

**IN THE MATTER OF AN ARBITRATION UNDER THE  
NORTH AMERICAN FREE TRADE AGREEMENT**

**- and -**

**THE ARBITRATION RULES OF THE  
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (1976)**

**- between -**

**Alicia Grace; Ampex Retirement Master Trust; Apple Oaks Partners, LLC; Brentwood Associates Private Equity Profit Sharing Plan; Cambria Ventures, LLC; Carlos Williamson-Nasi in his own right and on behalf of Axis Services, Axis Holding, Clue and F. 305952; Carolyn Grace Baring; Diana Grace Beard; Floradale Partners, LLC; Frederick Grace; Frederick J. Warren; Frederick J. Warren IRA; Gary Olson; Genevieve T. Irwin; Genevieve T. Irwin 2002 Trust; Gerald L. Parsky; Gerald L. Parsky IRA; John N. Irwin III; José Antonio Cañedo-White in his own right and on behalf of Axis Services, Axis Holding and F. 305952; Nicholas Grace; Oliver Grace III; ON5 Investments, LLC; Rainbow Fund, L.P.; Robert M. Witt; Robert M. Witt IRA; Vista Pros, LLC; Virginia Grace**

*Claimants*

**v.**

**The United Mexican States**

*Respondent*

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**PROCEDURAL ORDER No. 9  
SECOND DECISION ON THE PARTIES' REQUESTS  
FOR DOCUMENT PRODUCTION**

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*Tribunal*

Prof. Diego P. Fernández Arroyo, President  
Mr. Andrés Jana Linetzky, Arbitrator  
Mr. Gabriel Bottini, Arbitrator

*Secretary of the Tribunal*

Ms. Celeste E. Salinas Quero

**November 11, 2020**

## **I. Procedural Background**

1. On October 9, 2020, the Tribunal issued Procedural Order No. 8 on the Parties' Request for Document Production.
2. On October 20, 2020, Respondent stated having "serious concerns about the Requests 22, 23, 25, 25, 27, 29, 29, 30, 31, 32, 34, 43, 51 and 72"<sup>1</sup>, and requested the Tribunal for guidance on how to comply with the Tribunal's orders regarding such Requests (the "Request").
3. On October 27, 2020, the Tribunal invited the Claimants for comments.
4. On November 2, 2020, upon the Tribunal's invitation, the Claimants submitted their comments on the Respondent's Request.

## **II. The Parties' Positions**

### *a. Respondent*

5. On Requests 25, 27, 28, 31, 34 – The Respondent's team is legally prevented from accessing the five (5) investigative files indicated in each of these Requests. The investigative files involve possible crimes that can only be accessed by the offices conducting the investigation, the Office of the Attorney General, and the parties involved in the investigation.<sup>2</sup>
6. On Requests 29, 30, 32, and 72 - There exists an express prohibition in Mexican criminal law preventing the team of Respondent, Claimants, and the Tribunal from accessing the criminal judicial files referred to in each of these Requests. All criminal investigation documents (complaints, evidence, briefs, etc.) are strictly reserved and confidential.<sup>3</sup>
7. On Request 22 - The concept of "tax secret" ("*secreto fiscal*") legally prevents the Respondent from disclosing information about audits. Furthermore, releasing such information could affect the work of the Tax Administration Service.<sup>4</sup>
8. On Request 23 – The Claimants did not specify which criminal investigations they were referring to or which authorities had the required information. The Respondent

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<sup>1</sup> Respondent's Letter of October 20, 2020, p. 1.

<sup>2</sup> Ibid., para. 1 (Section I).

<sup>3</sup> Ibid.

<sup>4</sup> Ibid., para. 2 (Section I).

is unable to identify what other criminal investigations or prosecutions Oro Negro, its directors, executives, or employees are facing. Such criminal investigations are not directly related to this arbitration. Moreover, this arbitration forum is not the appropriate forum for such investigations, but rather the Mexican judicial system. Claimants have access to files and records of criminal investigations, criminal prosecutions, and audits through persons related to Oro Negro or local lawyers representing Oro Negro, subsidiaries, directors, executives, and employees.<sup>5</sup>

