

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

First Majestic Silver Corp.

v.

United Mexican States

(ICSID Case No. ARB/21/14)

**PROCEDURAL ORDER NO. 3
(Confidentiality Order)**

Members of the Tribunal

Prof. Giorgio Sacerdoti, President of the Tribunal

Prof. Stanimir A. Alexandrov, Arbitrator

Prof. Yves Derains, Arbitrator

Secretary of the Tribunal

Ms. Sara Marzal

6 February 2023

Procedural History

1. Pursuant to Section 23.2 of Procedural Order No. 1, the Tribunal will, after consultation with the parties, issue the Confidentiality Order that will establish the procedures for the protection of confidential, privileged or otherwise protected information.
2. In addition, Section 23.1 of Procedural Order No. 1 acknowledges the application of the FTC Note of Interpretation of 31 July 2001 to the treatment of documents in these proceedings.
3. In light of the above, on 15 December 2022, the Tribunal invited: (i) the Respondent to confirm whether it wishes the Centre to publish on its website the materials referred to in Section A of the Notes of Interpretation of the NAFTA Free Trade Commission; and (ii) both parties to consult with each other and to submit a joint proposal for the Confidentiality Order as soon as possible and no later than 30 December 2022. On 28 December 2022, the parties requested an extension until 13 January 2023. This was approved by the Tribunal on 29 December 2022.
4. On 13 January 2023, the parties submitted a joint proposal of the Confidentiality Order in accordance with the Tribunal's request.
5. On 25 January 2023, the Tribunal proposed to insert certain language in the jointly proposed draft and invited the parties to submit any comments they may have on such proposal by 2 February 2023.
6. On 2 February 2023, the Parties confirmed their agreement with the Tribunal's proposed language.
7. To date, none of the Procedural Orders issued by this Arbitral Tribunal and pleadings submitted by the parties, have been published by ICSID.
8. Based on the parties' joint proposal and the subsequent correspondence referred to above, the Tribunal issues the following Confidentiality Order:

Order

A. Publication of Covered Documents

9. Subject to the applicable limitations on confidentiality grounds envisaged below, the ICSID Secretariat will publish on the Centre's website the following documents (collectively, "Covered Documents"):
 - a. Any procedural orders, decisions, and the Award issued by the Tribunal (collectively, "Decisions");

- b. The following pleadings (but not the supporting witness statements, expert reports, exhibits, or legal authorities which shall not be published on the ICSID website nor be disclosed otherwise to the public, except with the consent of both parties and of the Tribunal): (i) Claimant’s Request for Arbitration, including the Notice of Intent of 13 May 2020; (ii) Claimant’s Memorial; (iii) Respondent’s Counter-Memorial; (iv) Claimant’s Reply; (v) Respondent’s Rejoinder, and (vi) pleadings relating to any request for interim measures (collectively, “Pleadings”);
- c. Any written submissions by Non-Disputing NAFTA Parties (Governments of Canada or the United States of America); and
- d. Any written submission by third persons (*amicus curiae*) that have been admitted by the Tribunal.

B. Exceptions to Public Disclosure on Confidentiality Grounds¹

1. Confidential information

- 10. Confidential information means any information that is not publicly available and is designated by a disputing party as confidential, and requested that it be protected from public disclosure, and is 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 information on pricing and costs, exports and imports, marketing and strategic planning documents, market share data, or accounting or financial records not otherwise disclosed in the public domain; c) information the 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 parties to which it relates.
 - (ii) Information that is protected against being made available to the public under the NAFTA, including information that the Respondent may withhold under Article 2102 (Essential Security) and Article 2105 (Disclosure of Information) of the NAFTA.

¹ The exceptions to public disclosure provided in this Confidentiality Order apply also to public disclosure of the Covered Documents that a party may wish to publish elsewhere.

- (iii) Information that is protected against being made available to the public under Mexico's law, 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)*;
- (iv) Privileged information;
- (v) Information that is protected from disclosure by a legal obligation such as a non-disclosure agreement (or similar agreements preventing disclosure or protecting confidentiality) or confidentiality order entered by other courts (for example, protective orders);
- (vi) Information the disclosure of which might affect the willingness of witnesses to give evidence;
- (vii) Information the disclosure of which would impede law enforcement;
- (viii) Communications treated as confidential in furtherance of settlement or by agreement between the disputing parties; or
- (ix) 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.

2. Procedure to request protection of confidential information

Covered Documents other than the Award

11. The following procedure shall govern requests by a party to protect confidential information contained in Covered Documents other than the Award:
 - (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. The redacted version of the document purporting to contain confidential information shall be submitted no later than 7 (seven) calendar days after the submission of the unredacted document.

- (ii) If the other party (the “opposing party”) does not object to the proposed redactions and does not itself request any redactions within 7 (seven) calendar days of the filing of the redacted version of the document, the redacted version of the document shall be made public.
- (iii) Within 7 (seven) calendar days of the filing of the redacted version of the document, the opposing party may object to the redactions proposed by the filing party, or propose redactions to the document.
- (iv) If the opposing party has proposed redactions to the document, the filing party shall have 7 (seven) calendar days to object to such redactions.
- (v) The Tribunal will issue its determination on disputed redactions promptly after receiving the parties’ proposed redactions. Until the Tribunal rules on the disputed redactions, the information that a party asks to be redacted shall be treated as confidential.
- (vi) The filing party will provide a redacted version of the document updated in accordance with the Tribunal’s ruling within (7) seven calendar days of the Tribunal’s determination and the Centre will thereafter publish this updated version on its website.
- (vii) If the Tribunal issues a Decision (other than the Award) containing information that either disputing party claims to be confidential, the requesting party shall inform the other disputing party that it wishes to redact certain confidential information from the Decision. In such case, the procedure for requests to protect the information in pleadings set out in § (i) – (vi) above shall apply. The same rule shall apply to any written submission 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.
- (viii) For any Pleading or Decision whose date of submission or issuance pre-dates this Order, the time limits established in § (i) – (v) shall run 45 (forty-five) calendar days from the date of issuance of this Confidentiality Order.

The Award

12. Following the issuance of the Award, the disputing parties shall confer with regard to redactions of confidential information from the Award, and within 30 (thirty) calendar days from the date of dispatch of the Award they shall:

- (i) 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. 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 Secretariat; or
 - (ii) 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. The ICSID Secretariat will then communicate the table summarizing the disagreements to the former Members of the Tribunal who will proceed to decide.² 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 so redacted will thereafter be published by the ICSID Secretariat.
13. Any request to protect information made following ¶¶ 11 and 12 shall specifically identify the part (or parts) of the document sought to be designated as confidential.
 14. The ICSID Secretariat shall not publish any Covered Document on its website until the initial period to seek redactions in ¶¶ 11 and 12 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. Conversely, if the time periods indicated in ¶¶ 11 and 12 expire and no declaration of confidentiality has been made by either party, the ICSID Secretariat shall be deemed to be authorized to publish the integral text of the Covered Document.

C. Hearings

15. The hearings shall be closed to the public, except to the extent that Non-Disputing NAFTA Parties may attend oral hearings pursuant to Section 24.1 of Procedural Order No. 1. Equally, the transcripts of the hearing will not be published on the website of ICSID.

² 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.

On behalf of the Tribunal,

A handwritten signature in blue ink that reads "G Sacerdoti". The signature is written in a cursive style with a large initial "G".

Prof. Giorgio Sacerdoti
President of the Tribunal
Date: 6 February 2023