

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. 3, PARTIALLY AMENDING PROCEDURAL ORDER NO.2

Members of the Tribunal

Mr. Manuel Conthe Gutiérrez, President of the Tribunal

Dr. Franz X. Stirnimann Fuentes, Arbitrator

Prof. Alain Pellet, Arbitrator

Secretary of the Tribunal

Ms. Anneliese Fleckenstein

Date: October 5, 2022

I. Procedural background

1. On September 13, 2022, the Secretariat informed the Parties that, as instructed by the Tribunal and pursuant to PO2,

“ICSID will proceed to publish on its website the following documents:

1. *Request for arbitration and supporting documents;*
 2. *Mexico’s letter to ICSID dated April 6, 2021;*
 3. *ICSID’s inquiries to Claimants dated April 19, 2021;*
 4. *Claimants’ response to same dated April 30, 2021;*
 5. *Procedural Order No. 1;*
 6. *Procedural Order No. 2; and*
 7. *Claimants’ memorial of June 10, 2022 and supporting documents”.*
2. The following day, September 14, 2022, Respondent averred that there was a mistake in the Secretariat’s message, as the reference to “pleadings” in paragraph 13 of PO2 does not include “supporting documents” (*i.e.* evidentiary documents, legal authorities, expert reports and witness testimonies). It made specifically clear that Respondent did not consent to the publication of such supporting documents and requested that, as foreseen in PO2, those documents not be published.
 3. On September 15, 2022, Claimants argued that they could not understand Respondent’s request, as the Tribunal had already rejected, when drafting PO2, Respondent’s proposal to exclude supporting documents from the transparency rule applicable to pleadings.
 4. On September 16, 2022, the Secretariat informed the Parties that

“The Tribunal has received the parties’ communication on this matter and notes that in its Procedural Order No. 2, the Tribunal agreed that the publication of pleadings includes the publication of their supporting documentation. As such, ICSID will now proceed to their publication”.
 5. On September 23, 2022, the Secretariat informed the Parties that the documents (*i.e.* those mentioned above in paragraph 1, including, thus, supporting documents) were already available on the ICSID website under the Case Materials tab.
 6. On September 26, 2022, Respondent filed another written submission on the matter, summarized below, in defense of its view that supporting documents should not be made public.
 7. At the invitation of the Tribunal, on September 30, 2022, Claimants submitted their response, summarized below, to Respondent’s submission.

II. Respondent's position

8. In its letter of September 26, 2022, Respondent recalls Mexico's full support for the transparency and publicity of investment arbitration, as borne out by its approval of the NAFTA and USMCA Treaties, two treaties at the forefront of the advancement in transparency rules, and by its involvement in ICSID's Working Group III on the reform of the ISDS system. Respondent however argues that transparency always requires the parties' consent and the orderly application of the relevant legal provisions.
9. In Respondent's view, Mexico had never given its consent to the publication of the supporting documents of the parties' pleadings. More specifically, Respondent, following the standard practice in investment arbitration procedures, had expressly excluded the publication of such supporting documents in the draft PO2 that it presented to the Tribunal on July 20, 2022.
10. In Respondent's view, the fact that the Tribunal did not include that reference to supporting documents in the final version of PO2 cannot be interpreted to mean that the Tribunal would have authorized and decided their publication. Otherwise, it would have said so explicitly, which would have prompted Respondent's opposition to such decision.
11. For Respondent, the Tribunal's subsequent decision to have the supporting documents published is at odds with the NAFTA's and USMCA's transparency provisions and with modern rules on transparency as enshrined in ICSID's new arbitration rules.
12. In Respondent's opinion, articles 1137.4 and Annex 1137.4 of NAFTA and article 14.D.8 of USMCA do not set out a general principle of transparency "without limitations". The NAFTA provisions refer only to the publication of awards, without any mention of evidence submitted, let alone witness statements, expert reports and evidentiary documents. Also, article 14.D.8 of USMCA limits transparency in order to protect confidential information. Thus, those Treaty provisions do not enshrine a general principle of maximum transparency, nor the publication of the pleadings' supporting documents.
13. Concerning the interpretation of article 14.D.8.1 (sections a-e), Respondent refers to the recent case of *Carlyle vs. Kingdom of Morocco*, ICSID Case No. ARB/18/29, where the tribunal, when interpreting an identical provision of the bilateral US-Morocco Free Trade Agreement (*i.e.* article 10.20.1) specifically determined the following: (original emphasis)

