

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

LUPAKA GOLD CORP.
Claimant

v.

REPUBLIC OF PERU
Respondent

(ICSID Case No. ARB/20/46)

PROCEDURAL ORDER No. 2
Transparency/Confidentiality

Members of the Tribunal

Prof. John R. Crook, President of the Tribunal
Mr. Jonathan D. Schiller, Arbitrator
Dr. Gavan Griffith QC, Arbitrator

Secretary of the Tribunal

Ms. Luisa Fernanda Torres

20 July 2021

I. INTRODUCTION

1. Pursuant to paragraph 24.3 of Procedural Order No. 1 dated 16 April 2021 (“**PO1**”), and in accordance with Article 835.2 of the Free Trade Agreement between the Government of Canada and the Republic of Peru signed on 29 May 2008 and in force since 1 August 2009 (the “**FTA**”), this Procedural Order No. 2 (“**PO2**”), along with the relevant provisions of PO1 and the FTA, will govern the transparency regime applicable to the present arbitration, as well as the designation and use of Confidential Information.

II. PROCEDURAL BACKGROUND

2. Paragraph 24.3 of PO1 invited the Parties to provide a draft procedural order concerning (i) the designation and protection of confidential information and (ii) the preparation of redacted copies of documents for disclosure under Article 835 of the FTA for the Tribunal’s consideration, within 28 days of the issuance of PO1.
3. On 14 May 2021, the Parties sent a draft of this Procedural Order to the Tribunal, and following further consultations with the Parties the Tribunal now issues this order in final form.

III. DEFINITIONS

4. For the purposes of this Procedural Order:
 - a. “**Disputing Party**” or “**Party**” means either Lupaka Gold Corp. or the Government of the Republic of Peru.¹
 - b. “**Non-Disputing Party**” means the Government of Canada.
 - c. “**Applicant**” means any person or entity that is not a Disputing Party or a Non-Disputing Party that applies to file a written submission with the Tribunal pursuant to Article 836 of the FTA and satisfies the Tribunal of the requirements of Article 836.4-5 of the FTA.
 - d. “**Confidential Information**” means:
 - (i) business confidential information;²

¹ In this arbitration proceeding, the State signatories of the FTA (Canada and Peru) are referred to as “FTA Party” or the “FTA Parties,” for clarity. (The Tribunal is mindful that the FTA refers to the States signatories to the FTA as “Party.”)

² For the purposes of this Procedural Order, the designation of information on the grounds that it is “business confidential information”, as referred to in the definition of “confidential information” in Article 847 of the FTA, shall include information

- (ii) information protected from disclosure under the applicable domestic law of the Disputing Party or the Non-Disputing Party;
- (iii) information that is privileged or otherwise protected from disclosure;
- (iv) information of special political or institutional sensitivity;
- (v) information that, pursuant to Article 2202 of the FTA, the Respondent deems to be contrary to its essential security interests;
- (vi) information that, pursuant to Article 2204 of the FTA, the Respondent deems would impede law enforcement or would be contrary to its law protecting deliberative and policy making processes of the executive branch of government at the cabinet level, personal privacy or the financial affairs and accounts of individual customers of financial institutions; and
- (vii) information for which there is a genuine concern by witnesses regarding possible reprisals and/or undue pressure, including information which would reveal a witness' identity, in circumstances involving such genuine concern.

e. **“Repository”** shall mean the ICSID Secretariat.

IV. PUBLICATION OF DOCUMENTS (ARTICLE 835 OF THE FTA)

5. Subject to Section VI.A below, documents designated for publication pursuant to the Disputing Parties' agreement reflected in paragraph 24.1 of PO1 – namely, “(i) all pleadings, expert opinions, and witness statements (but not exhibits, legal authorities and annexes) submitted to the Tribunal; and (ii) all Procedural Orders and Decisions issued by the Tribunal” – shall be publicly available, unless the Disputing Parties agree otherwise. Any Applicant will have access only to publicly available information, pursuant to Articles 835 and 836.8 of the FTA.
6. Subject to Section VI.A below, the Repository shall make all documents referred to in paragraph 5 above available to the public, subject to this Order and the Tribunal's instructions, by uploading

that: 1. describes trade secrets; 2. describes financial, commercial, scientific or technical information that is confidential business information, 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; 3. the disclosure of which could result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, the Disputing Party to which it relates; and 4. the disclosure of which could interfere with contractual or other obligations of the Disputing Party to which it relates.

them on the ICSID website in a timely manner, in the form and in the language in which it receives them.

