

**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

PROCEDURAL ORDER NO. 11

**CLAIMANTS' REQUEST FOR THE PRODUCTION OF DOCUMENTS COVERED BY
THE PROTECTIVE ORDERS**

Tribunal

Prof. Diego P. Fernández Arroyo, President

Mr. Andrés Jana Linetzky, Arbitrator

Mr. Gabriel Bottini, Arbitrator

Secretary of the Tribunal

Ms. Patricia Rodríguez Martín

13 May 2021

I. Procedural Background

1. On 15 April 2021, the Respondent sent a letter to the Tribunal requesting that the Tribunal order the Claimants to expeditiously produce all of the documents obtained under the “Protective Orders” (the “Documents”) in the proceedings under Section 1782 before the courts of the United States of America (the “Respondent’s Request”).
2. On 19 April 2021, the Tribunal invited the Claimants to respond to the Respondent’s Request.
3. On 21 April 2021, the Claimants sent a letter to the Tribunal opposing the production of the requested Documents because the Request was considered unduly burdensome, especially bearing in mind the stage of the proceedings.
4. On 29 April 2021, the Tribunal requested the Parties to elaborate further on their positions. In particular, the Tribunal invited the Respondent to explain in greater detail why it requested the production of the entire set of Documents; and the Claimants to explain why the production of the entire set of Documents would be unduly burdensome.
5. On 6 May 2021, following the Tribunal’s instructions, the Parties filed their respective submissions where they reaffirmed their positions (the “Submissions on Additional Clarifications”).
6. In sum, the Respondent argues as follows: (i) the Protective Orders allow the production of all of the covered Documents; (ii) the production of the Documents is not unduly burdensome for the Claimants, given that the Documents are easily accessible (they were exhibited together in the proceedings before the U.S. courts, and so the Claimants would not have to make an effort in locating them) and they have previously been reviewed for confidentiality by affected third parties in the proceedings before the U.S. courts (and therefore, according to the Respondent, it is not necessary that the Claimants carry out an additional analysis for confidentiality); and (iii) the Claimants have produced a subset of the Documents in these proceedings but not the totality of them. The Respondent argues that access to the entire set of Documents should be allowed, so that the Respondent can examine if the Claimants have withheld documents that are contrary to their interests (i.e., to know if the Claimants have made a disingenuous selection of the Documents).
7. The Claimants object to the Respondent’s Request for the following reasons: (i) the Request is untimely. The Respondent could have requested the production of the Documents during the document production phase of this arbitration and decided not

to. The Claimants also argue that there is no established procedural mechanism for the production of additional documents at this stage of the proceedings and that the Request would require re-litigating issues that have already been decided by the Tribunal; (ii) the Request is unduly burdensome for the Claimants (within the meaning of Rule 9.2 of the IBA Rules) because it would require that the Claimants review all of the Documents for privilege and confidentiality as well as compliance with the Protective Orders (the fact that third parties have reviewed the Documents is irrelevant, given that such review does not take into account the Claimants' interests). This would also have an impact on costs and time; and (iii) the Request is improperly broad, contrary to the requirements of Rule 3 of the IBA Rules, given that it requires the production of the entire set of Documents.

II. The Tribunal's Analysis

8. The Arbitral Tribunal has carefully considered the Parties' submissions, and in particular, their last submissions which were filed following the Tribunal's request for additional clarifications on 29 April 2021. In light of the Claimants' arguments, the Tribunal's decision in respect of the Respondent's Request has been based on three considerations: that the Request is untimely; that the Request is improperly broad, and that the production of the documents would be unduly burdensome.
9. The first consideration refers to the Claimants' argument that the Respondent's Request cannot be admitted because there is no established procedural mechanism for the production of additional documents, beyond those that have already been ordered by the Arbitral Tribunal. In this regard, the Claimants accurately point out that the document production phase has concluded. However, in the Arbitral Tribunal's view, the Claimants' argument is not sufficient in this particular context to deny the Respondent's Request, bearing in mind that the Request relates to documents that have been admitted in particular circumstances, as will be explained below.
10. As a matter of principle, a sensible application of procedural fairness may require allowing the production of certain documents outside the procedural calendar in extraordinary and justified circumstances. In the Arbitral Tribunal's view, it must determine whether such extraordinary circumstances are present in this case.
11. For this reason, the second consideration necessarily relates to the context in which the Claimants were initially authorized to present the referred to documents. The Claimants' request to introduce these documents into the record of this arbitration occurred at the last minute, as the Tribunal has already pointed out. The Arbitral Tribunal cannot set this context aside. Consequently, the Arbitral Tribunal considers that, for purposes of coherence, the Respondent's Request cannot be denied on the basis

of untimeliness; in other words, the Request cannot be denied because it could have been filed earlier.

