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. 9

Tribunal
Ms. Sabina Sacco, President
Mr. Pierre Bienvenu, Ad. E.
Prof. Hugo Perezcano Díaz

Secretary of the Tribunal
Ms. Elisa Méndez Bräutigam

19 November 2024

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I. SCOPE OF THIS ORDER

1. This Procedural Order No. 9 ("**PO9**") addresses the Respondent's objection to the production of certain Documents following the Tribunal's document production orders in Procedural Order No. 5 ("**PO5**"), and the ensuing application by the Claimant requesting that the Tribunal order the Respondent to produce a privilege log compliant with Procedural Order No. 1 ("**PO1**"), including by identifying all Documents over which the Respondent claims privilege or some other bases for withholding responsive Documents.[1] This Order is issued by majority, with Prof. Perezcano dissenting, with reasons to follow.

II. PROCEDURAL BACKGROUND

2. On 19 June 2024, the Tribunal issued PO5, in which it ruled on the Claimant's Final Document Requests. In PO5, the Tribunal ordered the Respondent to produce, by 19 July 2024, the following Documents: [2]

   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." [3]

   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)." [4]

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.[5] The Tribunal also invited the Parties to revert to the Tribunal as to the need for additional confidentiality protections for Documents to be produced pursuant to PO5.[6]

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[1] Capitalized terms have the meaning given to them herein or in PO5.

[2] PO5, ¶¶ 41-42.

[3] Annex A to PO5, p. 12.

[4] Annex A to PO5, p. 20.

[5] PO5, ¶¶ 39 and 44.

[6] PO5, ¶ 43.

4. On 10 July 2024, the Respondent indicated that it was still reviewing Documents and was not yet in a position to indicate whether on 19 July 2024 it would raise specific objections to the production of certain Documents.

5. On 19 July 2024, the Respondent submitted what it identified as "a Privilege and Confidentiality Log listing specific documents that the Respondent refrains from producing on the basis of legal impediment or privilege, commercial or technical confidentiality, or special political or institutional sensitivity" ("**Mexico's Privilege Log**").[7] In addition to identifying 13 specific documents it wished to withhold from production, the Respondent "object[ed] to the production of all responsive documents that relate to the litigation of ISDS arbitrations."[8]

6. By letter of 24 July 2024, the Claimant alleged that the Respondent's document production was "seriously deficient in several fundamental respects and not in compliance with [PO5]"[9] and requested the Tribunal to order the Respondent to remedy those deficiencies ("**Claimant's Application**"). 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'*."[10] This Order addresses the Claimant's Application only to the extent that it relates to the Respondent's Privilege and Confidentiality Log; the Claimant's objections to the Respondent's document production have been addressed in Procedural Order No. 8.

7. On 25 July 2024, the Tribunal invited the Respondent to respond to the Claimant's Application. For purposes of this Order, it suffices to say that it invited the Respondent to "[r]espond to the Claimant's arguments that its privilege log is deficient, and confirm whether it has included in that privilege log all Documents over which it claims privilege."[11]

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 26 July 2024, the Claimant submitted its Response to Mexico's Privilege Log (the "**Claimant's Response to the Privilege Log**"). The Claimant commented on the 13 specifically identified documents described in Mexico's Privilege Log, noting that its comments "supplement[ed] the general comments set out in [the Claimant's letter of 24 July 2024]." [12]

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[7] Mexico's Privilege Log, ¶ 1.

[8] Mexico's Privilege Log, ¶ 2.

[9] Claimant's Application, p. 1.

[10] Claimant's Application, p. 7.

[11] Tribunal's letter of 25 July 2024 (second letter).

[12] Claimant's Response to the Privilege Log, p. 1.

10. On 31 July 2024, the Respondent filed its response to the Claimant's Application ("**Mexico's Response**").

11. Following a request from the Claimant, on 5 August 2024 the Tribunal allowed the Parties to file a reply and rejoinder to the Claimant's Application, but indicated that "[u]nless and until the Tribunal directs otherwise, the Parties should not submit further comments on the Respondent's privilege claims."[13]

12. On 6 August 2024, the Claimant filed its reply on its Application, and the Respondent filed its rejoinder on 9 August 2024. These submissions concerned the Claimant's objections to the Respondent's document production and have been addressed in Procedural Order No. 8.

13. By letter of 21 August 2024, the Tribunal informed the Parties that, in light of the unanticipated 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.

III. THE PARTIES' POSITIONS

A. The Respondent's Privilege Log

14. The Respondent objects to the production of all "responsive [D]ocuments that relate to the litigation of ISDS arbitrations" in which the "interpretation of Annex 14-C and, more generally, Chapter 14 of the [USMCA] are disputed"[14] (for purposes of simplicity, the Tribunal will refer to this category of Documents as the "**ISDS Litigation Documents**"). For the Respondent, it is not clear whether the Tribunal intended the scope of its document production orders to extend to the ISDS Litigation Documents because, in its view (i) it would not be appropriate to disclose any privileged litigation Documents in relation to this or any other ISDS arbitration, and (ii) such Documents are outside the scope of supplemental means of interpretation under Article 32 of the Vienna Convention on the Law of Treaties ("**VCLT**").[15] Despite this, for greater certainty and out of an abundance of caution, the Respondent objected to the production of the ISDS Litigation Documents.[16]

15. While the Respondent has not said so expressly, it arises from its submission that it is objecting to four distinct subcategories of ISDS Litigation Documents:[17]

    a. "Communications with opposing lawyers in ISDS arbitrations" (what the Tribunal will refer to as "**Subcategory A**");

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[13] Tribunal's email of 5 August 2024.

[14] Mexico's Privilege Log, ¶¶ 2-3. While Mexico refers to the treaty as the "T-MEC", the Tribunal will use the English abbreviation, "USMCA."

[15] Mexico's Privilege Log, ¶ 2.

[16] Mexico's Privilege Log, ¶ 3.

[17] *Ibid*.

b. "Documents exchanged with the Respondent's external legal counsel" (what the Tribunal will refer to as "**Subcategory B**");

c. "[I]nternal ISDS legal documents" (what the Tribunal will refer to as "**Subcategory C**");

d. "Communications with government lawyers of the other [USMCA] Parties concerning ISDS arbitrations" (what the Tribunal will refer to as "**Subcategory D**").

16. According to the Respondent, all four subcategories are "covered by attorney-client privilege and/or litigation privilege," and Documents in Subcategory D "are not only covered by litigation privilege, but they are also considered to be highly politically and institutionally sensitive."[18]

17. The Respondent explains that, "[i]n the interests of efficiency, the Respondent objects to the production of all such documents as a category," that is to say, to all ISDS Litigation Documents, because compiling a log of all such Documents would require "tremendous time and resources," which would be inefficient considering that all of these Documents would be covered by attorney-client and/or litigation privilege, and or high political or institutional sensitivity.[19] However, the Respondent adds that should the Tribunal instruct the Respondent to identify and catalogue each and every Document in its possession, custody, or control, the Respondent will attempt to do so, but this will inevitably result in substantial delays.[20]

18. Notwithstanding the above, the Respondent notes that, "[i]n conducting searches for responsive documents within the scope of the Tribunal's Order, the Respondent has identified" 13 Documents "that fall within the category described above."[21] After reviewing these Documents, the Tribunal understands that they all fall under Subcategory D. The Respondent notes that "[t]he basis for asserting legal impediment, including litigation privilege and political or institutional sensitivity, are the same in each case."[22] Specifically, for each of these 13 Documents, the Respondent invokes:

> Litigation privilege and high political or institutional sensitivity, as described above. Consequently, pursuant to Article 9.2(b) of the IBA Rules, this document is privileged and confidential and therefore not subject to disclosure.[23]

[18] *Ibid*.

[19] Mexico's Privilege Log, ¶¶ 3-4.

[20] Mexico's Privilege Log, ¶ 4.

[21] Mexico's Privilege Log, ¶ 5.

[22] *Ibid*.

[23] Mexico's Privilege Log, Documents No. 1-1-P to 1-13-P.

