INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Fotowatio Renewable Ventures S.L.U., FRV Solar Holdings III, S.L.U. and FRV Solar Holdings VI, S.L.U.

v.

United Mexican States

(ICSID Case No. ARB/24/5)

PROCEDURAL ORDER NO. 4

DECISION ON DOCUMENT PRODUCTION

Members of the Tribunal
Sir Christopher Greenwood, GBE, CMG, KC, President of the Tribunal
Mr. Henri C. Alvarez, KC, Arbitrator
Prof. Mónica Pinto, Arbitrator

Secretary of the Tribunal
Ms. Gabriela González Giráldez

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21 October 2025

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I. INTRODUCTION

1. The Claimants claim that the Respondent has breached the terms of the Agreement on the Promotion and Reciprocal protection of Investments between the United Mexican States and the Kingdom of Spain (the "**BIT**").[1]

2. This Procedural Order addresses the requests for document production submitted by the Parties in accordance with the provisions of Procedural Order No. 1 ("**PO1**"), paragraph 15, and the revised schedule attached to Procedural Order No. 3, as modified by the agreement of the Parties dated 22 September 2025.

3. The decisions of the Tribunal regarding the requests of the Claimants are set out in Schedule A to this Order. The decisions of the Tribunal regarding the requests of the Respondent are set out in Schedule B to this Order.

4. Both Parties made general observations regarding the issues of disclosure. These are set out in the following documents:

Claimants' Requests for Document Production

Objections of the United Mexican States to the Claimants' Requests for Document Production ("**Respondent's Objections**"); these objections raise four "General Objections", some of which overlap with matters raised in connection with the Respondent's Requests;

Claimants' Reply to Respondent's Objections to the Claimants' Document Production Requests ("**Claimants' Reply**").

Respondent's Requests for Document Production

Introduction to the Request for Document Production of the United Mexican States ("**Respondent's Requests: Introduction**");

Introduction to Claimants' Response to Respondent's Document Production Requests ("**Claimants' Objections**");

Replies to Objections raised by the Claimants to the Request for Production of Documents from the United Mexican States ("**Respondent's Replies**").

5. To avoid repetition, the Tribunal addresses these general observations in this Order. The following sections of the Order are to be read in conjunction with Schedules A and B.

[1] Exhibit **C-0001**.

6. For the avoidance of doubt, the Tribunal wishes to make clear that nothing in this Order or the accompanying Schedules is to be taken as an expression of view on whether the Tribunal has jurisdiction or whether the claims are admissible or upon the merits of the case. While the Tribunal must necessarily take a position on what *might* be an important issue in the case, it is not expressing any view on what *will* be such an issue, let alone on how any such issue should be resolved.

II. THE APPLICABLE RULES AND THE LEGAL STANDARD

7. Chapter V of the 2022 ICSID Arbitration Rules, entitled "Evidence", includes the following provisions:

> *Rule 36*
>
> *(1) The Tribunal shall determine the admissibility and probative value of the evidence adduced.*
>
> *(2) Each party has the burden of proving the facts relied on to support its claim of defense.*
>
> *(3) The Tribunal may call upon a party to produce documents or other evidence if it deems it necessary at any stage of the proceeding.*

> *Rule 37*
>
> *In deciding a dispute arising out of a party's objection to the other party's request for production of documents, the Tribunal shall consider all relevant circumstances, including:*
>
> *(a) the scope and timeliness of the request;*
>
> *(b) the relevance and materiality of the documents requested;*
>
> *(c) the burden of production; and*
>
> *(d) the basis of the objection.*

8. Paragraph 15.1 of PO1 provides that:

> *The Parties shall follow Articles 3.3, 9.2 and 9.3 of the International Bar Association Rules for the Taking of Evidence in International Arbitration (2020) in making their respective document requests and objections to the other Party's requests, except as otherwise modified in this Procedural Order.*

