IN THE MATTER OF AN ARBITRATION UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT

- and -

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

- between -

Alicia Grace; Ampex Retirement Master Trust; Apple Oaks Partners, LLC; Brentwood Associates Private Equity Profit Sharing Plan; Cambria Ventures, LLC; Carlos Williamson-Nasi in his own right and on behalf of Axis Services, Axis Holding, Clue and F. 305952; Carolyn Grace Baring; Diana Grace Beard; Floradale Partners, LLC; Frederick Grace; Frederick J. Warren; Frederick J. Warren IRA; Gary Olson; Genevieve T. Irwin; Genevieve T. Irwin 2002 Trust; Gerald L. Parsky; Gerald L. Parsky IRA; John N. Irwin III; José Antonio Cañedo-White in his own right and on behalf of Axis Services, Axis Holding and F. 305952; Nicholas Grace; Oliver Grace III; ON5 Investments, LLC; Rainbow Fund, L.P.; Robert M. Witt; Robert M. Witt IRA; Vista Pros, LLC; and Virginia Grace

(the "Claimants")

and

THE UNITED MEXICAN STATES

(the "Respondent")

ICSID Case No. UNCT/18/4

PROCEDURAL ORDER No. 6
DECISION ON THE CLAIMANTS' APPLICATION FOR INTERIM MEASURES

Tribunal
Prof. Diego P. Fernández Arroyo, President
Mr. Andrés Jana Linetzky, Arbitrator
Mr. Gabriel Bottini, Arbitrator

Secretary of the Tribunal
Ms. Celeste E. Salinas Quero

December 19, 2019

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I. Procedural background

1. On July 19, 2019, Claimants requested an extension of the deadlines for the submission of the Statement of Claim and Statement of Defense (the "**Request for an extended briefing schedule**").

2. On July 21, 2019, Claimants filed an Application for Interim Measures, accompanied by the following documentation: Appendices A to E, Witness Statement of Mr. Carlos Williamson-Nasi dated July 18, 2019; Witness Statement of Mr. Gonzalo Gil White dated July 18, 2019; Witness Statement of Mr. Jose A. Cañedo-White dated July 18, 2019; Factual Exhibits C-0001 to C-0083; and Legal Authorities CL-0033 to CL-0057 (the "**Claimants' Application for Interim Measures**" or "**Claimants' Application**").

3. On July 22, 2019, Claimants requested an expedited briefing schedule for the Application (the "**Request for an expedited briefing**").

4. By letter of the same date, the Tribunal invited Respondent to submit comments, no later than July 29, 2019, on *(i)* Claimants' request of July 19, for an extension in the briefing schedule for the Statement of Claim and Statement of Defense; and *(ii)* Claimants' proposal of July 22, for an expedited briefing schedule for the Application for Interim Measures.

5. On July 29, 2019, Respondent submitted, among others, its comments on Claimants' Request for an extended briefing schedule of July 19, 2019 and Claimants' Request for an expedited briefing of July 22, 2019, accompanied by the following document: Annex A – Proposed Schedule and Factual Exhibits R-0001 to R-0004 (the "**Respondent's Comments**").

6. On August 7, 2019, the Tribunal issued Procedural Order No. 5 (on the Procedural Calendar). The Tribunal decided, among others, to extend the time limit for the submission of the Statement of Claim and Statement of Defense, and invited Respondent to submit a response to Claimants' Application by September 18, 2019.

7. On September 6, 2019, Claimants submitted a letter informing the Tribunal of two recent developments that, in their view, rendered the measures requested in the Application especially urgent. Claimants informed the Tribunal that Respondent had requested and obtained Interpol Red Notices (international arrest warrants) against two Claimants and three of its witnesses. Claimants also informed the Tribunal of the *amparo* proceeding in Mexico, in which Claimants had recently obtained a recording of the hearing "where the prosecutor requested and the judge issued the oral arrest warrants against Claimants and

the witnesses."[1] Claimants additionally sought leave to submit into the case record *(i)* the recordings of the hearing, and *(ii)* a short submission (not to exceed five pages) describing the contents of the recording.

8. On September 9, 2019, the Tribunal invited Respondent to submit comments on Claimants' letter by September 13, 2019.

9. On September 13, 2019, Respondent submitted its observations to Claimants' letter and requests of September 6, 2019. Respondent indicated that it would not oppose Claimants' request for leave to submit the hearing recording and the transcript of the recording. Respondent requested a two-week extension of time to submit its response to Claimants' Application for Interim Measures.

10. By letter of September 16, 2019, the Tribunal decided to *(1)* grant Claimants leave to submit *(i)* the recordings of the hearing with *(ii)* the transcript of the hearing, and *(iii)* a five-page letter describing the contents of the hearing to the Tribunal; and *(2)* grant Respondent a two-week extension until October 2, 2019, to submit its Response to Claimants' Application for Interim Measures.

11. On September 25, 2019, Claimants submitted the recording and the transcript of the hearing, as well as a six-page submission.

12. On September 29, 2019, Respondent submitted that Claimants had not followed the Tribunal's instructions and instead filed a submission on "new" arguments and revelations. Respondent requested that the Tribunal grant it an additional 10 days to respond to Claimants' submissions. Respondent further requested that the Tribunal bar Claimants from making any additional submissions.

