

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Angel Samuel Seda and others**

**v.**

**Republic of Colombia**

**(ICSID Case No. ARB/19/6)**

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**PROCEDURAL ORDER NO. 2**

***Members of the Tribunal***

Prof. Dr. Klaus Sachs, President of the Tribunal

Prof. Hugo Perezcano Díaz, Arbitrator

Dr. Charles Poncet, Arbitrator

***Secretary of the Tribunal***

Ms. Sara Marzal

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18 February 2021

**WHEREAS** on 7 April 2020, the Tribunal issued Procedural Order No. 1;

**WHEREAS** Section 15.2 of Procedural Order No. 1 provides that one round of document production shall take place prior to the submission of Claimants' Reply on the Merits and Damages;

**WHEREAS** Claimants submitted their Redfern Schedule, comprising 34 document production requests on 15 January 2021;

**WHEREAS** Respondent submitted its Redfern Schedule, comprising 55 document production requests on 15 January 2021;

**THE TRIBUNAL HEREBY ORDERS:**

**A. Applicable rules and principles governing document production**

1. Section 15 of Procedural Order No. 1 provides:

*15.1. The International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) ("IBA Rules of Evidence") shall guide the Tribunal and the parties regarding document production in this case.*

*15.2. As set out in Annex A, one round of document production shall take place prior to the submission of Claimants' Reply on the Merits and Damages. In case a bifurcation is requested, the Tribunal will decide on any request to conduct a round of document production during the first phase of the bifurcated proceedings in its Decision on Bifurcation.*

*15.3. Within the time limits set out in Annex A, each party may serve a request for production of documents on the other party. Every request for production of documents shall precisely identify each document, or category of documents, sought and establish its relevance and materiality for the outcome of the case. The requests shall be recorded in the schedule (using columns 1 through 3) in the form below. Such requests shall not be copied to the Tribunal or the Tribunal Secretary.*

*15.4. Within the time limits set out in Annex A, each party shall provide the other party with the documents in its possession, custody or control that are responsive to the other party's request and to which no objections are made. They shall not be copied to the Tribunal or the Tribunal Secretary.*

*15.5. Each party shall state in writing its responses or objections to the requested documents with reference to the objections listed in Article 9(2) of the IBA Rules of Evidence, within the time limits set out in Annex A. Such responses and objections shall be recorded in column 4 of the schedule below. They shall not be copied to the Tribunal or the Tribunal Secretary.*

*15.6. Within the time limits set out in Annex A, the requesting party shall state in writing its comments on any response or objection made to production (in both Word and PDF formats). Such comments shall be recorded in column 5 of the schedule below.*

*15.7. Within the time limits set out in Annex A, the requesting party shall submit the completed Redfern Schedule (requests, objections, responses to objections; in both Word and PDF formats) including any applications to decide on objected production requests to the Tribunal, with a copy to the other party.*

*15.8. The Tribunal will make its best efforts to rule on the objections within the time limits set out in Annex A.*

*15.9. A party shall produce those documents for which no objection is sustained by the Tribunal within the time limits set out in Annex A. They shall not be copied to the Tribunal or the Tribunal Secretary.*

*15.10. Any other request for the production of documents not provided for in the Procedural Calendar set out in Annex A, which is sought by either party from the other party or from any person or entity that it is not a party to this Arbitration, including any court, organization or other third party, shall be permitted only at the discretion of the Tribunal. The request must be substantiated with reasons. The Tribunal will rule on such reasoned application only after it has given the other party a proper opportunity to reply.*

*15.11. 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 a joint schedule in the form below.*

2. According to the IBA Rules, the Tribunal has considerable discretion when ruling on requests for the production of documents. It is left to the Tribunal to decide, on a case-by-case basis, how much, if any, disclosure should be allowed.
3. The IBA Rules establish the following standards for the Tribunal's guidance in its decision on document production requests:
  - a. the specific document or narrow and specific category of documents must be described in sufficient detail;
  - b. the relevance and materiality to the outcome of the case must be established with

- respect to each document or category of documents;
- c. any document or category of documents requested must be within the opposing party's possession, custody or control and must not be in the requesting party's possession, custody or control;
  - d. the Tribunal must take into account legal impediments or privilege under the applicable legal or ethical rules;
  - e. the production of the requested evidence should not cause unreasonable burden to the party under the production obligation;
  - f. the Tribunal must consider grounds of commercial or technical confidentiality that it determines to be compelling;
  - g. grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Tribunal determines to be compelling are to be observed; and
  - h. considerations of fairness or equality of the Parties that the Tribunal determines to be compelling may be applied.

