

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

BA Desarrollos LLC

v.

Argentine Republic

(ICSID Case No. ARB/23/32)

PROCEDURAL ORDER No. 4
(Redactions to Claimant's Document Production and Procedural Order No. 2)

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

19 July 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 9 May 2024 Claimant produced a series of responsive documents to the Decision.
3. On 22 May 2024 the Centre transmitted the Tribunal’s English version of PO No. 2 with the Parties and informed them that they had until 28 June 2024 to indicate whether they agree to any redactions prior to the PO’s publication by the Centre¹.
4. On 30 May 2024 Argentina contacted the Tribunal, informing it of alleged non-compliance with the decision, namely in relation to Document Requests 3, 14, 17, 19, 20, 21 and 25².
5. After receiving both Parties’ comments, on 20 June 2024 the Tribunal issued PO No. 3. Claimant was ordered to produce documents under Document Requests 14, 19, 20 and 21 by 24 June 2024 [the “**Ordered Documents**”]³.
6. On 24 June 2024 Claimant produced documents responsive to Document Request 14 and requested that Argentina sign a confidentiality agreement prior to producing the remaining Ordered Documents, providing a draft to that end⁴. This was accompanied by an Index of BA Desarrollo’s Supplementary Document Production⁵.
7. On 25 June 2024 the confidentiality agreement was duly signed⁶ – seemingly on the basis of a different draft provided by Argentina⁷. Upon its signing, documents related to Document Requests 19, 20 and 21 were duly handed over, with the Ordered Documents responsive to Document Request 21 [REDACTED] subject to redactions.
8. On 26 June 2024 Argentina requested that Claimant produce full, unredacted versions of the [REDACTED]. The following day, Claimant set out its belief that the redactions to the [REDACTED] were consistent with its production obligations⁸.

¹ ICSID’s letter of 22 May 2024.

² Respondent’s letter of 30 May 2024.

³ PO No. 3, para. 9.

⁴ Respondent’s email of 1 July 2024.

⁵ Claimant’s letter of 3 July 2024, Annex 1.

⁶ Claimant’s letter of 3 July 2024, Annex 2.

⁷ Claimant’s letter of 3 July 2024, p. 2.

⁸ Respondent’s email of 1 July 2024.

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9. On 27 June 2024 Claimant informed the Tribunal of its proposed redactions to PO No. 2, citing “concerns relating to confidential business information and personal protected information”⁹.
10. On 28 June 2024 Argentina set out its reasoning for why it believed PO No. 2 should be published in its entirety¹⁰. The Claimant then sought leave from the Tribunal to provide further comments, which was duly granted¹¹.
11. On 1 July 2024 Argentina submitted a request to the Tribunal requesting that it order Claimant to produce the [REDACTED] in their entirety¹². This was followed by comments from Claimant on 3 July 2024 regarding redactions to both the [REDACTED]¹³ and PO No. 2¹⁴.

⁹ Claimant’s email of 27 June 2024.

¹⁰ Respondent’s email of 28 June 2024.

¹¹ Claimant’s email of 2 July 2024.

¹² Respondent’s email of 1 July 2024.

¹³ Claimant’s letter of 3 July 2024.

¹⁴ Claimant’s email of 3 July 2024.

DISCUSSION

12. As has been evidenced above, the dispute between the Parties centres on two issues: the proposed redactions to PO No. 2 (1.) and Claimant's redactions to the [REDACTED] (2.).

1. PROPOSED REDACTIONS TO PO NO. 2

13. 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.

14. The Tribunal has, thus, a duty not to disclose any confidential or protected information¹⁵.

15. 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;
- (f) because it constitutes confidential business information or protected personal information;
- (g) because public disclosure would impede law enforcement;

¹⁵ ICSID Arbitration Rules 2022 63(3).