B. The Claimant's objections to the Respondent's approach to its privilege claims

19. The Claimant objects to the Respondent's approach to its privilege claims, which it argues is inconsistent with the requirements of both PO1 and PO5. Specifically, the Claimant argues that:

    a. PO1 and PO5 require the Respondent to object to the production of *specific* Documents based on claims of legal impediment or privilege, technical or commercial confidentiality, or special political or institutional sensitivity.[24]

    b. PO1 also requires the Respondent to identify, in respect of each Document withheld, "the law or ethical rules under which the legal impediment or privilege is said to exist," something the Respondent has not done (other than by reference generally to the IBA Rules).[25]

20. The Claimant contends that "if Mexico and the USMCA Parties have exchanged Documents reflecting their contemporaneous and / or current position of the correct interpretation of Annex 14-C in the context of an ongoing Arbitration, those Documents must be provided to Claimant consistent with the Tribunal's PO 5 as no privilege attaches to those Documents" (the Claimant notes in this regard that the Respondent has not asserted that any common interest privilege exists under Mexican law).[26] If, however, the Respondent wishes to withhold certain Documents on the grounds of privilege, the Respondent must include them in a privilege log so that the Claimant is able to dispute such privilege assertions if and where appropriate. The Claimant submits that, "[w]ithout a privilege log, Claimant is precluded from interrogating Respondent's privilege calls over what appears to be a voluminous number of documents (given Respondent's objection that the task would be time consuming), which is fundamentally unfair," as "there may well be responsive Documents that are not covered by privilege, but which Respondent would not know without completing a review of these documents."[27]

21. The Claimant further contends that, even if logging privilege responsive documents might be time-consuming, it "is not a valid basis for Respondent to produce a woefully insufficient privilege log of just 13 Documents."[28] In order to respond to the Respondent's jurisdictional objection, the "Claimant is entitled to understand which Documents are being withheld from its review and on what basis."[29] The Claimant notes that, in the *TC Energy* arbitration, the United States initially withheld over 1500 documents on alleged grounds of privilege and confidentiality but, following a review by a privilege master, was ordered to produce 852 of those documents. According to the

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[24] Claimant's Application, p. 5.

[25] Claimant's Application, pp. 5-6.

[26] Claimant's Application, p. 6 and n. 29.

[27] Claimant's Application, p. 6.

[28] *Ibid*.

[29] *Ibid*.

Claimant, "[t]hat is precisely why blanket assertions over privileged documents are inappropriate."[30]

22. As to the 13 Documents specifically identified by the Respondent, the Claimant raises three objections: [31]

a. A "**Litigation Privilege Objection**": The Claimant argues that, pursuant to PO1, the Respondent is required to identify "the law or ethical rules under which the legal impediment or privilege is said to exist," which it has not done (other than to cite generally to the IBA Rules). The Claimant adds that, "[t]o the extent that Respondent has applied Mexican law, Respondent has not asserted that litigation privilege is a concept that exists, or otherwise provided any legal support for its position. Consequently, litigation privilege does not attach to this Document and cannot have been 'the expectation[s] of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen'[.]"

b. A "**Common-Interest Privilege Objection**": The Claimant adds that, "[i]n any event, this Document is a communication between Respondent and a third party (i.e., the United States) reflecting their contemporaneous and / or current interpretation of the USMCA. Respondent has not asserted that any common interest privilege exists or otherwise applies here as a matter of Mexican law (or any other law). Thus, no privilege attaches to this Document[.]"

c. A "**High Politically or Institutionally Sensitive Objection**": The Claimant adds that the Respondent also asserts that the Documents are highly politically or institutionally sensitive, without providing further details. For the Claimant, the fact that these Documents involve Government persons do not make them highly politically or institutionally sensitive; "[r]ather, this type of legal impediment, envisaged in the IBA Rules, is intended to cover documents 'including evidence that has been classified as secret by a government or a public international institution'." The Claimant alleges that the "Respondent has not asserted that is the case here or otherwise provided any details to understand on what basis the information contained in this Document would be classified as secret," and as a result, "[t]his designation should thus be disregarded."

C. The Respondent's Reply

23. The Respondent denies the Claimant's objections, arguing that it filed its objections to the production of all ISDS Litigation Documents pursuant to para. 36 of PO1.

24. The Respondent submits that, "[i]n addition to considering that such documents are clearly outside the scope of 'supplementary means of interpretation' under Article 32 of the [VCLT], they are covered by attorney-client privilege and/or litigation privilege, pursuant to Article 9.2(b) of the IBA Rules."[32] The Respondent notes that, pursuant to

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[30] *Ibid*..

[31] Claimant's Response to the Privilege Log, response to Document 1-1-P, which is repeated for Documents 1-2-P through 1-13-P.

[32] Mexico's Response, p. 8.

para. 24 of PO1, the Tribunal may rely on the IBA Rules "for guidance on practices that are commonly accepted in international arbitration." Pursuant to Article 9.4(a) and (c) of the IBA Rules, the Tribunal must take into consideration that "many of these documents were created to obtain legal advice, and with the expectation of privilege between the Parties and their counsel in other disputes."[33]

25. The Respondent "is struck" by the fact that the Claimant is seeking production of documents covered by attorney-client privilege and/or litigation privilege. It argues that this would amount to the Claimant's counsel having to produce all documents and communications exchanged between Claimant's counsel and its client. This would make no sense, as it would be contrary to attorney-client and/or litigation privilege.[34] In the Respondent's view, if the Claimant wishes to challenge the classification of documents listed in Mexico's Privilege Log, "the correct procedure would be to appoint an independent expert (privilege master) to evaluate the documents and their classification and determine whether privilege can indeed be challenged." However, it notes that this process would take a long time. [35]

26. The Respondent further asserts that "[i]n Mexico, as in other legal systems, lawyers have the obligation to keep strictly confidential the matters entrusted to them, pursuant to Article 36 of the Regulatory Law of Article 5 of the Constitution, regarding the practice of professions in Mexico City, which applies at the Federal level and to which the Respondent's lawyers in this dispute are subject." [36]

27. In relation to its claim of political and institutional sensitivity, the Respondent argues that "documents that were exchanged with another NAFTA/USMCA Party constitute reserved information under Articles 113 and 110 of the General Law on Transparency and Access to Public Information and the Federal Law on Transparency and Access to Public Information, respectively, as their disclosure may undermine Mexico's international relations with its trading partners and violate due process in ISDS litigation, in addition to being part of a deliberative process of the Mexican State's legal defense in ISDS arbitrations."[37]

28. Finally, the Respondent "confirms that it has included in its Privilege and Confidentiality Log categories of documents that it identifies as privileged, including internal legal documents from ISDS arbitrations and documents exchanged with Respondent's outside counsel, communications with counsel for claimants in ISDS arbitrations, and communications with government counsel for the other USMCA Parties in connection with ISDS arbitrations, some of which are also protected by Procedural Rulings on confidentiality in various arbitrations." However, the Respondent explains that "not every such document has been identified, as (i) the Respondent is not convinced that many of these documents would fall under PO5 (especially those

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[33] *Ibid*.

[34] *Ibid*.

[35] Mexico's Response, pp. 8-9.

[36] Mexico's Response, p. 9.

[37] *Ibid*.

exchanged with Respondent's outside counsel and counterparties), and (ii) the number of these documents is considerable and would require an extended time to identify."[38]

IV. THE TRIBUNAL'S ANALYSIS

29. The Tribunal will first address whether the Documents that the Respondent wishes to withhold are covered by the Tribunal's order to produce in PO5 (A). The Tribunal will then address whether the Respondent has asserted its privilege claims in accordance with PO1 (B), and whether the Respondent must provide a document-specific Privilege and Confidentiality Log (C).

