

**Access Business Group LLC**

v.

**United Mexican States**

**ICSID Case No. ARB/23/15**

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

*Members of the Tribunal*

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal  
Prof. Franco Ferrari, Arbitrator  
Ms. Loretta Malintoppi, Arbitrator

*Secretary of the Tribunal*

Mr. Francisco Abriani

*Assistant of the Tribunal*

Ms. Laura Zinnerman

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19 January 2024

## **I. PROCEDURAL BACKGROUND**

1. On 13 April 2023, the Claimant filed its Request for Arbitration seeking arbitration under the ICSID Convention and the 2022 ICSID Arbitration Rules and invoking as the basis of its claims both the North American Free Trade Agreement (“NAFTA”) and the Agreement between the United States of America, Mexico, and Canada (“USMCA” and, together with the NAFTA, the “Treaties”, and each a “Treaty”).
2. On 21 April 2023, the Respondent wrote to ICSID objecting, *inter alia*, to the application of the USMCA to the present dispute.
3. On 27 November 2023, the Tribunal and the Parties held the first session by videoconference, discussing the Parties’ comments to draft Procedural Order No. 1 (“PO1”), including the regime governing the transparency of these proceedings and the participation of non-disputing parties. It was agreed that these two matters would be dealt with in a separate order.
4. On 8 December 2023, the Tribunal issued PO1, which records the Parties’ disagreement concerning the applicability of the USMCA to this arbitration (Section 1.2). Further, PO1 provides that, after consultation with the Parties, the Tribunal will issue Procedural Order No. 2 to govern matters concerning the transparency of these proceedings (“PO2”).
5. On 2 January 2024, the Tribunal circulated a draft PO2 for discussion by the Parties.
6. On 12 January 2024, the Parties provided their comments to the draft PO2.
7. In consideration of the Parties’ comments and having regard to the relevant provisions of the Treaties, the Tribunal issues the present Order setting out the transparency regime governing these proceedings and its implementation, including exceptions to transparency and participation of non-disputing contracting States and other non-disputing parties.
8. In this context, the Tribunal observes that the transparency regimes of the NAFTA and the USMCA differ from each other in certain respects, i.e. access to hearings and publication of the award, and that the Parties have not yet had the opportunity to brief the issue of the applicable Treaty or Treaties. Consequently, in this order, the Tribunal will refrain from addressing topics on which the rules found in the Treaties are not compatible, as this would necessarily require a decision about the applicable Treaty or Treaties, even if that decision were only implicit.
9. The present order thus only provides arrangements on transparency/confidentiality on matters on which the regimes of the Treaties are compatible. The Tribunal reserves transparency/confidentiality matters on which the Treaties materially differ, that is, as mentioned, the access to the hearing and the publication of the award, for later determination.

## **II. ADDITIONAL PROCEDURAL STEPS IN CONNECTION WITH THE APPLICABLE TREATY OR TREATIES**

10. The Tribunal invites the Parties to brief the issue of the applicable Treaty or Treaties in (i) the Claimant’s Memorial on the Merits and (ii) the Counter-Memorial on the Merits and Memorial on Jurisdiction in Scenarios 1 and 2, or the Memorial on Jurisdiction in Scenario 3 (see Procedural Timetable, Annex B to PO1).

11. The Government of the United States and, solely in respect of the NAFTA, the Government of Canada are invited to comment on the issue of the applicable Treaty in their submissions under Articles 14.D.7.2 of the USMCA and 1128 of the NAFTA to be filed within the time limits set in the Procedural Timetable.
12. The Parties shall have the opportunity to comment on the non-disputing States' submissions under Articles 14.D.7.2 of the USMCA and 1128 of the NAFTA within the time limit set in the Procedural Timetable.
13. Thereafter, the Tribunal will take appropriate action to set the missing transparency rules. It may in particular pose questions to the Parties either in writing or in a videoconference or through a combination of both; and/or give directions on how to deal with the remaining transparency matters; and/or issue a decision ruling on the Treaty or Treaties applicable to the present dispute.

### **III. TRANSPARENCY**

14. In view of the considerations set out in Section I above, the Tribunal adopts the following transparency and confidentiality rules to govern the proceedings.

