

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Angel Samuel Seda and others

v.

Republic of Colombia

(ICSID Case No. ARB/19/6)

PROCEDURAL ORDER NO. 13

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

19 January 2023

WHEREAS following the Hearing on New Evidence and Oral Closing Submissions on 3 and 4 October 2022 ("**Closing Hearing**"), the Parties filed additional submissions on [REDACTED] [REDACTED] (**Exhibits R-305, R-306, R-308**) and on the U.S. treaty practice on essential security interest exceptions ("**Post-Closing Submissions**").

WHEREAS Respondent's Post-Closing Submission was accompanied by a three-page cover letter ("**Respondent's Cover Letter**") and an additional factual exhibit (**Exhibit R-319**) containing [REDACTED]
[REDACTED]
[REDACTED]

WHEREAS in their cover email of 22 December 2022, Claimants requested the Tribunal to schedule a virtual hearing for the Parties to be able to answer any remaining questions from the Tribunal and to address each other's Post-Closing Submission given that they have no other opportunity to do so as the submissions were filed simultaneously.

WHEREAS by email dated 27 December 2022, Claimants requested the Tribunal to (i) exclude Respondent's cover-letter which Claimants argue was submitted by Respondent to exceed the 30-page limit set by the Tribunal to comment on [REDACTED] and (ii) exclude Exhibit R-319 which, according to Claimants, is a new exhibit for which Respondent has not sought the Tribunal's prior leave in violation of paragraph 16.3 of Procedural Order No. 1. Furthermore, Claimants reiterated its proposal to schedule a virtual hearing to address the Post-Closing Submissions.

WHEREAS on 28 December 2022, the Tribunal invited Respondent to submit comments to Claimants' communication of 27 December 2022.

WHEREAS by letter dated 4 January 2023, Respondent submitted its comments requesting the Tribunal to (i) reject Claimants' requests to exclude Respondent's cover and Exhibit R-319, (ii) grant it leave to file evidence [REDACTED]
[REDACTED]

[REDACTED] (iii) order Claimants to remove from Post-Closing Submission [REDACTED]
[REDACTED] and resubmit their submission as corrected, and (iv) order that no additional hearing is required at this late time in the arbitration and to close the record of the arbitration once [REDACTED] has been submitted.

WHEREAS by email dated 4 January 2023, Respondent submitted an English translation of Exhibit R-319 requesting that access to this document be restricted.

WHEREAS by email dated 7 January 2023, Claimants commented on Respondent's letter of 4 January 2023 and reiterated their request to exclude Respondent's Cover Letter and Exhibit R-319 from the record. Should the Tribunal admit these documents, Claimants suggested proceeding with a one-day hearing to resolve these issues and address the Tribunal's questions on the matter.

WHEREAS by email dated 9 January 2023, Respondent rejected the statements made by Claimants in their email dated 7 January 2023 and argued that the submission of Exhibit R-319 does not violate due process.

A. Introduction

1. This procedural order deals with Claimants' requests to exclude Exhibit R-319 (**B.**) and Respondent's cover letter (**C.**) and to schedule a virtual hearing to address the closing submissions (**D.**). Furthermore, the procedural order addresses Respondent's additional requests to file new evidence [REDACTED] and to order Claimants to remove such information from the record (**E.**).

B. Claimants' request to exclude Exhibit R-319

2. The Tribunal recalls that at the Closing Hearing, it "*decided to reconsider the decision that was communicated to the Parties in its email of the 22nd of September as regards the documents R 305, 306, and 308. We will allow them into the record, and we will allow the Parties to make further submissions, obviously, limited to these new documents, in written submissions. We have to define the date, but obviously no new evidence and only dealing with these documents or materials.*"¹
3. Based on Section 16.3 of Procedural Order No. 1 and in line with its above-mentioned decision at the Closing Hearing, the Tribunal decides that Exhibit R-319 be excluded from the record (both in the original Spanish version and the English translation) for the following reasons.
4. At the time of the Closing Hearing, neither the audio recordings nor the transcripts of those recordings contained in Exhibit R-319 were part of the record or otherwise available to the Parties, as confirmed by Respondent.² Respondent first submitted the transcript of the

¹ Closing Hearing Transcript, Day 2, p. 543: 5-15.

² Cf. Respondent's email dated 9 January 2023.

recordings along with its Post-Closing Submission without seeking prior leave from the Tribunal.

5. At the Closing Hearing, it was agreed that Claimants' counsel would be permitted to listen to the recordings, and Claimants' counsel reserved the right to *"make a request at some point in time if there is a Transcript that we would like to request"*.³ However, Claimants did not request a transcript of the recordings.
6. Beyond that, there was no agreement between the Parties that the recordings or a transcript thereof, should it become available at a later point in time, would be admitted to the record in any event, and the Tribunal did not grant the Parties leave to submit them.
7. Furthermore, Respondent did not submit a reasoned written request to the Tribunal to submit an additional factual exhibit based on exceptional circumstances, as required by Section 16.3 of Procedural Order No. 1.
8. Consequently, the Tribunal grants Claimants' request to exclude Exhibit R-319 from the record.

C. Claimants' request to exclude Respondent's cover letter

9. The Tribunal notes that Respondent's Cover Letter exclusively deals with the transcripts of the recordings contained in Exhibit R-319. The letter outlines how the transcript was prepared, explains Respondent's position on the chronology of the underlying events, and stresses the confidential nature of the recordings and consequently the transcript.
10. In light of the Tribunal's decision to strike Exhibit-319 from the record, the Tribunal decides that Respondent's cover letter shall likewise be excluded.

D. Claimants' request for a virtual hearing

11. Having considered the Parties' Post-Closing Submissions and bearing in mind that they were filed simultaneously and the Parties have so far not had the opportunity for a rebuttal, the Tribunal believes that it would be useful, both for the purpose of preserving the right to be heard and for the understanding of the Tribunal, to schedule a one-day virtual hearing in which each Party can make oral submissions on the other Party's Post-Closing Submission.
12. The Tribunal wishes to stress that the virtual hearing will be limited to hearing oral arguments which must focus exclusively on the issues addressed in the Post-Closing

³ Closing Hearing Transcript, Day 2, p. 564:4-6.

Submissions. Prior to or during the virtual hearing, the Tribunal will not admit new evidence or allow new witness testimony.

E. Respondent's requests to file [REDACTED]
[REDACTED]

13. While the Tribunal has taken note of Respondent's position in respect of [REDACTED] [REDACTED] the Tribunal is not satisfied that there are exceptional circumstances in the sense of Section 16.3 of Procedural Order No. 1 warranting the admission of new rebuttal evidence at this late of the proceedings.
14. Furthermore, the Tribunal understands that the Parties disagree on [REDACTED] [REDACTED] However, the Tribunal does not deem it appropriate to strike the submissions on this issue made by Claimants in their Post-Closing Submission from the record.
15. Consequently, the Tribunal denies Respondent's requests to [REDACTED] [REDACTED] and to strike such information from Claimants' Post-Closing Submission.

F. The Tribunal's Decision

16. Based on the foregoing, the Tribunal decides as follows:
 - I. Respondent's Cover Letter and Exhibit R-319 are excluded from the record.
 - II. The Parties will have the opportunity to address the Post-Closing Submissions in a one-day virtual hearing at a date to be determined.
 - III. The Parties are requested to indicate within one week of the issuance of this procedural order whether they are available for a one-day virtual hearing either on 25 or 26 April 2023.
 - IV. All other requests are denied.

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

[signed]

Professor Dr. Klaus Sachs
(Presiding Arbitrator)

On behalf of the Tribunal