

**IN THE MATTER OF AN ARBITRATION UNDER THE NORTH AMERICAN FREE
TRADE AGREEMENT**

-and-

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW (1976)**

-between-

ODYSSEY MARINE EXPLORATION, INC. (USA)

(the “Claimant”)

and

THE UNITED MEXICAN STATES

(the “Respondent”)

ICSID Case No. UNCT/20/1

**PROCEDURAL ORDER NO. 2
ON CONFIDENTIALITY**

Members of the Tribunal

Mr. Felipe Bulnes Serrano, Presiding Arbitrator
Dr. Stanimir Alexandrov, Arbitrator
Prof. Philippe Sands, Arbitrator

Secretary of the Tribunal

Ms. Anna Toubiana, Legal Counsel, ICSID

23 November 2020

I. Procedural Background

Pursuant to Section 26.2 of Procedural Order No. 1, the parties consented to the publication on ICSID's website of certain documents:

[s]ubject to the procedures for the protection of confidential information (i.e., confidential business information, information which is privileged or otherwise protected from disclosure under domestic law, or information which must be withheld pursuant to the applicable arbitral rules) that shall be established in a subsequent Procedural Order by the Tribunal after consultation with the parties.

In light of the above, the Tribunal invited the parties to confer with each other and propose a joint draft Procedural Order on Confidentiality.

On 17 November 2020, the parties submitted their joint proposal on the Confidentiality Order.

II. Order

The Tribunal issues the following Confidentiality Order:

1. In accordance with Section 26.2 of Procedural Order No. 1, this Confidentiality Order shall apply to the following documents that the ICSID Secretariat will publish on the Centre's website. These include:
 - 1.1. Any orders, decisions, interim or partial awards, as well as the final award, issued by the Tribunal;
 - 1.2. The following pleadings (but not the supporting witness statements, expert reports, exhibits or legal authorities, which shall not be published): (i) Claimant's Memorial; (ii) Respondent's Counter-Memorial; (iii) Claimant's Reply; (iv) Respondent's Rejoinder;
 - 1.3. Any written submissions by other NAFTA Parties; and
 - 1.4. Any written submissions by third persons (*amicus curiae*) that have been admitted by the Tribunal.
2. This Order governs issues relating to the disclosure of information to the public and is without prejudice to the right of the disputing parties to object to the production of documents on grounds of confidentiality.

3. Confidential information, as defined in Section 4 of this Order shall not be made available to the public.
4. Confidential information comprises, without limitation:
 - 4.1. Confidential business information, which includes, but is not limited to: confidential business communications, trade secrets, confidential research, competitively sensitive technical, marketing, financial, or sales information, business plans, customer and supplier information, information the disclosure of which could interfere with contractual or other negotiations of the disputing party to which it relates, or any other information that, if disclosed, could cause business injury;
 - 4.2. Information that is protected against being made available to the public under the NAFTA, including information that the Respondent may withhold in accordance with Article 2102 (Essential Security) and Article 2105 (Disclosure of Information);
 - 4.3. Information that is protected against being made available to the public, in the case of information of the Respondent, under the law of the Respondent, and in the case of other information, under any law or rules determined by the Tribunal to be applicable to the disclosure of such information;
 - 4.4. Information that is privileged;
 - 4.5. Information that is protected from disclosure by a legal obligation such as a non-disclosure agreement (or similar agreements preventing disclosure or protecting confidentiality) or confidentiality order entered by other courts (for example, protective orders);
 - 4.6. Information the disclosure of which might affect the willingness of witnesses to give evidence; or
 - 4.7. Information the disclosure of which would impede law enforcement.
5. If a disputing party wishes to declare certain information contained in a pleading to be confidential, it shall provide its proposed redactions in a redacted copy of the pleading and a list of the paragraph and page numbers as set out in Annex A to this order (the “Transparency Schedule”) in the manner provided in Section 9 below. The ICSID Secretariat shall not publish any pleading on its website until the initial 22 business-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 in Section 9.
6. The disputing party seeking redactions shall clearly identify the document containing such

