

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. 6

Members of the Tribunal

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

Secretary of the Tribunal

Ms. Anna Toubiana

Assistant to the Tribunal

Ms. Charlotte Matthews

19 January 2023

Table of Contents

A. PROCEDURAL BACKGROUND..... 1

B. THE PARTIES' POSITIONS..... 3

1. The Respondent's position.....3

 a) The Respondent's position on the alleged new evidence submitted by the Claimant 3

 b) The Respondent's position on its request to submit new evidence6

2. The Claimant's position.....6

 a) The Claimant's position on the alleged new evidence submitted by the Claimant6

 b) The Claimant's position on the Respondent's request to submit new evidence.....9

C. THE TRIBUNAL'S CONSIDERATIONS..... 10

1. The Tribunal's decision on the alleged new evidence submitted by the Claimant..... 10

2. The Tribunal's decision on the Respondent's request to submit new evidence 11

D. THE TRIBUNAL'S ORDER..... 11

The Tribunal hereby issues the following Procedural Order No. 6 to address the Respondent's requests set out in its letter of 29 December 2022.

In **Section A.**, the Tribunal recalls the procedural background of the Respondent's requests.

In **Section B.**, the Tribunal sets out the Parties' positions on the Respondent's requests.

In **Section C.**, the Tribunal sets out its considerations and decisions on the Respondent's requests.

In **Section D.**, the Tribunal sets out the Tribunal's order.

A. Procedural Background

1. From 1 to 15 September 2022, the Hearing took place in Washington D.C.
2. During the Respondent's cross-examination of the Claimant's witnesses, the Respondent noted *inter alia* that Exhibit C-341 had a "huge blank"¹ and that Exhibit C-465, which is an email, contained "no greeting, final greeting, or signature."² The Respondent also noted during the cross-examination of the Respondent's quantum expert in relation to Exhibit BRG-222 that "if we look at the Spanish version of the Report, which we have open in Acrobat now, to the properties of the document, it shows that the author of these documents is Consuelo Sánchez."³
3. On the final and tenth day of the Hearing, *i.e.* on 15 September 2022, the Tribunal discussed post-Hearing procedural steps with the Parties, including Post-Hearing Briefs. The President noted:

"Paragraph 24.1 of our POI, [...] clearly stipulates that Post-Hearing Briefs shall be limited to addressing the remaining issues that still divide

¹ Hearing Transcript, Day 2, p. 426 (Ms. Lozza referring to Exhibit C-341: "I would like to go back to Exhibit C-341 at Page 9. It's the Duke presentation. C-341. Page 9. The first--it's kind of weird the way this is because it is like a huge blank.").

² Hearing Transcript, Day 3, p. 711 (Ms. Etchegorry referring to Exhibit C-465: "And if we go back to the next page again, there is no greeting, final greeting, or signature there, is there?").

³ Hearing Transcript, Day 8, pp. 2183-2184 (Ms. Etchegorry referring to Exhibit BRG-222: "Okay. And if we look at the Spanish version of the Report, which we have open in Acrobat now, to the properties of the document, it shows that the author of these documents is Consuelo Sánchez. [...] Did you know that Consuelo Sánchez is Manager, Corporate Controlling, at Inkia Energy since 5 January 2017?").

the Parties after the Hearing as well as any issues that the Tribunal might wish to request.

[...]

With regard to the questions, we have Professor Pellet who has some immediate questions, which he will share with the Parties on a fully non-prejudice basis, and it's just his very immediate reaction to what he has heard. And our co-Arbitrator, Mr. Haigh, and me have no such immediate questions, and should the Tribunal come up with a more defined set of questions by the Tribunal, we will do so in the course of the next two weeks. If you do not receive such questions, there will be none.

[...]

