

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

**Rand Investments Ltd., William Archibald Rand, Kathleen Elizabeth Rand,
Allison Ruth Rand, Robert Harry Leander Rand and Sembi Investment Limited**

v.

Republic of Serbia

(ICSID Case No. ARB/18/8)

PROCEDURAL ORDER NO. 2

Members of the Tribunal

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal

Mr. Baiju S. Vasani, Arbitrator

Prof. Marcelo G. Kohen, Arbitrator

Secretary of the Tribunal

Ms. Marisa Planells-Valero

Assistant to the Tribunal

Mr. Rahul Donde

12 February 2019

I. BACKGROUND

1. On 13 November 2018, the ICSID Secretariat, acting on behalf of the Tribunal, sent the Parties a draft Procedural Order No.1 (“PO 1”) containing the procedural rules that would apply in this arbitration. The Parties were advised that the Tribunal would hear them on issues concerning the publication of the award as well as on the transparency regime applicable in the proceedings during the first procedural session scheduled on 23 November 2018.
2. On 20 November 2018, the Parties submitted their joint comments on draft PO 1, including their comments on the publication of the award as well as on the transparency regime applicable to the proceedings.
3. The first procedural session was held on 23 November 2018, at which the Parties made further submissions explaining their positions. The Claimants contended that the arbitration must be conducted in compliance with the transparency requirements of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, 2015 (the “Canada-Serbia BIT”), the silence of the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, 2005 (the “Cyprus-Serbia BIT”) not ruling out transparency. For its part, the Respondent agreed to the publication of award(s)¹ (albeit conditionally) and on the publicity of hearing(s)² but not essentially to the publicity of the case file in respect of Claimant 6 who acts on the basis of the Cyprus-Serbia BIT. It was provided that the Tribunal would issue PO 1 promptly after the session (which it did) and issue

¹ Respondent’s comments to draft PO 1 (“Respondent agrees that the award be published subject to Claimants’ agreement that the case file (documents, pleadings, etc.) shall not be published.”).

² Audio recording of the first procedural session (“[Respondent:] Respondent would be prepared to accept what it accepted in the treaty that is that the hearing be public. But again, we think that the case file should not be public and we think that paragraph 1 second sentence would also allow us to keep the transcripts of the hearing from being public. So, we accept that the hearing is open, but the documents, transcripts and other parts of the case file shall remain not in public [sic]”).

a separate decision on transparency thereafter. That decision would set out the transparency regime applicable in this arbitration and would be guided by the UNCITRAL Rules on Transparency in Treaty-based Investor-state Arbitration (“UNCITRAL Transparency Rules”).

4. On 16 January 2019, the Claimants filed the Memorial on the Merits and Quantum, in which they elaborated on their claims under the Canada-Serbia BIT and the Cyprus-Serbia BIT.
5. As envisaged during the first procedural session, the Tribunal proposes a transparency order a draft of which is set forth in Annex A. That draft takes into account the provisions of the Canada-Serbia BIT (particularly Article 31) and the Cyprus-Serbia BIT as well as the applicable rules in the ICSID framework. In drawing up the proposed order, the Tribunal has looked for guidance to the UNCITRAL Transparency Rules, which reflect a broad consensus of states recognizing the importance of transparency as a tool for promoting and ensuring effective democratic participation, predictability, and the rule of law. Although elaborated in the framework of UNCITRAL, the Transparency Rules are available for use in non-UNCITRAL arbitrations such as this ICSID arbitration (Article 1(9) of the UNCITRAL Transparency Rules).
6. The draft transparency order in Annex A is in line with the recent trend towards transparency in investor-state arbitration. Indeed, an increasing number of treaties, institutional rules and other instruments provide for public access to materials and hearings as well as publication of awards. The draft order contains several safeguards to protect the Parties legitimate confidentiality concerns.

II. **ORDER**

7. For the foregoing reasons, the Tribunal:
- (i) Directs that this arbitration shall be conducted under a transparency order, a draft of which is found in Annex A hereto;
 - (ii) Gives the Parties an opportunity to comment on the draft transparency order by **February 22, 2019**, after which the Tribunal will finalize the order.

On behalf of the Tribunal,

[signed]

Professor Gabrielle Kaufmann-Kohler
President of the Tribunal

Annex A

DRAFT TRANSPARENCY ORDER

I. PROCEDURAL BACKGROUND

1. In Procedural Order No. 2, the Tribunal decided to apply transparency rules to this arbitration in conformity with the provisions of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, 2015 (the “Canada-Serbia BIT”), the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, 2005 (the “Cyprus-Serbia BIT”) as well as the applicable rules in the ICSID framework and seeking guidance from the UNCITRAL Rules on Transparency (the “Transparency Rules”) where the three previous sets of rules provide no directions (the “Transparency Regime”). This order sets out the details of the Transparency Regime applicable in this arbitration. The Tribunal has annexed the Transparency Rules applicable in this case which reflect the content of this Order.

