

**IN THE MATTER OF AN ARBITRATION UNDER THE NORTH AMERICAN FREE
TRADE AGREEMENT AND THE UNITED STATES-MEXICO-CANADA
AGREEMENT**

- and -

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

- between -

Coeur Mining, Inc.

(the “Claimant”)

and

United Mexican States

(the “Respondent”)

ICSID Case No. UNCT/22/1

PROCEDURAL ORDER NO. 8

Tribunal

Ms. Sabina Sacco, President

Mr. Pierre Bienvenu, Ad. E.

Prof. Hugo Perezcano Díaz

Secretary of the Tribunal

Ms. Elisa Méndez Bräutigam

29 October 2024

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I. SCOPE OF THIS ORDER

1. This Procedural Order No. 8 (“**PO8**”) addresses the Claimant’s contention that the Respondent has failed to comply with the Tribunal’s document production orders pursuant to Procedural Order No. 5 (“**PO5**”).

II. PROCEDURAL BACKGROUND AND PARTIES’ POSITIONS

2. On 19 June 2024, the Tribunal issued Procedural Order No. 5 (“**PO5**”) on the Claimant’s Final Document Requests (as defined in that Order). In PO5, the Tribunal ordered the Respondent to produce, by 19 July 2024, the following Documents: ¹
 - a. In response to Request No. 1: “Documents exchanged between the Mexican Government Agencies on the one hand, and one or more of the USMCA Parties on the other hand, reflecting the USMCA Parties’ negotiation, understanding, or interpretation of the investment chapter of the USMCA, including Chapter 14 of the USMCA (including previous iterations of that Chapter and its provisions) between 20 January 2017 until 17 April 2024 (date of the Claimant’s Final Document Requests). For the purpose of this Order, Mexican Government Agencies shall mean: the Secretariat of Economy, the Secretariat of Foreign Affairs, and the President’s Office of Mexico.” ²
 - b. In response to Request No. 2: “All internal Documents of the Mexican Government Agencies (as defined in the decision on Request No. 1 above) reflecting Mexico’s negotiation, understanding, or interpretation of the investment chapter of the USMCA, including Chapter 14 of the USMCA (including previous iterations of that Chapter and its provisions) created or exchanged between 20 January 2017 and 17 April 2024 (date of the Claimant’s Final Requests).” ³
3. The Tribunal further directed the Respondent to indicate, as soon as possible and at the latest by 19 July 2024, whether it objected to the production of specific documents based on claims of legal impediment or privilege, technical or commercial confidentiality, or special political or institutional sensitivity.⁴ The Tribunal also invited the Parties to revert to the Tribunal as to the need for additional confidentiality protections that would apply to documents produced under PO5.⁵
4. On 8 July 2024, the Tribunal confirmed that the hearing on jurisdiction would be held on 9-10 October 2024 in Washington, D.C.
5. On 19 July 2024, the Respondent objected to the production of a category of Documents described generically as “responsive documents that relate to the litigation of ISDS

¹ PO5, ¶¶ 41-42.

² Annex A to PO5, p. 12.

³ Annex A to PO5, p. 20.

⁴ PO5, ¶¶ 39 and 44.

⁵ PO5, ¶ 43.

arbitrations”,⁶ as well as to the production of 13 specifically identified and individually described documents, on the basis of attorney-client and/or litigation privilege and/or special political or institutional sensitivity (“**Mexico’s Objections to Production**”), and submitted a privilege and confidentiality log describing the 13 individually identified documents (“**Mexico’s Privilege Log**”).⁷ The Claimant’s requests for relief in relation to Mexico’s Objections to Production and Privilege Log are addressed in a separate Order.

6. By letter of 24 July 2024, the Claimant objected to the Respondent’s document production, alleging that it was “seriously deficient in several fundamental respects and not in compliance with [PO5] or the IBA Rules on the Taking of Evidence in International Arbitration”⁸ (“**Claimant’s Application**”). The Claimant alleged that (i) the Respondent had produced a significantly more limited number of Documents than the United States in the *TC Energy* case⁹ in response to nearly identical requests; (ii) the use of online platforms (i.e., the MAX or Scratchpad platforms) to exchange and/or store Documents suggested that a large volume of Documents had been exchanged; (iii) entire categories of Documents in the Respondent’s possession, custody or control were allegedly missing, and (iv) the Respondent’s stated methodology in identifying and producing Documents was flawed. In particular, the Claimant alleged that, with one exception, the Respondent had failed to identify any custodians from whom Documents were searched for and collected, and that the sparsity of production suggested that it was “highly unlikely” that the Respondent had produced all responsive Documents from the MAX or Scratchpad platforms.¹⁰ For these reasons, the Claimant requested the Tribunal to order the Respondent to:¹¹
- a. Produce “all Documents responsive to Request[s] Nos. 1 and 2 within its possession, custody or control,” adding that “Documents should include all writing, communication, picture, drawing or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means from 20 January 2017 until 17 April 2024, including but not limited to on the MAX

⁶ Mexico’s Objections to Production, ¶ 2.

