

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. 4

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

13 August 2021

WHEREAS on 18 February 2021, the Tribunal issued Procedural Order No. 2;

WHEREAS by letter dated 28 June 2021, Claimants requested the Tribunal to order Respondent to fully comply with its obligations pursuant to Procedural Order No. 2;

WHEREAS by letter dated 6 July 2021, Respondent submitted its reply to Claimants' application and requested the Tribunal to dismiss Claimants' application;

WHEREAS by letter dated 2 August 2021, Respondent informed the Tribunal that it had located and logged additional documents and submitted an updated Exemption Log.

A. Introduction

1. This procedural order deals with Claimants' application that the Tribunal order Respondent to (i) complete document production for all the categories of documents identified in Annex A to their letter dated 28 June 2021; and (ii) disclose the documents which Respondent has logged on its Exemption Log contained in Annex B to Claimants' letter dated 28 June 2021.
2. The Tribunal takes note of Respondent's letter dated 2 August 2021 according to which it has located additional documents responsive to Claimants' document requests to be produced or logged pursuant to Procedural Order No. 2. Accordingly, Respondent has provided to Claimants updated versions of Annex A and Annex B, which the Tribunal will consider in its subsequent analysis.
3. This procedural order is structured as follows: the Tribunal's analysis will first address the Parties' submissions on the applicable legal or ethical rules governing legal impediment and privilege under Article 9.2 of the IBA Rules, in particular the US-Colombia Trade Promotion Agreement ("Treaty") (**B.**) and Colombian domestic law (**C.**). The Tribunal's decisions on Claimants' individual requests to complete document production and to produce logged documents are contained in **Annex A** and **Annex B** to this procedural order.

B. US-Colombia Trade Promotion Agreement

4. The Tribunal will first deal with Claimants' allegation that Respondent's objections to withhold documents under the Treaty are "untimely" and should be dismissed as such (**I.**). The Tribunal will then, if appropriate, determine whether the provisions of the Treaty are applicable to the document production obligations of Respondent (**II.**).

I. Whether Respondent's objections under the Treaty are untimely

5. Claimants submit that Respondent has raised Articles 10.21 and 22.4 of the Treaty for the first time, in its most recent communication to Claimants (Annex C to Claimants' letter dated 28 June 2021) as another basis to withhold documents. For Claimants, Respondent failed to raise such objections in its responses to Claimants' document request and its Exemption Log.
6. The Tribunal agrees with Claimants that Respondent did not invoke said Treaty-based objections during the document production phase preceding Procedural Order No. 2.
7. Respondent appears to have raised the application of the Treaty for the first time in its email to Claimants of 16 June 2021, as follows:

"Claimants cannot, under the guise of document production, seek to impose on the Respondent an obligation to disclose information in violation of Article 10.21 and 22.4 of the [Treaty] and Colombian Law."¹

8. However, the fact that Respondent did not raise the Treaty-based objection before, does not mean that the Treaty is not applicable nor can it be considered that Respondent waived such Treaty-based objection by not raising it earlier in the document production phase.
9. Consequently, Respondent is not barred from invoking Articles 10.21 and 22.4 of the Treaty as potential exceptions to its document production obligations at this stage.

II. Whether the Treaty contains exceptions to document production

10. Article 10.21 of the Treaty reads as follows:

"Article 10.21: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:

- (a) *the notice of intent;*
- (b) *the notice of arbitration;*

¹ Email from Respondent's counsel to Claimants' counsel dated 16 June 2021, provided by Claimants as "Annex C" to their letter dated 28 June 2021.

- (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 10.20.2 and 10.20.3 and Article 10.25;
 - (d) minutes or transcripts of hearings of the tribunal, where available; and
 - (e) orders, awards, and decisions of the tribunal.
2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.
3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 22.2 (Essential Security) or Article 22.4 (Disclosure of Information).
4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

- (a) subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to any non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);
- (b) any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;
- (c) a disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Parties and made public in accordance with paragraph 1; and
- (d) the tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance

with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws."

