

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Gran Colombia Gold Corp.**

**v.**

**Republic of Colombia**

**(ICSID Case No. ARB/18/23)**

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**PROCEDURAL ORDER No. 5**

***Members of the Tribunal***

Ms. Jean Kalicki, President of the Tribunal  
Professor Bernard Hanotiau, Arbitrator  
Professor Brigitte Stern, Arbitrator

***Secretary of the Tribunal***

Ms. Ana Constanza Conover Blancas

***Assistant to the President of the Tribunal***

Dr. Joel Dahlquist

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8 April 2020

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**I. PROCEDURAL BACKGROUND**

1. By letter of 31 March 2020, the Claimant submitted an application for the Tribunal to put into place a confidentiality order, along with a proposed form of order for the Tribunal's consideration ("**Claimant's Application**").
2. On 6 April 2020, following an invitation from the Tribunal, the Respondent submitted observations on the Claimant's Application ("**Respondent's Observations**").
3. On 7 April 2020, the Claimant requested leave from the Tribunal to provide a brief reply to the Respondent's Observations. The Tribunal granted the Claimant's request on the same date. On 8 April 2020, the Claimant submitted a reply to the Respondent's Observations ("**Claimant's Reply**").
4. This Procedural Order sets out the Tribunal's decision on the Claimant's Application.

**II. PARTIES' POSITIONS**

**A. The Claimant's Position**

5. The Claimant requests the Tribunal to issue a confidentiality order to ensure the protection of "confidential information", as defined in Article 838 of the Canada-Colombia Free Trade Agreement (the "FTA").<sup>1</sup> The Claimant also refers to Article 830(5) of the FTA which, in its view, explicitly contemplates the possibility of a Tribunal's confidentiality order.<sup>2</sup>
6. The Claimant submits that it will attach certain confidential information as supporting material to its Counter-Memorial on Jurisdiction which is due on 13 April 2020. Accordingly, its Application is aimed at ensuring "that a procedure is in place for protection of confidential information, as contemplated by the Treaty."<sup>3</sup> The Claimant further submits that the draft confidentiality order that was attached to its Application has been adopted by ICSID tribunals in other cases and its terms are standard ones commonly used in arbitration.
7. In Claimant's view, an order is required not only to ensure the privacy (i.e. non-publication) of documents but also the confidentiality of a limited subset of materials that require greater protection, which the Claimant is obligated to ensure to its shareholders by law and responsibility. In addition, the Claimant submits that it would not be responsible or

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<sup>1</sup> Pursuant to Article 838 of the FTA, "confidential information means: (a) confidential business information; and (b) information that is privileged or otherwise protected from disclosure under the law of a Party[.]"

<sup>2</sup> The full text of Article 830(5) of the FTA provides as follows: "To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information shall prevail. However, a Party should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal."

<sup>3</sup> Claimant's Application, p. 1.

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reasonable to allow the Respondent to widely disseminate Claimant's confidential information within the Colombian Government.

**B. The Respondent's Position**

8. The Respondent requests that the Tribunal reject the Claimant's Application for two main reasons: first, the FTA already ensures the protection of confidential information; and second, the Claimant's draft confidentiality order is in conflict with the confidentiality provisions in the FTA and in Procedural Order No. 1 ("PO1").
9. First, the Respondent argues that a confidentiality order is not necessary because any confidential information is already protected under Article 830 of the FTA. Moreover, section 24 of PO1 identifies the case documents that the parties have agreed to publish (subject to the redaction of confidential information) and sets forth that no other documents submitted to, or issued by, the Tribunal – e.g. supporting materials – shall be publicly available unless the parties otherwise agree.
10. Second, the Respondent submits that the terms of the draft confidentiality order presented by the Claimant are in conflict with and improperly extend the scope of Article 830 of the FTA and section 24 of PO1. For instance, by allowing the parties to designate "any" information as confidential in the draft order, the Claimant improperly seeks to expand the scope of the categories of "confidential information" as the term is defined in Article 838 of the FTA. Moreover, the draft order seeks to impose restrictions on the categories of persons to which confidential information can be disclosed by the parties in the course of the arbitration. This would exceed the scope *ratione personae* established in Article 830(3) of the FTA and section 24.2 of the PO1 and would impact the parties' right to adequately prepare their case.
11. The Respondent highlights that, under Article 830(4) of the FTA, the parties may share confidential information with officials of their respective national and sub-national governments. In this case, Colombia's *Agencia Nacional para la Defensa Jurídica del Estado* is under a statutory obligation to inform other Colombian State entities of these proceedings and it needs to share the information received with other State-related entities to prepare the Respondent's defence in this case.

