

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC

v.

United Mexican States

(ICSID Case No. ARB/21/25)

**PROCEDURAL ORDER NO. 2
ON CONFIDENTIALITY**

Members of the Tribunal

Mr. Manuel Conthe Gutiérrez, President of the Tribunal

Prof. Alain Pellet, Arbitrator

Dr. Franz X. Stirnimann Fuentes, Arbitrator

Secretary of the Tribunal

Ms. Anneliese Fleckenstein

August 10, 2022

I. Procedural Background

1. This order deals with the transparency and confidentiality of information in this proceeding (the “Confidentiality Order” or “Order”).
2. Pursuant to Section 23 of Procedural Order No.1 (“PO1”), the parties consented to ICSID’s publication of materials submitted into the record subject to a:

confidentiality order that the Tribunal will issue in consultation with the disputing parties (the “Confidentiality Order”). Such Order shall be subject to the redaction process of protected information envisaged in USMCA Article 14.D.8.4.

3. On July 11, 2022, Claimants asked the Tribunal whether it intended to circulate a draft of such order or if the Parties should submit their proposals.
4. On July 14, 2022, the Tribunal invited the parties to confer with each other, and ideally agree on a draft of the Confidentiality Order, to be submitted by July 21, 2022.
5. On July 20, 2022, Respondent informed the Tribunal that the parties had not reached an agreement on the Confidentiality Order. Respondent advised the Tribunal that Claimants had refused to negotiate such an order and Respondent submitted its own draft, which, it explained, was based on similar orders used in previous arbitrations. In response, Claimants explained the fundamental disagreements between the parties on the need for and contents of such an order and attached the communications between the parties which followed the Tribunal’s invitation to arrive at an agreement on the text of the Confidentiality Order.
6. On July 26, 2022, Claimants stated that they “agree[d] to a process consistent with USMCA Article 14.D.10 for designating [confidential] information. Sections 7 to 10 of Mexico’s proposed confidentiality order appear to follow USMCA Article 14.D.10, thus, Claimants are amenable to such a designation process.”

II. The Tribunal's Analysis

7. In the Tribunal's view, the Treaty provisions applicable to this arbitration (e.g. NAFTA Article 1137.4 and Annex 1137.4; FTC Note of Interpretation of 31 July 2001, Section A: Access to Documents; USMCA Article 14.D.8) while seeking the greatest transparency of the proceedings, recognize also the need to protect from public disclosure confidential information filed or made available in the course of the proceedings and, specifically, that documents containing confidential information may be subject to the redaction process envisaged in USMCA Article 14.D.8.4.
8. While those provisions refer mostly to confidential information contained in documents filed during the arbitration, the Tribunal is also cognizant that confidentiality issues may also arise in connection with witnesses' oral statements during the hearing or bilateral exchanges between counsel to the parties.
9. In reconciling the principles of (i) transparency and public disclosure of the proceedings and (ii) protection of confidential information, the Tribunal, consistent with the approach enshrined in the already mentioned Treaty provisions, will consider full transparency and public disclosure as the general principle or default, such that the party seeking the protection of specific confidential information will bear the burden of proving the need for such protection.
10. Finally, the Tribunal sees no need to regulate in this Confidentiality Order neither the respective duties of confidentiality of the Tribunal and ICSID -as ICSID rules already envisage that both the Tribunal and ICSID are subject to strictly confidentiality obligations concerning the arbitration-, nor the possibility for the parties to object on confidentiality grounds to the production of documents -a topic already covered by *The International Bar Association Rules on the Taking of Evidence in International Arbitration* (2020) ("The IBA Rules"), which, as foreseen in paragraph 15.1 of PO1, will guide the Tribunal and the parties regarding document disclosure.

III. Decision

11. In light of the above considerations, the Tribunal decides the following:

A. Scope of this Order

12. This Confidentiality Order governs the disclosure to the public, and use by the parties, of confidential information and materials filed or resulting from this arbitration.