13. On October 2, 2019, Claimants informed the Tribunal that it was "agnostic" on whether the Tribunal should grant Respondent's request for an extension of time to submit its Response. Claimants additionally requested that the Tribunal issue its decision as expeditiously as possible.

14. On October 3, 2019, the Tribunal informed the Parties that it granted Respondent a ten-day extension from October 2, 2019, to submit its Response to Claimants' Request for Interim Measures and Claimants' letter of September 25, 2019.

15. On October 7, 2019, Claimants submitted the Statement of Claim, with accompanying witness statement, expert reports, appendices and indexes of legal authorities and exhibits

[1] Claimants' letter of September 6, 2019, page 2.

(the "**Statement of Claim**"). On October 10, 2019, Claimants submitted accompanying exhibits C-0183 and C-0216 to C-0216.30 which were audio recordings (exhibit C-0220 was intentionally omitted) (the "**Audios**").

16. Further to the Tribunal's invitation, on October 12, 2019, Respondent submitted its Response to the Application (the "**Respondent's Response**").

17. On October 21, 2019, Respondent submitted that the Audios accompanying the Statement of Claim were leaked to the press, in breach of the provisions of Procedural Orders No. 1 and No. 3. Respondent further submitted that as public officials they had the duty to report to the competent authorities any accusation related to corruption and, thereby, were obliged to share the Audios.

18. On November 4, 2019, the Tribunal invited the Parties to a telephonic hearing on Claimants' Application for Interim Measures, which, after exchanges with the Parties was scheduled for December 3, 2019.

19. On December 3, 2019, the Hearing on Interim Measures took place by telephone. In addition to the Members of the Tribunal and the Secretary of the Tribunal, the following persons participated in the Hearing on Interim Measures:

For the Claimant:

Counsel:

Mr. Juan P. Morillo	Quinn Emanuel Urquhart & Sullivan, LLP
Mr. Philippe Pinsolle	Quinn Emanuel Urquhart & Sullivan, LLP
Mr. David M. Orta	Quinn Emanuel Urquhart & Sullivan, LLP
Ms. Dawn Yamane Hewett	Quinn Emanuel Urquhart & Sullivan, LLP
Mr. Daniel Pulecio-Boek	Quinn Emanuel Urquhart & Sullivan, LLP
Ms. Julianne Jaquith	Quinn Emanuel Urquhart & Sullivan, LLP
Ms. Ana Paula Luna Pino	Quinn Emanuel Urquhart & Sullivan, LLP

For the Respondent:

Counsel:

Mr. Orlando Pérez Gárate	Director General de Consultoría Jurídica de Comercio Internacional, Secretaría de Economía
Ms. Cindy Rayo Zapata	Dirección General de Consultoría Jurídica de Comercio Internacional, Secretaría de Economía
Mr. Alan Bonfiglio Ríos	Dirección General de Consultoría Jurídica de Comercio Internacional, Secretaría de

	Economía
Ms. Blanca Del Carmen Martínez Mendoza	Dirección General de Consultoría Jurídica de Comercio Internacional, Secretaría de Economía
Mr. Stephan E. Becker	Pillsbury Winthrop Shaw Pittman, LLP
Mr. David J. Stute	Pillsbury Winthrop Shaw Pittman, LLP

Interpreters:
Mr. Charles H. Roberts
Ms. Silvia Colla

II. The Parties' positions

A. Claimants

(a) Respondent has engaged in a series of actions intended to persecute Claimants as retaliation for initiating these arbitration proceedings

20. Claimants argue that Respondent has engaged in a "relentless" series of persecutions as "retaliation" for the Claimants' initiation of the present arbitration proceedings.[2] These actions are presented as forcing Claimants, as well as Integradora and its subsidiaries, to spend a considerable amount of resources to respond to and defend against them.[3] Claimants' application specifically refers to the following actions:[4]

- Eight criminal investigations launched by Respondent against Integradora, Perforadora, their directors, employees and lawyers. Claimants argue that these investigations lack any legal basis and are solely motivated by the objective of taking over the Jack-Up Rigs and defaming everyone associated with them.[5] Claimants describes these investigations as a "carefully orchestrated and methodically executed effort" to deter from further pursuing these arbitration proceedings.[6] Claimants refer specifically to:

[2] Claimants' Application for Interim Measures, §3.
[3] Claimants' Application for Interim Measures, §9 and §11.
[4] An overview of the chronology of events according to the Claimants can be found in Claimants' Appendix D and Appendix E.
[5] Claimants' Application for Interim Measures, §6.
[6] Claimants' Application for Interim Measures, §27.