11. Article 22.2 of the Treaty provides as follows:

"Article 22.2: Essential Security"

Nothing in this Agreement shall be construed:

(a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

(b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."

12. Article 22.4 of the Treaty reads as follows:

"Article 22.4: Disclosure of Information"

Nothing in this Agreement shall be construed to require a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private."

13. Article 10.21 of the Treaty, which is titled "*Transparency of Arbitral Proceedings*", governs the publicity of hearings and documents submitted by the Parties in the course of arbitral proceedings and the Tribunal's decisions and awards, which are, in principle, to be made publicly available or transmitted to non-disputing parties, save for "*protected information*"² designated by the Parties.

² Under Article 10.28 of the Treaty, "*protected information means confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law*".

Procedural Order No. 4

14. Article 10.21(1) of the Treaty obliges Respondent to transmit the arbitral documents listed in this provision to non-disputing Parties and to make them available to the public.
15. Article 10.21(3) of the Treaty refers to Articles 22.2 and 22.4 of the Treaty and stipulates that nothing in this section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with said provisions.
16. Article 10.21(4) of the Treaty sets forth a procedure for excluding protected information from disclosure to any non-disputing party or to the public.
17. Based on the foregoing, the Majority of the Tribunal is of the view that the purpose of Article 10.21 of the Treaty is to ensure the transparency of the arbitral proceedings on the one hand and to make sure that "protected information", which has been designated as such by the disputing parties, remains confidential *vis-à-vis* the public and non-disputing parties on the other hand.
18. However, Article 10.21 of the Treaty (as well as the definition of "protected information" in Article 10.28 of the Treaty) are silent on the disclosure of documents between the disputing parties. They do not oblige Respondent to disclose any documents to Claimants. The Majority of the Tribunal is therefore not convinced that these provisions set any limits to the document production obligations of the disputing parties within this arbitration.
19. Insofar as Article 10.21(3) refers to the general exceptions of Articles 22.2 and 22.4 of the Treaty, the Majority of the Tribunal is of the view that this serves to clarify that the respondent's obligation to make the arbitral documents listed in para. 1 available to the public and to any non-disputing parties (as well as the obligation to conduct hearings open to the public pursuant to para. 2) does not take precedence over the general exceptions.
20. In similar vein, Articles 22.2 and 22.4 of the Treaty provide that "[n]othing in this Agreement shall be construed" to require a Party to furnish or allow access to information the disclosure of which would either be contrary to its essential security interests or impede law enforcement, be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private. Yet as the Treaty itself does not deal with the disclosure obligations of the disputing parties during arbitral proceedings, these general exceptions do not apply (or provide limitations) to document production.
21. For these reasons, the Majority of the Tribunal does not follow Respondent's arguments that Articles 10.21 and 22.4 of the Treaty contain limitations to Respondent's consent to arbitrate or set limits to the Parties' document production obligations.
22. In any event, even if these provisions were applicable, the Majority of the Tribunal is not convinced that Respondent has sufficiently established that disclosure of the logged

documents to Claimants (only) would be contrary to its essential security interests or the public interest or impede law enforcement. Rather, the Majority of the Tribunal considers that Respondent's concerns regarding the public disclosure of documents pertaining to ongoing criminal or disciplinary investigations can be addressed by the procedure set forth in Article 10.21(4) of the Treaty as well as a confidentiality undertaking between the Parties.

C. Colombian domestic law

23. Respondent relies on two Colombian laws to justify withholding documents pursuant to Article 9.2(b) of the IBA Rules, namely Law 1712 of 2014 (titled "*Law on Transparency and Right to Access National Public Information*") and Law 1437 of 2011 (titled "*Whereby the Administrative Procedure and Contentious Administrative Code is Enacted*").
24. Article 18 of Law 1712 provides:

"TITLE III

EXCEPTIONS TO ACCESS TO INFORMATION

Article 18. Information excepted due to harm to the rights of natural or legal persons. It is all classified public information, access to which may be refused or denied in a reasoned manner and in writing, provided that access may cause damage to the following rights:

(a) The right of every person to privacy, under the limitations imposed by the condition of civil servant, in accordance with the provisions of Article 24 of Law 1437 of 2011.