A. Are the Documents that the Respondent wants to withhold covered by the Tribunal's order to produce in PO5?

30. Before assessing the Respondent's privilege claims, the Tribunal must address a preliminary question raised by the Respondent, namely, whether the ISDS Litigation Documents withheld by the Respondent are included within the scope of the Tribunal's production order in PO5. The Respondent's position appears to be that they are not, because (i) they are privileged, and (ii) they do not qualify as supplemental means of interpretation under Article 32 of the VCLT.[39] The Claimant's position is that, to the extent that the ISDS Litigation Documents were exchanged between Mexico and the USMCA Parties and reflect their contemporaneous and/or current position of the Annex 14-C in the context of an ongoing arbitration, they must be produced.[40]

31. In the Tribunal's opinion, the Respondents' preliminary question must be answered in the affirmative. As regards its first argument, and as further discussed in Section B below, the Respondent is raising this question at the production stage, pursuant to para. 36 of PO1.[41] Whether the Respondent is entitled to withhold Documents at the production stage on the grounds of privilege, legal impediment, or special political or institutional sensitivity is dependent on whether the Respondent can invoke a valid ground to justify withholding Documents that fall within the Order's subject-matter and temporal scope. A Party is not entitled to withhold Documents at the production stage based on arguments seeking to narrow down the scope of the Tribunal's orders to produce. The Respondent understood this, since its Privilege Log states that it raises objections to the production of "all *responsive* documents that relate to the litigation of ISDS arbitrations," albeit adding, immediately thereafter, that it was unclear whether the Tribunal intended its orders to extend to the Documents Mexico was choosing to withhold.[42]

32. The Respondent's second argument must also be rejected, as it assumes that the Tribunal's orders only target Documents that might qualify as supplementary means of

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[38] *Ibid*.

[39] Mexico's Privilege Log, ¶ 2.

[40] Claimant's Application, p. 6. The Claimant also takes the position that no privilege attaches to these documents.

[41] See PO1, ¶ 36.

[42] Mexico's Privilege Log, ¶ 2 (emphasis added).

interpretation under Article 32 of the VCLT. This is incorrect. As the Tribunal expressly set out in Annex A to PO5, the Tribunal found that the Documents sought under Request No. 1, as reformulated by the Tribunal (i.e., Documents exchanged between the Mexican Government Agencies and one or more of the USMCA Parties reflecting the USMCA Parties' negotiation, understanding, or interpretation of the investment chapter of the USMCA, including Chapter 14 of the USMCA between 20 January 2017 until 17 April 2024) "might provide evidence of or reflect (i) agreements relating to the USMCA made between all the parties in connection with the conclusion of the USMCA; (ii) instruments made by one or more parties in connection with the conclusion of the USMCA and accepted by the other parties as an instrument related to the USMCA; (iii) subsequent agreements between the parties regarding the interpretation of the investment chapter of the USMCA or the application of its provisions; or (iv) subsequent practice in the application of Chapter 14 of the USMCA establishing the agreement of the parties regarding its interpretation, all of which are relevant to the primary rule of interpretation set out at Article 31 of the VCLT."[43] To the extent that, for example, Documents in Subcategory D (communications with government lawyers of the other USMCA Parties concerning ISDS arbitrations) reflect the USMCA Parties' negotiation, understanding, or interpretation of the investment chapter of the USMCA, they would fall, *prima facie*, within the subject-matter scope of Request No. 1.[44]

33. Further, the Tribunal found in PO5 that, at this stage of the arbitration, it could not exclude that Documents sought under Request No. 2 (i.e., internal Documents of the Mexican Government Agencies reflecting Mexico's negotiation, understanding, or interpretation of the investment chapter of the USMCA) created by the Mexican Government Agencies after the conclusion of the USMCA might provide evidence of or reflect a subsequent practice in the application of Chapter 14 of the USMCA for purposes of Article 31 of the VCLT.[45] To the extent that, for example, Documents in Subcategories B (Documents exchanged with the Respondent's external counsel in other ISDS arbitrations) and C ("internal ISDS legal documents") reflect Mexico's negotiation, understanding, or interpretation of the investment chapter of the USMCA, they would fall, *prima facie*, within the subject-matter scope of Request No. 2.

34. The Tribunal also found, with respect to both Requests, that at this stage the Tribunal was not in a position to determine whether recourse to supplementary means of interpretation would be required, nor could it exclude that the requested documents might qualify as such pursuant to Article 32 of the VCLT (a question that the Parties have not as yet fully briefed).[46]

35. For these reasons, the Tribunal concludes that, to the extent that the ISDS Litigation Documents in Subcategories B, C and D withheld by the Respondent address the matters described in Requests No. 1 and 2, they fall within the scope of the Tribunal's

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[43] Annex A to PO5, p. 12.

[44] The Respondent appears to accept that these Documents are responsive to the Tribunal's order for Request No. 1, as it has identified 13 such Documents in its Privilege Log when it was in the process of "conducting searches for responsive documents within the scope of the Tribunal's Order" (Mexico's Privilege Log, ¶ 5).

[45] Annex A to PO5, p. 20

[46] Annex A to PO5, pp. 12 and 20.

production order in PO5. By contrast, Documents within the Respondent's Subcategory A (communications with opposing counsel in other ISDS arbitrations) do not fall within the scope of the Tribunal's production orders, to the extent that they do not consist of communications exchanged between Mexican Government Agencies and other USMCA Parties, or contain internal Documents reflecting Mexico's negotiation, understanding, or interpretation of the investment chapter of the USMCA, including Chapter 14 of the USMCA.

B. Do the Respondent's objections to production comply with PO1?

36. The Tribunal turns to the question of whether, as the Claimant contends, the Respondent has failed to comply with the rules set out in PO1 for the submission of objections based on legal impediment, privilege or political or institutional sensitivity.

37. The Respondent is claiming that an entire category of Documents (the ISDS Litigation Documents) can be withheld from production on the basis of attorney-client and/or litigation privilege and/or grounds of special political or institutional sensitivity. Based on the Respondent's submissions, the category of ISDS Litigation Documents encompasses four distinct subcategories of Documents, namely:

   a. "Communications with opposing lawyers in ISDS arbitrations" (Subcategory A);

   b. "Documents exchanged with the Respondent's external legal counsel" (Subcategory B);

   c. "[I]nternal ISDS legal documents" (Subcategory C);

   d. "Communications with government lawyers of the other [USMCA] Parties concerning ISDS arbitrations" (Subcategory D).

38. Although the Respondent's submission is entitled "Privilege and Confidentiality Log," the Respondent has not separately identified the Documents it wishes to withhold from production, arguing that "tremendous time and resources would be required to compile a list of all such documents, each of which would be covered by attorney-client privilege and/or litigation privilege."[47] The Respondent has indicated that, "[i]f the Tribunal instructs the Respondent to attempt to identify and catalogue all such documents in its possession, custody, or control, the Respondent will endeavor to do so, but this will unavoidably incur substantial delays."[48]

39. Further, in response to the Tribunal's request that it "confirm whether it has included in that privilege log all Documents over which it claims privilege,"[49] the Respondent advised "that it has included in its Privilege and Confidentiality Log [the] ***categories*** of documents that it identifies as privileged, including internal legal documents from ISDS arbitrations and documents exchanged with Respondent's outside counsel, communications with counsel for claimants in ISDS arbitrations, and communications

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[47] Mexico's Privilege Log, ¶ 3.

[48] Mexico's Privilege Log, ¶ 4.

[49] Tribunal's letter of 25 July 2024 (second letter).

with government counsel for the other USMCA Parties in connection with ISDS arbitrations, some of which are also protected by Procedural Rulings on confidentiality in various arbitrations."[50]

40. In addition to its general assertions concerning these categories of Documents, the Respondent has identified 13 specific Documents, all of which appear to fall within Subcategory D, over which it claims litigation privilege and high political or institutional sensitivity.

41. A few observations are in order:

a. First, the Tribunal understands the Respondent to be averring that it knows of the existence of the ISDS Litigation Documents, but (with the exception of 13 Documents in Subcategory D) has not yet identified specific Documents or carried out a document-by-document review to determine which of them can be withheld from production on one or more of the grounds set out in para. 36 of PO1, including Art 9.2 of the IBA Rules.

b. Second, and with the exception of 13 Documents in Subcategory D, it is clear from the Respondent's submissions that the Respondent is withholding from production, on one or more of the grounds set out in para. 36 of PO1, not individual Documents, but rather one or more *categories* of Documents.

c. Third, the categories of Documents withheld by the Respondent are regrouped by document type, not on the basis of the ground of objection mentioned in para. 36 of PO1 (e.g., legal impediment or privilege, commercial or technical sensitivity, etc.).

d. Fourth, while the Respondent has advanced its claims seeking to justify the withholding of responsive Documents in a submission which it has entitled "Privilege and Confidentiality Log," the Respondent has, effectively, only produced a log for 13 specific Documents.

