

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

BA Desarrollos LLC

v.

Argentine Republic

(ICSID Case No. ARB/23/32)

**PROCEDURAL ORDER No. 8
DECISION ON THE REQUESTS FOR DOCUMENT PRODUCTION**

Members of the Tribunal

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

Assistant to the Tribunal

Mr. Ethan Shannon-Craven

Secretary of the Tribunal

Ms. Catherine Kettlewell

13 January 2025

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BACKGROUND

1. This arbitration has been instituted by BA Desarrollos LLC [**“Claimant”**] against the Argentine Republic [**“Argentina”** or **“Respondent”**], and together with Claimant, the **“Parties”**], pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [**“ICSID Convention”**] and under the Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, signed on 14 November 1991 and in force since 20 October 1994 [**“Treaty”**]. This proceeding is governed by the ICSID Arbitration Rules in force as of 1 July 2022 [**“ICSID Arbitration Rules”**].
2. On 15 March 2024, the Arbitral Tribunal issued Procedural Order [**“PO”**] No. 1, in which the procedural rules of the case were established, including those related to the requests for document production, and the procedural calendar of the proceeding [**“Procedural Calendar”**].
3. On 29 April 2024, the Arbitral Tribunal issued PO No. 2, in which it ruled on certain requests for document production [**“First Requests”**], made by Respondent before the submission of Argentina’s request for bifurcation [**“Request for Bifurcation”**].
4. On 9 September 2024, the Arbitral Tribunal notified the Parties of PO No. 7, in which it rejected Respondent’s Request for Bifurcation.
5. On 9 December 2024, in accordance with the Procedural Calendar, the Parties internally exchanged their requests for document production [**“Requests”**].
6. On 23 December 2024, the Parties filed their responses to the other Party’s Request [**“Responses”**].
7. On 30 December 2024, the Parties submitted their Replies to the objections raised by the other Party [**“Replies to the Response”**] to the Tribunal.
8. Within the time limit set forth in the Procedural Calendar, the Tribunal issues this PO, pursuant to Section 16 of PO No. 1.

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1. DECISION OF THE ARBITRAL TRIBUNAL

9. The Tribunal hereby issues its decision on each of the Requests, setting out its decision in the row provided for that purpose in the forms attached as Annex A (for Claimant’s Request) and Annex B (for Respondent’s Request) of this PO No. 8.

2. GUIDELINES FOR RULING ON THE REQUESTS

10. Para. 20.1 of PO No. 1 provides that:

“Notwithstanding the fact that this proceeding is governed by the ICSID Arbitration Rules, the Tribunal may, when issuing orders and decisions necessary for the conduct of the proceeding, refer to other rules that may be relevant, to the extent that they do not conflict with the ICSID Convention, the ICSID Arbitration Rules or the ICSID Administrative and Financial Regulations.”

11. In addition, para. 16.7 provides that the Arbitral Tribunal may take into consideration Arts. 3 and 9 of the IBA (International Bar Association) Rules on the Taking of Evidence in International Arbitration (2020) [“**IBA Rules**”], as well as such other instruments as may serve as a reference.

12. This section summarises the guidelines established in the IBA Rules and in PO No. 1, on the basis of which the decisions on the Parties’ Requests were adopted.

2.1 DEFINITION OF DOCUMENT

13. The “Definitions” section of the IBA Rules includes the following definition of the term “**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.”

14. The same definition has been used by the Tribunal to decide on the Requests.

2.2 REQUIREMENTS

15. The Arbitral Tribunal granted the Requests that satisfied the following cumulative requirements:

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A. Identification of each Document or description of a narrow and specific category¹

16. The requesting Party was should have identified the requested Document in sufficient detail. When the Request referred to a category of Documents, the Arbitral Tribunal has considered the following additional requirements:
- The identification, in a clear and well-defined manner, of a narrow and specific category of Documents;
 - The identification of circumstantial evidence of the existence of the category of Documents;
 - An indication of the name of the person, authority or entity that has issued the category of Documents.
17. In addition, the Arbitral Tribunal has rejected those Requests that required the production of Documents in a general manner.

