

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Fernando Paiz Andrade and Anabella Schloesser de León de Paiz**

**v.**

**Republic of Honduras**

**(ICSID Case No. ARB/23/43)**

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**PROCEDURAL ORDER NO. 2  
On Transparency and Confidentiality**

***Members of the Tribunal***

Prof. Nicolas Angelet, President of the Tribunal

Mr. Stephen L. Drymer, Arbitrator

Prof. Brigitte Stern, Arbitrator

***Secretary of the Tribunal***

Ms. Gabriela González Giráldez

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22 July 2024

## I. PROCEDURAL BACKGROUND

1. On 31 May 2024, the Tribunal circulated a draft of this order (“**Draft PO2**”) for discussion by the parties.
2. On 24 June 2024, the parties commented on Draft PO2.
3. On 2 July 2024, the first session was held. During the first session, the parties and the Tribunal discussed the parties’ comments on Draft PO2.
4. This Procedural Order No. 2 contains the parties’ agreements and the Tribunal’s decisions concerning the transparency regime governing this case.

## II. LEGAL FRAMEWORK

5. The legal framework applicable to this proceeding is determined by the Dominican Republic-Central America-United States of America Free Trade Agreement signed on 5 August 2004 (“**CAFTA-DR**”), which entered into force for Honduras on 1 April 2006 and for Guatemala on 1 July 2006.
6. CAFTA-DR Article 10.21 establishes the transparency regime applicable to arbitral proceedings instituted under CAFTA-DR.
7. Pursuant to CAFTA-DR Article 10.28 (Definitions), the term “*protected information*” means “*confidential business information or information that is privileged or otherwise protected from disclosure under a CAFTA-DR Party’s law.*”
8. In accordance with CAFTA-DR Article 10.21.1, and subject to the redaction of information designated as “*protected information*”, the following documents shall be publicly available:
  - (i) the notice of intent;
  - (ii) the notice of arbitration;
  - (iii) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Articles 10.20.2, 10.20.3 and 10.25;
  - (iv) minutes or transcripts of hearings of the tribunal, where available; and
  - (v) orders, awards, and decisions of the tribunal.
9. Any “*protected information*” that is submitted to the Tribunal shall be protected from disclosure and publication in accordance with the procedures set out in CAFTA-DR Articles 10.21.3 and 10.21.4, Article 48(5) of the ICSID Convention and as supplemented by Section III of this Order.
10. The “*protected information*” of this arbitral proceeding shall be governed by CAFTA-DR Articles 10.21.3 and 10.21.4, which read as follows:

“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 21.2 (Essential Security) or Article 21.5 (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 same time that 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.”

11. In light of CAFTA-DR Article 10.21(4)(d) above, the parties agree that the Tribunal shall resolve any disputes between the parties over redaction of “protected information” reflected in the Award.

### III. TRANSPARENCY RULES

12. The Tribunal adopts the following transparency and confidentiality rules governing the proceeding.

#### A. ORDERS, DECISIONS AND AWARD (CAFTA-DR ARTICLES 10.21)<sup>1</sup>

13. ICSID shall publish on its website all orders, decisions and the Award of the Tribunal, with any redactions agreed by the parties and jointly notified to the Secretary-General within 120 days after the order, decision or Award is rendered.

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<sup>1</sup> Pursuant to ICSID Arbitration Rule 72(2), this procedural order shall continue to apply to an interpretation, revision or annulment proceeding with necessary modifications, unless the parties agree or the Tribunal or Committee orders otherwise.

Procedural Order No. 2

14. If the parties do not agree on a jointly redacted text, either party shall, within the 120 day period referred to in paragraph 13 above, inform the Secretary-General who shall refer the order, decision or Award to the Tribunal to decide any disputed redactions. ICSID shall publish the order, decision or Award in accordance with the decision of the Tribunal pursuant to Section E below.

**B. WRITTEN SUBMISSIONS (CAFTA-DR ARTICLES 10.21.1(C), 10.21.3 AND 10.21.4)**

15. ICSID shall publish the “*pleadings, memorials and briefs*” (request for arbitration, memorial, counter-memorial, reply, rejoinder, and post-hearing briefs, if any), with any redactions agreed to by the parties or decided by the Tribunal, in accordance with Section E below.
16. Supporting documents, including indexes, exhibits, legal authorities, witness statements and expert reports (including annexes, appendices or exhibits thereto) shall not be published by ICSID.
17. The parties agree that ICSID will publish “*written submissions submitted pursuant to Article 10.20.2 and 10.20.3 and Article 10.25*” of CAFTA-DR within 30 days from the filing of the relevant submission. These submissions will be published with any redactions agreed by the parties or decided by the Tribunal in accordance with Section E below.

