

**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. 11**

***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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15 July 2022

**WHEREAS** by email dated 20 April 2022, Respondent requested the Tribunal to order Claimants to disclose (i) the precise stake and financial interest of Mr. Amariglio and/or Tenor Capital and/or Downie North LLC in this arbitration; and (ii) provide the financial arrangement between Tenor Capital and/or Downie North LLC and Claimants ("**Respondent's TPF Disclosure Application**").

**WHEREAS** by email dated 20 April 2022, Claimants commented on Respondent's TPF Disclosure Application.

**WHEREAS** on 21 April 2022, the Tribunal invited Respondent to state whether it upheld its TPF Disclosure Application in light of Claimants' comments.

**WHEREAS** by email dated 25 April 2022, Respondent reiterated its request for disclosure relating to Mr. Amariglio and/or Tenor Capital and sought the Tribunal's permission to add four factual exhibits relating to Mr. Amariglio and the funding arrangements between Tenor Capital and Eco Oro Minerals Corp. to the record.

**WHEREAS** by email dated 29 April 2022, Respondent sought the Tribunal's permission to admit new factual exhibits and legal authorities onto the record which, according to Respondent, fall within three categories: (i) documents in response to Mr. Seda's Third Witness Statement of 25 April 2022; (ii) documents in response to Claimants' Preliminary Response to Colombia's New Essential Security Defense of 18 April 2022; and (iii) new documents that are responsive to Claimants' document production requests ("**Respondent's Initial Application for Admission of New Documents**").

**WHEREAS** on the same day, Claimants requested the Tribunal's leave to respond to Respondent's application to admit new documents onto the record and to address Respondent's TPF Disclosure Application, if necessary, on the first day of the Hearing.

**WHEREAS** on the same day, the Tribunal informed the Parties that it would decide on these issues during the Hearing.

**WHEREAS** on the first day of the Hearing, the Tribunal decided to admit the *travaux préparatoires* of the US-Colombia TPA and the legal authorities submitted by Respondent in response to Claimants' Preliminary Response to Colombia's New Essential Security Defense (i.e., the documents falling within category (ii) of Respondent's Initial Application for Admission of New

Documents).<sup>1</sup> Furthermore, the Tribunal decided not to admit the transcripts of the interceptions of Mr. Seda's telephone line and respective media.<sup>2</sup> As regards the other categories of documents, the Tribunal invited the Parties to confer with each other and find a joint solution.<sup>3</sup>

**WHEREAS** by letter dated 2 June 2022, Respondent informed the Tribunal that the Parties had been unable to reach agreement and requested it to (i) allow the submission of new factual exhibits and legal authorities listed in an annex to Respondent's letter onto the record ("**Respondent's Proposed New Documents**"); (ii) reject any attempt by Claimants to belatedly and inappropriately include factual information in breach of Respondent's fundamental due process rights; and (iii) declare the close of the record as of 2 June 2022, except in connection with any legal authority strictly relating to the documents in the *travaux préparatoires* to which Claimants had not had access prior to 2 June 2022, which may be filed onto the record by no later than 9 June 2022 ("**Respondent's Application for Admission of New Documents**"). Respondent's Proposed New Documents fall within four categories: (i) factual exhibits relating to Mr. Amariglio and the funding arrangements between Tenor Capital and Eco Oro Minerals Corp. (annexes to Respondent's email of 25 April 2022); (ii) documents produced by Respondent to Claimants on 27 April 2022 regarding new developments and rebuttal documents; (iii) a letter from Bancolombia to ANDJE dated 24 March 2022 (with annexes) concerning Mr. Seda's allegation as to a loan application by Royal Realty that had been rejected by Bancolombia; and (iv) legal authorities.

