

**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**

**(the “Claimants”)**

**and**

**THE UNITED MEXICAN STATES**

**(the “Respondent”)**

**ICSID Case No. UNCT/18/4**

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**PROCEDURAL ORDER No. 2  
ON AMICUS CURIAE AND NON-DISPUTING PARTY PARTICIPATION**

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*Tribunal*

Prof. Diego P. Fernández Arroyo (Presiding Arbitrator)  
Mr. Andrés Jana Linetzky  
Mr. Gabriel Bottini

*Secretary of the Tribunal*

Ms. Celeste E. Salinas Quero

**April 5, 2019**

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## **II. Procedural background**

1. On February 14, 2019, the Tribunal circulated draft Procedural Order No. 1, addressing different procedural matters, including draft § 25 on “Confidentiality and Publication” and draft § 26 on “Amicus curiae and non-disputing party participation.”
2. On March 5, 2019, the parties circulated their joint proposal on draft Procedural Order No. 1, stating their respective positions on the matters with respect of which there was disagreement, including their positions on draft § 25 and draft § 26.
3. On March 12, 2019, the preliminary meeting between the Tribunal and the parties was held. The parties stated their positions on the issue of confidentiality and publication of documents. The Tribunal invited the parties to consult with each other with a view to reach agreement on this matter. If the parties failed to reach an agreement, the Tribunal would resolve the matter, including the matter of amici curiae submissions.
4. On March 20, 2019, the Claimants circulated the parties’ agreement on the language for Transparency, Confidentiality and Publication. The Claimants also informed that the parties had agreed to make simultaneous submissions on the matter of amicus curiae submissions by March 27, 2019. The parties’ agreement was incorporated in § 25 of Procedural Order No. 1, issued on March 25, 2019 (“PO 1”). Pursuant to § 27.2 of PO 1, after receiving the parties’ briefs, the Tribunal shall issue an order on amicus curiae and non-disputing party participation.
5. On March 27, 2019, the parties submitted their positions on the matter of amicus curiae submissions. Participation of non-disputing NAFTA parties was undisputed.
6. On March 27, 2019, the Claimants suggested a revision of § 25.4 of PO 1. The Tribunal informed the parties that any revisions of PO 1 would be dealt in the next procedural order.

## **III. The parties’ positions**

### *a) Claimants*

7. The Claimants object to the participation of third parties beyond the participation on questions of interpretation by non-disputing NAFTA parties prescribed in NAFTA Article 1128.<sup>1</sup>

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<sup>1</sup> Claimants’ letter of March 27, 2019, p. 1.

8. Since arbitration is a consent-based system, the Tribunal should not allow third-party intervention unless both parties give their consent thereto. Had the drafters intended to permit the participation of amici curiae in proceedings subject to the 1976 UNCITRAL Arbitration Rules, they would have included an explicit provision to that effect, like the 2013 UNCITRAL Rules do.
9. NAFTA does not contain any express provisions permitting amicus curiae submissions. While the Free Trade Commission (“FTC”) is authorized to issue binding interpretations, the 2003 FTC Statement on non-disputing party participation (“FTC Statement”) is non-binding. Given the lack of consent from the Claimants and the non-binding FTC Statement, the Tribunal must not allow amicus curiae participation in this arbitration.
10. Amicus curiae participation will increase the costs of the proceeding and cause delay, with the parties bearing the expenses of responding to any amicus curiae submissions. In this respect, the Claimants refer to the decisions of the tribunals in *Merrill v. Canada* and *UPS v. Canada*.<sup>2</sup>
11. By allowing participation of amici curiae, the arbitration would weight in favor of the Respondent. Amicus curiae submissions in investor-state proceedings are nearly always encouraged by state parties, bolster the state’s arguments and politicise the dispute. In this regard the Claimants refer to the tribunal’s decision in *Methanex v. United States*. This case does not raise issues of human rights, cultural rights, environmental rights or labor welfare, on which civil society groups are inclined to comment.<sup>3</sup>
12. The Tribunal should consider the risk of further politicizing the dispute. In many cases, amicus curiae submissions are funded by a state or a private company. This added influence would make it more difficult for the Tribunal to effectively assess the Claimants’ and Respondent’s interests in this dispute.
13. The participation by amici curiae puts the confidentiality and privacy of the dispute at risk, since third parties are not bound by the parties’ agreement on Transparency, Confidentiality, and Publication.
14. Considering the above, the Claimants request that:

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<sup>2</sup> Claimants’ letter of March 27, 2019, p. 2, referring to *Merrill and Ring Forestry L.P. v. The Government of Canada*, Opinion with respect to the Effect of NAFTA Article 1116(2) On Merrill and Ring’s Claim April 22, 2008, ¶ 25; *United Parcel Service of America Inc. v. Canada*, Decision of the tribunal on petitions for intervention and participation as amici curiae, 17 October 2011, ¶ 69.

