

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Veolia Propreté SAS**

**v.**

**Italian Republic**

**(ICSID Case No. ARB/18/20)**

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**PROCEDURAL ORDER NO. 4**

*Decision on Document Production No. 2*

***Members of the Tribunal***

Mr. Eduardo Zuleta, President of the Tribunal  
Ms. Judith Gill QC, Arbitrator  
Prof. Laurence Boisson de Chazournes, Arbitrator

***Secretary of the Tribunal***

Ms. Natalí Sequeira

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22 July 2021

## **I. Introduction**

1. The Tribunal refers to the letter from Claimant dated 13 July 2021 (“Claimant’s Letter”) and the reply from Respondent dated 19 July 2021 (“Respondent’s Letter”) regarding Respondent’s Final Update on the Claimant’s Requests and Document Production dated 2 July 2021 (“Claimant’s Requests”).

## **II. Claimant’s position**

2. Category 2 of Claimant’s Request: Initially, Respondent did not deny that requested documents existed and objected on the grounds of attorney-client privilege (Article 9.2(b) of the IBA Rules). The Tribunal directed Respondent to particularize its claim for privilege with respect to the above request by 2 July 2021. Respondent did not particularize the claim for privilege but rather changed its position by indicating that it is not able to confirm whether the document exists.
3. Category 6 of Claimant’s Request: Respondent invoked the attorney-client privilege (Article 9.2(b) of the IBA Rules) with respect to subcategories a) and b) of Claimant’s request. The Tribunal directed Respondent to particularize its claim for privilege with respect to these subcategories by 2 July 2021. Respondent identified one responsive document under the aforesaid categories (a document dated 20 January 2009) but is refusing to produce it on the ground of privilege. The issue before this Tribunal is whether Respondent has discharged its burden of proving privilege over the responsive document. Claimant considers that Respondent has not discharged its burden and therefore the Tribunal should order Respondent to produce the document.
4. As regards the responsive document, Claimant contends that it is dated two months after the Region of Calabria issued Decree No. 18830 (on 21 November 2008) in which it rejected the *Commissario’s* request for the subsidy and demanded that payment of the subsidy was conditioned upon the commission of TEC2. According to Claimant, any advice from the *Avvocatura* would come before the decree is published, not after, and Respondent has not discharged its burden of proof. Therefore, Claimant requests the Tribunal to direct Respondent to produce the responsive document or, in the alternative, direct Respondent to provide a redacted version of the document excluding the information allegedly subject to attorney-client privilege.
5. Category 9 of Claimant’s Request: Respondent has changed its ground for objection. Initially, Respondent maintained that subcategories b) through h) lacked sufficient

relevance and materiality to the outcome of the dispute under Article 9.2(a) of the IBA Rules. The Tribunal rejected the objection and directed Respondent to produce documents under these subcategories. Now, Respondent claims that it does not have access to the documents as they concern third parties. According to Claimant, this is not credible because the plants and sites previously operated by TEC were and are providing a public service under concession agreements secured following a public tender process, and the details surrounding the present operations would be accessible to the public grantor of the concessions. Claimant requests the Tribunal to direct Respondent to produce the documents and, if it does not, Claimant reserves its right to request the Tribunal to draw adverse inferences.

6. Category 13 of Claimant's Request: Claimant contends that Respondent has failed to comply with the Tribunal's order. The Tribunal directed Respondent to produce the above document. Respondent appears to have only produced subcategories c) through f), not the supporting documents issued by CAV. The Tribunal should order Respondent to produce the supporting documents.

### **III. Respondent's position**

1. Categories 2 and 6 of Claimant's request: Respondent reiterates that the *Avvocatura dello Stato* acts as the legal counsel for State entities in any judicial proceedings or legal matters in which such entities are involved. The documents and correspondence between the *Avvocatura* and any State entity is protected by attorney-client privilege since it concerns (actual or potential) judicial rights. Legal opinions (as well as any internal document to that end) indeed concern the analysis of the legitimacy of an act or a behavior and are consequently covered – in Respondent's understanding – by such privilege. As regards the document at Category 2, it would accordingly be privileged but in fact does not exist, and Respondent knows of no requirement regarding the order in which these two objections must be advanced.
2. Category 9 of Claimant's request: The companies that have managed the relevant plants after Claimant are not part of these procedures or of any other coincident domestic procedure. Therefore, Respondent's counsel has no access to any of the documents that Claimant requests. In any case Respondent's counsel has filed a request to obtain such documentation, with no success.
3. Category 13 of Claimant's request: Respondent affirms that it has produced all the documents it could find.

#### **IV. Tribunal's Considerations and Decision**

4. Categories 2 and 6 of Claimant's request: Absent evidence to the contrary, the Tribunal is satisfied with the express representation from Respondent's counsel to the effect that these documents are subject to privilege and the reasons supporting such representation. The Tribunal is not persuaded that the date of the responsive document in Category 6 is sufficient to support Claimant's allegation that the document should be produced. Whilst the Tribunal would ordinarily expect Respondent to indicate that documents do not exist before or at least at the same time as asserting privilege, the position has now been clearly stated by Respondent. The Tribunal therefore rejects Claimant's request as regards Categories 2 and 6.
5. Category 9 of Claimant's request: Respondent asserts that it has requested the documents from the companies involved with no success. However, the only evidence submitted by Respondent is an e-mail dated 18 April 2021. There is no evidence of a follow-up or additional requests from Respondent. The Tribunal therefore directs Respondent to provide the Tribunal, on or before 29 July 2021 with a complete description of the activities undertaken before the third parties to obtain the documents. After receiving the description, the Tribunal will decide accordingly.
6. Category 13 of Claimant's request: Respondent affirms that it has provided the documentation requested. No decision from the Tribunal is required at this stage.

[Signed]

Mr. Eduardo Zuleta  
President of the Tribunal  
Date: 22 July 2021