⁷ While the Respondent entitled its Submission on Privilege “Privilege and Confidentiality Log”, in reality this submission encompasses an introduction entitled “Justification” where the Respondent provides its arguments in support of general claims of privilege with respect to a category of Documents, together with a log of 13 specific Documents.

⁸ Claimant’s Application, p. 1. The Claimant also objected to the Respondent’s approach to its privilege claims, and requested the Tribunal to order the Respondent to produce “a privilege log for all Documents over which it claims privilege, including but not limited to responsive Documents exchanged in the context of the ‘ongoing ISDS arbitrations in which the interpretation of Annex 14-C . . . [is] disputed’.” Claimant’s Application, p. 7. These arguments and requests are addressed in a separate Order.

⁹ *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63 (“*TC Energy v. USA*” or “*TC Energy*”).

¹⁰ Claimant’s Application, pp. 4-5.

¹¹ Claimant’s Application, p. 7.

Platform. For the avoidance of doubt, attachments to emails should be produced together with their parent emails and vice versa.”¹²

- b. Provide “for each of Request[s] Nos. 1 and 2, (i) the search terms used to identify Documents, (ii) the date ranges used for each search, (iii) the locations and offices where physical searches were undertaken, (iv) a description of any electronic media searched (including but not limited to the MAX platform and Scratchpad), and (v) a complete list of the custodians whose emails, files and other records have been reviewed for purposes of responding to Claimant’s requests for documents. This should include a description of whether the custodians’ email archives were searched or if the searches undertaken were limited to emails available in the custodians’ email inboxes at the time of the search.”¹³

7. On 25 July 2024, the Tribunal invited the Respondent to, *inter alia*:

1. Confirm whether it has produced all Documents responsive to Requests No. 1 and 2 within its possession, custody or control, pursuant to PO5. If it has not, it should produce them immediately. The Respondent should also respond to the Claimant’s allegation that entire categories of Documents are missing;
2. Respond to the Claimant’s request that it provide the information on its search methodology, as set out at para. 2 of its request for relief;

[...]
4. Provide any additional comments or information deemed relevant in response to the Claimant’s letter of 24 July 2024.

8. Also on 25 July 2025, the Tribunal issued Procedural Order No. 6, setting out a revised procedural calendar for the jurisdictional phase.

9. On 31 July 2024, the Respondent filed its response to the Claimant’s Application (“**Mexico’s Response**”). The Respondent submitted that the Claimant’s Application was based on “erroneous premises” and “unsubstantiated assumptions,”¹⁴ and requested the Tribunal to “reject the Claimant’s [Application], as the order issued through PO5 has already been complied with.”¹⁵ More specifically, the Respondent rejected the Claimant’s attempt to compare the document production exercise in this case with the one in *TC Energy*,¹⁶ responded to the Claimant’s specific allegations of missing categories of Documents,¹⁷ and confirmed that it had produced all Documents available

¹² Claimant’s Application, pp. 6-7.

¹³ Claimant’s Application, p. 7.

¹⁴ Mexico’s Response, p. 1.

¹⁵ Mexico’s Response, p. 10.

¹⁶ Mexico’s Response, pp. 1-3.

¹⁷ Mexico’s Response, pp. 3-8. The Respondent also responded to the Claimant’s objections to its Privilege and Confidentiality Log, which are addressed in a separate order.

to it, all of which came from the files of the *Dirección General de Consultoría Jurídica de Comercio Internacional* (Office of the General Counsel for International Trade).¹⁸

10. On 2 August 2024, the Claimant requested an opportunity to reply to Mexico's Response.
11. On 5 August 2024, the Tribunal allowed further submissions from the Parties in the following terms:

The Tribunal will allow the Claimant to reply to the Respondent's letter of 31 July 2024 by **Tuesday 6 August 2024**, but limited to the Claimant's allegations that the Respondent's document production is deficient and not in compliance with PO5. If the Respondent wishes to rejoin, it should indicate its intention to do so by **Wednesday 7 August 2024**, and may do so by **Friday 9 August 2024**. Unless and until the Tribunal directs otherwise, the Parties should not submit further comments on the Respondent's privilege claims.
12. On 6 August 2024, the Claimant filed its reply to Mexico's Response (the "**Claimant's Reply**"). In particular, the Claimant argued that (i) the Respondent had failed to provide information on its search methodology; (ii) that its response confirmed that it had not complied with the Tribunal's document production orders; and that its arguments as to the scope of the handover or reporting obligations of Mexican officials provided no comfort that the Respondent had conducted a proper search.¹⁹
13. On 9 August 2024, the Respondent filed its response to the Claimant's Reply ("**Mexico's Rejoinder**"), in which it rejected the Claimant's arguments in its Reply.
14. By letter of 21 August 2024, the Tribunal informed the Parties that, in light of the length and complexity of the document production phase, it was suspending the time limits set out in Procedural Order No. 6 and vacated both the hearing and pre-hearing conference dates. The Tribunal indicated that it would revert on the procedural calendar once the document production phase was completed.
15. Through correspondence of 3 September 2024, 17 September 2024, 24 September 2024, and 4 October 2024, the Parties and the Tribunal agreed to schedule the Hearing on Jurisdiction for 31 March and 1 April 2025.
16. On 16 October 2024, the Respondent requested an update on the procedural calendar, including on the timing of the resolution of the document production phase and the submission of Claimant's Rejoinder on Jurisdiction.
17. By letter of 24 October 2024, the Tribunal informed the Parties that, over the past months, it had been deliberating intensely on the outstanding document production matters with the aim of finding consensus among its Members. The Tribunal indicated that it would revert shortly with its decisions on the pending issues before it, as well as

