

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Orazul International España Holdings S.L.

v.

Argentine Republic

(ICSID Case No. ARB/19/25)

**PROCEDURAL ORDER NO. 2
ON THE PRODUCTION OF DOCUMENTS**

Members of the Tribunal

Dr. Inka Hanefeld, President of the Tribunal
Mr. David R. Haigh QC, Arbitrator
Prof. Alain Pellet, Arbitrator

Secretary of the Tribunal

Ms. Anna Toubiana

Assistant to the Tribunal

Ms. Charlotte Matthews

10 February 2022

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1. The Tribunal hereby issues the following Procedural Order No. 2 to address the Respondent's requests for the production of documents as formulated in its letter to the Tribunal dated 26 January 2022.

A. Procedural Background

2. On 30 August 2019, Orazul International España Holdings S.L. submitted a Request for Arbitration against the Argentine Republic, which was registered by the Secretary-General on 11 September 2019.
3. On 24 August 2020, following the First Session held on 7 August 2020 and further communications with the Parties thereafter, the Tribunal issued its Procedural Order No. 1 (**PO1**) and the Procedural Timetable as Annex A thereto.
4. On 15 September 2020, the Claimant filed its Memorial in English language together with accompanying documentation, including *inter alia* a damages assessment report by Ms. Daniela M. Bambaci and Mr. Santiago Dellepiane A. of BRG (**First BRG Report**).
5. On 29 September 2020, the Claimant filed a Spanish translation of its Memorial.
6. On 16 November 2020, the Respondent submitted its Memorial on Preliminary Objections and Request for Bifurcation in Spanish language.
7. On 30 November 2020, the Respondent submitted an English translation of its Memorial on Preliminary Objections and Request for Bifurcation.
8. On 14 December 2020, the Claimant submitted its Observations on the Respondent's Request for Bifurcation in English language.
9. On 28 December 2020, the Claimant submitted a Spanish translation of its Observations on the Respondent's Request for Bifurcation.
10. On 7 January 2021, the Tribunal issued its Decision on the Respondent's Request for Bifurcation, whereby it denied the bifurcation of the proceedings and directed the Parties to follow the procedural calendar set out in Scenario 2.2 of the Procedural Timetable annexed to the PO1.
11. On 27 April 2021, the Respondent submitted its Counter-Memorial in Spanish language and accompanying documentation, including *inter alia* an expert report by Dr. Daniel Flores of Quadrant Economics (**First Quadrant Economics Report**) on quantum issues and which addresses the First BRG Report's conclusions.

12. On 11 May 2021, the Respondent submitted an English translation of its Counter-Memorial. The Respondent noted therein that “*Claimant has neither submitted the purchase agreement for its assets in Argentina nor indicated the price paid by DEI for its interest in Hidroeléctrica Cerros Colorados S.A.,*”¹ that “*Claimant has not stated the value of its alleged investment – that is, of its stock interest in Hidroeléctrica Cerros Colorados S.A. in 2003,*”² and that “*Claimant has failed to indicate the purchase value of the stock interest in Duke Energy Cerros Colorados S.A.*”³ The Respondent reserved the right to request such information if not produced by the Claimant together with its Reply.⁴ The Respondent requested the Tribunal *inter alia* to:

(b) consider the reservations made by the Argentine Republic with regard to submitting further arguments and requesting for any documentation Claimant fails to submit.

13. On 27 July 2021, the Claimant submitted its Counter-Memorial on Preliminary Objections and its Reply on the Merits (dated 26 July) in English language together with accompanying documentation, including *inter alia* a second expert report on damages by Ms. Daniela M. Bambaci and Mr. Santiago Dellepiane A. (**Second BRG Report**), which provides an update to the Claimant’s damages assessment as well as an analysis of the First Quadrant Economics Report’s conclusions.

14. On 10 August 2021, the Claimant submitted Spanish translations of its Counter-Memorial on Preliminary Objections and its Reply on the Merits.

15. On 25 October 2021, the Respondent submitted its Rejoinder on the Merits and Reply on Jurisdiction in Spanish language together with accompanying documentation, including *inter alia* a second expert report by Dr. Daniel Flores (**Second Quadrant Economics Report**), which assesses the Second BRG Report’s conclusions.

