

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT AND THE
UNCITRAL ARBITRATION RULES (1976)**

-between-

**THEODORE DAVID EINARSSON, HAROLD PAUL EINARSSON, RUSSELL JOHN
EINARSSON, AND GEOPHYSICAL SERVICE INCORPORATED
("Claimants")**

-and-

**GOVERNMENT OF CANADA
("Respondent", and together with Claimants, the "Disputing Parties")**

(ICSID CASE NO. UNCT/20/6)

PROCEDURAL ORDER NO. 3

Confidentiality Designations

The Arbitral Tribunal

Ms. Carita Wallgren-Lindholm (Presiding Arbitrator)

Mr. Trey Gowdy

Mr. Toby Landau KC

Administrative Authority

ICSID

Tribunal Secretary

Ms. Geraldine R. Fischer

21 September 2023

[CORRECTED]

I. Procedural Background

1. On 13 June 2022, the Tribunal issued a Confidentiality Order, which adopted a text that had been agreed between the Parties. The Confidentiality Order contains a process and timetable for designating confidential information and protected seismic data contained in the written submissions. The Parties may submit disputed designations to the Tribunal for resolution.
2. On 27 September 2022, Claimants submitted their Memorial and supporting documents.
3. Pursuant to Section 9 of the Confidentiality Order, on 23 November 2022, Claimants advised that they were uploading to the file-sharing system two versions of Claimants' Memorial, a public version and a confidential version. The Parties did not submit any dispute regarding confidentiality designations to the Tribunal.
4. On 17 January 2023, Canada submitted its Counter-Memorial on Jurisdiction, Merits and Damages together with supporting documents.
5. On 3 March 2023, the Tribunal granted the Parties an extension, until 10 March 2023, to agree upon the final confidentiality designations for Canada's Counter-Memorial.
6. On 10 March 2023, Canada notified the Tribunal of the Parties' dispute regarding the confidentiality designations for Canada's Counter-Memorial and, pursuant to paragraph 8 of the Confidentiality Order and the Tribunal's extension, Respondent submitted a chart of its fifty-six outstanding objections to Claimants' proposed confidential information designations. Claimants responded by letter of 14 March 2023.
7. On 19 March 2023, pursuant to paragraph 8 of the Confidentiality Order, the Tribunal invited the Parties to make further submissions on the proposed designations at a hearing, which was held virtually on 17 April 2023 ("**Hearing**").
8. On 18 April 2023, the Tribunal reiterated the instructions it relayed at the Hearing whereby it invited Respondent, by 27 April 2023, to: "*(i) update its 10 March 2023 table to indicate where any alleged publicly available information can be found; and (ii) furnish a copy of the referenced source.*" Claimants were then "*invited to reply to Respondent's submissions using the same chart by 8 May 2023.*"
9. On 27 April 2023, Respondent sent a letter with its updated 10 March 2023 table, providing "*references to publicly available information and, where applicable, explain[ed] Canada's position as to why the Claimants' proposed confidentiality designations do not meet the definition of Confidential Information as set out in paragraph 1(b) of the Confidentiality Order.*"¹

¹ R. Letter of 27 April 2023, p. 1.

10. On 8 May 2023, Claimants sent a letter objecting that Respondent’s 27 April 2023 correspondence went beyond the Tribunal’s directions as “*Respondent drafted a new table in which it removed the Claimants’ previous submissions, and improperly made extensive new substantive arguments regarding the confidentiality designations that wholly are unrelated to ‘where any alleged publicly available information can be found.’*”² In its 8 May 2023 letter, Claimants submitted general responses to Respondent’s 27 April 2023 correspondence and requested that “*the Tribunal apply confidentiality designations to the Respondent’s materials as set out in the Claimants’ March 9, 2023 correspondence.*”³ Claimants also submitted that Canada’s allegedly improper submissions ought to be ignored by the Tribunal.