1. (“**The PGR Investigation**”) **—** an investigation following a complaint filed by the Bondholders before the *Procuraduría General de la República,* used by the Respondent “to fabricate evidence” against Perforadora to be used to further attack Perforadora in other criminal proceedings.[7]

2. (“**The Improper Representation Investigation**”) **—** an investigation for a procedural fraud (*fraude procesal*) by way of improper representation “based on allegations that warrant no serious consideration.”[8]

3. (“**The Sham Companies Investigation**”) **—** an investigation for fraudulent administration (*administración fraudulenta*) focusing on Perforadora’s relationship with sixteen “sham” or “ghost” companies that supposedly facilitate tax evasion.[9] Claimants specifically argue that Respondent rewarded a Mexican Judge in this case “for issuing baseless and suspicious orders by promoting him […] from trial judge to appellate judge.”[10]

4. (“**The Contempt Investigation**”) **—** an investigation against Perforadora and its employees based on a complaint that these were in contempt of the Rigs Take-Over Order.[11]

5. **(“The Duplicative *Amparos* Investigation”) —** an investigation against Mr. Alonso Del Val for having omitted to describe all *amparos* related to the Mexican criminal investigations.[12]

6. **(“The Tax Evasion Investigation”) —** Claimants further refer to a media report about the Mexican Ministry of Finances (*Secretaría de Hacienda y Crédito Público*) complaint filed with the PGR against Mr. Cañedo, the Non-Executive Chairman of the Board of Directors of Integradora and one of the Claimants; Mr. Gil, CEO and a director of Integradora, and Mr. Cañedo’s cousin; and Mr. Gustavo Mondragon, an employee in Integradora’s tax department for an improperly claimed deduction in a 2014 tax return.[13] Claimants argue that on information and belief it is the first time that such a

[7] Claimants’ Application for Interim Measures, §42.
[8] Claimants’ Application for Interim Measures, §46.
[9] Claimants’ Application for Interim Measures, §52.
[10] Claimants’ Application for Interim Measures, §71.
[11] Claimants’ Application for Interim Measures, §73.
[12] Claimants’ Application for Interim Measures, §75.
[13] Claimants’ Application for Interim Measures, §§77-78.

criminal complaint is filed against directors and executives of a company for this type of deduction.[14]

7. **("The First Investigation Against Quinn Emanuel") —** Claimants further refer to a media report about an ongoing investigation against Quinn Emanuel focusing on whether the firm used information obtained from another Quinn Emanuel client to prepare the Notice of Arbitration.[15]

8. **("The Second Investigation Against Quinn Emanuel") —** Claimants argue that they have learned that the Bondholders were working with Mexican prosecutors in the PGJCDMX to obtain charges and obtain arrest warrants against Quinn Emanuel and its attorneys for *prevaricato*, which under Mexican law makes it a crime to represent conflicting interests in the same litigation.[16]

- Seven tax audits against Integradora and its subsidiaries. Claimants argue that none of these audits have any merit or foundation in Mexican law.[17]
- Pemex's continued refusal to pay Perforadora approximately USD 24 million that it owes since late 2017.[18]
- Respondent's attempt to obtain, outside the proper course of this arbitration, the evidence underlying Claimants' Notice of Arbitration.[19]
- The arrest warrants issued by Mexico against two Claimants (Messrs. Cañedo White and Williamson-Nasi) ant three of their witnesses (Messrs. Gil White, Del Val and Villegas).[20]

21. As mentioned above, Claimants informed the Tribunal that after having filed their Application for interim measures, the Respondent had in the meantime requested and obtained Interpol Red Notices against two Claimants and three of their witnesses. Claimants further reported about the *amparo* proceeding in Mexico, in which the judge issued oral arrest warrants against the above-mentioned Claimants and witnesses.[21]

[14] Claimants' Application for Interim Measures, §80.
[15] Claimants' Application for Interim Measures, §§81-82.
[16] Claimants' Application for Interim Measures, §§83-84.
[17] Claimants' Application for Interim Measures, §§9 and 89-91.
[18] Claimants' Application for Interim Measures, §§10 and 92-93.
[19] Claimants' Application for Interim Measures, §§11 and 94-95.
[20] Claimants' Application for Interim Measures, §§29-32.
[21] See *supra* §7.

(b) This Tribunal has broad authority to issue interim measures

22. Claimants filed its request on the basis of Articles 26(1) of the 1976 UNCITRAL Arbitration Rules and 1134 of the NAFTA. Claimants argue that pursuant to these rules, the Tribunal enjoys wide powers to issue interim measures in support of the underlying arbitration. Claimants submit that the requested measures relate to the subject matter of the dispute as, absent such interim measures, Claimants would suffer irreparable injury to their rights.[22] Claimants further seek to protect the Tribunal's jurisdiction, including their ability to pursue their NAFTA claim.[23]

(c) Claimants' request meets the three criteria generally used by tribunals in UNCITRAL and NAFTA cases when assessing a request for interim measures

23. Claimants argue that despite the silence of Articles 26(1) of the 1976 UNCITRAL Arbitration Rules and 1134 of the NAFTA, tribunals in UNCITRAL and NAFTA cases generally consider three criteria when assessing a request for interim measures:[24]

(i) whether the tribunal has *prima facie* jurisdiction;

(ii) whether the interim measures are necessary to:

- prevent acts of retaliation by the respondent State against the claimants;

- protect the claimants from suffering greater injuries during the pendency of the arbitration (*i.e.*, necessary to preserve claimants' right to the *status quo*);

- prevent that the claimants suffer an irreparable injury; and

- protect the integrity of the arbitral proceedings, including the claimants' ability to pursue their claim; and

(iii) whether there is an urgent need for the tribunal to issue the interim measures.