And [...] so I turn to Professor Pellet with his set of questions. He does not wish to have answers on that right now, but it is really just his immediate reaction.”⁴

4. Professor Pellet *inter alia* stated:

“My second point is clearly directed to the Claimants. The Respondent in two or three occasions noted that some documents apparently had been redacted. You have not at all reacted to that, so I would enjoy to have the answer because always these kinds of remarks can say, Ah, they don't want to show that.”⁵

5. On the same day, following the closing of the Hearing, the Tribunal Secretary communicated the following message from the Tribunal to the Parties:

“Following the Hearing held from 1-15 September 2022, the Tribunal invites the Parties to (i) submit their post-hearing briefs by 4 November 2022 limited to 50 pages; and (ii) submit joint or unilateral proposals as to the timing, sequence, and level of detail of the cost submissions by 29 September 2022.”

6. The Respondent submitted its Post-Hearing Brief on 4 November 2022 and the Claimant submitted its Post-Hearing Brief on 5 November 2022.

7. On 4 November 2022, the Claimant submitted a letter to the Tribunal titled “*Answer to Prof. Pellet's Question on Respondent's Suggestions regarding Document*

⁴ Hearing Transcript, Day 10, p. 2801.

⁵ Hearing Transcript, Day 10, pp. 2803-2804.

Authenticity” along with exhibit C-600, a report by FTI Consulting (“**FTI**”) submitted as Appendix A titled “*Documents Metadata Certificates*” on Exhibits C-341, C-465, C-466, and C-517 (“**FTI Report**”), and a letter by Quantum America (“**Quantum**”) submitted as Appendix B on Exhibits BRG-222 and BRG-98 (“**Quantum’s Letter**”).

8. On 29 December 2022, the Respondent addressed a letter to the Tribunal by which it requested the Tribunal to:

“a) declare Claimant’s new evidence submitted with its letter of 4 November 2022 inadmissible;

b) in any case, take into account Respondent’s observations on Claimant’s new evidence submitted with its letter of 4 November 2022; and

c) authorize Respondent to submit CAMMESA’s document that includes updated information on the payment of Cerros Colorados’ sales liquidations.”

9. On 30 December 2022, the Tribunal invited the Claimant to submit any comments it may have on the Respondent’s letter of 29 December 2022 by 9 January 2023.

10. On 9 January 2023, the Claimant requested an extension of time until 12 January 2023 to submit its views on the Respondent’s letter of 29 December 2022, which the Tribunal granted on 10 January 2023.

11. On 12 January 2023, the Claimant submitted its comments on the Respondent’s letter of 29 December 2022 as well as a newly submitted exhibit C-600. The Claimant requested the Tribunal to dismiss the Respondent’s requests in their entirety.

B. The Parties’ positions

1. The Respondent’s position

a) The Respondent’s position on the alleged new evidence submitted by the Claimant

12. The Respondent alleges that the Claimant unilaterally introduced new evidence without seeking leave from the Tribunal either prior or together with its letter of 4 November 2022, in violation of paragraph 16.4 of Procedural Order No. 1. In particular, the Respondent observes that the Claimant submitted with its letter of 4 November 2022 a new Exhibit C-600, a Report by FTI submitted as Appendix A, and a letter by Quantum

submitted as Appendix B. The Respondent notes that neither FTI nor Quantum were available for cross-examination at the Hearing.

13. **With respect to FTI’s Report**, which allegedly reviewed the metadata of Exhibits C-341, C-465, C-466 and C-517, the Respondent disputes FTI’s conclusions and submits that the Report does not add any value to the Claimant’s position with respect to these exhibits.

