

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Riverside Coffee, LLC

v.

Republic of Nicaragua

(ICSID Case No. ARB/21/16)

PROCEDURAL ORDER No. 4

Members of the Tribunal

Dr. Veijo Heiskanen, President of the Tribunal

Mr. Philippe Couvreur, Arbitrator

Ms. Lucy Greenwood, Arbitrator

Secretary of the Tribunal

Ms. Ana Constanza Conover Blancas

19 December 2022

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I. PROCEDURAL BACKGROUND

1. On 21 October 2022, the Claimant filed a memorial on the merits, with supporting documentation (the “**Memorial**”).
2. On 13 November 2022, the Claimant wrote to the Tribunal stating that it had discovered, after the filing of the Memorial, that the Respondent had taken “extraordinary measures” by issuing, on 15 December 2021, a court order referred to by the Claimant as the *Hacienda Santa Fé Seizure Order* (the “**Court Order**”). According to the Claimant, the Court Order had the effect of circumventing the Tribunal’s exclusive jurisdiction under Article 26 of the ICSID Convention and amounts to a judicial seizure of Hacienda Santa Fé – the property at issue in this arbitration – taken in retaliation of the Claimant having commenced the present arbitration. The Claimant seeks relief from the Tribunal to address the alleged consequences of the Court Order. The Claimant’s communication was accompanied by exhibits C-0251 to C-0253 (the “**Request**”).
3. On 23 November 2022, following an invitation from the Tribunal to provide observations, the Respondent filed a response to the Claimant’s Request, with accompanying exhibits A through D (the “**Response**”).
4. On 28 November 2022, the Claimant requested that it be provided with an opportunity to reply to the Respondent’s Response. On the same date, the Tribunal granted the Claimant’s request and invited it to submit a reply by 2 December 2022. The Tribunal also invited the Respondent to submit any additional observations by 8 December 2022. The Tribunal indicated that it would decide on the Claimant’s Request upon receipt of these submissions.
5. On 2 December 2022, the Claimant filed a reply submission to the Respondent’s Response, with accompanying exhibits C-0254 to C-0277 (the “**Reply**”).
6. On 12 December 2022, following an extension request granted by the Tribunal, the Respondent filed a rejoinder submission to the Claimant’s Reply, with accompanying exhibits R-0001 to R-0009 and legal authorities RL-0001 to RL-0006 (the “**Rejoinder**”).

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7. This order sets out the Tribunal’s decision on the Claimant’s Request.

II. SUMMARY OF THE PARTIES’ POSITIONS

A. THE CLAIMANT’S POSITION

8. The Claimant submits that, after the filing of its Memorial, it became aware of the Court Order in an “accidental discovery” while reviewing unrelated litigation files before the courts of Jinotega.¹ The Claimant states that, although Nicaragua was ordered in December 2021 to serve the Court Order upon the Claimant, no service took place over the last eleven months after it was issued.²
9. In particular, the Claimant disputes the Respondent’s assertion that the investor became aware of the Court Order in July 2022 when it was provided with a land certificate of Hacienda Santa Fé. Contrary to the Respondent’s allegation, the Claimant submits that the Court Order was not included as an attachment to the one-page Related Certificate it received from the Jinotega Property Registry.³ Similarly, the Claimant alleges that the underlying application filed on 30 November 2021 by the Nicaraguan Attorney General in domestic courts (the “**Application**”) “for a preventative application to seize and occupy Hacienda Santa Fé” was not served upon the Claimant.⁴
10. The Claimant argues that the Court Order – which is final and cannot be appealed⁵ — circumvents the Tribunal’s exclusive jurisdiction under Article 26 of the ICSID Convention, which excludes local remedies once an ICSID arbitration has commenced.⁶ According to the Claimant, the fact that the Respondent made no reservation for local court access under ICSID Arbitration Rule 39(6) nor under CAFTA Article 10.17(1), further

¹ Request, ¶ 6; Reply, ¶ 17.

² Request, ¶ 5; Reply, ¶¶ 83, 85.

³ Reply, ¶ 5. *See also id.*, ¶¶ 18-50.

⁴ Request, ¶ 11.

⁵ Request, ¶ 16.

⁶ Request, p. 1 and ¶¶ 1, 10(a), 25, 63; Reply, ¶¶ 111-114.