(b) The right of every person to life, health or safety. [...]"

25. Article 24(3) of Law 1437 reads as follows:

"Right to petition authorities

Special rules

Article 24. Reserved information and documents. Only information and documents expressly subject to reserve by the Constitution or the law shall be reserved, and in particular:

1. Those related to national defense or security.

[...]

3. Those involving rights to privacy and protection of the intimate sphere of persons, including resumes, work history and pension files and other personnel records in the archives of public or private institutions, as well as medical records.

[...]

5. The data referring to financial and commercial information, under the terms of Statutory Law 1266 of 2008.

[...]

7. Those protected by professional secrecy.

[...]

PARAGRAPH. For the purposes of the request for information of a reserved nature, as set forth in paragraphs 3, 5, 6 and 7, it may only be requested by the owner of the information, by their attorneys or by persons authorized with express power to access such information.”

26. At the outset, the Majority of the Tribunal notes that both provisions deal with the right to petition the Colombian authorities to access public information and with the exceptions to such right.
27. The Majority of the Tribunal agrees with Claimants that these domestic rules on information access do not constitute mandatory legal rules on a legal impediment or privilege in the sense of Article 9.2(b) of the IBA Rules. They vest the Colombian authorities with discretion to restrict public access to information and documents held by the authorities under certain conditions, e.g., when a person's right to privacy is concerned. The Majority of the Tribunal is not convinced that these domestic rules can equally be applied to document production in an international arbitration.
28. Yet, in any event, the Majority of the Tribunal is of the view that a confidentiality undertaking between the Parties provides appropriate safeguards against public disclosure of information protected under Article 18 of Law 1712 and/or Article 24(3) of Law 1437.
29. The Tribunal invites the Parties to confer with each other regarding the terms of an appropriate confidentiality agreement. If the Parties are unable to reach agreement, the Tribunal will, upon application by either Party, issue a protective order governing the treatment of confidential documents.

THE TRIBUNAL HEREBY ORDERS:

30. Based on the foregoing, the Tribunal, by majority, decides as follows:

- I. The Parties shall seek agreement on the terms of a confidentiality agreement and inform the Tribunal of their agreement no later than 30 August 2021;
- II. Respondent is ordered to produce the documents as directed in the attached Exemption Log (Annex B) within one week of the conclusion of the confidentiality agreement;
- III. Respondent is ordered to conduct any additional searches for responsive documents as directed in Annex A and either to produce or to log the responsive documents on a supplementary Exemption Log by 30 August 2021; and
- IV. All other document production requests are denied, but without prejudice to the Tribunal's power to review its decision on the production of documents.

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

[Signed]

Professor Dr. Klaus Sachs
(Presiding Arbitrator)

On behalf of the Tribunal

International Centre for Settlement of Investment Disputes

ICSID Case ARB/19/6

Ángel Samuel Seda et al.

v.

The Republic of Colombia

**Dissenting Opinion Regarding Production of Documents pursuant to
Procedural Order No. 4**

Hugo Perezcano Díaz
Arbitrator

13 August 2021

**Dissenting Opinion of Hugo Perzcano D. Regarding Production of Documents pursuant to
Procedural Order No. 4**

I disagree with the decision of the majority to order the Respondent to produce certain documents. In my view, the Respondent has raised valid objections under the applicable rules and guidelines, and the corresponding order to produce such documents raises important issues and concerns, including that it is fundamentally at odds with the express language of the Colombia-US Trade Promotion Agreement (TPA) and the IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Rules on Evidence”), as well as with principles that other international tribunals have recognized and accepted, and it impinges on the rights of third parties.

I disagree with the majority that Article 10.21 only governs “publicity of hearings and documents submitted by the Parties” or generated by the Tribunal. I do not agree either that the purpose of Article 10.21 “is to ensure the transparency of the arbitral proceedings on the one hand and to make sure that “protected information”, which has been designated as such by the disputing parties, remains confidential *vis-à-vis* the public and non-disputing parties on the other hand”. Article 10.21 is broader.

