

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mario Noriega Willars

v.

United Mexican States

(ICSID Case No. ARB/23/29)

**PROCEDURAL ORDER NO. 2
On Transparency and Confidentiality**

Members of the Tribunal

Prof. Bernard Hanotiau, President of the Tribunal
Mr. Andrés Moreno Gutierrez, Arbitrator
Prof. Hélène Ruiz Fabri, Arbitrator

Secretary of the Tribunal

Ms. Jara Mínguez Almeida

Assistant to the President

Mr. Juan Camilo Jiménez-Valencia

22 July 2024

I. BACKGROUND

1. According to the NAFTA Free Trade Commission Note of Interpretation of Certain Chapter 11 Provisions of 31 July 2001 (the “Note”), “the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals [...]”
2. The Note further establishes that, in the application of the foregoing, the NAFTA Parties agree that documents submitted to, or issued by, a Chapter Eleven tribunal will be made available to the public subject to the redaction of (i) confidential business information; (ii) information which is privileged or otherwise protected from disclosure under the relevant domestic law; and (iii) information which must be withheld pursuant to the relevant arbitral rules.
3. In light of the above, on 20 June 2024, the Tribunal circulated a draft of this Procedural Order to the Parties.
4. On 15 July 2024, the Parties commented on the draft circulated by the Tribunal.
5. On 18 July 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 PO1.
6. This Procedural Order No. 2 contains the Parties’ agreements and the Tribunal’s decisions concerning the transparency regime governing this case.

II. SCOPE

7. This Confidentiality Order shall apply to all hearings and conferences between the parties and the tribunal, as well as the following documents (the “**Covered Documents**”):
 - a) Any decisions, orders, and the Award issued by the Tribunal;
 - b) Written Submissions, including the Request for Arbitration, Memorial, Counter-Memorial, Reply and Rejoinder;
 - c) Any written submissions by other NAFTA Parties and by third persons (*amicus curiae*) that have been admitted by the Tribunal.

8. In accordance with the provisions set forth in this Procedural Order No. 2, ICSID will publish the Tribunal's procedural decisions and orders, the Award, as well as written pleadings and submissions of the parties and written submissions by other NAFTA Parties and by third persons (*amicus curiae*), with redactions if so requested. For further clarification, witness statements, expert reports, transcripts and recordings of the Hearing or any session between the Parties and the Tribunal, exhibits and legal authorities, or excerpts thereof, shall not be published.
9. This Order governs issues relating to the disclosure of information to the public and is without prejudice to the Parties' right to object to the production of documents on grounds of confidentiality.

III. CONFIDENTIAL INFORMATION

10. Confidential information is information which is protected because:
 - a) It is confidential business information;
 - b) It is privileged or otherwise protected from disclosure under the Party's domestic law;
 - c) It must be withheld pursuant to the relevant arbitral rules, as applied;
 - d) It is protected by the applicable law or applicable rules, or in the case of information of a State party to the dispute, by the law of that State;
 - e) It is protected in accordance with the orders and decisions of the Tribunal;
 - f) It is protected by agreement of the parties;
 - g) It constitutes protected personal information;
 - h) Public disclosure would impede law enforcement;
 - i) Because a State party to the dispute considers that public disclosure would be contrary to its essential security interests;
 - j) Because public disclosure would aggravate the dispute between the parties; or

- k) Because public disclosure would undermine the integrity of the arbitral process.
11. A Party claiming that a Covered Document contains confidential information shall notify the other Party and ICSID within fifteen days of its filing or issuance, as the case may be, that it contains confidential information and shall provide its redacted version to the other Party within thirty days thereafter. The ICSID Secretariat shall not publish any Covered Document on its website until the initial fifteen-day period has expired, and no declaration of confidentiality has been made by either Party, or the proposed redactions have been agreed or resolved in the manner provided below at paragraph 12.
 12. Disputes related to a Party's designation of Confidential Information may be submitted to the Tribunal for determination, pursuant to the following procedure:
 - a. If a Party opposes any redaction that the other Party proposes, it shall notify the proposing Party within fifteen days of receiving the redacted document in question, providing its reasons for objecting.
 - b. If the Parties cannot agree on the resolution of any dispute within thirty days, either Party may submit the matter to the Tribunal for a decision that the Tribunal shall endeavour to render within thirty days. The notice and the objections shall be submitted to the Tribunal in the form of a "Transparency Table", in the form attached as **Annex A** both in word and .pdf format.
 - c. If the Tribunal determines that the information was not properly designated, the proposing Party that has submitted the document shall prepare a new redacted version in which the improperly designated information is either included or deleted, as the case may be, in accordance with the Tribunal's instructions. Only the approved revised redacted version shall be published on the ICSID website.
 13. The Parties agree that in the event of a dispute regarding proposed redactions to the Award, the power to decide shall reside with the former Members of the Tribunal, even if such Tribunal is at that time *functus officio*.
 14. The former 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 Section 3 of Procedural Order No. 1, with their claims

being paid from the case fund administered by ICSID for this proceeding pursuant to ICSID Administrative and Financial Regulations.¹

IV. PUBLICATION OF COVERED DOCUMENTS

15. Without prejudice to the Respondent's obligations under Article 1127 of the NAFTA and Section A.2 of the Note, the Parties agree that ICSID shall act as repository of published information.
16. The following rules shall apply in connection with the Repository:
 - a. The Tribunal will submit the documents for publication (in redacted form, if applicable) to ICSID;
 - b. ICSID will publish information and documents in the format and language in which it receives it; and
 - c. Upon completion of this Arbitration, documents referred to in Section II above shall continue to be made available to the public on the ICSID website.
17. Neither Party shall publish an unredacted version of any Covered Document, including the Award, without the consent of the other Party.

V. HEARINGS

18. Hearings shall be closed to the public. However, provisions shall be made for representatives of the other NAFTA Parties to attend the hearing upon request.

¹ As the proceeding will conclude upon dispatch of the Tribunal's Award, any costs incurred after the dispatch of the Award (e.g., arbitrator fees for time spent addressing disputed confidentiality designations) will not be considered part of the costs of the proceeding. To ensure the payment of any fees incurred by the former Members of the Tribunal in connection with disputes over redactions of the Award, the Parties agree that ICSID will maintain the case trust fund open after the proceeding is concluded. ICSID will close the case trust fund once the arbitrators have submitted their claims for fees relating to the resolution of disputes over redactions of the Award, if any.

On behalf of the Tribunal,

[signed]

Bernard Hanotiau
President of the Tribunal
Date: 22 July 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	