

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Legacy Vulcan, LLC**

**v.**

**United Mexican States**

**(ICSID Case No. ARB/19/1)**

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**PROCEDURAL ORDER NO. 2  
(CONFIDENTIALITY ORDER)**

***Members of the Tribunal***

Prof. Albert Jan van den Berg, President of the Tribunal

Prof. Sergio Puig, Co-Arbitrator

Prof. Guido Santiago Tawil, Co-Arbitrator

***Secretary of the Tribunal***

Ms. Sara Marzal

***Assistant to the Tribunal***

Ms. Emily Hay

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30 July 2020

### **Procedural History**

On 6 November 2019, the Tribunal and the Parties held the First Session of the Tribunal by conference call. The Parties expressed their positions on the issue of publication and confidentiality of documents. On the same date, the Tribunal invited the Parties to consult with each other to reach an agreement on the Confidentiality Order.

On 26 November 2019, the Tribunal issued Procedural Order No. 1, providing in Sections 24.1 and 24.3 that the Tribunal will, after consultation with the Parties, issue a Confidentiality Order to govern matters concerning confidentiality and privacy of the arbitral proceedings, rulings, orders, decisions and the Award.

On the same date, the Tribunal invited the Parties to “agree on the template to be proposed” for the Confidentiality Order.

On 4 March 2020, the Parties notified the Tribunal that they wished to extend all the relevant deadlines and dates in the Procedural Calendar (set out in Annex A to Procedural Order No. 1) by seventy days to explore the potential resolution of the dispute.

On 6 March 2020, the Tribunal approved the Parties’ agreement to extend all relevant deadlines and dates by seventy days.

On 30 June 2020, Claimant submitted the Parties’ agreed revised Procedural Calendar. The Respondent confirmed its agreement on 2 July 2020.

On 2 July 2020, the Tribunal approved the Parties’ agreement and issued a revised Procedural Calendar.

On 20 July 2020, Respondent submitted a joint proposal of the Confidentiality Order in accordance with the Tribunal’s request. The draft submitted reflected the Parties’ joint proposal on all issues covered by the Confidentiality Order except for paragraph 10, on which the Parties were unable to reach an agreement.

On 21 July 2020, Claimant confirmed its agreement with the draft submitted by Respondent and submitted arguments explaining its position on paragraph 10.

On 24 July 2020, the Tribunal proposed to insert certain language in paragraph 8 and invited the Parties to submit any comments they may have on such proposal. The Tribunal also invited Respondent to submit comments in response to Claimant’s observations of 21 July 2020 regarding paragraph 10.

On 28 July 2020, the Parties confirmed their agreement with the Tribunal’s proposal regarding paragraph 8 and Respondent submitted its response regarding paragraph 10.

Based on the Parties’ joint proposal and the subsequent correspondence referred to above, the Tribunal herein issues this Confidentiality Order, resolving those issues in which there was disagreement between the Parties.

**Order**

WHEREAS, the *NAFTA Free Trade Commission Note of Interpretation of certain Chapter 11 Provisions* of July 31, 2001 calls for arbitrations under Chapter 11 of the North American Free Trade Agreement (“NAFTA”) to be transparent to the maximum extent possible.

The Tribunal issues the following Confidentiality Order:

1. This Confidentiality Order shall apply to the following documents (collectively “Covered Documents”):
  - 1.1. Any decisions, procedural orders, and the Award issued by the Tribunal (collectively “Decisions”).
  - 1.2. The following Pleadings (but not, as provided in Section 24.3 of the Procedural Order No. 1, the supporting witness statements, expert reports, exhibits, or legal authorities submitted with any Pleading, which are confidential and are subject to the terms of that provision):
    - 1.2.1. Claimant’s Request for Arbitration;
    - 1.2.2. Claimant’s Memorial;
    - 1.2.3. Respondent’s Counter-Memorial;
    - 1.2.4. Claimant’s Reply;
    - 1.2.5. Respondent’s Rejoinder;
    - 1.2.6. Simultaneous Post-Hearing Submissions (if any);
    - 1.2.7. Simultaneous Reply Post-Hearing Submissions (if any); and
    - 1.2.8. Simultaneous Costs Submissions (collectively “Pleadings”).
  - 1.3. Any written submissions by other NAFTA Parties and any written submissions by third persons (*amicus curiae*) that have been admitted by the Tribunal and that may contain Confidential Information.
2. In accordance with Arbitration Rule 48(5), the Parties consent to the publication of a redacted version of the Award in accordance with the terms of this Confidentiality Order. Neither Party shall publish an unredacted version of any Covered Document, including the Award, without the consent of the other Party.
3. If a Party wishes to declare certain information contained in a Covered Document to be confidential, it shall notify the other Party within fifteen days of the filing or issuance of such Covered Document, as the case may be, that it contains confidential information and

shall provide its redacted version<sup>1</sup> to the other Party within thirty days thereafter. The ICSID Secretariat shall not publish any Covered Document on its website until the initial fifteen-day period has expired and no declaration of confidentiality has been made by either Party, or the proposed redactions have been agreed or resolved in the manner provided below.<sup>2</sup>