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reinforces the general exclusion of local remedies under Article 26 of the ICSID Convention.⁷

11. The Claimant argues that the Respondent has also breached its duty of good faith under the CAFTA and the ICSID Convention to consent to the Tribunal’s exclusive jurisdiction to address the *lis pendens* in the present case.⁸ In the Claimant’s view, the Respondent has “selectively applied its domestic law to obtain a provisional relief while ignoring the CAFTA treaty provisions.”⁹ In particular, the Claimant argues that the CAFTA does not allow judicial recourse for interim relief for a Respondent as a matter of treaty practice.¹⁰
12. According to the Claimant, the Respondent’s actions were unfair and abusive because Nicaragua’s Attorney General relied on materially false representations before its domestic court to justify the seizure of Hacienda Santa Fé.¹¹ The Claimant contends that counsel for the Respondent has also failed to meet its evidentiary burden of proof for the contentions it made in response to the Request. According to the Claimant, the Tribunal should follow the general principle of international law according to which a party may not profit from its own wrongdoing.¹²
13. The Claimant submits that the Respondent also unfairly refused to allow local researchers acting for the Claimant to review the court files related to the Court Order until 11 November 2022, even though access to court files is a matter of legal right in Nicaragua. The Respondent eventually only granted access to the files on the condition that the local researchers accepted service of the Court Order for the Claimant and its counsel in this arbitration.¹³ The Claimant contends that access to the original court file was refused and only copies of documents were made available to the local researchers.¹⁴

⁷ Request, ¶ 27.

⁸ Request, p. 1 and ¶¶ 8, 32, 59, 61, 63.

⁹ Request, ¶ 32.

¹⁰ Request, ¶ 34.

¹¹ Request, p. 2 and ¶¶ 8, 53-58, 60.

¹² Reply, ¶¶ 86-91.

¹³ Request, p. 2 and ¶¶ 7, 20, 22. *See also* Reply, ¶¶ 94, 101, 103.

¹⁴ Request, ¶¶ 7, 21; Reply, ¶ 102.

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14. The Claimant argues that the Court Order constitutes a retaliatory action against the Claimant for commencing the present arbitration¹⁵ and has caused direct harm to the Claimant.¹⁶ The Claimant disputes the Respondent’s allegation that the Application for the Court Order was filed after the investor rejected Nicaragua’s offer to repossess the property. The Claimant contends that it never refused to return to the Hacienda Santa Fé.¹⁷
15. According to the Claimant, since the Respondent failed to disclose the Court Order prior to the Claimant’s filing of its Memorial, the Claimant was unduly prevented from commenting on the Court Order, filing additional supporting materials and addressing the issue of harm in the calculation of damages in its Memorial and in its expert valuation report. Accordingly, the Claimant seeks relief from the Tribunal to address such “procedural and substantive unfairness.”¹⁸
16. The Claimant argues that the Respondent’s conduct undermines the maintenance of the *status quo* and is contrary to the customary international law principle of non-aggravation of the dispute.¹⁹ Accordingly, the Claimant seeks the Respondent’s agreement for a consent order aimed at preserving the procedural integrity and exclusivity of the present arbitration.²⁰
17. The Claimant requests the following relief from the Tribunal:
 - a) *Nicaragua must immediately disclose all measures contrary to its obligations under ICSID Convention Article 26 that affect the exclusive jurisdiction of this Tribunal. To that end and as part of the international law duty of satisfaction, this Tribunal must direct Nicaragua to disclose judicial and administrative measures taken or underway by Nicaragua against the Investor, or the Investment, since the filing of the Notice of Arbitration on March 19, 2021. [the “Cessation Order”]*

¹⁵ Request, p. 1 and ¶¶ 1, 4, 13, 19, 33, 46, 60. *See also* Reply, ¶ 2.

¹⁶ Request, pp. 1-2 and ¶¶ 37, 64; Reply, ¶ 138.

¹⁷ Reply, ¶ 55. *See also id.*, ¶¶ 56-81.

¹⁸ Request, p. 2 and ¶ 37. *See also id.*, ¶¶ 62, 64.

¹⁹ Request, ¶¶ 39-40.

²⁰ Request, ¶ 9.