7. Pursuant to paragraph 24.2 of PO1, and in accordance with Article 835.4 of the FTA, “the Award shall be publicly available and will therefore be published by the ICSID Secretariat, subject to the deletion of confidential information.” The procedure for the deletion of Confidential Information from the Award prior to publication is addressed at Section VI.B below .

V. PUBLICITY OF HEARINGS (ARTICLE 835.1 OF THE FTA)

8. The following logistical arrangements will be made to facilitate public access to hearings:
 - a. In the case of an in-person hearing at the seat of the Centre in Washington, DC, the hearing will be broadcast on closed-circuit television in a separate room at the seat of the Centre. An audio-video recording will also be made of hearings. In the event that in-person access to the Centre’s facilities by the public is restricted at the time, or in the event of any hearing held by video-conference in accordance with paragraph 10.2 of PO1, the Tribunal will establish alternative arrangements in relation to public access to such hearing after consultation with the Disputing Parties.
 - b. The Tribunal will discuss with the Disputing Parties at a later stage, whether in order to protect Confidential Information, the broadcast can be technically delayed or whether alternative protocols shall be established;
 - c. At any time during a hearing, a Disputing Party may request, on a reasoned basis and subject to the right of the other Disputing Party to object, that a part of the hearing be held in private, that is, that the broadcast of the hearing be temporarily suspended such that Confidential Information is excluded from the video transmission. A Disputing Party shall inform the Tribunal before raising topics where Confidential Information could reasonably be expected to arise. The Tribunal will then consult the Parties *in camera* and the transcript shall be marked “confidential.” After consultation with the Parties, the Tribunal will decide whether the broadcast of the hearing will be temporarily suspended to prevent public disclosure of the information in question, and whether to mark the relevant portion of the transcript as “confidential.”

- d. The Tribunal may revisit these protocols or establish further protocols for the conduct of the public Hearing and the protection of “Confidential Information” at a later stage, in consultation with the Disputing Parties.
- e. Pursuant to Article 832.2 of the FTA, the Non-Disputing Party (Canada) may attend hearings in person or, if the hearing is held by videoconference in accordance with paragraph 10.2 of PO1, may attend virtually. Physical attendance in the hearing room by third parties will not be permitted.

VI. NON-DISCLOSURE OF CONFIDENTIAL INFORMATION

- 9. Confidential Information, as defined in paragraph 4.d above and identified pursuant to this Section, shall not be made available to any person not involved in this Arbitration. For the avoidance of doubt, unredacted versions of documents containing Confidential Information may be used only in these proceedings and may be disclosed, exclusively in connection with these proceedings, to and among:
 - a. counsel to a Disputing Party;
 - b. officials or employees of the Disputing Parties;
 - c. independent experts or consultants retained or consulted by the Disputing Parties in connection with these proceedings;
 - d. individuals whom a Disputing Party or its counsel have a legitimate interest in communicating with in order to discuss the preparation of that Disputing Party’s pleadings or expert, witness and documentary evidence, to the extent that the provision of the information is reasonably necessary;
 - e. the members of the Tribunal;
 - f. the ICSID Secretariat and persons employed by the ICSID Secretariat, including counsel, secretaries, court reporters, translators and any clerical or administrative personnel; and
 - g. officials of the Non-Disputing Party (Canada).
- 10. All persons receiving material in this proceeding containing Confidential Information shall be bound by this Order to keep such information confidential. Each Disputing Party shall have the obligation of notifying all persons receiving such material of the obligations under this Order.

