

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Legacy Vulcan, LLC

v.

United Mexican States

(ICSID Case No. ARB/19/1)

PROCEDURAL ORDER NO. 5

Members of the Tribunal

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

Prof. Sergio Puig, Arbitrator

Prof. Guido Santiago Tawil, Arbitrator

Secretary of the Tribunal

Ms. Sara Marzal

Assistant to the Tribunal

Ms. Emily Hay

3 June 2021

I. INTRODUCTION

1. On 30 July 2020, the Tribunal issued Procedural Order No. 2 (Confidentiality Order) (“**PO 2**”) with respect to confidentiality in this arbitration, based on the Parties’ joint proposal.
2. Following the issuance of PO 2, Claimant proposed certain redactions to the Request for Arbitration and Memorial to Respondent. Respondent objected to a number of Claimant’s proposed redactions. The Parties entered into a series of discussions regarding the proposed redactions.
3. On 14 April 2021, the Tribunal requested an update from the Claimant as to the status of the proposed redactions to its pleadings, and invited the Parties to confirm whether the Centre may proceed to publish on its website Respondent’s Counter-Memorial without any redactions.
4. On 16 April 2021, Claimant advised the Tribunal that the Parties continue to discuss redactions to the pleadings, and for this reason the pleadings should not be published by the Centre at this time. Respondent confirmed its agreement by separate email.
5. On 20 April 2021, the Tribunal referred to Section 7 of PO 2 (the terms of which were proposed and agreed by the Parties) which establishes the procedure to be followed in case of disputes related to a Party’s designation of confidential information. The Tribunal invited the Parties to either agree on the redactions, or submit any outstanding disagreements to the Tribunal for resolution by 5 May 2021.
6. On 5 May 2021, Claimant submitted its proposed redacted versions of the Request for Arbitration, Memorial, Counter-Memorial and Reply and requested that its redactions be maintained for pleadings disclosed to the public.
7. On 12 May 2021, Respondent submitted its response to Claimant’s correspondence of 5 May 2021.
8. On 18 May 2021, Claimant filed its reply comments on the redactions, and on 28 May 2021 Respondent submitted its rejoinder comments.

II. APPLICABLE RULES

9. As reflected in Section 1 of Procedural Order No. 1, these proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of 10 April 2006, except to the extent that they are modified by Section B of NAFTA Chapter Eleven.

10. Section A of the NAFTA Free Trade Commission Note of Interpretation of certain Chapter 11 Provisions of July 31, 2001 provides as follows:

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.

11. Pursuant to Section 3 of PO 2:

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 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.

12. Section 7 of PO 2 contains the procedure for resolving disputed redactions:

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 as 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.*

13. Section 9 of PO 2 defines confidential information as follows:

“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).

14. The Tribunal shall apply the above provisions to determine whether the redactions proposed by Claimant and opposed by Respondent should be upheld.

III. DISPUTED REDACTIONS

15. In this Section, the Tribunal shall decide upon the disputed redactions, which fall into 12 categories and relate to the Request for Arbitration, the Memorial, the Counter-Memorial and the Reply. No redactions have been proposed or opposed in relation to the Rejoinder at this stage, which was filed on 24 May 2021.
16. The Parties have set out their positions with respect to each category of redactions in their correspondence mentioned at Sections 6 to 8 above. This correspondence included an Annex identifying the specific redactions opposed by Respondent in each pleading and the Parties' respective views in relation to each. The Tribunal identifies each category of redactions below as set out in that Annex. The Tribunal notes that in their discussions, the Parties have narrowed down the disputed redactions from those first identified by Respondent, as reflected in the final column of the Annex. As such, the Tribunal's decisions relate only to those redactions in relation to which a dispute remains unresolved.
17. The Tribunal further notes that those redactions which have been proposed by Claimant and have not been opposed by Respondent are not in dispute. No decision from the Tribunal is required in relation to those redactions, which may be maintained.
18. In setting forth its decisions on the disputed redactions, the Tribunal has not explicitly addressed every argument raised by the Parties in their correspondence; doing would be unnecessary and indeed repetitive. Instead, the Tribunal addresses only what it views as

the most important reasons for its decisions. Yet, the Tribunal emphasizes that in reaching these decisions, it has considered all of the Parties' arguments and objections.

(i) *Nombre de los testigos y cargos*

19. The Tribunal is satisfied that the names of Claimant's fact and expert witnesses, as well as individuals affiliated with Claimant or its affiliates, are Confidential Information protected from public disclosure by Mexico's legal obligations. The Tribunal rejects Respondent's objection (noting that it did not object to the redaction of expert witness names), and upholds the proposed redactions in this category.

(ii) *Cita al video "The Calica Story", VIMEO*

20. This category is moot, in light of Claimant's agreement that the citation in question is not confidential.

(iii) *Información sobre la Concesión portuaria, la cual está disponible al público*

21. The Tribunal considers that it has not been established that the proposed redactions are Confidential Information under Section 9 of PO 2. Among other things, it has not been demonstrated that the redactions contain confidential financial information. Nor has it been demonstrated that disclosure could interfere with contractual or other negotiations by Claimant. In addition, it has not been established that Claimant may claim "deliberative process privilege" or other protection on Respondent's behalf under applicable law, which protection has not been claimed by Respondent. The Tribunal rejects the redactions proposed by Claimant in this category.

