

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Azienda Elettrica Ticinese**

**v.**

**Federal Republic of Germany**

**(ICSID Case No. ARB/23/47)**

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**PROCEDURAL ORDER No. 2**  
**On Addition Procedural Matters and Procedural Calendar**

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***Members of the Tribunal***

Sir Christopher Greenwood GBE, CMG, KC, President of the Tribunal

Mr. John Beechey CBE, Arbitrator

Prof. Campbell McLachlan KC, Arbitrator

***Secretary of the Tribunal***

Ms. Anna Holloway

17 June 2024

## I. PROCEDURAL BACKGROUND

1. On 10 May 2024 the Tribunal issued Procedural Order No. 1 (“PO1”).
2. Paragraphs 14.1 and 15.1 of PO1 recorded:
  - 14.1. Since the parties made clear at the first session that they were still in discussion regarding the schedule, the Tribunal will issue the schedule in a separate Procedural Order. The parties will report to the Tribunal the status of their discussions within five working days of the issue of Procedural Order No. 1.
  - 15.1. Since the parties made clear at the first session that they were still in discussion regarding the question of document production, the Tribunal will issue directions on that matter in a separate Procedural Order. The parties will report to the Tribunal the status of their discussions within five working days of the issue of Procedural Order No. 1.
3. In accordance with these directions, on 17 May 2024, the parties each provided their additional comments on the points of document production and the procedural calendar. These comments demonstrated that the parties had not reached agreement on these matters.
4. Having considered the parties’ respective positions, and having deliberated, the Tribunal now issues its rulings on these remaining aspects of procedure.

## II. DOCUMENT PRODUCTION

5. The Claimant submitted that the procedural calendar should not include a document production phase; rather, it suggested that document production could happen *ad hoc* as needed, in accordance with Arbitration Rule 36(3). It argued that this would increase procedural/cost efficiency. However, the Claimant also provided proposed text for a procedural order describing a standard document production process, that it submitted should be used if the Tribunal wished to provide for such a process.
6. The Respondent stated that it was not prepared to agree to the omission of a document production phase until after had seen the Claimant’s Memorial. It maintained that the Claimant’s proposal to allow for document production on a rolling basis, *ad hoc* under Arbitration Rule 36(3), would be procedurally cumbersome and inefficient. It made no comments regarding the text of the description for the document production process submitted by the Claimant.
7. In the Tribunal’s view, not having a specified document production phase in the procedural timetable, and instead having document production requests dealt with *ad hoc* throughout the course of the proceeding, would not advance the time and cost efficiency of the proceedings. Cognizant of its duty under Arbitration Rule 3(1) to “conduct the proceeding ... in an expeditious and cost-effective manner,” the Tribunal has therefore determined that there will be a document production phase included in the procedural calendar (which is set forth as **Annex A**).
8. The Tribunal adopts the language proposed by the Claimant regarding the modalities of the document production phase (with minor modifications), which it sets forth below:
  - 8.1. The International Bar Association Rules on the Taking of Evidence in International Arbitration (2020) (“IBA Rules”) shall guide, but not bind, the Tribunal and the Parties regarding document production in this case.

