

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Riverside Coffee, LLC

v.

Republic of Nicaragua

(ICSID Case No. ARB/21/16)

PROCEDURAL ORDER No. 3

Members of the Tribunal

Dr. Veijo Heiskanen, President of the Tribunal

Mr. Philippe Couvreur, Arbitrator

Ms. Lucy Greenwood, Arbitrator

Secretary of the Tribunal

Ms. Ana Constanza Conover Blancas

9 August 2022

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I. PROCEDURAL BACKGROUND

1. On 27 June 2022, the Tribunal issued Procedural Order No. 1, which set out the procedural rules that govern this arbitration, including the publication of case materials. Section 23.1 of Procedural Order No. 1 provides that, *inter alia*, the notice of intent dated 28 August 2020 (the “**Notice of Intent**”), the notice of arbitration dated 19 March 2021 (the “**Notice of Arbitration**”) and the Tribunal’s procedural orders shall be publicly available, subject to the deletion of protected information, pursuant to Article 10.21 of the Dominican Republic-Central America Free Trade Agreement, signed on 5 August 2004, and which entered into force between the United States and Nicaragua on 1 April 2006 (“**CAFTA-DR**” or the “**Treaty**”).
2. On 1 July 2022, the Tribunal issued Procedural Order No. 2 establishing the procedural calendar for this arbitration.
3. By letter of 5 July 2022, the Parties were invited to indicate by 19 July 2022 whether they considered that the Notice of Intent, the Notice of Arbitration or the Tribunal’s Procedural Orders Nos. 1 and 2 contained protected information that required redaction prior to their publication on the ICSID website. In such case, the Parties were invited to confer on the necessary redactions and jointly provide the redacted versions for publication by 19 July 2022.
4. On 19 July 2022, the Parties informed the Tribunal of their agreement to (i) publish Procedural Orders Nos. 1 and 2 without any redactions on the ICSID website, and (ii) extend the deadline for filing comments on the issue of publication of the Notice of Intent and the Notice of Arbitration to 5 p.m. Washington D.C. time on 20 July 2022.
5. On 20 July 2022, the Parties filed simultaneous submissions setting out their respective positions on the publication of the Notice of Intent and the Notice of Arbitration.

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II. SUMMARY OF THE PARTIES' POSITIONS

1. The Respondent's Position

6. The Respondent requests that the Tribunal publish only redacted versions of the Notice of Intent and the Notice of Arbitration as the two documents contain protected information within the meaning of CAFTA-DR and Nicaraguan law. According to the Respondent, its proposed redactions are justified because Nicaraguan law protects against disclosure of personal information harmful to “honor and reputation” of individuals, and the Respondent’s proposed redactions would cause no prejudice to the Claimant.

7. The Respondent submits that the Treaty’s transparency regime is subject to Article 10.21(4) of CAFTA-DR, which provides that any “*protected information*” shall be protected from disclosure. The term “protected information” is defined in Article 10.28 of CAFTA-DR as “[...] *information that is privileged or otherwise protected from disclosure under a Party’s law.*”¹ The matter is thus governed by Nicaraguan law.

8. The Respondent refers, in support of its position, to Article 26 of the Constitution of the Republic of Nicaragua (which recognizes every person’s right to their honor and reputation) and, in application of this principle, to Article 3 of its Law on Access to Public Information (regarding the protection from disclosure of personal data that may affect an individual’s honor and reputation). According to the Respondent, under the Law on Access to Public Information in particular, any identifying information having a negative impact on an individual’s honor and reputation must be protected and, as such, considered as protected information for the purposes of Article 10.21(4) of CAFTA-DR.² The Respondent submits that its position is supported by the jurisprudence of investment treaty tribunals, including *Elliot v. Korea* and *Aven v. Costa*

¹ Respondent’s letter dated 20 July 2022, pp. 1-2.

² Respondent’s letter dated 20 July 2022, p. 2.