#### **A. ORDERS AND DECISIONS**

15. Pursuant to Section A.2(b) of the Notes of Interpretation of Certain Chapter 11 Provisions of the NAFTA Free Trade Commission of 31 July 2001 (the "NAFTA Notes") and Article 14.D.8.1(e) of the USMCA, 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 F below.

#### **B. WRITTEN SUBMISSIONS**

16. Pursuant to Section A.2(b) of the NAFTA Notes and Article 14.D.8.1(a) to (c) of the USMCA, ICSID shall publish the Parties' written submissions, including the notice of intent, the notice of arbitration and any other pleadings, memorials and briefs submitted to the Tribunal by the disputing Parties, with any redactions agreed by the Parties or decided by the Tribunal in accordance with Section F below.<sup>1</sup>

#### **C. DELIVERY OF DOCUMENTS AND PARTICIPATION OF NON-DISPUTING CONTRACTING STATES**

17. In light of Articles 1127 and 1129 of the NAFTA and 14.D.8.1 of the USMCA, the Respondent shall promptly deliver to the non-disputing contracting States the disputing Parties' pleadings and written submissions and the Tribunal's orders and decisions, with any redactions agreed by the Parties or decided by the Tribunal in accordance with Section F below.
18. Pursuant to Articles 1128 of the NAFTA and 14.D.7.2 of the USMCA, non-disputing NAFTA Parties and the USMCA non-disputing Annex Party may make submissions to the

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<sup>1</sup> For the avoidance of doubt, this publication does not cover supporting materials such as factual exhibits, legal authorities, witness statements, and expert reports with their annexes, appendices or exhibits.

Tribunal regarding the interpretation of the relevant Treaty within the time limits set out in the Procedural Timetable.

19. ICSID shall publish any submissions made by non-disputing contracting States pursuant to Section A.2(b) of the NAFTA Notes and Article 14.D.8.1(c) of the USMCA, with any redactions agreed by the Parties or decided by the Tribunal in accordance with Section F below.

**D. PARTICIPATION OF OTHER NON-DISPUTING PARTIES**

20. Other non-disputing parties may apply for leave to file submissions within the time limits set out in the Procedural Timetable and in accordance with the procedure provided in the Statement of the NAFTA Free Trade Commission on non-disputing party participation of 7 October 2003 (the “NAFTA Statement”) or in Article 14.D.7.3 of the USMCA, as applicable.
21. The Parties shall have the opportunity to comment on any such application for leave and on any submission by non-disputing parties within the time limit set in the Procedural Timetable or fixed by the Tribunal.
22. ICSID shall publish any submission made by other non-disputing parties pursuant to Section A.2(b) of the NAFTA Notes and Article 14.D.8.1(c) of the USMCA, with any redactions agreed by the Parties or decided by the Tribunal in accordance with Section F below.

**E. CONFIDENTIAL INFORMATION**

23. In accordance with Section A of the NAFTA Notes and Article 14.D.8.3 of the USMCA, a Party may designate as confidential information, and request that such information be protected from disclosure in accordance with the procedures set out in Section F below, any information that falls within one of the following categories:
  - (i) information the disclosure of which would be contrary to the Respondent’s domestic law;
  - (ii) information that would impede law enforcement or be otherwise contrary to the public interest;
  - (iii) information the disclosure of which the Respondent determines to be contrary to its essential security interests;
  - (iv) protected personal information;
  - (v) information which would prejudice the legitimate commercial interests of particular enterprises, public or private;
  - (vi) information the disclosure of which would aggravate the dispute between the Parties;
  - (vii) information the disclosure of which would undermine the integrity of the arbitral process;
  - (viii) information that is privileged under the legal or ethical rules determined by the Tribunal to be applicable;

- (ix) information that is confidential and/or is prevented from disclosure by legal obligation or impediment determined by the Tribunal to be applicable, such as a non-disclosure agreement (or similar agreements preventing disclosure or protecting confidentiality) or a confidentiality order entered by other courts (for example, protective orders); or
  - (x) communications between the disputing Parties made in connection with and for the purpose of settlement negotiations and which either Party designates as confidential or privileged.
24. Notwithstanding the above, the disputing Parties may disclose to persons involved in the arbitration unredacted versions of documents to the extent necessary, ensuring that these persons protect the information designated as confidential information in such documents as if they were a disputing Party.