- 8.2. At the relevant date set forth in the applicable scenario in the procedural timetable, attached as **Annex A**:
- 8.2.1. each party may submit a Request for the Production of Documents (“Request”) to the other party (without copying the Tribunal or the Tribunal Secretary), using the Redfern Schedule in substantially the form attached as **Annex B**;
  - 8.2.2. the other party shall produce all documents responsive to the Request in respect of which it has no objections;
  - 8.2.3. if and to the extent the other party objects to produce requested documents with reference to the objections listed in Article 9(2) of the IBA Rules, it shall submit such objection in writing (using a Redfern Schedule in substantially the form attached as **Annex B**) to the requesting party only;
  - 8.2.4. the requesting party shall comment in writing on any objection made (according to § 8.2.3) by the other party, and the parties shall thereafter consult with a view towards mutual resolution of the remaining objection(s).
  - 8.2.5. If the parties cannot mutually agree on a prompt resolution of such objections, the other party may submit the completed Redfern Schedule to the Tribunal, with a copy to the requesting party, but the submitted Redfern Schedule may be accompanied by a separate letter or brief; this shall constitute the requesting party’s application to the Tribunal for an order for the production of such documents (“Application”).
  - 8.2.6. If the requesting party submits a separate letter or brief in accordance with § 8.2.5, the other party shall be entitled promptly to submit a response of substantially similar length.
  - 8.2.7. The Tribunal shall use its best endeavours to rule on any Application according to the timetable aforementioned;
  - 8.2.8. The parties shall produce any documents ordered to be produced by the Tribunal according to the timetable aforementioned.
- 8.3. Documents deemed by any party to be legally privileged shall be listed in a privilege log (in substantially the form attached as **Annex C**). The privilege log shall contain the following information for each redacted or withheld document: Number in the Request for the Production, document (type), date, author(s) and recipient(s)/addressee(s) (including any persons who are copied), subject-matter of the document, scope of the information withheld, and the basis for the claim of privilege.
- 8.4. Documents produced pursuant to a Request voluntarily under § 15.2.2 or pursuant to an order from the Tribunal under § 8.2.7 shall be exchanged between the parties only and shall form part of the record only if and when they are submitted by a party with a later pleading.
- 8.5. Neither party shall be permitted to submit additional requests for the production of documents, save under exceptional circumstances and at the discretion of the Tribunal upon a reasoned written request followed by observations from the other party.

8.6. The Request, responses or objections to the Request, the reply to the responses or objections to the Request, and the Tribunal's decisions referred to in this Section shall be recorded in the Redfern Schedule attached at **Annex B** of this Order. This format shall be used with respect to the writings referred to in §§ 8.2.1 – 8.2.8, but it may be accompanied by a separate letter or brief in a format other than the Redfern Schedule format.

### **III. PROCEDURAL CALENDAR**

9. The Parties principally disagree on two issues.
10. The first is how long the Respondent should have for its Counter-Memorial and Rejoinder. The Claimant originally proposed 5 months for the Rejoinder (later suggesting 7.5 months), and the Respondent has said it needs 1 year (364 days) for each of its main submissions.
11. The second issue is whether the procedural calendar should include scenarios for bifurcation, if it is sought. The Claimant suggested dates for this scenario whereas the Respondent has stated that it “reserves its right to request a bifurcation but does not consider it necessary to address a hypothetical procedural calendar in this regard now.”
12. In the Tribunal's view, again taking into account its duty under Arbitration Rule 3(1), a full year for each of the Respondent's principal pleadings is excessive given the nature of the case. The Tribunal considers that a period of eight months for the Counter-Memorial and four months each for the Reply and Rejoinder (the period for the Reply to start running after the close of the document production phase) would be appropriate. This decision is reflected in the procedural calendar at **Annex A**.
13. As for including a procedural calendar for the scenario in which bifurcation is sought, the Tribunal considers this unnecessary. It notes that under Arbitration Rule 44(1), a request for bifurcation of preliminary objections must be made not later than 45 days after the filing of the Memorial, absent alternate party agreement. The same rule provides that the Tribunal must set procedural deadlines for submissions on the question of bifurcation at that stage. For this reason, the Tribunal has not included alternative scenarios in the procedural calendar.
14. Finally, the Tribunal prefers to wait to fix a hearing date. To that end, it has included, in the procedural calendar, a procedural step for fixing the hearing dates in consultation with the parties.