**B. The Tribunal's considerations**

I. General observations

4. The Tribunal has reviewed the reasons advanced by the Parties for their respective requests for production of documents as well as their respective objections to the other Party's requests.
5. Considering the principles outlined above, the Tribunal has decided on the Parties' document production requests in the manner set out in the attached Redfern Schedules.
6. The Tribunal notes that, in deciding on the requests for document production, it has considered the *prima facie* relevance of the documents sought, having regard to the allegations of fact made by the Parties so far. At this stage of the proceedings, the Tribunal is not in a position to make any final determination regarding the ultimate relevance or materiality of the documents in question to the adjudication of the Parties' claims and defenses in this arbitration, and its determinations are thus without prejudice.
7. The Tribunal reserves the right to review its decision on the production of documents if later in the proceedings it comes to the view that certain documents, the production of which has been denied, could indeed be relevant and material to a claim.
8. The Tribunal further notes that the Parties have raised certain general objections to the respective other Party's document production requests, which the Tribunal will address in general terms in this Procedural Order. The Tribunal's decisions on the individual document production requests can be found in the attached Redfern Schedules.

II. The Parties' objections based on legal impediment or privilege, confidentiality and political or institutional sensitivity, and burden of proof issues.

9. The Parties disagree on whether they are entitled to withhold production of documents as a result of a legal impediment, compelling grounds of confidentiality and compelling political and/or institutional sensitivity, under Articles 9.2(b), 9.3, 9.2(e) and 9.2(f) of the IBA Rules.
  - a) The Parties' positions
    - (i) Respondent's objections
10. Respondent objects to the production of certain documents requested by Claimants on the basis of "*applicable legal impediment, compelling grounds of confidentiality and compelling political and/or institutional sensitivity*"<sup>1</sup> under Articles 9.2(b), 9.3, 9.2(e) and 9.2(f) of the IBA Rules.
11. Respondent submits that with respect to criminal investigations, "*which are reserved in nature*", the disclosure of related documents could jeopardize the proceedings.<sup>2</sup> Furthermore, Respondent asserts that disclosing information of criminal investigations or proceedings relating to third parties<sup>3</sup> may pose a risk to a subject's fundamental right to privacy and confidentiality, and even to the effective administration of justice.<sup>4</sup>
12. Nevertheless, in some instances Respondent offers that it "*will make*" or "*is willing to make*" the appropriate searches and produce the requested documents, albeit in some cases limited to those related to specific matters (i.e., to the Asset Forfeiture Proceedings of the Meritage lot).
13. In return, Claimants submit that Respondent does not, however, explain the nature, source, and scope of any such purported legal impediment, confidentiality or sensitivity. Claimants also point out that no reference is made by Respondent to its own domestic law or to principles of international law that may support the exclusion of the requested documents from production.
14. Claimants further contend that Respondent cannot claim blanket legal impediment and compelling sensitivity to withhold the requested documents. Instead, it must establish the basis of such objections with respect to each document it objects by submitting a detailed privilege or legal impediment log (identifying their author, date, type of document and the grounds for its objection).
15. Moreover, Claimants submit that Respondent cannot pick and choose what it wishes to disclose under its offer to make the "*appropriate searches*" in some instances. In this regard, Claimants propose that in the event Respondent chooses not to disclose a responsive document in full for reasons of sensitivity or legal impediment, it must redact the document in such a way that those sections are excluded from the production.

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<sup>1</sup> Respondent's Responses to Requests 1-8, 10-12, 15, 17-18, 20-23, 25-27, 34.

<sup>2</sup> Respondent's Responses to Requests 1, 3.

<sup>3</sup> Respondent's Responses to Requests 11, 21.

<sup>4</sup> Respondent's Responses to Request 7.

