

**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 -**

**JOSHUA DEAN NELSON, IN HIS OWN RIGHT AND ON BEHALF OF TELE FÁCIL  
MÉXICO, S.A. DE C.V., AND JORGE LUIS BLANCO**

**(the “Claimants”)**

**and**

**THE UNITED MEXICAN STATES**

**(the “Respondent”)**

**ICSID Case No. UNCT/17/1**

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**PROCEDURAL ORDER NO. 4**

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*Tribunal*

Dr. Eduardo Zuleta (President)  
Mr. V.V. Veeder, QC (Arbitrator)  
Mr. Mariano Gomezperalta Casali (Arbitrator)

*Secretary of the Tribunal*

Ms. Sara Marzal Yetano

**2 January 2018**

**Procedural history**

1. On 28 September 2017, the Tribunal issued Procedural Order No. 3 whereby the Tribunal accepted Claimants' document requests No. 1, 3, 5, 6, 7, 7 Bis, 8, 9, 10, 11, 12 and 17, and asked Respondent to confirm that it had undertaken and will undertake a good faith effort to search for the documents responsive to requests 3, 6, 7, 7 Bis, 9, 10 and 11.
2. On 26 October 2017, Respondent informed the Tribunal that it did a new search diligently and in good faith without finding other documents. Respondent made additional observations regarding Procedural Order No. 3. The Tribunal invited Claimants to file their comments on Respondent's communication.
3. On 1 November 2017, Claimants sent their comments on Respondent's communication of 26 October 2017 stating that Respondent had failed to comply with Procedural Order No. 3. Claimants also indicated that Respondent's officials had intimidated one of Claimants' witness. Claimants also requested a procedural hearing to evaluate Respondent's conduct. In light of these allegations and Claimants' request for a procedural hearing, the Tribunal invited Respondent to provide comments.
4. On 15 November 2017, Respondent denied having failed to comply with Procedural Order No. 3. Respondent also stated that it was not aware of any witness interference and offered to conduct a more thorough investigation should the Tribunal requested it.
5. On 23 November 2017, the Tribunal asked Respondent to provide answers to a list of issues that were still unclear for the Tribunal. On 30 November 2017, Respondent provided such answers.
6. On 6 December 2017, at the Tribunal's request, Claimants submitted their comments on Respondent's answers of 30 November 2017, explaining that Respondent had provided incomplete answers because it did not comment on relevant IFT internal regulations. The Tribunal invited Respondent to comment on these internal regulations and Claimants to submit a brief comment afterwards.
7. In their communication dated 6 December 2017, Claimants also reiterated their request to hold a procedural hearing and stated that they could share more information on the allegations of witness interference through an *in camera* process. On these two issues, the Tribunal also invited Claimants to provide more details and Respondent to comment on Claimants' proposals afterwards.
8. Pursuant to the Tribunal's invitation, the parties submitted their final comments on the above referred issues on 18 and 22 December 2017.

**Considerations and decisions of the Tribunal**

***A. Request for additional information from Respondent regarding the search conducted to find the documents requested by Claimants***

9. A controversy between the parties arose when Claimants alleged that Respondent had failed to comply with Procedural Order No. 3. Both parties have had several opportunities to expand on whether this alleged failure did in fact occur. Nevertheless, before closing this matter, the Tribunal would like to request additional information from Respondent.
10. As stated above, through Procedural Order No. 3, the Tribunal asked Respondent to confirm that it had undertaken and will undertake a good faith effort to search for the documents responsive to Claimants' document requests No. 3, 6, 7, 7 Bis, 9, 10 and 11. In response, Respondent informed the Tribunal that it had made a new search diligently and in good faith but that no other documents had been found. Respondent did not expand on what were the steps undertaken to conduct these searches.
11. Therefore, the Tribunal directs Respondent to inform by **16 January 2018** with respect to Claimants' document requests No. 3, 6, 7, 7 Bis, 9, 10 and 11 (a) which were the steps undertaken to conduct the search; (b) which were the specific offices where searches were conducted and; (c) in which offices the response was that documents were not found because they would have been eliminated.

***B. The procedural hearing and the adverse inferences requested by Claimants***

12. As stated above, Claimants have requested a procedural hearing to "address both Respondent's refusal to disclose documents in violation of Procedural Order No. 3, and the issue of possible witness tampering."<sup>1</sup> The Tribunal's understanding is that the purpose of the hearing would be to answer any remaining question the Tribunal may still have regarding these issues.<sup>2</sup> Claimants have also requested the Tribunal to decide at this point on the application of sections 18.23 (on adverse inference) and 18.24 (on assignment of the costs of the arbitration) of Procedural Order No. 1.
13. The Tribunal considers that it is not necessary to schedule a separate hearing to further discuss these issues. The parties have submitted their positions in several briefs and the Tribunal has the elements to decide and, if need be, any remaining question the Tribunal may have can be addressed in the hearing provided for in section 23 of Procedural Order No. 1.
14. As to the application of sections 18.23 and 18.24, the Tribunal considers that it is premature at this stage of the proceedings. Any decision would be taken in the final

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<sup>1</sup> Claimants' One-Page Response Re Document Production (18 December 2017), p. 1.

