

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Franco-Nevada Corporation

v.

Republic of Panama

(ICSID Case No. ARB/24/26)

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

Members of the Tribunal

Prof. Luca G. Radicati di Brozolo, President of the Tribunal
Prof. Dr. Klaus Sachs, Arbitrator
Dr. José Antonio Rivas, Arbitrator

Secretary of the Tribunal

Ms. Catherine Kettlewell

March 4, 2025

I. PROCEDURAL BACKGROUND

1. On January 13, 2025, the Tribunal circulated a draft of this order (“**Draft PO2**”) for discussion by the Parties.
2. On January 31, 2025, the Parties commented on Draft PO2.
3. On February 5, 2025, 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 (i) the Free Trade Agreement between Canada and the Republic of Panama which entered into force on April 1, 2013 (the “**FTA**”), (ii) the ICSID Convention, and (iii) the 2022 ICSID Arbitration Rules.
6. Article 9.30 of the FTA contains a number of rules on transparency/confidentiality, which shall apply to these proceedings. Specifically, the FTA provides the following:

Article 9.30: 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.
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, including business 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 Chapter, but they shall ensure that those persons protect confidential information in those documents.
5. To the extent that a Tribunal’s confidentiality order designates information as confidential and a Party’s domestic law on access to information requires public access to that information, the Party’s domestic law on access to information prevails.

However, a Party should endeavour to apply its domestic law on access to information so as to protect information designated confidential by the Tribunal.

7. In accordance with Article 9.01 of the FTA, confidential information means “*confidential business information or information that is privileged or otherwise protected from disclosure.*”

III. TRANSPARENCY RULES

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

A. AWARD (FTA ARTICLE 9.30)

9. Further to Article 9.30 of the FTA, the Parties consent to publication of the Award by ICSID on its website, subject to redactions agreed by the Parties or decided by the Tribunal, in accordance with Section G below.

B. ORDERS AND DECISIONS (FTA ARTICLE 9.30)

10. 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 (FTA ARTICLE 9.30)

11. The Parties’ consent to publication of their main written submissions (memorial, counter-memorial, reply and rejoinder) by ICSID on its website once ICSID has dispatched the Award to the Parties, with any redactions agreed by the Parties or decided by the Tribunal, in accordance with Section G below.
12. The Parties may agree that ICSID will publish other written submissions not falling within paragraph 11 above. These submissions will be published with any redactions agreed by the Parties or decided by the Tribunal in accordance with Section G below. In that case, the deadline foreseen at paragraph 17 below to propose redactions shall start running from the date of the Parties’ agreement to publish the relevant submission.

D. SUPPORTING DOCUMENTS (FTA ARTICLE 9.30)

13. Supporting documents, including exhibits, legal authorities, witness statements and expert reports (including annexes, appendices or exhibits thereto) shall not be published by ICSID.

E. OPEN HEARINGS (FTA ARTICLE 9.30)

14. Hearings shall be open to the public. The Tribunal shall establish a protocol governing public access to a hearing and the non-disclosure of confidential and protected information addressed during the hearing at the latest at the pre-hearing organizational conference.

F. TRANSCRIPTS AND RECORDINGS OF HEARINGS (FTA ARTICLE 9.30)

15. The Parties consent to publication of transcripts or recordings by ICSID on its website once ICSID has dispatched the Award to the Parties, with any redactions agreed by the Parties or decided by the Tribunal, in accordance with Section G below.

G. PROCEDURE FOR REDACTIONS - NON-DISCLOSURE OF CONFIDENTIAL OR PROTECTED INFORMATION (FTA ARTICLE 9.30)

16. With respect to publication pursuant to Sections A, B, C and F above, any confidential or protected information as defined in the FTA or any additional definition agreed by the Parties that is submitted to the Tribunal shall be protected from disclosure and publication in accordance with the procedure set forth below.
17. Within 35 days from the date of the Award, 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 35-day timeline, and unless the Tribunal determines on its own initiative that certain information is not to be made public in accordance with the applicable framework, the Tribunal will authorize ICSID to publish the document or recording without redactions from the Parties.
18. Within 14 days of receipt of the notice referred to in paragraph 17, the other Party may raise objections to the proposed redactions.
19. If no objections are raised within the deadline established in paragraph 18, the Tribunal will authorize ICSID to publish the document or recording at issue with the requested redactions.
20. If objections are raised within the deadline established in paragraph 18, the Parties shall confer and seek to agree on redactions within 14 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.
21. 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.
22. If information is to be redacted from a document or recording in accordance with this Section G, the Parties shall provide a redacted version of the document. Upon receipt of the redacted document, the Tribunal will verify the redactions and ask ICSID to publish the document.
23. Pursuant to paragraphs 11 and 15 above, ICSID will publish the Parties' written submissions, transcripts and recordings of hearings only after ICSID has dispatched the Award to the Parties.

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24. 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*.
25. 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
26. Neither the Parties nor the Tribunal shall disclose to any non-disputing parties or to the public any confidential information redacted in accordance with this Order or a subsequent ruling of the Tribunal.

On behalf of the Tribunal,

[Signed]

Prof. Luca G. Radicati di Brozolo
President of the Tribunal
Date: March 4, 2025

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.

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Procedural Order No. 2 – Annex A

ANNEX A
TRANSPARENCY SCHEDULE

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