16. On 15 November 2021, the Respondent submitted English translations of its Rejoinder on the Merits and Reply on Jurisdiction. In its Rejoinder on the Merits, the Respondent requested *inter alia* the Tribunal to:

(a) order[] Claimant to submit all supporting documentation to justify: (i) the amounts paid by I Squared Capital for the acquisition in December 2016 of the operations of Cerros Colorados in Argentina; (ii) the relationship between Orazul Energy Southern Cone and Cerros Colorados; (iii) the interests of Claimant in

¹ Respondent’s Counter-Memorial, ¶ 33.

² Respondent’s Counter-Memorial, ¶ 36; see also ¶ 636.

³ Respondent’s Counter-Memorial, ¶ 39.

⁴ Respondent’s Counter-Memorial, fn. 46, 51, 941.

renewable electric energy generators and the plants related to the agreements of the FONINVEMEM; and (iv) the value of its alleged investment, i.e., the block of shares of Hidroeléctrica Cerros Colorados S.A. in 2003;

(b) order[] Claimant to submit the instrument by virtue of which the assets in Argentina were purchased, as well as the value paid by DEI to purchase its share in Hidroeléctrica Cerros Colorados S.A.

In its Reply on Preliminary Objections, the Respondent requested *inter alia* the Tribunal to:

(a) [] order Claimant to produce in these arbitral proceedings the agreement signed between Duke Energy and I Squared Capital relating to the purchase of the investments in the Argentine Republic on 22 December 2016, which was requested by the Argentine Republic in its Counter-Memorial.

Therein, the Respondent also reserved its right to request the Tribunal to order the Claimant to produce the F1 Form submitted before the CNDC, the Argentine Antitrust Agency.

17. On 29 November 2021, the Tribunal took note of the Respondent's requests set out in its Rejoinder on the Merits and Reply on Preliminary Objections and invited the Claimant to provide its comments thereon by 1 December 2021, or at the latest in its Rejoinder on Preliminary Objections.
18. On 10 December 2021, the Claimant submitted its Rejoinder on Preliminary Objections (dated 9 December) in English language together with an index of all supporting exhibits and authorities.
19. On the same day, following communications between the Tribunal and the Parties, the Tribunal rescheduled the Hearing to 1 September 2022 to 15 September 2022.
20. On 15 December 2021, the Claimant uploaded *inter alia* factual exhibits C-559 through C-593 to the file sharing platform of the case.
21. On 23 December 2021, the Claimant submitted a Spanish translation of its Rejoinder on Preliminary Objections.
22. On 27 January 2022, the Respondent addressed a letter (dated 26 January) to the Members of the Tribunal noting that the Claimant had failed to produce a certain number of requested documents. Accordingly, the Respondent requested the Tribunal to order the Claimant to produce:

- (i) *all supporting documentation to justify the amounts paid by I Squared Capital for the acquisition in December 2016 of the operations of Cerros Colorados in Argentina;*
- (ii) *all supporting documentation to justify the value of Claimant’s alleged investment, i.e., the block of shares of Hidroeléctrica Cerros Colorados S.A. in 2003;*
- (iii) *the instrument by virtue of which the assets in Argentina were purchased, as well as the value paid by DEI to purchase its share in Hidroeléctrica Cerros Colorados S.A.;*
- (iv) *the agreement signed between Duke Energy and I Squared Capital relating to the purchase of the investments in the Argentine Republic on 22 December 2016; and*
- (v) *a complete copy of Form F1, i.e. including all annexes of Form F1 (C-587).*

B. The Respondent’s Position

23. The Respondent states that the Claimant has not produced

“(i) any single document to justify the amounts paid by I Squared Capital for the acquisition in December 2016 of the operations of Cerros Colorados in Argentina; (ii) nor any single document to justify the value of its alleged investment, i.e., the block of shares of Hidroeléctrica Cerros Colorados S.A. in 2003 (iii) nor the instrument by virtue of which the assets in Argentina were purchased, as well as the value paid by DEI to purchase its shares in Hidroeléctrica Cerros Colorados S.A. (iv) nor the agreement signed between Duke Energy and I Squared Capital relating to the purchase of the investments in the Argentine Republic on 22 December 2016.”⁵

24. The Respondent submits that the requested documents are *“relevant and material to the jurisdiction, merits and quantum discussions in this arbitration proceeding.”⁶*

25. With respect to its requests (i) to (iv), the Respondent specifically submits that the Claimant has not stated the value of its investment, neither in 2003 nor in 2016. Accordingly, the Respondent considers that the Claimant presented no evidence

⁵ Respondent’s letter to the Tribunal dated 26 January 2022, p. 2.