24. Claimants submit that the three above-mentioned criteria constitute a mere guidance for the Tribunal as its power to order interim measures should be understood as discretionary

[22] Claimants' Application for Interim Measures, §100.
[23] Claimants' Application for Interim Measures, §103.
[24] Claimants' Application for Interim Measures, §105.

in nature.[25] Claimants however submit that, in any event, all of the three criteria are met in the present case to justify an order of interim measures.[26]

25. Firstly, Claimants submit that the Tribunal has *prima facie* jurisdiction as Articles 1120, 1121 and 1139 of the NAFTA afford a basis on which the Tribunal's jurisdiction might be founded.[27]

26. Secondly, Claimants argue that the requested measures are necessary to prevent further acts of retaliation and persecution by Respondent against Claimants.[28] Claimants underscore that Investor-State tribunals have already granted interim measures staying criminal proceedings against a claimant.[29]

27. Claimants further argue that the right to non-aggravation of the dispute is well established under international law and that Respondent's attacks are increasing Claimants' injuries during the pendency of the arbitration, thus altering the *status quo* and unnecessarily and improperly aggravating the dispute.[30]

28. In addition, Claimants argue that Investor-State tribunals have issued interim measures when, absent such measures, the claimant would have suffered an injury or harm that a monetary award could not fully and properly have compensated.[31] Claimants argue that they precisely seek interim measures to prevent suffering injuries which no monetary award could properly and fully compensate.[32] In their view, absent any interim measures, Respondent's acts of retaliation and persecution would likely cause the issuance of more arrest warrants against possibly other Claimants and against Integradora's and Perforadora's key employees.[33]

29. Claimants further argue that the requested measures are necessary to protect the integrity of the proceedings as, otherwise, Respondent would make it impossible or significantly more challenging for Claimants to pursue this NAFTA claim because key witnesses would either be imprisoned or under criminal prosecution; and key evidence could become unavailable to Claimants.[34]

[25] Claimants' Application for Interim Measures, §105.
[26] Claimants' Application for Interim Measures, §106.
[27] Claimants' Application for Interim Measures, §§107-114.
[28] Claimants' Application for Interim Measures, §§115-116.
[29] Claimants' Application for Interim Measures, §115.
[30] Claimants' Application for Interim Measures, §§117-122.
[31] Claimants' Application for Interim Measures, §123.
[32] Claimants' Application for Interim Measures, §125.
[33] Claimants' Application for Interim Measures, §126.
[34] Claimants' Application for Interim Measures, §128.

30. Claimants further submit that Respondent has demonstrated that it will continue to injure Claimants absent an order from this Tribunal, as it failed to reply to Claimants' letters requesting that it "cease and desist from its retaliatory and persecutory actions."[35]

31. Thirdly, Claimants argue that, even if neither NAFTA nor the UNCITRAL Arbitration Rules expressly require "urgency" for the Tribunal to order interim measures, in the present case the measures are urgently needed as Respondent will not cease its actions.[36]

(d) Claimants' request meets other criteria occasionally used by tribunals in UNCITRAL and NAFTA cases when assessing a request for interim measures

32. Claimants submit that—although not mandatory—they also meet other criteria occasionally used by Investor-State tribunals when deciding whether to issue interim measures.[37]

33. Claimants submit that they established a *prima facie* case on the merits, as they are U.S. investors in Mexico who have alleged violations of NAFTA based on the conduct of the Mexican state.[38]

34. Claimants further submit that the interim measures will not disproportionally burden Respondent.[39] Claimants specifically underscore that the requested measures are limited to the pendency of the proceedings and that Respondent would incur no loss of any kind.[40]

(e) Claimants request is timely

35. Claimants submit that they acted quickly to notify Respondent of the matter. The Claimants have been sending letters to Respondent since July 2018, alerting it to each of the instances of retaliation and persecution described above, and requesting that Respondent cease attacks which are "aggravating the dispute and threaten to irreparably injure [their] rights."[41] In the absence of any response, Claimants argue that they have no alternative than to file this application to protect themselves from Respondent's "abuse of its executive branch powers."[42]

[35] Claimants' Application for Interim Measures, §129.
[36] Claimants' Application for Interim Measures, §133.
[37] Claimants' Application for Interim Measures, §134.
[38] Claimants' Application for Interim Measures, §136.
[39] Claimants' Application for Interim Measures, §140.
[40] Claimants' Application for Interim Measures, §142.
[41] Claimants' Application for Interim Measures, §88.
[42] Claimants' Application for Interim Measures, §145.