4. The Party seeking redactions shall clearly identify the document containing such information with the notation “Confidential” or “Contains Confidential Information” on each page, and shall take equivalent measures with respect to information contained in other material produced in electronic and similar media.
5. Confidential Information shall not be disclosed to the public except in accordance with the terms of this Confidentiality Order or with the prior written consent of the Party that claimed confidentiality with respect to the information.
6. 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 Section 7 of this Confidentiality Order.
7. Disputes related to a Party’s designation of Confidential Information may be submitted to the Tribunal for determination, pursuant to the following procedure:
  - 7.1. If a Party opposes any redactions that the other Party proposes, it shall so notify the other proposing Party within fifteen days of receiving the redacted Pleading in question, providing its reasons for objecting.
  - 7.2. If the Parties cannot agree on the resolution of any dispute within thirty days, either Party may submit the matter to the Tribunal for a decision that the Tribunal shall endeavor to render within thirty days.
  - 7.3. If the Tribunal determines that the information was not properly designated, the proposing Party that has 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.
8. If the Tribunal issues a Decision containing information that either Party considers to be

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<sup>1</sup> For greater certainty, a “redacted version” is any Covered Document that may be disclosed to the public pursuant to this Order and Procedural Order No. 1 that contains Confidential Information that has been redacted by one of the Parties.

<sup>2</sup> The Claimant has declared that its Request for Arbitration and Memorial contain Confidential Information and it will provide a redacted version of the Memorial within thirty days of the entry of this Order.

confidential, then the proposing Party shall inform the other Party that it wishes to redact certain confidential information from the Decision and the procedure for redacting confidential information in Section 7 and resolving related disputes shall apply.<sup>3</sup>

9. “Confidential Information” means any information designated by a Party as confidential pursuant to this Procedural Order. A Party may designate as confidential, and, subject to the terms and procedures of this Confidentiality Order, protect from disclosure to the public any information that may otherwise be released, on any of the following grounds:

9.1. business confidentiality, which includes:

9.1.1. commercial business secrets;

9.1.2. financial, commercial, scientific or technical confidential information from the enterprise that has been consistently treated as confidential information by the Party to whom is related, and includes information on prices, costs, strategic and marketing plans, market share data, accounting or financial records that have not been disclosed to the public;

9.1.3. information 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

9.1.4. information the disclosure of which could interfere with contractual or other negotiations of the disputing Party to which it relates.

9.2. communications exchanged between the Parties in furtherance of settlement discussions;

9.3. business confidentiality relating to a third party; and

9.4. information protected from public disclosure by a legal obligation or legislation, including but not limited to 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)* and the *Federal Tax Code (Código Fiscal de la Federación)*.<sup>4</sup>

10. Notwithstanding any other provision in this Order, the disputing Parties may make such disclosure of documents or information pursuant to Articles 1127 and 1129 of the NAFTA. Non-disputing NAFTA Parties shall be made aware of the Confidentiality Order, and pursuant to Article 1129 of the NAFTA, shall treat all information received from the

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<sup>3</sup> The Parties agree that in the event of a dispute regarding proposed redactions to the Award, 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*.

<sup>4</sup> As provided in Paragraph 12, this provision is without prejudice to the Parties’ right to object to the production of documents as provided in Section 15.10 of Procedural Order No. 1.

Respondent as if they were a disputing Party, particularly in respect of protection of confidential information.

11. For greater certainty, Respondent shall be entitled to share Confidential Information with federal, state and municipal authorities to the extent necessary to defend this claim, provided that any federal, state or municipal authority receiving Confidential Information is provided a copy of this Confidentiality Order and agrees to be bound by the terms thereof. A federal, state or municipal authority receiving confidential information shall treat this information as confidential pursuant to this Order as if it were a disputing Party hereunder.
12. This Confidentiality Order only 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 as provided in Section 15.10 of Procedural Order No. 1.

On behalf of the Tribunal

[Signed]

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Prof. Albert Jan van den Berg  
President of the Tribunal  
Date: 30 July 2020