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- b) *An order under Article 43 of the ICSID Convention that Nicaragua produces the entire Hacienda Santa Fé Seizure Order protective measures court file [001434-ORN2-2021-CO and 001432-ORN2-2021-CO] and all related or associated files. [the “Disclosure Order”]*
 - c) *A direction allowing the Investor to supplement its Memorial and supporting materials within seven days following receipt of information in the Cessation Order and the completion of production under the Disclosure Order, and*
 - d) *In light of the Respondent’s conduct, Riverside seeks the costs of this Motion payable forthwith.*²¹
18. The Claimant confirms that its requests do not require an order for provisional measures and fall within the discretionary authority of the Tribunal under Articles 44 and 43 of the ICSID Convention.²²

B. THE RESPONDENT’S POSITION

19. The Respondent requests that the Tribunal reject the Claimant’s Request for three main reasons: (i) the Claimant’s Request misstates the relevant facts and Nicaraguan law; (ii) the request for the Claimant to supplement its Memorial is procedurally unfounded; and (iii) the Claimant’s request for a “disclosure order” is an attempt to request a provisional measure under the ICSID Convention and the ICSID Arbitration Rules, without satisfying the corresponding legal standard.²³
20. *First*, the Respondent alleges that the Court Order was issued to protect the Claimant’s unoccupied property, so as to prevent third parties from possessing or damaging it, and to preserve the *status quo*. The Respondent also notes that the Attorney General’s Application of 30 November 2021 was filed after the Claimant had “rejected Nicaragua’s offer to have Claimant repossess the property in or around September 2021.”²⁴
21. In particular, the Respondent submits that, contrary to the Claimant’s assertions, Nicaragua has not “seized” Hacienda Santa Fé but put in place a legal framework consisting of

²¹ Reply, ¶¶ 16, 139.

²² Request, ¶ 67. *See also id.*, ¶ 65 and Reply, ¶¶ 105, 121-122, 137.

²³ Response, pp. 1-2.

²⁴ Response, p. 1 (emphasis in the original omitted).

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appointing a judicial custodian of the property while the arbitration is pending – a procedure which is contemplated in Nicaragua’s Code of Civil Procedure and is aimed at protecting the investor’s property from damage by third parties and preserving the *status quo*. The purpose of the measure was “to safeguard the property after Claimant refused to re-take possession of it and after Nicaragua learned that there were intruders trying to occupy the property.”²⁵ As a result of the Court Order, Hacienda Santa Fé “remains secured and free of unlawful, third-party occupants.”²⁶

22. The Respondent argues that, by preserving the *status quo* of the arbitration, the Court Order facilitates the Tribunal’s adjudication of the dispute and is in compliance with Nicaragua’s obligations under Article 26 of the ICSID Convention as nothing in that provision prevents a State from taking steps to protect the rights of foreign investors. The Respondent notes that the Court Order confers no title nor ownership of the property to Nicaragua and, to the contrary, imposes a significant financial burden on it.²⁷
23. The Respondent disputes the Claimant’s allegation that Nicaragua improperly withheld from it access to files related to the Court Order and that Nicaragua’s Attorney General relied on “non-truthful facts” to justify the alleged seizure.²⁸ According to the Respondent, there is no evidence that the Claimant sought to obtain a copy of the file, but instead downloaded the information from the court’s website.²⁹ It is also correct, in the Respondent’s view, that Claimant refused to travel to Nicaragua and take possession of the property.³⁰
24. *Second*, the Respondent argues that there is no legal basis for the Claimant’s request to supplement its Memorial. The Respondent alleges that the Claimant became aware of the Court Order no later than July 2022, *i.e.*, months before it filed its Memorial.³¹ This is

²⁵ Response, pp. 2-3. *See also* Rejoinder, pp. 1-4.

²⁶ Rejoinder, p. 3.

²⁷ Rejoinder, p. 4.

²⁸ Response, pp. 4-5.

²⁹ Response, p. 4.

³⁰ Response, p. 5.

³¹ Response, pp. 1-3.

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allegedly evidenced by the fact that the Nicaraguan Property Registry provided Inversiones Agropecuarias, Sociedad Anónima (“**Inagrosa**”) with a land certificate of Hacienda Santa Fé already on 13 July 2022. Even if the certificate did not include the Court Order as an attachment, it mentioned the existence of an “*anotación preventiva*” (*i.e.*, a provisional filing) concerning Hacienda Santa Fé.³² The Respondent adds that the Claimant filed its Memorial after having nineteen months to prepare its brief and supporting documents since filing its Notice of Arbitration.³³ Hence, there is no reason to deviate from the agreed procedural calendar.