A. PROCEDURE FOR REDACTION OF CONFIDENTIAL INFORMATION FROM DOCUMENTS OTHER THAN THE AWARD

11. The Disputing Parties shall give notice within 15 days from the filing of a document by a Disputing Party or issuance of a document by the Tribunal, other than the Award, that they seek protection of Confidential Information in that document and object to its disclosure to any person other than those listed at paragraph 9 above, or, if covered by paragraph 5 above, to its publication in whole or in part. Such notice shall (i) specifically identify the document or part(s) thereof sought to be designated as Confidential Information, (ii) be accompanied by the moving Party's proposed redactions, and (iii) explain the reasons why the document or part(s) thereof should be treated as Confidential Information. In the absence of such notice, the Tribunal will authorize the publication of any document mentioned in paragraph 5 above.
12. The other Disputing Party may raise reasoned objections to the requested protection within 15 days of the notice referred to in paragraph 11 above. The notice under paragraph 11 and any objections under paragraph 12 shall be submitted in the form attached as Annex A.
13. In the absence of an objection, the information which is the subject of the notice at paragraph 11 above shall be considered Confidential Information and the Tribunal will authorize the publication of the document by the Repository only with any redactions proposed by the moving Party in the notice. Within 7 days of such authorization, the moving Party shall provide a redacted version of the relevant document(s) for publication. If the entire document is the subject of a notice as per paragraph 11, the Tribunal will not authorize its publication.
14. In the event of an objection, the Tribunal will decide within 10 days of that objection whether the identified information is to be treated as Confidential Information. If the Tribunal decides that the identified information is to be treated as Confidential Information, the moving Party shall provide a redacted version of the document within 7 days of the Tribunal's decision. The Tribunal will thereafter authorize publication of the redacted document by the Repository.
15. If the Tribunal decides that information for which protection is sought is not Confidential Information (and should be made available to the public if covered by paragraph 5 above), the Disputing Party that filed the document shall be permitted to withdraw all or part of the document from the record within 10 days of the Tribunal's decision. In the absence of a withdrawal within the established deadline, the Tribunal will authorize the publication of the unredacted document

pursuant to paragraph 24.1 of PO1. If the entire document in question is withdrawn from the record, it shall not be published pursuant to paragraph 24.1 of PO1. If only part of the document is withdrawn from the record, the withdrawing Disputing Party shall provide a version of the document removing the withdrawn parts, which shall then be published pursuant to paragraph 24.1 of PO1.

B. PROCEDURE FOR REDACTION OF CONFIDENTIAL INFORMATION FROM THE AWARD

16. Following issuance of the Award, the Disputing Parties shall confer with regard to redactions of Confidential Information from the Award, and within 30 days from the date of dispatch of the Award, they shall:
- a. Give joint notice to the ICSID Secretariat that the Disputing Parties jointly seek the redaction of Confidential Information from the Award prior to its publication pursuant to paragraph 24.2 of PO1. The joint notice shall be accompanied by a redacted copy of the Award including the Disputing Parties agreed redactions. The Award as jointly redacted by the Disputing Parties will thereafter be published by the ICSID Secretariat pursuant to paragraph 24.2 of PO1; or
 - b. Give notice to the ICSID Secretariat that the Disputing Parties are in disagreement over proposed redactions of Confidential Information from the Award, summarizing their disagreements in a single table in the form attached as Annex A. The ICSID Secretariat will then communicate the table summarizing the disagreements to the former Members of the Tribunal who will proceed to decide.³ Following the decision by the former Members of the Tribunal, the Disputing Parties shall jointly prepare a redacted copy of the Award reflecting the redactions pursuant to the decision of the former Members of the Tribunal. The Award

³ The Disputing Parties agree that the power to decide on such dispute shall reside in the former Members of the Tribunal, even if such Tribunal is at that time *functus officio*. However, as the proceeding will conclude upon dispatch of the Tribunal's Award, any costs incurred after the dispatch of the Award (e.g., arbitrator fees for time spent addressing disputed confidentiality designations) will not be considered part of the costs of the proceeding. To ensure the payment of any fees incurred by the members of the former Tribunal in connection with disputes over redactions of the Award, the Parties agree that ICSID will maintain the case trust fund open after the proceeding is concluded. The three arbitrators will be able to submit claims for such fees at the same hourly rate and through the same process used during the proceeding, and the claims will be paid from the advance payments made by the Parties. ICSID will close the case trust fund once the arbitrators have submitted their claims for fees relating to the resolution of disputes over redactions of the Award, if any.

so redacted will thereafter be published by the ICSID Secretariat pursuant to paragraph 24.2 of PO1.

17. Absent a notice from the Disputing Parties pursuant to paragraph 16 above within 30 days from the date of the dispatch of the Award, the Award will be published unredacted by the ICSID Secretariat pursuant to paragraph 24.2 of PO1.

VII. REPOSITORY OF PUBLISHED INFORMATION

18. ICSID shall act as Repository of published information.
19. 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 IV above shall continue to be made available to the public on the ICSID website.

For and on behalf of the Tribunal,

_____ [Signed] _____

Prof. John R. Crook
President of the Tribunal
Date: 20 July 2021

Annex A

Claimant/Respondent	
Identification of document and parts sought to be protected	[use one sheet per document/category of documents]
Legal basis for protection	
Reply by opposing party	
Decision	