42. The rules governing a Party's objections to the production of Documents on the basis of privilege, legal impediment, commercial or technical confidentiality, or special political or institutional sensitivity are set out at paragraphs 30 and 36 of PO1.

43. Paragraph 30 of PO1 provides as follows:

> Within the time limit set out in the Procedural Calendar, the Requested Party may object to the requests under any of the grounds set out under Art. 9.2, 9.3 and 9.4 of the IBA Rules, in the format set out in Annex C to this Procedural Order. If a Document Request objected to targets a category of Documents, the Requested Party shall, at the same time, indicate whether there is a narrower category of documents that it is

[50] Mexico's Response, p. 9 (emphasis added by the Tribunal). The Tribunal notes that the Spanish version of Mexico's response suggests that it is confirming that it has included *all* categories of documents that it identifies as privileged. *("[L]a Demandada confirma que ha incluido en su Registro de Privilegio y Confidencialidad las categorías de documentos que identifica como sujetas a privilegio* […]").

> willing to produce. To the extent a Party objects to an entire category of documents on grounds of privilege, legal impediment, commercial or technical confidentiality, or special political or institutional sensitivity, such objection must be included in the Parties' objections to document requests in the Annex C to this Procedural Order.[51]

44. In turn, paragraph 36 of PO1 provides:

> A Party who objects to producing a Document or category of Documents for which production has been ordered (or that it has otherwise voluntarily agreed to produce) on the basis of legal impediment or privilege, commercial or technical confidentiality, or special political or institutional sensitivity, shall submit a privilege and confidentiality log ("**Privilege and Confidentiality Log"**) (in Word and PDF format) identifying specific documents withheld on those grounds within three weeks of the Parties completing production of documents responsive to requests as to which an objection was not upheld by the Tribunal's decision. The Privilege and Confidentiality Log will (i) identify the Document (including type of document, its author(s), recipient(s), and subject matter), (ii) the basis for asserting the privilege, legal impediment, grounds of commercial or technical confidentiality or political or institutional sensitivity (including the law or ethical rules under which the legal impediment or privilege is said to exist, and for grounds of confidentiality or sensitivity, why those grounds are compelling) (iii) the number of the request(s) with respect to which the Document or category of Documents subject to privilege or legal impediment is responsive. The Tribunal will timely set a schedule to issue a decision in case of a challenge by either Party to assertions of privilege or legal impediment set out in the Privilege and Confidentiality Log.[52]

45. Paragraph 30 of PO1 governs objections to Document Requests prior to the Tribunal's decision on whether to grant the Requests. These are objections which the Requested Party raises for the purpose of having the entire Request (or a part of it) denied. By contrast, para. 36 of PO1 applies at the production stage, after a Party has agreed to produce, or the Tribunal has ordered the production of certain Documents or categories of Documents, and the Requested Party wishes to withhold certain Documents from production.

46. At the request stage, the Respondent raised certain objections based on legal impediment that attached to the entire category of Documents requested or anticipated that it might have to object to the production of specific Documents or categories of Documents at the production stage. Specifically:

   a. With respect to Request No. 1, the Respondent indicated that it was "unable to unilaterally disclose such documents on a voluntary basis prior to 1 July 2024 because it [was] bound by the USMCA Trilateral Agreement on Confidentiality." It also stated that, if the Tribunal ordered the Respondent to produce all documents requested, there would be "further legal impediments on a document-by-document

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[51] PO1, ¶ 30 (emphasis added).

[52] PO1, ¶ 36 (emphasis added).

basis, related to the specific nature of certain responsive documents," including "solicitor-client privilege, government or private commercial or technical confidentiality, special political or institutional sensitivity, or personal privacy." The Respondent added that "[g]iven the absurdly broad scope of the Claimant's requests, it is not possible at this stage to identify all such legal impediments affecting documents responsive to such an order of the Tribunal." As a result, the Respondent "reserve[d] its rights to object to production of documents or categories of documents for which production is ordered pursuant to paragraph 36 of Procedural Order No. 1."[53]

b. With respect to Request No. 2, the Respondent stated that, if the Tribunal ordered it to produce "all internal documents" that are "encompassed in the absurdly broad range of the Claimant's request," there might be "legal impediments to producing such documents, such as solicitor-client privilege, government or private commercial or technical confidentiality, special political or institutional sensitivity, or personal privacy;" however, "given the excessive scope of the Claimant's request, and that Mexico has not maintained a collection of such records, it is not possible at this stage to identify all such legal impediments." The Respondent therefore "reserve[d] its rights to object to production of documents or categories of documents for which production is ordered pursuant to paragraph 36 of Procedural Order No. 1."[54]

47. Thus, the Respondent only invoked a legal impediment at the request stage for Request No. 1, because of the existence of the USMCA Trilateral Agreement on Confidentiality,[55] and reserved its right to object, at the production stage, to the production of specific documents or categories of Documents pursuant to para. 36 of PO1.

48. In response to this reservation of rights, in PO5 the Tribunal directed the Respondent to "indicate, as soon as possible and at the latest on the date scheduled for document production, whether it objects to the production of specific documents based on claims of legal impediment or privilege, technical or commercial confidentiality, or special political or institutional sensitivity." The Tribunal added that, "[i]n that case, the procedure set out at para. 36 of PO1 shall apply, with an abbreviated schedule that will be determined in a separate Order."[56]

49. When the Respondent submitted its Privilege Log, it stated that it was submitting it "[p]ursuant to paragraph 36 of Procedural Order No. 1 of August 17, 2023, and Procedural Order No. 5 and its Annex A of June 19, 2024."[57]

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[53] Annex A to PO5, Respondent's objections to Request No. 1.

[54] Annex A to PO5, Respondent's objections to Request No. 2.

[55] The Tribunal addressed this claim of legal impediment in PO5. Specifically, it found that by the time the Respondent would need to produce the Documents, the USMCA Trilateral Agreement on Confidentiality would have expired, and the legal impediment would no longer have a legal basis. PO5, ¶ 37.

[56] PO5, ¶ 39.

[57] Mexico's Privilege Log, ¶ 1.

50. It is thus common ground that the Respondent's Privilege Log and the Claimant's objections thereto are governed by para. 36 of PO1.

51. Pursuant to para. 36 of PO1, "[a] Party who objects to producing a Document or category of Documents for which production has been ordered (or that it has otherwise voluntarily agreed to produce) on the basis of legal impediment or privilege, commercial or technical confidentiality, or special political or institutional sensitivity, shall submit a privilege and confidentiality log […] identifying specific documents withheld on those grounds […]."[58] Paragraph 36 goes on to require "[t]he Privilege and Confidentiality Log [to] (i) identify the Document (including type of document, its author(s), recipient(s), and subject matter)." PO1 thus clearly calls for the identification and description of *individual* Documents.

52. However, other than identifying 13 specific Documents falling in Subcategory D, the Respondent has not identified the specific Documents it wishes to withhold from production. Rather, it is requesting the Tribunal to allow it to withhold entire categories of Documents from production without having to identify these Documents with the particulars required under para. 36 of PO1.

53. In the present case, the grouping proposed by the Respondent - "all responsive documents that relate to the litigation of ISDS arbitrations"[59]- is admittedly a grouping, not of documents but of *categories* of documents. Moreover, the production of these categories of documents is being withheld not on a single ground, for example, attorney-client privilege, but on three different grounds, namely attorney-client privilege, litigation privilege, and political and institutional sensitivity. In such circumstances, the Tribunal is of the opinion that there is force to the Claimant's argument that it is being effectively deprived of the opportunity given to it under the terms of PO1 to verify whether the Respondent is justified in seeking to withhold Documents based on Article 9.2 of the IBA Rules. The Tribunal therefore finds that the Respondent has not complied with the terms of paragraph 36 of PO1.

C. Must the Respondent submit a Privilege and Confidentiality Log identifying all Documents it wishes to withhold from production?

54. The Tribunal understands the Respondent's position to be that the strict application of para. 36 of PO1 would lead to inefficiencies and a significant burden imposed on the Requested Party, because it would require it separately to identify each specific Document in a category that is, *per se*, protected by privilege or political and institutional sensitivity. For this reason, the Tribunal understands the Respondent, in effect, to be requesting that it be relieved of the obligation to identify every single responsive Document in its possession, custody or control that are being withheld on the ground that they are so protected.