**WHEREAS** by letter dated 3 June 2022, Claimants requested the Tribunal to (i) allow the submission of new factual exhibits and legal authorities listed in an annex to Claimants' letter onto the record ("**Claimants' Proposed New Documents**"), noting that it would agree to the admission of Respondent's New Documents if Claimants' application is granted; and (ii) deny the requests for relief set out in Respondent's Application dated 2 June 2022 ("**Claimants' Application for Admission of New Documents**"). Claimants' Proposed New Documents fall within three categories: (i) factual exhibits provided to Respondent on 2 May 2022 and responding to Ms. Ardila Polo's witness statement; (ii) new documents provided to Respondent on 30 May 2022, comprising a letter from Bancolombia dated 30 December 2021, a Unit Buyer Contract dated 13 November 2013 and a letter from Fanny Giraldo dated 30 May 2022; and (iii) legal authorities.

**WHEREAS** on 10 June 2022, Respondent commented on Claimants' Application and reiterated its objection to the admission of Claimants' New Documents onto the record.

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<sup>1</sup> Preliminary Hearing Transcript, Day 1, p. 357:20 – 359:5, p. 361:19 – 362:5.

<sup>2</sup> Preliminary Hearing Transcript, Day 1, p. 361:13-17.

<sup>3</sup> Preliminary Hearing Transcript, Day 1, p. 357:16-19.

**WHEREAS** on 13 June 2022, Claimants informed the Tribunal of the Parties' agreement on the timetable for Post-Hearing Briefs.

**WHEREAS** on 15 June 2022, Claimants provided additional comments on Respondent's communication of 10 June 2022.

**A. Introduction**

1. This procedural order deals with Respondent's TPF Disclosure Application (**B.**) and the Parties' Applications for Admission of New Documents (**C.**).

**B. Respondent's TPF Disclosure Application**

2. The Tribunal recalls that in Procedural Order No. 2, it ordered Claimants to disclose the existence and identity of a third-party funder but denied Respondent's further request for production of "[a]ll Documents reflecting, containing, evidencing or relating to the conditions under which the Claimants' claims are being funded, including the funding agreement and any other relevant correspondence with the funder."
3. In the Tribunal's view, none of the reasons put forth by Respondent justify departing from this decision.
4. First, the fact that Mr. Amariglio attended the Hearing and was listed as a "Party Representative" on Claimants' list of attendees does not indicate that Tenor Capital's financial interest in this arbitration goes beyond that of an ordinary third-party funder.
5. Second, even if Tenor Capital may have acquired a stake in a mining company in a different dispute against Colombia, there is no evidence that it did so in the present case. Rather, Mr. Amariglio confirmed at the Hearing that he was neither a board member nor a shareholder of any of the Claimants.<sup>4</sup> There is no reason for the Tribunal to doubt the veracity of his statements. Claimants also confirmed that, other than additional funding having been required, there has been no change in the original underlying relationship between Claimants and the third-party funder.
6. Consequently, the Tribunal believes that there are no sufficient grounds to revisit the issue of disclosure of the financial arrangement between Tenor Capital, Downie North and Claimants, which has already been conclusively decided in Procedural Order No. 2.

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<sup>4</sup> Preliminary Hearing Transcript, Day 1, p. 363:2-16.