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Rica, which “recognized the importance of guarding against unnecessary disclosure of prejudicial information that is protected under a party’s internal law.”³

9. Accordingly, the Respondent seeks to redact “*the names of any Nicaraguan citizen, whether a public official or private person,*” whose reputation and honor it considers would be prejudiced by the publication of the Claimant’s “unproven and as-yet un rebutted allegations.”⁴
10. The Respondent submits that its proposed redactions would not cause any prejudice to the Claimant since they do not conceal the nature of the Claimant’s allegations from the public at large and given that unredacted versions of the Notice of Intent and the Notice of Arbitration are already available to the parties and the Tribunal.⁵ The Respondent therefore requests that the Tribunal “consider [the] Respondent’s proposed redactions contained in the documents attached to this letter.”⁶

2. The Claimant’s Position

11. The Claimant requests that the Tribunal dismiss the Respondent’s proposed redactions to the Notice of Intent and the Notice of Arbitration as the proposed redactions do not contain “protected information.” The Claimant further requests that the Tribunal order the publication of the Notice of Intent and the Notice of Arbitration without any redactions.
12. The Claimant disagrees with the Respondent’s interpretation of the term “protected information.” The Claimant notes that the Respondent seeks to redact the names of various categories of individuals from the Notice of Intent and the Notice of Arbitration, including publicly elected officials, political party officials, officials of government

³ Respondent’s letter dated 20 July 2022, pp. 2-3 (referring to *Elliott Associates L.P. v. Republic of Korea*, PCA Case No. 2018-51, Procedural Order No. 4 dated 22 July 2019 (“*Elliot v. Korea*”), ¶¶ 4-5 and *David Aven et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award dated 18 September 2018 (“*Aven v. Costa Rica*”), ¶ 6).

⁴ Respondent’s letter dated 20 July 2022, p. 3. (Emphasis in original.)

⁵ Respondent’s letter dated 20 July 2022, p. 3.

⁶ Respondent’s letter dated 20 July 2022, p. 3.

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departments and members of the police.⁷ In the Claimant’s view, (i) Nicaragua’s Law on Access to Public Information does not cover the information that the Respondent seeks to protect; (ii) the Respondent has made an abusive overuse of protected information designations; and (iii) the Respondent’s proposed redactions do not constitute “protected information” within the meaning of CAFTA-DR.

13. The Claimant submits that Nicaragua’s Law on Access to Public Information does not cover the information that the Respondent seeks to redact because (i) the information at issue did not originate from Nicaragua nor was it in the Respondent’s care or control; rather it concerns information exclusively provided by the Claimant and based on publicly available sources (including social media posts) or documents from the Claimant over which the Claimant claims no protection;⁸ (ii) such Law only applies to documents held by Nicaraguan public entities or institutions and hence cannot govern information produced in the context of an ICSID arbitration;⁹ and (iii) Nicaragua does not apply said Law to protect the accused in Nicaragua.¹⁰
14. The Claimant further argues that the extent of nearly one hundred designations of protected information made by the Respondent is unprecedented and would entail “*tedious and unnecessary redaction of evidence filed,*” restrictions to the public observance of the hearing, and significant redactions to hearing transcripts and the award.¹¹
15. Finally, the Claimant highlights the statement in CAFTA-DR’s preamble that the Contracting Parties are resolved to promote transparency. The Claimant argues that the Treaty’s transparency regime set out in Article 10.21 gives effect to such CAFTA-DR objective and that the Respondent’s interpretation of the term “protected information”

⁷ Claimant’s Submission on Protected Information dated 20 July 2022, ¶¶ 2-3.

⁸ Claimant’s Submission on Protected Information dated 20 July 2022, ¶¶ 8, 30-31.

⁹ Claimant’s Submission on Protected Information dated 20 July 2022, ¶¶ 35-38.

¹⁰ Claimant’s Submission on Protected Information dated 20 July 2022, ¶ 47.

¹¹ Claimant’s Submission on Protected Information dated 20 July 2022, ¶¶ 16-17.