9. Paragraphs 15.6 and 15.7 of PO1 provide in relevant part:

> *... the Tribunal will, at its discretion, rule upon the production of the documents or categories of documents having regard to the legitimate interests of the Parties and all the relevant circumstances, including applicable privileges and if appropriate the burden of proof.* (Paragraph 15.6)
>
> *The Tribunal may for this purpose refer to the International Bar Association Rules for the Taking of Evidence in International Arbitration (2020) in regard to matters concerning the gathering or taking of evidence, that are not otherwise covered by this Procedural Order or the ICSID Arbitration Rules. ...* (Paragraph 15.7)

10. The International Bar Association Rules for the Taking of Evidence in International Arbitration (2020) (hereinafter the "**IBA Rules**") contain the following provisions of particular relevance:

> *Article 3.3*
>
> *A Request to Produce shall contain:*
>
> *(a) (i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;*
>
> *(b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and*
>
> *(c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents; and*
>
> *(ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.*
>
> *Article 9.2*
>
> *The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons:*

> *(a) a lack of sufficient relevance to the case or materiality to its outcome;*
>
> *(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (see Article 9.4 below);*
>
> *(c) unreasonable burden to produce the requested evidence;*
>
> *(d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;*
>
> *(e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;*
>
> *(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or*
>
> *(g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.*

11. Taking these different provisions together, the following requirements must be applied in determining whether or not to grant a request for the production of documents:

(1) the request must be sufficiently specific to enable the requested Party to identify the documents sought (IBA Rules Article 3.3(a));

(2) the documents requested must be relevant to the case or material to its outcome (ICSID Arbitration Rule 37(b); IBA Rules Articles 3.3(b) and 9.2(a));

(3) production must not be unduly burdensome for the requested Party (ICSID Arbitration Rule 37(c); IBA Rules Article 9.2(c));

(4) production must not infringe considerations of commercial or technical confidentiality, or institutional or political sensitivity that the Arbitral Tribunal determines to be compelling (IBA Rules Article 9.2(e) and (f));

(5) production must not run counter to considerations of procedural economy, proportionality or fairness that the Arbitral Tribunal determines to be compelling (IBA Rules Article 9.2(g));

(6) production should be ordered only where the documents in question are in the possession, custody or control of the requested Party and, subject to the caveat in Article 3.3(c)(i) of the IBA Rules, not in the possession, custody or control of the requesting Party (IBA Rules Article 3.3(c)).

12. In assessing whether these requirements have been met, the Tribunal must have regard to which Party bears the burden of proof on a particular issue (ICSID Arbitration Rule 37(c)).

13. Finally, the Tribunal must protect from disclosure any material which it finds is legally privileged under whatever rules it determines to be applicable (IBA Rules Article 9.4 and general international law).

III. THE SCOPE AND PURPOSE OF PRODUCTION

14. Before turning to the individual requirements set out above, it is necessary to briefly examine the nature and scope of document production in international investment arbitration.

15. The Respondent cites[2] with approval the observation in the Commentary to the IBA Rules that "*[e]xpansive American – or English – style discovery is generally inappropriate in international arbitration. Rather, requests for documents to be produced should be carefully tailored to issues that are relevant and material to the determination of the case*".[3] The Respondent goes on to submit that "*[t]he Claimants bear the burden of proving their claims and cannot use the document production phase to support allegations that were submitted without the necessary documentary evidence to establish a* prima facie *case*".[4]

16. The Tribunal agrees that the document production phase in an international investment arbitration should not be used for the kind of extensive discovery which is a feature of some common law systems. In particular, it should not be employed for a "fishing expedition" by either side in the hope of finding evidence which might assist in formulating or building a claim or defence.

17. Nevertheless, neither the IBA Rules nor the international law principles applied in the case law adopt a rigidly restrictive approach to document production. As the Commentary observes, the IBA Rules adopt a balanced approach; if they do not provide for the broad discovery characteristic of some common law systems, nor are they as restrictive as the approach taken in many civil law jurisdictions.[5] As the Respondent itself says, in the context of its own request for the production of documents, "*[a] generally accepted principle is that '[j]ustice is almost always best served by a*

[2] Respondent's Objections, para. 3.
[3] Commentary to the IBA Rules (2020), p. 8, **CL-0126**. The Respondent actually quotes the Commentary to the 2010 Rules, but the passage is the same in the Commentary to the 2020 Rules which are the ones applicable here.
[4] Respondent's Objections, para. 4.
[5] Commentary, loc. cit. above, pp. 8-9.