14. **In relation to Exhibit C-465** in particular, the Respondent notes that the native files of the emails contained in the exhibit have not been submitted into the record and have not been reviewed by FTI. In addition, the persons copied in the email thread of the exhibit did not involve any local representative of Cerros Colorados and thus, “*any comments and conclusions made by FTI upon reviewing a pdf file stored in Cerros Colorados are of no value and cannot confirm that Exhibit C-465_ENG.pdf reflects the content of the original email dated 28 August 2013 in which Ms. Bertone was copied.*”⁶ The Respondent also submits that the version reviewed by FTI, unlike the version submitted on the record, shows that José Tierno, one of the Claimant’s witnesses, printed the email thread, “*which is important information that could have been used during the cross examination of José Tierno.*”⁷ In addition, the Respondent submits that while the FTI Report sought to confirm that Exhibit C-465 was created, last written and last accessed on 1 October 2013, Respondent alleges that it was able to modify the date of creation and the last written date of a copy of Exhibit C-465 with the use of free software. The Respondent concludes that there is no guarantee that metadata information, including the creation and last modification dates of a file, cannot be modified, and that such conclusion applies to Exhibits C-341, C-517 and C-466 as well.

15. **In relation to Exhibit C-341 and the newly submitted Exhibit C-600**, the Respondent notes that the Claimant acknowledges that some information was “*not submitted into the record*” consisting of “*the last slide of the document that corresponded with Exhibit C-341*” (submitted as a ‘pdf’ file), which has now been submitted as Exhibit C-600 as a ‘ppt’ file with an additional slide. The Respondent notes that the additional slide is titled “2005 Priorities” and lists several courses of action that Duke Energy Argentina intended to follow in 2005. Contrary to the

⁶ Respondent’s letter to the Tribunal dated 29 December 2022, p. 2.

⁷ Respondent’s letter to the Tribunal dated 29 December 2022, p. 3.

Claimant's view that the missing slide is "*irrelevant to the dispute*",⁸ the Respondent submits that the missing slide clearly demonstrates that Cerros Colorados' priority was to strengthen its relationship with the Government, which is inconsistent with the Claimant's statement that Cerros Colorados was coerced by the Argentine Government and that its representatives feared retaliation throughout the FONINVEMEM process. The Respondent asserts that in any event it is not for the Claimant to unilaterally determine what is and is not relevant to the dispute. According to the Respondent, the Claimant's failure to submit Exhibit C-341 in its entirety has deprived the Respondent of the opportunity to cross-examine the Claimant's witnesses on the full version of Exhibit C-341. Finally, the Respondent notes that the document properties of the new file submitted as Exhibit C-600 show that it was created, last modified and printed on 1 January 1900, "*which makes no sense and does not provide confidence in the reliability of this new document.*"⁹

16. **With respect to Exhibit C-517**, the Respondent notes that such Exhibit is a pdf file and that the native Word document of that exhibit examined by FTI has not been submitted in the record. Moreover, according to the Respondent, the number of pages, words and lines does not match between the pdf file submitted in the record as Exhibit C-517 and the Word document whose information appears in the FTI Report.
17. **With respect to Quantum's letter**, the Respondent notes that it had showed during the Hearing that the document properties of Exhibit BRG-0098 indicated Consuelo Sánchez—an employee of Inkia Energy, one of the companies of the I Squared Capital group to which the Claimant belongs—as the author of such document. According to the Respondent, Quantum's letter submitted as Appendix B to the Claimant's letter of 4 November 2022 does not contradict that fact nor does it provide any reasonable explanation for it. The Respondent submits that the key issue is that the Claimant has deprived the Respondent of the right to cross-examine Quantum on the reports submitted as Exhibits BRG-0098 and BRG-0222, and that the Respondent's expert did not have access to Quantum's model.

⁸ Claimant's letter to the Tribunal dated 4 November 2022, p. 2.

⁹ Respondent's letter to the Tribunal dated 29 December 2022, p. 6.

b) The Respondent's position on its request to submit new evidence

18. The Respondent also seeks leave from the Tribunal to submit a document prepared by CAMMESA, “*which includes updated information regarding Cerros Colorados’ sales liquidations accrued during the period disputed in this arbitration, as well as updated information regarding the payment of such sales liquidations as of 19 December 2022.*”¹⁰ The Respondent adds that such document “*shows the yield obtained by Cerros Colorados through the application of the LIBOR rate agreed in the 2005 Final Agreement, Res. SE 564/2007 and the 2008-2011 Agreement.*” The Respondent submits that such document is relevant to correct the unsupported contentions that the Claimant’s witnesses made during the Hearing according to which Cerros Colorados was supposedly not paid its receivables.

