

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Riverside Coffee, LLC

v.

Republic of Nicaragua

(ICSID Case No. ARB/21/16)

PROCEDURAL ORDER No. 6

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

29 May 2023

Procedural Order No. 6

I. INTRODUCTION

1. In accordance with the procedural timetable set out in Procedural Order No. 2, as amended by Procedural Order No. 5, on 19 May 2023, the Parties submitted their applications to the Tribunal for decision on their respective contested requests for production of documents. The Parties' applications were filed in a schedule format, as set out in Sections 15.1 to 15.4 and Annex B of Procedural Order No. 1.
2. This Procedural Order is made pursuant to Section 15.7 of Procedural Order No. 1, which deals with the Tribunal's decisions on any disputed requests for production of documents, and in accordance with the procedural timetable set out in Procedural Order No. 2, as amended by Procedural Order No. 5.

II. REASONS

3. The Tribunal has carefully considered the Parties' document production requests, as set out in their document production schedules. Where objections have been raised, the Tribunal has reviewed the objections and made a ruling on each such request. The Tribunal's rulings are set out in the Parties' document production schedules, which are attached to this Procedural Order No. 6 as **Annex A** and **Annex B**. Pursuant to Section 11.3 of Procedural Order No. 1, Annexes A and B are in English only, as this is the language in which the Parties presented their document production schedules to the Tribunal.
4. In accordance with the procedural timetable, the Parties shall produce the documents as ordered by the Tribunal in Annex A or B, as applicable, to the requesting Party, but not to the Tribunal, by no later than **9 June 2023**, as directed in Section III of this Procedural Order No. 6.
5. In the body of this Procedural Order, the Tribunal sets out its determinations on a number of general issues that are not limited to any specific document production request.

Procedural Order No. 6

6. The Tribunal notes that it is not in a position at this stage of the proceedings to make final determinations on the relevance and materiality of the requested documents. Accordingly, the Tribunal's rulings on the Parties' document production requests are based on a *prima facie* assessment of the relevance and materiality of the requested documents.
7. The Tribunal further notes that its decisions on the Parties' contested document production requests do not provide a basis for the Parties to infer a decision on any other issues in dispute between the Parties, including as to the allocation of burden of proof, and the Parties should not hereafter plead or allege that the Tribunal's decision to grant or deny any particular request is indicative of a position either in favor or against either Party. Thus, for instance, if a request is denied, this does not mean that the requested Party can consider that its burden of proof has been discharged. Similarly, if a Party refuses to produce documents which it has been ordered to produce on an issue on which it bears the burden of proof, it assumes the risk of having the issue resolved in due course as not proven. Furthermore, if either Party produces documents in the course of the arbitration in support of its own case which it had previously refused to produce to the other Party on the basis that such documents were not under its possession, custody or control, the Tribunal may refuse to admit such document upon an objection of the other Party, in view of the due process implications of such late production on the other Party's ability to make its case. If a Party fails to comply with the Tribunal's order for production without a valid justification, the other Party may make submissions to the Tribunal and request that the Tribunal draw appropriate inferences from the failure to produce.
8. Both Parties raise a number of objections to the other Party's requests for production of documents on the basis that the requested documents are privileged, politically sensitive, confidential, or contain information that is protected for reasons of privacy. The Tribunal is not in a position to determine, merely on the basis of the information provided in the responses to the relevant document production requests, whether such objections are justified and accordingly, to the extent that the Tribunal has granted any requests for production in which a Party has raised an objection on the basis that the requested documents are privileged, politically sensitive, confidential, or contain information that is

Procedural Order No. 6

protected for reasons of privacy, the Tribunal’s decisions are without prejudice to a Party’s right to refuse production on such basis. The Tribunal notes, in this connection, that pursuant to Section 15.1 of Procedural Order No. 1, the Tribunal may be guided in its decision-making on document production by the 2010 IBA Rules on the Taking of Evidence in International Arbitration (the “**IBA Rules**”), and that according to Article 9(2) of the IBA Rules, the Tribunal “shall, at the request of a Party or on its own motion,” exclude from evidence or production any document for reasons of legal impediment or privilege under the applicable legal or ethical rules, or on grounds of commercial confidentiality or special political or institutional sensitivity. Accordingly, to the extent that a Party wishes to withhold or redact any of the documents that it has been ordered to produce, for any of the reasons set out in Article 9(2) of the IBA Rules, it shall produce to the other Party, by 9 June 2023, a privilege log identifying any documents or redactions in respect of which a claim of privilege or any other basis of exclusion is asserted and the legal basis for such assertion. In the event that the receiving Party disputes a claim of privilege or any other basis of exclusion identified in the relevant privilege log, it may apply to the Tribunal by **16 June 2023**, following which the Tribunal shall issue further directions.