**C. OPEN HEARINGS (CAFTA-DR ARTICLE 10.21.2)**

18. Pursuant to CAFTA-DR Article 10.21.2, the Tribunal shall conduct hearings open to the public and shall determine, in consultation with the parties, the appropriate logistical arrangements. The parties shall give the Tribunal advance notice prior to referencing protected information at the hearing. The Tribunal shall establish a protocol governing public access to a hearing and the non-disclosure of confidential and protected information addressed during the hearing at the latest at the pre-hearing organizational conference.

**D. TRANSCRIPTS AND RECORDINGS OF HEARINGS (CAFTA-DR ARTICLE 10.21.1(D))**

19. ICSID shall publish transcripts of hearings, with any redactions agreed by the Parties or decided by the Tribunal in accordance with Section E below.
20. ICSID shall not publish any recordings of hearings.

**E. PROCEDURE FOR REDACTIONS - NON-DISCLOSURE OF PROTECTED INFORMATION (CAFTA-DR ARTICLES 10.21.3, 10.21.4 AND 10.28)**

21. With respect to publication pursuant to Sections A<sup>2</sup>, B and D above, any protected information as defined in CAFTA-DR Article 10.28 that is submitted to the Tribunal shall

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<sup>2</sup> In accordance with CAFTA-DR Article 10.21(4)(d), the Tribunal shall decide any disputed redactions to the Award. The Members of the Tribunal will be compensated for time spent in the resolution of any disputes in connection with redaction of “*protected information*” in the Award in accordance with Section 3 of Procedural Order No. 1, with their claims being paid from the case fund administered by ICSID for this proceeding pursuant to the ICSID Administrative and Financial Regulations. As the proceeding will conclude upon dispatch of the Tribunal’s Award, any costs incurred after the dispatch of the Award (e.g., arbitrator fees for time spent addressing disputed confidentiality designations) will not be considered part of the costs of the proceeding. To ensure the payment of any fees incurred by the Members of the Tribunal in connection with disputes over redactions of the Award, the Parties agree that ICSID will maintain the case trust fund open after the proceeding is concluded. ICSID will close the case trust fund once the arbitrators have submitted their claims for fees relating to the resolution of disputes over redactions of the Award, if any.

be protected from disclosure and publication in accordance with the procedure set forth below:

22. Within 60 days from the date of a decision, order or Award, a written submission (as defined in paragraphs 15 and 17), or the date of transmittal of a final transcript, a party shall give written notice to the Tribunal and the other party that it requests the non-disclosure of certain information it considers protected and may propose redactions.
23. Absent such a notice, and unless the Tribunal determines on its own initiative that certain information is not to be made public in accordance with CAFTA-DR Article 10.21, the Tribunal will authorize ICSID to publish the document without redactions from the parties.
24. Within 14 days of receipt of the notice referred to in paragraph 22, the other party may raise objections to the proposed redactions.
25. If no objections are raised within the deadline established in paragraph 24, the Tribunal will authorize ICSID to publish the document at issue with the requested redactions.
26. If objections are raised within the deadline established in paragraph 24, the parties shall confer and seek to agree on redactions within 14 days of receipt of the objections to the proposed redactions. If the parties reach an agreement, the Tribunal will authorize ICSID to publish the document at issue with the agreed redactions.
27. If objections remain unresolved, the disputed redaction requests and the objections thereto shall be submitted to the Tribunal in the form of the Transparency Schedule set out in **Annex A** to this Order.
28. If information is to be redacted from a document in accordance with paragraphs 25, 26 and 27, the parties shall provide a redacted version of the document. Upon receipt of the redacted document, the Tribunal will ask ICSID to publish the document.
29. If the Tribunal decides that information filed by a party for which protection is sought is not protected information and should be published, the party that filed the document or submission shall be permitted to withdraw all or part of the document from the record within 14 days of the Tribunal's decision as provided for in CAFTA-DR Article 10.21.4(d).

On behalf of the Tribunal,

[signed]

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Prof. Nicolas Angelet  
President of the Tribunal  
Date: 22 July 2024

**Annex A - Transparency Schedule**

[insert Party]	Request [1]
Information sought to be protected from disclosure	
Legal basis for protection	
Comments	
Reply by opposing Party	
Decision	