

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

BA Desarrollos LLC

v.

Argentine Republic

(ICSID Case No. ARB/23/32)

**PROCEDURAL ORDER No. 6
(Redactions to Procedural Order No. 3)**

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

2 September 2024

WHEREAS

1. On 29 April 2024, the Tribunal issued Procedural Order [“**PO**”] No. 2, through which it made a decision on Respondent’s Request for Document Production on Preliminary Objections.
2. On 20 June 2024, the Tribunal issued PO No. 3 which, *inter alia*, decided on Claimant’s alleged non-compliance with the decision made in PO No. 2. This was accompanied by a letter from the Centre granting the Parties until 19 August 2024 to indicate whether the Parties agree on any redactions to the PO before its publication¹, pursuant to ICSID Arbitration Rule 63.
3. On 19 August 2024, Claimant contacted the Tribunal informing it that the Parties were engaged in negotiations regarding the redactions to PO No. 3. To this end, they requested a one-day extension to the deadline for agreeing on any redactions², later confirmed by Argentina³, which the Tribunal duly accepted⁴.
4. On 20 August 2024, Claimant informed the Tribunal that, despite the Parties’ best efforts, they were ultimately unable to reach an agreement regarding the redactions. This being the case, Claimant provided the Tribunal with a copy of PO No. 3, highlighting the redactions it viewed as being uncontested and those which required a decision from the Tribunal. In addition, it set out its reasoning why it believed said reactions were necessary⁵.
5. Also, on 20 August 2024, Respondent contacted the Tribunal alleging that what Claimant had represented as agreed-upon redactions were merely compromises made in the context of trying to arrive at an agreement. These did not, therefore, equate to Argentina consenting to their redaction. This being the case, it provided the Tribunal with its own, redacted version of PO No. 3 and set out why it believes the Tribunal should reject certain redactions⁶.

¹ ICSID’s letter of 20 June 2024.

² Claimant’s email of 19 August 2024.

³ Respondent’s first email of 20 August 2024.

⁴ Tribunal’s email of 20 August 2024.

⁵ Claimant’s email of 20 August 2024.

⁶ Respondent’s second email of 20 August 2024.

APPLICABLE STANDARD

6. Claimant is of the view that the relevant principle for the purpose of determining whether redactions are necessary is that of ensuring that private information that is not public should remain so. This, it suggests, is the principle behind the Tribunal's ruling in PO No. 4 regarding redactions to a previous PO, and therefore forms the basis of the approach it has taken when suggesting redactions⁷.
7. Argentina's belief is that its approach is an application of the general principle, contained within the ICSID Arbitration Rules, of publishing decisions. It submits that Claimant departs from this approach by failing to provide adequate justification for why the redactions should be deemed to cover confidential commercial or protected personal information⁸.
8. ICSID Arbitration Rules 63 states as follows:
 - (1) The Centre shall publish orders and decisions, with any redactions agreed to by the parties and jointly notified to the Secretary-General within 60 days after the order or decision is issued.
 - (2) If either party notifies the Secretary-General within the 60-day period referred to in paragraph (1) that the parties disagree on any proposed redactions, the Secretary-General shall refer the order or decision to the Tribunal to decide any disputed redactions. The Centre shall publish the order or decision in accordance with the decision of the Tribunal.
 - (3) In deciding a dispute pursuant to paragraph (2), the Tribunal shall ensure that publication does not disclose any confidential or protected information as defined in Rule 66.
9. Confidential or protected information is defined in ICSID Arbitration Rule 66 as:

Information which is protected from public disclosure:

 - (a) by the instrument of consent to arbitration;
 - (b) by the applicable law or applicable rules;
 - (c) in the case of information of a State party to the dispute, by the law of that State;
 - (d) in accordance with the orders and decisions of the Tribunal;
 - (e) by agreement of the parties;

⁷ Claimant's email of 20 August 2024.

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- (f) because it constitutes confidential business information or protected personal information;
 - (g) because public disclosure would impede law enforcement;
 - (h) because a State party to the dispute considers that public disclosure would be contrary to its essential security interests;
 - (i) because public disclosure would aggravate the dispute between the parties;
or
 - (j) because public disclosure would undermine the integrity of the arbitral process.
10. The above constitutes the applicable standard [**“Applicable Standard”**].
11. The Tribunal notes that Claimant’s argument that the relevant standard is one of ensuring that private information does not become public represents a simplification of the Applicable Standard. As set out above, there is a general principle of publishing decisions⁹, with a duty on the Tribunal not to publish confidential or protected information¹⁰. Argentina is right in stating that, in this context, the proposed redactions, if successful, would fall under ICSID Arbitration Rule 66(f) – confidential business information or protected personal information. This does not entail blanket protection for every piece of private information from becoming public. Claimant is, however, correct in asserting that the Tribunal’s approach will and must be consistent with its approach in PO No. 4¹¹ – which in itself is a reflection of the ICSID Arbitration Rules.