25. The Respondent adds that the Claimant could have obtained a copy of the Court Order through other publicly available channels but failed to do so.³⁴
26. *Third*, the Respondent submits that the Claimant’s request constitutes “a thinly veiled attempt to initiate the provisional measure mechanism under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules,”³⁵ as it references procedural integrity and seeks an order to maintain the *status quo* of the proceeding. The Respondent submits that it would be improper to grant such relief absent a formal request for provisional measures. In any event, the Claimant would not be able to justify such provisional measures given that (a) there is no urgency as the Claimant was aware of the Court Order prior to filing its Memorial; (b) there is no harm to the Claimant since its property is being safeguarded; and (c) the Claimant only seeks monetary damages, thus rendering any provisional measures unnecessary.³⁶
27. The Respondent also considers the Claimant’s request for a disclosure order to be procedurally improper, on the ground that a document production phase is already scheduled in this case and given the lack of showing of good cause to prematurely open

³² Response, p. 4. *See also* Rejoinder, pp. 5-7.

³³ Response, p. 5.

³⁴ Rejoinder, p. 8.

³⁵ Response, p. 6.

³⁶ Response, p. 6.

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such disclosure period.³⁷ Moreover, the Respondent notes that the Claimant has already filed into the record extensive argumentation and evidence concerning this matter, and it will have an opportunity to submit additional argumentation and evidence with its reply memorial.³⁸

28. Finally, the Respondent seeks “all litigation costs incurred as a result of Claimant’s frivolous Submission.”³⁹ Additionally, the Respondent states that, in view of the “disruption” caused by the Request, it anticipates that it will seek an extension of the deadline to its Counter-Memorial.⁴⁰

III. THE TRIBUNAL’S ANALYSIS

29. The Tribunal notes at the outset that the Claimant is not seeking provisional measures, but rather “discretionary relief” to protect the integrity of the arbitration. According to the Claimant, the Tribunal has “broad discretionary powers” under Article 44 of the ICSID Convention to control the arbitration procedure,⁴¹ as well as the authority, under Article 43 of the ICSID Convention, to “order document production at any time.”⁴²
30. On the facts, the Claimant’s Request is based on the allegation that the Court Order amounts to a “retaliatory judicial seizure” of Hacienda Santa Fé, the property at issue in this arbitration. Having reviewed the evidence before it, including the Court Order and the underlying Application of the Attorney General, the Tribunal is unable to agree with the Claimant’s characterization of the Court Order as a “seizure” order.
31. The Application was made specifically for “the purpose of appointing a judicial depositary” and “in order to avoid damage to the property belonging to the [Claimant].”⁴³

³⁷ Response, p. 7.

³⁸ Rejoinder, p. 9.

³⁹ Rejoinder, p. 10.

⁴⁰ Response, pp. 2, 7. *See also* Rejoinder, pp. 9-10.

⁴¹ Under Art. 44 of the ICSID Convention, “[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.”

⁴² According to Art. 43 of the ICSID Convention, “[e]xcept as the parties otherwise agree, the tribunal may, if it deems it necessary at any state of the proceedings, (a) call upon the parties to produce documents or other evidence”

⁴³ Exhibit C-253-ENG, p. 5.

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The Court agreed, noting that the Application was for “an urgent precautionary measure consisting in the appointment of a depositary,”⁴⁴ and that it was made for

*the sole purpose of avoiding any affectations to the property belonging to Riverside Coffee L.L.C. – Investor and any possible damages that may occur due to the refusal of the plaintiffs to come to Nicaragua to take possession of the property, and that these damages or losses could subsequently be attributed to the State of Nicaragua is why the appointment of a judicial depositary of the property known as Hacienda Santa Fé is requested.*⁴⁵