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B. Principle of Public Disclosure

13. Subject to the potential limitations on confidentiality grounds envisaged below, the ICSID Secretariat will publish on the Centre's website, which will serve as the case's repository:
 - a. Any rulings, orders, decisions, and the Award, issued by the Tribunal.
 - b. The following pleadings: (i) Claimants' notice of arbitration, including the notices of intent and their supplements; (ii) Claimants' Statement of Claim; (iii) Respondent's Statement of Defense; (iv) Claimants' Reply; (v) Respondent's Rejoinder; and (vi) pleadings or procedural exchanges between the parties relating to the request for interim measures.
 - c. Any written submissions by non-disputing NAFTA/USMCA Parties (Governments of Canada or the United States of America);
 - d. Any written submission by third parties (*amicus curiae*) that have been admitted by the Tribunal; and
 - e. Any transcripts of hearings of the Tribunal.
14. Pursuant to Section 20.6 of PO1, the Tribunal shall conduct hearings open to the public. In order to do so, ICSID shall broadcast the hearing from the hearing room to a separate room on the premises of the hearing. However, in order to protect potential confidential information which may exceptionally emerge during the hearing, the public broadcast of the hearing will be delayed by 30 minutes, as envisaged below.

C. Exceptions to Public Disclosure on Confidentiality Grounds

Confidential information

15. A party may designate as confidential, and request that it be protected from public disclosure, any information that falls within one of the following categories:
 - (i) Confidential business information, including a) trade secrets; b) financial, commercial, scientific or technical information which is treated consistently in a confidential manner by the disputing party to which it relates, 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; c) information the

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- disclosure of which could result in material financial loss or gain to the disputing party, or of a federal, state or municipal authority or third party to which it relates; or d) information the disclosure of which could interfere with contractual or other negotiations of the disputing party to which it relates;
- (ii) Information that the parties may withhold in accordance with Article 2102 (National Security) and Article 2105 (Disclosure of Information) of the NAFTA, and Article 32.2 (Essential Security) and Article 32.7 (Disclosure of Information) of the USMCA.
 - (iii) Information that is protected against being made available to the public under Mexico's Federal Law on Transparency and Access to Public Information (*Ley Federal de Transparencia y Acceso a la Información Pública*), General Law on Transparency and Access to Public Information (*Ley General de Transparencia y Acceso a la Información Pública*), the Federal Tax Code (*Código Fiscal de la Federación*) or any other relevant law of Mexico.
 - (iv) Information or legal opinions that are privileged under the applicable rules or laws.
 - (v) Information that is protected from disclosure by another legal obligation, 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).
 - (vi) Communications in furtherance of settlement between the disputing parties which either party designates as confidential.
 - (vii) Any other information whose public disclosure would likely produce significant, unjustified harm to the legitimate interests of the party requesting its protection as confidential information.

Procedure to request protection of confidential information

Documents or materials

16. The following procedure shall govern requests by a party to protect confidential information contained in documents or materials filed by any party:
 - (i) A 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 and shall briefly identify the reasons for the redactions in a schedule as

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set out in Annex A to this order (the “Transparency Schedule”).¹ The redacted version of the document purporting to contain confidential information, together with a brief listing of the reasons for the redactions, shall be submitted no later than 10 days after the submission of the unredacted document.

- (ii) The filing party shall clearly identify the document containing such information with the notation “*Confidential*” or “*Confidential Information – Unauthorized Disclosure Prohibited*” or some variation thereof.
- (iii) If the other party (the “opposing party”) does not object to the proposed redactions and does not itself request any redactions within 14 days of the filing of the redacted version of the document, only the redacted version of the document shall be made public.
- (iv) Within 14 days of the filing of the redacted version of the document, the opposing party may object to the redactions proposed by the filing party, using the Transparency Schedule (Annex A) provided by the filing party, and/or itself propose redactions to the document in a new Transparency Schedule.
- (v) If a party (the “non-filing party”) requests redactions to a document filed by the other party, it shall do so no later than 21 days after the submission by the other party of the unredacted document and it shall specifically identify the part (or parts) of the document sought to be designated as confidential. The filing party shall have 14 days to object to such redactions using the Transparency Schedule provided by the opposing party.
- (vi) The Tribunal will issue its determination on disputed redactions promptly after receiving the parties’ Transparency Schedules and include its decision in the Schedules. Until the Tribunal rules on the disputed redactions, the redacted information shall be treated as confidential.
- (vii) If the Tribunal issues a ruling, order, decision or Award containing information that either party claims to be confidential, the requesting party shall inform the other disputing party, no later than 14 days after its issuance, that it wishes to redact certain confidential information from the ruling, order, decision or Award. In such