On behalf of the Tribunal,

[signed]

Sir Christopher Greenwood  
President of the Tribunal  
Date:  
17 June 2024

**ANNEX A TO PROCEDURAL ORDER NO. 2**  
**PROCEDURAL CALENDAR**

Description	By	Days	Date
First Session	All		<b>Friday, April 19, 2024</b>
Memorial	Claimant	98	Friday, July 26, 2024
[Date for scheduling hearing]	All		Approx. Friday, January 31, 2025
Counter-Memorial on the Merits <i>[and Memorial on Jurisdiction (if applicable)]*</i>	Respondent	243	Wednesday, March 26, 2025
Requests for Production of Documents	Claimant and Respondent	28	Wednesday, April 23, 2025
Production of Non-Objected Documents and Objections	Claimant and Respondent	28	Wednesday, May 21, 2025
Responses to Objections - Sent to Tribunal	Claimant and Respondent	14	Wednesday, June 4, 2025
Letter & Document Production Application to the Tribunal	Claimant and Respondent	7	Wednesday, June 11, 2025
Decision on Requests	Tribunal	28	Wednesday, July 9, 2025
Production as Ordered	Claimant and Respondent	35	Wednesday, August 13, 2025
CMC No. 1	All		TBD
Reply on the Merits <i>[and Counter-Memorial on Jurisdiction (if applicable)]</i>	Claimant	121	Friday, December 12, 2025
Rejoinder on the Merits <i>[and Reply on Jurisdiction (if applicable)]**</i>	Respondent	129	Monday, April 20, 2026
<i>[Rejoinder on Jurisdiction (if applicable)]</i>	<i>Claimant</i>	<i>56</i>	<i>Monday, June 15, 2026</i>
Notification of Witnesses and Experts	Claimant and Respondent	14	Monday, June 29, 2026
Notification of Witnesses and Experts not called by the Parties	Tribunal	14	Monday, July 13, 2026

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Procedural Order No. 2

Description	By	Days	Date
CMC No. 2*** (incl. Hearing Organization )	All		TBD
Hearing Commencement	All		TBD
Hearing Ends	All		TBD
Corrections to Hearing Transcripts	Claimant and Respondent		<i>TBD</i>
<i>[Simultaneous Post-Hearing Briefs]</i>	<i>Claimant and Respondent</i>		<i>TBD</i>
<i>[Simultaneous Reply Post-Hearing Briefs]</i>	<i>Claimant and Respondent</i>		<i>TBD</i>
Simultaneous Costs Submissions	Claimant and Respondent		TBD
Award	Tribunal		TBD
<p><i>* If the Respondent seeks bifurcation of the proceeding, Arbitration Rule 44(1) shall apply, and the Tribunal will determine the Procedural Timetable that is to follow as part of that process.</i></p> <p><i>** an extra 8 days has been provided for this step, given the intervention of the Christmas and New Years period.</i></p> <p><i>*** per AR 31, additional CMCs can be scheduled in the procedural calendar</i></p>			

**ANNEX B TO PROCEDURAL ORDER NO. 2  
REDFERN SCHEDULE**

No.	Documents or category of documents requested (requesting Party)	Relevance and materiality (requesting Party)		Reasoned objections to document production request (*) (objecting Party)	Response to objections to document production request (requesting Party)	Decision (Arbitral Tribunal)
		References to submissions, exhibits, witness statements or expert reports	Comments			

(\*) Codes for objections to requests for production of documents

Code	Description
V	The description given is insufficient to identify the requested documentation. The request is too <b><u>V</u>ague</b> .
B	The category of documentation requested is insufficiently narrow and specific. The request is excessively <b><u>B</u>road</b> .
E	The requested documentation does not <b><u>E</u>xist</b> .
M	The requested documentation is not <b><u>M</u>aterial</b> to the outcome of the case.

**ANNEX C TO PROCEDURAL ORDER NO. 2  
PRIVILEGE LOG**

Requesting party: Requesting party

Requested party: Requested party

<b>Doc. No.</b>	<b>Date of issuance (in chronological order)</b>	<b>Author/Sender (identifying any attorney to the Requested party)</b>	<b>Recipient(s) (including any individuals in copy)</b>	<b>Brief description of the Document or Category of the Documents</b>	<b>Asserted privilege</b>	<b>Reasons for objection</b>