55. The Tribunal could entertain the notion that, in certain circumstances, requiring a document-by-document review of all Documents within a category claimed as privileged might be inefficient and disproportionate, and that reasonable alternatives

[58] PO1, ¶ 36 (emphasis added).

[59] Mexico's Privilege Log, ¶ 2.

should be considered, for example if it can be shown with certainty that it is a foregone conclusion that all Documents within a category of responsive Documents are protected from production based on a recognized privilege. At the same time, the Tribunal must safeguard the opposing party's due process rights, in particular the right to challenge the claim that certain Documents are covered by privilege and can be withheld from production on that basis.

56. In the Tribunal's opinion, for the Respondent to be permitted to make a claim of legal impediment or privilege or political or institutional sensitivity in regard, not to individual documents, but to a class or category of documents, the Respondent would have to demonstrate that the grouping it proposes as a category is highly homogeneous such that the Tribunal can be confident that all documents falling within the category can properly be withheld from production.

57. Upon the pre-condition of homogeneity being met, the Tribunal could entertain a request that the Respondent be relieved of the obligation to describe each and every document falling within the category, provided (a) that the request is not used altogether to dispense the Respondent from conducting a search of responsive Documents, as required under PO5; (b) that the Documents within the proposed category benefit from a recognizable privilege, or qualify under article 9.2(f) of the IBA Rules; and (c) that in respect of *each category*, the Respondent clearly identify, as required by para. 36 of PO1, the "law or ethical rules under which the legal impediment or privilege [invoked] is said to exist," or, in the case of Article 9.2(f), the compelling grounds of sensitivity.

58. In light of the foregoing, the Tribunal is prepared to afford the Respondent the opportunity formally to apply to the Tribunal to request, in respect of clearly defined categories of Documents, to be relieved of its obligation, under para. 36 of PO1, to identify in its Privilege Log the individual Documents it has withheld and the basis upon which each one of these Documents has been withheld, provided the Respondent demonstrates how the categories of Documents so withheld meet the pre-condition of homogeneity and the other requirements set out at paragraphs 56 and 57 above. If the Respondent elects not to formalize such a request within the time limits indicated in this Order, it should provide a Privilege and Confidentiality Log compliant with para. 36 of PO1.

59. The Tribunal will allow the Claimant an opportunity to comment on any application of the Respondent pursuant to the preceding paragraph of this Order before deciding whether the Respondent should be relieved of its obligation to provide a Privilege and Confidentiality Log identifying individual Documents.

60. For the sake of efficiency, and subject to considering the Claimant's submission in response to any application of the Respondent pursuant to para. 58 of this Order, the Tribunal makes the following observations in respect of the Respondent's Subcategories B, C, and D of the Documents withheld by the Respondent.

1. Subcategory B: documents exchanged with the Respondent's external legal counsel

61. The Respondent seeks to withhold from production "documents exchanged with the Respondent's external legal counsel" in the context of ISDS arbitrations in which it is a Party.[60] The Tribunal understands this Subcategory to consist of communications between Respondent and its external legal representatives in pending ISDS arbitrations where the interpretation of Chapter 14C is at issue. If this understanding is correct, the Tribunal finds that this subcategory meets the pre-condition of homogeneity.

62. The Respondent asserts broadly that these Documents are covered by attorney-client privilege and/or litigation privilege, and it invokes Article 9.2(b) of the IBA Rules.[61] As regards the claim of litigation privilege, the Tribunal notes that the Respondent has not identified, as required by para. 36 of PO1, the law or ethical rules under which the alleged litigation privilege invoked is said to exist.

63. As for the Respondent's claim of attorney-client privilege, the Respondent has invoked the Mexican law concept of professional secrecy. Relying on Article 36 of the Regulatory Law of Article 5 of the Constitution, the Respondent argues that "[i]n Mexico, as in other legal systems, lawyers have the obligation to keep strictly confidential the matters entrusted to them."[62] However, the Respondent has not provided the text of this provision, nor has it explained what the concept of professional secrecy entails under Mexican law. In particular, the Respondent has not explained (i) whether the concept of professional secrecy applies to all matters entrusted to a lawyer and to all documents handled by him (or, conversely, whether it attaches only to certain documents or communications exchanged between a lawyer and his client), or (ii) whether it is absolute or can be subject to exceptions.

2. Subcategory C: "internal ISDS legal documents"

64. The Respondent seeks to withhold from production what it refers to as "internal ISDS legal documents,"[63] or "internal legal documents from ISDS arbitrations."[64]

65. The Tribunal finds that this subcategory does not meet the pre-condition of homogeneity. Based on its title, and without more, the Tribunal considers this subcategory to be extremely vague: what is an "internal *legal* document," and how exactly does it become a legal document "*from* ISDS arbitrations"? The Respondent must explain what type of Documents this subcategory encompasses or, if necessary, split this subcategory into further subcategories.

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[60] Mexico's Privilege Log, ¶ 3.

[61] *Idem*.

[62] Mexico's Response, p. 9.

[63] Mexico's Privilege Log, ¶ 3.

[64] Mexico's Response, p. 9.

66. The Respondent broadly asserts, without more, that these "internal ISDS legal documents" are "covered by attorney-client privilege and/or litigation privilege."[65] However, the Respondent has not substantiated the legal or ethical basis for these claims.

    a. With respect to attorney-client privilege, the Respondent again invokes the concept of professional secrecy. However, as noted in Section (1) above, the Respondent does not explain whether the concept of professional secrecy applies to all matters entrusted to a lawyer and to all documents handled by him, whether there are any exceptions, or whether it protects documents created within the in-house legal department of a party. Nor does the Respondent explain what is the attorney-client relationship that would be protected by the asserted privilege;

    b. As for the claim of litigation privilege, the Respondent does not even attempt to explain what it entails, or what is the legal or ethical basis for it.

3. Subcategory D: Communications with government lawyers of the other [USMCA] Parties concerning ISDS arbitrations

67. Finally, the Respondent seeks to exclude from production "communications with government lawyers of the other [USMCA] Parties concerning ISDS arbitrations."[66]

68. The Tribunal finds that, *prima facie*, this subcategory could meet the pre-condition of homogeneity. However, it remains unclear whether the 13 specific Documents included in the Respondent's Privilege Log represent the totality of the Documents that the Respondent wishes to withhold from Subcategory D.

69. The Respondent asserts that these communications "are not only covered by litigation privilege, […] [but] are also considered to be highly politically and institutionally sensitive."[67] In other words, it argues that there are two different grounds on the basis of which the Respondent is allegedly permitted to withhold this subcategory of documents, namely: (i) litigation privilege, and (ii) political or institutional sensitivity.

70. However, the Respondent has not substantiated its claim of litigation privilege. It has not explained what this privilege entails, under what law it arises, or why it attaches to these documents.

71. As for political or institutional sensitivity, in its Privilege Log the Respondent merely argues that these Documents were "considered to be highly politically and institutionally sensitive."[68] The Claimant rejected these broad assertions, arguing that the fact that the Documents involve government persons does not make them highly politically and institutionally sensitive. According to the Claimant, the IBA Rules envisioned this type of legal impediment to cover Documents that include evidence

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[65] Mexico's Privilege Log, ¶ 3.

[66] *Idem*.

[67] Mexico's Privilege Log, ¶ 3.

[68] *Idem*.

classified as secret by a government or a public international institution. In this case, the Respondent has not "provided any details to understand on what basis the information contained in the[se] Document[s] would be classified as secret."[69]

72. In its Response, the Respondent argued that these Documents amount to "reserved information" under Articles 113 and 110 of the General Law on Transparency and Access to Public Information and the Federal Law on Transparency and Access to Public Information ("**Mexico's Transparency Laws**") because their disclosure may undermine "Mexico's international relations with its trading partners and violate due process in ISDS litigation, in addition to being part of a deliberative process of the Mexican State's legal defense in ISDS arbitrations."[70] However, the Respondent has not provided the text of these laws, nor has it explained whether these Documents have in fact been classified as reserved pursuant to the relevant provisions of the Mexico's Transparency Laws, what exactly that classification entails, and for how long that classification will remain in place.