II. The Parties’ Arguments

A. Summary of Claimants’ Position

11. Claimants note that the Confidentiality Order defines “Confidential Information” as including information that is not publicly available and is designated by a Disputing Party as confidential on the grounds that it is “Business Confidential Information”, being a defined term.⁴ According to Claimants, “*confidentiality protections such as those imposed by the Confidentiality Order are established for the purposes of ‘encouraging efficient, dispassionate dispute resolution, rather than emotive ‘trial by press release’ or efforts to gain extraneous leverage; reducing the risks of damaging disclosure of commercially-sensitive information to competitors, customers and others...’*”⁵ In Claimants’ view, “[i]nsofar as disclosures are permitted in investor-state arbitrations, they should be limited to [] objective, neutral information and reports.”⁶
12. According to Claimants, “*Respondent’s [i]nsistence on [d]isclosing [a]llegations [c]omparing [p]ublic [c]ourt [r]ecords to [c]onfidential [i]ncome [s]tream [i]nformation is an [a]ttempt to [g]ain [e]xtraneous [l]everage.*”⁷ Claimants assert that many of their confidentiality designations relate to financial or commercial information that Claimants have consistently treated as confidential, including price and cost information, market share data and accounting or financial records.⁸ As GSI is not a public company, much of this information is not reported.⁹ Moreover, additional confidentiality designations relate to information, which, if disclosed, could interfere with third party contractual negotiations.¹⁰

² Cl. 8 May 2023 Letter, p. 1.

³ Cl. 8 May 2023 Letter, p. 5.

⁴ Cl. 8 May 2023 Letter, p. 2.

⁵ Cl. 8 May 2023 Letter, p. 2 (citing G. Born, *International Commercial Arbitration*, 3rd ed (Kluwer International, updated August 2022).

⁶ Cl. 8 May 2023 Letter, p. 2 (citing G. Born, *International Commercial Arbitration*, 3rd ed (Kluwer International, updated August 2022).

⁷ Cl. 8 May 2023 Letter, p. 3.

⁸ Hearing Tr. 15:1-6.

⁹ Hearing Tr. 15:7-9.

¹⁰ Hearing Tr. 15:11-14.

In Claimants' view, it is "*best to err on the side of caution and designate materials that the Claimants['] view as their Confidential Information as confidential in this Arbitration.*"¹¹

13.

[REDACTED]

14.

[REDACTED]

15.

[REDACTED]

16.

[REDACTED]

¹¹ Hearing Tr. 15:7-20.

¹² Hearing Tr. 19:12-22; 20:1-10.

¹³ Hearing Tr. 21: 1-6.

¹⁴ Hearing Tr. 21: 10-14.

¹⁵ Cl. 8 May 2023 Letter, p. 3.

¹⁶ Hearing Tr. 23: 8-19.

¹⁷ Cl. 8 May 2023 Letter, p. 3.

¹⁸ Cl. 8 May 2023 Letter, p. 3.

¹⁹ Cl. 8 May 2023 Letter, p. 3.

²⁰ Cl. 8 May 2023 Letter, p. 4.

[REDACTED]

17. [REDACTED]

B. Summary of Respondent's Position

18. According to Respondent, NAFTA Free Trade Commission's 31 July 2001 Notes of Interpretation (the "**FTC 2001 Notes**") are binding on this Tribunal and address the issue of confidentiality in NAFTA proceedings.²⁵ As stated in such notes, there is no general duty of confidentiality on the Disputing Parties and, moreover, there have been growing calls for transparency due to public interest in investor-State disputes.²⁶

19. [REDACTED]

20. Respondent asserts that Claimants bear the burden of proving that the information that they seek to designate as confidential falls within the terms of the Confidentiality Order, which defines "Confidential Information" as information that is not publicly available and falls under the sub-paragraphs of paragraph 1(b).³⁰ Therefore, any information that is publicly available cannot be designated as confidential.³¹ Similarly, "business confidential Information" under the Confidentiality Order requires that the information be consistently treated as confidential or that there be a demonstrable harm from disclosing the

²¹ Cl. 8 May 2023 Letter, p. 4.

²² Cl. 8 May 2023 Letter, p. 4.

²³ Cl. 8 May 2023 Letter, p. 5.

²⁴ Cl. 8 May 2023 Letter, p. 5.

²⁵ Hearing Tr. 58.

²⁶ Hearing Tr. 58-59. *See also* R. Letter of 10 March 2023.

²⁷ Hearing Tr. 59.

²⁸ Hearing Tr. 60.

²⁹ Hearing Tr. 60.

³⁰ Hearing Tr. 61.

³¹ Hearing Tr. 61.

information.³² Respondent has found several instances where the information is in fact publicly available and, for the remainder of the proposed designations, Respondent finds that they are overly-broad.³³

21. During the hearing, Canada identified three categories of objections to Claimants' proposed confidentiality designations:
- (1) Publicly Available Information Relating to Alleged Unpaid Invoices: 3-11, 13-18, 20, 21, 26-28, 29, 32-34, 36-40, 47;
 - (2) Other Information that is Publicly Available: 2, 23, 53; and
 - (3) Information that Does Not Disclose Any Confidential Information: 1, 12, 19, 22, 24-25, 30, 31, 35, 41-46, 48-52, 54-56.³⁴
22. Respondent further identifies references to public documents in its updated 27 April 2023 chart.