36. Claimants accordingly request the Tribunal to order Respondent to:

(i) refrain from arresting Claimants or the witnesses that will support their NAFTA claim during the pendency of this arbitral proceeding;

(ii) confirm whether it is conducting any investigations against Quinn Emanuel or its attorneys and, if so, to immediately suspend any such investigations; and

(iii) order any additional relief it deems appropriate to preserve Claimants' rights.[43]

B. Respondent

(a) Respondent submits that the mentioned investigations are in conformity with Mexican Law and are still pending at this stage

37. Respondent does not deny the existence of the various investigations mentioned by the Claimants; Respondent however does not admit the veracity of the facts reported in the Application for interim measures.[44] Respondent further denies any participation in the ongoing disputes between the Bondholders, on the one side, and Integradora and Perforadora, on the other side.[45]

38. Respondent argues that the present arbitration proceedings do not provide any immunity to persons or entities participating in these proceedings.[46] Respondent further submits that in Mexico, as in any other legal system committed to the rule of law, national authorities have the obligation to investigate acts (or omissions) that may constitute a crime, in accordance with the principles of presumption of innocence, access to justice, due process and legality.[47]

[43] Claimants' Application for Interim Measures, §146 (see also §97). In fact, in these paragraphs, Claimants also included the request of another interim measure, namely "that the Tribunal order México to […] cease subverting the procedures laid out in this NAFTA proceeding by using domestic proceedings to obtain evidence for use in this arbitration." This request was withdrawn during the Hearing on Interim Measures, on the basis of two events: (a) the evidence that Mexico was seeking–the tapes and recordings that, according to the Claimants, establish that Mexico retaliated against the Claimants and their investments for not agreeing to participate in requests for bribes that were being made by Mexican Governmental officials to Claimants–were produced in the context of the presentation of Claimants' Statement of Claim; so Mexico is already in possession of that evidence. And (b) there have not been additional efforts by Mexico to subvert the evidentiary requirements in this proceeding. Respondent took note of Claimants' withdrawal, regardless of Mexico's position on the recordings presented by Claimants.
[44] Respondent's Response, §15.
[45] Respondent's Response, §8.
[46] Respondent's Response, §9.
[47] Respondent's Response, §10.

39. Respondent submits that all persons and entities under investigation are subject to proceedings in conformity with Mexican law, have access to ordinary means of defense available in such investigations and have benefited—and continue to benefit—from legal representation.[48]

(b) Claimants fail to demonstrate the necessity, urgency and proportionality of the requested measure to order Respondent to refrain from arresting Claimants or the witnesses that will support their NAFTA claim during the pendency of this arbitral proceeding

40. Respondent argues that—apart from the need to establish *prima facie* the jurisdiction of the Tribunal and the existence of a right susceptible of protection—the criteria for the Tribunal to take into account are:

(i) the necessity of the requested measure;

(ii) the urgency of the requested measure; and

(iii) the proportionality of the requested measure.[49]

41. Respondent states that Claimants' submission fails to underscore the "clear message" of investor-State tribunals having been requested to order interim measures following criminal investigations. Respondent submits that in such cases a high standard is applied to justify interference with a State's sovereign police powers.[50] Respondent argues that none of the three criteria are met in the present case.

42. Firstly, Respondent underscores that the requested measures are not necessary to prevent an irreparable injury given that Claimants have not been prevented to pursue their claim in these proceedings during the past year. Respondent further highlights that none of Claimants live in Mexico and none is subject to arrest.[51]

43. Secondly, Respondent submits that Claimants fail to concretely demonstrate the urgency of the measures.[52]

[48] Respondent's Response, §§16 and 149.
[49] Respondent's Response, §131.
[50] Respondent's Response, §138.
[51] Respondent's Response, §§150-152.
[52] Respondent's Response, §§153-157.

44. Thirdly, Respondent argues that Claimants' request is overly broad in that it fails to precisely identify the persons to protect.[53] Respondent submits that the request for interim measures is used as a tool by Claimants in relation to ongoing procedures against the Bondholders and other parties.[54]

(c) Claimants fail to demonstrate the necessity, urgency and proportionality of the requested measure to order Respondent to cease subverting the procedures laid out in this NAFTA proceeding by using domestic proceedings to obtain evidence for use in this arbitration

45. Respondent submits that Claimants have not submitted any information supporting their request on the necessity to prohibit the investigation of allegations of possible acts of corruption. Respondent argues that, in any case, Claimants have not reported any news on this matter since October 2018, which in itself demonstrates the absence of any urgency or necessity of protection.[55]

(d) Claimants fail to demonstrate the necessity, urgency and proportionality of the requested measure to order Respondent to confirm whether it is conducting any investigations against Quinn Emanuel or its attorneys and, if so, to immediately suspend any such investigations

46. Respondent argues that Claimants request is entirely based on suppositions. The continued traveling and representation of Claimants by the lawyers in question demonstrates that the requested measures are neither necessary, urgent or proportional.[56]

47. Respondent accordingly requests the Tribunal to dismiss the request for interim measures in its entirety.[57]

III. The Tribunal's analysis

A. Introduction

48. At the outset, the present case appears to be particularly complex from a variety of viewpoints. One of the obvious signs of such complexity stems from the high level of

[53] Respondent's Response, §158.
[54] Respondent's Response, §159.
[55] Respondent's Response, §161. As previously mentioned (*supra* note 43), this request was withdrawn by Claimants during the Hearing on Interim Measures.
[56] Respondent's Response, §§163-166.
[57] Respondent's Response, §167.

litigation between the Parties, both within and—especially—outside the proceedings before the Tribunal. Apart from these proceedings, the number and diversity of procedures involving the Parties are, indeed, quite significant. It must be highlighted that in several of them, in addition, intervene third parties closely linked to the underlying transactions of this arbitration, *i.e.* the Bondholders. Furthermore, such Parties' activism explains the time elapsed between the submission of Claimants' Application and the present Procedural Order.

