

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

BA Desarrollos LLC

v.

Argentine Republic

(ICSID Case No. ARB/23/32)

PROCEDURAL ORDER No. 5
(Lifting of Redactions to the [REDACTED])

Members of the Tribunal

Ms. Deva Villanúa, President of the Tribunal
Mr. Stephen L. Drymer, Arbitrator
Mr. Luis Alberto González García, Arbitrator

Secretary of the Tribunal

Ms. Catherine Kettlewell

Assistant to the Tribunal

Mr. Ethan Shannon-Craven

15 August 2024

Procedural Order No. 5

WHEREAS

1. On 29 April 2024, the Tribunal issued Procedural Order [“PO”] No. 2, through which, *inter alia*, it ordered the production of “[f]inancial statements [REDACTED] for all fiscal years between [REDACTED] and the date of the filing of the Request for Arbitration (inclusive)”¹.
2. On 30 May 2024, Argentina contacted the Tribunal, informing it of alleged non-compliance with the Tribunal’s decision insofar as no financial statements were produced².
3. On [REDACTED] 2024, after receiving Claimant’s comments³, the Tribunal issued PO [REDACTED] under which Claimant was ordered to produce [REDACTED] for the same time period covered by the decision in PO No. 2⁴.
4. On 25 June 2024, in response to the Tribunal’s decision *supra*, and after signing a confidentiality agreement⁵, the Claimant handed over redacted [REDACTED] to Respondent.
5. On 1 July 2024, Argentina contacted the Tribunal requesting that it order Claimant to produce full, unredacted versions of the [REDACTED]⁶. On 3 July 2024, Claimant set out its belief that by producing the redacted [REDACTED] it had fully complied with the Tribunal’s decision⁷.
6. On 19 July 2024, the Tribunal issued PO No. 4 whereby it ordered Claimant to produce a new version of the [REDACTED] with the [REDACTED] and [REDACTED] unredacted by 24 July 2024⁸ – a deadline that was duly complied with⁹. Simultaneously, Respondent was given the opportunity to explain how the lifting of the redactions on other individual accounts may be useful for verifying jurisdiction¹⁰.
7. On 29 July 2024, Argentina set out its reasoning once more for why it believed [REDACTED] should be produced in their entirety¹¹. This was followed by

¹ PO No. 2 [REDACTED].

² Respondent’s letter of 30 May 2024, p. 14.

³ Claimant’s letter of 10 June 2024.

⁴ PO [REDACTED].

⁵ Claimant’s letter of 3 July 2024, Annex 2.

⁶ Respondent’s email of 1 July 2024.

⁷ Claimant’s letter of 3 July 2024.

⁸ PO No. 4, para. 58.

⁹ Claimant’s email of 24 July 2024.

¹⁰ PO No. 4, para. 54.

¹¹ Respondent’s letter of 29 July 2024.

comments on the issue, at the Tribunal's invitation, by Claimant¹².

PARTIES' POSITIONS

8. The discussion between the Parties on the lifting of further redactions to [REDACTED] can broadly be split into two issues: the relevance of the lifting (1.) and the veracity of [REDACTED] data (2.).

1. RELEVANCE OF THE LIFTING OF FURTHER REDACTIONS

9. Argentina begins by suggesting that the redacted information is relevant for establishing business activities and the control structure of BA Desarrollos LLC ["BA Desarrollos"] linked to the issue of denial of the benefits of the Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment ["BIT"] under its Article I.2(a)¹³.

10. Claimant criticises the purpose of establishing the "control" element under Article I.2(a) of the BIT, suggesting that having access to [REDACTED] unredacted [REDACTED] would not assist Argentina in this purpose. It argues that both Parties are in agreement that BA Desarrollos is not controlled by a US national and that, in any case, Respondent has not justified how accessing the unredacted information would enable it to assess [REDACTED] control of BA Desarrollos¹⁴.

11. Additionally, Claimant finds Argentina's suggestion that the removal of the redactions would assist in assessing whether BA Desarrollos has substantial business activities to be particularly egregious due to it not being raised during document production. It highlights that [REDACTED] and that the redacted accounts have nothing to do with BA Desarrollos or the dispute – rendering the data useless for establishing business activities. In any case, it suggests, the relevant company for this purpose is the investor (BA Desarrollos) [REDACTED] as acknowledged by Respondent itself by not making any reference to the [REDACTED] in its Request for Bifurcation¹⁵.