- information with the notation “*Confidential*” or “*Contains Confidential Information*,” and shall take equivalent measures with respect to information contained in other material produced in electronic and similar media.
7. Confidential information shall not be disclosed to the public except in accordance with the terms of this Order or with the prior written consent of the disputing party that claimed confidentiality with respect to the information.
 8. Neither the disputing parties nor the Tribunal may make publicly available information that either disputing party has properly designated as confidential, subject to the dispute resolution procedure established in Section 9 of this Order.
 - 8.1. For greater certainty, the Government of the United Mexican States shall be entitled to share confidential information with federal, state and municipal authorities only to the extent necessary to defend this claim and on a need to know basis. Confidential information cannot be disclosed to federal, state and municipal authorities that are not directly involved in this dispute. Mexico will notify any federal, state or municipal authorities receiving confidential information of the terms of this Confidentiality Order. A federal, state or municipal authority receiving confidential information shall treat this information as if it were a disputing party under this Order.
 - 8.2. Pursuant to Articles 1127, 1128 and 1129 of the NAFTA, non-disputing NAFTA Parties may attend oral hearings, and have access to confidential versions of transcripts, written submissions and exhibits, including witness statements and expert reports. Non-disputing NAFTA Parties shall be made aware of this Confidentiality Order and pursuant to Article 1129 of the NAFTA, shall treat all information received from the Respondent as if they were a Disputing Party, notably in respect of protection of confidential information.
 - 8.3. Each party shall have the obligation of notifying all persons who receive access to confidential material, including consultants and witnesses, of the obligations under this Order. The obligations created by this Order shall survive the termination of these proceedings. The Tribunal and the Centre shall maintain such material in conditions that ensure the protection of confidential information.
 9. Disputes related to a disputing party’s designation of confidential information may be submitted to the Tribunal for determination, pursuant to the following procedure:
 - 9.1. A disputing party filing a document (the “filing party”) that it claims to contain confidential information shall submit an unredacted as well as a redacted version of

that document. The redacted version of the document purporting to contain confidential information along with the Annex A Transparency Schedule identifying the redacted paragraphs shall be submitted no later than 15 business days after the submission of the unredacted document.

- 9.2. If the other party (the “opposing party”) does not object to the proposed redactions and does not itself request any redactions within 7 business days of the filing of the redacted version of the document, the redacted document shall be made public.
 - 9.3. Within 7 business days of the filing of the redacted document, the opposing party may object to the redactions proposed by the filing party, using the Transparency Schedule provided by the filing party, and/or itself propose redactions to the original or redacted document in a new Transparency Schedule.
 - 9.4. If the opposing party has proposed redactions to the document, the filing party shall have 7 business days to object to such redactions using the Transparency Schedule provided by the opposing party. The parties shall submit the Transparency Schedules in Word and PDF formats.
 - 9.5. Where either party has objected to proposed redactions pursuant to this Section 9 procedure, the other party shall have 7 business days to respond to such objections using the Transparency Schedule. The parties shall submit the Transparency Schedules in Word and PDF formats.
 - 9.6. The Tribunal will issue its determination on disputed redactions promptly after receiving the parties’ Transparency Schedules. The Tribunal’s determination will be included in the Transparency Schedules. Until the Tribunal rules on the disputed redactions, the redacted information shall be treated as confidential.
 - 9.7. For any pleading whose date of submission or issuance pre-dates this Order, the time limits established in paragraph 9.1 shall run from the date of issuance of this Order.
10. If the Tribunal issues an order, decision or award containing information that either disputing party considers to be confidential, then the proposing party shall inform the other disputing party that it wishes to redact certain confidential information from the order, decision or award and the procedure for redacting confidential information in pleadings and resolving related disputes shall apply.
- 10.1. The Tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication or other disclosure of information where such publication would jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses,

lawyers acting for parties or members of the Tribunal, or in comparably exceptional circumstances.

- 10.2. No disputing party shall file any confidential material covered by this Order in any Court without first bringing this Order to the attention of the Court and seeking directions concerning the filing of such material in a manner that protects its confidentiality. A disputing party shall notify the other disputing party and any affected parties prior to requesting such direction from the Court.

[Signed]

Mr. Felipe Bulnes Serrano
Presiding Arbitrator
Date: 23 November 2020

Annex A
Transparency Schedule

No.	
Identification of redacted passages (Document, paragraph, page)	
Objections to the request for redaction	
Responses to the objections to the request for redaction	
Decision of the Tribunal	