

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bank of Nova Scotia
Claimant

v.

Republic of Peru
Respondent

(ICSID Case No. ARB/22/30)

PROCEDURAL ORDER No. 2
On Transparency and Confidentiality

Members of the Tribunal

Ms. Lucy Reed, President of the Tribunal
Prof. Dr. Kaj Hobér, Arbitrator
Prof. Zachary Douglas K.C., Arbitrator

Secretary of the Tribunal

Ms. Veronica Lavista

28 February 2024

I. INTRODUCTION

1. Pursuant to paragraph 23.1 of Procedural Order No. 1 dated 28 February 2024 (“PO1”), and in accordance with Article 835.2 of the Free Trade Agreement between the Government of Canada and the Republic of Peru signed on 29 May 2008 and in force since 1 August 2009 (the “FTA”) and the 2022 ICSID Arbitration Rules, this Procedural Order No. 2 (“PO2”), along with the relevant provisions of PO1, the 2022 ICSID Arbitration Rules and the FTA, will govern the transparency regime applicable to the present arbitration, as well as the designation and use of Confidential Information.

II. PROCEDURAL BACKGROUND

2. On 9 June 2023, the Tribunal circulated a draft of this order (“Draft PO2”) for discussion by the Parties.
3. On 26 January 2024, the Parties commented on Draft PO2.
4. On 26 February 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.
5. This Procedural Order No. 2 contains the Parties’ agreements and the Tribunal’s decisions concerning the transparency regime governing this case.

III. DEFINITIONS (ARTICLES 835, 836 AND 847 OF THE FTA)

6. For the purposes of this Procedural Order:
 - i. “Disputing Party” or “Party” means either Bank of Nova Scotia or the Government of the Republic of Peru.
 - ii. “Non-Disputing Party” means the Government of Canada.
 - iii. “Applicant” means any person or entity that is not a Disputing Party or a Non-Disputing Party that applies to file a written submission pursuant to Article 836 of the FTA and satisfies the requirements of Article 836.4-5 of the FTA.
 - iv. “Confidential Information” means:
 - a) information that constitutes business confidential information or protected personal information;
 - b) information that is privileged or otherwise protected from disclosure under a Party’s law;
 - c) pursuant to Article 2202 of the FTA, information where the public disclosure would be contrary to the Respondent’s essential security interests;

- d) pursuant to Article 2204 of the FTA, information where the public disclosure would (i) impede law enforcement, (ii) would be contrary to the Respondent's law protecting deliberative and policy making processes of the executive branch of government at the cabinet level, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or (iii) information protected under the Respondent's competition laws, or a competition authority of the Respondent to furnish or allow access to any other information that is privileged or otherwise protected from disclosure;
- e) information designated as such in accordance with the orders and decisions of the Tribunal;
- f) information designated as such by agreement of the Parties;
- g) information designated as such because public disclosure would aggravate the dispute between the Parties;
- h) information designated as such because public disclosure would cause harm to one of the Parties; or
- i) information designated as such because public disclosure would undermine the integrity of the arbitral process.

IV. DOCUMENTS EXCHANGED IN DOCUMENT PRODUCTION

- 7. A document produced by a Disputing Party to the other Disputing Party shall be protected from disclosure to third parties as though it contained Confidential Information in its entirety, except that (a) should the document be filed by one of the Disputing Parties as part of a written submission or pleading, the Disputing Party must follow the process for designating Confidential Information set out in this Procedural Order, and (b) any produced documents that are already publicly available need not be treated as Confidential Information protected from disclosure.

V. PUBLICATION OF DOCUMENTS (ARTICLES 835 AND 836 OF THE FTA)

- 8. In accordance with Article 835(3) of the FTA, and unless the Disputing Parties otherwise agree and, in any event, subject to the deletion of Confidential Information, the ICSID Secretariat will publish on its website (i) all pleadings (but not expert opinions, witness statements, exhibits, legal authorities and annexes) submitted to the Tribunal; and (ii) all Procedural Orders and Decisions issued by the Tribunal, in accordance with Section VI.A below.
- 9. Any Applicant will have access only to publicly available information, pursuant to Articles 835 and 836.8 of the FTA.
- 10. In accordance with Article 835(4) of the Canada-Peru FTA, the Award shall be publicly available and will be published by the ICSID Secretariat on its website, subject to the deletion of Confidential Information. The procedure for the deletion of Confidential Information from the Award prior to publication is addressed at Section VI.B below.