V. ORDER

73. In light of the above, the Tribunal, by majority:

a. FINDS that, based on the Respondent's submissions, many of the Documents contained in the broad category of "responsive [D]ocuments that relate to the litigation of ISDS arbitrations" […] "in which the interpretation of Annex 14-C and, more generally, Chapter 14 of the [USMCA] are disputed" fall within the scope of the Tribunal's production orders in PO5;

b. FINDS that the Respondent has failed to file a Privilege and Confidentiality Log compliant with paragraph 36 of PO1 in support of its objections to produce certain Documents that are responsive to the orders to produce set out in PO5;

c. AFFORDS the Respondent the opportunity to seek leave from the Tribunal, within **two weeks** of the date of issuance of this Order and in accordance with, but subject to the conditions of paragraphs 56 and 57 of this Order, to comply with paragraph 36 of PO1 by raising objections to produce in respect of discrete categories of responsive Documents (as opposed to individually identified Documents);

d. If the Respondent elects not to seek leave pursuant to paragraph (c) above, DIRECTS the Respondent, within **three weeks** of the date of issuance of this Order, to file a Privilege and Confidentiality Log compliant with PO1 and, specifically in respect of individual Documents that the Respondent objects to produce on the basis of legal impediment or privilege, commercial or technical confidentiality, or special political or institutional sensitivity, a Privilege and Confidentiality Log that identifies (i) the Document (including type of document, its author(s), recipient(s), and subject matter), (ii) the basis for asserting the privilege, legal impediment, grounds of commercial or technical confidentiality

[69] Claimant's Response, p. 4.

[70] Mexico's Response, p. 10.

or political or institutional sensitivity (including the law or ethical rules under which the legal impediment or privilege is said to exist, and for grounds of confidentiality or sensitivity, why those grounds are compelling) and (iii) the number of the request(s) with respect to which the Document or category of Documents subject to privilege or legal impediment is responsive;

e. AFFORDS the Claimant the opportunity to comment on the Respondent's request pursuant to paragraph (c) above, or on the Respondent's revised Privilege and Confidentiality Log pursuant to paragraph (d) above, within **two weeks** of the date of the Respondent's filing it.

On behalf of the Tribunal,

[Signed]

Sabina Sacco
President of the Tribunal

Date: 19 November 2024

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 ORDERS NOS. 8 AND 9
DISSENTING OPINION OF HUGO PEREZCANO DÍAZ

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22 January 2025

I dissented from the majority's decision in Procedural Order No. 5 (PO5) to order production of documents that post-date the conclusion of the USMCA. In my view, the relevance and materiality of documents created after the date when the USMCA negotiations concluded had not been established. I dissented as well because the Claimant did not provide any indication of why it reasonably believed that documents postdating the signature of the USMCA would exist, and the majority of the Tribunal, in deciding to grant the request until 17 April 2024 (the date of the Claimant's Final Document Request), simply glossed over the requirement in article 3.3(a)(ii) of the IBA Rules to state so. Thirdly, I expressed a concern in this context over a continuously expanding category of documents and the impact that this had had on the efficient conduct of the arbitration.

These concerns persist, and indeed they have deepened, so I must again dissent from the decisions of the majority of the Tribunal contained in Procedural Order Nos.8 and 9 (PO8 and PO9, respectively), both of which I will address here. I will go through the issues raised by the Parties in chronological order. Therefore, I will address PO9 first, followed by PO8.

I. PO9

1. On 19 July 2024, following PO5 and production of documents to the Claimant, the Respondent submitted a Privilege and Confidentiality Log. In conducting its search for documents pursuant to PO5, the Respondent identified a number of documents, all of which were generated in, and for the purpose of, other ongoing investor-State dispute settlement (ISDS) arbitrations under the USMCA, where the Respondent is also a party, and where the interpretation of Annex 14-C and, more generally, Chapter 14 is also being disputed. These are the so-called ISDS Litigation Documents that PO9 classifies into 4 subcategories (Subcategories A through D).

2. The Respondent objected to disclosure of the ISDS Litigation Documents on the following grounds:

   a. It raised two "scope" objections arguing that documents in Subcategories A, B and C were outside the scope of:

      i. PO5 (the first scope objection), and

      ii. supplementary means of interpretation under article 32 of the VCLT (the second scope objection).

   b. The Respondent also argued that all documents, including 13 emails in Subcategory D that it identified individually and admittedly are within the scope of PO5, are subject to privilege or legal impediment.

A. Scope of PO5

1. Subcategory A documents

3. I agree with the majority that Subcategory A documents, that is communications exchanged between counsel acting for the Respondent in this and other ISDS arbitrations and counsel for Mexico's opposing parties in those arbitrations are not within the scope of PO5. I have nothing to add.

2. Subcategory B and Subcategory C documents

4. I disagree that Subcategory B and Subcategory C documents fall within the scope of PO5 (the Respondent admits that Subcategory D documents do). As noted, according to the Respondent, all such documents have been generated in, and for the purpose of, other ongoing ISDS arbitrations where the same questions of interpretation of the USMCA provisions that are before the Tribunal in this case are being litigated. They comprise:

   a. documents exchanged between the Respondent's internal and external counsel (Subcategory B); and

   b. legal documents, that is litigation-related documents, prepared and shared internally by the Respondent (Subcategory C).

5. With regard to these documents, the majority says at paragraph 31 of PO9 that "the Respondents' [sic] preliminary question [whether the ISDS Litigation Documents withheld by the Respondent are included within the scope of the Tribunal's production order in PO5] must be answered in the affirmative". The majority then goes on to say that "the Respondent is raising this question [of scope] at the production stage, pursuant to para. 36 of PO1" and then explains that "[w]hether the Respondent is entitled to withhold Documents at the production stage… is dependent on whether the Respondent can invoke a valid ground to justify withholding Documents that fall within the Order's subject-matter and temporal scope", but that "[a] Party is not entitled to withhold Documents at the production stage based on arguments seeking to narrow down the scope of the Tribunal's orders to produce". (PO9, ¶ 31).

6. I disagree with that determination of the majority.

7. First, a question about the scope of an order obviously can only arise *after* the order has been issued. Thus, there was nothing out of the ordinary in the Respondent's raising questions regarding the scope of PO5 during the stage that followed its issuance.

8. The majority said that the Respondent "understood" that a Party is not entitled to withhold Documents based on arguments seeking to narrow down the scope of the Tribunal's orders to produce because "its Privilege Log states that it raises objections to the production of 'all *responsive* documents that relate to the litigation of ISDS arbitrations'" (emphasis in original). The majority appears to conflate two separate issues: whether the documents in question are within the scope of PO5 and whether the Respondent is entitled to withhold documents at the production stage. This raises a

number of issues that I do not agree with. Obviously, what a party understood cannot define the scope of the Tribunal's order. Further, even if the Respondent understood that the documents in question are responsive to the Claimant's request for documents, that understanding does not answer the question of whether the documents are within the scope of the Tribunal's order. Moreover, it is evident from the face of the Respondent's submission that it did not understand the documents in question to be within the scope of PO5. The Respondent states so at the very outset and that is the very basis of its objection (Respondent's Privilege and Confidentiality Log, ¶ 2).

9. Ultimately, the question is not about what the Respondent's underlying intention may have been either; and I disagree that the Respondent's submissions in any way suggest that it was "seeking to narrow down the scope of the Tribunal's orders to produce". The Respondent objected to produce the documents in question on the basis that they fell outside the scope of PO5 and there can be no question that it has a right to raise such an objection. There was nothing improper or even out of the ordinary about the Respondent's objection either. It explained that it was "not clear to the Respondent that the Tribunal intended the scope of its orders to extend to such documents, given that it would not be appropriate to disclose to the Claimant any privileged litigation documents in relation to this arbitration or in relation to other ISDS arbitrations". The Respondent then added: "Nonetheless, for greater certainty and out of an abundance of caution, the Respondent raises this objection." (Respondent's Privilege and Confidentiality Log, ¶ 2).