32. Having determined that the Application met the factual and legal requirements under the applicable Nicaraguan law, the Court adopted the requested precautionary measure for the appointment of a judicial depositary and appointed the State of Nicaragua, represented by the Attorney-General, as the judicial depositary.⁴⁶
33. On its face, the Court Order is therefore for the appointment, by way of a provisional measure, of a judicial depositary for the purpose of protecting, and not for the purpose of seizing, Hacienda Santa Fé. Both the Application and the Court Order specifically acknowledged that the property was registered in favor of Inagrosa, a Nicaraguan company in which the Claimant is a majority shareholder.⁴⁷ Thus the Court Order did not purport to transfer ownership. The Court Order also is provisional and specifically provides that it “will have a duration of two years.”⁴⁸
34. While the Claimant disputes the Respondent’s account as to whether or not the Claimant specifically refused to take possession of the property, this does not affect the nature and substance of the Court Order. The fact remains that the Claimant was not in possession of the property when the Court Order was issued and protective measures were therefore not inappropriate. In the circumstances, the Tribunal does not consider it necessary to decide as to whether or not the Claimant specifically refused to take possession. Indeed, by its

⁴⁴ Exhibit C-251-ENG, p. 1.

⁴⁵ Exhibit C-251-ENG, p. 2.

⁴⁶ Exhibit C-251-ENG, pp. 4-5.

⁴⁷ Exhibit C-253-ENG, p. 10; Exhibit C-251-ENG, p. 2.

⁴⁸ Exhibit C-251-ENG, p. 5.

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terms, the Court Order does not preclude the Claimant from seeking repossession of the property at any time.

35. The Tribunal is therefore unable to accept the Claimant’s contention that the Respondent has “jeopardized the procedural integrity and the exclusivity” of the Tribunal’s jurisdiction under Article 26 of the ICSID Convention. The Court Order cannot be characterized as a “seizure” order; it rather constitutes a measure that is intended to protect the Claimant’s property in Nicaragua, pending the completion of the present proceedings. In the circumstances, the Court Order also does not contravene Article 26 of the ICSID Convention, which provides for the exclusion of any local remedy other than ICSID arbitration, once the parties have given their consent to such arbitration. Indeed, by issuing the Court Order, the Respondent has not resorted to another “remedy” in order to seek a decision on the subject matter of the dispute, to the exclusion of this arbitration.
36. It follows that there is no basis for the Claimant’s request that the Respondent be ordered to “disclose all measures contrary to its obligations under [Article 26 of the ICSID Convention]” and to “disclose the judicial and administrative measures taken or underway by Nicaragua against the Investor, or the Investment, since the filing of the Notice of Arbitration.”⁴⁹
37. Similarly, although it appears undisputed that the Court Order was not formally served on the Claimant, which in itself is not in accordance with due process, this does not affect the legal nature and substance of the Court Order. The same applies to the Claimant’s complaint that only copies, rather than the original Court file, was made available to the Claimant’s researchers in Nicaragua, and that the copies were made available only on the condition that the Claimant’s researchers accepted legal service of the Court Order on behalf of the Claimant. The Court Order operates so as to protect the property at issue in this arbitration, pending the completion of the proceedings. It cannot, and does not, have any impact on the Tribunal’s jurisdiction over the Claimant’s claims.

⁴⁹ Reply, ¶ 16(a).

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38. In view of the Tribunal’s findings as set out above, the Claimant’s request that the Respondent disclose the entire Court Order file and “all related or associated files” also stands to be rejected. The Tribunal notes that the Claimant will have an opportunity to request from the Respondent any documents that it considers to be relevant to the case and material to its outcome in the document production phase of this arbitration. According to Procedural Order No. 2, this phase will commence after the filing by the Respondent of its Counter-Memorial on the Merits and Memorial on Jurisdiction.
39. As to the Claimant’s argument that the Court Order will have a “material effect” on the issue of harm and the quantification of compensation, and that it should therefore be allowed to supplement its Memorial, for the reasons set above, this request also stands to be rejected. The Tribunal notes that the Claimant will have an opportunity to amend its claims, including on quantum, in its Reply on the Merits and Counter-Memorial on Jurisdiction.
40. The Tribunal considers it appropriate to defer its decision on the costs incurred by the Parties in connection with this procedural incident to a later stage of the proceedings.

IV. ORDER

41. In view of the above, the Tribunal determines as follows:
- (a) the Claimant’s Request is dismissed; and
 - (b) the Tribunal’s decision on costs is reserved.

On behalf of the Tribunal,

[Signed]

Dr. Veijo Heiskanen
President of the Tribunal
Date: 19 December 2022