¹⁸ Mexico's Response, p. 2.

¹⁹ Claimant's Reply, pp. 1-3.

with a revised procedural calendar. In the meantime, the Tribunal anticipated that the hearing dates would remain unchanged.

18. This Procedural Order No. 8 is issued by majority, with Prof. Perezcano dissenting with reasons to follow.

III. ANALYSIS

A. Applicable standards

19. The applicable rules for the production of documents are set out in Section III.B of Procedural Order No. 1 (“**PO1**”). In particular:
- a. Pursuant to para. 32 of PO1, “[w]ithin the time limit set out in the Procedural Calendar, the Requested Party shall produce to the other Party all the Documents requested in its possession, custody or control as to which it makes no objection.”
 - b. Pursuant to para. 33 of PO1, “[w]ithin the time limit indicated in the Procedural Calendar, the Tribunal will rule on the Parties’ outstanding Document Requests.”
 - c. Pursuant to para. 34 of PO1, “[e]ach Party shall produce Documents pursuant to this Section, whether voluntarily or as ordered by the Tribunal, directly to the Requesting Party within the time limits specified in the Procedural Calendar [...]”
20. PO5 contained the Tribunal’s document production orders, as well as specific instructions.
21. Pursuant to para. 24 of PO1, “[f]or matters concerning the gathering or taking of evidence that are not otherwise covered by a procedural order issued by the Tribunal, the UNCITRAL Rules or NAFTA Chapter 11, the Tribunal may refer to the IBA Rules on the Taking of Evidence in International Arbitration (2020) (the ‘**IBA Rules**’) for guidance as to the practices commonly accepted in international arbitration, but it shall not be bound to apply them.” The Tribunal notes in particular that:
- a. Article 3.7 of the IBA Rules provides that, if the Tribunal orders a Party to produce any requested Document in its possession, custody or control, “[a]ny such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.”
 - b. Pursuant to Article 9.6 of the IBA Rules, “[i]f a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.”
 - c. Pursuant to Article 9.8 of the IBA Rules, “[i]f the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these

Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.”

B. The Claimant’s complaints

22. The Claimant alleges that the Respondent’s production of documents in response to the Tribunal’s orders in PO5 is “seriously deficient in several fundamental respects and not in compliance with [PO5] or the [IBA Rules].”²⁰
23. Specifically, the Claimant contends that the Respondent’s production is incomplete, as evidenced by:
 - a. The sparsity of the Respondent’s production, in particular when compared with the United States’ production of documents in *TC Energy* (Section 1 below);
 - b. The use of online platforms to exchange and store Documents, which suggests that a large number of Documents were exchanged between the USMCA Parties (Section 2 below);
 - c. The fact that entire categories of Documents in Respondent’s possession, custody or control are allegedly missing (Section 3 below); and
 - d. The Respondent’s flawed methodology in identifying and producing Documents (Section 4 below).
24. The Tribunal addresses each of these arguments in turn.

1. The comparison with the *TC Energy* document production

25. According to the Claimant, it is apparent that the Respondent’s production is incomplete, as it only consists of 132 documents: 85 in response to Request No. 1, and 47 in response to Request No. 2. For the Claimant, it is not credible “that so few external and internal Documents exist over a seven-year period involving three USMCA Parties and three Mexican Government Agencies regarding the negotiation of the entire Investment Chapter of the USMCA.”²¹ The Claimant notes that the USMCA underwent seven rounds of negotiations over a period of 13 months. By contrast, in the *TC Energy* case, the United States produced 852 documents and logged over 1500 documents as privileged for “nearly identical document requests.”²²
26. The Respondent rejects the Claimant’s comparison, which it characterizes as “meaningless”,²³ for the following reasons:

²⁰ Claimant’s Application, p. 1.

²¹ Claimant’s Application, p. 2 (emphasis in original).

²² *Ibid.*

²³ Respondent’s Response, p. 1.

