

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ESPÍRITU SANTO HOLDINGS, LP AND LIBRE HOLDING, LLC
Claimants

v.

UNITED MEXICAN STATES
Respondent

(ICSID Case No. ARB/20/13)

PROCEDURAL ORDER NO. 10
ON TRANSPARENCY

Members of the Tribunal

Mr. Eduardo Zuleta Jaramillo, President of the Tribunal
Mr. Charles Poncet, Arbitrator
Mr. Raúl Emilio Vinuesa, Arbitrator

Secretary of the Tribunal

Ms. Elisa Méndez Bräutigam

January 27, 2023

I. BACKGROUND

1. This Order addresses the transparency and confidentiality of information in this proceeding (the “**Confidentiality Order**” or “**Order**”).
2. 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 [...].”
3. 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.
4. Paragraph 24 of Procedural Order No. 1 establishes the following:

24. Publication and Confidentiality

Convention Article 48(5), Administrative and Financial Regulation 22, Arbitration Rule 48(4); NAFTA Article 1137(.4) and Annex 1137(.4); FTC Note of Interpretation of 31 July 2001, Section A: Access to Documents,” before Convention Article 48(5), Administrative and Financial Regulation 22, Arbitration Rule 48(4)

24.1. The parties consent to ICSID publication of the award and any order or decision issued in the present proceeding.

24.2. Matters concerning confidentiality and privacy of the arbitral proceedings, rulings, orders, decisions and the Award shall be the subject of a separate confidentiality order that the Tribunal will issue in consultation with the disputing parties (the “Confidentiality Order”).

24.3. The written submissions by the Governments of Canada or the United States of America (“Non-Disputing NAFTA Parties”) and the

written submissions by third persons (amicus curiae) that have been admitted by the Tribunal shall be published on the dates determined by the Tribunal in Annex B.

24.4. Supporting witness statements, expert reports, exhibits or legal authorities submitted with any pleading shall not be published and may not be disclosed to any third party.

5. In light of the above, on December 13, 2022, the Tribunal circulated a draft of this Procedural Order to the parties. The parties submitted their respective comments on the draft Order on January 12, 2023. The Tribunal now issues this Order in its final form.

II. SCOPE

6. This Confidentiality Order shall apply to the following documents (the “**Covered Documents**”):
- a. Any decisions, orders, and the Award issued by the Tribunal;
 - b. The following pleadings submitted by the parties in this proceeding, save for the supporting witness statements, expert reports, exhibits, and legal authorities, which the parties agreed in paragraph 24.2 of Procedural Order No. 1 “shall not be published and may not be disclosed to any third party”:
 - i. The Request for Arbitration of Espiritu Santo Holdings;
 - ii. The Claimants’ Memorial;
 - iii. The Claimants’ Addendum to the Memorial;
 - iv. The Respondent’s Counter-Memorial;
 - v. The Claimants’ Reply;
 - vi. The Respondent’s Rejoinder;
 - vii. The parties’ Post-Hearing Submissions (if any);
 - viii. The parties’ Reply Post Hearing Submissions (if any);
 - ix. The parties’ Cost Submissions (together the “**Pleadings**”).
 - c. Any written submissions by other NAFTA Parties and by third persons (*amicus curiae*) that have been admitted by the Tribunal.

7. 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

A. DEFINITION

8. Confidential information means any information designated by a disputing party as confidential. A disputing party may designate as confidential, and, subject to the terms and procedures of this Order, protect from disclosure to the public any information that may otherwise be released under the terms of this Order on any of the following grounds:
 - a. Business Confidentiality;
 - b. Business Confidentiality relating to a third party;
 - c. Information which is privileged or otherwise protected from disclosure, including information properly and consistently classified by the government as determined by the Tribunal;
 - d. Confidential 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 or the recipient; and
 - e. Information the disclosure of which prevents law enforcement.
9. "Business Confidentiality" includes i. commercial business secrets, ii. financial, commercial, scientific or technical confidential information from the disputing party that has been consistently treated as confidential information by the party to which the information relates, and includes information on prices, costs, strategic and marketing plans, market share data, accounting or financial records that have not been disclosed to the public; iii. information the disclosure of which could result in material financial loss or gain, or could reasonably be expected to prejudice the competitive position of the disputing

party to which it relates, and iv. information the disclosure of which could interfere with contractual or other negotiations of the disputing party to which it relates.

B. PROCEDURE

10. The following procedure shall govern requests by a disputing party to protect confidential information contained in the Covered Documents.
11. A disputing party claiming that a Covered Document contains confidential information shall notify the other disputing 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 disputing 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 disputing party, or the proposed redactions have been agreed or resolved in the manner provided below at paragraph 12.
12. Disputes related to a disputing party's designation of Confidential Information may be submitted to the Tribunal for determination, pursuant to the following procedure:
 - a. If a disputing party opposes any redaction that the other disputing party proposes, it shall notify the other proposing party within fifteen days of receiving the redacted document in question, providing its reasons for objecting.
 - b. If the disputing 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. Until the Tribunal has ruled on the disputed redactions, the redacted information shall be treated as confidential.

- d. 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 within five days 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. With respect to the Award, the parties agree that the Tribunal shall only become *functus officio* after the confidentiality objections, if any, have been resolved.
14. 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 Section 3 of Procedural Order No. 1, with their claims being paid from the case fund administered by ICSID for this proceeding pursuant to the ICSID Administrative and Financial Regulations.

IV. REPOSITORY OF PUBLISHED INFORMATION

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 the Repository;
 - b. The Repository 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 IIII above shall continue to be made available to the public on the ICSID website.

For and on behalf of the Tribunal,

[Signed]

Mr. Eduardo Zuleta Jaramillo
President of the Tribunal
Date: January 27, 2023

ANNEX A: TRANSPARENCY TABLE

Claimants/Respondent [Party seeking protection against publication]	
Identification of document and parts sought to be protected (document, paragraph, page)	[use one sheet per document/category of documents]
Reasons for requesting redaction	
Reply by opposing party	
Decision of the Tribunal	