

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Riverside Coffee, LLC

v.

Republic of Nicaragua

(ICSID Case No. ARB/21/16)

PROCEDURAL ORDER No. 10

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

20 June 2024

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I. PROCEDURAL BACKGROUND

1. On 24 April 2024, the Tribunal provided the Parties with a draft procedural order on the organization of the upcoming hearing on jurisdiction and merits scheduled for 1-12 July 2024 (the “**Hearing**”). The Parties were invited to confer regarding the draft procedural order and requested to submit a joint proposal advising the Tribunal of any agreements reached and setting out their respective positions where they were unable to reach agreement, by no later than one week prior to the date set for the pre-hearing conference to be held between the Tribunal and the Parties pursuant to section 19.1 of Procedural Order No. 1.

2. The draft procedural order contained a Section I titled “Open Hearing,” which provided:
 45. *In accordance with Section 20.6 of Procedural Order No. 1 and Article 10.21(2) of the Treaty, the Hearing shall be open to the public. The Tribunal shall make appropriate arrangements to protect the information from disclosure.*

 46. *The recordings of the Hearing will be posted for viewing in the ICSID website, in the “floor” language, i.e., using the original language of the speaker. [Note to Parties: The Centre proposes to achieve transparency by posting the recordings (after editing, if any, in video format) after the Hearing.]*

 47. *Any information designated by one or both of the Parties as being protected will be excluded from the public recordings, as further addressed in [a] Protocol attached hereto[.]*

 48. *The availability of the Hearing recordings will be announced publicly via the ICSID website in English and Spanish. The video recordings of the Hearing will be available for viewing on the ICSID website [permanently / for [] day(s)/week(s)/month(s) only].*

3. On 3 and 4 June 2024, the Parties provided joint statements regarding the draft procedural order, advising the Tribunal of the agreements reached on the various items, as well as of their respective positions where no agreement was reached.

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4. On 10 June 2024, the Tribunal and the Parties held a pre-hearing conference by videoconference to discuss outstanding procedural, administrative and logistical matters in preparation for the Hearing. During the pre-hearing conference, the Claimant took the view that, in addition to posting the Hearing recordings on the ICSID website, the Hearing should be broadcasted in real time so as to meet the transparency requirements under the CAFTA-DR. The Respondent stated that, in its view, real-time broadcasting was not necessary as the CAFTA-DR transparency requirement would be met by posting the hearing recordings to the ICSID website after the conclusion of the Hearing.
5. By letter of 11 June 2024, the Tribunal invited each Party to file, by 17 June 2024, a brief submission limited to addressing the question of whether the CAFTA-DR required that the Hearing shall be made open to the public in real time, or whether the CAFTA-DR requirements may be satisfied by the posting of the video recording of the Hearing to the ICSID website after the conclusion of the Hearing. The Tribunal further directed that the Parties' submissions were not to exceed three pages in length and should be accompanied by any legal authorities which each Party might wish to rely on in support of its position.
6. On 17 June 2024, the Parties filed their respective submissions in response to the Tribunal's letter of 11 June 2024.

II. THE PARTIES' POSITIONS

A. THE CLAIMANT'S POSITION

7. The Claimant contends that "only simultaneous public access to the hearing meets the CAFTA requirement for public hearings." The Claimant submits that the ordinary meaning of the relevant terms of Article 10.21.1 of the CAFTA-DR – "[t]he Tribunal

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shall conduct the hearings open to the public” – is clear, and that a hearing must be accessible to the public “as it occurs.”¹

8. The Claimant stresses that transparency is “crucial for public trust in CAFTA and its dispute resolution process.” According to the Claimant, the transparency provisions in CAFTA-DR were based on an evolution of open hearings which arose from an “express omission of requirements in the NAFTA.”² In the Claimant’s view, the obligation to be open to the public means that hearings are “open to public observation.” This requirement would not be satisfied if the public was to learn about the Hearing only after its conclusion.³ The Claimant contends that best arbitral practice also supports transparency and public access in arbitration.⁴
9. As to the modalities of the Hearing, the Claimant states that live broadcasting is the most effective method to meet the CAFTA-DR’s transparency requirement. The Claimant notes that other international courts and tribunals routinely use live broadcasts and that ICSID has confirmed that such service is available for this Hearing.⁵