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- (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.
16. Claimant has identified various allegedly confidential information which, in its view, warrants protection from public disclosure under ICSID Arbitration Rule 66(f): confidential business information or protected personal information. This information can be classified under five broad categories (A. – E.)
17. Argentina does not appear to take issue with the fact that the redacted information indeed falls under a protected category, but argues that such protection would be lifted, as the information is already publicly available¹⁶.
18. Claimant, in turn, does not deny that confidential business information or protected personal information which has become public would no longer warrant redactions.
19. There is one last category (F.) which pertains to information that Argentina admits not to be public. Respondent, however, still thinks that Claimant’s proposed redactions are too broad.

A. References to the date of constitution of BA Desarrollos

20. BA Desarrollos is not a publicly listed company; hence the need to redact the date of its constitution, according to Claimant¹⁷.
21. Argentina argues that the date of constitution of BA Desarrollos is information that is already publicly available on the website of the State of Delaware¹⁸.
22. In response, Claimant agreed to removing this redaction within PO No. 2¹⁹.
23. This being the case, the Tribunal sees no need to make any further decision regarding this point and orders the removal of the proposed redactions linked to the date of constitution of BA Desarrollos.

¹⁶ Respondent’s email of 28 June 2024.

¹⁷ Claimant’s email of 27 June 2024.

¹⁸ Respondent’s email of 28 June 2024, point 4.

¹⁹ Claimant’s email of 3 July 2024.

B. References to EMS Capital LP and EMS Holding Inc.

24. Claimant wishes to redact PO No. 2’s references to EMS Capital LP [“**EMS Capital**”], EMS Capital Holding Inc. [“**EMS Capital Holding**”] and a link to the website of the United States Securities and Exchange Commission [“**SEC**”]²⁰.
25. Respondent requests that all references to EMS Capital be maintained on the grounds that its participation in the acquisition of Plots 2 and 3 in the Catalinas Norte area is public knowledge²¹. Similarly, it rejects the redaction of references to EMS Capital Holding, arguing that the information is publicly available on the SEC website – as evidenced by the very link that Claimant wishes to redact²².
26. The Tribunal concurs with Argentina that EMS Capital’s involvement in the acquisition of the Plots is public knowledge. What’s more, seeing as the relationship between EMS Capital Holding and EMS Capital is publicly available on the aforementioned website²³, it thus cannot be deemed to be protected information.
27. The Tribunal therefore rejects the redaction of all references to EMS Capital and Holding within PO No. 2.

C. References to EMS Opportunity and EMS Continuation

28. Claimant wishes to redact references to EMS Opportunity Ltd [“**EMS Opportunity**”] and EMS Continuation S.A [“**EMS Continuation**”] to withhold [REDACTED] place of their incorporation (and registration) [REDACTED]²⁴.
29. Argentina seeks to maintain the references within the PO on the grounds that it is public knowledge that EMS Capital has connections to EMS Opportunity²⁵. Similarly, it opposes the redaction of all the company’s other information and that of EMS Continuation due to it being publicly available²⁶. [REDACTED]²⁷.

²⁰ Claimant’s proposed redactions to PO No. 2 of 28 June 2024.

²¹ Respondent’s email of 28 June 2024, point 1.

²² Respondent’s email of 28 June 2024, point 2.

²³ See, for example, the link in PO No. 2, p. 48.

²⁴ Claimant’s proposed redactions to PO No. 2 of 28 June 2024.

²⁵ Respondent’s email of 28 June 2024, point 5.

²⁶ Respondent’s email of 28 June 2024, points 5 and 6.

²⁷ Respondent’s email of 28 June 2024.