(ii) Claimants' objections

16. Claimants for their part also raised an objection on the basis of Article 9.2(e) of the IBA Rules. In particular, they are concerned with maintaining the confidentiality of: (i) the beneficiary of a trust that has held an interest in their investment vehicles Newport and Luxé; (ii) the provider of capital to pursue their claims in this arbitration, in light of Respondent's alleged treatment of Mr. Seda;<sup>5</sup> (iii) Claimants' insurance against any award on adverse costs;<sup>6</sup> as well as (iv) the identity of shareholders and/or corporate documents (i.e., regarding JTE International Investment;<sup>7</sup> Haystack Holdings LLC and The Hass Family Investment Trust;<sup>8</sup> Revmarketing SAS;<sup>9</sup> and Royal Beverages SAS.<sup>10</sup>).
17. Respondent submits that Claimant must show that they have made a contribution or a commitment of capital or other resources into their projects in Colombia, as a jurisdictional requirement under both the ICSID Convention and the FTA.
18. Respondent further asserts that the evidence submitted by Claimants is not sufficient to establish that significant contributions of capital were made in the Meritage project, or that they have assumed any investment risk in the project.<sup>11</sup> Respondent also argues that there is no evidence to support: (i) the incorporation of some of their investment vehicles (i.e., The Boston Enterprises Trust, and Interpalmas SAS);<sup>12</sup> (ii) the viability and profitability of some of their projects (i.e., Santa Fé and 450 Heights projects) relevant to the quantum of the damages claimed.<sup>13</sup> In Respondent's submission, if Claimants cannot meet the burden (as they have not), the claims are deemed to fail.
19. Claimants disagree with Respondent as they argue there is already evidence in the record showing that Claimants have made investments in Colombia, including ownership of shares in Newport (the developer of the Meritage Project), and therefore object to the production of additional documents.
20. Claimants also assert they have already adduced the relevant evidence, encompassing documents and supporting testimony, with their Memorial to support the incorporation of the investment vehicles and the viability of their projects. Ultimately, Claimants submit that they bear the burden of proof of establishing their respective claims in this arbitration.
21. As far as the third party funder is concerned, Claimants contend that Respondent fails to point to any provision in the IBA Rules, the TPA or the ICSID Convention mandating the disclosure of the identity of third party funders, and that the ICCA-Queen Mary Report or

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<sup>5</sup> Claimants' Responses to Requests 4 and 53, respectively.

<sup>6</sup> Claimants' Responses to Request 55.

<sup>7</sup> Claimants' Responses to Request 3.

<sup>8</sup> Claimants' Responses to Request 5.

<sup>9</sup> Claimants' Responses to Request 13.

<sup>10</sup> Claimants' Responses to Request 14.

<sup>11</sup> Respondent's Reply to Claimants' Objections in Request 6.

<sup>12</sup> Respondent's Reply to Claimants' Objections in Requests 4, 16.

<sup>13</sup> Respondent's Reply to Claimants' Objections in Requests 21, 22.

the IBA Guidelines on Conflicts of Interest on which Respondent relies are not binding on this Arbitration.

22. In response, Respondent submits that investment tribunals have recognized the importance of disclosing the existence and identity of third party funding to indicate any potential conflicts of interest and, if necessary, for the Respondent to assess the need to submit an application for security for costs. Respondent also contends that most agreements (and in particular arbitration financing agreements), provide expressly that the agreement may be disclosed in case a court or tribunal orders such disclosure.
23. Claimants further invoke strict confidentiality and non-disclosure provisions of contractual financing agreements.<sup>14</sup> Furthermore, Claimants object to the production of certain documents related to business structuring decisions made with the assistance of legal counsel under attorney-client privilege.<sup>15</sup>
24. Respondent contends that it is reasonable to assume that Claimant's business decisions were not made by their legal counsel but rather by the Claimants themselves, and therefore should not be protected under privilege.
25. Finally, Respondent submits that the alleged concerns raised by a beneficiary of a trust and any third party funder fearing the same harassment encountered by Mr. Seda are totally unjustified.

b) The Tribunal's considerations

26. Article 9.2 of the IBA Rules provides in relevant part:

*The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:*

[...]

*(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;*

[...]

*(e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;*

*(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the*

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<sup>14</sup> Claimants' Responses to Request 54.

