

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

BA Desarrollos LLC

v.

Argentine Republic

(ICSID Case No. ARB/23/32)

**PROCEDURAL ORDER No. 9
(Decision on Request for Case Documents)**

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

11 February 2025

Procedural Order No. 9

WHEREAS

1. On 22 January 2025 the Tribunal received the United States Government's [**"United States"**] application for access to the Notice of Arbitration, the Parties' pleadings and the relevant procedural orders [**"Request for Case Documents"**] in order to assess whether to make a non-disputing Treaty party submission [**"NDP Submission"**].
2. On 24 January 2025 the Tribunal granted the Parties leave to submit their comments on the Request for Case Documents.
3. On 31 January 2025 the Tribunal received both Claimant's [**"Claimant's Response"**] and Respondent's comments [**"Respondent's Response"**].
4. After considering the Parties' respective positions, the Tribunal issues the following Procedural Order deciding on the Request for Case Documents.

PROCEDURAL ORDER NO. 9

5. The Tribunal will first set out the applicable standard (1.) before summarising the Request for Case Documents (2.) and setting out the Parties' positions (3.). Thereafter, the Tribunal will make its decision (4.).

1. APPLICABLE STANDARD

6. As noted by both the United States¹ and the Parties², the relevant norm for a potential NDP Submission is ICSID Arbitration Rule 68 [**"Rule 68"**] which states as follows:

- (1) The Tribunal shall permit a Party to a treaty that is not a party to the dispute ("non-disputing Treaty Party") to make a submission on the interpretation of the treaty at issue in the dispute and upon which consent to arbitration is based. The Tribunal may, after consulting with the parties, invite a non-disputing Treaty Party to make such a submission.
- (2) The Tribunal shall ensure that non-disputing Treaty Party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the making of the submission by the non-disputing Treaty Party, including with respect to the format, length, scope or publication of the submission, and the time limit to file the submission.
- (3) The Tribunal shall provide the non-disputing Treaty Party with relevant documents filed in the proceeding, unless either party objects.
- (4) The parties shall have the right to make observations on the submission of the non-disputing Treaty Party.

2. REQUEST FOR CASE DOCUMENTS

7. The United States argues that its Request for Case Documents should be accepted as it would allow it to produce an informed and targeted NDP Submission, in turn helping to clarify the meaning of the provisions of the Treaty³. It highlights the wording of Rule 68(3) and its requirement for the Tribunal to grant such a request if neither Party objects. It does, however, acknowledge that the Parties' pleadings are likely to be subject to a confidentiality agreement that would prevent their sharing with a third party; therefore, it seeks to assure the Parties that the pleadings

¹ Request for Case Documents, p. 1.

² Claimant's Response, p. 1; Respondent's Response, p. 1.

³ Request for Case Documents, p. 2. Capitalised terms not defined in this communication shall have the definition given to them in the Tribunal's previous decisions.

Procedural Order No. 9

would remain confidential and that it would be prepared to be bound by any such confidentiality agreement⁴.

8. Subsidiarily, if the Tribunal deems that the United States does not need access to all the requested documents, the United States is open to only reviewing the portions of said documents that the Tribunal deems relevant for a potential NDP Submission on matters of law and treaty interpretation, including receiving redacted documents⁵.

3. PARTIES' POSITIONS

9. Respondent used its Response to set out that it has no objections to the Request for Case Documents, without providing further comments⁶.

10. Claimant, on the other hand, objects to the Request for Case Documents, arguing that an NDP Submission should be limited to commenting on the interpretation of the Treaty, and not its application to the facts; accordingly, the information in the public domain on the dispute, including the Tribunal's various procedural orders, should suffice for such a purpose. Therefore, it argues that sharing the Parties' pleadings and other documents, which would require redactions due to confidentiality considerations, would be inefficient and produce significant and unnecessary costs⁷.

11. Turning to the wording of Rule 68, Claimant argues that the Tribunal has a duty to ensure that the United States' participation in the proceeding does not "disrupt the proceeding or unduly burden or unfairly prejudice either Party" and that, to this end, the Tribunal may place conditions on any NDP Submission. This being the case, Claimant requests that the United States be limited to a fifteen-page submission filed no later than 21 March 2025 so that its content may be addressed in its Reply Memorial, if necessary⁸.

4. DECISION

12. The Tribunal notes that the wording of Rule 68 is unambiguous insofar as non-disputing Treaty parties should be allowed to make an NDP Submission, and that the United States may be invited to do so once the Parties have been consulted⁹ – as does not seem to be disputed by either Party. Seeing as the conditions of Rule 68 have been met, it is proper for the Tribunal to allow such a submission.

13. Rule 68 does, however, also empower the Tribunal to impose conditions on the NDP Submission in order to ensure that the proceedings are not disrupted or that

⁴ Request for Case Documents, pp. 1 – 2.

⁵ Request for Case Documents, p. 2.

⁶ Respondent's Response.

⁷ Claimant's Response, pp. 1 – 2.

⁸ Claimant's Response, p. 2.

⁹ Rule 68(1).

Procedural Order No. 9

either Party is unduly burdened or prejudiced¹⁰. In light of these considerations, Claimant's proposal that the length of the NDP Submission be limited and that a deadline be imposed seem reasonable. Respondent is therefore invited to confirm whether it agrees to the proposed deadline and pleading lengths by **12 February 2025** or, conversely, provide its own alternatives. The Tribunal will then either confirm the conditions, in the case of agreement, or proceed to make a decision on the appropriate deadline and pleading lengths.

14. On the issue of the sharing of case documents, Rule 68 is similarly explicit, providing that the Tribunal shall only do so if it has the assent of the Parties¹¹ – something which has evidently been withheld by Claimant in its Response¹². In any case, the Tribunal concurs with Claimant that the United States has access to publicly available information, including redacted versions of the first seven procedural orders¹³, which it may use to inform its decision on whether to make an NDP Submission.

* * *

15. In light of the above, the Tribunal decides to:

- Permit the United States to file an NDP Submission on the interpretation of the Treaty, if it so wishes;
- Invite Respondent to produce its comments on the deadline and pleading length of the NDP Submission by **12 February 2025**; and
- Reject the United States' Request for Case Documents.

On behalf of the Arbitral Tribunal,

[Signed]

Ms. Deva Villanúa
President of the Tribunal
Date: 11 February 2025

¹⁰ Rule 68(2).

¹¹ Rule 68(2).

¹² Claimant's Response, pp. 1 – 2.

¹³ See <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/23/32>.