12. For the sake of clarity, the Arbitral Tribunal is not suggesting that the Respondent's Request should be accepted solely to compensate for the flexibility the Arbitral Tribunal allowed in respect of the Claimants' previous request related to the same documents. What the Tribunal notes is that it is reasonable to consider that the timing of the Respondent's Request responds in large part to the fact that the underlying documents were introduced into the record by the Claimants at a given procedural stage. Nevertheless, this is not enough to allow the production of the documents. The Respondent's Request has to be examined taking into account the argument that it is improperly broad and that accepting the Request would be unduly burdensome for the Claimants.
13. In this respect, the Arbitral Tribunal cannot but accept that the Claimants' submission on additional clarifications confirm that the processing of such a large set of documents would be burdensome, in terms of both costs and time. However, the Arbitral Tribunal does not consider that to be sufficient to deny the Respondent's Request.
14. First, the Claimants' assertion must be weighed against the general framework of this arbitration which has had a long and extensive document production phase. In that context, the requested production does not seem to be excessive or disproportionate. Furthermore, it is reasonable to assume that the documents in question must have been analyzed by the Claimants, given that the Claimants themselves have argued in their previous submissions that the documents are relevant for this arbitration.
15. The Arbitral Tribunal has no doubt that procedural fairness must guarantee that both Parties are treated equally in relation to the referred documents. Said fairness requires, in the Tribunal's view, that the Respondent can have access to the requested documents and can verify their content, considering that the Claimants have selected part of those documents to be filed as evidence in this arbitration proceeding.
16. The Respondent's Request must therefore be accepted. This decision does not prevent the Tribunal from taking into account the practical difficulties the Claimants have pointed out, in terms of deciding the deadline to produce the referred documents. In this sense, the Tribunal orders that the production of the documents must be made, at the latest, on 2 June 2021.

III. Adjustment of the Procedural Calendar

17. In Procedural Order No. 10, the Arbitral Tribunal decided to modify the Procedural Calendar to extend the deadline for the submission of the Reply and Rejoinder, but kept

the dates of the Pre-Hearing Organizational Meeting, which according to ¶ 12 would be held “*not later than August 30, 2021*”.

18. However, given that the Hearing on the Merits has been re-scheduled for 25-29 April 2022,¹ the Arbitral Tribunal considers it would be better to postpone the Pre-Hearing Organizational Meeting to a date closer to the actual Hearing on the Merits. In particular, pursuant to Procedural Order No. 1,² the Pre-Hearing Organizational Meeting will be held at least six weeks before of the Hearing on the Merits. The specific date for the Pre-Hearing Organizational Meeting will be set between the Tribunal and the Parties at a later date. The Procedural Calendar is accordingly adjusted as follows:

Procedural Step	Date
Rejoinder	21 June 2021
1128 Submissions (Non-disputing NAFTA parties)	5 July 2021
Comments to 1128 Submissions (Claimants and Respondent)	19 July 2021
Witness Notifications (Claimants and Respondent)	16 August 2021
Pre-Hearing Organizational Meeting (if necessary) (Tribunal, Claimants, Respondent)	At least six weeks before the Hearing [<i>Date to be determined</i>]
Hearing on the Merits (Tribunal, Claimants, Respondent)	25-29 April 2022

IV. Order

19. For the reasons set out above, the Arbitral Tribunal accepts the Respondent’s Request and orders the Claimants to produce, no later than **2 June 2021**, the entire set of documents obtained under the “Protective Orders” in the proceeding under Section 1782 before the U.S. courts.
20. The Pre-Hearing Organizational Meeting will be held at least six weeks prior to the Hearing on the Merits, at a date to be determined.

¹ See e-mail from the Arbitral Tribunal to the Parties, 31 July 2020, setting a new date for the Hearing on the Merits.

² Procedural Order No. 1, Annex A.

On behalf of the Tribunal,

[Signed]

Professor Diego P. Fernández Arroyo
President of the Tribunal
Date: 13 May 2021
Seat of the arbitration: Toronto, Canada