- a. First, the Respondent alleges that the document production orders in both cases have different scopes. In particular, the *TC Energy* tribunal's document production order was not limited to the interpretation of Annex 14-C, but also ordered the production of internal documents of the United States that are not in Mexico's possession, custody, or control. Further, the *TC Energy* tribunal's document production order targeted over 10 agencies and offices within the U.S. government, as opposed to the three agencies targeted in PO5.²⁴
- b. Second, the Respondent asserts that handover regulations under Mexican law are different from those in the United States, such that there is no custodian for many Documents. The Respondent alleges that Mexico only requires a formal handover for public servants with the rank of general managers and hierarchical superiors. Some public servants mentioned by the Claimant (such as [REDACTED] and [REDACTED]) held positions lower than general managers and therefore did not carry out a formal handover. As a result, the Respondent only has some printed documents and digital files that they voluntarily decided to hand over before leaving their respective positions.²⁵
- c. [REDACTED]
- d. Fourth, contrary to the Claimant's assertions, the fact that the USMCA negotiations were intense does not necessarily mean that a large number of Documents responsive to PO5 must exist.²⁷

27. The Tribunal accepts the Respondent's submission that the document production order in this arbitration cannot be compared to that in *TC Energy*. The *TC Energy* tribunal's document production order was broader in scope than PO5: in addition to ordering the United States to produce the negotiating history of Chapter 14 of the USMCA and certain internal documents reflecting the United States' negotiating position, the *TC Energy* tribunal ordered the United States to produce documents related to the Keystone XL Pipeline in the context of the renegotiation of NAFTA/negotiation of USMCA.²⁸

²⁴ Mexico's Response, pp. 1-2.

²⁵ Mexico's Response, p. 2.

²⁶ Mexico's Response, pp. 2-3.

²⁷ Mexico's Response, p. 3.

²⁸ *TC Energy v. United States*, Procedural Order No. 3 dated 6 November 2023, Appendix 11 to the Claimant's Application of 15 March 2024.

28. Moreover, even if the production orders were comparable, there is no reason to assume that different States generate a similar number of Documents in the negotiation of a treaty. Each State has its protocols and practices, as well as a different number of agencies and persons involved. The Tribunal finds that the fact that the Respondent's production in response to PO5 was more limited than the United States' production in *TC Energy* is not, on its own, evidence that the Respondent has failed to conduct a proper search or withheld documents.

2. Use of online platforms to exchange and store Documents

29. The Claimant notes that the USMCA Parties used online platforms to exchange Documents (i.e., the MAX Platform) during the negotiations. For the Claimant, this suggests that a substantial volume of Documents was exchanged between the USMCA Parties (such that email would be inadequate). Given the limited production of Documents produced by the Respondent, the Claimant posits that it is "highly unlikely" that the Respondent has searched for, collected and produced all responsive Documents from these platforms.²⁹
30. The Claimant further argues that the Respondent's limited production suggests that the Respondent has not searched for, collected or produced all responsive Documents from the Scratchpad platform (used by the USMCA Parties to exchange and store notes on negotiation discussions).³⁰
31. In response, the Respondent confirms that the USMCA Parties exchanged the majority of Documents through the MAX Platform set up by the United States, but denies the Claimant's allegations. It explains that the USMCA Parties used the MAX Platform to enhance efficiency, and not because of the high volume of Documents. The Respondent reiterates that "it has produced all the documents that were in the MAX, including the so-called "Scratchpad."³¹
32. The Tribunal addresses the Parties' arguments on this point together with the Claimant's allegation on missing categories of Documents in Section 3 below.

3. The allegedly missing categories of Documents

33. The Claimant's third argument is that "it is apparent that entire categories of Documents in Respondent's possession, custody or control are missing."³²
34. The Claimant provides a list of categories of Documents allegedly missing. These categories of Documents can be broadly divided into three groups:

²⁹ Claimant's Application, p. 5.

³⁰ *Ibid.*

³¹ Mexico's Response, p. 4.

³² Claimant's Application, p. 2.

- a. Documents that, in the Claimant's submission, should have been sent to or from certain individuals who acted as negotiators for the USMCA Parties.
 - b. Certain types of Documents that, in the Claimant's submission, should exist.
 - c. Documents that were produced in the *TC Energy* case.
35. First, according to the Claimant, the Respondent has produced a limited number of Documents, or no Documents at all, [REDACTED]. Specifically, the Claimant alleges that the Respondent has produced:³³
- a. Only one Document to/from [REDACTED], the [REDACTED];
 - b. Only two Documents to/from [REDACTED], [REDACTED];
 - c. No Documents to/from [REDACTED], who the Claimant alleges was [REDACTED];
 - d. No Documents from [REDACTED], [REDACTED];
 - e. No Documents from [REDACTED], [REDACTED];
 - f. No Documents from 10 different individuals³⁴ who commented on and/or edited in track changes drafts of the Investment Chapter.³⁵
36. The Claimant also highlights that the Respondent has produced just two documents from the Office of the President of Mexico. In the Claimant's view, it is not possible that so few documents came out from this Agency, especially considering that the negotiation of the USMCA took place during a change of government in Mexico.³⁶
37. The Respondent clarifies that [REDACTED].
[REDACTED] According to the Respondent, [REDACTED] was not involved in the negotiation of Chapter 14 ([REDACTED]).

³³ Claimant's Application, pp. 2-3.