**C. The Parties' Applications for Admission of New Documents**

7. At the outset, the Tribunal notes that both Parties wish to file, and neither is generally opposed to the admission of, new documents to the record at this stage of the proceedings. Rather, the Parties disagree on the categories of admissible documents.
8. The Parties agreed prior to the Hearing to add certain evidence to the record, including a third witness statement by Mr. Seda. The Parties also agreed that the inclusion of Mr. Seda's Third Witness Statement was without prejudice to Respondent's right to submit evidence in response to any new allegations in Mr. Seda's additional witness statement. Respondent identified two sets of documents in response to Mr. Seda's Third Witness Statement: (i) the transcripts of interceptions; and (ii) the transcript of Mr. Seda's cross-examination in the *Pinturas Prime* case. At the Hearing, the Tribunal denied inclusion of the transcripts because "*they would not be helpful to the Tribunal*".<sup>5</sup> The application for admission of the transcript of Mr. Seda's cross-examination in the *Pinturas Prime* case remains outstanding (it is now item 14 in Annex A to Respondent's letter of 2 June 2022).
9. In its letters of 2 and 10 June 2022, Respondent does not object to the admission of the legal authorities that Claimants wish to add to the record.
10. In respect of the new documents which Claimants provided to Respondent on 3 May 2022, Respondent submits that none of them concerns a new development. Claimants, on the other hand, submit that they were only able to identify the materiality of these new factual documents following the submission of Ms. Ardila Polo's witness statement.
11. The Tribunal is prepared to admit Claimants' factual documents in response to Ms. Ardila Polo's witness statement. The Tribunal is also prepared to admit the transcript of Mr. Seda's cross-examination in the *Pinturas Prime* case and any rebuttal evidence to Claimants' new documents concerning Ms. Ardila Polo's witness statement, which should be filed along with Respondent's Post-Hearing Brief and Reply on New Evidence.
12. As regards the documents provided by Claimants on 30 May 2022, Respondent does not object to the admission of Bancolombia's letter of 30 December 2021 provided that Respondent is permitted to submit Bancolombia's letter of 24 March 2022. In the Tribunal's view, to have a complete picture, both letters should be admitted to the record.
13. The Tribunal is also prepared to admit the Unit Buyer Contract dated 13 November 2013 and the letter from Ms. Giraldo dated 30 May 2022, as well as any rebuttal evidence from

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<sup>5</sup> Preliminary Hearing Transcript, Day 1, p. 361:15-16.

Respondent, which should be included with its Post-Hearing Brief and Reply on New Evidence.

14. The sequence of post-hearing submissions ensures that Respondent will have the last word on the merits, as envisaged under the original pleading schedule. Furthermore, the Tribunal is prepared, if necessary, to resume the taking of evidence with respect to the new exhibits during the two-day hearing in October.
15. As regards Respondent's Application for Admission of New Documents, the Tribunal notes that in their letter dated 3 June 2022, Claimants agreed to the admission of Respondent's New Proposed Documents provided that their own documents are admitted to the record.
16. For the above-mentioned reasons, the Tribunal decides that Claimants' New Proposed Documents as well as Respondent's New Proposed Documents shall be admitted to the record.

#### **D. The Tribunal's decision**

17. Based on the foregoing, the Tribunal decides as follows:
  - I. Respondent's request that Claimants disclose (i) the precise stake and financial interest of Mr. Amariglio and/or Tenor Capital and/or Downie North LLC in this arbitration; and (ii) provide the financial arrangement between Tenor Capital and/or Downie North LLC and Claimants is **denied**.
  - II. Respondent's request to admit the proposed new documents listed in Annex A to Respondent's Application for the Admission of New Documents dated 2 June 2022 to the record is **granted**.
  - III. Claimants' request to admit the proposed new documents listed in the annex to Claimants' Application for the Admission of New Documents dated 3 June 2022 to the record is **granted**.
  - IV. The Parties are requested to assign exhibit numbers to the newly admitted documents and upload them to the Box folder within three days from issuance of this procedural order or from submission of Respondent's Post-Hearing Brief and Reply on New Evidence, as the case may be.

- V. As per the Parties' agreement of 13 June 2022, the following timetable shall apply to the next procedural steps:

Claimants' Post-Hearing Brief and Submission on New Evidence	21 July 2022
Respondent's Post-Hearing Brief and Reply on New Evidence	25 August 2022
Claimants' Rebuttal on Essential Security	13 September 2022
Hearing on New Evidence and Oral Closing Submissions (Paris, France)	3-4 October 2022

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

[signed]

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Professor Dr. Klaus Sachs  
(Presiding Arbitrator)

On behalf of the Tribunal