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runs contrary to it.¹² Moreover, the Claimant considers that the proposed redactions would prejudice “*due process, equality of the disputing parties, and the overall rights of the Claimant*” as it would, for instance, materially increase the costs of the proceeding and provide less information to any third party who may be interested in filing *amicus curiae* submissions in this proceeding.¹³

III. THE TRIBUNAL’S ANALYSIS

16. The relevant provisions governing the redactions to the Parties’ submissions are Section 23.1 of Procedural Order No. 1 (“**PO1**”) and Articles 10.21 and 10.28 of CAFTA-DR. According to Section 23.1 of PO1, “in accordance with Article 10.21 of the CAFTA-DR,” the notice of intent and the notice of arbitration “shall be publicly available, subject to the deletion of protected information.” Article 10.21(1) of CAFTA-DR further provides that, *inter alia*, the notice of intent and the notice of arbitration shall be made public “by the respondent,” after having received the documents.
17. The term “protected information” is defined in Article 10.28 of CAFTA-DR as “confidential business information or information that is privileged or otherwise protected from disclosure under a Party’s law.” Article 10.21(4)(d) of CAFTA-DR further provides:

“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.”

¹² Claimant’s Submission on Protected Information dated 20 July 2022, ¶¶ 19-20, 62-63.

¹³ Claimant’s Submission on Protected Information dated 20 July 2022, ¶¶ 64-65.

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18. While Article 10.21(4)(d) of CAFTA-DR envisages that it is the party who submits a document that proposes redactions, there is nothing in the provision that would suggest that the other party is precluded from proposing redactions, if it considers them justified under the Treaty. In any event, it is for the arbitral tribunal constituted under the Treaty to resolve any disputes between the parties regarding proposed redactions.
19. The Tribunal notes, as a preliminary matter, that Article 10.28 of CAFTA-DR deals with the “transparency of the proceedings,” including the publication of the parties’ submissions, the arbitral tribunal’s decisions and other documents generated in connection with the proceedings, as well as the public’s access to hearings. The non-disclosure of “protected information” thus constitutes an exception to the principle of transparency of the proceedings. In the circumstances, as noted by the tribunal *Aven v. Costa Rica*, “[i]t 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.”¹⁴
20. The relevant provision, Article 10.28 of CAFTA-DR, makes a renvoi to “a Party’s law” as the law governing the question of whether the proposed redactions are “protected from disclosure.” Since it is the Respondent that seeks to redact certain information contained in the Notice of Intent and the Notice of Arbitration, it is in the first place for the Respondent to establish, to the Tribunal’s satisfaction, that its proposed redactions are “protected from disclosure” under Nicaraguan law. For the reasons set out below, the Tribunal is not persuaded that the Respondent has met its burden of justification.
21. The Tribunal notes that the Nicaraguan Law on Access to Public Information applies to information held by the Nicaraguan authorities.¹⁵ However, the information that the Respondent seeks to redact in this arbitration is not information held by Nicaraguan authorities; it is information collected and sought to be disclosed by the Claimant.

¹⁴ *Aven v Costa Rica*, Procedural Order No. 3, para. 14.

¹⁵ See Art. 1 of the Law on Access to Public Information.

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Indeed, the issue here is not the Nicaraguan public's access to information held by Nicaraguan authorities, or any exclusions applicable thereto, but the redactions proposed to be made by the Republic of Nicaragua to the Claimant's Notice of Intent and Notice of Arbitration. It is also not evident to the Tribunal, and the Respondent has not addressed the issue, that the Law on Access to Public Information applies to disclosure of information in legal proceedings, in particular where the final decision of the court is intended to be published, which is the case here. If allegations relating to the conduct of individuals, after having been made public, are upheld in public proceedings, they cannot be considered as prejudicial to the honor or reputation of the individuals concerned. If they are dismissed, the names of such individuals are automatically cleared of any wrongdoing.

22. The Tribunal further observes that a number of the individuals whose names the Respondent proposes to redact are State officials, who appear to have acted in their official capacity in connection with the events out of which the Claimant's claims allegedly arise. In this connection, the Tribunal notes the distinction made by the tribunal in *Aven v. Costa Rica* "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. ... These [latter] 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."¹⁶

23. In the circumstances, and in the absence of any further justifications, the Tribunal is unable to agree to the Respondent's proposed redactions.

¹⁶ *Aven v Costa Rica*, Procedural Order No. 3, para. 18.

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IV. ORDER

24. In view of the above, the Respondent's request that the Tribunal publish only the redacted versions of the Notice of Intent and the Notice of Arbitration on the ICSID website is dismissed.

On behalf of the Tribunal,

[Signed]

Dr. Veijo Heiskanen
President of the Tribunal
Date: 9 August 2022