<sup>3</sup> Claimants’ letter of March 27, 2019, p. 2, referring to *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as “amici curie”, UNCITRAL Award, January 15, 2001.

- (i) the Tribunal reject any provision in a Procedural Order allowing the participation of amici curiae in the proceeding, or alternatively,
- (ii) if the Tribunal was inclined to allow the participation of amici curiae, that the Tribunal limit the scope and length of any such submission and consider in any eventual award on costs the attorney fees and costs associated with responding to any such submission.

*b) Respondent*

15. The Respondent argues that there is no reason to limit the possibility of non-disputing parties requesting leave to make a written submission in the arbitration at an appropriate stage in the proceeding, determined by the Tribunal.
16. The Respondent refers to the FTC Statement, whereby (i) no provision of the NAFTA limits a tribunal's discretion to accept written submissions from a person or entity that is not a disputing party; (ii) tribunals shall adopt specific procedures in relation with the non-disputing party submissions; and (iii) nothing shall prejudice the rights of NAFTA Parties under Article 1128 of the NAFTA.
17. The Respondent supports the idea expressed in the FTC Statement that non-disputing party submissions may assist a tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties. The FTC Statement is published on, among others, the website of the Secretaría de Economía.
18. The non-disputing parties must request leave to make a written submission and the Tribunal must consider the reasons invoked by a non-disputing party to be heard in the arbitration. If the Tribunal allowed a non-disputing party to make a submission, both Claimants and Respondent would have an opportunity to comment thereon.
19. There is a public interest in the arbitrations subject to NAFTA and there is an expectation that those arbitrations conform to the FTC statement. Besides, this arbitration has become a matter of public knowledge and interest, as reflected by articles published in the media, which are a direct consequence of statements made by Claimants' counsel.<sup>4</sup>

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<sup>4</sup> In this respect, the Respondent accompanied two media notes.

20. Although the FTC Statement is not an interpretation under NAFTA Article 1131, in its statement “the FTC recommends that Chapter 11 Tribunals adopt the following procedures with respect to such submissions.”
21. The Respondent, as a NAFTA Party, is obliged to follow the provisions issued by the FTC, including the FTC Statement, which was issued after reviewing the recommendations of the Investment Expert Group.<sup>5</sup> Also, the FTC Statement is closely related with the FTC’s Notes of Interpretation of Certain Chapter 11 Provisions on access to documents.
22. Today there is a trend to encourage transparency in investor-state arbitration, reflected, for example, in the FTC Statement and interpretative notes, the 2006 amendments to the ICSID Arbitration Rules and the current proposed amendments to the ICSID Arbitration Rules. In this regard, the Respondent also refers to the decision of the tribunal in *Abaclat v Argentina*.<sup>6</sup>
23. The Tribunal’s proposal in § 26 of draft Procedural Order No. 1 reflects the international practice in investor-state arbitration and NAFTA regime. Besides, Chapter 11 proceedings can benefit from being more open and transparent.
24. The benefits of having third-party participation outweigh any objection that the Claimants may raise. The tribunals have ample power to avoid delays and abuse of process.
25. Considering the above, the Respondent requests that:

the Tribunal maintains the original language proposed in § 26 of draft Procedural Order No. 1 on amicus curiae briefs and non-disputing party participation.

#### **IV. The Tribunal’s analysis**

26. After careful analysis of the parties’ submissions on the possible participation of amicus curiae and non-disputing party in these arbitral proceedings, the Tribunal has concluded that the draft originally proposed to the parties reflects the most suitable approach to deal with this issue.

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<sup>5</sup> Respondent’s letter of March 27, 2019, p. 4, referring to the NAFTA Free Trade Commission Joint Statement “Celebrating NAFTA at Ten,” Montreal, October 7, 2003.

<sup>6</sup> Respondent’s letter of March 27, 2019, p. 5 citing *Abaclat and Others v. Argentine Republic* (ICSID Case No. ARB/07/5) (formerly *Giovanna a Beccara and Others v. The Argentine Republic*), Award, ¶ 72.