Paragraph 1 governs access by non-disputing Parties and the public to the *record of the proceedings*, which is comprised of the documents listed therein in subparagraphs (a) through (e), namely:

- the notice of intent and the notice of arbitration filed by the claimant;
- pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to:
 - Article 10.20.2 by a non-disputing party,
 - Article 10.20.3 by *amici curiae*, and
 - Article 10.25, which concerns objections raised by the respondent;
- minutes or transcripts of hearings of the tribunal, where available; and
- orders, awards, and decisions of the tribunal.

Paragraphs 1, 2 and 4 of Article 10.21, which deal with publicity of the arbitral proceedings, including the record of the proceedings, are expressly meant to work together. Paragraph 1 begins by providing that, “[s]ubject to paragraphs 2 and 4”, the respondent will transmit to the non-disputing Parties and make available to the public

**Dissenting Opinion of Hugo Perzcano D. Regarding Production of Documents pursuant to
Procedural Order No. 4**

documents that are already on the record. Paragraph 2 requires hearings to be open to the public and establishes how to safeguard from disclosure protected information that is already on the record, which is intended to be used during an open hearing. Paragraph 4 also deals with protected information that has already been submitted to the tribunal. It provides, as well, how to safeguard from disclosure to the public or non-disputing Parties such protected information, including how to resolve questions about the designation by a party of certain information as *protected information*.

The provision contained in paragraph 3 is very different. It is evident that its absence from the introductory “subject to” phrase in paragraph 1 was not a mistake or an oversight of the TPA Parties. There is a marked contrast that sets it apart from paragraphs 1, 2 and 4 (which concern protected information that has been submitted to the tribunal and put into the record). Quite clearly, paragraph 3 is meant to safeguard the respondent from disclosing, not only to the public or non-disputing Parties, but also to the claimant and even the tribunal (or anyone else) certain *information* (which is not limited to *protected information*). It is obvious from the numerous references to the public and non-disputing Parties in paragraphs 1, 2 and 4 that, when the TPA Parties meant to safeguard protected information from disclosure to the public and non-disputing Parties, the TPA Parties knew how to do it and did so expressly. Paragraph 3 is not so qualified: “Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 22.2 (Essential Security) or Article 22.4 (Disclosure of Information)” (emphasis added). Reading “the public or non-disputing Parties” into paragraph 3 fundamentally alters the provision as drafted by the TPA Parties: “Nothing in this Section requires a respondent to disclose [to the public or non-disputing Parties] protected information or to furnish or allow access [to the public or non-disputing Parties] to [protected] information that it may withhold [notwithstanding] Article 22.2 (Essential Security) or Article 22.4 (Disclosure of Information)”. Such a result is contrary to the rules of treaty interpretation.

**Dissenting Opinion of Hugo Perzcano D. Regarding Production of Documents pursuant to
Procedural Order No. 4**

I disagree as well with the majority's view that the Treaty does not deal with disclosure obligations during arbitral proceedings, and that the general exceptions contained in Articles 22.2 and 22.4 do not apply or provide limitations to document production. In my view, this too is an impermissible conclusion.

Whether viewed as "disclosure obligations" of the disputing parties or exceptions to such obligations, evidently Article 10.21 specifically deals with disclosure of information during the arbitral proceedings. Moreover, paragraph 3 provides that "Nothing in this Section" (that is Section B of Chapter 10 of the TPA, which establishes and governs the dispute settlement mechanism that we are involved in) requires the respondent to disclose certain information that the respondent may properly withhold under Articles 22.2 and 22.4. Indeed, contrary to the majority's conclusion that these general exceptions do not apply to disclosure of information during the arbitral proceedings, paragraph 3 expressly incorporates Articles 22.2 and 22.4 into Section B and makes them directly applicable to arbitral proceedings under "this Section" (B of Chapter 10 of the TPA).

