

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER CHAPTER 10 OF THE DOMINICAN
REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT AND
THE UNCITRAL ARBITRATION RULES (2010)**

DAVID AVEN ET AL. V. THE REPUBLIC OF COSTA RICA
(UNCT/15/3)

PROCEDURAL ORDER NO 3

**On Respondent's request to redact from the case documents to be published the name of
certain individuals**

Eduardo Siqueiros T., Presiding Arbitrator
C. Mark Baker, Arbitrator
Pedro Nikken, Arbitrator

Secretary of the Tribunal
Francisco Grob

April 5, 2016

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A. Background

1. On March 1, 2016, Mr. Francisco Grob, Secretary of the Arbitral Tribunal, contacted the Parties' representatives in respect to the posting on the International Centre for Settlement of Investment Disputes' (ICSID) website of the documents listed in Article 10.21(1) of the CAFTA-DR, and invited the Parties to submit any comments on the proposal.
2. In response, counsel to Respondent stated in a letter dated March 7, 2016, that it had no objection to the posting, but requested that "*the names of any individual mentioned in the case documents be redacted in order to preserve these persons' reputation and protect their privacy.*" Counsel to Costa Rica added that publicizing the names of the persons that are the object of allegations of corruption could be damaging to these individuals' reputation, but also would not be consistent with Costa Rican principles on the protection of privacy.
3. In response to the Arbitral Tribunal's request for comments, on March 9, 2016, counsel to Claimants objected to the petition, and requested that case documents be published in their entirety on the Centre's website, in accordance with the principles of transparency enshrined in CAFTA-DR Article 10. In this respect, Claimants made reference to Article 10.21 (Transparency of Arbitral Proceedings) which provides that "the respondent shall, after receiving the [case documents], promptly transmit them to the non-disputing Parties and make them available to the public". Claimants noted that the obligation of transparency is subject to an exception contemplated under Article 10.21(4) for "protected information" and added that the definitions to apply for Chapter Ten of CAFTA-DR define this concept to mean "confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law". Claimants further argued that the Respondent did not identify the names of individuals whose names it sought to redact from the published version of the documents, and failed to explain how the names of those individuals would constitute "protected information".
4. The Tribunal granted the Respondent a term to provide further comments, and on March 16, 2016, Respondent submitted a letter listing the names of seven individuals whose alleged misconduct had been made in the case documents, but added that such list was not exhaustive, and Respondent reserved its right to expand as was necessary. On the other hand, Respondent identified that the right to privacy ("*derecho a la intimidad*") is a constitutionally protected principle which prohibits the publication of information that may, amongst others, lead to adverse administrative or criminal proceedings or liability damaging the reputation of the persons concerned by the information at issue (Article 24 of the Costa Rican Constitution). Respondent also made reference to the General Law of Public Administration in respect to a general prohibition on the publication of information that may lead to the criminal or administrative liability of the individuals concerned by the information and impede their right to privacy, and argued that despite the guarantee of transparency afforded to an administrative process under Article 30 of the Costa Rican Constitution, such principle of transparency is balanced against the constitutional requirement to protect the privacy of the individual. It made reference to several decisions of the Constitutional Court of Costa Rica which prohibited the publication of administrative documents when the information contained was likely,

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individually or linked to additional information available to the public, to harm an individual or to affect its protected right to privacy.

5. In response to Claimants' argument that the transparency obligations contemplated under Article 10.21 of the CAFTA-DR require the publication of the case documents, Respondent stated that redacting the names of the cited individuals would not affect the level of transparency of the proceedings, while Costa Rican constitutional principles and laws on privacy would be preserved.
6. The Tribunal asked the Claimants to respond to any issues addressed by the Respondent in the letter of March 16, 2016. Claimants submitted on March 24, 2016 their position, and again objected to the petition to redact the case documents. Claimants stated that Respondent had failed to explain the basis on which the individuals' names would qualify as "protected information" for purposes of the CAFTA-DR.
7. Claimants further made reference to the rights to privacy under the Costa Rican Constitution, and provisions under the Law for Protection Against the Processing of Personal Data No. 8968 so as to distinguish three types of information: personal data of restricted access, sensitive personal data (i.e., that which is intimate information, concerning a person), and data of unrestricted access. The information in question, the Claimants stated, is neither of the first two.
8. Claimants quoted decisions of the Constitutional Chamber (Resolutions 136-2003, 14563.05 and 6577-06), where the judiciary has decided to protect the right to privacy of both private persons and public officers in their private activities, but this exception to the principle of transparency is not applied to public acts of public officials executing their public powers in the course of administrative duties.
9. In addressing the meaning that should be given to the concept of "protected information" for purposes of the CAFTA-DR, Claimants insisted on the defined term under Article 10.28, which together with Article 10.21.4 require that any disputing party claiming that certain information constitutes protected information clearly designates the information at the time it is submitted to the Tribunal. Claimants argue that not only did Respondent fail to identify why the redacting of the names was to be deemed protected under the laws of Costa Rica, but that it also failed to identify it at the time of submission, and even the COMEX's website includes Claimants' memorial without the redacted names, which should be interpreted as a fact that demonstrates the Respondent did not consider it self-bound by Costa Rican law to withhold the names from disclosure.