B. THE RESPONDENT’S POSITION

10. The Respondent submits that the transparency requirement of the CAFTA-DR would be satisfied if the Hearing recordings “are made available to the public on the ICSID’s website after the hearing has concluded and the Parties are afforded the opportunity to redact any confidential information introduced at the hearing.”⁶
11. In support of its position, the Respondent relies on Article 10.21.2 of CAFTA-DR, which provides that the appropriate logistical arrangements to conduct open hearings shall be determined by the Tribunal in consultation with the Parties. In the

¹ Investor’s Observations on Conducting Hearings Open to the Public of 17 June 2024, p. 1.

² Investor’s Observations on Conducting Hearings Open to the Public of 17 June 2024, p. 2.

³ Investor’s Observations on Conducting Hearings Open to the Public of 17 June 2024, p. 2.

⁴ Investor’s Observations on Conducting Hearings Open to the Public of 17 June 2024, p. 3.

⁵ Investor’s Observations on Conducting Hearings Open to the Public of 17 June 2024, p. 3.

⁶ Respondent’s letter of 17 June 2024, p. 1.

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Respondent’s view, the wording of Article 10.21.2 of CAFTA-DR affords the Tribunal and the Parties freedom to decide on the modalities of achieving the required level of transparency.⁷ The Respondent refers to prior ICSID cases brought under CAFTA-DR which in its view show that the transparency requirement of Article 10.21.2 is met if hearings were made available to the public “by posting video recordings of the hearing.”⁸

12. The Respondent submits that these cases also show that the mutual consent of the Parties is required to live stream the hearing. The Respondent also refers to Rule 32(2) of the 2006 ICSID Arbitration Rules to argue that the method for making hearings public require consent by both Parties.⁹
13. Finally, the Respondent alleges that live streaming the Hearing would risk “serious procedural disruptions” considering the number of confidential exhibits on the record. The Respondent notes that the Claimant has designated 90 of its own exhibits as confidential and “has asked Respondent to observe the confidential designation of 12 documents originally produced by Riverside and submitted by Respondent as exhibits to its Rejoinder.”¹⁰ This risk would be prevented by posting the video recordings after the Hearing concludes, as the Parties would be able to redact any instances where confidential information is discussed or displayed.¹¹

III. THE TRIBUNAL’S ANALYSIS

14. The relevant provisions for the present purposes are Article 10.21.2 of the CAFTA-DR and Section 29.6 of Procedural Order No. 1. Article 10.21.2 of the CAFTA-DR provides:

The tribunal shall conduct the hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate

⁷ Respondent’s letter of 17 June 2024, p. 1.

⁸ Respondent’s letter of 17 June 2024, pp. 1-2.

⁹ Respondent’s letter of 17 June 2024, p. 2.

¹⁰ Respondent’s letter of 17 June 2024, p. 3.

¹¹ Respondent’s letter of 17 June 2024, p. 3.

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logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

15. Section 20.6 of Procedural Order No. 1 further provides:

In accordance with Article 10.21(2) of the CAFTA-DR, hearings shall be open to the public. The Tribunal shall determine, in consultation with the parties, the appropriate logistical arrangements. Any party that intends to use information designated as protected information in a hearing shall so advise the Tribunal. The Tribunal shall make appropriate arrangements to protect the information from disclosure.

16. The Tribunal notes that, by its terms, Article 10.21.2 of the CAFTA-DR is clearly mandatory: “[t]he tribunal shall conduct the hearings open to the public.” Contrary to what the Respondent suggests, the second part of the first sentence of Article 10.21.2, providing that the tribunal “shall determine, in consultation with the disputing parties, the appropriate logistical arrangements”, cannot be read, in accordance with its ordinary meaning, to qualify the obligation set out in the first sentence. The clause merely requires that the Tribunal determine, in consultation with the Parties, the appropriate way of implementing (“the appropriate logistical arrangements”) the requirement that the hearing be “open to the public.”