III. The Tribunal's Analysis

A. Procedural Objections

23. Claimants have argued that Canada in its 27 April 2023 updated table improperly made extensive new substantive arguments and have asked the Tribunal to ignore such arguments. Claimants, for their part, did not, as directed by the Tribunal, respond by using that same chart but have responded by their 8 May letter, without Respondent objecting.
24. The Tribunal finds that Canada's explanations in its 27 April table did not unduly expand on its position regarding confidentiality designations and that Claimants had the opportunity to respond substantively, and did respond to Canada's arguments, in Claimants' 8 May letter. Both sides have therefore been afforded an adequate opportunity to address the procedural measures undertaken by the other Party(ies) regarding the confidentiality designations.

B. Applicable Legal Standard

25. The Parties' dispute turns on the interpretation and application of the Confidentiality Order, against the backdrop of the dispute resolution regime (NAFTA Chapter 11) governing these proceedings.

³² Hearing Tr. 61-62.

³³ Hearing Tr. 62.

³⁴ R. Outstanding Designations in Canada's Counter Memorial (the "Designation Categories Slide") (17 April 2023).

26. The FTC 2001 Notes, as referenced by Respondent, provide under their heading “A. Access to documents” that:

“1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration...”

27. The FTC 2001 Notes further provide, in subsection 2, for limited specific exceptions *e.g.*, in b.i. for “*confidential business information*”.
28. In the Confidentiality Order, the Disputing Parties agreed to respect and maintain the confidentiality of information exchanged in this arbitration in accordance with the terms of the Order, as well as a procedure to be followed in designating Confidential Information and Protected Seismic Data.
29. There is no allegation that the procedure set out in the Confidentiality Order has not been observed (other than the issue whether the Tribunal’s directions have been followed in the exchanges following the Hearing, as identified in para. 10 above and as dealt with in para. 24 above).
30. When interpreting the Confidentiality Order, the Tribunal notes that its provisions have been negotiated and agreed between the Disputing Parties.
31. The Parties appear largely in agreement as to the meaning of the text of the Order, disputing mainly the application of the text to the facts at hand.
32. The Confidentiality Order defines “Confidential Information”, and “Business Confidential Information” as follows:

b. “Confidential Information” means information that is not publicly available and is designated by a Disputing Party as confidential on the grounds that it is:

i. Business Confidential Information of a Disputing Party or of a provincial, territorial, or municipal government;

ii. Business Confidential Information relating to a third party;

iii. information otherwise protected from disclosure under the applicable domestic law of the disputing State party including, but not limited to, and as amended, Canada’s Access to Information Act, the Canada Evidence Act, Canada’s Privacy Act, or any domestic law of any Province governing access to information and protection of privacy; or

iv. information that is deemed to be financial, commercial, scientific or technical information supplied by third parties that has been treated as Confidential Information by those third parties.

c. “Business Confidential Information” includes:

i. trade secrets;

ii. financial, commercial, scientific or technical information that is treated consistently in a confidential manner by the Disputing Party, provincial, territorial or municipal government or third party to which it relates, including pricing and costing information, marketing and strategic planning documents, market share data, or detailed accounting or financial records not otherwise disclosed in the public domain;

iii. information the disclosure of which could result in material financial loss or gain to the Disputing Party, provincial, territorial, or municipal government or third party to which it relates;

iv. information the disclosure of which could interfere with contractual or other negotiations of the Disputing Party, provincial, territorial, or municipal government or third party to which it relates; or

v. other communications treated as confidential in furtherance of settlement between the Disputing Parties.

