

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Astrida Benita Carrizosa

v.

Republic of Colombia

(ICSID Case No. ARB/18/5)

PROCEDURAL ORDER NO. 2

Members of the Tribunal

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal
Prof. Diego P. Fernández Arroyo, Arbitrator
Mr. Christer Söderlund, Arbitrator

Secretary of the Tribunal

Ms. Alicia Martín Blanco

Assistant to the Tribunal

Mr. David Khachvani

7 March 2019

I. Introduction

On 5 February 2019 at 15:00 (CET), the Parties and the Tribunal held the first session by telephone conference (the “First Session”). At the First Session, the Parties agreed that the present proceedings should be transparent and that the Tribunal would issue a procedural order governing the transparency regime.

On 19 February 2019, the Tribunal circulated a draft of the present order, to which the Parties provided their comments on 1 and 2 March 2019.

Considering the Parties’ comments and having regard to:

- (i) Article 10.21 of the United States - Colombia Trade Promotion Agreement (the “TPA”),
- (ii) the relevant provisions of the ICSID Convention and ICSID Arbitration Rules, and
- (iii) the Parties’ agreement to have the texts referred to above, to the extent they are silent on transparency-related matters, supplemented by the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the “UNCITRAL Transparency Rules”),

the Tribunal issues the following order (“PO No. 2” or “this Order”) to govern the transparency regime applicable to this arbitration.

To the extent that there is any conflict between this PO No. 2 and Article 10.21 of the TPA, the latter shall prevail.

II. Publication of documents

1. Subject to Section IV below, the following documents shall be made available to the public:
 - i. The written pleadings filed by the Parties pursuant to Section 15 and Annex A of Procedural Order No. 1, dated 19 February 2019 (“PO No. 1”);

- ii. The indexes of exhibits and legal authorities filed by the Parties pursuant to Section 14.18 of PO No. 1, but not the exhibits and legal authorities themselves;
 - iii. Any written submissions by the non-disputing party to the TPA and by a non-disputing third person,
 - iv. Transcripts of hearings;
 - v. Orders, decisions and awards of the Tribunal.
2. Subject to Section IV, witness statements and expert reports, exclusive of the exhibits or annexes thereto, shall be made available to the public upon request of any Party to the Tribunal.
 3. The documents to be made available to the public pursuant to paragraphs 1 and 2 above shall be communicated by the Tribunal to the Repository referred to in Section V below as soon as possible, subject to relevant arrangements or time limits for the protection of information prescribed under Section IV. Subject to any limitation or safeguard in this PO No. 2, the Repository shall make all documents available in a timely manner, in the form and in the language in which it receives them.

III. Hearings

4. The following logistical arrangements will be made to facilitate public access to the hearings:
 - i. Hearings will be broadcast by being made publicly accessible by video link on the ICSID website. An audio-video recording will also be made. For logistical reasons, physical attendance at the hearings by third persons (i.e., persons not formally involved in the proceedings) will not be permitted.
 - ii. In order to avoid public disclosure of protected information, the broadcast will be delayed by 30 minutes or one hour, to the extent technically feasible.

- iii. At any time during a hearing, a Party may request that a part of the hearing be held in private and that protected information be excluded from the video transmission. To this effect, a Party shall inform the Tribunal before topics are raised (or immediately as they begin to be raised) which could reasonably be expected to address protected information. The Tribunal will then consult the Parties. Such consultations shall be held in camera and the transcript shall be marked “confidential”. After consultation with the Parties, the Tribunal will decide whether to exclude the information in question from the broadcast and whether the relevant portion of the transcript shall be marked “confidential”. The transcript made public by the Repository shall redact those portions of the hearing marked “confidential”.
- iv. The ICSID Secretariat will make the necessary technical arrangements to broadcast the hearings through video link, subject to the provisions in this Section.

IV. Exceptions to transparency

A. Protected information

5. Protected information, as defined in paragraph 6 below and as identified pursuant to the arrangements referred to in paragraph 7, shall not be made available to the public.
6. Protected information consists of:
 - i. Confidential business information;
 - ii. Information that is protected against being made available to the public under the TPA, including information that the Respondent may withhold in accordance with Article 22.2 (Essential Security) and Article 22.4 (Disclosure of Information).
 - iii. Information that is protected against being made available to the public (in the case of information of the Respondent, under the law of the Respondent; and in

the case of other information, under any law or rules determined by the Tribunal to be applicable to the disclosure of such information); or

iv. Information the disclosure of which would impede law enforcement.