¹ The parties shall submit the Transparency Schedules in Word and Pdf formats.

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case, the procedure for requests to protect information in pleadings set out in § (i) – (vi) above shall apply.

(viii) All the time limits set out in this paragraph are meant as calendar days. They will start running from the date of submission of documents in their original language. However, for any pleading whose date of submission or issuance pre-dates this Order, the time limits established in § (i), (v) and (vii) above shall run from the date of issuance of this Order.

17. Where the Tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, the filing party shall have 14 calendar days to withdraw all or part of the document from the record of the arbitral proceedings. In case no such withdrawal is made by this deadline, the unredacted document shall be made available to the public.
18. The ICSID Secretariat shall not publish any pleading on its website until the initial period to seek a redaction has expired and no declaration of confidentiality has been made by either party, or the proposed redactions have been agreed or resolved by the Tribunal in the manner provided above.

Hearings

19. Pursuant to Section 20.6 of PO1, if a party intends to use information in a hearing that is designated as protected information, it shall advise the Tribunal. Accordingly, the Tribunal shall make all appropriate arrangements to protect such information from being disclosed, which may include closing the hearing for the duration of the discussion of that information.
20. If, exceptionally, during the course of a hearing a Party requests that a part of the hearing be held in private and that confidential information be excluded from the video transmission, the Tribunal, after seeking the other party's views, will decide on how to proceed.

Bilateral communications between the parties

21. Bilateral exchanges between counsel to the parties during the arbitration (e.g. emails or drafts exchanged when invited by the Tribunal to arrive at an agreement to the text of an order) will not be part of the arbitral file, nor shared unilaterally by any party with the Tribunal except:

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- a) With the explicit agreement of the other party; or
- b) If, exceptionally, the Tribunal requests, or authorizes the communication of, such exchanges.

Access to confidential information

22. Information and materials containing confidential information may be disclosed by the parties only to and among:
- (i) legal counsel to a party (and their supporting staff) whose involvement in the preparation or conduct of these proceedings is reasonably considered by the disputing party to be necessary;
 - (ii) officials or employees of the disputing parties to whom disclosure is reasonably considered by a disputing party to be necessary;
 - (iii) independent experts or consultants retained or consulted by the disputing parties in connection with these proceedings;
 - (iv) witnesses who in good faith are reasonably expected by a disputing party to offer evidence in these proceedings but only to the extent material to their expected testimony; and
 - (v) 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. 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.
23. Pursuant to NAFTA Articles 1127, 1128 and 1129 and USMCA Article 14.D.7.2, non-disputing NAFTA Parties and the USMCA non-disputing Annex Party 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 and the USMCA non-disputing Annex Party shall be made aware of this Confidentiality Order and shall treat all information received from Respondent as if they were a Disputing Party, notably in respect of protection of confidential information.

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24. All persons receiving material in this proceeding containing confidential information shall be bound by this Confidentiality Order, even after the termination of these proceedings. Each disputing party shall have the obligation of notifying all persons receiving such material of the obligations under this Order.

Use by the parties of confidential information

25. Information and materials containing confidential information may be used by the parties only in these proceedings. Specifically, no party shall file any confidential material declared as such under 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.

On behalf of the Tribunal

[Signed]

Mr. Manuel Conthe Gutiérrez
President of the Tribunal

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Annex A
Transparency Schedule

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