VI. PUBLICITY OF HEARINGS (ARTICLES 832, 835 AND 836 OF THE FTA)

11. In accordance with Article 835(1) of the FTA, hearings shall be open to the public. To the extent necessary to ensure the protection of Confidential Information, the Tribunal may hold portions of the hearing *in camera*.
12. The following logistical arrangements will be made to facilitate public access to hearings:
 - i. In the case of an in-person hearing at the seat of the Centre in Washington, DC, the hearing will be broadcast on closed-circuit television in a separate room at the seat of the Centre. In the event that in-person access to the Centre's facilities by the public is restricted at the time, or in the event of any hearing held by video-conference as permitted by paragraph 20.3 of PO1, the Tribunal will establish alternative arrangements in relation to public access to such hearing after consultation with the Disputing Parties.
 - ii. At any time during a hearing, a Disputing Party may request, on a reasoned basis and subject to the right of the other Disputing Party to object, that a part of the hearing be held in private, that is, that the broadcast of the hearing be temporarily suspended such that Confidential Information is excluded from the video transmission. A Disputing Party shall inform the Tribunal before raising topics where Confidential Information could reasonably be expected to arise. The Tribunal will then consult the Parties *in camera* and the transcript shall be marked "confidential." After consultation with the Parties, the Tribunal will decide whether the broadcast of the hearing will be temporarily suspended to prevent public disclosure of the information in question, and whether to mark the relevant portion of the transcript as "confidential."
 - iii. The Tribunal may revisit these protocols or establish further protocols for the conduct of the public Hearing and the protection of "Confidential Information" at a later stage, in consultation with the Disputing Parties.
 - iv. Pursuant to Article 832.2 of the FTA, the Non-Disputing Party (Canada) may attend hearings in person or, if the hearing is held by videoconference in accordance with paragraph 20.3 of PO1, may attend virtually. Physical attendance in the hearing room by third parties will not be permitted.

VII. DELETION OF CONFIDENTIAL INFORMATION

13. Except with the prior written consent of the Disputing Party that claimed confidentiality with respect to the information and subject to paragraph 14, Confidential Information shall not be made available to any person not involved in this Arbitration. For the avoidance of doubt, unredacted versions of documents containing Confidential Information may be used only in these proceedings and may be disclosed, exclusively in connection with these proceedings, to and among:
 - i. counsel to a Disputing Party (and their support staff);
 - ii. officials or employees of the Disputing Parties to whom disclosure is reasonably considered by the Disputing Party to be necessary in connection with preparation of the Disputing Party's case;

- iii. independent experts or consultants retained or consulted by the Disputing Parties in connection with these proceedings;
 - iv. witnesses who in good faith are reasonably expected by a Disputing Party to offer evidence in these proceedings but only to the extent material to their expected testimony;
 - v. the Members of the Tribunal;
 - vi. the ICSID Secretariat and persons employed by the ICSID Secretariat, including counsel, secretaries, court reporters, translators and any clerical or administrative personnel;
 - vii. counsel to the Non-Disputing Party; and
 - viii. officials or employees of the Non-Disputing Party to whom disclosure is reasonably considered by the Non-Disputing Party to be necessary in connection with preparation of the Disputing Party's submission.
14. The confidentiality obligations in this Procedural Order shall not prevent a Disputing Party from complying with applicable laws, including but not limited to securities laws. In any event, to the extent that a Disputing Party is legally obliged to disclose Confidential Information, it shall inform the other Disputing Party and the Tribunal before the Confidential Information is disclosed.
15. All persons receiving material in this proceeding containing Confidential Information shall be bound by this Order to keep such information confidential. Each Disputing Party shall have the obligation of notifying all persons receiving such material of the obligations under this Order and ensuring that the persons protect the Confidential Information, in accordance with Article 835.5 of the Canada-Peru FTA.