2. The Claimant's position

a) The Claimant's position on the alleged new evidence submitted by the Claimant

19. The Claimant submits that the limited observations and evidence it submitted to the Tribunal with its 4 November 2022 letter were procedural and not substantive in nature. According to the Claimant, they were provided in direct response to Professor Pellet’s request for the Claimant to address certain allegations that the Respondent raised at the Hearing concerning purported redactions in and the authenticity of the Claimant’s exhibits. The Claimant adds that what the Respondent refers to as “new evidence” is information confirming that the documents that the Respondent questioned for the first time at the Hearing are authentic and have not been modified by the Claimant for purposes of submitting them in this arbitration. The Claimant affirms that these documents do not expand on the substantive claims and arguments made by the Claimant. The Claimant adds that the Respondent has not previously raised the same alleged concerns when the Claimant submitted additional evidence to address procedural issues.¹¹ Furthermore, the Claimant submits that the Respondent has not been prejudiced by the Claimant’s procedural comments as the Respondent was on

¹⁰ Respondent’s letter to the Tribunal dated 29 December 2022, p. 7.

¹¹ The Claimant specifically refers to Prof. Schreuer’s statement dated 19 October 2022 explaining his health situation, appended to the Claimant’s letter dated 21 October 2022, and issued in the context of the Respondent’s requests with respect to Prof. Schreuer set out in the Respondent’s letter dated 6 October 2022.

notice of Prof. Pellet's request and submitted an eight-page letter with its views on the Claimant's comments.

20. **With respect to the Respondent's allegations concerning FTI's Report and the authenticity of the Claimant's Exhibits C-465, C-341, and C-517**, the Claimant submits that the software and methodology that FTI used to preserve and confirm the authenticity of the files at issue are top industry standards and provide ample guarantees, contrary to Respondent's statements. In particular, the Claimant explains that FTI *inter alia* employed a "forensic tool called EnCase, which is routinely used [...] to retrieve and analyze evidence procured from digital sources [...] [and] allows the investigator to conduct a deep analysis of an electronic file, including the preservation of the original metadata of a file to certify its authenticity at a subsequent time, delivering reliable investigation results."¹²
21. **With respect to Exhibit C-465**, the Claimant submits that the email contained in such Exhibit is an authentic copy of a communication of a representative of Duke Energy that was shared with Cerros Colorados. The Claimant adds that FTI "confirms that [the metadata located in the drive in which the pdf file at issue was saved] is consistent with the one that was submitted into the record as Exhibit C-465."¹³ The Claimant submits that the Respondent refers to no requirement for Parties to preserve and submit native files into the record and that the Respondent did not raise this issue at any point following the presentation of the exhibit submitted with the Claimant's Reply. In addition, with respect to the allegation that the email submitted in the Exhibit did not involve any local representative of Cerros Colorados, the Claimant states that the exhibit itself shows that the email was forwarded to representatives of Cerros Colorados, including Mr. Tierno, and thus, it was naturally stored by Cerros Colorados. With respect to the allegation that Mr. Tierno's name does not appear as a person having printed the email in the exhibit and that such information could have been used during cross-examination, the Claimant sustains that the Respondent could have asked Mr. Tierno about the email during cross-examination, as he received the email chain at issue.

¹² Claimant's letter to the Tribunal dated 12 January 2023, p. 3.

¹³ Claimant's letter to the Tribunal dated 12 January 2023, p. 4.