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30. The Tribunal notes that the public information on EMS Opportunity on the SEC webpage provided by Respondent²⁸ mentions that EMS Opportunity is (was) incorporated in Cayman Islands, that it holds 2,350,000 shares in Replay Acquisition Corp and that EMS Capital is the investment manager of EMS Opportunity.
31. It follows that it being part of the EMS Group is public knowledge, as well as its place of incorporation – thus, this information does not warrant protection.
32. Argentina has referred the Tribunal to the Brazilian company registry²⁹, which lists EMS Continuation as a company domiciled abroad, with its address at Wickhams Cay, P.O. Box 662, Road Town – a location corresponding to the British Virgin Islands. The place of incorporation is, therefore, public knowledge.
33. [REDACTED]
- [REDACTED] Thus, these proposed redactions related to [REDACTED] are hereby upheld.

D. Reference to [REDACTED]

34. Claimant wishes to redact a reference to [REDACTED] Fideicomiso BAP and [REDACTED] filed before the *Agencia de Administración de Bienes del Estado*³⁰.
35. Respondent suggests that pending claims before the *Agencia de Administración de Bienes del Estado* are accessible to the public³¹.
36. Claimant, on the other hand, puts emphasis on the fact that [REDACTED] Fideicomiso BAP is not publicly available, with a formal request to access the files being necessary to obtain this information³².
37. Not without hesitation, the Tribunal is inclined to side with Claimant.
38. The redacted information is not completely private, as it could be made available upon individual request if the *Agencia de Administración de Bienes del Estado* decides to grant the request – the Tribunal has not been briefed on whether grounds exist for which such request may be refused.

²⁸ Respondent's email of 28 June 2024, point 5.

²⁹ Respondent's email of 28 June 2024, point 6.

³⁰ Claimant's email of 28 June 2024.

³¹ Respondent's email of 28 June 2024, point 8.

³² Claimant's email of 3 July 2024.

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39. Thus, the Tribunal is of the opinion that, although admittedly not private, the information is far from being considered as publicly available; hence, protection via redaction is granted.

E. References to personal information

40. PO No. 2 discloses personal information of Messrs. (i) Safra and (ii) [REDACTED]:

- Mr. Safra's nationalities, place of residence and the fact that he is the ultimate owner and president of EMS Capital;
- The fact that [REDACTED] appears as a witness and references to his witness statement.

41. (i) Claimant believes that the information related to Mr. Safra constitutes personal protected information, publication of which could contravene data privacy laws and regulations³³.

42. Respondent makes the argument that references to Mr. Safra should not be redacted as it is public knowledge that he started the arbitration and that he controls EMS Capital. This, it contends, also extends to information about his nationalities that can also be found online³⁴.

43. The Tribunal notes that Mr. Safra's ownership of EMS Capital is publicly available on the website of the United States Securities and Exchange Commission, as is the fact that he is an Italian national. Press articles have also referred to Mr. Safra as a Brazilian national³⁵. The intended redactions regarding Mr. Safra are, therefore, not warranted.

44. (ii) Argentina argues that it is public information that [REDACTED]

[REDACTED]

45. The Tribunal takes the position that [REDACTED] participation as a witness and references to the content of his witness statement must not be disclosed except if the Parties so agreed – which does not seem to be the case. The redactions in this regard are, thus, upheld.

³³ Claimant's emails of 27 June 2024 and 3 July 2024.

³⁴ Respondent's email of 28 June 2024, point 3.

³⁵ See links provided in Respondent's email of 28 June 2024, point 3.

³⁶ Respondent's email of 28 June 2024, points 1 and 3.

³⁷ Claimant's email of 3 July 2024.

F. Information that Argentina regards as non-public

46. Claimant proposes that the following information be redacted³⁸:

- [REDACTED]
- [REDACTED]

47. Respondent admits that this information may enjoy some kind of privilege³⁹.

48. The Tribunal is inclined to agree and upholds the redaction of references falling under the above categories.

2. CLAIMANT'S REDACTIONS TO THE [REDACTED]

49. As was explained by Claimant at an earlier date⁴⁰, EMS Continuation does not produce financial statements. This being the case, and in line with Claimant's comments in relation to the production of other financial documents⁴¹, the Tribunal ordered the production of "analogous documents" to financial statements⁴², such as [REDACTED]⁴³.

