

**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. 9**

***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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28 March 2022

**WHEREAS** by letter dated 28 February 2022, Respondent requested the Tribunal to issue an order adopting enhanced confidentiality measures regarding the production of several files ("**Request for Enhanced Confidentiality Measures**") and to order that any violation of this confidentiality order or any of the confidentiality terms in place in this arbitration by any Party shall give rise to injunctive relief ("**Request for Injunctive Relief**");

**WHEREAS** on 7 March 2022, upon the Tribunal's invitation, Claimants commented on Respondent's letter of 28 February 2022, consenting to the imposition of enhanced confidentiality measures and requesting Respondent's Request for Injunctive Relief;

**WHEREAS** by letter of the same day, Claimants requested the Tribunal to (i) declare that Respondent's belated new defence in its Rejoinder relating to the protection of its essential security interests ("**New Essential Security Defence**") violates Respondent's duty of good faith, the ICSID Arbitration Rules and Procedural Order No. 1, (ii) strike the New Defence from the Rejoinder, (iii) reject the new items for relief at paragraphs 974(a)-(b) added by Respondent in its unauthorized errata to the Rejoinder, and (iv) order Respondent to pay all of the costs incurred by Claimants in preparing their letter to the Tribunal ("**Request to Strike the New Essential Security Defence**");

**WHEREAS** on 11 March 2022, upon the Tribunal's invitation, Respondent reiterated its Request for Enhanced Confidentiality Measures, enclosing a draft Enhanced Confidentiality Order, and its Request for Injunctive Relief;

**WHEREAS** on 18 March 2022, upon the Tribunal's invitation, Claimants agreed to the material terms of the draft Confidentiality Order and provided further comments on the allegedly delayed production of documents by Respondent and Respondent's Request for Injunctive Relief;

**WHEREAS** on the same day, upon the Tribunal's invitation, Respondent replied to Claimants' Request to Strike the New Essential Security Defence and requested the Tribunal to dismiss Claimants' requests and to admit paragraphs 974(a)-(b) of its Rejoinder to the record.

#### **A. Introduction**

1. This procedural order deals with Respondent's Request for Injunctive Relief (**B.**) and Claimants' Request to Strike the New Essential Security Defence (**C.**).
2. The Tribunal has already dealt with Respondent's Request for Enhanced Confidentiality Measures in its Procedural Order No. 8 ("**Enhanced Confidentiality Order**").

**B. Respondent's Request for Injunctive Relief**

3. As regards Respondent's request to order "*that any violation of the confidentiality order or any of the confidentiality terms in place in this arbitration by any Party shall give rise to injunctive relief*", the Tribunal does not deem it necessary or appropriate to issue such a pre-emptive order.
4. In the Tribunal's view, Respondent has not sufficiently established that future breaches of the two confidentiality orders in place are likely to occur. Furthermore, it remains unclear what kind of injunctive relief Respondent would seek in the event of a breach of confidentiality.
5. Consequently, the Tribunal considers it premature to declare at this stage that it will grant injunctive relief in the event of a potential breach of confidentiality.

**C. Claimants' Request to Strike the New Essential Security Defence**

6. At the outset, the Tribunal notes that Respondent's New Essential Security Defence, set out in Section II of its Rejoinder, is presented primarily as an objection to the Tribunal's jurisdiction and, as an alternative argument, as a defence on the merits.
7. Sections 14.2 and 14.3 of Procedural Order No. 1, on which Claimants rely in their Request to Strike the New Essential Security Defence, provide:

*14.2. In the first exchange of submissions (Memorial and Counter-Memorial), the parties shall set forth all the facts and legal arguments on which they rely including any expert opinion evidence the parties submit in support of their respective cases. Allegations of fact and legal arguments shall be presented in a detailed, specified and comprehensive manner, and shall respond to all allegations of fact and legal arguments made by the other party.*

*14.3. In their second exchange of submissions (Reply and Rejoinder), the parties shall limit themselves to responding to allegations of fact and legal arguments made by the other party in the first exchange of submissions, unless new facts have arisen after the first exchange of submissions which justify new allegations of fact and/or legal arguments.*

8. ICSID Arbitration Rule 41(1) and (2), which deal with objections to the Tribunal's jurisdiction, provides:

*(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.*

*(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.*

9. In addition to that, ICSID Arbitration Rule 26(3), which deals with time limits and which Claimants also invoke in their Request to Strike the New Essential Security Defence, stipulates:

*(3) Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.*

10. The Tribunal notes that both under ICSID Arbitration Rule 41(2) and ICSID Arbitration Rule 26(3), it enjoys discretion in considering new submissions made by a Party independent of their timing.
11. Given that the Tribunal has the duty to ascertain its jurisdiction and may do so at any time, as set forth in ICSID Arbitration Rule 41(2), the Tribunal does not consider it appropriate to reject the New Essential Security Defence, which Respondent has primarily framed as a jurisdictional objection, as belated.<sup>1</sup> For the purposes of assessing its admissibility, the Tribunal accepts Respondent's characterization of the New Essential Security Defence as a jurisdictional objection. At this point, the Tribunal need not take a definite view on the legal nature of Respondent's defence.
12. In the Tribunal's view, admitting the New Essential Security Defence does not unfairly prejudice Claimants or deprive them of the opportunity to make written submissions on that issue. Yet the Tribunal is sympathetic to Claimants' concerns regarding the limited amount of time remaining

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<sup>1</sup> Cf. *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award of 7 October 2003 (**Exhibit CL-033**), para. 9.2; Christoph H. Schreuer et al., *The ICSID Convention: A Commentary*, Cambridge University Press, 2009, Article 41, paras. 40-42 (**Annex-33** to Respondent's letter of 18 March 2022).

until the Hearing and their ongoing hearing preparations. Therefore, the Tribunal leaves it to Claimants and their counsel to decide whether they wish to file any additional submission on the New Essential Security Defence before or after the Hearing.

**THE TRIBUNAL HEREBY ORDERS:**

13. Based on the foregoing, the Tribunal decides as follows:
  - I. Respondent's request for a declaration that any violation of the Enhanced Confidentiality Order or any of the confidentiality terms in place in this arbitration by any Party shall give rise to injunctive relief is **denied**.
  - II. Claimants' request for a declaration that the New Essential Security Defence violates Respondent's duty of good faith, the ICSID Arbitration Rules and Procedural Order No. 1 is **denied**.
  - III. Claimants' request to strike the New Essential Security Defence from Respondent's Rejoinder is **denied**.
  - IV. Paragraphs 974(a)-(b) of Respondent's corrected Rejoinder are **admitted** to the record.
  - V. Claimants are **granted leave** to address the New Essential Security Defence in an additional submission to be filed, at their choice, either prior to the Hearing by 15 April 2022 or at a date after the Hearing to be determined by the Tribunal in consultation with the Parties.
  - VI. Claimants are **invited** to indicate by 4 April 2022 whether they intend to make an additional submission on the New Essential Security Defence and, if so, whether they will do so before or after the Hearing.
  - VII. The Tribunal **reserves** its decision on costs until the Final Award.

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

[Signed]

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Professor Dr. Klaus Sachs  
(Presiding Arbitrator)

On behalf of the Tribunal