Importantly as well, in contrast to the IBA Rules on Evidence which, in accordance with Procedural Order No. 1, only serve as a guide for the Tribunal and the Parties in this arbitration (¶ 15.1), Article 10.21 is part of the *governing law* in disputes under Chapter 10, Section B. Article 10.22 provides in pertinent part: "...the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law". Obviously, *this Agreement* (that is the TPA) takes precedence over other applicable rules of international law —which the IBA Rules on Evidence are not. Moreover, not only do the Articles 22.2 and 22.4 exceptions in and of themselves apply to the whole of the TPA, including Chapter 10, but the TPA Parties found it important to incorporate them specifically into Section B of Chapter 10. The conclusion that the Chapter 22 exceptions that deal with access to, and disclosure of, information do not apply to access to, and disclosure of, information through document production in arbitration proceedings under Section B is contrary to the express language of the TPA. Paragraph 3 of article 10.21 is

**Dissenting Opinion of Hugo Perzcano D. Regarding Production of Documents pursuant to
Procedural Order No. 4**

categorical. “Nothing” means no more than that, not paragraphs 1, 2 or 4 of Article 10.21¹, not other rules of international law that might be applicable, certainly not the IBA Rules on Evidence that are only meant to provide guidance in this arbitration, and not even confidentiality agreements.

But there is no contradiction between the IBA Rules on Evidence and the TPA. In my opinion, the result is no different whether the IBA Rules on Evidence or the TPA provisions are applied. A party may properly refrain from producing certain documents to the other party for the reasons set forth in Article 9.2, even if the documents have been deemed to be relevant to the dispute and material to its outcome. That is the very purpose of Article 9.2 of the IBA Rules on Evidence. Ordering production subject to a confidentiality agreement to safeguard the information “against public disclosure” renders Article 9.2 meaningless.

More specifically, it is not difficult to appreciate why information concerning ongoing criminal or disciplinary inquiries, including information gathered or prepared by law enforcement and investigative agencies, or disciplinary and supervisory bodies in the course of investigating criminal activity or other type of misconduct, is protected as confidential information in most countries, not only in Colombia. Revealing such information to persons that are not the subject of those investigations or privy to the inquiries can compromise the success of the investigations, it can be prejudicial to prospective law enforcement actions, it may lead to the identification of witnesses or informers, etc. In general, it can impede the law from being properly enforced and it can place people and property at risk. It is beyond any doubt that these are matters of public interest.

It is readily apparent why a confidentiality agreement cannot adequately safeguard against such risks. Even if the information does not become public, it may be leaked,

1. Article 10.21.5 is not relevant here. It contains the flip side provision: where domestic law requires information to be disclosed, nothing in Section B of Chapter 10 requires a respondent to withhold it from the public.

**Dissenting Opinion of Hugo Perzcano D. Regarding Production of Documents pursuant to
Procedural Order No. 4**

regardless of whether that happens on purpose, by indiscretion, oversight or otherwise. Obviously, persons who are not part of investigative agencies or do not have appropriate clearance are not subject to the same protocols and measures that apply to handling such information. Importantly, such persons do not pursue the same public interest in handling and using that information. Arbitral tribunals also lack the means to enforce such confidentiality agreements and related undertakings effectively or at all.

Indeed, international arbitration tribunals have recognized the *principle of secrecy of criminal investigations*. They have accepted that these types of investigations are covered by Article 9.2 of the IBA Rules on Evidence. Accordingly, international tribunals have refused to order production of related documents². This principle equally applies to similar investigations or inquiries.

I am also satisfied that the document identified by the Respondent regarding Ms. Yolima Cruz falls under the legal exceptions which concern an individual's right to privacy, including with respect to that person's employment history, personnel records, etc. As a general matter, governments can only use an individual's personal information for the specific purpose that it was collected and must safeguard it from disclosure without the individual's consent. Evidently, a confidentiality agreement cannot obviate an individual's consent regarding her personal information.

There is no question that the information sought by the Claimants is protected information under Colombian law, specifically Laws 1712, 1430 and 1708 and Decree Law 663. The Claimants do not dispute the Respondent's interpretation of the relevant provisions of those laws. Nevertheless, the majority doubts whether "these domestic rules can equally be applied to document production in an international arbitration". Yet, beyond Article 9.2 of the IBA Rules on Evidence, Article 10.28 of the TPA specifically provides: "For purposes of this Chapter [10 of the TPA]... **protected information** means

2. *Elliott Associates, LP (USA) v. Republic of Korea*, PCA Case No. 2018-51. Procedural Order No. 14, June 24, 2020, ¶ 72. See also *BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea*, ICSID Case No. ARB/14/22. Procedural Order No. 7, September 5, 2016.