A. Procedure for Redaction of Confidential Information from Documents other than the Award

16. Information that the Respondent has designated as Confidential Information shall be surrounded by double brackets **{[]}** highlighted in yellow. Information that the Claimant has designated as Confidential Information shall be surrounded by double brackets **{[]}** highlighted in blue.
17. A Disputing Party has twenty-one (21) calendar days from the filing of a document by the Disputing Party or issuance of a document by the Tribunal, other than the Award, to designate Confidential Information. Such notice shall (i) specifically identify the document or part(s) thereof sought to be designated as Confidential Information, and (ii) be accompanied by the moving Party's proposed deletions. In the absence of such notice, the Tribunal will authorize the publication of any document mentioned in paragraph 8 above without deletions.
18. The other Disputing Party may raise reasoned objections to the requested deletion within 15 days of the notice referred to in paragraph 17 above. The notice under paragraph 17 and any objections under paragraph 18 shall be submitted in the form attached as **Annex A**.

19. In the absence of an objection, the information which is the subject of the notice at paragraph 17 above shall be considered Confidential Information and the Tribunal will authorize the publication of the document by the ICSID Secretariat only with any redactions proposed by the moving Party in the notice. Within 7 days of such authorization, the moving Party shall provide a redacted version of the relevant document(s) for publication. If the entire document is the subject of a notice as per paragraph 17, the Tribunal will not authorize its publication.
20. In the event of an objection, the Disputing Party seeking to have information designated as Confidential Information shall provide the reasons why the document or part(s) thereof should be treated as Confidential Information within seven (7) calendar days. The Tribunal will decide within 10 days of that objection whether the identified information is to be treated as Confidential Information. If the Tribunal decides that the identified information is to be treated as Confidential Information, the moving Party shall provide a redacted version of the document within 7 days of the Tribunal's decision. The Tribunal will thereafter authorize publication of the redacted document by the ICSID Secretariat.
21. In case that one of the Disputing Parties objects to the disclosure of Confidential Information in a document, the ICSID Secretariat shall refrain from publishing the document until the Tribunal has decided on the objection.

B. Procedure for Redaction of Confidential Information from the Award

22. Following issuance of the Award, the Disputing Parties shall confer with regard to redactions of Confidential Information from the Award, and within 30 days from the date of dispatch of the Award, they shall:
 - i. Give joint notice to the ICSID Secretariat that the Disputing Parties jointly seek the redaction of Confidential Information from the Award prior to its publication pursuant to paragraph 10. The joint notice shall be accompanied by a redacted copy of the Award including the Disputing Parties agreed redactions. The Award as jointly redacted by the Disputing Parties will thereafter be published by the ICSID Secretariat pursuant to paragraph 10; or
 - ii. Give notice to the ICSID Secretariat that the Disputing Parties are in disagreement over proposed redactions of Confidential Information from the Award, summarizing their disagreements in a single table in the form attached as **Annex A**. The ICSID Secretariat will then communicate the table summarizing the disagreements to the former Members of the Tribunal who will proceed to decide. Following the decision by the former Members of the Tribunal, the Disputing Parties shall jointly prepare a redacted copy of the Award reflecting the redactions pursuant to the decision of the former Members of the Tribunal. The Award so redacted will thereafter be published by the ICSID Secretariat pursuant to paragraph 10.
23. Absent a notice from the Disputing Parties pursuant to paragraph 21 above within 30 days from the date of the dispatch of the Award, the Award will be published unredacted by the ICSID Secretariat pursuant to paragraph 10.

24. The Members of the Tribunal will be compensated for time spent in the resolution of any disputes in connection with redaction of Confidential Information in the Award in accordance with paragraph 3.1 of PO 1, with their claims being paid from the case fund administered by ICSID for this proceeding pursuant to ICSID Administrative and Financial Regulations. However, the Parties agree that as the arbitration proceeding formally concludes with the dispatch of the Award, any costs incurred after the dispatch of the Award (*e.g.* for arbitrator fees for time spent addressing disputed “confidential information” designations) will not be considered part of the “costs of the proceeding” for purposes of Rule 50 of the ICSID Arbitration Rules.

On behalf of the Tribunal,

[SIGNATURE]

Ms. Lucy Reed
President of the Tribunal
Date: 28 February 2024

**ANNEX TO PROCEDURAL ORDER NO. [...]
TRANSPARENCY SCHEDULE**

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