⁹ ICSID Arbitration Rule 63(1).

¹⁰ ICSID Arbitration Rule 66(f). See also, PO No. 4, para. 14.

¹¹ ICSID Arbitration Rule 66(d).

DISCUSSION

12. Claimant has identified various information which, in its view, warrants protection from public disclosure. This information can be classified under five broad categories (**A. – E.**): redactions related to EMS Capital specifically (**A.**), references to whether or not BA Desarrollos, EMS Continuation and EMS Capital produce financial statements (**B.**), references to [REDACTED] (**C.**), references to EMS Capital’s balance sheets and income statements (**D.**) and sensitive information relating to the EMS Group (**E.**).

A. EMS Capital¹²

13. As a preliminary point, the Tribunal wishes to tackle the issue of whether the redactions related to EMS Capital should be rejected *in limine* due to its impact on various categories of redactions.
14. Claimant makes no separate argument related to the redactions it proposes linked to EMS Capital, instead dealing with said redactions alongside those linked to BA Desarrollos and EMS Continuation. Conversely, Respondent suggests that the Tribunal has previously ruled that EMS Capital’s involvement is public knowledge¹³.
15. The Tribunal accepts the point made by Argentina that the Tribunal has already ruled on redactions linked to EMS Capital within PO No. 2. However, the context of the proposed redactions in PO2 (concerning the role of EMS Capital within the EMS Group) is different to the context here, in relation to PO3 (redactions made in order to maintain how EMS Capital carries out its accounting private). It therefore follows that the redactions linked to EMS Capital should not be rejected on this basis alone and should instead be dealt with alongside the redactions related to the other companies.

B. Existence of Financial Statements

16. Claimant sets out its belief that all information regarding how BA Desarrollos, EMS Continuation and EMS Capital [**“Relevant Entities”**] organise their accounting, which includes references to whether or not they produce financial statements, should be kept private. The redactions, it argues, should also extend to phrases that would allow an inference of whether or not the Relevant Entities produce said statements, such as those made to “analogous documents” and, as demonstrated by its proposed redactions¹⁴, references to the Relevant Entities not

¹² Capitalised terms not defined in this communication shall have the definition given to them in the Tribunal’s previous decisions.

¹³ PO No. 4, paras. 24 – 27.

¹⁴ See, for example, Claimant’s proposed redactions to PO No. 3 of 20 August 2024, p. 6.

being required to produce financial statements as a matter of Delaware law.

17. Respondent, on the other hand, suggests that Claimant has not explained why redactions in this regard are protected under the Applicable Standard. What's more, it suggests that Claimant's approach is contradictory, highlighting examples where Claimant did not propose the redaction of references to the Relevant Entities not producing financial statements. It also highlights that the fact that the Relevant Entities are not required to produce financial statements is the result of laws which are publicly known.
18. The Tribunal acknowledges that whether the Relevant Entities produce financial statements is not necessarily public information. Nevertheless, the Tribunal does not believe that Claimant's proposed redactions achieve even its own stated purpose of preventing this information from reaching the public eye. This is due to the fact that the unredacted portions would suggest that the Relevant Entities produce financial statements, which they do not. If Claimant was prepared to give the impression that the Relevant Entities produce financial statements, it should also be prepared to do the same to correct the record that they do not, in fact, produce them. Therefore, the proposed redactions relating to the Relevant Entities not producing financial statements, including those that allow the inference that they are not produced, are hereby rejected.

C. [REDACTED]

19. As in relation to financial statements, Claimant argues that references to [REDACTED] should be redacted as a way of preventing how the Relevant Entities organise their accounting becoming public knowledge. This extends to references to the purpose that these documents serve [REDACTED]¹⁵.
20. Respondent argues that Claimant has failed to justify the redactions according to the Applicable Standard. It claims that the confidentiality agreement entered into by the Parties¹⁶, [REDACTED] governs the disclosure of the information within the protected documents, but not their existence. As evidence of this, it points to Claimant not proposing the redaction of references to "the Incorporation Agreement or similar instruments under which EMS Continuation S.A. was constituted" despite the company's articles of association being under the scope of the confidentiality agreement.
21. The Tribunal is not convinced by Argentina's objections to these redactions. Irrespective of the content of the confidentiality agreement, Claimant's failure to redact references to EMS Continuation's incorporation agreement is not in the Tribunal's view tantamount to Claimant tacitly accepting that [REDACTED]

¹⁵ Claimant's proposed redactions to PO No. 3 of 20 August 2024, p. 5.