**F. PROCEDURE FOR THE PROTECTION OF CONFIDENTIAL INFORMATION**

25. For the purposes of Section A of the NAFTA Notes and Article 14.D.8.4 of the USMCA, each Party shall give notice within 15 days from the filing or issuance of a document referred to in Sections A to D above that it requests information in that document be deemed “confidential information”.<sup>2</sup> All information in that document shall remain confidential pending the expiry of the 15 days mentioned in the preceding sentence. The notice shall specifically identify the part(s) of the document sought to be designated as “confidential information”, and it shall be submitted in the form attached as **Annex A** (in Word and pdf format). In the absence of such notice, the Tribunal will authorize the publication of any document mentioned at Sections A to D above unredacted.
26. The other Party may raise reasoned objections to the requested protection within 15 days of the notice in paragraph 25 above, in the form attached as **Annex A** (in Word and pdf format). In the absence of an objection, the information identified in the notice under paragraph 25 above will be treated as “confidential information”, and the Tribunal will not authorize the publication of the information for which protection is requested.
27. If an objection is raised, the Parties shall confer and seek to resolve it by agreement within 12 days. If the objection remains unresolved within the specified period, the notice and the objections shall be submitted to the Tribunal, in the form attached as **Annex A** both in Word and pdf format. The Tribunal will then decide whether the identified information is to be treated as “confidential information”.
28. If information is to be treated as “confidential information” by operation of paragraph 26 above, an agreement under paragraph 26 above, or an affirmative decision by the Tribunal under paragraph 27 above: (i) the Party that filed the protected document shall provide a redacted version of the document within 8 days of the Tribunal’s decision (paragraphs 26 and 27 above) or the Parties’ agreement (paragraph 26 above), or (ii) for documents emanating from the Tribunal, the Tribunal will issue a redacted version. The Tribunal will thereafter transmit that document to the Repository for publication.
29. If the Tribunal decides that information for which protection is sought is not “confidential information” and should be made available to the public, the Party that filed the document shall be permitted to withdraw the document from the record within 8 days of the Tribunal’s

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<sup>2</sup> The Parties agree that a notice so given satisfies the requirement of Article 14.D.8.4(b) and (c) of the USMCA.

decision. Absent a withdrawal, the Tribunal will authorize the publication of the document unredacted.

30. Arbitration Rule 9 and paragraph 6.4 of PO1 apply to the time limits set out in this Section F. With respect to documents filed or issued after this Order, the 15-day time limit in paragraph 25 above shall be computed from the date following the filing or issuance of these documents in their original language. With respect to documents filed or issued before the date of this Order, the 15-day time limit in paragraph 25 above shall be computed from the date following the Order's issuance.
31. The obligations created by this Order shall survive the termination of these proceedings.

**G. REPOSITORY OF PUBLISHED INFORMATION**

32. Without prejudice to the Respondent's obligations under Article 14.D.8.1 of the USMCA, the Parties agree that the ICSID Secretariat shall serve as Repository of published information.
33. The following rules shall apply in connection with the Repository:
  - (i) The Repository shall make documents available to the public by uploading them on the ICSID website, subject to the provisions of this Order.
  - (ii) Any administrative costs of making documents available to a person, but not the costs of making those documents available to the public through the Repository (on the ICSID website), shall fall under ICSID Administrative and Financial Regulation 17.
  - (iii) The Repository will publish information and documents in the form and language in which it receives it. The Repository will publish a document in searchable electronic format (pdf format), if received in that manner.
  - (iv) Upon completion of this arbitration, documents referred to in paragraph 17 above shall continue to be made available to the public on the ICSID website.

On behalf of the Tribunal,

[signed]

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Prof. Gabrielle Kaufmann-Kohler  
President of the Tribunal  
Date: 19 January 2024

ANNEX A – TRANSPARENCY SCHEDULE

Claimant/Respondent [Party seeking protection against publication]	
Identification of document and part(s) sought to be protected	[use one sheet per document/category of documents]
Legal basis for protection	
Comments	
Reply by opposing Party	
Decision of the Tribunal	