

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mainstream Renewable Power Ltd and others

v.

Federal Republic of Germany

(ICSID Case No. ARB/21/26)

PROCEDURAL ORDER NO. 6

Members of the Tribunal

Ms. Wendy Miles KC, President of the Tribunal

Mr. Antolín Fernández Antuña, Arbitrator

Dr. Charles Poncet, M.C.L., Arbitrator

Secretary of the Tribunal

Ms. Martina Polasek

6 March 2023

I. RELEVANT PROCEDURAL BACKGROUND

1. On 22 November 2021, the Tribunal issued Procedural Order No. 1 (“**PO 1**”) setting forth the relevant procedure to govern this arbitration.
2. On 9 January 2023, the Tribunal issued Procedural Order No. 4 (“**PO 4**”) concerning the production of documents. Section 30(c) of PO 4 provides that each Party shall produce the documents of which production is ordered to the requesting Party by 27 January 2023.
3. On 30 January 2023 and 2 February 2023 the Respondent and the Claimants, respectively, made applications to the Tribunal for orders arising out of the other Party’s production of documents. This Procedural Order No. 6 rules on those applications.

II. THE PARTIES’ POSITIONS

4. By letter dated 30 January 2023, the Respondent wrote to the Tribunal alleging that the Claimants had “*failed to meet their obligations imposed by the Tribunal*” under PO 4 relating to the document production, in particular their obligation to produce the documents as ordered by 27 January 2023 pursuant to Section 30(c) and (d) of PO 4 (the “**Respondent’s Application**”). According to the Respondent, the Claimants had only produced the ordered documents in part, communicating on the day of the ordered production that they would produce “*on a rolling basis*”. The Respondent alleged that the Claimants “*created their own rules by inventing the possibility of a rolling production*” and that their actions affected the Respondent’s “*opportunity to be heard and properly defend itself*”.
5. The Respondent’s Application requested that the Tribunal:
 - (i) order the Claimants to “*comply with their obligations set forth in Sec. 30(c) and (d) of PO 4 immediately*”;
 - (ii) consider the Claimants’ “*failure to comply with their obligations ... when rendering the decision on the costs of this arbitration*”; and

- (iii) amend PO 1 to “*introduce[e] an obligation of the Parties to inform the Tribunal, ICSID and the opposing Party about any incapability to meet deadlines in a timely fashion as soon as such circumstance becomes foreseeable*”.
- 6. By response dated 2 February 2023, following invitation from the Tribunal, the Claimants asserted that the claims in the Respondent’s Application were “*serious, unwarranted and unfounded allegations*” and denied these. They did not dispute that they were (at that time) yet to complete the production of documents as ordered but aimed to conclude their searches and produce the remaining documents by 10 February 2023. The Claimants further denied that the Respondent had suffered any prejudice from the “*short delay*” in production.
- 7. Also in their 2 February 2023 response, the Claimants alleged that the Respondent’s document production was defective under PO 4, (the “**Claimants’ Application**”). The Claimant’s Application requested that the Tribunal:
 - (i) direct the Respondent to provide a brief summary of the scope and nature of its searches;
 - (ii) direct the Respondent to provide a political sensitivity log;
 - (iii) invite the Parties to agree on the means of production of commercially sensitive documents, with a direction that the Respondent produce the documents identified in its privilege log as being “*commercially confidential*” pursuant to such agreement; and
 - (iv) invite the Respondent to clarify why its production has primarily taken the form of image files rather than files in their native or in .pdf-format.
- 8. By response dated 7 February 2023, following invitation from the Tribunal, the Respondent argued it had conducted “*reasonable and proportionate searches*” for responsive documents as required by PO 4 and that a large number of custodians across multiple ministries and agencies had reviewed an “*immense volume of documents in an extremely narrow time window.*” It submitted further that PO 4 required the document production

process be “*efficient, economic and fair*”, and that tracking and consolidating detailed information about the search efforts undertaken would have made it impossible for the Respondent to comply with its disclosure obligations on time and would go beyond what is “*reasonably economical*”.

9. As to the political and institutional sensitivity, the Respondent stated that it eventually did not withhold any responsive documents from production on these bases and was therefore not obligated to produce a political and institutional sensitivity log.
10. Regarding the documents withheld on the basis of data privacy and commercial confidentiality, the Respondent submitted it was bound to balance its obligations under PO 4 with the fundamental rights of third parties and confidentiality protections under the German Constitution. The Respondent argued that the redaction of personal information alone could not adequately address the protection of third-party data as the content of the document would have allowed the third party to be identified.
11. Finally, on the issue of the format of the production of the documents, the Respondent stated that (i) PO 4 did not specify a particular file format; (ii) the Claimants had not raised any objections to a production of image files during an organizational call on 14 December 2022 in which the technical parameters of document production were discussed; and (iii) the use of an image file format was imperative for it to comply with data privacy law.
12. The Respondent further requested the amendment of certain deadlines in PO 1 and an order that the Claimants “*bear all costs caused by their ... extension of the deadline to produce documents*”.
13. By email of 10 February 2023, the Claimants informed the Tribunal that they had completed their production to the Respondent of the documents ordered in PO 4, and that they had produced to the Respondent their privilege log and their summaries as to the nature and scope of the search process. The Claimants also reserved their rights to respond to the Respondent’s 7 February 2023 letter.

III. THE TRIBUNAL'S DECISION AND ORDER

14. The Tribunal reiterates its PO 4 regarding document production and its reasoning therein.
15. As to the Respondent's Application, having carefully considered the Parties' submissions, the Tribunal makes no orders against the Claimants on the basis that document production was finally completed by 10 February 2023. However, the Tribunal notes that:
 - a. any extension to the due dates set out in Annex C to PO 1 (as amended) should be (and should have been) subject to an application to and order from the Tribunal before the relevant date; and
 - b. given the Claimants' failure to meet the due date for document production, and their failure to seek or obtain any extension of time from the Tribunal, the Tribunal considers it appropriate to ensure that their delay does not adversely impact the Respondent or the procedural schedule and, notes in that regard that:
 - i. as the next scheduled submission is due from the Claimants, any shortening of the window between the completion of document production and the next step in the schedule affects the Claimants as opposed to the Respondent; and
 - ii. exceptional circumstances would be required to entertain a change to the due date of the Claimants' Reply, currently scheduled for 5 May 2023.
16. As to the Claimant's Application, having carefully considered the Parties' submissions, the Tribunal:
 - a. makes no order as to the form of documents produced, on the basis that this a matter for the Parties; and
 - b. directs the Respondent, to the extent it has not already done so, to provide the Claimants with:
 - i. a brief summary of the scope and nature of its document search;

- ii. the proposed confidentiality terms regarding any responsive documents that are subject to a specific commercial or technical sensitivity;
- iii. in relation to any responsive documents that are subject to a “*special political or institutional sensitivity*”, a description as to the nature of that sensitivity; and
- iv. a privilege log in relation to any documents in respect of which privilege is asserted.

17. As to both Applications, the Tribunal:

- a. confirms that at this time it does not make any further orders or adjustments to the schedule in PO 1 (as amended); and
- b. decides that any costs orders concerning document production will be dealt with in the ordinary course of this arbitration.

On behalf of the Tribunal,

[signed]

Ms. Wendy Miles KC
President of the Tribunal
Date: 6 March 2023