9. The Tribunal further notes that the Claimant has raised an objection to a number of the Respondent’s document production requests relating to “Inagrosa” on the basis that the request is addressed to an “unknown” company (as the Respondent defines “Inagrosa” to mean “Inagrosa Agropecuarias S.A.” in its schedule for requests for production). As noted by the Respondent, it is apparent that this is a typographical error and that the reference should be understood to be to “Inversiones Agropecuarias S.A.,” a company allegedly owned and controlled by the Claimant, and which at the relevant time owned and operated Hacienda Santa Fé, the property at issue in this arbitration. The Tribunal determines that the Claimant cannot legitimately rely on what is clearly a typographical error to resist an otherwise valid request for production of documents, and therefore cannot refuse to produce documents requested by the Respondent on the sole basis of such an error. Accordingly, where the Claimant has been requested by the Respondent to produce

Procedural Order No. 6

documents relating to both Riverside and “Inagrosa,” and where the Claimant has agreed or has been ordered to produce documents relating to Riverside, it shall also produce documents relating to “Inagrosa.”

10. The Tribunal notes that in a number of instances a Party has agreed to search for and produce any responsive documents requested by the other Party, while also raising objections to such requests. In view of the Party’s agreement to produce, the Tribunal has granted such requests, without taking a view on such Party’s objections.
11. Finally, the Tribunal notes that the Claimant has requested in a number of its document production requests that the Tribunal draw adverse inference from the Respondent’s refusal to produce. The Claimant’s request is premature and is denied. As indicated above in paragraph 7, the appropriate time for determining whether an adverse inference is justified is the making of the Award, which is when the Tribunal will be in a position to determine whether a Party has unjustifiably refused to produce a document that the Tribunal had ordered it to produce, and whether the relevant document or documents are likely to contain evidence that is material to the outcome of the dispute. If the Tribunal is requested to draw adverse inferences at an appropriate time, the Tribunal will consider and rule on any such requests.

III. ORDER

12. In light of the above, the Tribunal orders as follows:
 - (a) The Tribunal’s decisions on the Claimant’s requests are set out in Annex A, which forms an integral part of this Procedural Order No. 6;
 - (b) In accordance with the procedural timetable, the Respondent shall produce the requested documents to the Claimant as directed by the Tribunal in Annex A by **9 June 2023**;
 - (c) The Tribunal’s decisions on the Respondent’s requests are set out in Annex B, which forms an integral part of this Procedural Order No. 6;

Procedural Order No. 6

- (d) In accordance with the procedural timetable, the Claimant shall produce the requested documents to the Respondent as directed by the Tribunal in Annex B by **9 June 2023**;
- (e) If they are asserting privilege or any other reason for withholding production, the Parties are directed to prepare a privilege log which identifies each responsive document that the Parties withhold from production on grounds of legal privilege or any other valid basis of exclusion. The privilege log must contain sufficient information (but without disclosing the privileged or otherwise excluded information) to allow the other Party and, if necessary, the Tribunal to determine whether withholding the document from production is justified. Any such privilege log shall be produced to the other Party, without copying the Tribunal, by 9 June 2023;
- (f) In the event that the receiving Party disputes a claim of legal privilege or of any other basis for exclusion identified in the privilege log, it may apply to the Tribunal by **16 June 2023**, identifying only the document in question and stating why it considers the reason for withholding the document not to be justified, following which the Tribunal shall issue further directions; and
- (g) The Parties are directed to prepare and submit to the other Party (without copying the Tribunal), together with the documents being produced, a list of the documents produced, identifying which document responds to which request of the other Party.

On behalf of the Tribunal,



Dr. Veijo Heiskanen
President of the Tribunal
Date: 29 May 2023