³⁴ The individuals mentioned by the Claimant are: [REDACTED]

[REDACTED] Claimant's Application, n. 16.

³⁵ Claimant's Application, p. 3.

³⁶ Claimant's Reply, p. 3.

██████████). While ██████████, the legal scrub is only intended to ensure legal consistency, not to modify what has already been negotiated.

38. With this clarification, the Respondent insists that, first, it has produced all Documents in its possession, custody or control. Specifically, it alleges that:³⁷

- a. It has produced 55 documents prepared by/for ██████████ and/or ██████████ ██████████³⁸ as well as more than 60 documents that relate to previous versions of Chapter 14, which means that they were sent by ██████████ and/or ██████████ ██████████.
- b. All the documents it has found within the files of former public servants, including ██████████ and ██████████. The Respondent emphasizes however that only Chapter 14 negotiators produced documents about that chapter, which is why there are no Documents on the interpretation of Chapter 14 prepared by ██████████ and/or ██████████.
- c. All of the Chapter 14 legal scrub documents, which included the participation of ██████████.
- d. The fact that there are comments or edits from the individuals identified by the Claimant “does not imply that the documents were prepared by them, so it makes no sense to say that Mexico failed to comply with [PO5] simply because no documents from these individuals were submitted.”³⁹ The Respondent explains that ██████████ ██████████, but who did not have a role in the definition and negotiation of Chapter 14. The Respondent adds that the exchange of Documents was conducted almost exclusively through the MAX Platform, which explains why there are no emails from these individuals.⁴⁰
- e. Contrary to the Claimant’s contentions, the Respondent has produced two Documents from the President’s Office. In response to the Claimant’s contention that “[i]t cannot be the case that these are the only two Documents to come out of the Office of the President reflecting Mexico’s negotiation, understanding, or interpretation of Chapter 14 of the USMCA,”⁴¹ the Respondent explains that the Documents responsive to PO5 at this hierarchical level are very scarce, since the interpretative intricacies of Chapter 14 were made at the technical level. Likewise,

³⁷ Mexico’s Response, pp. 3-5, 10.

³⁸ Specifically, the Documents identified as 1-001, 1-002, 1-006, 1-012, 1-017, 1-018, 1-020, 1-021, 1-027, 1-029, 1-030, 1-031, 1-034, 1-035, 1-036, 2-002, 2-003, 2-004, 2-005, 2-006, 2-007, 2-008, 2-009, 2-010, 2-011, 2-012, 2-013, 2-014, 2-015, 2-016, 2-017, 2-018, 2-019, 2-020, 2-021, 2-022, 2-023, 2-024, 2-025, 2-026, 2-028, 2-029, 2-030, 2-031, 2-035, 2-037, 2-038, 2-039, 2-040, 2-041, 2-043, 2-044, 2-045, 2-046, and 2-047.

³⁹ Mexico’s Response, p. 5.

⁴⁰ Mexico’s Response, pp. 6-7.

⁴¹ Claimant’s Reply, n. 11.

the fact that there was a change of government during the negotiations of the USCMA is irrelevant for the purpose of PO5. In any event, the Respondent confirms that the documents produced “are the only ones available to the Office of the President of Mexico.”⁴²

39. Second, the Claimant contends that certain types of Documents that in its submission should exist have not been produced, or have been produced only in a limited fashion. In particular, it is asserted that the Respondent has produced:
- a. Only one joint report among the USMCA Parties, as the other Documents identified by the Respondent are draft reports exchanged internally within Mexico.⁴³
 - b. No handwritten notes from attendees of meetings held among the USMCA Parties or within the Mexican Government Agencies.⁴⁴
 - c. No cover letters, transmittal emails, or internal correspondence regarding all the drafts of the USMCA.⁴⁵
40. The Respondent asserts that it has produced all Documents in its possession, custody or control. With respect to the specific Documents mentioned by the Claimant:
- a. The Respondent has now produced the joint reports of the negotiation of Chapter 14, in addition to the copies of the missing reports which were delivered to the Claimant after 19 July 2024.⁴⁶
 - b. There is no evidence that handwritten notes and annotated printed documents have been created and, even if they were created, Mexican law does not require public officials to safeguard these notes. In any case, it argues that handwritten notes prepared by public officials do not reflect the will and understanding of a sovereign State.⁴⁷
 - c. As noted above, the USMCA Parties exchanged the majority of the documents through the MAX Platform, which explains why there are relatively few documents exchanged via e-mail.⁴⁸
41. Third and finally, the Claimant contends that the Respondent has failed to produce certain Documents that were produced in the *TC Energy* case, including Documents “(i) evidencing the United States’ inclusion of the legacy investment annex, (ii) reflecting

⁴² Mexico’s Rejoinder, p. 6.

⁴³ Claimant’s Application, p. 4; Claimant’s Reply, p. 3.

⁴⁴ Claimant’s Application, p. 4.

⁴⁵ *Ibid.*

⁴⁶ Mexico’s Rejoinder, p. 6.

⁴⁷ Mexico’s Response, p. 7.