**Dissenting Opinion of Hugo Perzcano D. Regarding Production of Documents pursuant to
Procedural Order No. 4**

confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law" (bolded in the original, emphasis added otherwise). Thus, for purposes of Chapter 10 of the TPA, domestic law —in this instance Colombian law— is the law that governs matters concerning classification, protection and disclosure of information.

For these reasons, in my view documents identified in the Claimants' Requests Nos. 1, 3, 8, 18 and 19³ should be excluded from production in accordance with Article 10.21 of the TPA and Article 9.2 of the IBA Rules on Evidence⁴. Documents under the Claimants' Request No. 12 fall into the same category as they concern ongoing investigations involving illegal activities (albeit not within the criminal law framework). Similar to criminal or disciplinary investigations, they involve sensitive matters that concern the public interest, law enforcement and the administration of justice. They should equally be excluded from production.

Documents under the Claimants' Request No. 31 also fall into this category. They involve an inquiry conducted by financial supervisory authorities into compliance by Corficolombiana with applicable financial laws and regulations related to its role in some of the underlying facts. Nothing precludes the Claimants and, specifically Mr. Seda, from requesting that information directly from Corficolombiana for use in this proceeding. However, it is inappropriate for the Tribunal to order production of such information without Corficolombiana's consent. Not only is it protected information under Colombian

3. Entries 1 - 8, 10 -12, and 16 - 30 of the Respondent's Privilege Log.

4. In light of my dissent and in order to avoid any confusion, I must provide a brief explanation concerning entries 13 and 14 of the Respondent's Privilege Log in response to the Claimants' Request No. 6, where I do not disagree with the majority's decision. In those entries, the Respondent identified two decisions issued by Ms. Malagón as the *Directora Nacional Especializada de Extinción del Derecho de Dominio* related to the precautionary measures imposed on the Meritage Site. The Respondent referred to "its response to the Claimants' objections to Entry 1" of its Privilege Log, which concerns the Claimants' Request No. 1 for documents regarding criminal and disciplinary investigations into Ms. Malagón's conduct. However, the decisions at issue do not fall into the category of documents under the Claimants' Request No. 1 because they do not concern criminal or disciplinary investigations into anyone's conduct. They were issued by Ms. Malagón in the course of the administrative asset forfeiture proceedings that have concluded, and the matter now has moved to a judicial phase.

**Dissenting Opinion of Hugo Pérezcano D. Regarding Production of Documents pursuant to
Procedural Order No. 4**

law and the TPA, but the Tribunal has no way of ascertaining whether or not the interests of the Claimants, Newport and Royal Realty in the underlying matter are aligned with those of Corficolombiana and, if they are not, in addition to the risks identified above, forcing the respondent to provide Corficolombiana's information to the Claimants may affect a third party's rights and jeopardize its legal strategies.

The right to privacy is a fundamental right enshrined in international law and protected across jurisdictions. It is beyond any doubt that protection of such information is in the public interest and thus covered by Art. 22.4 of the TPA. Accordingly, the document concerning Ms. Yolima Cruz should be excluded from production⁵.

[Signed]

Hugo Pérezcano Díaz
Arbitrator

5. Entry 15 of the Respondent's Privilege Log. Another clarification is warranted. The Respondent also objected to producing Ms. Malagón's decisions identified in entries 13 and 14 of its Privilege Log on the basis that the documents are protected under the right to privacy. However, the decisions in question concern the precautionary measures, not Ms. Malagón or her conduct. Indeed, they are decisions that Ms. Malagón issued during the course of the initial investigation into the Meritage Site that led to the Asset Forfeiture Action. The objection has not been validly invoked and, for these reasons as well, I do not disagree with the majority's decision regarding those decisions issued by Ms. Malagón.