10. This brings me to the next point of disagreement with the decision of the majority. I disagree that Subcategory B and Subcategory C documents fall within the scope of PO5. No such documents were specifically the subject of the Claimant's request and, consequently, the Tribunal did not address them. This is precisely the type of problems that arise from the failure to identify a narrow and specific category of documents sought and to state why they are reasonably believed to exist; and this is the reason why, in my view, to that extent the Claimant's request amounted to a fishing expedition (as I pointed out in my dissent to PO5).

11. Had the Claimant intended to request that type of documents, it should have specifically identified them as required by PO1 and the IBA Rules, so that the Tribunal could have specifically addressed that particular request and decided the matter specifically as well. Importantly, given that there are several ongoing arbitrations involving the same questions of interpretation of the USMCA provisions that are before this Tribunal, there was no difficulty at all in the Claimant describing in sufficient detail such a narrow and specific category of Documents reasonably believed to exist.

12. More particularly, if the Claimant intended documents generated or exchanged by the Respondent as a disputing party in other ISDS arbitrations involving the same legal questions of interpretation that are before this Tribunal to be produced, it should have identified them as a category or categories. It was perfectly foreseeable that objections to disclosure of such litigation documents in all likelihood would have been raised and, consequently, the issue of protection from disclosure and, in this connection, their relevance and materiality, would have been squarely before the Tribunal. The

Respondent's doubts about whether the Tribunal itself intended this type of documents to be produced (despite any objections to disclosure, to which I will come back, and setting aside the ultimate decision on disclosure) are, therefore, unsurprising, especially where the Members of the Tribunal are not in agreement regarding the scope of the Tribunal's own order.

13. Short of rejecting the Claimant's request (for the reasons and to the extent noted in my dissent to PO5), ISDS Litigation Documents having been caught in the fishing net, rather than the majority "entertain[ing] a [purported] request that the Respondent be relieved of the obligation to describe each and every document falling within [an entire] category" (or subcategories) of documents (PO9, ¶ 57) "on grounds of privilege, legal impediment, commercial or technical confidentiality, or special political or institutional sensitivity" (PO1, ¶ 30), the Tribunal, if anything, should have afforded the Claimant an opportunity to reformulate a specific request for the ISDS Litigation Documents in question pursuant to PO1 and the IBA Rules, including stating why such documents would be relevant to the case and material to its outcome, so that the Respondent could have raised any concrete objections it had, and the Tribunal could have expressly addressed and decided such a request.

14. Instead, "[a]s regards its [the Respondent's] first argument" namely that the ISDS Litigation Documents were not within the scope of PO5 (PO9, ¶ 31), the majority went on to discuss whether the Respondent had complied with PO1 and found that it did not. I disagree with this finding of the majority as well.

15. The majority observed that "[a]t the request stage, the Respondent raised certain objections based on legal impediment that attached to the entire category of Documents requested or anticipated that it might have to object to the production of specific Documents or categories of Documents at the production stage" and, "[t]hus, the Respondent only invoked a legal impediment at the request stage for Request No. 1, because of the existence of the USMCA Trilateral Agreement on Confidentiality", (PO9, ¶¶ 46 and 47). This is not entirely accurate.

16. The Respondent's objection in relation to the USMCA Trilateral Agreement on Confidentiality only applied to the documents (*travaux préparatoires*) specifically covered under that Agreement (which, in any event, the Respondent did not object to produce, if so ordered by the Tribunal, provided that the necessary safeguards were in place to protect the confidentiality of the documents, see PO9, ¶ 3). The Respondent also objected to the request "on the grounds of its expansive, non-specific substantive scope (i.e., speculating as to the existence of other documents, outside the negotiations, that may reflect the common intention of the USMCA parties regarding the 'understanding or interpretation of the investment chapter') and its unreasonable temporal scope (i.e., 7 years)" (among other objections, see PO5, Annex A). Moreover, the Respondent repeatedly stated that, if the Tribunal were to order production of the documents as requested by the Claimant, it would undertake its best efforts to comply, to the extent that documents existed and they were in its possession, custody or control (PO5, Annex A), which, quite clearly, it did not know at the time. Thus, it is evident on its face that the

Respondent did not understand the request to cover any ISDS Litigation Documents. Indeed, by granting what was, in effect, an open-ended request for documents, the majority reversed the burden of identifying a narrow and specific category of documents, placing it on the requested party —in this case the Respondent. Because the Claimant's request did not contain a description in sufficient detail of the narrow and specific category of Documents —namely the ISDS Litigation Documents— that were reasonably believed to exist, the Respondent could not reasonably have been expected to identify such documents itself *ex ante* in order to raise more specific objections to disclosure. This illustrates one of the risks of granting document requests that amount to fishing expeditions: nobody —not the requesting party, not the requested party and not even the tribunal (as is the case here)— knows exactly what documents may turn up and it becomes difficult —if not impossible— for the requested party to raise appropriate, concrete objections; and for the tribunal to properly consider and deal with the request and the objections (as noted above).

3. Objection to entire categories of documents[1]

17. Having disregarded in PO5 the requirements that requests for documents have to comply with under PO1 and the IBA Rules, the decision of the majority deprived the Respondent of the possibility to raise objections it could have otherwise made at the time; and subsequently in PO9 the majority decided that, because the Respondent did not raise objections to disclosure of the ISDS Litigation Documents as a category (or the corresponding subcategories) "prior to the Tribunal's decision on whether to grant the Requests" (PO9, ¶ 55), it was precluded from raising them thereafter (in the instant case, in its Privilege and Confidentiality Log) and, consequently, the majority found the Respondent in breach of PO1. Moreover, had the Claimant made a proper request for a narrow and specific category of documents such as ISDS Litigation Documents —or subcategories thereof—, the Respondent naturally would have been in a position to consider whether to raise any objections to such a request for a category (or categories) of documents as such.

18. As already noted, in the circumstances it was not inconsistent in any way with PO1 or PO5, or inappropriate for the Respondent to have objected to entire categories (or subcategories) of documents. I also do not share the majority's suggestion that the Respondent may have raised the objection "altogether [or, in my view, in any way] to dispense the Respondent from conducting a search of responsive Documents, as required under PO5" (PO9, ¶ 57).

19. I do not agree either with the new requirement that the majority has imposed that categories of documents have to be "highly homogeneous" as a "pre-condition" to raising objections on grounds of privilege, legal impediment, commercial or technical

1. My views in the following section are without prejudice to the reasons why I disagree that Subcategory B and C Documents are not covered by PO5.

confidentiality, or special political or institutional sensitivity. This is neither a requirement under the IBA Rules (which are silent on objections to categories of documents), nor under PO1. Of course, the documents in question must belong to a *category*, that is, they must form part of a *general class* of documents. That goes without saying. Beyond that, if it were a pre-condition, it needed to have been established in PO1 so that the Parties were aware of it and could formulate their respective requests for documents and objections accordingly. It was not.

20. In any event, Subcategories B and C are, in fact, highly homogeneous; so much so that PO9 itself has grouped the ISDS Litigation Documents in question into *subcategories*. According to the Respondent's Privilege and Confidentiality Log, all of the documents in question have been generated in the course of "a significant number of ongoing ISDS arbitrations in which the interpretation of Annex 14-C and, more generally, Chapter 14 of the T-MEC are disputed", in which the Respondent is a Party. Subcategory B comprises communications exchanged between the Respondent and its external legal counsel in those arbitrations. The majority itself acknowledges that they are, indeed, "highly homogenous" (PO9, ¶ 69).

21. Subcategory C is also "highly homogenous". It comprises documents of a legal nature generated by Respondent's internal counsel for the purpose of litigation in ISDS arbitrations in which the Respondent is involved, concerning the disputed interpretation "of Annex 14-C and, more generally, Chapter 14 of the T-MEC", which have been circulated by the Respondent internally. I disagree with —and indeed I am puzzled by— the majority's characterization of the Subcategory C documents as vague, let alone being "extremely vague". I simply fail to understand what is in any way ambiguous about the legal nature of documents generated in, and for the purpose of, litigation in ISDS arbitrations involving the same legal questions that are before this Tribunal; and, the ultimate decision on whether they may be withheld aside, it does not take much to understand why the Respondent argues that such documents should be protected from disclosure.