49. When considering a request such as the one that forms the subject of this Procedural Order, it is obvious that the Tribunal must concentrate on the legal aspects relevant to the task in front of it, in application of the rules governing the proceedings. This does not mean that no attention should be paid to the intense activity carried out by the Parties before all types of public authorities. Rather, it implies that the Tribunal must avoid entering into the substantial analysis of the various administrative, judicial and police procedures in progress, over which it most certainly lacks jurisdiction. Accordingly—as a matter of principle and for present purposes—it is not for the Tribunal to study or decide about the origin, justification or outcome of the ongoing or past procedures involving the Parties or other actors related to this case.

50. What does however clearly fall within the scope of the mandate of the Tribunal is the paramount need to protect the integrity of the arbitration process and the equally important need to avoid any aggravation of the dispute. Consequently, were the Tribunal to conclude that, as a result of Respondent's actions—such as those mentioned in the preceding paragraphs—the integrity of the proceeding could be affected or the dispute could be aggravated, it would have to avoid it using all available measures.

51. Nevertheless, in order to do so, and given the seriousness of Claimants' allegations with respect to Respondent's alleged conduct, the required burden of proof shall be particularly high.[58]

52. Claimants specifically request the Tribunal to order Respondent to:

(i) refrain from arresting Claimants or the witnesses that will support their NAFTA claim during the pendency of this arbitral proceeding;[59] and

[58] See, in general, *Corfu Channel (UK v. Albania)*, ICJ Reports 1949.
[59] See *supra* §36(i).

(ii) confirm whether it is conducting any investigations against Quinn Emanuel or its attorneys and, if so, to immediately suspend any such investigations.[60]

53. Concerning the generic request of "order any additional relief it deems appropriate to preserve Claimants' rights,"[61] Claimants clarified during the Hearing on Interim Measures that it is not a separate request but a way to tell the Tribunal that when it exercises its discretion in awarding any measure it might order any variation of them.

54. In order to decide whether to grant Claimants' request, the Tribunal must first establish which powers are available within the framework of the applicable rules and, where appropriate, apply for each of the specific requested measures the different criteria which are nowadays routinely invoked by international courts and tribunals when deciding whether or not to adopt such measures. Before this, however, it appears necessary to consider the precise content of each of the requested measures.

B. The specific requested measures

55. The first requested measure[62] refers to the exercise of powers of the State with respect to the investigation and prosecution of possible criminal offenses. Specifically, Claimants request that the Tribunal order Respondent to refrain from exercising said competence with respect to the persons acting as Claimants and/or witnesses in the present case. Although a request of these characteristics is not so unusual in arbitration between investors and States,[63] the granting of such measures can only take place in very particular circumstances.

56. In order to decide on the requested measures, it must be stressed that the Tribunal is not bound by any previous decisions reached by other international courts and tribunals on the granting of interim measures. The Tribunal is however mindful of the need to take into account previous decisions, where relevant, and in particular as the Parties have extensively referred to a series of cases to argue whether or not the requested measures should be granted. Nevertheless, the Tribunal underscores that—this being particularly true for requests for interim measures—it needs to be mindful of the factual differences which exist between the different cases. On the basis of the foregoing, the Tribunal finds that investor-State tribunals, regardless of the underlying applicable legal framework, as a matter of

[60] See *supra* §36(ii).
[61] See *supra* §36(iii).
[62] See *supra* §36(i).
[63] See in particular the recent empirical study conducted by the British Institute of International and Comparative Law with White & Case LLP: *2019 Empirical study: Provisional measures in investor-state arbitration*. The study found that the stay of criminal investigations or proceedings is the fourth most requested type of interim measure. https://www.biicl.org/publications/2019-empirical-study-provisional-measures-in-investorstate-arbitration

principle, have consistently recognized the undisputed sovereign right of a State to pursue a criminal investigation within its territory. Investor-State tribunals have unmistakably indicated that this right should in no circumstance lightly be interfered. The Tribunal has no difficulty in agreeing on this point. This does not mean that the Tribunal lacks any power to appreciate the regularity of the ongoing procedures and investigations, as will be further discussed in this Procedural Order.[64]

57. Indeed, in addition to the common criteria used to decide whether or not to issue interim measures,[65] the fact that the object of the requested measure is to order the State to refrain from exercising its prerogatives introduces an additional element to be considered by the Tribunal. Specifically, the Tribunal must analyze—with all the elements available to it—whether the State is exceeding its powers and, should it find this point to be verified, the extent to which such conduct has had a detrimental impact on the arbitration procedure.

