

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Kurt Harald Grüninger, Alexandra Grüninger, and Sascha Spittel
Claimants

v.

Republic of Costa Rica
Respondent

(ICSID Case No. ARB/23/16)

PROCEDURAL ORDER NO. 2
On Transparency and Confidentiality

Members of the Tribunal

Ms. Lucinda Low, President of the Tribunal
Mr. Adolfo E. Jiménez, Arbitrator
Professor Mónica Pinto, Arbitrator

Secretary of the Tribunal

Ms. Elisa Méndez Bräutigam

February 7, 2024

I. PROCEDURAL BACKGROUND

1. On November 27, 2023, the Tribunal circulated a draft of this order (“**Draft PO2**”) for discussion by the parties.
2. On January 16, 2024, the parties commented on Draft PO2.
3. On January 19, 2024, the first session was held. During the first session, the parties and the Tribunal discussed the parties’ comments on Draft PO2 and the draft procedural order no. 1.
4. This Procedural Order No. 2 contains the parties’ agreements and the Tribunal’s decisions concerning the transparency regime governing this case.

II. LEGAL FRAMEWORK

5. The legal framework applicable to these proceedings is determined by the Costa Rica-Germany BIT, the ICSID Convention, and the 2022 ICSID Arbitration Rules.
6. ICSID Arbitration Rules 62-66 contain provisions concerning the publication of the award, orders and decisions, other documents filed in the proceedings, transcripts and recordings of hearings, open hearings, and the definition of confidential or protected information.
7. In accordance with ICSID Arbitration Rule 1(2), the parties may agree on other rules governing transparency and confidentiality of this proceeding.
8. In this case, the Costa Rica-Germany BIT is silent with respect to transparency /confidentiality. Therefore, the applicable provisions are those set out in Article 48(5) of the ICSID Convention and ICSID Arbitration Rules 62-66 as supplemented by Section III of this Order.
9. In accordance with ICSID Arbitration Rule 66, confidential or protected information is information which is protected from public disclosure:
 - (a) by the instrument of consent to arbitration;
 - (b) by the applicable law or applicable rules;
 - (c) in the case of information of a State party to the dispute, by the law of that State;
 - (d) in accordance with the orders and decisions of the Tribunal;
 - (e) by agreement of the parties;
 - (f) because it constitutes confidential business information or protected personal information;
 - (g) because public disclosure would impede law enforcement;
 - (h) because a State party to the dispute considers that public disclosure would be contrary to its essential security interests;
 - (i) because public disclosure would aggravate the dispute between the parties; or
 - (j) because public disclosure would undermine the integrity of the arbitral process.

III. TRANSPARENCY RULES

10. The Tribunal adopts the following transparency and confidentiality rules governing the proceedings.

A. AWARD (ICSID ARBITRATION RULE 62)

11. For the purposes of Article 48(5) of the ICSID Convention and ICSID Arbitration Rule 62, the parties consent to publication of the Award by ICSID on its website, with any redactions agreed by the parties.¹ The parties shall provide ICSID with their jointly redacted text within 60 days after the dispatch of the Award.
12. If the parties do not agree on a jointly redacted text, they shall, within 60 days after the dispatch of the Award, inform ICSID and provide their respective proposals for redaction.
13. In accordance with ICSID Arbitration Rule 62(4), if the parties disagree on redactions, ICSID shall prepare excerpts of the Award within 60 days after receipt of the parties' notice under paragraph 11, taking into account each party's proposed redactions as far as possible. The parties may comment on the proposed excerpts within 60 days after their receipt, including whether any information in the proposed excerpts is confidential or protected. ICSID shall consider any comments received on the proposed excerpts and publish the excerpts within 30 days after the expiry of the time limit for the parties' comments on the proposed excerpts.

B. ORDERS AND DECISIONS (ICSID ARBITRATION RULE 63)

14. ICSID shall publish the orders and decisions of the Tribunal, with any redactions agreed by the parties or decided by the Tribunal, in accordance with Section G below.