⁴⁸ Mexico’s Response, p. 4.

explanations by the United States’ negotiators to their Mexican counterparts that the legacy investment annex would operate as a grandfather clause, and (iii) evidencing that Mexico (and Canada) understood the same—all of which were disclosed in *TC Energy*.⁴⁹

42. The Respondent rejects the Claimant’s allegations:
- a. With respect to (i), it highlights that it did submit the first version of Annex 14-C (Document 1-003).
 - b. With respect to (ii), it alleges that “it is common for explanations of proposed texts in international trade negotiations to be made orally, which explains why Mexico does not have in its possession, custody, or control a physical document that the United States would have sent to Mexico with these explanations.”⁵⁰
 - c. With respect to (ii) and (iii), it asserts that “the [USMCA] Parties’ understanding of the interpretation of Annex 14-C has always been consistent with and is consistent with, the Respondent’s position in this case. The Respondent does not have in its possession, custody, or control any document containing a different interpretation.”⁵¹ The Respondent further notes that the Claimant’s assertions at (ii) and (iii) above rely on a submission by the claimant in *TC Energy* with no factual support.⁵²
43. The Tribunal acknowledges Mexico’s explanations and assurances with respect to its production of Documents in response to PO5. This, however, is not sufficient to establish that the Respondent has met its document production obligations. While the Tribunal has no reason to doubt Mexico’s assurances, it must ascertain that a robust process was put in place to search for, and produce responsive documents. In other words, for the Tribunal to determine whether Mexico has complied with PO5 it must ensure that Mexico’s search methodology was appropriate and diligent. The Tribunal addresses this in Section 4 below.

4. The methodology applied by the Respondent to identify and produce documents

44. The Claimant alleges that in addition to the “significant gaps in Respondent’s Production, Respondent’s stated methodology in identifying and producing Documents is obviously flawed.”⁵³
45. In its Application, the Claimant highlighted three issues:

⁴⁹ Claimant’s Application, p. 4.

⁵⁰ Mexico’s Response, p. 7.

⁵¹ *Ibid.*

⁵² Mexico’s Response, pp. 7-8.

⁵³ Claimant’s Application, p. 4.

- a. With one exception, the Respondent failed to identify any other custodians from whom Documents were searched for and collected. The Claimant argues that “[t]his is problematic” because “virtually no Documents were identified or produced from more than a dozen individuals directly involved in the negotiations and drafts of the Investment Chapter of the USMCA.”⁵⁴
 - b. As discussed above, the Claimant argued that the sparsity of production suggested that the Respondent had not conducted a proper search, collected or produced responsive Documents in the MAX Platform or Scratchpad.⁵⁵
46. For these reasons, the Claimant requested the Tribunal to order the Respondent to provide “for each of Request[s] Nos. 1 and 2, (i) the search terms used to identify Documents, (ii) the date ranges used for each search, (iii) the locations and offices where physical searches were undertaken, (iv) a description of any electronic media searched (including but not limited to the MAX platform and Scratchpad), and (v) a complete list of the custodians whose emails, files and other records have been reviewed for purposes of responding to Claimant’s requests for documents. This should include a description of whether the custodians’ email archives were searched or if the searches undertaken were limited to emails available in the custodians’ email inboxes at the time of the search.”⁵⁶
47. As noted in Section II above, the Tribunal invited the Respondent to “[r]espond to the Claimant’s request that it provide the information on its search methodology, as set out at para. 2 of its request for relief.”⁵⁷
48. In response, and as discussed at para. 23 above, the Respondent explained that hand-over regulations under Mexican law are different from those in the United States, such that there is no custodian for many Documents, an [REDACTED]
- [REDACTED]⁵⁸
49. In its Reply, the Claimant submitted that the Respondent’s answers confirmed that it had failed to conduct a proper search of responsive Documents. Specifically, the Claimant argued that:
- a. Contrary to the Tribunal’s order, the Respondent did not provide information on its search methodology, including, “(i) the search terms used to identify Documents, (ii) the date ranges for each search, (iii) the locations and offices where physical searches were undertaken, (iv) a description of any electronic media searched, and (v) a complete list of the custodians whose emails, files, and other records have been reviewed for purposes of responding to Claimant’s

⁵⁴ Claimant’s Application, pp. 4-5.

⁵⁵ Claimant’s Application, p. 5.

⁵⁶ Claimant’s Application, p. 7.

⁵⁷ Tribunal’s letter of 25 July 2024 (second letter).

⁵⁸ Mexico’s Response, pp. 1-3.

requests for Documents.”⁵⁹ According to the Claimant, there can only be one reason for the Respondent to ignore a direct order from the Tribunal: because it has failed to conduct a proper search for documents which would support the Claimant’s interpretation of Annex 14-C of the USMCA.