58. The second requested measure[66] differs from the previous one, as it does not affect the Parties but the legal counsel of Claimants. In this sense, should Claimants' statements be

[64] For an overview of the case law, see: Cameron Miles, *Provisional measures before International Courts and Tribunals*, Cambridge University Press, 2017, spec. p. 377-382. See for instance *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures dated November 19, 2007, at §62: "[T]he Tribunal notes that it has great respect for the Ecuadorian Judiciary and that it acknowledges Ecuador's sovereign right to prosecute and punish crimes of all kinds perpetrated in its territory."; *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order dated May 30, 2014 at §21: "Neither the ICSID Convention nor the BIT imposes a prohibition on a State that enjoins it from exercising criminal jurisdiction over such matters. In particular, they do not exempt suspected criminals from investigation or prosecution by virtue of their being investors."; *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures dated January 21, 2015 at §145: "[T]he Tribunal agrees with the tribunal in *Caratube International Oil Co. LLP v. Kazakhstan* that the State's investigative powers, including in criminal matters, are 'a most obvious and undisputed part of [its] sovereign right ... to implement and enforce its national law on its territory' and 'a particularly high threshold must be overcome before an ICSID Tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state'.", citing *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures dated July 31, 2009, at §§134-137; *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures dated March 3, 2016 at §3.16: "It is trite to say that criminal law and procedure are a most obvious and undisputed part of a State's sovereignty."; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures dated April 8, 2016, at §185: "The Tribunal is also aware of the decisions of other tribunals which have expressed the view that provisional measures are an extraordinary remedy and that tribunals should exercise particular caution when asked to restrain a sovereign State's exercise of its right to conduct criminal investigations and prosecutions relating to conduct within its territory. However, such powers must be exercised in good faith, respecting a claimant's rights to have its claims fairly considered and decided by an arbitral tribunal."

[65] See *infra* §62.

[66] See *supra* §36(ii).

confirmed, the Tribunal would face a potential serious issue that could lead to a violation of Claimants' fundamental right of access to justice.

59. Nonetheless, it should be borne in mind that what has been requested regarding this issue is, on the one hand, the confirmation about the existence of some ongoing investigation, and, on the other hand, the immediate suspension of such investigation. This means that, as of now, the Tribunal can only consider the first of these issues (*i.e.* to request confirmation of the existence of such investigations), leaving the second (*i.e.* to order the suspension of such investigations) for a potential later stage.

C. The appropriateness of the requested measures

60. Having thus presented the measures requested by Claimants, it becomes necessary:

- firstly, to establish the scope of the Tribunal's powers under the applicable legal framework to adopt measures such as those described and,

- secondly, to apply to each of those measures the criteria that allows to conclude if it is indeed appropriate to grant them.[67]

61. There is no doubt that the Tribunal is empowered to order interim measures under the applicable legal framework to this arbitration proceeding. Indeed, the first sentence of Article 1134 of the NAFTA states that "*[a] Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction*." For its part, Article 26(1) of the UNCITRAL Arbitration Rules indicates that "*[a]t the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute* […]."

62. The effective exercise of the power of this Tribunal to grant each of the requested measures depends, in essence, on the fulfillment of three conditions:

(i) the danger of a risk if the requested measures are not adopted [*periculum in mora*] also sometimes mentioned as the risk of irreparable harm;

(ii) the likelihood of success on the merits [*fumus boni iuris*]; and

[67] See *infra* §62.

(iii) the need, efficiency and proportionality of the measure.

63. Although the criteria indicated are partially different from those described, respectively, by Claimants[68] and Respondent,[69] there is no doubt that they are generally admitted when it comes to determining the source of a request for provisional measures.[70] Obviously, given the generality of these formulated criteria, they must be adapted to the specific characteristics of the requested measures in the context of this case, as will be done hereafter.

64. Regarding measure referred in §52(i), even if it were accepted that the issuance of the "apprehension" orders constitutes in itself an urgent situation–what Claimants posit rather than demonstrate–, it cannot be considered proven—at least so far—that the actions of the Mexican authorities are not based on regular procedures established in their criminal law, in particular because such actions has been taken precisely in the application of such procedures upon the action of private parties (*i.e.* the Bondholders). Lacking evidence that the Mexican judicial authorities are acting improperly, the granting of the requested measure would be inappropriate. Indeed, such granting would appear disproportionate and its efficiency could also be doubted.

65. The Tribunal has not found any evidence in the documents presented or in the statements of the Parties during the Hearing on Interim Measures that allows inferring that these actions exceed the regular framework of State powers. For example, from the reading of the 167 pages of the transcript of the hearing held before a local Mexico City judge on July 16, 2019, it appears that all arrest warrants issued respond to the complaints made by the Bondholders; and as stated by Respondent, the Mexican authorities before which these complaints have been filed cannot do anything else than activate the judicial mechanisms to investigate such complaints.