II. TRANSPARENCY REGIME

2. Article 31 of the Canada-Serbia BIT provides as follows:

“ARTICLE 31

“Public Access to Hearings and Documents

1. A Tribunal award under this Section shall be publicly available, subject to the redaction of confidential information. All other documents submitted to, or issued by, the Tribunal shall be publicly available unless the disputing parties otherwise agree, subject to the redaction of confidential information.

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2. Hearings held under this Section shall be open to the public. The Tribunal may hold portions of hearings in camera to the extent necessary to ensure the protection of confidential information.
 3. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in those documents.
 4. The Parties may share with officials of their respective national and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Section, but they shall ensure that those persons protect the confidential information in those documents.
 5. If a Tribunal's order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information prevails. However, the Party should try to apply its law on access to information so as to protect information that the Tribunal's order has designated as confidential."
3. This provision shall apply to the present proceedings together with the ICSID Arbitration Rules and the UNCITRAL Transparency Rules, subject to the following specifications or amendments to the latter:
- (i) Articles 1(1)-(2), 1(3)(a), and 2 of the UNCITRAL Transparency Rules are not applicable;
 - (ii) Article 1(5) of the UNCITRAL Transparency Rules is modified to the extent that the Tribunal may exercise its authority to promote transparency in this case;
 - (iii) Article 3(1) of the UNCITRAL Transparency Rules is modified to reflect the submissions in this arbitration.

- (iv) The following provision replaces Article 3(5) of the UNCITRAL Transparency Rules:

“Any administrative costs of making documents under Article 3(3) available to a person, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the Repository (on the ICSID website), shall fall under ICSID Administrative and Financial Regulation 15.”

4. As a result of the foregoing, Article 48(5) of the ICSID Convention and Rule 32(2) and 48(4) of the ICSID Arbitration Rules do not apply to this proceeding.
5. Pursuant to Article 6(3) of the UNCITRAL Transparency Rules, the following logistical arrangements will be made to facilitate public access to the hearings:
- (i) The hearings will be broadcast and made publicly accessible by video link on the ICSID website. An audio-video recording will also be made of hearings. For logistical reasons, physical attendance at the hearings by third persons will not be permitted.
- (ii) In order to protect potential confidential information, the broadcast will be delayed by 30 minutes (Articles 6(2) and 7(3)(c) of the UNCITRAL Transparency Rules).
- (iii) At any time during the hearings, a Party may request that a part of the hearing be held in private and that confidential information be excluded from the video transmission. A Party shall inform the Tribunal before raising topics where confidential information could reasonably be expected to arise. 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.
6. Pursuant to Article 7(3)(a) of the UNCITRAL Transparency Rules, each Party, non-disputing Party to the treaty or third person shall give notice within 15 days from the filing of a document mentioned in Article 3(1) of the Rules that it seeks protection for confidential information in that document. In the absence of such notice, the Tribunal will authorize the publication by the Repository (see para. 8 below).
7. Pursuant to Article 7(3)(b) of the UNCITRAL Transparency Rules, any request to protect confidential information made in accordance with the preceding paragraph shall specifically identify the part (or parts) of the document sought to be designated as confidential. After consulting the Parties, the Tribunal will decide whether the information identified is confidential. If the information is found to be confidential, the Party, non-disputing Party to the treaty or third person will provide the Tribunal with a redacted version of the document in question. The Tribunal will thereafter transmit that document to the Repository for publication.
8. Article 8 of the UNCITRAL Transparency Rules is modified to the extent that ICSID shall be the Repository of published information. In addition, the following rules shall apply in connection with the Repository:
- (i) The Tribunal will be responsible for submitting the documents for publication (in redacted form if applicable) to the Repository.

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- (ii) The Secretary of the Tribunal will receive the documents from the Tribunal and ensure publication 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 communicate with the Repository in English.
- (v) The Tribunal will be released of its responsibility under the UNCITRAL Transparency Rules and this Order upon completion of its mandate under the ICSID Convention and Arbitration Rules, being specified such mandate extends to any interpretation or revision proceedings. Upon completion of the case, video recordings of hearings, and all documents shall continue to be available to the public on the ICSID website in accordance with ICSID's usual practice in this respect.