⁶ *Idem.*

showing that the value of Cerros Colorados was negatively affected in any way by the measures the Claimant complains of, let alone that such value was destroyed.⁷ The Respondent asserts that if the Measures had had an impact on the economic performance of Cerros Colorados, this should have been reflected in the sales price of Cerros Colorados. The Respondent submits that it could be assumed that the price paid by Duke España in December 2003 and by I Squared Capital in December 2016 should reflect the fair market value of Cerros Colorados after the Measures.⁸ Further, the Respondent is critical of the Claimant’s assessment of quantum through a book value approach as it “*does not represent the amount an investor was willing to pay for Cerros Colorados.*”⁹ The Respondent contends that since it is unaware of the actual amount paid for the acquisition of Cerros Colorados in 2003, it is not possible to determine the impact of the measures complained of on the price paid and thus on profitability.¹⁰ Finally, the Respondent submits that without the production of the purchase agreement between Duke Energy and I Squared Capital, the conditions of the acquisition of the Claimant’s indirect holdings remain unknown to the Tribunal and that the Tribunal is not in a position to ascertain whether the Claimant holds indirect shares in Cerros Colorados and rights under the Concession Contract.¹¹

26. With respect to its request (v), the Respondent contends that the Claimant produced an incomplete version of Form F1, *i.e.* without its attachments, despite claiming to do so.¹²
27. The Respondent submits that the Form F1 demonstrates Orazul Group’s acknowledgement that the investment in Cerros Colorados was made in December 2016, and that such investment was the first deal in Argentina, allowing the group to benefit from the “*first landing exception*” under Argentine antitrust law.¹³

C. The Claimant’s Position

28. The Claimant states that it has already submitted ample evidence demonstrating its ownership of Cerros Colorados at all relevant times and that I Squared Capital is not the

⁷ Respondent’s Rejoinder on the Merits, ¶¶ 527 *et seq.*

⁸ Respondent’s Rejoinder on the Merits, ¶ 1164.

⁹ Second Quadrant Economics Report, ¶ 51.

¹⁰ Respondent’s Rejoinder on the Merits, ¶¶ 1164-1165.

¹¹ Respondent’s Reply on Preliminary Objections, ¶ 159.

¹² Respondent’s letter to the Tribunal dated 26 January 2022, p. 4.

¹³ Respondent’s Reply on Preliminary Objections, ¶¶ 143-144.

Claimant in this dispute so that the Respondent's request (i) is irrelevant and unjustified.¹⁴

29. The Claimant also argues that the Respondent's request (ii), made for the first time in its Rejoinder on the Merits, is belated and unwarranted. The Claimant submits that it acquired an interest in Cerros Colorados through an internal corporate reorganization. To the extent that the Respondent's request relates to Cerros Colorados's profitability in the actual and but-for scenarios, the Respondent contends that such calculation should be based on Cerros Colorados' book value.¹⁵
30. The Claimant has not submitted the instrument by virtue of which the assets in Argentina were purchased, nor indicated the value paid by DEI to purchase its share in Cerros Colorados. The Claimant's position is that it qualifies as an investor under the Spain-Argentina BIT as it was incorporated in Spain in October 2003 and acquired an indirect interest in Cerros Colorados in December 2003.¹⁶
31. The Claimant has also not submitted the agreement signed between Duke Energy and I Squared Capital relating to the purchase of the investments in the Argentine Republic on 22 December 2016. The Claimant's position is that Orazul is bringing claims under the Spain-Argentina BIT on its own behalf, based on its own investment in Cerros Colorados in December 2003 and that I Squared is not the Claimant in this dispute.¹⁷
32. The Claimant has submitted exhibit C-587, which it states is the F1 Form submitted before the CNDC by Nautilus Inkia Holdings LLC and Inkia Energy Ltd. The Claimant contends that while the Respondent has failed to articulate why the filing of such form is relevant in the case at hand, it has still submitted "*a copy of this form and its attachments.*"¹⁸

D. The Tribunal's Considerations

33. This Procedural Order as well as each of the considerations set out below are based upon the Tribunal's current and non-prejudicial understanding of the case. In particular, these considerations should not be taken as any indication as to the Tribunal's views on the question of the Tribunal's jurisdiction and/or the merits of the case.