B. Relevant and material²

18. Pursuant to para. 16.3.2 of PO No. 1, the requesting Party was required to show that the Documents are relevant to the case and material to its outcome, identifying why it alleges that evidentiary support is necessary through the production of Documents.
19. As a general rule, the Documents referred to in other Documents on the record may also be considered relevant and material.
20. In addition, pursuant to para. 16.2 of PO No. 1, it was not for a Party to rebut, by way of Requests submitted to the other Party, allegations for which the other Party has the burden of proof. Accordingly, the Request was dismissed when the Tribunal concluded that it was grounded on the need to prove allegations the burden of proof of which seemed to be on the Party to which the Request was addressed.
21. Any analysis by the Arbitral Tribunal of the relevance and materiality of the requested Documents was made on a *prima facie* basis, without prejudging any final decision that the Arbitral Tribunal may adopt as to the relevance, probative value or weight to be attributed to a Document once all the evidence has been furnished.

C. Not in the possession, custody or control of the requesting Party³

22. Furthermore, the Tribunal also considered the fact that the requesting Party demonstrated that the requested Documents were not in its possession, custody or control.

¹ PO No. 1, para. 16.3.1.; IBA Rules, Art. 3.3(a) (ii).

² PO No. 1, para. 16.3.2.; IBA Rules, Arts. 3.3(b) and 9.2(a).

³ IBA Rules, Art. 3.3(c) (i) and (ii).

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23. The Request was denied when the Arbitral Tribunal found it likely that the requested Documents would be in the possession, custody or control of the requesting Party, or if they were in the offices or under the control of a third party to which the requesting Party had access. Similarly, a Document has been deemed to be in the possession of the requesting Party if it is already kept on the arbitration record.

2.3 OBJECTIONS

24. In addition to assessing compliance with the previously established requirements, the Arbitral Tribunal decided on the following objections raised by the Parties:⁴

A. Unreasonable burden⁵

25. The Parties objected to the submission of a number of Requests, alleging an unreasonable burden for them if the Tribunal ordered production of the evidence requested.⁶

26. In making its decision, the Tribunal has weighed the time and cost associated with the production of the Documents against their expected probative value, as well as the fact that similar Documents might already be on the record and satisfy the purpose sought through a Request. Where appropriate, the Tribunal has also reduced the scope of the Request to avoid unreasonable burden.

B. Legal privilege⁷

27. Claimant has also invoked the existence of legal privilege concerning certain Documents requested by Argentina.⁸

28. A Document shall satisfy the following requirements in order to be considered under special protection pursuant to the legal privilege objection:

- The Document must have been prepared by, or addressed to, a lawyer acting in such capacity;
- A relationship of trust must exist between the lawyer (internal or external legal counsel) and the client;
- The Document must have been prepared for the purpose of seeking or providing legal advice;
- In seeking or providing legal advice, the client and the lawyer must have acted with the expectation that, in the event of a legal dispute, such advice would be kept in confidence.

⁴ IBA Rules, Art. 3.5.

⁵ IBA Rules, Arts. 9.2(c) and 9.2(g).

⁶ See, e.g., Annex A, Claimant's Request No. 1, and Annex B, Respondent's Request No. 1.

⁷ IBA Rules, Arts. 9.2(b) and 9.4(b).

⁸ See, e.g., Annex B, Respondent's Request No. 19.

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29. If the above requirements are met, Claimant may produce the requested Documents with redactions to the privileged information or enter into a confidentiality agreement with Respondent, where possible. In those cases in which the alleged privilege cannot be properly safeguarded through redaction, Claimant, instead of producing the Document, may choose to disclose its existence and characteristics in a privilege log:
- Identifying chronologically the date, the issuer (specifying whether the issuer is the Party's lawyer) and the recipient of the Document;
 - Providing a summarised description of the Document; and
 - Explaining the reasons that justify why the Document is not produced in its entirety.

3. NEXT STEPS

30. The Parties shall produce the ordered Documents no later than 27 January 2025, in accordance with the Procedural Calendar.⁹
31. The Documents produced shall be transmitted directly to the requesting Party without copying the Arbitral Tribunal, the Assistant to the Tribunal or the Secretary of the Tribunal. Such Documents shall not be considered part of the record until one of the Parties submits them into the record with the forthcoming pleadings contemplated in the Procedural Calendar.¹⁰
32. The Arbitral Tribunal may, where appropriate, make negative inferences if a Party refuses to produce information or documents during the document production phase without justification.¹¹

On behalf of the Arbitral Tribunal,

[Signed]

Deva Villanúa
President of the Arbitral Tribunal

Date: 13 January 2025

⁹ PO No. 1, Annex B.

¹⁰ PO No. 1, para. 16.11.

¹¹ IBA Rules, Art. 9.5.