degree of transparency, which brings the relevant facts before the arbitrators" and "*the purpose of the document production stage is to enable arbitral tribunals to establish the facts of the case by all appropriate means*".[6]

IV. RELEVANCE, MATERIALITY AND BURDEN OF PROOF

A. THE RESPONDENT'S SUBMISSIONS

18. In its Objections to the Claimants' Requests, the Respondent maintains that the Claimants' requests are for documents which are not relevant to the case or material to its outcome.[7] In this context, the Respondent contends that Articles 3.3(b) and 9.2(b) of the IBA Rules require "*a substantial nexus to be articulated between the category of requested documents and the likely materiality of such documents to the outcome of the case*".[8]

19. The Respondent argues that, since the Claimants do not advance a claim for violation of the provisions on national treatment or most-favoured-nation treatment in the BIT (Article III), requests for documents regarding the treatment of other generators are not relevant to the case or material to its outcome.[9]

20. The Respondent also argues that the requests for documents to test the technical and legal justifications for CENACE's measures should be rejected because "*the Claimants cannot use the document production phase to support allegations made in the Memorial without the documentary support necessary to establish a* prima facie *case*".[10]

21. In connection with the Respondent's own request for document production, the Respondent rejects the Claimants' argument that the relevance or materiality of documents whose production is sought is bound up with whether the requesting party bears the burden of proof on a particular issue.[11] The

[6] Respondent's Reply, para. 8, citing G. Born, *International Commercial Arbitration* (2nd edition, 2014), pp. 2364 and 2366 and Commentary, loc. cit., above, p. 8.
[7] Respondent's Objections, paras. 7-12 (General Objection No. 1).
[8] Respondent's Objections, para. 8, quoting *Glamis Gold v. United States of America*, Decision on Objections to Document Production, 20 July 2005, para. 28.
[9] Respondent's Objections, para. 10.
[10] Respondent's Objections, para. 11.
[11] Respondent's Reply, paras. 5-9.

Respondent emphasises that "*the purpose of the document production stage is 'to give the parties equal access to the facts of the case'*".[12]

B. THE CLAIMANTS' SUBMISSIONS

22. The Claimants submit that the "*substantial nexus*" test advanced by the Respondent is not the correct test of whether documents sought are relevant to the case or material to its outcome.[13] They maintain that "*[a] requested document is 'relevant' if the requesting party 'put forward a credible argument as to the likely or* prima facie *relevance of the requested evidence in support of an important contention in the petitioning party's case'*".[14] Accordingly, "*a document is 'relevant' so long as the requesting party shows that it relates to an issue in dispute for which it has the burden of proof*" and "*it is 'material' if it relates to an issue that would bear upon and affect the outcome of the dispute*".[15] They nevertheless argue that, if the substantial nexus test were applied, their own requests would satisfy it.

23. The Claimants maintain that they have established a *prima facie* case that the Respondent has breached the BIT and each document for which they seek production is relevant and material to establishing that breach.[16] In particular, they contend that they have shown that the Respondent breached the fair and equitable treatment requirement of Article IV of the BIT *inter alia* because its conduct was unreasonable, disproportionate and arbitrary. The Claimants' requests are relevant to that claim.[17] For that reason, they seek production of documents relating to the legal and technical basis for CENACE's actions and whether CENACE acted in an arbitrary and non-transparent manner.[18]

24. The Claimants also maintain that, while they have not brought a claim for breach of Article III of the BIT, they allege that discriminatory treatment by the Respondent of the Potosí plant is part and

[12] Respondent's Reply, para. 9, quoting Derains 'Towards Greater Efficiency in Document Production before Arbitral Tribunals: A Continental Viewpoint', para. 10.
[13] Claimants' Reply, paras. 6-9.
[14] Claimants' Reply, para. 7, quoting O'Malley, *Rules of Evidence in International Arbitration* (2nd ed. 2019), para. 3.69, **CL-0124**.
[15] Claimants' Reply, para. 7, quoting O'Malley, *Rules of Evidence in International Arbitration* (2nd ed. 2019), para. 3.69, **CL-0124**.
[16] Claimants' Reply, para. 10.
[17] Claimants' Reply, para. 11.
[18] Claimants' Reply, paras. 12-13.