22. **With respect to Exhibit C-341 (re-submitted as Exhibit C-600)**, first, the Claimant clarifies that the metadata shows a date of 1 January 1900 because the file was scrubbed when being submitted. The Claimant also clarifies that it submitted the native file with the correct metadata as a new Exhibit C-600. Second, the Claimant submits that contrary to the Respondent’s suggestions, the exhibit shows that Cerros Colorados had, at the time, “*rejected the Government’s proposal to invest in [...] FONINVEMEM because: the money corresponding to Duke Energy accounts receivables should not be subject to any additional investment.*”¹⁴
23. **With respect to Exhibit C-517** and the Respondent’s allegation that the number of pages, words, and lines in the Word document assessed by FTI do not match the pdf file that was submitted by Claimant, FTI clarifies that “*the mismatch in page count and other information raised is a common issue in the way in which Microsoft Word updates the metadata that is stored within the file.*”¹⁵ In addition, the Claimant notes that the exhibit contains minutes of a meeting between Cerros Colorados and a representative from the Secretariat of Energy and that the Respondent would have submitted witness testimony to address its content and/or it would have submitted evidence in support of its contentions, had the Respondent been genuinely concerned about the authenticity of this document.
24. **With respect to the Respondent’s comments on Quantum’s Dispatch Model**, the Claimant notes that any discussion concerning the authenticity of the reports submitted as Exhibits BRG-222 and BRG-98 is moot as Quantum already submitted a letter confirming that both reports, which Quantum prepared “*under the direction of Mr. Santiago Dellepiane and Ms. Daniela Bambaci from [BRG], [...] are true and correct copies of the versions that [Quantum] prepared and submitted to BRG.*”¹⁶ Claimant also states that the purported objections the Respondent raises with respect to Quantum’s reports and its model are not material to the outcome of these proceedings as the Respondent’s expert, Dr. Flores, conceded at the Hearing that he had no “*qualm [...] with the Quantum Model.*”¹⁷ In addition, the Claimant submits that the Respondent did not raise any arguments concerning the cross-examination of Quantum until after

¹⁴ Duke Energy Argentina, Government Affairs, Mar. 2006 (Exhibits C-341 and C-600), at 8.

¹⁵ Claimant’s letter to the Tribunal dated 12 January 2023, p. 6.

¹⁶ Claimant’s letter to the Tribunal dated 4 November 2022 (Appendix B, Letter from Quantum to White & Case dated 4 November 2022).

¹⁷ Claimant’s letter to the Tribunal dated 12 January 2023, p. 7.

the Hearing had finalized. With respect to the Dispatch Model itself, the Claimant sustains that the model used by Quantum replicates the same model that CAMMESA uses to set spot prices for the Argentine electricity. In addition, while Respondent and Dr. Flores had access to both the CAMMESA model and a factual witness from CAMMESA, Mr. Ruisoto, they did not propose alternatives nor disputed the appropriateness of the adjustments made by BRG. Finally, with respect to the properties of exhibit BRG-98 showing an individual named Consuelo Sanchez as the author of the document, the Claimant clarifies that the author reflected in the properties of a pdf file can be the person that saves the original native file as a pdf document and does not necessarily reflect the individual(s) responsible for the content of the native file.

b) The Claimant's position on the Respondent's request to submit new evidence

25. According to the Claimant, the Respondent's request to submit an additional document must be rejected because it is an improper attempt to reopen an issue that the Parties briefed at length and there are no extraordinary circumstances or new facts that can plausibly support it. The Claimant points to paragraph 16.4 of Procedural Order No. 1, pursuant to which the Parties must not submit documents after the filing of their last written submission, unless the Tribunal determines that there is justification.
26. In the case at hand, contrary to the Respondent's characterizations, there are no new developments or claims that could plausibly justify the Respondent's request. According to the Claimant, the Respondent could have, but did not, submit this purported evidence together with any of its substantive pleadings or as part of the testimony of its CAMMESA witness, Mr. Ruisoto. In addition, the Claimant states that the purported evidence pertains to data that has been available for years, so there is no excuse for the Respondent's belated request. The Claimant submits that where no exceptional circumstances or new facts exist that warrant the admission of belated evidence, tribunals routinely reject attempts to submit evidence once the written and oral phases of an arbitration have concluded.¹⁸

¹⁸ Claimant's letter to the Tribunal dated 12 January 2023, p. 10 referring to *Mathias Kruck, et. al. v. Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility dated 19 April 2021 ¶¶ 99-101; *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award dated 29 April 1999 ¶¶ 41-49.