<sup>15</sup> Claimants' Responses to Request 7.

*Arbitral Tribunal determines to be compelling [...]*

(i) As regards Respondent's objections

27. In the Tribunal's view, a Party seeking to invoke any of these exemptions needs to specify which of the requested documents ought to be exempted from production and which specific legal impediment or privilege, confidentiality or ground of special political or institutional sensitivity it invokes in respect of each particular document.
28. The mere assertion that a category of documents could potentially be considered as reserved information, under domestic law (without even specifying the legal basis), is not sufficient under Article 9.2(b) of the IBA Rules.
29. Consequently, to the extent Respondent intends to have certain documents, or parts thereof, excluded from production, pursuant to Article 9.2(b) IBA, it will have to identify such documents and provide sufficient detail for Claimants and the Tribunal to assess whether the exemption is justified.

(ii) As regards Claimants' objections

30. As regards the structure, the financing and the ultimate beneficiaries of Claimants investment in Colombia, in addition to the confidentiality concerns raised by Claimants, the Tribunal notes that the Parties disagree on whether the evidence already on the records submitted by Claimants is sufficient and relevant. The Tribunal further notes that the Parties seem to be in agreement that Claimants bear the burden of proof of establishing their investment in the manner and with the evidence they deem appropriate.<sup>16</sup> It will be for this Tribunal to assess whether the evidence submitted by the respective Parties is sufficient and relevant.
31. Without the benefit of a full pleading and without prejudice to any further decisions on the issue, notably any questions of jurisdiction and quantum, the Tribunal has granted the production of certain and denied the production of certain other documents requested by Respondent, based on the criteria set out in the IBA Rules, burden of proof considerations under a case-by-case analysis and taking into account other objections raised by Claimants, as reflected in the respective Redfern Schedule attached.
32. Furthermore, as regards the identity of a third party funder, the Tribunal has ordered Claimants to reveal its identity for the identification (and avoidance) of potential conflicts of interests. The Tribunal has considered Claimants' agreement in principle to provide this information *in camera*, but has opted instead to order full disclosure to Respondent, for the sake of transparency.

(iii) Exemption log

33. Considering the foregoing, the Tribunal has decided to direct both Parties to prepare an

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<sup>16</sup> Respondent's Reply to Claimants' Objections in Requests 4, 6, 44; Claimants' Responses to Request 6.

exemption log, in the format set out in Annex I and sorted by individual document production requests to the extent that the Tribunal has granted the request in principle, for any documents they wish to exclude from document production on the basis of Article 9.2 of the IBA Rules and provide it to the other Party for comments.

**C. Order**

34. Based on the foregoing, the Tribunal decides as follows:

- a. The Parties are ordered to produce the documents and/or confirmations as directed in the attached Redfern Schedules by 17 March 2021 (instead of 9 March 2021 as determined in Annex A of Procedural Order No. 1) taking into account the additional time taken by the Tribunal to render this Procedural Order.
- b. To the extent that any Party seeks to exclude responsive documents from production pursuant to Article 9.2 of the IBA Rules, it shall provide the opposing Party with a log of the documents withheld in the format set out in Annex I by 17 March 2021.
- c. With respect to documents for which production has been ordered or for which the Party has indicated its willingness to produce them, each Party shall provide an index of the documents produced, with an indication of the requests to which they respond. Each Party shall state whether it has produced all responsive documents in its possession, custody or control.
- d. All other document production requests are denied, but without prejudice to the Tribunal's power to review its decision on the production of documents in accordance with paragraph 7 above.

**Place of arbitration (legal seat):** Washington, D.C.

[signed]

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Professor Dr. Klaus Sachs  
(Presiding Arbitrator)

On behalf of the Tribunal

**Annex I**

**Exemption log**

<b>No.</b>	<b>Date of creation</b>	<b>Document type</b>	<b>Author(s)/ Sender(s)</b>	<b>Recipient(s)</b>	<b>Document title / brief description</b>	<b>Exemption invoked under Art. 9.2 IBA Rules</b>	<b>Reasons for exemption</b> (including relevant classification, date of classification, authority responsible for classification and legal or other grounds)	<b>Responses/ objections to exemption</b>	<b>Tribunal's decision</b>