parcel of their claim for breach of the fair and equitable treatment requirement in Article IV.1 of the BIT.[19]

25. In the Claimants' Objections to the Respondent's Requests, the Claimants contend that "*[i]t is established practice that, in allowing document production in international arbitration proceedings, arbitrators should seek to promote efficiency by limiting document production to documents that are required to discharge the requesting party's own burden of proof.*"[20] They accuse the Respondent of seeking production of documents with respect to which the Respondent does not bear the burden of proof, in breach of this established practice.[21]

C. THE TRIBUNAL'S ANALYSIS

26. The requirement that document production should be ordered only where the documents in question are believed to be relevant to the case or material to its outcome is well established and the principle is not in dispute between the Parties. They differ, however, with regard to three issues: (a) whether the test is one of "*substantial nexus*", as the Respondent maintains, or a possible bearing on a disputed issue in the case, as the Claimants argue; (b) whether a document is relevant or material only if it relates to a matter on which the requesting party bears the burden of proof; and (c) whether documents which might show that the Respondent treated other power generators differently from the way in which it treated the Claimants are relevant or material given the absence of a claim under Article III of the BIT.

27. On the first of these issues, the Tribunal considers that the test of relevance and materiality can be – and has been – articulated in different ways. It is not clear, however, that those differences reflect any real difference in the nature of the test to be applied. While a requesting party may in some instances know of the existence of a document which has not been disclosed by the other party and be able to demonstrate clearly that that document is relevant to the case or material to its outcome, such instances are likely to be comparatively rare. More often, the requesting party seeks production of a category of documents which it believes to exist and there is then an inevitable degree of speculation about what the effect of those documents – if they exist – might be and thus whether they would be relevant to the case or material to its outcome. That is particularly likely to

[19] Claimants' Reply, para. 14.
[20] Claimants Objections, para. 7.
[21] Claimants Objections, paras. 9-10.

be the case where, as here, a party seeks production of a category of documents to which the other party alone has access.

28. In practice, therefore, it is impossible to lay down a hard and fast rule about the application of the relevance and materiality requirement. The requesting party must be expected to show how the documents whose production it seeks – if they exist – might be relevant to issues already identified in a case or might materially affect the tribunal's ruling on any of those issues.

29. With regard to the burden of proof, ICSID Arbitration Rule 37(c) makes plain that a tribunal must take this into account when deciding on a disputed request for document production. The Tribunal also understands the point made by Professor Derains regarding the importance of whether the requesting party bears the burden of proof for ensuring the efficient conduct of the case. In general, a party seeking production of documents should be required to show that those documents are potentially relevant or material to issues on which that party bears the burden of proof.

30. Nevertheless, it is important to avoid a rigid or mechanistic approach for several reasons. First, the question of which party bears the burden of proof on a particular issue may not always be straightforward. For example, a claimant has the burden of proving that a tribunal has jurisdiction over its claims but a respondent which challenges jurisdiction may bear the burden of proving facts which it alleges in support of its jurisdictional challenge. Similarly, on the merits, each party bears the burden of proving the facts in support of its assertions whether those assertions are made as part of a claim or a defence.

31. Secondly, where a party suspects that the other party has advanced a case on a particular point which is in fact contradicted or weakened by documents to which only the latter party has access, there may be grounds for ordering disclosure of the documents in question.

32. Thirdly, where documents are referred to in the pleadings of a party, or in a report submitted by an expert or a statement submitted by a witness whom that party has called, but have not been produced, there is a strong case for requiring the production of those documents unless that case is outweighed by one of the grounds for refusal considered in paragraph 11, above.

33. With regard to the specific issue raised by the Respondent concerning the treatment of other electricity generators, the Tribunal notes that no claim under Article III of the BIT has been advanced by the Claimants. Nevertheless, their claim for a breach of Article IV on the ground that they were not given fair and equitable treatment is specifically put on the basis, *inter alia,* that other

generators were treated in a more favourable way.[22] In those circumstances, the Tribunal considers that documents concerning the treatment of other electricity generators in comparable circumstances are capable of being relevant to the case and material to its outcome.

