

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

South32 SA Investments Limited

v.

Republic of Colombia

ICSID Case No. ARB/20/9

PROCEDURAL ORDER NO. 2
(Decision on the Parties' Document Production Requests)

Members of the Tribunal

Ms. Deva Villanúa, President of the Tribunal
Prof. Guido S. Tawil, Arbitrator
Dr. Andrés Jana Linetzky, Arbitrator

Secretary of the Tribunal

Ms. Catherine Kettlewell

Assistant to the Tribunal

Ms. Francisca Seara Cardoso

10 November 2021

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WHEREAS

1. This arbitration arises between South32 Investments Limited [**“Claimant”**] and the Republic of Colombia [**“Respondent”**] under the Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Colombia, which entered into force on 10 October 2014 [the **“Treaty”**]. Claimant and Respondent shall be jointly referred to as the **Parties**.
2. On 29 December 2020, the Arbitral Tribunal issued Procedural Order [**“PO”**] No. 1, setting a number of case management issues, among them, the **“Procedural Calendar”** and some rules for the production of documents.
3. On 30 September 2021, the Parties filed their document production requests in the form of Redfern Schedules.
4. On 14 October 2021, the Parties filed their objections to the other Party’s document production requests.
5. On 28 October 2021, the Parties filed their replies to the objections to the other Party’s document production requests.
6. This Order is made in accordance with Section 16 and Annex A of PO No. 1, which establish the rules and the deadline for the Tribunal to decide on the Parties’ document production requests.

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I. GUIDELINES FOR RULING ON REQUESTS

7. Paragraph 20.1 of PO No. 1 provides that the Tribunal may take into consideration the International Bar Association Rules for the Taking of Evidence in International Arbitration (2010) [the **“IBA Rules”**].
 8. This section summarizes the guidelines provided by the IBA Rules for the production of documents, upon the basis of which decisions on each of the Parties’ requests are made in Annexes A and B enclosed herein, which form an integral part of the present Procedural Order No. 2.
1. **DEFINITION OF DOCUMENT**
 9. The **“Definitions”** section of the IBA Rules includes the following definition of the term **“Document”**:

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“*Document*’ means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means”.

10. The same definition has been used by the Parties in their requests for document production and will also be used in this Order.

2. REQUIREMENTS

11. The Tribunal will grant the requests for production of those Documents that meet the following cumulative requirements [“**R**”]:

A. “R1”: Identification of each Document or description of a narrow and specific category¹

12. The Parties must have identified the requested Document in sufficient detail. When the request was for a category of Documents, the Tribunal has considered the following additional requirements:

- a clear and well-defined characterization of a narrow and specific category has been provided;
- circumstantial evidence of the putative existence of the category has been marshalled;
- the name of the person, authority or entity which has issued the category of Documents has been provided.

B. “R2”: Relevant and material²

13. The requesting Party has proven that the Documents are relevant to the case and material to its outcome by identifying the parts of its submission for which evidentiary support by way of document production is requested³.

14. Documents

- referred to in other Documents that have already been submitted,
- mentioned in witness statements or in expert reports, or
- relied upon by experts to prepare their expert reports (but excluding working papers used by experts),

have, as a general rule, been considered relevant.

¹ Art. 3.3 (a) (i) and (ii) IBA Rules.

² Arts. 3.3 (b) and 9.2 (a) IBA Rules.

³ Including Claimant’s claims or Respondent’s jurisdictional objections.

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15. It is not for a Party to disprove, by way of Document requests directed to the counterparty, allegations for which the counterparty bears the burden of proof, since failure to discharge such burden will by itself lead to dismissal. Production with the purpose of disproving the counterparty's allegations will only be ordered in exceptional circumstances.
16. The Tribunal acknowledges that certain allegations are especially onerous to proof – such as corruption, fraud or, in this specific case, treaty shopping allegations. In view of this, the Tribunal has a more favourable attitude to ordering the requested party to provide documents that may facilitate the requesting party discharge its otherwise too onerous burden of proof.
17. Any analysis by the Tribunal regarding the relevance and materiality of requested Documents will be made *prima facie*, without prejudging any final decision that the Tribunal may adopt once all evidence has been marshalled.

C. “R3”: Not in the possession, custody or control of the requesting Party⁴

18. The requesting Party must have averred that the Documents sought are not in its possession, custody or control, and explain why it assumes that the Documents are in the possession, custody or control of the counterparty.
19. The request will be rejected if the Documents are located in the premises or under the control of a third party, to which the requesting Party has access. Similarly, a Document shall be considered to be in possession of the requesting Party if it is already on the record of the arbitration or if it is publicly available (and the counterparty is not in a significantly more favourable position to obtain such Document). For the avoidance of doubt, “publicly available” means that a Document is in the public domain and is easily accessible.
20. Documents which are located in the premises or under the control of a third party, to which the requested Party has access, will generally be considered to be in its “possession, custody or control”, unless otherwise proven by the requested Party.

3. OBJECTIONS

21. The IBA Rules provide for a number of objections to the production of Documents. Further to alleging failure to satisfy any of the previously established requirements (R1 to R3), the Parties may object to requests from the counterparty under certain grounds, *inter alia* [“O”]⁵:

⁴ Art. 3.3 (c) (i) and (ii) IBA Rules.

⁵ Art. 3.5 IBA Rules.

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A. “O1”: Confidentiality

22. The requested Party may invoke privilege with regard to Documents prepared by or addressed to counsel, pertaining to the provision of legal advice, and given or received with the expectation that such Documents would be kept confidential⁶.
23. The requested Party may also request that a Document should not be produced, alleging compelling grounds of technical or commercial confidentiality⁷.
24. If the requested Party raises an objection under O1 and, if challenged, the Tribunal confirms it, the requested Party shall present, as per para. 16.7 of the PO No. 1, a privilege and confidentiality log, listing the responsive documentary evidence alleged to contain privileged, confidential or highly sensitive information, including its description, date, author and recipient.

B. “O2”: Production would be unreasonably burdensome⁸

25. The Parties may object to the production of certain Documents on the basis that such production would impose an unreasonable burden. In making its decision, the Tribunal has weighed the time and cost of producing the Documents against their expected evidentiary value. Where appropriate, the Tribunal has also reduced the scope of production to avoid unreasonable burden.

C. “O3”: Production would affect the fairness or equality of the procedure⁹

26. Production of Documents will not be ordered if the Tribunal finds that there are compelling considerations of procedural economy, proportionality, fairness or equality of the Parties.

⁶ Art. 9.2 (b) IBA Rules.

⁷ Art. 9.2 (e) IBA Rules.

⁸ Art. 9.2 (c) IBA Rules.

⁹ Art. 9.2 (g) IBA Rules.

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II. DECISION OF THE ARBITRAL TRIBUNAL

27. The Tribunal hereby decides each of the requests for document production as set out in Annexes A and B enclosed herein, which form an integral part of the present PO No. 2.
28. The Parties shall produce the Documents as ordered by 25 November 2021, in conformity with the Procedural Calendar.

[Signed]

Ms. Deva Villanúa
President of the Tribunal
Date: 10 November 2021