50. Claimant has produced [REDACTED]⁴⁴. Claimant's position is that the redacted information is irrelevant [REDACTED]⁴⁵.

51. Argentina objects to the suggested redactions⁴⁶.

52. As evidenced in the Tribunal's decision on [REDACTED], one of the criteria according to which the Tribunal considered the redactions to be reasonable was that they did not seem to impede Argentina [REDACTED]. In line with that decision, the Tribunal will therefore now base its consideration of the redactions on whether their removal would assist this aim.

³⁸ Claimant's email of 28 June 2024.

³⁹ Respondent's email of 3 July 2024.

⁴⁰ Claimant's letter of 10 June 2024, p. 6.

⁴¹ PO No. 3, see e.g. Document Requests 3, 17, and 25.

⁴² PO No.3, p. 24.

⁴³ PO No. 3, p. 6.

⁴⁴ See, for example, Annex 3 to Claimant's letter of 3 July 2024.

⁴⁵ Claimant's letter of 3 July 2024, pp. 2 – 3.

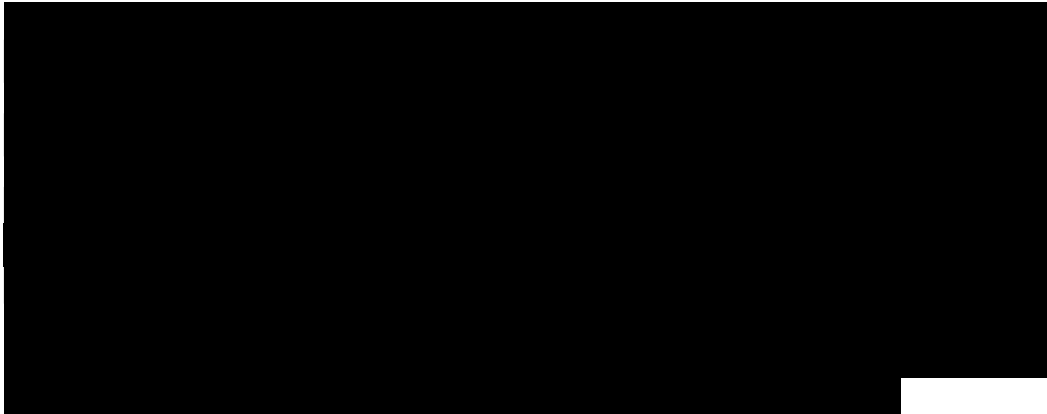
⁴⁶ Respondent's email of 1 July 2024.

⁴⁷ [REDACTED].

53.





54.



DECISION

55. As per the decisions made *supra*, the Tribunal hereby orders the lifting of the redactions of the following information:

- BA Desarrollos: the date of its constitution;
- EMS Capital and EMS Capital Holding: all redacted information;
- EMS Opportunity: all references except those relating to   ;
- EMS Continuation: the location (but not date) of incorporation.

56. Claimant shall submit a new version of PO No. 2 (in English and Spanish) in application of this decision by **Wednesday, 24 July 2024**. The Tribunal will then confirm the content of the new version prior to publication.

⁴⁸ Respondent's email of 1 July 2024.

⁴⁹ Claimant's letter of 3 July 2024, p. 4.

⁵⁰ Respondent's email of 1 July 2024.

⁵¹ Claimant's letter of 3 July 2024, p. 4.

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57. Any redactions to which objections have not been made by Argentina, and which have therefore not been dealt with in this Procedural Order, are deemed to have been tacitly waived by Respondent and therefore accepted.

58. Claimant is hereby ordered to produce a new version of [REDACTED]

Wednesday, 24 July 2024.

On behalf of the Arbitral Tribunal,

[Signed]

Deva Villanúa
President of the Arbitral Tribunal
Date: 19 July 2024