V. SPECIFICITY AND BREADTH OF REQUESTS

A. THE RESPONDENT'S SUBMISSIONS

34. The Respondent maintains that several of the Claimants' requests are too broad and insufficiently specific.[23] It cites the decision of the tribunal in *Libananco v. Turkey* that

> *The Tribunal, like any other arbitral tribunal in a similar position, could not allow its process to be used as the cover for a mere fishing expedition launched in the hope of uncovering material to serve as the foundation for an argument.*[24]

35. The Respondent adds:

> *In investor-State arbitration practice, it is not appropriate to request every conceivable type of document in a request and it is insufficient to state that the Claimants believe that such a document exists.*[25]

36. The Respondent maintains that the Claimants' requests are couched in too broad terms and lack sufficiently precise references to enable the Respondent to conduct a proper search.[26]

B. THE CLAIMANTS' SUBMISSIONS

37. The Claimants accept that requests must be sufficiently specific but maintain that:

> *There is no requirement that each Request include search terms, keywords or identify officials and channels of communication. Indeed, the Commentary to the IBA Rules recognizes that, depending on the circumstances, documents "may not be capable of specific identification" but that "requests must be accepted if they are carefully tailored to produce relevant and material documents".*[27]

[22] See, e.g., Memorial, para. 147 et seq.
[23] Respondent's Objections, paras. 13-21 (General Objection No. 2).
[24] *Libananco Holdings Co. Limited v. Turkey*, Decision on Preliminary Issues, 23 June 2008, para. 70, **CL-0117**.
[25] Respondent's Objections, para. 17.
[26] Respondent's Objections, paras.18-20.
[27] Claimants' Reply, para. 17, citing Commentary, loc. cit above, p. 10, **CL-0126**.

C. THE TRIBUNAL'S ANALYSIS

38. The Tribunal agrees that requests for document production must not be too broad and should not constitute a fishing expedition. It accepts, however, that particularly where the requesting party cannot know precisely what documents the other party possesses, it is not necessary for a request to include search terms or keywords or to identify the individual officials or channels of communication. In this case to impose such a requirement would be to place an impossible burden on the Claimants.

39. Nevertheless, requests must, as the Commentary puts it, be "*carefully tailored*" and there may be occasions when it is necessary to reject or limit the scope of a request. It is impossible to say more on this point in the abstract and the Tribunal has dealt with this General Objection by the Respondent in its rulings in Schedule A.

VI. REQUESTS MUST NOT BE UNDULY BURDENSOME

A. THE RESPONDENT'S SUBMISSIONS

40. The Respondent argues that most of the Claimants' requests are such that compliance would impose an undue burden on the Respondent.[28] In this respect, it invokes Article 9.2(c) and (g) of the IBA Rules, contending that the Claimants' requests impose "*an unreasonable burden to produce the requested evidence*" (Article 9.2(c)) and that rejection of their requests is required by compelling considerations of procedural economy, proportionality, fairness and equality (Article 9.2(g)).

41. In support of this argument, the Respondent maintains that "*formulations such as 'Documents created by, for, and/or exchanged with the Respondent' related to a particular topic would force the Respondent to conduct comprehensive searches throughout the public administration and the Legislative and Judicial branches (all at the federal, state, and municipal levels of government), which would result in an excessively onerous burden.*"[29] It adds that the Claimants "*minimize the fact that the government has complex administrative structures composed of various administrative areas in which thousands of civil servants work.*"[30] Finally, it points to what it describes as "*the*

[28] Respondent's Objections, paras. 22-26 (General Objection No. 3).
[29] Respondent's Objections, para. 24.
[30] Respondent's Objections, para. 25.

legal impossibility of the Respondent to compel other government entities to provide documents whose potential custodians have not been identified."[31]

B. THE CLAIMANTS' SUBMISSIONS

42. The Claimants deny that any of their requests would place an undue burden on the Respondent.[32] They maintain that the Respondent's complaint about the breadth of the search that it would have to undertake is specious:

> *Each Request provides all relevant details available to the Claimants for the Respondent to conduct a reasonable and diligent search. The respondent is better placed than the Claimants to know which entities to include in the search and how to conduct targeted searches for Documents responsive to each Request*.[33]

43. The Claimants add that "*most if not all of the Requests relate to Documents prepared by, sent, or received by CENACE, CRE (now CNE), CFE Transmission (now CFE) or the Secretary of Energy*".[34]

44. With regard to the Respondent's argument concerning "*legal impossibility*", the Claimants maintain that the relevant documents should, as a matter of the law of Mexico, have been filed and kept and would thus be in the possession, custody or control of CENACE, CRE (now CNE), CFE Transmission (now CFE) or the Secretary of Energy.[35] The Respondent, it is maintained, has control over all of its agencies and entities.

C. THE TRIBUNAL'S ANALYSIS

45. It is clearly established that a ground for rejection of a document production request is that compliance would place an undue burden on the requested party. However, the test is whether the burden would be "*undue*" or "*excessive*". That calls for a balancing act in which the burden for the requested party has to be assessed against the potential importance of the documents for the case.

46. The Tribunal is conscious of the point made by the Respondent about the size and complexity of a modern governmental structure. Nevertheless, the Tribunal agrees with the Claimants that most of

[31] Respondent's Objections, para. 26.
[32] Claimants' Reply, paras. 19-23.
[33] Claimants' Reply, para. 20.
[34] Claimants' Reply, para. 20.
[35] Claimants' Reply, para. 21. A further argument related to possession, custody and control, which arises in respect of both the Claimants' Requests and the Respondent's Requests, is considered below.

the Claimants' Requests concern documents which would be held by a relatively restricted group of entities. Where the Tribunal considers that a particular request is addressed to too broad a group, it has endeavoured to narrow it.

47. The Tribunal cannot however accept the suggestion that it is "*legally impossible*" for the Respondent to produce documents held by different authorities. The Respondent in this case is the United Mexican States, not any particular department or branch thereof. The obligation to produce documents if the Tribunal upholds a request rests upon the State as a whole and all departments, agencies and other entities whose acts are attributable to the State as a matter of international law form part of the State for those purposes.

VII. CONFIDENTIAL INFORMATION AND INFORMATION OF POLITICAL OR INSTITUTIONAL SENSITIVITY

A. THE RESPONDENTS' SUBMISSIONS

48. The Respondent's fourth General Objection is that some of the documents requested concern matters of political or institutional sensitivity or contain confidential information relating to third parties.[36] In this connection, Mexico relies on Article 9.2(e) and (f) of the IBA Rules.

49. The Respondent contends that the operational safety of the Mexican electricity network (the SEN) is a matter of great sensitivity with important security implications. It argues that the studies into blackouts conducted by CENACE or on its behalf contain important technical information which cannot be disclosed. In this connection, it argues that the issue of political sensitivity has to be considered based on the Mexican regulatory system.[37]

50. With regard to confidential third-party information, the Respondent maintains that it is under a legal obligation, as a matter of Mexican law, to protect the confidentiality of information entrusted in confidence by third parties to Mexican governmental bodies. That information is commercially sensitive in a case brought by a competitor of the third parties involved.[38]

[36] Respondent's Objections, paras. 27-35 (General Objection No. 4).
[37] Respondent's Objections, paras. 30-33.
[38] Respondent's Objections, paras. 34-35.

B. THE CLAIMANTS' SUBMISSIONS

51. The Claimants reject the idea that political or institutional sensitivity or the confidentiality of third party information must be decided by reference to Mexican law; if that were the case, a respondent State could use its own internal law to make its documents immune from any risk of a production order.[39] They cite the decision in *Biwater Gauff* as establishing that proposition.[40]

52. Moreover, they maintain that a blanket assertion of political or institutional sensitivity is not sufficient. A party seeking to withhold production must indicate why particular information is sensitive and why it should not be disclosed even in a confidential arbitration.[41]

53. Finally, the Claimants dispute that Mexican law does indeed impose a requirement of secrecy in respect of the documents sought by the Claimants.[42]

54. With regard to third party confidentiality, the Claimants dispute that there are any compelling reasons for withholding the documents which they request and point to a general duty of disclosure under Mexico's General Transparency Law.[43]

C. THE TRIBUNAL'S ANALYSIS

55. The Tribunal does not accept that issues of political or institutional sensitivity or commercial confidentiality fall to be decided solely by reference to Mexican law. Article 9.2(e) and (f) of the IBA Rules provide that a tribunal may refuse production on one of those grounds if it finds the ground compelling. If the matter had to be decided by the law of the respondent State alone, then that reference to grounds which the tribunal finds compelling would be redundant. The law of the respondent State is undoubtedly relevant, but it is not decisive.