17. The sole issue for the Tribunal to determine is, therefore, whether the requirement that the hearing be “open to the public” may be satisfied by posting a video recording of the Hearing on ICSID’s website after the Hearing, or whether Article 10.21.2 requires that the general public be allowed to follow the Hearing in real time, either in person (possibly in a separate room at the Hearing venue) or by way of live streaming.

18. The Tribunal notes, in this connection, that the Respondent seeks to rely on arbitral practice under the CAFTA-DR to argue that “mutual consent” of the parties is required to live stream the hearing. The Tribunal is not persuaded that the Respondent’s position is supported by the legal authorities it seeks to rely upon. While the positions

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of the CAFTA-DR tribunals in these cases are not entirely consistent,¹² and while in almost all of these cases, with one exception, the parties agreed to real time access, or live streaming, of the hearing, it does not appear that the parties in any of these cases disagreed as to what Article 10.21.2 of the CAFTA-DR requires. These cases therefore cannot be relied upon to argue that the parties' consent is required for real time access; it would be equally justified to rely upon them to argue that the parties in these cases in fact agreed that Article 10.21.2 of the CAFTA-DR requires real time access to the hearing. In other words, the CAFTA-DR tribunals in these cases do not appear to have taken any view on the interpretation of Article 10.21.2 in circumstances where the parties disagree on whether real time access is required, which is the issue here.¹³

19. In view of the above, and in light of the ordinary meaning of the terms of Article 10.21.2 of the CAFTA-DR, the Tribunal finds that live streaming is the appropriate way of ensuring the full application of Article 10.21.2 in the present case, in the absence of any compelling reasons justifying another approach. The Tribunal will determine, in consultation with the Parties, the appropriate logistical requirements for live streaming in accordance with Article 10.21.2, including the arrangements required to protect protected information from disclosure during the Hearing.

¹² Thus, for instance, the *TECO ad hoc* committee in its Procedural Order No. 7 merely states that “[p]ursuant to Section 20.6 of PO No.1 and DR-CAFTA Article 10.21.2, the Committee shall conduct the Hearing open to the public. In order to comply with this requirement, the Hearing will be recorded and within 30 days posted on ICSID’s website for public access and will be available for viewing for 30 days.” *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Procedural Order No. 7, 14 July 2022 (RL-0201), para. 42.

¹³ *See, e.g., Commerce Group Corp. and San Sebastian Gold Mines, Inc., v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Minutes of the First Session of the Tribunal, 27 July 2010 (RL-0203), para. 20.1 (“The parties agreed in principle (subject to the review of the respective costs) to webcast any hearing pursuant to CAFTA Article 10.21.2”); *David Aven et al. v. Republic of Costa Rica*, Case No. UNCT/15/3, Final Award, 18 September 2018 (RL-0204), para. 66 (“As agreed by the Parties, [the hearing] was also live streamed through ICSID’s Website”); *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Procedural Order No. 12, 24 August 2018 (RL-0202), para. 11 (“Considering the public nature of the Hearing, the Parties have agreed that the Hearing be video recorded and streamed in real time (*i.e.*, via live feed) on the PCA website ...”); *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012 (CL-0165), para. 23 (“Pursuant to CAFTA Article 10.21.2 the hearing was open to the public and, with the consent of the parties, was transmitted via live internet feed.”).

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20. The Tribunal considers that in the circumstances it is not necessary to also post a video recording of the Hearing on the ICSID website after the Hearing.

IV. ORDER

21. In light of the above, the Tribunal orders that, having regard to Article 10.21.2 of the CAFTA-DR, the Hearing shall be made open to the public by way of live-streaming.

On behalf of the Tribunal,

[Signed]

Dr. Veijo Heiskanen
President of the Tribunal
Date: 20 June 2024