(iv) *Información sobre las Autorizaciones de Impacto Ambiental Estatal y Federal, incluidas las especificaciones técnicas*

22. The Tribunal is satisfied that the redacted portions are Confidential Information under Section 9 of PO 2, since they are technical confidential information from the enterprise within the meaning of Section 9.1.2 thereof. The Tribunal maintains the redactions proposed by Claimant in this category.

(v) *Información del POEL, la cual está disponible al público*

23. The Tribunal is satisfied that the redacted portions are Confidential Information under Section 9 of PO 2, since they are technical confidential information from the enterprise within the meaning of Section 9.1.2 thereof. The Tribunal maintains the redactions proposed by Claimant in this category.

(vi) *Información sobre los predios de Calica, específicamente la dimensión y planos testados.*

24. The Tribunal is satisfied that the redacted portions are Confidential Information under Section 9 of PO 2, since they are technical confidential information from the enterprise within the meaning of Section 9.1.2 thereof. The Tribunal maintains the redactions proposed by Claimant in this category.

(vii) *Información de los MOUs y Acuerdos entre Calica y autoridades mexicanas*

25. The Tribunal considers that it has not been established that the proposed redactions are Confidential Information under Section 9 of PO 2. Among other things, it has not been demonstrated that the redactions contain confidential financial information. Nor has it been demonstrated that disclosure could interfere with contractual or other negotiations by Claimant. In addition, it has not been established that Claimant may claim “deliberative process privilege” or other protection on Respondent’s behalf under applicable law, which protection has not been claimed by Respondent. The Tribunal rejects the redactions proposed by Claimant in this category.

(viii) *Información relacionada con la clausura parcial de “el Corchalito” y renovación de la AIA Estatal y Federal, la cual está disponible al público*

26. The Tribunal considers that it has not been established that the proposed redactions are Confidential Information under Section 9 of PO 2. It has not been established that the information in question is protected from public disclosure under the relevant laws as

required by Section 9.4 of PO 2. The Tribunal rejects the redactions proposed by Claimant in this category.

(ix) *Información relacionada con el cobro de impuestos*

27. The Tribunal is satisfied that the redacted portions are Confidential Information under Section 9 of PO 2, since it includes information the disclosure of which could interfere with contractual or other negotiations of Claimant. The Tribunal maintains the redactions proposed by Claimant in this category.

(x) *Citas que no son confidenciales y son extraídas de expedientes radicados en tribunales mexicanos*

28. The Tribunal considers that it has not been established that the proposed redactions are Confidential Information under Section 9 of PO 2. It has not been established that the information in question is protected from public disclosure under the relevant laws as required by Section 9.4 of PO 2. The Tribunal rejects the redactions proposed by Claimant in this category.

(xi) *Justificación del testado de ciertos hechos planteados en el Memorial*

29. The Tribunal is satisfied that the redacted portions are Confidential Information under Section 9 of PO 2 insofar as they relate to (i) personal data; and (ii) business strategy. The Tribunal maintains those redactions while rejecting all others in this category. Among other things, it has not been established that the remaining proposed redactions are protected from public disclosure under the relevant laws as required by Section 9.4 of PO 2, or that Claimant may claim “deliberative process privilege” or other protection on Respondent’s behalf under applicable law, which protection has not been claimed by Respondent. Nor has it been demonstrated that disclosure could interfere with contractual or other negotiations by Claimant. Aside from those relating to personal data and business strategy, the Tribunal therefore rejects the redactions proposed by Claimant in this category.

(xii) *Estimaciones técnicas y financieras de Legacy Vulcan*

30. The Tribunal is satisfied that the redacted portions are Confidential Information under Section 9 of PO 2, since they are financial and commercial confidential information from the enterprise within the meaning of Section 9.1.2 thereof. The Tribunal maintains the redactions proposed by Claimant in this category.

IV. DECISION

31. On the basis of the above, the Tribunal hereby decides as follows:

- (a) The outstanding disputed redactions as proposed by Claimant in categories **1, 4, 5, 6, 9, and 12** of the Annex are maintained;
- (b) The outstanding disputed redactions as proposed by Claimant in categories **3, 7, 8, and 10** of the Annex are rejected;
- (c) The outstanding disputed redactions as proposed by Claimant in category **11** of the Annex are maintained with respect to (i) personal data and (ii) business strategy, and rejected in all other respects;
- (d) All undisputed redactions are maintained;
- (e) In accordance with Section 7.3 of PO 2 and the above directions, Claimant shall prepare a new redacted version of the Request for Arbitration, Memorial, Counter-Memorial and Reply within 7 days of this Order, i.e., by Thursday, 10 June 2021.

On behalf of the Tribunal,

[Signed]

Prof. Albert Jan van den Berg
President of the Tribunal
Date: 3 June 2021