56. Nor does the Tribunal accept that a blanket assertion that disclosure would violate domestic law on political or institutional sensitivity or commercial confidentiality is sufficient. It is for the State which claims that its laws prohibit disclosure to demonstrate that that is the case. The Respondent's Objections do not do that. Indeed, it is the Claimants who have produced the relevant provisions of Mexican law and submitted detailed argument as to their meaning and effect.

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[39] Claimants' Reply, para. 26.
[40] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 2, 24 May 2006, p. 8, **CL-0116**.
[41] Claimants' Reply, para. 26.
[42] Claimants' Reply, paras. 28-38.
[43] Claimants' Reply, paras. 39-41. The General Transparency Law is exhibited as **CL-0129**.

57. The Tribunal concludes that the plea of political or institutional sensitivity is not acceptable as a blanket reason for refusing disclosure of the documents requested by the Claimants in their entirety. Where the Tribunal has directed in Schedule A that a document production request is granted, if the Respondent wishes to argue that part of a particular document must be withheld on grounds of political or institutional sensitivity, it must produce a log meeting the requirements set out in paragraph 67, below.

58. In the case of Claimants' Request No. 5, which concerns the reports by CENACE into past electricity blackouts, these have been expressly cited by the Respondent's expert as the reason for decisions by CENACE which are the subject of these proceedings. The Respondent cannot tender an expert report which relies in part upon documents which it then declines to disclose. Accordingly, as shown in Schedule A, the Tribunal orders the production of the reports in question. If the Respondent wishes to argue that parts of the documents should be redacted, it must produce a log, as set out in the previous paragraph, explaining precisely why those parts should be redacted. The Tribunal wishes to make clear that the Claimants are entitled to see enough of the reports for them to be fully comprehensible and capable of explanation to the Tribunal.

VIII. POSSESSION, CUSTODY OR CONTROL OF DOCUMENTS

A. THE RESPONDENT'S SUBMISSIONS

59. In making its own Requests for document production, the Respondent submits that the Claimants must produce any document which is in their possession, custody or control and that this includes documents in the possession, custody or control of third parties related to the Claimants, "*such as shareholders or business partners, attorneys, representatives, advisors, or any other person related to the Claimants*".[44] In response to the Claimants' argument (summarised below), the Respondent maintains that "*in order for the Claimants to assert that the requested third-party documents are not in their control, 'they must have made 'best efforts' to obtain documents that are in the possession of persons or entities with whom or which the party has a relevant relationship'*".[45]

[44] Respondent's Requests, Introduction, para. 6.
[45] Respondent's Replies, para. 3, citing *Clayton and Bilcon Inc. v. Canada*, PCA Case No. 2009-04, Procedural Order No. 8, 25 November 2008, para. 1(h).

60. As explained in paragraph 41 above, the Respondent submits that it is legally impossible for it to obtain documents from every Mexican State entity.

B. THE CLAIMANTS' SUBMISSIONS

61. The Claimants do not accept that documents held by third parties should be considered within the Claimants' possession, custody or control. However, they undertake to conduct a reasonable search for documents in their possession, custody or control which come from third parties.[46]

62. As explained in paragraph 44, above, the Claimants do not accept the Respondent's argument that the Respondent cannot obtain documents from all Mexican State agencies.

C. THE TRIBUNAL'S ANALYSIS

63. The Tribunal considers that a document is in the possession, custody or control of a party if it is held by a subsidiary, employee, agent or representative of that party, including other companies in the same corporate group. In addition, if a party has a legal right to have a document delivered to it by a third party which itself has possession, custody or control of the document, then that document must be deemed to be within the possession, custody or control of that party.