- b. Mexico’s Response confirmed that it has not complied with the Tribunal’s order to produce Documents “reflecting” the Respondent’s and/or the USMCA Parties’ “negotiation, understanding, or interpretation of the investment chapter of the USMCA;” rather, the Respondent appears to have taken a narrow (and noncompliant) view of the scope of the Tribunal’s order, excluding Documents from custodians who participated in the legal scrub of the USMCA but did not participate in the negotiation of Chapter 14, as well as Documents which the Respondent considers “do not reflect the will and understanding of a sovereign State.”⁶⁰
- c. In any event, the Respondent’s arguments as to the scope of the handover or reporting obligations of Mexican officials provide no comfort that the Respondent conducted a proper search. In particular, these arguments do not address whether the Respondent made proper inquiries of public officials “who (i) remain employed by the Government (and might not even have ‘handed over’ any Documents yet), or (ii) left office, but who might have handed over/kept responsive Documents even if not expressly required by the 2017 Mexican regulation,” or whether Documents (hardcopy and electronic) were searched from the relevant custodians, during the defined date range and applying the relevant search terms.⁶¹

50. In its Rejoinder, the Respondent denied having violated the Tribunal’s orders and affirmed having applied an appropriate search methodology. Specifically:

- a. The Respondent submitted that the Tribunal had not ordered it to provide information on its search methodology with the level of detail requested by the Claimant; rather, the Tribunal invited the Respondent to respond to the Claimant’s request that it provide information on that methodology. The Respondent argues that “[i]t is clear from the context of this invitation [...] that the Tribunal was providing the Respondent with an opportunity to respond to the Claimant’s request itself, rather than ordering the Respondent to provide an account of the specific details demanded by the Claimant.”⁶²
- b. Despite this, the Respondent confirmed that “exhaustive searches were conducted in all relevant offices of the Ministry of Economy, the Ministry of Foreign Affairs and the Office of the President of Mexico, through the Legal Counsel of the Federal Executive; as well as consultations with relevant personnel to obtain any

⁵⁹ Claimant’s Reply, p. 1.

⁶⁰ Claimant’s Reply, pp. 1-2.

⁶¹ Claimant’s Reply, pp. 2-3.

⁶² Mexico’s Rejoinder, pp. 2-3.

and all documents related to the negotiation, understanding or interpretation of Chapter 14 of the USMCA.”⁶³ The Respondent further alleged that “[t]he documents that were collected on this basis were subsequently reviewed to identify those documents that were created or exchanged between January 20, 2017 and April 17, 2024.”⁶⁴

- c. The Respondent also noted that it had provided a general explanation of its methodology in its cover letter to the Claimant of 19 July 2024, which it attached as Annex A (Spanish original) and B (English translation) to its Rejoinder.⁶⁵ In that letter, the Respondent explained that it had conducted an exhaustive and diligent search in files, records, computer equipment, institutional e-mails, devices, and in the physical files of the Ministry of Economy as well as the Ministry of Foreign Affairs and the Office of the President of Mexico, through the Legal Counsel of the Federal Executive.⁶⁶

51. The Respondent further denied the Claimant’s suggestions that it had failed to produce Documents from certain custodians or platforms due to a restrictive interpretation of the Tribunal’s document production orders, arguing that the Claimant has ignored its explanations:

- a. The Respondent insisted that, in Mexico, there are no “custodians” *per se* of Documents responsive to the Tribunal’s orders. In any event, contrary to the Claimant’s suggestions, the Respondent did not exclude from production Documents from “custodians” who participated in the legal scrub of the USMCA; rather, these Documents were not produced because they do not exist, or are not currently within the Respondent’s possession, custody or control.⁶⁷ The Respondent reiterated that it has produced all documents in its possession, custody, or control that fall within the Tribunal’s document production order, including all Chapter 14 legal scrub documents.⁶⁸
- b. The Respondent denied that its explanations “sidestep” the question of whether it conducted a proper search for responsive Documents, or are “misleading and flawed,” as the Claimant suggests.⁶⁹ Specifically:⁷⁰
 - i. With respect to public officials who remain employed with the relevant offices, the Respondent has explained that exhaustive searches for responsive Documents were conducted in all relevant offices. The Respondent has also

⁶³ Mexico’s Rejoinder, p. 3.

⁶⁴ *Ibid.*

⁶⁵ Mexico’s Rejoinder, p. 2.

⁶⁶ *Ibid.*

⁶⁷ Mexico’s Rejoinder, pp. 3-4.

⁶⁸ *Ibid.*

⁶⁹ Mexico’s Rejoinder, p. 4.

⁷⁰ Mexico’s Rejoinder, p. 5.

explained why additional responsive Documents do not exist, no longer exist, or are no longer in the possession, custody or control of the relevant offices.