¹⁴ Claimant's Rejoinder on Preliminary Objections, ¶¶ 23-24.

¹⁵ Claimant's Rejoinder on Preliminary Objections, fn. 26.

¹⁶ Claimant's Rejoinder on Preliminary Objections, ¶¶ 18 *et seq.*

¹⁷ Claimant's Rejoinder on Preliminary Objections, ¶ 24.

¹⁸ Claimant's Rejoinder on Preliminary Objections, ¶ 20 and fn. 35.

34. The Tribunal notes that it enjoys discretion to decide to call upon a Party to produce documents at any stage of the proceeding, as per §16.5 of PO1, ICSID Rule 34(2) and Article 43 of the ICSID Convention.
35. When deciding on the Respondent's requests for the production of documents, the Tribunal has taken further guidance from the IBA Rules on the Taking of Evidence in International Arbitration 2010.¹⁹ The Tribunal's discretion is particularly informed by the concepts of materiality, relevance and specificity provided for therein.²⁰

1. The Tribunal's decision on the Respondent's requests (i) and (ii)

36. The Tribunal dismisses the Respondent's requests (i) and (ii).
37. The Tribunal finds that the documents sought through requests (i) and (ii) are described in overly broad terms and thus lack specificity. The Respondent has not set out in its submissions nor its letter of 26 January 2022 the nature of the documents sought nor their general time frame. The Tribunal is thus not in a position to clearly identify the documents requested by the Respondent.

2. The Tribunal's decision on the Respondent's requests (iii) and (iv)

38. The Tribunal decides that the Claimant shall produce the documents of the Respondent's requests (iii) and (iv).
39. The Tribunal finds the documents sought through the Respondent's requests (iii) and (iv) to be clearly identified. The Tribunal, without taking a decision as to the ultimate probative value of such documents, is of the view that the documents sought through requests (iii) and (iv) hold the potential of assisting the Tribunal's overall understanding of the facts of the case and impose a limited burden upon the Claimant.

3. The Tribunal's decision on the Respondent's request (v)

40. The Tribunal finds that the Claimant shall produce the document of the Respondent's request (v).
41. The Tribunal takes note of the Claimant's statement according to which it submitted a copy of the F1 Form along with its attachments. The Tribunal further notes that the

¹⁹ See Procedural Order No. 1, §20.1.

²⁰ See SCHREUER, C. H., MALINTOPPI, L., REINISCH, A., & SINCLAIR, A. (2009). *The ICSID Convention: a Commentary*, pp. 640 *et seq.*, in particular pp. 644-645; see also, KHODYKIN, R., MULCAHY, C., & FLETCHER, N. (2019). *A guide to the IBA rules on the taking of evidence in international arbitration*, ¶¶ 6.76 *et seq.*

original Spanish version of exhibit C-587 (15 pages) is longer than the English translation thereof (2 pages). In particular, the English translation does not allow the Tribunal to establish that I Squared Capital's indirect acquisition of Cerros Colorados in 2016 is referenced as its "*first landing*" in Argentina.

42. In view of the Claimant's willingness to submit the Form F1 along with its attachments, the Tribunal finds that there is no particular controversy in ordering the Claimant to submit exhibit C-587 in its entirety, including all annexes of Form F1 and the full English translation thereof.

E. The Tribunal's Order

43. Based on the general considerations set out above, the Tribunal decides as follows:
- a. The Respondent's requests (i) and (ii) are dismissed.
 - b. The Claimant is ordered to produce the instrument by virtue of which the assets in Argentina were purchased, as well as the value paid by DEI to purchase its share in Hidroeléctrica Cerros Colorados S.A.
 - c. The Claimant is ordered to produce the agreement signed between Duke Energy and I Squared Capital relating to the purchase of the investments in the Argentine Republic on 22 December 2016.
 - d. The Claimant is ordered to produce a complete copy of Form F1, including all annexes of Form F1.

[signed]

Dr. Inka Hanefeld
President of the Tribunal
Date: 10 February 2022