7. The following procedure shall govern requests to protect information:

- i. A Party filing a document (the “Filing Party”) that it claims to contain protected information shall submit an unredacted as well as a redacted version of that document and shall briefly identify the reasons for the redactions in a schedule as set out in Annex A to this order (the “Transparency Schedule”). The Transparency Schedules shall not be made public.
- ii. If the other Party (the “Opposing Party”) does not object to the proposed redactions and does not itself request any redactions within 21 days of the filing of the document, the redacted version of the document shall be made public.
- iii. Within 21 days of the filing of the document, the Opposing Party may object to the redactions proposed by the Filing Party, using the Transparency Schedule provided by the Filing Party, and/or itself propose redactions to the document in a new Transparency Schedule.
- iv. If the Opposing Party has proposed redactions to the document, the Filing Party shall have 14 days to object to such redactions using the Transparency Schedule provided by the Opposing Party.
- v. The Tribunal will issue its determination on disputed redactions promptly after receiving the Parties’ Transparency Schedules. The Tribunal’s determination will be included in a procedural order.
- vi. The Parties shall submit the Transparency Schedules in Word and .Pdf formats.

8. Any request to protect information made in accordance with the preceding paragraph shall specifically identify the part (or parts) of the document sought to be designated as protected.
9. Where the Tribunal determines that all or part of the information should not be redacted from a document, or that a document should not be prevented from being made available to the public, the Filing Party shall have seven days to (i) withdraw all or part of its submission containing such information, or (ii) refile its submission in accordance with the Tribunal's determination.
10. Where the Tribunal determines that information should be redacted from a document, the Filing Party shall have seven days to submit a redacted version, which the Tribunal will send to the Repository for publication.

B. Integrity of the arbitral process

11. Information shall not be made available to the public pursuant to this order where the information, if made available to the public, would jeopardize the integrity of the arbitral process, as determined by the Tribunal pursuant to paragraph 12.
12. The Tribunal may, on its own initiative or upon the application of a Party, after consultation with the Parties where practicable, take appropriate measures to restrain or delay the publication of information, where such publication would jeopardize the integrity of the arbitral process (e.g., because it could hamper the collection or production of evidence; lead to the intimidation of witnesses, lawyers acting for Parties or members of the Tribunal; or in comparably exceptional circumstances).

V. Repository of published information

13. ICSID shall act as Repository of published information. The following rules shall apply in connection with the Repository:
 - i. The Tribunal will submit the documents for publication (in redacted form, if applicable) to the Repository;

- ii. The Secretary of the Tribunal will receive the documents from the Tribunal and ensure publication—if possible—in searchable electronic format (.pdf format).
 - iii. The Repository will publish information and documents in the form and language in which it receives it;
 - iv. The Tribunal will be released of its responsibility under this Order upon completion of its mandate under the ICSID Convention and Arbitration Rules, being specified that such mandate extends to any interpretation or revision proceedings;
 - v. Upon completion of the arbitration, video recordings of hearings, and all documents referred to in Section II above shall continue to be made available to the public on the ICSID website in accordance with ICSID’s usual practice.
14. Nothing in this provision shall prevent the Respondent from complying with Article 10.21 of the TPA.

VI. Discretion and authority of the Tribunal

15. The Tribunal shall have the power to adapt the requirements of any specific provision of this Order to the particular circumstances of the case, after consultation with the Parties, if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of the TPA and of this Order.
16. Where this Order provides for the Tribunal to exercise discretion, the Tribunal in exercising such discretion shall take into account:
- i. The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and
 - ii. The Parties’ interest in a fair and efficient resolution of their dispute.

17. In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of this Order, the Tribunal shall ensure that those objectives prevail.

[signed]

Professor Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 7 March 2019

Annex A
Transparency Schedule

No.	
Identification of redacted passages (Document, paragraph, page)	
Reasons for requesting redaction	
Objections to the request for redaction	
Decision of the Tribunal	