C. WRITTEN SUBMISSIONS (ICSID ARBITRATION RULE 64)

15. ICSID shall publish the parties' main written submissions (request for arbitration, memorial, counter-memorial, reply and rejoinder), within 30 days of the publication of the Award by ICSID on its website with any redactions agreed by the parties or decided by the Tribunal, in accordance with Section G below.
16. The parties may agree that ICSID will publish other written submissions not falling within paragraph 15 above within 30 days from the publication of the Award by ICSID on its website. These submissions will be published with any redactions agreed by the parties.

D. SUPPORTING DOCUMENTS (ICSID ARBITRATION RULE 64)

17. Supporting documents, including exhibits, legal authorities, witness statements and expert reports (including annexes, appendices or exhibits thereto) shall not be published by ICSID, unless the parties agree otherwise.

E. OPEN HEARINGS (ICSID ARBITRATION RULE 65(1)-(2))

18. Hearings shall be open to the public via live streaming. If there is a need to protect confidential information during the hearing, at the pre-hearing organizational meeting the Tribunal and the parties will discuss measures to safeguard such confidential information,

¹ Pursuant to ICSID Arbitration Rule 72(2) this procedural order shall continue to apply to an interpretation, revision or annulment proceeding with necessary modifications, unless the Parties agree or the Tribunal or Committee orders otherwise.

Procedural Order No. 2

(e.g., by using deferred streaming and/or implementing a protocol governing public access to the hearing and the non-disclosure of confidential and protected information).

F. TRANSCRIPTS AND RECORDINGS OF HEARINGS (ICSID ARBITRATION RULE 65(3))

19. Transcripts and recordings of hearings shall not be published by ICSID, unless both parties agree otherwise no later than 30 days from the time limit for corrections to a transcript.

G. PROCEDURE FOR REDACTIONS - NON-DISCLOSURE OF CONFIDENTIAL OR PROTECTED INFORMATION (ICSID ARBITRATION RULE 66)

20. With respect to publication pursuant to Sections B, C, D, and F above, any confidential or protected information as defined in ICSID Arbitration Rule 66 that is submitted to the Tribunal shall be protected from disclosure and publication in accordance with the procedure set forth below:
21. Within 45 days from the date of a decision or order, a written submission, or the date of transmittal of a final transcript or recording, a party shall give written notice to the Tribunal and the other party that it requests the non-disclosure of certain information it considers confidential or protected. Absent such a notice within the 45-day timeline, and unless the Tribunal determines on its own initiative that certain information is not to be made public in accordance with ICSID Arbitration Rule 66, the Tribunal will authorize ICSID to publish the document or recording without redactions from the parties.
22. Within 45 days of receipt of the notice referred to in paragraph 21, the other party may raise objections to the proposed redactions.
23. If no objections are raised within the deadline established in paragraph 22, the Tribunal will authorize ICSID to publish the document or recording at issue with the requested redactions.
24. If objections are raised within the deadline established in paragraph 22, the parties shall confer and seek to agree on redactions within 30 days of receipt of the objections to the proposed redactions. If the parties reach an agreement, the Tribunal will authorize ICSID to publish the document at issue with the agreed redactions.
25. If objections remain unresolved, the disputed redaction requests and the objections thereto shall be submitted to the Tribunal in the form of the Transparency Schedule set out in **Annex A** to this Order.
26. If information is to be redacted from a document or recording in accordance with paragraphs 23, 24, or 25, the parties shall provide a redacted version of the document. Upon receipt of the redacted document, the Tribunal will ask ICSID to publish the document.

On behalf of the Tribunal,

[Signed]

Ms. Lucinda Low
President of the Tribunal
Date: February 7, 2024

ANNEX TO PROCEDURAL ORDER NO. 2
TRANSPARENCY SCHEDULE

[insert Party]	Request [1]
Information sought to be protected from disclosure	
Legal basis for protection	
Comments	
Reply by opposing Party	
Decision	