**III. TRIBUNAL'S ANALYSIS**

12. The Tribunal reiterates the order to which the parties agreed at paragraph 24.1 of PO1 that, other than with respect to the award, any decision on jurisdiction, the Notice of Intent, the Request for Arbitration, and the Tribunal's procedural orders, "no other documents submitted to, or issued by, the Tribunal shall be publicly available" unless the parties otherwise agree, and even in such circumstances "always subject to the deletion of confidential information."

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13. For the avoidance of doubt, this restriction on public disclosure would extend *inter alia* to the particular information about which the Claimant expresses concern in its Application, namely certain exhibits it intends to submit with its 13 April Counter-Memorial on Jurisdiction that are expected to reflect personal or financial data of individual shareholders. The Respondent's Observations do not express any different understanding with respect to this particular information. The financial data of individuals would fall within the scope of the FTA's own definition of "confidential information" as including "confidential business information." The Tribunal also retains inherent authority to provide appropriate protection for other categories of personal information of individuals, such as their addresses.
14. Because of the general provision for confidentiality agreed in PO1, paragraph 24.1, it does not appear necessary in this case to establish a protocol for document-by-document confidentiality designations. Nonetheless, if the Claimant wishes for the avoidance of doubt to specially designate particular documents as "confidential" by affixing such a label to the relevant documents, it may do so. The Respondent does not indicate any prejudice from the Claimant's making such designations, which moreover would be consistent with the general provision in both FTA Article 830(1) and PO1, paragraph 24.1 that "a disputing party providing information that it claims is confidential has the burden of designating it as confidential." If nothing else, affixing such designations in advance could facilitate the determination of any redactions for confidentiality that may be required before public disclosure of any passages of the award or any decision on jurisdiction that may cross-reference the particular documents.
15. Aside from the issue of *public* disclosure, FTA Article 850(3) also constrains the parties' dissemination of each other's documents by reference to the *purpose* of such dissemination: such documents may be shared "in connection with the arbitral proceedings" with such persons as considered "necessary for the preparation of" a party's case. The Tribunal interprets this provision as permitting disclosure of case documents to the four categories of individuals covered by paragraph 4 of Claimant's proposed confidentiality order (i.e., counsel and their support staff; officials or employees of the parties to whom disclosure is reasonably considered to be necessary; experts or consultants retained or consulted in connection with these proceedings; and witnesses who are reasonably expected to offer evidence but only to the extent material to their expected evidence). Pursuant to FTA Article 850(4), the Respondent also may share "all relevant" case documents with government officials "in the course of dispute settlement under this Agreement."
16. However, both Article 850(3) and Article 850(4) impose on the party which discloses documents for such purposes a duty to "ensure that those persons" (i.e., the recipients) protect the confidential information in such documents." The Tribunal expects both parties to take this duty seriously, and to put into place appropriate mechanisms to ensure that document recipients are aware of the limited purposes for which such documents may be used, and of the restrictions on further dissemination of case materials. These mechanisms need not necessarily take the form of the specific "Confidentiality Undertaking" procedure the

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Claimant proposes, but nonetheless should be reasonably designed to protect against undue disclosure of materials beyond the boundaries of that permitted above. The Tribunal also cautions that it retains authority as necessary under FTA Article 850(2) to establish specific procedures for the protection of confidential information, if that proves necessary to ensure the parties' compliance with the duties imposed by Articles 850(3) and 850(4).

**IV. ORDER**

17. For the reasons set out above, the Tribunal denies the Claimant's Application for issuance of a separate Confidentiality Order in the terms proposed. The Tribunal nonetheless takes this opportunity to remind the parties, as per the discussion above, of the considerable limits already in place on disclosure, dissemination and use of documents submitted by the parties, including but not limited to documents reflecting personal or financial information of individuals. The Tribunal expects both parties to proceed accordingly with appropriate diligence and care.

[Signed]

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Ms. Jean Kalicki  
President of the Tribunal  
Date: 8 April 2020