C. The Tribunal's considerations

27. The Tribunal has duly considered the Parties' positions on the Respondent's requests set out in its letter of 29 December 2022. Based on the considerations set out below, the Tribunal decides to reject the Respondent's requests (a) and (c).

1. The Tribunal's decision on the alleged new evidence submitted by the Claimant

28. **With respect to the Respondent's request (a) set out in its letter of 29 December 2022**, the Tribunal considers that the Claimant has not violated paragraph 16.4 of Procedural Order No. 1. The Claimant was not in a situation in which it should have sought leave from the Tribunal as it was directly invited by the Tribunal to answer Prof. Pellet's query made to the Claimant on 15 September 2022. In this regard, the Tribunal is satisfied that the Claimant's letter of 4 November 2022 is within the scope of Prof. Pellet's query as the Tribunal considers that the FTI Report, Quantum's Letter and Exhibit C-600 are directly responsive to such query, for which the Respondent was put on notice.

29. In addition, the Tribunal does not consider crucial for the purposes of document authenticity the fact that neither FTI nor Quantum were available during the Hearing for cross-examination as, in any event, Prof. Pellet's query was only put to the Claimant at the end of the Hearing. In addition, the Tribunal is satisfied that the Respondent was afforded an opportunity to comment on such documents.

30. The Tribunal thus finds no reason to declare the FTI Report, Quantum's Letter and Exhibit C-600 as inadmissible. Accordingly, the Tribunal rejects the Respondent's request to declare such documents as inadmissible.

31. **With respect to the Respondent's request (b) set out in its letter of 29 December 2022**, the Tribunal notes that the Parties have commented at length on the authenticity and relevance of the Claimant's Exhibits C-341, C-465, C-466, C-517, C-600, BRG-98, and BRG-222. The Tribunal has taken into account both the Respondent's observations as well as the Claimant's so that the Respondent's request to "*take into account Respondent's observations*" is already satisfied. The Tribunal finds that it is not required to reach any finding for the purposes of this Procedural Order on the comments made by Parties but reserves any findings, if required, to its Award.

32. The Tribunal further stresses that it will not require any further submissions by the Parties on the issue of the authenticity and relevance of the Claimant’s Exhibits C-341, C-465, C-466, C-517, C-600, BRG-98, and BRG-222.

2. The Tribunal’s decision on the Respondent’s request to submit new evidence

33. The Tribunal recalls that paragraph 16.4 of Procedural Order No. 1 provides:

“Without prejudice to §16.5 below, neither party shall submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that there is reasonable justification based on a reasoned written request followed by observations from the other party.”

34. The Tribunal is of the view that the Respondent has not provided a “*reasonable justification*” to its request to submit new evidence. In particular, the Respondent has not established and the Tribunal is not satisfied that exceptional factual or legal circumstances mandating the admission of new evidence at such a late stage on the record exist.

35. Accordingly, the Tribunal rejects the Respondent’s request to submit CAMMESA’s document that allegedly includes updated information on the payment of Cerros Colorados’ sales liquidations.

D. The Tribunal’s Order

36. Based on the considerations set out above, the Tribunal:
- (a) decides to reject the Respondent’s requests (a) and (c) set out in its letter of 29 December 2022;
 - (b) takes note that the Respondent’s request (b) set out in its letter of 29 December 2022 is satisfied.

[signed]

Dr. Inka Hanefeld
President of the Tribunal
Date: 19 January 2023