"...only those documents specially designated in Article 10.20.1 -including the Parties' pleadings and primary submissions, as well as the hearing transcript and tribunal decisions -will be made available to the non-disputing Party and the

public (the Public Documents). All other documents, such as exhibits, witness statements, expert reports, letters between the Parties and to the Arbitral Tribunal, etc. remain outside the Transparency Regime, and thus, confidential”.

14. As an additional argument in support of its view, Respondent, while recognizing that the present arbitration is subject to the 2006 ICSID Arbitration Rules, recalls that article 64 of the new 2022 ICSID Arbitration Rules reads: (Respondent’s emphasis)

Rule 64: Publication of Documents Filed in the Proceeding

(1) With consent of the parties, the Centre shall publish any written submission or supporting document filed by a party in the proceeding, with any redactions agreed to by the parties and jointly notified to the Secretary-General.

(2) Absent consent of the parties pursuant to paragraph (1), a party may refer to the Tribunal a dispute regarding the redaction of a written submission, excluding supporting documents, that it filed in the proceeding. The Tribunal shall decide any disputed redactions and the Centre shall publish the written submission in accordance with the decision of the Tribunal.

(3) In deciding a dispute pursuant to paragraph (2), the Tribunal shall ensure that publication does not disclose any confidential or protected information as defined in Rule 66.

15. Respondent further recalls that Rule 66, on “Confidential or Protected Information”, excludes from public disclosure, *inter alia*, those cases in which

(i) public disclosure would aggravate the dispute between the parties; or

(j) public disclosure would undermine the integrity of the arbitral process.

16. In Respondent’s view, that would be the case if supporting documents of the parties’ pleadings were to be published.

17. Thus, Respondent concludes that the Tribunal should take into consideration the criterion embedded in the new ICSID Rules that “no publication of any supporting material will be published without the consent of both parties”.

18. Finally, Respondent argues that the 10-day period for a Party to redact its own submissions would be clearly insufficient to check for confidentiality in the potentially thousands of pages of witness statements, documentary evidence and expert reports.

19. To conclude, Respondent requests that the Tribunal:

Procedural Order No. 3

1. Take into account Respondent's opposition to the Tribunal's decision to publish on the ICSID website, without Respondent's consent, the pleadings' supporting documents.
2. Clarify whether the Parties could take more than 10 days when asking for redactions of their own submissions.

III. Claimants' position

20. In its response to Respondent's letter of September 30, 2022, Claimants recalls how the final text of PO2 emerged. For Claimants, Mexico chose to propose its own version to the Tribunal without first sharing it with Claimants. The Tribunal reviewed Mexico's proposal and circulated a revision to both parties, asking for comment. One of the Tribunal's revisions was the deletion of Mexico's proposal to exclude from publication attachments to pleadings such as exhibits, witness statements, and legal authorities. Mexico responded with its comments, and the Tribunal finalized and rendered Procedural Order No. 2 on August 10, 2022.
21. Turning to substance, Claimants assert that Mexico has been unable to provide any legal authority based on the text of the NAFTA and the USMCA to support its argument that portions of submissions are exceptions to the principles of full transparency and should be excluded from publication. For Claimants, this is so because there is no applicable treaty language nor any relevant legal authority that supports Mexico's "novel argument" that the main body of a pleading is independent of its attached, supporting exhibits, legal authorities, witness statements, and expert reports which are cited in and incorporated into the pleading.
22. According to Claimants, Mexico now attempts to rely on a procedural order from a tribunal in a U.S.-Morocco investment arbitration which is irrelevant and inapplicable in the present arbitration, and which contains no analysis why a pleading shall not be regarded as entailing its attachments, and thus why those attachments should be hidden from public view. Claimants surmise that the tribunal's interpretation of that free trade agreement was influenced, in part, by a protective order from a U.S. federal court that covered certain evidence being used in the arbitration, a fact which does not exist in the present arbitration.
23. Claimants recall that Mexico confirmed in FTC Note of Interpretation of 31 July 2001 that "nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal."
24. Claimants conclude that Mexico has chosen to reargue a decision that the Tribunal made and then confirmed. They contend that they are incurring unnecessary attorney's fees and costs as a result of Mexico's continued persistence on a more favorable ruling on this issue and ask the Tribunal to treat the resolution of Mexico's latest "objection"