64. Where a document is held by a third party connected to the Claimants but in respect of which the Claimants have no legal right to have the document delivered to them, they should nevertheless use their best efforts to obtain that document.

65. For the reasons set out at paragraph 47 above, documents in the possession, custody or control of the Respondent include documents in the possession, custody or control of any government department, state or federal, and any public agency or entity whose acts are attributable to the United Mexican States as a matter of international law.

IX. PRIVILEGE

A. THE PARTIES' SUBMISSIONS

66. Both Parties agree that if one of them wishes to assert legal privilege in respect of a document or part thereof, it must submit a privilege log. They differ, however, as to what it should contain. The

[46] Claimants' Objections, para. 5.

Respondent contends that it should identify "*the request in which the document is located, the date of the document, its author or issuer, the recipient and a description of the subject matter or issue*".[47] The Claimants "*disagree that the issue or subject matter of each document is necessary*" and maintain that identifying the Request concerned is sufficient since "*[a]ny additional information risks providing privileged information*".[48] The Respondent replies that the identification of the relevant Request is insufficient and that the "*privilege log must be sufficiently detailed to allow the opposing party (and, where applicable, the Tribunal) to assess the legitimacy of the privilege claim*".[49]

B. THE TRIBUNAL'S ANALYSIS

67. The Tribunal agrees with the Respondent that a privilege log must be sufficiently detailed to enable an assessment of the legitimacy of the privilege claim. Where a Party wishes to claim privilege for a document or a part thereof it must submit a log identifying (i) the document, (ii) the author or issuer, (iii) the recipient, (iv) the date of creation of the document, and (v) a brief description of the issue or subject matter. The last need not disclose privileged information but must give enough details to enable the Tribunal to determine the basis on which privilege is claimed and the legitimacy of that claim.

68. These requirements apply not only to a claim of legal privilege but also to a claim based upon commercial confidentiality, third party confidentiality or political or institutional sensitivity. For convenience, the term "privilege" is used here and in the Schedules to this Order to apply to all of these grounds for resisting production.

69. Privilege applies to information in a document rather than to the document itself. While it may be the case that privilege attaches to all of the contents of a document that will by no means always be the case and the Parties should endeavour, wherever possible, to identify which parts of a document are privileged and resist production only in respect of those parts.

70. Each Party should submit its privilege log **no later than 4 November 2025**. The other Party may submit any comments **no later than 14 November 2025**.

[47] Respondent's Requests, Introduction, para. 10.
[48] Claimants' Objections, para. 11.
[49] Respondent's Replies, para. 4.

X. REQUESTS FOR PRODUCTION OF CORPORATE DOCUMENTS

71. The Respondent seeks production of an extensive list of corporate records which it maintains are relevant to the question whether the Claimants owned or controlled FRV Potosí at the relevant times. The Claimants resist production on the grounds that this is not a matter on which the Respondent bears the burden of proof, that the Requests are too broad and that compliance with them would be unduly burdensome.

72. The Tribunal considers that the Respondent is entitled to see some documents relating to this issue but that the Requests are too broad and it has accordingly narrowed them.

XI. RESPONSIBILITY FOR DELAYS IN THE CONSTRUCTION OF THE POTOSÍ PLANT

73. The Respondent seeks production of a range of documents relating to the responsibility for delays in the construction of the Potosí plant. That has been the subject of an arbitration between FRV Potosí and the contractor. The Claimants resist production on the ground that the fact of the delay was well known to the Respondent and that it is irrelevant to the issues in the present proceeding who was responsible for those delays.

74. The Tribunal agrees with the Claimants on this point and has accordingly rejected the Requests for production.

XII. ORDER

75. For the reasons set out in this Order and in Schedule A, the Respondent is directed to produce to the Claimants **by 4 November 2025** the documents identified in Schedule A.

76. For the reasons set out in this Order and in Schedule B, the Claimants are directed to produce to the Respondent **by 4 November 2025** the documents identified in Schedule B.

On behalf of the Tribunal,

[Signed]

_____
Sir Christopher Greenwood, GBE, CMG, KC
President of the Tribunal
Date: 21 October 2025