- ii. With respect to public officials who have left office, the Respondent submits that any responsive Documents in the possession of a former official could not be considered to be within the relevant offices' possession, custody or control. Any such Documents would also fall outside the scope of the Tribunal's orders and the IBA Rules.
- iii. As to the Claimant's suggestions that the Respondent's explanations provide no comfort that the Respondent has searched responsive Documents from the relevant custodians, during the relevant date range and applying relevant search terms, the Respondent reiterates that it has "conducted an exhaustive and diligent search in files, records, computer equipment, institutional e-mails, devices, and in the physical files, currently in the possession, custody and control" of the relevant offices.⁷¹

52. Once again, the Tribunal acknowledges the Respondent's explanations. However, it is not satisfied that the Respondent has sufficiently established that its methodology to search, collect and produce documents is appropriate.
53. The Respondent has confirmed that "exhaustive searches were conducted in all relevant offices of the Ministry of Economy, the Ministry of Foreign Affairs and the Office of the President of Mexico, through the Legal Counsel of the Federal Executive; as well as consultations with relevant personnel to obtain any and all documents related to the negotiation, understanding or interpretation of Chapter 14 of the USMCA. The documents that were collected on this basis were subsequently reviewed to identify those documents that were created or exchanged between January 20, 2017 and April 17, 2024."⁷²
54. The Respondent has indicated that further details were provided in its cover letter of 19 July 2024 to the Claimant, accompanying its production of Documents in response to PO5. This letter stated as follows:

The Respondent conducted an exhaustive and diligent search in files, records, computer equipment, institutional e-mails, devices, and in the physical files of the Ministry of Economy, an agency of the Federal Government of Mexico, which, under the domestic law, was and currently is in charge of coordinating Mexico's international trade negotiations, including the modernization of the North American Free Trade Agreement (NAFTA), which culminated in the signing of the Agreement between the United States of America, the United Mexican States and Canada (USMCA); as well as the Ministry of Foreign Affairs and the Office of the President of Mexico, through the Legal Counsel of the Federal Executive.

⁷¹ *Ibid.*

⁷² Mexico's Rejoinder, p. 3.

Respondent's search included a review of the records, electronic and physical files, notes, reports, available emails, among others, of [REDACTED]

55. The Tribunal finds that this broad description lacks the necessary detail required to understand the methodology applied by the Respondent. While the Respondent has indicated the offices in which it has conducted its search, and has confirmed that it has searched in the date range set out in PO5, with the exception of [REDACTED], [REDACTED], [REDACTED] and [REDACTED], it has not provided the names of the personnel that it has searched.⁷⁴ Further, while the Respondent indicates that its search has included a review of the records, electronic and physical files, notes, reports, and available emails, among other sources, it has not detailed what databases it has searched, nor has it explained what the term "available emails" mean. Nor has the Respondent explained whether it used search terms, and if so, which ones. In the Tribunal's view, more detail is required to determine whether the Respondent has complied with its document production obligations under PO5.
56. As to the Respondent's arguments in connection with former officials of the Mexican Government Agencies (as defined in PO5), the Tribunal finds that the Respondent has not adequately shown whether it has searched the records and databases of the Mexican Government Agencies to determine whether any Documents created, sent or received by such former officials remain in possession, custody or control of the Respondent.
57. For these reasons, the Tribunal orders the Respondent to provide, within two weeks of this Order (i.e., **by 12 November 2024**), a full description of the process followed by the Respondent to search for, collect and produce any Documents responsive to PO5, including:
- a. A complete list of the relevant personnel whose emails, files and other records have been reviewed for purposes of responding to the Tribunal's orders in PO5.
 - i. The Respondent shall provide an explanation as to whether the search included these officials' email archives, or was limited to the emails available in their email inboxes at the time of the search.
 - ii. In relation to personnel involved in the negotiation of Chapter 14 of the USMCA that are no longer employed by the relevant agency, the Respondent shall confirm that its offices, databases and archives, both physical and electronic, have been searched for Documents created, sent or received by these former officials. Alternatively, it shall confirm that, as a result of those individuals' departure, all Documents created by those individuals have been

⁷³ Mexico's Rejoinder, p. 2, citing Annex A of the Respondent's letter dated 19 July 2024.

⁷⁴ While the Respondent has indicated that it has searched all of the Chapter 14 legal scrub documents, which included the participation of [REDACTED], it is unclear whether it has searched all of the files of [REDACTED].

deleted or destroyed, such that no searches can physically or electronically be conducted in connection with those individuals.

- b. The locations and offices where physical searches were undertaken;
 - c. A description of any platforms or electronic media in which electronic searches were conducted (including but not limited to the MAX platform and Scratchpad, internal databases, email files, etc.);
 - d. The search terms used to identify any responsive Documents; and
 - e. The date ranges used for each search.
58. The Tribunal also directs that this description be accompanied by a representation by counsel that the process described has been followed.

IV. ORDER

59. For the reasons set out above, the Tribunal:
- a. Orders the Respondent to provide, with two weeks of this Order (i.e., **by 12 November 2024**), a full description of the process followed by the Respondent to search for, collect and produce any Documents responsive to PO5, in the terms set out at para. 57 above;
 - b. Directs the Respondent's counsel, as the case may be, to represent that the process thus described has been followed;
 - c. Defers its decision on whether the Respondent has complied with its document production obligations under PO1 and PO5 until the instructions above have been complied with.

[Signed]

Sabina Sacco
Presiding Arbitrator

Date: 29 October 2024