as a second request to amend Procedural Order No. 2 and, hence, that the Tribunal should make its decision subject to publication on ICSID's website under Section 12(a)¹ of Procedural Order No. 2, so that the Non-Disputing NAFTA/USMCA Parties (the Canadian and U.S. governments) and other U.S. investors know about Mexico's efforts to avoid its transparency obligations.

IV. The Tribunal's analysis

25. The Tribunal agrees with Respondent that all confidential information should be protected from disclosure, and that both NAFTA and the USMCA Treaties endorse that principle. Thus, the Tribunal shares Respondent's opinion that articles 1137.4 and Annex 1137.4 of NAFTA and article 14.D.8 of USMCA do not set out a general principle of transparency "without limitations".
26. But, in the Tribunal's view, in so far as, according to the Treaties, any such "confidential information" is to be so "designated", this implies that unless an information is so designated it should not be regarded as "confidential" and, hence, is to be made public.
27. Concerning NAFTA, this understanding is confirmed by the Notes of Interpretation of Certain Chapter 11 Provisions (approved by the NAFTA Free Trade Commission on July 31, 2011): (Tribunal's emphasis)
- A. *Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137 (4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.*
- B. *In the application of the foregoing:*
- i. *In accordance with Article 1120(2), 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, apart from the limited specific exceptions set forth expressly in those rules.*
- ii. *Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:*

¹ Claimants seem to be referring to Article 13 (a) of PO2, which foresees the publication of "any rulings, orders, decisions, and the Award, issued by the Tribunal".

Procedural Order No. 3

a. confidential business information;

b. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and

c. information which the Party must withhold pursuant to the relevant arbitral rules, as applied.

iii. The Parties reaffirm that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.

28. The same approach is followed in Article 14.D.8 of the USMCA, which enshrines the principle that confidential information shall be protected from disclosure, but only to the extent that it is so designated (and such designation is not challenged by the other party and disavowed by the Arbitral Tribunal).
29. This justifies the Tribunal's statement in paragraph 7 of PO2 that the Treaty provisions applicable to this arbitration "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". In practical terms, this means, as stated in paragraph 9 of PO2, that public disclosure should be considered the default rule, "such that the party seeking the protection of specific confidential information will bear the burden of proving the need for such protection".
30. Concerning the treatment of "supporting documents" attached to main pleadings (like expert reports, witness statements or documentary evidence), the Tribunal is of the view that they are an integral part of the documents or memorials to which they are attached and can occasionally be helpful, or even necessary, for the full understanding of the Parties' pleadings. This is precisely the reason why the Tribunal deleted from Respondent's PO2 draft the reference to the exclusion of such supporting documents from disclosure.
31. At the same time, to make sure that the Parties could always ask, in justified cases, for the protection of any genuine confidential information, the Tribunal added to paragraph 15 of PO2 a "catch all" provision not included in Respondent's draft, which reads:

(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.

