

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Enerflex US Holdings Inc. and Exterran Energy Solutions, L.P.

Claimants

v.

United Mexican States

Respondent

(ICSID Case No. ARB/23/22)

PROCEDURAL ORDER NO. 2
On Transparency and Confidentiality

Members of the Tribunal

Ms. Dyalá Jiménez Figueres, President of the Tribunal
Prof. Dr. Silvina S. González Napolitano, Arbitrator
Prof. Dr. Stephan W. Schill, Arbitrator

Secretary of the Tribunal

Ms. Elisa Méndez Bräutigam

Assistant of the Tribunal

Ms. Karima Sauma

1 February 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 28 December 2023, the Tribunal circulated a draft of this procedural order to the parties.
4. On 29 January 2024, the first session was held. During the first session, the parties and the Tribunal discussed the parties’ comments on the draft Procedural Orders Nos. 1 and 2.
5. This Procedural Order No. 2 (also called “**Order**”) contains the parties’ agreements and the Tribunal’s decisions concerning the transparency regime governing this proceeding.

II. SCOPE

6. This Order shall apply to the following documents (the “**Covered Documents**”):
 - a. any decisions, orders, and the Award issued by the Tribunal;
 - b. 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

8. Confidential information is information that is protected because:
 - a. it is confidential business information;
 - b. it is information that is privileged or otherwise protected from disclosure under the Party's domestic law;
 - c. it is information which the Party must withhold pursuant to the relevant arbitral rules, as applied;
 - d. it is protected by the relevant applicable law or applicable rules;
 - e. it is protected in accordance with the orders and decisions of the Tribunal;
 - f. it is protected by agreement of the parties;
 - g. public disclosure would impede law enforcement;
 - h. because a State party to the dispute considers that public disclosure would be contrary to its essential security interests;
 - i. because public disclosure would aggravate the dispute between the parties; or
 - j. because public disclosure would undermine the integrity of the arbitral process.
9. A party claiming that a Covered Document contains confidential information shall notify the other party and ICSID within 15 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 30 days thereafter. The parties will seek to reach an agreement about the information that must be redacted from the Covered Document before it is published.
10. A redacted version for publication purposes (as agreed by the parties, or if disputed, as the case may be, in accordance with the instructions of the Tribunal) of the Covered Document shall be provided by the parties to the Secretary of the Tribunal, within 90 days from its filing or issuance.

Procedural Order No. 2

11. After this period, in the absence of a declaration of confidentiality by either party or provision of a redacted version to the Secretary of the Tribunal that has been agreed or resolved in the manner provided below, it will be understood that the information in the Covered Document is of a public nature and can be published.
12. Neither the parties nor the Tribunal may make publicly available information that either party has properly designated as confidential, subject to the dispute resolution procedure established in paragraph 13 of this Order.
13. 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 submitted by the other party, 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 such 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 a "Transparency Table" in the form attached as **Annex A** to this Order, both in word and .pdf format.
 - c. If the Tribunal determines that the information was not properly designated, the party that 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.
14. 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.
15. 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, and their claims will be paid from the case fund administered by ICSID for this proceeding pursuant to ICSID Administrative and Financial Regulations.

16. Notwithstanding any other provision in this Order, the Respondent Party may make such disclosure of documents or information pursuant to Articles 1127 and 1129 of the NAFTA. Upon disclosing the notice of claim and pleadings under Article 1127, the Respondent Party shall deliver Non-Disputing NAFTA Parties a copy of the Confidentiality Order, and pursuant to Article 1129 of the NAFTA, Non-Disputing NAFTA Parties shall treat all information received from the Respondent as if they were a Disputing Party, particularly with respect to protection of confidential information. For that purpose, upon receiving submissions from Non-Disputing NAFTA Parties, the Tribunal will inform Non-Disputing NAFTA Parties that their submissions will be subject to the terms of this Order.

IV. PUBLICATION OF COVERED DOCUMENTS

17. 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.
18. 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 III above shall continue to be made available to the public on the ICSID website.

On behalf of the Tribunal,

[signed]

Ms. Dyalá Jiménez Figueres
President of the Tribunal
Date: 1 February 2024

ANNEX A
TRANSPARENCY SCHEDULE

[insert party]	Request [1]
Information sought to be protected from disclosure	
Basis for seeking protection	
Comments	
Reply by opposing party	
Decision by the Tribunal	