4. Subcategory D documents

22. Documents in Subcategory D have been individually identified. They were not objected to as a category. The majority doubted whether the 13 emails that the Respondent listed in its Privilege and Confidentiality Log represented the totality of the documents in that subcategory (PO9, ¶ 68). A simple request for clarification would have sufficed to resolve any doubts.

B. Supplementary means of interpretation

23. I reiterate the opinion on supplementary means of interpretation in my Dissent to PO5. I will only add here that, in the circumstances of this case, the Respondent's objections to disclosure are closely related to relevance and materiality, and they should have been put squarely to the Tribunal in the form of a particular request (or requests) for

narrow and specific categories of documents, such as the Subcategory B or Subcategory C documents. In deciding whether to grant the request subject to potential exclusion of documents, for instance on grounds of privilege or legal impediment, or to deny it, the Tribunal would have been able to consider whether and how such litigation documents that may be properly shielded from disclosure even from the Tribunal itself, would be relevant to the case and material to its outcome, either as primary means of interpretation under Article 31 of the VCLT or if they could assist the Tribunal in the interpretation of the relevant treaty provisions as supplementary means of interpretation under Article 32 of the VCLT.

II. PO8

24. In relation to the Claimant's complaint that the Respondent failed to comply with the document production orders pursuant to PO5, the majority of the Tribunal "acknowledg[ed] Mexico's explanations and assurances with respect to its production of Documents in response to PO5". Nevertheless, it considered that they were "not sufficient to establish that the Respondent has met its document production obligations" noting that "[w]hile the Tribunal has no reason to doubt Mexico's assurances, it [i.e. the majority] must ascertain that a robust process was put in place to search for, and produce responsive documents" (PO8, ¶ 43). More specifically, the majority considered that, beyond the persons that the Claimant had identified, the Respondent had "not provided the names of the personnel that it has searched" and it had "not detailed what databases it [had] searched" or "explained whether it used search terms, and if so, which ones", so that, in the majority's "view, more detail [was] required to determine whether the Respondent [had] complied with its document production obligations under PO5" (PO8, ¶ 55). The majority also found that "the Respondent [had] not adequately shown whether it [had] searched the records and databases of the Mexican Government Agencies to determine whether any Documents created, sent or received by… former officials [of the Mexican Government Agencies (as defined in PO5)] remain in possession, custody or control of the Respondent" (PO8, ¶ 56).

25. I disagree with the majority's reasoning, conclusions and findings. I have no reason to doubt that the Respondent and its counsel have conducted an adequate, exhaustive, and diligent search for documents, nor do I question their representations to that effect. In my view, the majority's instruction to counsel in paragraph 58 of PO8 is unwarranted, and I do not subscribe to it.

26. Under PO1 and the IBA Rules, it is the *requesting party* (i.e. the Claimant) who in its request for documents not only has to provide "a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist"; but also "in the case of Documents maintained in electronic form, [to] identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner" (IBA Rules Art. 3(a)(ii)). The Claimant did not provide such a sufficiently detailed description of narrow and specific categories of documents sought (as I noted in my dissent to PO5), and it did

not identify at all specific files, search terms, individuals or other means of searching for documents maintained in electronic or other form. It was only after the Respondent had produced documents pursuant to PO5 that the Claimant (belatedly) identified certain individuals and online document sharing platforms used by the USMCA Parties during the negotiations of the Agreement, and sought the Tribunal to impose on the Respondent a particular search methodology, which is neither required under the procedural rules nor standard in ISDS arbitration, thus attempting to transfer its burden as a requesting party to the requested party.

27. While the Claimant argued that the Respondent was improperly withholding documents, it did not provide clear and convincing evidence thereof. The Claimant's arguments are based on a comparison with the *TC Energy* case (which the Tribunal rejected could be used as a benchmark (PO8, ¶¶ 27 and 28, a decision that I agree with) and, by their own terms, are otherwise speculative. Indeed, in regard to the Respondent's production of 132 documents, the Claimant argued that "[i]t is simply not credible that so few external and internal Documents exist" (Claimant's letter of 24 July 2024, p. 2).

28. The Tribunal then 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" (ICSID letter of 25 July 2024). In its subsequent submissions, the Respondent provided a sufficient and more than adequate response. The Respondent stated as follows and further reiterated that:

> *it 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.*
>
> [Respondent's letter of 9 August 2024.]

29. The process that the Respondent carried out, as described by the Respondent itself, is fairly standard in document production in ISDS arbitrations and there is no reason to doubt that the Respondent's search was not exhaustive or diligent. The Respondent explained how it conducted its searches, where specifically it searched files, records, computer equipment, institutional e-mails, devices, and the physical files, including the Dirección General de América del Norte, the Unidad de Negociaciones Comerciales Internacionales and the Dirección General de Consultoría Jurídica de Comercio Internacional of the Secretaría de Economía, in addition to the Office of the President and the Ministry of Foreign Affairs. The Respondent also identified the relevant individuals, the positions they held and the role they played during the negotiations: Mexico's Lead Negotiator, Kenneth Smith Ramos, its Deputy Lead Negotiator, Salvador Behar Lavalle, Mexico's Head of the Investment Chapter negotiation, Aristeo López Sánchez, as well as

Mr. Hugo Romero Martínez, one of the lawyers who participated in the so-called legal scrub of the USMCA investment chapter (but not in the negotiation itself of the chapter). Mexico explained and provided the regulations that govern the formal procedure for outgoing officials to hand over the matters, documents, and resources that they were in charge of; who was under an obligation to follow that procedure and who was not, and it reiterated that it had produced all the documents that it found in the files that were handed over. It also reiterated that it had produced all of the documents that were stored in the MAX Platform, including on the so-called "Scratchpad" (see Respondent's letters of 31 July and 9 August 2024).

30. PO9 notes that, "[w]hile the Tribunal has no reason to doubt Mexico's assurances", the majority "must ascertain that a robust process was put in place to search for, and produce responsive documents" and "ensure that Mexico's search methodology was appropriate and diligent". The majority stated that it was "not satisfied that the Respondent [had] sufficiently established that its methodology to search, collect and produce documents [was] appropriate".

31. Beyond the Claimant's averred incredulity there is no factual basis nor have any domestic rules or other legal basis been identified that govern procedures for collecting, retaining, keeping custody of and preserving government records, including the designation of "custodians" (to use the Claimant's term) or other "relevant personnel" (to use the majority's terms), which would cast doubt on the Respondent's assertions that it conducted exhaustive and diligent searches, and its reliance on the applicable regulations it cited to (the so-called handover regulations[2]), for instance, that there would be relevant online platforms or databases other than the MAX Platform (including the "Scratchpad") identified by both parties, or that the relevant persons identified as well by both parties[3] would be an incomplete list of "relevant personnel" and the "locations" identified by the Respondent, an incomplete list of relevant locations (See PO9, ¶ 57).

32. If the Tribunal intended a specific search methodology to be followed, specific search criteria to be used or a particularly detailed description of how and where searches were conducted, they should have been included in PO1 as part of the procedural rules, so that the Parties were aware of what would be required of them, and they could act accordingly. Instead, the majority of the Tribunal again disregarded the requirements in PO1 and the IBA Rules, transferring the requesting party's burden of providing the appropriate search criteria onto the requested party; it then dismissed the Respondent's search criteria as insufficient, without reference to any pre-existing standard or benchmark that would have been known to both parties, against which the sufficiency of the parties' searches would be measured.

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2. Lineamientos Generales para la regulación de los procesos de entrega-recepción y de rendición de cuentas de la Administración Pública Federal, published on 24 July 2017. See Respondent's letter of 31 July 2024, FN 2.

3. Including the Claimant, having reviewed over 100 documents produced. See Claimant's letter of 24 July 2024.

33. I additionally disagree with the highly prescriptive approach that the majority has taken and the consequent, unwarranted burden it places on the parties. In any event, if such a highly prescriptive approach was to be followed, the procedural rules should have clearly prescribed it at the outset, *ex-ante*, rather than introduced it as the proceedings progress or *ex post*.

III. Conclusion

34. As reasoned herein, I am unable to join the majority's reasoning, conclusions, findings and determinations, and I have no reason to doubt the conduct or statements of the Respondent in connection with the matters addressed in PO8 and PO9.

[Signed]

Hugo Perezcano Díaz
Arbitrator

Date: 22 January 2025