C. Analysis

33. *General:* As a general consideration, the Tribunal at the outset notes that, as set out in the FTC 2001 Notes, there is no general duty of confidentiality in these proceedings. This means that the only confidentiality obligations binding upon the Parties and the Tribunal are those set out in the Confidentiality Order. Further, insofar as the FTC 2001 Notes refer to “*confidential business information*” as an exception, this category has been defined and calibrated by the Disputing Parties themselves in the Confidentiality Order.
34. It follows that information in these proceedings shall not be deemed confidential unless specifically agreed. The default position is therefore transparency, and the party arguing for confidentiality (Claimants in this instance) bears the burden of proving any exception to transparency.
35. The Tribunal will first assess whether, as argued by Claimants, the submissions by Respondent sought to be designated by Claimants (“**Disputed Designation(s)**”) do in fact directly or indirectly disclose information that is to be kept confidential pursuant to the

Confidentiality Order or the Parties' specific confidentiality designation of Exhibit C-112. The Disputed Designations are contained in Respondent's Counter-Memorial on Jurisdiction, Merits and Damages of 17 January 2023 and the Expert Report of the Brattle Group submitted therewith as RER-04.

36. *"Publicly Available" Information:* It is not in dispute that information that is *publicly available*³⁵ shall not be deemed confidential. This is unequivocally stated in the Confidentiality Order³⁶ and applies to all information dealt with in the Order. There seems to be a difference between the Parties, however, whether the information needs to be in the same form or context as a Disputed Designation to qualify as publicly available information. In the Tribunal's view, the information qualifies as publicly available if the same substantive elements of the information are publicly available, whether or not in another form or context, and even if such information could be argued to convey a false message.³⁷
37. While the Tribunal considers it arguable that whether reference is made to public court documents, reports where the referenced information is publicly available, or to Exhibit C-112, is not relevant *per se*, the Tribunal has upheld confidential designations where there is direct reference to Exhibit C-112. This is a document that both Disputing Parties have agreed is confidential, and there is otherwise a risk, in the Tribunal's view, that the confidentiality designation of Exhibit C-112 itself will be deprived of all meaning. Designations have also been upheld where comparisons are made between the contents of Exhibit C-112 and publicly available information.
38. *Overall Comments on Annex A:* As will be seen in Annex A, the Tribunal has in most cases rejected confidentiality designations when the information in issue is general in nature. In particular, opinions, conclusions, calculations or arguments ("**Conclusions**") drawn from Claimants' financial records have not, in and of themselves, been found to indirectly disclose Business Confidential Information (as defined in the Confidentiality Order) - other than where specific information is given or specific references are made, or where the Conclusions clearly allow for Confidential Information to be derived.
39. The relevant test for the Tribunal's decision regarding the Disputed Designations is whether such designations (in blue in Annex A) must be kept confidential under the provisions of the Confidentiality Order. The default position, as reflected in the FTC 2001 Notes³⁸ is that "*Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration*"³⁹ It is therefore incumbent on Claimants to show that a disputed designation is confidential under the provisions of the Order and not for Canada to show a need for publication.

³⁵ See Confidentiality Order, Section 1(b).

³⁶ *ib.*

³⁷ Claimants' Submission' e.g. Hearing Tr. 32:12-14 "*the fact that it's also untrue is harmful to GSI, because, you know, untrue information is always harmful to anybody*".

³⁸ This position is also in line with the increased call for transparency in investor-state arbitration.

³⁹ FTC 2001 NAFTA Notes A.1.

40. The Tribunal has therefore not found that the possibility that a Disputed Designation may result in a submission becoming devoid of meaning should affect its findings. Claimants carry the burden of proving that designations are justified in the first instance, within the terms of the Confidentiality Order, and if this burden is discharged, any argument by the Respondent as to why any Disputed Designation needs to be available to the public is limited by the terms of the Confidentiality Order.

41.



42. The Tribunal's individual conclusions for each requested Disputed Designation are inserted in Annex A. The reference to one or more grounds in the Tribunal's Decision Column thereof may not be exhaustive, and it may be that other grounds may also have motivated the upholding or denial of a Disputed Designation. The indicated grounds are nevertheless sufficient to explain the Tribunal's individual decision.

IV. Order

43. After carefully considering each side's arguments, the Tribunal decides as set out in the attached Table (**Annex A**) and which forms an integral part of the present Procedural Order.

44. The Parties are directed to discuss and attempt to agree the extent to which this PO 3 shall be designated as confidential as set out in the Confidentiality Order.

45. The principles regarding Confidentiality Designations reflected in the present Procedural Order shall serve as a direction to the Parties in implementing the Confidentiality Order going forward.

Dated: 21 September 2023

Place of Arbitration: Calgary, Alberta, Canada

[Signed]

Carita Wallgren-Lindholm
(Presiding Arbitrator)

[Signed]

Trey Gowdy

[Signed]

Toby Landau KC

Enclosure: Annex A