On behalf of the Tribunal,

Professor Gabrielle Kaufmann-Kohler
President of the Tribunal

ANNEX

TRANSPARENCY RULES

I. Discretion and authority of the Tribunal

1. The arbitral tribunal shall have the power to adapt the requirements of any specific provision of these Rules 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 these Rules.
2. Where these Rules provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account:
 - a. The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and
 - b. The Parties' interest in a fair and efficient resolution of their dispute.
3. These Rules shall not affect any authority that the arbitral tribunal may otherwise have to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third persons.
4. In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.

II. Applicable instrument in case of conflict

5. These Rules shall supplement any applicable arbitration rules. Where there is a conflict between these Rules and the applicable arbitration rules, these Rules

shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules and the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, 2015, the provisions of the treaty shall prevail.

6. As a result of the specifications and amendments made by the Transparency Order, Article 48(5) of the ICSID Convention and Rule 32(2) and 48(4) of the ICSID Arbitration Rules do not apply to proceedings before this Tribunal.
7. Where these Rules are in conflict with a provision of the law applicable to the arbitration from which the Parties cannot derogate, that provision shall prevail.

III. Publication of documents

8. Subject to Section V, the following documents shall be made available to the public: the Claimants' request for arbitration, the Claimants' memorial, the Respondent's counter-memorial and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and the award of the arbitral tribunal. [Tribunal note: The Parties are invited to comment on the publication of the file with respect to claims under the Cyprus-Serbia BIT.]
9. Subject to Section V, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.
10. Subject to Section V, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the Parties, whether

and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 8 or 9 above. This may include, for example, making such documents available at a specified site.

11. The documents to be made available to the public pursuant to paragraphs 8 and 9 shall be communicated by the arbitral tribunal to the Repository referred to under Section VI as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential information prescribed under Section V. The documents to be made available pursuant to paragraph 9 may be communicated by the arbitral tribunal to the Repository referred to under Section VI as they become available and, if applicable, in a redacted form in accordance with Section V. The Repository shall make all documents available in a timely manner, in the form and in the language in which it receives them.
12. Any administrative costs of making documents under this Section available to a person, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the Repository (on the ICSID website), shall fall under ICSID Administrative and Financial Regulation 15.

IV. Hearings

13. The following logistical arrangements will be made to facilitate public access to the hearings:
 - (i) The hearings will be broadcast and made publicly accessible by video link on the ICSID website. An audio-video recording will also be made of hearings. For logistical reasons, physical attendance at the hearings by third persons will not be permitted.

- (ii) In order to protect potential confidential information, the broadcast will be delayed by 30 minutes.
- (iii) At any time during the hearings, a Party may request that a part of the hearing be held in private and that confidential information be excluded from the video transmission. To the extent possible, a Party shall inform the Tribunal before raising topics where confidential information could reasonably be expected to arise. 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.

V. Exceptions to transparency

A. Confidential information

- 14. Confidential information, as defined in paragraph 15 and as identified pursuant to the arrangements referred to in paragraphs 16 and 17, shall not be made available to the public.
- 15. Confidential information consists of:
 - a. Confidential business information;
 - b. Information that is protected against being made available to the public under the treaty;

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- c. Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or
 - d. Information the disclosure of which would impede law enforcement.
16. Each Party or third person shall give notice within 15 days from the filing of a document mentioned in Section III that it seeks protection for confidential information in that document. In the absence of such notice, the Tribunal will authorize the publication by the Repository.
17. Any request to protect confidential information made in accordance with the preceding paragraph shall specifically identify the part (or parts) of the document sought to be designated as confidential. After consulting the Parties, the Tribunal will decide whether the information identified is confidential. If the information is found to be confidential, the Party or third person will provide the Tribunal with a redacted version of the document in question. The Tribunal will thereafter transmit that document to the Repository for publication.
18. Any determination as to whether information is confidential shall be made by the arbitral tribunal after consultation with the Parties.
19. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.

20. Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.

B. Integrity of the arbitral process

21. Information shall not be made available to the public pursuant to these Rules where the information, if made available to the public, would jeopardize the integrity of the arbitral process as determined pursuant to paragraph 22.
22. The arbitral tribunal may, on its own initiative or upon the application of a disputing 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 because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for Parties or members of the arbitral tribunal, or in comparably exceptional circumstances.

VI. Repository of published information

23. The Repository of published information under these Rules shall be ICSID. The following rules shall apply in connection with the Repository:
- (i) The Tribunal will be responsible for submitting 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 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 communicate with the Repository in English.
- (v) The Tribunal will be released of its responsibility under the Transparency Rules and this Order upon completion of its mandate under the ICSID Convention and Arbitration Rules, being specified such mandate extends to any interpretation or revision proceedings.
- (vi) Upon completion of the case, video recordings of hearings, and all documents referred to in Section III above shall continue to be made available to the public on the ICSID website in accordance with ICSID's usual practice in this respect.