³ Arts. 3.3(b) and 9.2(a) IBA Rules.

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20. 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.

21. It is not for a Party to disprove, by way of document requests directed to the counterparty, allegations for which the counterparty bears the burden of proof, since failure to discharge such burden will by itself lead to dismissal. Production with the purpose of disproving the counterparty's allegations will only be ordered in exceptional circumstances.
22. Any analysis by the Tribunal regarding the relevance and materiality of requested Documents is made *prima facie*, without prejudging any final decision that the Tribunal may adopt once all evidence has been marshalled.

C. “R3”: Not in the possession, custody or control of the requesting Party⁴

23. 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.
24. 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. Similarly, a Document shall be considered to be in possession of the requesting Party if it is already on the record of the arbitration or if it is publicly available (and the counterparty is not in a significantly more favourable position to obtain such a Document).
25. Documents which are located in the premises or under the control of a third party, to which the requested Party has access, shall generally be considered to be in its “possession, custody or control”, unless otherwise proven by the requested Party.

3. OBJECTIONS

26. The IBA Rules provide for a number of objections to the production of Documents. Further to alleging failure to satisfy any of the previously established requirements (R1 to R3), a Party may object to a request for production in the following cases [“O”]⁵:

⁴ Art. 3.3(c)(i) and (ii) IBA Rules.

⁵ Art. 3.5 IBA Rules.

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A. “O1”: Legal or settlement privilege⁶

27. A requested Party may invoke legal privilege with regard to Documents either prepared by or addressed to counsel, containing legal advice, and given or received with the expectation that such Documents would be kept confidential, or communications with third parties prepared for the dominant purpose of litigation (or arbitration).
28. In general, a Document needs to meet the following requirements in order to be granted special protection under legal advice privilege⁷:
- The Document has to be drafted by or addressed to a lawyer acting in his or her capacity as lawyer;
 - A relationship based on trust must exist between the lawyer (in-house or external legal advisor) and the client;
 - The Document has to be elaborated for the purpose of requesting or giving legal advice;
 - The client and the lawyer, when requesting or giving legal advice, must have acted with the expectation that in a contentious situation the advice would be kept confidential.
29. In general, in order to be granted special protection under litigation work product privilege, a Document containing communications with third parties must have come into existence with the dominant purpose of gathering evidence in circumstances where legal proceedings are in existence or in reasonable prospect.
30. A requested Party may also invoke privilege regarding Documents prepared in connection with settlement negotiations⁸, including:
- Oral or written statements submitted to the other party during negotiations;
 - Internal Documents prepared specifically for negotiations; and
 - Drafts or final versions of any settlement agreements.
31. If the requested Party raises an objection under O1 and, if challenged, the Tribunal confirms it, the requested Party shall deliver the requested Documents with the privileged information redacted.
32. In those cases in which the asserted privilege cannot be adequately safeguarded through redaction, the requested Party, instead of delivery, may choose to disclose

⁶ Art. 9.2(b) IBA Rules.

⁷ *Vito G. Gallo v. The Government of Canada*, NAFTA-UNCITRAL, Procedural Order No. 3, April 8, 2009, para. 47.

⁸ Art. 9.3(b) IBA Rules.

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the existence and characteristics of the Document in a “**Privilege Log**”, drafted in accordance with Annex II,

- Identifying in chronological order the date, the issuer (specifying whether he/she is an attorney of the party) and the recipient of the Document,
- Providing a summary description of the Document, plus
- An explanation of the reasons which justify that the Document be withheld in full.

33. Any discussion will be settled by the Tribunal.

B. “O2”: Production is unreasonably burdensome⁹

34. 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.

C. “O3”: Loss, destruction or inexistence¹⁰

35. 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.

36. In such case, the Tribunal shall take note of the requested Party’s declaration. The requesting Party may make the inferences it deems appropriate in its subsequent written submission.

D. “O4”: Technical or commercial confidentiality¹¹

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

38. If the requested Party raises an objection under O4 and, if challenged, the Tribunal confirms it, the requested Party may request a reasonable confidentiality undertaking from the counterparty, to protect the confidentiality of the Documents. Absent such agreement, the requested Party shall deliver the Documents with the confidential information redacted.

