

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Orazul International España Holdings S.L.**

**v.**

**Argentine Republic**

**(ICSID Case No. ARB/19/25)**

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**PROCEDURAL ORDER NO. 3  
ON THE PRODUCTION OF DOCUMENTS**

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***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

2 June 2022

## Table of Contents

<b>I. PROCEDURAL HISTORY .....</b>	<b>1</b>
<b>II. THE PARTIES' POSITIONS.....</b>	<b>2</b>
<b>A. The Respondent's Position.....</b>	<b>2</b>
<b>B. The Claimant's Position .....</b>	<b>2</b>
<b>III. THE TRIBUNAL'S DECISION.....</b>	<b>3</b>

## **I. PROCEDURAL HISTORY**

1. The Tribunal recalls that on 10 February 2022, it invited the Claimant to produce (i) 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., (ii) 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 (iii) a complete copy of Form F1, including all annexes of Form F1 (hereinafter, the “**Documents**”).
2. On 6 May 2022, the Tribunal invited the Parties to submit a joint or unilateral proposals regarding the sequence and timing of any comments they should have regarding the Documents to be produced by the Claimant within one week of the production of the Documents.
3. On 21 May 2022, the Claimant produced three documents (exhibits C-594, C-595, C-596) as well as a Confidentiality Agreement between the Parties. The Parties agreed in their Confidentiality Agreement to treat as confidential the documents ordered to be produced by the Claimant, i.e., “*Attachments to CNDC F1 Form, dated 4 January 2018*”, “*Purchase and Sale Agreement [...], together with exhibits and Amendment dated 1 November 1999*”, and “*Purchase and Sale Agreement [...] dated 10 October 2016*”.
4. On 26 May 2022, the Respondent noted that the newly produced evidence was redacted and incomplete, without the Claimant having provided any legal ground or explanation, and requested the Tribunal to order the Claimant to promptly and completely produce the Documents without redactions.
5. On 27 May 2022, the Tribunal invited the Claimant’s comments on the Respondent’s communication by 30 May 2022.
6. On 30 May 2022, the Claimant provided its comments on the Respondent’s letter dated 26 May 2022 and requested the Tribunal to reject the Respondent’s request.
7. While the Parties were, in principle, expected to submit their joint or unilateral proposals as to the sequence and timing of their comments on the Claimant’s newly produced documents by 28 May 2022, the Tribunal noted in its communication to the Parties of 30 May 2022, that it expected the Parties’ joint or unilateral proposals as to the sequence

and timing of their comments on the Claimant's newly produced documents by 14 June 2022 at the latest.

## **II. THE PARTIES' POSITIONS**

### **A. The Respondent's Position**

8. The Respondent submits that the Documents produced by the Claimant more than three months after Procedural Order No. 2 are redacted and incomplete, without the Claimant having provided any legal ground or explanation. The Respondent adds that the fact that a Confidentiality Agreement was signed implies that the Claimant would not produce redacted versions of the Documents. The Respondent identifies in its letter a number of examples of redactions.

### **B. The Claimant's Position**

9. In its communication of 30 May 2022, the Claimant indicated that it was objecting to the production of unredacted versions of the Documents on the basis of Article 9.2(a) and (e) of the IBA Rules on the Taking of Evidence in International Arbitration 2010 (hereinafter, "**IBA Rules 2010**"), which provide that the "*Arbitral Tribunal shall . . . exclude from evidence or production any Document, statement, oral testimony or inspection for . . . lack of sufficient relevance to the case or materiality of its outcome [or] . . . grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling.*"
10. With respect to exhibit C-594, the Claimant submits that it produced the CNDC F1 Form dated 4 January 2018 and its attachments, except for the financial statements of third-parties to this arbitration and a share purchase agreement entered into by third-parties in connection to the acquisition of an Argentine company, which is unrelated to the present case and the claims before this Tribunal. The Claimant submits that the redactions it made are subject to commercial or technical confidentiality, such as personal or commercially sensitive, third-party information that is irrelevant to Respondent's prior contentions regarding the F1 Form, or to any other issue in this case. The Claimant further submits that the Respondent has not explained the relevance of the redacted information or why it would be entitled to obtain personal and commercially sensitive information belonging to individuals and companies that are not

parties to this arbitration or involved with Claimant's investment in Cerros Colorados. Finally, the Claimant avers that the Respondent has not explained whether the Claimant's redactions have caused it any prejudice.