Procedural Order No. 3

32. Consequently, in view of the scope of the exceptions to public disclosure envisaged in paragraph 15 of PO2, the Tribunal does not see any real risk that information of the type envisaged in sections (i) or (ii) of the new ICSID Rule 66 (*i.e.* which “aggravate the dispute between the parties” or “undermine the integrity of the arbitral process”) will be disclosed under PO2, provided, of course, that the Party or Parties concerned about their public disclosure request, and make a convincing case for, its redaction.
33. The Tribunal has considered the decision referred to in paragraph 107 of Procedural Order No. 5 concerning the designation of protected information made by the tribunal in the case *The Carlyle Group vs. Kingdom of Morocco* (ICSID Case No. ARB/18/29), also referred to by Respondent in its September 26, 2022 letter, a decision which rules on a very specific request for the protection of confidential business information made by Claimants and firmly opposed by Respondent.
34. Irrespective of the difference in context, this Tribunal sees three main reasons why the decision by the tribunal in ICSID Case No. ARB/18/29 is not a decisive precedent for this arbitration.
35. First, even if paragraph 107 of Procedural Order No.5 is part of the Tribunal’s decision and not a pure *obiter dictum*, there is not a single line in the Order, not even in paragraph 79 -which is the paragraph preceding paragraph 107- that would explain the rationale for such determination, which appears in the Order, so to speak, “out of the blue”, maybe as an expedient way for the tribunal to narrow down the scope of the specific disagreement between the parties which it had to decide.
36. Second, paragraphs 107 and 79 conflate “exhibits, witness statements and expert reports” -which are typically part of parties’ pleadings- with “letters between the Parties and to the Arbitral Tribunal, etc.”, the latter being a different category of documents which, in this Tribunal’s opinion, should be considered separately.
37. Finally, there is no evidence that the Kingdom of Morocco and the United States had agreed on a common interpretation of their obligations under Article 10.20.1 of their BIT which enshrined as wide a scope of their transparency obligations as the one accepted by the United States, Canada and Mexico in the already mentioned Notes of Interpretation of Certain Chapter 11 Provisions (approved by the NAFTA Free Trade Commission on July 31, 2011).
38. Finally, the Tribunal is sensitive to Respondent’s view that the sheer potential length of the supporting documents accompanying their main pleadings may make 10 days too short a period for a thorough review of their potential confidentiality aspects even for the Party submitting them. At the same time, the Tribunal recalls that, by hypothesis, the Party requesting the redaction, having produced the documents concerned, will presumably be aware of their confidential nature.

39. Hence, the Tribunal has come to the conclusion that it is reasonable to extend such period from 10 to 14 days, and that this 14-day period applies to sections (i), (iii) and (iv) of paragraph 16 of PO2.
40. Concerning the public disclosure of this Order, the Tribunal observes that it is self-contained and includes a detailed summary of the positions of the Parties concerning the procedural issue at stake. Hence, the Tribunal considers sufficient the publication of this Order and does not see any need for the entire exchanges between the Parties as part of the preparation of this Order to be made public by ICSID.

V. Decision

In light of the foregoing, the Tribunal, after having considered Respondent's disagreement over the Tribunal's decision not to exclude *a priori* the publication of supporting documents, decides:

1. To confirm that supporting documents of the pleadings mentioned in paragraph 13 (a) of PO2 are to be regarded as part of such pleadings and, hence, subject to the principle of public disclosure;
2. To extend from 10 to 14 days the term envisaged in paragraph 16 (i) of PO2, so that its last sentence is replaced by the following wording:

“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 14 days after the submission of the unredacted document”.

3. Not to take at this stage any decision concerning the distribution of costs between the Parties resulting from the preparation of this Order.
4. To instruct the Secretariat to apply to this Order the disclosure rules set out in Procedural Order No.2.

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Procedural Order No. 3

On behalf of the Tribunal

[Signed]

Manuel Conthe Gutiérrez

President of the Tribunal

Date: October 5, 2022