39. In those cases in which the confidential information cannot be adequately safeguarded by a confidentiality undertaking or through redaction, the requested

⁹ Art. 9.2(c) IBA Rules.

¹⁰ Art. 9.2(d) IBA Rules.

¹¹ Art. 9.2(e) IBA Rules.

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Party, instead of delivery, may choose to disclose the existence and characteristics of the Document in a Privilege Log, drafted in accordance with Annex II,

- Identifying in chronological order the date, the issuer (specifying whether he/she is an attorney of the party) and the recipient of the Document,
- Providing a summary description of the Document, plus
- An explanation of the reasons which justify that the Document be withheld in full.

40. Any discussion will be settled by the Tribunal.

E. “O5”: Special political or institutional sensitivity¹²

41. 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).

42. If the requested Party raises an objection under O5 and, if challenged, the Tribunal confirms it, the requested Party may request a reasonable confidentiality undertaking from the counterparty, to protect the sensitive information. Absent such agreement, the requested Party shall deliver the Documents with the political or institutionally sensitive information redacted.

43. In those cases in which sensitive information cannot be adequately safeguarded by a confidentiality undertaking or through redaction, the requested Party, instead of delivery, may choose to disclose the existence and characteristics of the Document in a Privilege Log, drafted in accordance with Annex II,

- Identifying in chronological order the date, the issuer (specifying whether he/she is an attorney of the party) and the recipient of the Document,
- Providing a summary description of the Document, plus
- An explanation of the reasons which justify that the Document be withheld in full.

44. Any discussion will be settled by the Tribunal.

¹² Art. 9.2(f) IBA Rules.

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F. “O6”: Production would affect the fairness or equality of the procedure¹³

45. 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

A. DPS Response

46. On the date identified in the Procedural Calendar, each Party shall return directly to the counterparty the initial DPS (without copying the Tribunal), indicating which requests it 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.

B. DPS Response to Objections

47. On the date identified in the 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.

48. The requesting Party shall formalize its response in the DPS [**“DPS Response to Objections”**].

49. 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.

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

51. When submitting the DPS to the Tribunal, the Parties are kindly requested to refrain from making additional submissions. The Parties are expected to strictly adhere to the rules set out in the present Procedural Order.

C. Delivery of Non-Contested Documents

52. On the same date, each requested Party shall produce all documents which it has voluntarily accepted to deliver [the **“Non-Contested Documents”**]. Non-Contested Documents shall only be delivered to the requesting Party, without

¹³ Art. 9.2(g) IBA Rules.

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copying the Tribunal. The requesting Party may marshal any of these Non-Contested Documents as evidence with their subsequent written submissions.

53. The requested Party should not deliver at this stage Documents for which it has raised an Objection; such Documents shall only be delivered (or a Privilege Log submitted) once the Tribunal has issued its decision.

D. Decision on DPS

54. 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.

E. Production of Contested Documents or Privilege Log

55. 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 subsequent written submissions.

56. The same rule shall apply if the requested Party has raised, and the Tribunal has accepted, Objections O4 or O5 with regard to certain Documents, and the Parties have reached a confidentiality agreement.

57. Absent such agreement, or if Objection O1 has been pleaded and accepted, the requested Party shall deliver the Documents with the privileged information redacted.

58. In those cases in which the privileged information cannot be adequately safeguarded through redaction, the requested Party shall produce to the counterparty (without copying the Tribunal) a Privilege Log, drafted in accordance with Annex II,

- Identifying in chronological order the date, the issuer (specifying whether he/she is an attorney of the party) and the recipient of the Document,
- Providing a summary description of the Document, plus
- An explanation of the reasons which justify that the Document be withheld in full.

F. Delivery of Affidavits

59. 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

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- A second Affidavit signed by the head external legal counsel to such Party drafted in accordance with Annex IV.
60. 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

61. 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 the Requests and Objections, each Party's willingness to produce the Documents under its control and the relative success of each Party.
62. Parties shall identify separately in their statements of costs, the costs incurred in preparing their DPS Requests and DPS Responses, and the costs incurred in the search and delivery of the requested Documents.

[signed]

Prof. Juan Fernández-Armesto
President of the Tribunal
Date: May 21, 2021