11. With respect to exhibit C-595, the Claimant submits that exhibit C-595 is not incomplete but that the exhibit was filed with only limited redactions to third-party, personal, or commercially sensitive information that is irrelevant and immaterial to the issues in this case. The Claimant avers that the Respondent has not explained how or why it would be entitled to obtain commercially sensitive information, which includes information concerning assets and companies unrelated to Claimant's investment in Cerros Colorados, and that such information is not relevant to Orazul's investment in Cerros Colorados. Finally, the Claimant avers that the Respondent has not explained whether the Claimant's redactions have caused it any prejudice.
12. With respect to exhibit C-596, the Claimant submits that it complied with the Tribunal's request to produce such document. According to the Claimant, its redactions are limited to the contact information for the buyer's and seller's representatives, and ancillary documents disclosed by the buyer and seller containing commercially sensitive information, including information related to assets and companies unrelated to Cerros Colorados. Furthermore, the Claimant submits that the Respondent has not explained why it is entitled to obtain personal and commercially sensitive information, or how it is relevant to this arbitration proceeding.

### **III. THE TRIBUNAL'S DECISION**

13. 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 Procedural Order No. 1, ICSID Rule 34(2) and Article 43 of the ICSID Convention. The Tribunal is also the judge of the admissibility of any evidence adduced and of its probative value pursuant to ICSID Rule 34(1). The Tribunal further takes guidance from the IBA Rules 2010, in particular Article 9.2 lit. (a) and (e).

14. The Tribunal notes that the Claimant has provided redacted and incomplete Documents, contrary to what was expected from the Claimant.<sup>1</sup> Pursuant to Procedural Order No. 2, the Claimant was ordered to produce the Documents without any limitation thereto.
15. The Tribunal also notes that the Parties agreed on a Confidentiality Agreement upon the Claimant's request, in which the Parties *inter alia* agreed that the Attorney General's Office of the Argentine Republic "*shall not use, share, or make public the Confidential Documents for any purpose other than their use in the context of the Arbitration.*" In the Tribunal's view, the fact that the Parties entered into a Confidentiality Agreement without reserving the possibility for the Claimant to produce redacted or incomplete Documents indicates that the Claimant renounced to any additional confidentiality safeguards.
16. The Tribunal furthermore finds that the Claimant has not shown to the Tribunal's satisfaction that there were compelling grounds precluding unredacted and full production pursuant to **Article 9.2 lit. (e) of the IBA Rules 2010**.
17. Moreover, the Tribunal is of the view that it can only conclusively decide on the ultimate probative value of the evidence adduced at a later stage.
18. However, the Tribunal recognizes that the production of the full versions of the Documents, in particular the production of each and every Exhibit and Schedule to Exhibits C-595 and C-596, will likely result in a voluminous and unnecessary addition to the record of the proceeding, which may lack relevance within the meaning of **Article 9.2 lit (a) of the IBA Rules 2010**.
19. Therefore, the Tribunal invites the Respondent to consider exempting certain information in the Documents (such as specific Exhibits and Schedules) from disclosure, which it would consider *prima facie* irrelevant, and notify the Tribunal and the Claimant accordingly by **5 June 2022 at the latest**.

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<sup>1</sup> E.g. C-594 at pp. 3, 14, 20-42, 45-59, 227; C-595 at pp. 35-36, 36-38, as well as missing Exhibits. The Tribunal notes that such Exhibits form an integral part of C-595 as per Article 1.2 of the Purchase and Sale Agreement ("All schedules and exhibits attached to this Agreement constitute a part of this Agreement and are incorporated herein for all purposes."). C-596 at pp. 6-7, 83-84. The Tribunal also notes with respect to exhibit C-596 that the purchaser and seller disclosure schedules form an integral part of the Purchase and Sale Agreement, as implied by Article 9.2 ("as otherwise expressly provided in this Agreement, or unless the context otherwise requires, whenever used in this Agreement (including the Schedules)") (emphasis added).

20. Subject to any exemptions of disclosure notified by the Respondent by 5 June 2022, the Tribunal orders the Claimant to produce the Documents unredacted and in full to the Box, by **7 June 2022**.
21. Finally, and irrespective of the potential length and volume of the Documents eventually produced, the Tribunal expects the Parties to provide their comments (if any) on the Documents well in advance of the Hearing.
22. Accordingly, the Tribunal, which originally had aimed to have a complete record already by the date of the CMC scheduled on 29 June 2022, invites the Parties to envisage that any final comments on the Documents be submitted by **29 July 2022 at the latest** and to take such deadline into account when conferring as to the sequence and timing of any comments on the Documents, due by **14 June 2022 at the latest**.

[signed]

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Dr. Inka Hanefeld  
President of the Tribunal  
Date: 2 June 2022