9. Respondent may not order the Office of the Attorney General of the Republic and the Office of the Attorney General of México City, both constitutionally autonomous organs, to produce confidential documentation of ongoing criminal investigations. The production of such documentation would jeopardize the investigations; officials of the Prosecutor's Office and criminal investigations, as well as the team of the Ministry of Economy would incur administrative sanctions.<sup>6</sup>
10. The Respondent requested the Tribunal to confirm whether it analyzed the Respondent's general objections, in particular General Objection No. 5; and requested to guide the Respondent regarding the scope of its decisions and how to comply with them or, failing that, to confirm whether it has ordered the Mexican State to produce documentation and communications related to ongoing criminal investigations, criminal trials, and tax audits in the arbitration, which would be in violation of the Mexican legal system.<sup>7</sup>
11. On Request 43 - Between 2015 and 2017, the Pemex Negotiations Working Group met with several service providers unrelated to the services of Oro Negro. Request 43 is extremely broad and complying with the order would involve months of work and coordination with different administrative areas of Pemex. The Respondent asks the Tribunal to confirm whether it ordered the production of documents related to Pemex's suppliers not involved in the same line of business as Oro Negro.<sup>8</sup>
12. On Request 51 – The Respondent requests the Tribunal to confirm the scope of its decision and whether it actually ordered the production of documents related to all of Pemex's platform providers. The Respondent considers that Request 51 is irrelevant, just as the Tribunal found with respect to Request 48.<sup>9</sup>
13. In summary, the Respondent requests the Tribunal to (i) confirm the scope of requests 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 34, and 72 and provide guidance on how to comply

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<sup>5</sup> Ibid., paras. 3 and 4 (Section I).

<sup>6</sup> Ibid., paras. 5 and 6 (Section I).

<sup>7</sup> Ibid., para. 7 (Section I).

<sup>8</sup> Ibid., para. 1 (Section II).

<sup>9</sup> Ibid., para. 2 (Section II).

with them, or to confirm whether the Tribunal actually ordered the production of documents regarding ongoing criminal investigations, criminal trials, and audits, which would be in violation of the Mexican legal system. And, (ii) provide guidance or clarification on how the Respondent is supposed to comply with the decisions on Requests 43 and 51.<sup>10</sup>

*b. Claimants*

14. Respondent's objections repeat the objections already made to such requests, including General Objection No. 5, attempting to assert confidentiality in an extremely broad manner regarding documentation of investigations involving the Claimants and conducted by Mexican authorities. The Claimants contend that Mexican law does not prevent the Respondent from obtaining and producing documentation regarding investigations involving the Claimants in order to comply with the Tribunal's decisions on those Requests.<sup>11</sup>
15. On Requests 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 34 and 72 - The Respondent in this arbitration is the United Mexican States, not the Ministry of Economy. Mexico has access to the documentation that the Tribunal ordered to be produced and the Respondent cannot invoke internal rules on access to information in order to violate a Tribunal order. According to Claimants, based on Article 113, Section VIII of the National Code of Criminal Procedure, the Claimants, Oro Negro, and/or Quinn Emanuel have the right to access information about investigative proceedings being conducted against them; the confidentiality of information cannot be applied to the detriment of the right to defence.<sup>12</sup>
16. Although the Office of the Attorney General of the Republic and the Office of the Attorney General of México City are autonomous organs, based on Article 68, Section I of the Political Constitution of Mexico, such bodies can collaborate in order to deliver the information ordered by the Tribunal. In addition, Article 74 of the National Code of Criminal Procedures implicitly recognizes that the Public Prosecutor's Office can collaborate with other authorities. Also, the Respondent's authorization to request information about investigations in order to comply with the Tribunal's orders is established in Article 48, Section VIII of the Regulations of the Ministry of Economy.<sup>13</sup>
17. On Request 22 - It is a repetition of the objection already made regarding the Tax Administration Service on the basis of "tax secret" ("*secreto fiscal*"). According to the Claimants, Article 69 of the Fiscal Code of the Federation establishes that the *secreto*

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<sup>10</sup> Respondent's letter of October 20, 2020, paras. 1 and 2, p. 6.

<sup>11</sup> Claimants' Letter of November 2, 2020, p. 1.

<sup>12</sup> *Ibid.*, p. 2.

<sup>13</sup> *Ibid.*, p. 3 and 4.