12. A further argument made by Respondent is that the redaction of practically the entire content of [REDACTED] makes it impossible to verify whether the information is comprehensive, correct and complete ("*integral, correcta y*

¹² Claimant's letter of 7 August 2024.

¹³ Respondent's letter of 29 July 2024, p. 1.

¹⁴ Claimant's letter of 7 August 2024, p. 3.

¹⁵ Claimant's letter of 7 August 2024, pp. 3 – 4.

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completa”). Using a source¹⁶ quoted by Claimant earlier on in the proceedings¹⁷, Argentina suggests that the purpose of a [REDACTED] is to ensure the veracity of the entries in a company’s [REDACTED]. This, it argues, cannot be done without having access to the data to ensure that the [REDACTED] and [REDACTED] are correctly calculated [REDACTED].¹⁸

2. VERACITY OF THE [REDACTED] DATA

13. Respondent alleges that its need to review data of [REDACTED] is particularly pressing due to the fact that [REDACTED] often contain errors which are detected through the auditing process – something that has not occurred in relation to [REDACTED] as its financial information is not audited by a third party¹⁹.

14. Moreover, the little data that has been disclosed provides evidence of these very errors, demonstrating object inconsistencies. For example, Respondent highlights the fact that certain accounts are included within some [REDACTED] but not in others²⁰.

15. Argentina also notes contradictions in the data provided in the accounts unredacted on the Tribunal’s orders. In particular, Respondent claims that inconsistencies

[REDACTED]

²¹.

16. Claimant refuses to reply to Respondent’s allegations regarding the accuracy of [REDACTED], arguing that Argentina is seeking to audit [REDACTED] accounting – something outside of the scope of the Tribunal’s request and irrelevant for both the dispute and establishing jurisdiction. It emphasises that the Tribunal has previously rejected requests by Respondent to obtain additional data to verify the validity of the finances of an entity from the EMS Group. What’s more, responding to Argentina’s allegations would not contribute to the efficiency of the proceedings²².

¹⁶ Doc. C 207. Later provided again by Respondent as Doc. R 45.

¹⁷ See, for example, Claimant’s letter of 10 June 2024.

¹⁸ Respondent’s letter of 29 July 2024, pp. 1 – 3.

¹⁹ Respondent’s letter of 29 July 2024, p. 3.

²⁰ Respondent’s letter of 29 July 2024, pp. 3 – 4.

²¹ Respondent’s letter of 29 July 2024, pp. 5.

²² Claimant’s letter of 7 August 2024, pp. 4.

DECISION

17. As has been set out above, the emphasis placed by both Parties varies significantly, with Claimant principally basing its argument on the lack of relevance of the lifting of further redactions and Respondent primarily disputing the veracity of the data contained in [REDACTED].
18. The Tribunal reminds Argentina that under PO No. 4 it was granted [REDACTED] [REDACTED]²³. Although references were made to establishing control and substantial business activities, as per Article I.2(a) of the BIT, this was not substantiated in Respondent's submission, with its sole justified argument being a need to establish the comprehensiveness, correctness and completeness of [REDACTED].
19. Irrespective of the veracity of the data, Argentina has failed to explain the relevance of lifting the remaining redactions for establishing whether or not the Tribunal has jurisdiction. Besides, the purpose of this exercise is to demonstrate the relevance of individual accounts – not to rehash general arguments about the materiality of [REDACTED]. The Tribunal acknowledges that this may be slightly impeded by not having access to the majority of the data, yet Respondent did have access to the titles of the accounts. In the Tribunal's view, this would have allowed it to argue for the significance of individual accounts for determining jurisdiction.
20. Therefore, no further action regarding [REDACTED] is ordered and Respondent's request for the production of full, unredacted versions of [REDACTED] [REDACTED] is hereby rejected.

On behalf of the Arbitral Tribunal,

[Signed]

Deva Villanúa
President of the Arbitral Tribunal
Date: 15 August 2024

²³ PO No. 4, para. 54.