¹⁶ Claimant's letter of 3 July 2024, Annex 2.

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should not be redacted. The other documents mentioned in the agreement (share register and articles of association) are not financial documents. Therefore, there is no reason for Claimant to request their redaction – at least as a matter of consistency.

22. In contrast, the Tribunal is persuaded by Claimant’s argument regarding [REDACTED] is unlikely to be public knowledge [REDACTED]. Therefore, the Tribunal is willing to grant the proposed redactions relating to [REDACTED].

D. Balance sheets and income statements

23. As has previously been set out, Claimant believes that information regarding how the Relevant Entities organise their accounting is a matter that should remain private. This extends to the accounting reports that the Relevant Entities do or do not prepare which [REDACTED] also include balance sheets and income statements.
24. Argentina counters Claimant’s argument, suggesting that the mere existence of documents that are “ordinary, generic and widely-used” (*ordinario[s], genérico[s] y ampliamente utilizado[s]*) is not cause for adding redactions and neither is the fact that balance sheets contain the assets and liabilities of a company. To this end, it references an example of Claimant not arguing for the redaction of a mention of the outputs of the accounting systems that were used to prepare EMS Capital’s balance sheet and income statements.
25. The Tribunal acknowledges that whether or not EMS Capital produces particular balance sheets and income statements is not necessarily public information. That being said, the Tribunal fails to see how the redactions Claimant proposes, which include some but not all references to EMS Capital producing said documents, achieves the aim advocated by Claimant. Therefore, the proposed redactions related to balance sheets and income statements (including in footnote 64) are hereby rejected.

E. Sensitive information relating to the EMS Group

26. Claimant wishes to redact its explanation regarding the press’ interest in Mr. Safra’s business and affairs. It argues that the content of said explanation should remain private and that, more generally, explanations relating to sensitive matters made by the Parties in the context of these proceedings need not be ventilated in public.
27. Argentina begins by arguing that Claimant has failed to set out how press interest determines whether information falls under the Applicable Standard. It then goes

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on to suggest that the existence of intermediary entities within the Group reflects common practice within the industry for groups of its size, as pointed out by Claimant itself¹⁷, with Respondent therefore not understanding the need for such redactions.

28. To an extent, the Tribunal is inclined to agree with Argentina. Claimant has failed to justify, and the Tribunal fails to understand, how the mere existence of press interest in Mr. Safra [REDACTED] is private information – let alone information that merits protection from publication.
29. Similarly, the mere existence of intermediary entities in the corporate chain of BA Desarrollos is already public knowledge and can be gauged from the Tribunal’s other decisions – such as the published version of PO No. 2¹⁸. It seems from Argentina’s comments that it only disputes the redaction of references to the existence of entities in BA Desarrollos’ corporate chain. Nevertheless, for the avoidance of doubt, the Tribunal confirms and upholds the redactions to the name and domicile of the intermediary entities in the corporate chain which do not seem, *prima facie*, to be public knowledge.
30. In addition, the Tribunal is willing to grant protection to the redactions on page 11 of PO No. 3 [REDACTED] in the intermediary entities [REDACTED]. Therefore, the redactions relating to their involvement are hereby upheld.

¹⁷ Claimant’s Memorial, para. 50 and Witness Statement of [REDACTED] para. 16.

¹⁸ See, for example, the published version of PO No. 2, p. 37: “For the avoidance of doubt, BA Desarrollos confirms that [REDACTED] is the sole Member of BA Desarrollos and that no entity in its chain of ownership is a US national”.

DECISION

31. As per the decisions made *supra*, the Tribunal hereby orders the lifting of the following redactions:
- Those relating to the Relevant Entities not producing financial statements, including those that allow the inference that they are produced;
 - Those relating to balance sheets and income statements (including in footnote 64);
 - Those related to the press interest in Mr. Safra [REDACTED] and the existence (but not the name and domicile of) intermediary entities in the corporate chain of BA Desarrollos.
32. Any redactions to which objections have not been made by the Parties, and which have therefore not been dealt with in this Procedural Order, are deemed to have been tacitly waived and therefore accepted.
33. Claimant shall submit a new version of PO No. 3 (in English and Spanish) in application of this decision by Friday, 6 September 2024. The Tribunal will then confirm the content of the new version prior to publication.

* * *

34. Seeing as this decision is the second related to the redaction of procedural orders, upon receipt of this PO, the Parties should be well aware of the criteria used by the Tribunal for making a decision in this regard. In future, it trusts that the Parties will know which information is redactable or not and hopes that it will only be called to make a decision regarding redactions to procedural orders in exceptional circumstances.

On behalf of the Arbitral Tribunal,

[Signed]

Deva Villanúa
President of the Arbitral Tribunal
Date: 2 September 2024