*fiscal* shall not bar disclosure of relevant information that must be provided to officials in charge of the administration and defense of federal fiscal interests. The Claimants also argue that the classification of information as “reserved” or “confidential” must be done in accordance with Articles 97, 98 and 99 of the Federal Law of Transparency and Access to Public Information, which require a case-by-case analysis of the documents to be produced. Articles 118, 119 and 120 of the same Law establish that, if the requested documents contain certain reserved or confidential information, the governmental authorities must create a public version of the requested documents.<sup>14</sup>

18. On Request 23 – The Claimants argue that the authorities that have the requested information are the Office of the Attorney General and local prosecutors of each of the states. The Respondent could send a letter to each of the public prosecutor’s offices and request the information that the Tribunal has ordered.<sup>15</sup>
19. The allegation of irrelevance of criminal investigations with respect to this arbitration challenges the decision of the Tribunal, which has already determined that such investigations are relevant to this arbitration. The Tribunal’s decisions on the requests are clear, specific, and reasonable. In any event, the criminal investigations are relevant because they directly address the Claimants’ claim that Mexican authorities engaged in baseless criminal proceedings as a retaliatory measure.<sup>16</sup>
20. The claim according to which the Claimants already have access to these files is counterintuitive. The requested documents are in the Respondent’s possession, custody or control, without the Claimants having access to the entirety of the investigative files, although they were able to access very limited and specific documents from some of the records. In any event, Art. 3(3)(c)(i) of the IBA Rules simply requires not to request documents which are “in the possession, custody or control of the requesting Party.”<sup>17</sup>
21. In addition, the fact that the Attorney General’s Office and the Attorney General’s Office of Mexico City are autonomous organs does not prohibit collaboration necessary to comply with the Tribunal’s document production orders, in accordance with Article 68, Section I of the Political Constitution of Mexico. Collaboration, such as the exchange of information and notification of documents, is also recognized in Title XI of the National Code of Criminal Procedures (Article 439).<sup>18</sup>
22. On Request 43 - The claim according to which complying with the Request would require months of work and coordination is speculative and unsubstantiated. The

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<sup>14</sup> Ibid., p. 4.

<sup>15</sup> Ibid., p. 6.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid., p. 6.

<sup>18</sup> Ibid., p. 8.

Respondent does not refer to any authority to justify that the decision can be changed because compliance would be laborious or time-consuming. In addition, Procedural Order No. 8 allows the Parties to agree to another time limit for document production.

23. The claim according to which this Request is overbroad because it involves several of Pemex's providers who were not direct competitors of Oro Negro also misrepresents the purpose of Request 43. The documents of Request 43 are relevant to evaluate the Respondent's claims that Pemex treated all contractors the same way. Moreover, the comparison with Request 48, which the Tribunal denied, is likewise unpersuasive. The Request does not explain why the rejection of Request 48 is relevant to the determination of Request 43.<sup>19</sup>
24. On Request 51 – The Claimants contend that there was nothing erroneous about the decision on Request 51. The Claimants justified the relevance of such request for purposes of Claimants' claim that Mexico colluded with the Bondholders for various purposes and for purposes of Mexico's allegation that Pemex treated all contractors the same way.<sup>20</sup>
25. The Claimants ask that the Tribunal (i) reject the Respondent's challenges to the decisions made by the Tribunal on fourteen of the Claimants' Document Requests; and (ii) order that the Respondent comply with Procedural Order Number 8, including, if necessary, by engaging with the Claimants to negotiate and agree to another time limit.<sup>21</sup>

### **III. Order**

26. Taking into consideration the above summarized positions of the Parties, the Tribunal decides as follows:
  - i. In connection with Requests 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 34 and 72, the Tribunal has carefully considered the Respondent's general objection. These requests have been considered relevant and the Respondent has not submitted any new elements which might justify a review of the decision contained in Procedural Order No. 8. The Tribunal therefore confirms the order to produce the documents in question.
  - ii. With respect to Requests 43 and 51, the Tribunal maintains its decision on the relevance and specificity of the documents included in requests 43 and 51, whose production was ordered with restrictions, allowing it to be made for

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<sup>19</sup> Ibid., p. 9 and 10.

<sup>20</sup> Ibid, p., 11.

<sup>21</sup> Claimants' letter of November 2, 2020, paras. 1 and 2, p. 12.

“Attorneys’ Eyes Only”. The Tribunal sees no contradiction between the decisions on these applications and the refusal to exhibit the documents in Request 48, which was considered insufficiently specific. The Tribunal finds that the ordered production in respect of Requests 43 and 51, linked to documents referred by the Respondent, may shed light on the treatment received by Oro Negro. In any event, in light of the Parties’ claims regarding the time and effort required for the production of the documents referred to in Request 43, the Tribunal urges the Parties to negotiate in good faith the deadline by which such production must be completed.

- iii. For the remaining requests subject of this decision, the Tribunal extends the filing deadline for document production until **Friday, November 20, 2020**, unless otherwise agreed by the Parties.

On behalf of the Tribunal,

[Signed]

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Professor Diego P. Fernández Arroyo  
Presiding Arbitrator  
Date: November 11, 2020  
Seat of arbitration: Toronto, Canada