66. Accordingly, in the present context, although the Tribunal is ready to accept that a possible detention of a Claimant and/or witness could affect and ultimately endanger Claimants' rights, at this stage such detention has not taken place, not being sufficient in the eyes of the Tribunal, the damage alleged by Claimants created by the possibility that such detention would occur. The only person said to have been arrested (Mr. Del Val) is apparently free

[68] Claimants' Application for Interim Measures, §105. See *supra* §23.
[69] Respondent's Response, §131. See *supra* §40.
[70] See, among many other references, Resolution on "Provisional measures," IDI, Hyderabad Session (2017). In particular, see §2: "Provisional measures are available if the applicant for such measures can show that: (a) there is a *prima facie* case on the merits; (b) there is a real risk that irreparable injury will be caused to the rights in dispute before final judgment; (c) the risk of injury to the applicant outweighs the risk of injury to the respondent; and (d) the measures are proportionate to the risks" (http://www.idi-iil.org/app/uploads/2017/08/3-RES-FINAL-EN-COR.pdf).

and, according to the comments offered by the Parties, said person would in principle be willing to collaborate with the Mexican authorities.[71]

67. Furthermore, the Tribunal has not been presented with any evidence that the directors of Oro Negro—subject to the various procedures listed in the Application—as well as the companies, have not been able to exercise their rights in the Mexican judicial system. To the contrary, evidence suggests they have been able to defend their rights.[72]

68. In addition, the request for assistance from Interpol and the request for the so-called Red Notices mentioned at a late stage by Claimants[73] do not affect the previous considerations as they are a foreseeable consequence in the wake of criminal proceedings in respect of persons who are not within reach of the jurisdiction of the Mexican authorities.

69. Accordingly, the Tribunal decides that the measure requested in §52(i) cannot be granted, at the present time, in the manner proposed by Claimants. However, the Tribunal, based on the risk that the activity within the powers of the State could unjustifiably prejudice the integrity of this arbitration proceeding, will consider the issuance of an order addressed to Respondent requesting its collaboration for the arbitration to take place in an effective way in order to ensure the adoption of a fair decision. In this sense, Respondent shall abstain from adopting any unjustified measure that may aggravate the dispute. A measure like this can be framed under Claimants' generic request ("any additional relief").[74]

70. The measure requested in §52(ii) is, as noted above, different from the previous one. The potential curtailment of the exercise of the fundamental right of access to justice—by impeding the activity of Claimants' legal counsel—would be, if proven, extremely serious.

71. The evidence produced does not, at the present stage, demonstrate that Quinn Emanuel or its lawyers are currently subject to a criminal investigation in Mexico. The only evidence invoked by Claimants are media reports mentioning in potential terms that possibility, and their suspicion that the Bondholders would be working with members of the PGJCDMX to coordinate the investigation and prosecution for certain crimes against Quinn Emanuel.

[71] Respondent's Response, §151. During the Hearing on Interim Measures, Claimants argued that the fact that Mr. Del Val was originally ready to act as an essential witness called by Claimants and has now changed his position would demonstrate the perverse effects of Mexico's actions. However, so far there is no evidence of Mr. Del Val's original willingness to testify in favor of Claimants.
[72] Claimants themselves have recognized this. See Claimants' Application for Interim Measures, §§59, 67, 75.
[73] See *supra* §7.
[74] See *supra* §53.

72. As already stated,[75] the requested measure referred to in §52(ii) is composed of two successive steps. At first, Respondent should be ordered to confirm whether such investigations is taking place and, it should be added, under which circumstances these are being carried out. The suspension could, in a second step, only be ordered if such investigations are confirmed to exist.

73. Regarding the first step, the Tribunal finds that the measure in question must be considered in the form of a request for information, having due regard to the sovereign prerogatives of the Mexican State, based on the potential gravity of the prosecution of lawyers and the law firm that represents Claimants, in particular if this investigation is related to the dispute in front of the Tribunal. In effect, the Tribunal considers it appropriate to grant the measure referred to, with said limitation.

74. During the Hearing on Interim Measures, Respondent indicated that it asked two concrete judicial authorities (the *Fiscalía General de la República* and the PGJCDMX) for the existence of the above-mentioned investigations. According to Respondent, the answer was in the negative. Considering that there is no evidence of such questions and answers, the Tribunal considers necessary to explicitly formulate the same question by means of this Procedural Order in order to receive a concrete and formal answer thereto.

75. The Tribunal can and will only decide on the appropriate measures to be taken with respect to the second step once the response or reaction of the Mexican authorities has been received and properly assessed.

76. As a whole, this Decision is taken on the basis of the elements presented by the Parties so far. Consequently, nothing prevents the Tribunal from modifying it, if additional and relevant pieces of evidence are brought to its attention at a later stage. The Tribunal also emphasizes that the analysis carried out to adopt this decision does not in any way lead to a prejudgment which could later prevent this Tribunal from ruling on the claims before it.

[75] See *supra* §58.

IV. Order

77. On the basis of the foregoing considerations, the Tribunal:

i) orders Respondent to make all the efforts to collaborate for the arbitration to take place in an effective way, and to abstain to adopt any unjustified measure that may aggravate the dispute; and,

ii) requests Respondent –and specifically the *Fiscalía General de la República* and the PGJCDMX– to provide concrete information about the existence of any investigation against Quinn Emanuel and/or its lawyers acting in this arbitration.

On behalf of the Tribunal,

[Signed]

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Prof. Diego P. Fernández Arroyo
Presiding Arbitrator
Date: December 19, 2019