<sup>2</sup> Claimants' Two-Page Response Re Document Production (22 December 2017), p. 2.

award, after evaluating all the evidence in the record and having granted the parties the opportunity to comment on any specific adverse inferences that may be requested.

**C. The request for an *in camera* “*ex parte*” proceedings for the alleged interference with a witness**

15. Claimants have alleged that Respondent’s officials have “tampered with one of Claimants’ key witnesses, thus preventing that witness from giving evidence in this proceeding.”<sup>3</sup> Respondent has stated not being aware of any witness interference, has offered its cooperation to investigate and has explained that in order to conduct a more thorough investigation, Claimants would have to reveal the identity of the witness and the public officials involved.<sup>4</sup> Claimants, however, have stated that they will not reveal the identity of the witness to Respondent due to safety concerns and requested an *in camera* hearing “on an *ex parte* basis” to disclose the evidence that the witness could offer and more information regarding his intimidation.<sup>5</sup>
16. Respondent has opposed to the *in camera* proceedings proposed by Claimants.<sup>6</sup> Respondent also noted that Claimants have not provided any information concerning their allegations and that under the circumstances it is impossible to conduct a more thorough investigation or to respond to the allegations.<sup>7</sup>
17. The Tribunal is not persuaded that there is support to order the extreme measure requested by Claimants (an *ex parte* hearing *in camera*). The mere assertion by Claimants that unidentified officials of Respondent have been intimidating a witness is not sufficient for the Tribunal to disrupt the proceedings and conduct a hearing with only one of the parties and a witness, without allowing the participation of Respondent.
18. If and when the circumstances so merit, and after hearing both parties, the Tribunal could take measures to protect the witnesses, including by keeping confidential the identity of the witnesses.

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<sup>3</sup> Claimants’ Views on Respondent’s Response to Procedural Order No. 3 (1 November 2017), p. 1.

<sup>4</sup> 2017.11.15 Respuesta México, p. 6 (stating that “[l]a Demandada no tiene conocimiento de los hechos señalados por los Demandantes” and that “[e]n caso de que el Tribunal Arbitral solicite que la Demandada realice una investigación con mayor profundidad al respecto, los Demandantes deberán revelar la identidad del supuesto potencial testigo a su cargo y de los servidores públicos supuestamente involucrados”).

<sup>5</sup> Claimants’ Response to Respondent’s Refusal to comply with Procedural Order No. 3, p. 2 (6 December 2017); Claimants’ One-Page Response Re Document Production (18 December 2017), p. 1.

<sup>6</sup> 2017.12.17 Respondent’s submission re procedural hearing, p. 1.

<sup>7</sup> 2017.12.17 Respondent’s submission re procedural hearing, p. 1.

**D. Draft of Decree 77**

19. Claimants' document request No. 11 was related to "[a]ny information in the IFT's possession, including memoranda, internal communications, emails, notes, recordings and transcripts of meetings, and any other information, *indicating the IFT's views with respect to* Resolution 381 issued on November 26, 2014, Decree 77 issued on April 8, 2015, and Resolution 127 issued on October 7, 2015."<sup>8</sup>
20. With respect to Claimants' document request No. 11, Respondent produced drafts of Resolutions 381 and 127. No similar documents were produced regarding Decree 77.
21. In its communication of 15 November 2015, Respondent, however, admitted the existence of a draft of Decree 77 that was supposed to be voted during the plenary meeting of the IFT on 13 March 2015 but was later withdrawn and the vote postponed.<sup>9</sup> Nevertheless, Respondent has not produced this document nor explained why it cannot be produced. It merely pointed out that this draft was identical to its final version.<sup>10</sup>
22. The Tribunal considers that a draft of Decree 77 is, in principle, as responsive as the drafts of Resolutions 381 and 127 that were produced. Moreover, all responsive documents must be produced, even if identical.
23. For these reasons, the Tribunal directs Respondent to produce this document and failing that, to explain why it cannot be produced, by **16 January 2018**.

On behalf of the Tribunal,

[ Signed ]

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Dr. Eduardo Zuleta Jaramillo  
Presiding Arbitrator  
2 January 2018

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<sup>8</sup> Procedural Order No. 3, Claimants' documents request, Redfern Schedule, Document Request No. 11.

<sup>9</sup> 2017.11.15. Respuesta México, p. 5.

<sup>10</sup> 2017.11.15. Respuesta México, p. 5 (explaining that "la Unidad de Asuntos Jurídicos recibió comentarios por parte de Comisionados sobre el anteproyecto del Acuerdo 77 . . . fueron valorados por la Unidad de Asuntos Jurídicos, y se estimó que el fondo del asunto no debía ser modificado, por lo que se sometió el proyecto nuevamente **en los términos originalmente planteados. Muestra de ello es que la resolución aprobada por el Pleno . . . es la misma que fue sometida a su consideración por parte de la Secretaría Técnica del Pleno**").