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B. Analysis by the Arbitral Tribunal

10. There is a clear provision found in Article 10.21 CAFTA-DR, that establishes that a respondent shall promptly transmit the case documents to the non-disputing parties and make them available to the public, which include, inter alia, all pleadings, memorials and briefs submitted to the Tribunal by a disputing party. Further, Article 10.21(2) requires that the Tribunal conducts hearings that are open to the public. The only exceptions to this principle of transparency are found in Section 10.21(2), (3) and (4), which would allow a respondent to withhold information that is protected information or that other that it may withhold in accordance with Articles 21.2 (Essential Security) or Article 21.5 (Disclosure of Information).
11. The concept of “protected information” was defined by the parties to CAFTA-DR in Article 10.28 as “confidential business information or information that is privileged or otherwise protected from disclosure under a Party’s law”. The Tribunal believes that this should be interpreted in their plain meaning: (i) business information deemed of a confidential nature, (ii) information that is subject to a legal privilege or other privilege afforded by applicable law, or (iii) information that is otherwise protected for disclosure under the laws of Costa Rica or the investor’s home State. The names of the individuals in the case documents should clearly not fall within the first two categories. Costa Rica has attempted, however, to justify that they should be covered under the third exception.
12. The Arbitral Tribunal recognizes that there are two principles at issue here; on the one hand, the right to transparency of actions of the public administration, and the right for the protection of personal information; the right to privacy.
13. In this case, the issue involves the identity of several public officials of Costa Rica. The allegations of Claimants are that some of those individuals may have acted improperly, and that the harm inflicted on Claimants derives from such actions. The current stage of the proceeding is not the time for this Tribunal to ponder whether or not there may have been impropriety in these actions, but only whether disclosure of the Costa Rican official’s names in the case documents would breach their rights of privacy.
14. It follows from Article 10.21.4 that the burden to justify the nature of the protected information is placed on the party that alleges the exception. On the evidence so far submitted, the actions appear to be public acts carried out by public officials that were executed within their public powers, in the course of their duties. Respondent was required to address and justify that disclosure of the names of the seven public officials would indeed be damaging to their reputation, but Respondent has failed to submit any argument to the effect that the allegations of Claimants deal with information that is sensitive or personal to said public officials. Lacking such personal nature of the information, it is not information that is shielded and protected by the right to privacy (and honor) under the terms of CAFTA-DR.
15. In addition, the right to privacy and the right to honor should be contemplated within the framework of the principles of transparency enshrined in CAFTA-DR Article 10. In such context, this Tribunal finds guidance in some international standards of human rights law,

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concerning the dissemination of offensive information and its balance against the right to privacy (and honor) of public officials.

16. The Inter-American Court of Human Rights, following explicitly the European Court of Human Rights, has consistently determined that “[t]his freedom (of speech) should not only be guaranteed with regard to the dissemination of information and ideas that are received favourably or considered inoffensive or indifferent, but also with regard to those that offend, are unwelcome or shock the State or any sector of the population”.¹
17. Finally, it is worthwhile to cite what the Inter-American Court of Human Rights has stated in respect to the right to privacy (and honor) of public officials:

“In this context, it is logical and appropriate that statements concerning public officials and other individuals who exercise functions of a public nature should be accorded, in the terms of Article 13(2) of the Convention, a certain latitude in the broad debate on matters of public interest that is essential for the functioning of a truly democratic system. The foregoing considerations do not, by any means, signify that the honor of public officials or public figures should not be legally protected, but that it should be protected in accordance with the principles of democratic pluralism.

*A different threshold of protection should be applied, which is not based on the nature of the subject, but on the characteristic of public interest inherent in the activities or acts of a specific individual, **in this domain, they are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate.** (Emphasis added)²*

18. A distinction is recognized by the Arbitral Tribunal between the information and actions carried out by public officials in their personal life, and those that are carried out in the exercise of their public duties, and concludes that the actions of the public officials that have been identified in the case documents thus far were conducted in their respective capacity and function. These would not be subject to the exemption of “protected information” to the principle of transparency agreed by the parties to CAFTA-DR in Article 10.21, which should prevail in this instance.

¹ I/A Court H.R., Case of “The Last Temptation of Christ” (Olmedo Bustos et al.) v. Chile. Judgment of February 5, 2001. Series C No. 73, para. 69. See also I/A Court H.R., Case of Herrera Ulloa v. Costa Rica, Judgment of July 2, 2004. Series C No. 107, para. 113; I/A Court H.R., Case of Ricardo Canese v. Paraguay. Judgment of August 31, 2004. Serie C No. 111, para. 83; I/A Court H.R., Case of Manuel Cepeda Vargas v. Colombia. Judgment of May 26, 2010. Series C No. 213, para 172; Eur. Court H.R. Case of Handyside v. United Kingdom, Judgment of December 7, 1976, Series A No. 24, para. 49; Eur. Court H.R. Case of The Sunday Times v. United Kingdom, Judgment of March 29, 1979, Series A no. 30, para. 65; and Eur. Court H.R., Case of Scharsach and News Verlagsgesellschaft v. Austria, Judgment of 13 February 2004, para. 29.

² I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Judgment of July 2, 2004, paras. 128 and 129.

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C. **Decision**

19. For the above reasoning, the Arbitral Tribunal resolves that there is no need to redact from the case documents to be published the names of individuals who Claimants have alleged misconduct.

Date: April 5, 2016



On behalf of the Tribunal

Eduardo Siqueiros T.
Presiding Arbitrator