27. The Tribunal finds that the silence on the participation of amicus curiae in both the NAFTA and the 1976 UNCITRAL Arbitration Rules is not indicative that such participation would be prohibited. The FTC Statement is clear in this respect.
28. The Tribunal further notes that its finding is in line with a number of arbitrations proceedings, which have been conducted under the same legal framework as the present proceedings, and which have accepted the possibility of amici curiae before<sup>7</sup> and after<sup>8</sup> the FTC Statement has been issued. As a matter of fact, most salient recent developments on this issue evidence the growing concern to ensure transparent and open proceedings.<sup>9</sup>
29. The Tribunal emphasizes that the proposed text –which directly refers to the abovementioned FTC Statement– cannot be construed as providing for an automatic admission of any submissions by amicus curiae. To the contrary, the recommendation contained in the section B of the FTC Statement clarifies that a Tribunal shall carefully review applications to file an amicus curiae submission and only grant leave to the filing if the amicus curiae intervention may provide relevant arguments for its decision.
30. In determining whether to grant such leave to file an amicus curiae submission, the Tribunal shall consider in particular §§ 6-7 of section B of the FTC Statement, as well as the need to avoid any unnecessary costs or delays and possible issues of confidentiality, in order to take all measures at hand to avoid any disruptive effect that such submission might provoke.
31. Taking into account the content of the present Procedural Order, § 25.4 of PO1 remains unaltered.

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<sup>7</sup> *Methanex Co. v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae” of 15 January 2001, para. 31 [NAFTA/1976 UNCITRAL Arbitration Rules]; *United Parcel Service of America INC v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* of 17 October 2001, para. 61 [NAFTA/1976 UNCITRAL Arbitration Rules].

<sup>8</sup> See notably *Glamis Gold Ltd. v. USA*, Award of 8 June 2009, para. 286 [NAFTA/1976 UNCITRAL Arbitration Rules]; *Merrill & Ring Forestry L. P. v. Canada*, Award of 31 March 2010 [NAFTA/1976 UNCITRAL Arbitration Rules], para. 22; *Grand River Enterprises Six Nations Ltd. et Al. v. USA*, Award of 12 January 2011, para 60 [NAFTA/1976 UNCITRAL Arbitration Rules]; *Apotex Inc. v. USA*, Procedural Order No. 2 on the participation of a non-disputing party of 11 October 2011 [NAFTA/1976 UNCITRAL Arbitration Rules].

<sup>9</sup> Within the UNCITRAL framework, the 2014 Rules on Transparency in Treaty-based Investor-State Arbitration explicitly empower arbitral tribunals to accept *amici curiae*. Within ICSID, a 2006 reform of the arbitration rules also confirmed that arbitral tribunals can accept *amici curiae* (see ICSID Arbitration Rule 37(2)). The ICSID Additional Facility Rules have also been amended accordingly (see ICSID Additional Facility Rules 41(3)). Transparency and Non-Disputing party participation are identified as key concern for ongoing IIA Reform (See UNCTAD IIA Issue note 1 2018, p.8).

**V. Order**

32. On the basis of the foregoing considerations, the Tribunal issues Procedural Order No. 2 in the following terms:

**Procedural Order No. 2**  
**Amicus Curiae and Non-Disputing Party Participation**

- 1.1. Non-disputing NAFTA parties may make submissions on questions of NAFTA treaty interpretation pursuant to the procedure and requirements set forth in NAFTA Article 1128 and in accordance with the schedule set out in the Annex A of Procedural Order No. 1.
- 1.2. The disputing parties shall have an opportunity to comment on any submission made by the NAFTA parties under NAFTA Article 1128.
- 1.3. The Tribunal shall follow the NAFTA Free Trade Commission's recommendations on non-disputing party participation issued on 7 October 2003 ("Recommendations") in respect of any application for permission to file a submission in this arbitration by a person or entity that is not a party to the dispute, other than non-disputing NAFTA Parties.
- 1.4. The disputing parties shall have a reasonable opportunity to make submissions on any application for leave to file a submission in this arbitration by an intending amicus and to comment on the submission itself should the Tribunal allow it.
- 1.5. The Tribunal shall issue a ruling on any application for leave to file an Amicus submission, considering the Recommendations of the NAFTA Free Trade Commission on non-disputing party participation.
- 1.6. If an application for permission to file a submission is granted, the Parties shall have an equal opportunity to present their observations on any such submission.

On behalf of the Tribunal

[Signed]

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Prof. Diego P. Fernández Arroyo  
Presiding Arbitrator  
Date: April 5, 2019