INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ESPÍRITU SANTO HOLDINGS, LP AND L1BRE HOLDING, LLC
Claimants

v.

UNITED MEXICAN STATES
Respondent

(ICSID Case No. ARB/20/13)

PROCEDURAL ORDER NO. 12

Members of the Tribunal
Mr. Eduardo Zuleta Jaramillo, President of the Tribunal
Mr. Charles Poncet, Arbitrator
Mr. Raúl Emilio Vinuesa, Arbitrator

Secretary of the Tribunal
Ms. Elisa Méndez Bräutigam

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13 September 2023

I. BACKGROUND

1. The Tribunal is seized with two applications:

   a. An application by the Claimants dated 13 July 2023 (the "**Reconsideration Request**") for the Tribunal to reconsider its decision in Procedural Order No. 11 of 3 July 2023 denying their application to supplement the documentary record with thirteen email exchanges (the "**Emails**") filed on 5 June 2023 (the "**Second Application**").[1]

   b. An application by the Claimants that the report on graphoscopy and documentoscopy dated 7 March 2023 (the "**Armenta-Bartolo Report**")[2] be excluded from the record in the event the Respondent does not make Dr. Angélica Armenta Pichardo available for cross-examination.

II. PROCEDURAL HISTORY

2. On 13 July 2023, the Claimants filed their Reconsideration Request together with a second witness statement of Mr. Agustín Muñana.[3]

3. Upon the Tribunal's invitation, on 19 July 2023, the Respondent filed its response opposing the Reconsideration Request. The Respondent further reserved its right to seek costs against the Claimants.[4]

4. On 2 August 2023, the Tribunal informed the Parties that it required further information before deciding on the Reconsideration Request and asked them to respond to the following questions by 4 August 2023:

> "1. In their original application dated June 5, 2023, the Claimants affirmed that the email exchanges are "responsive to the Claimants' Redfern Document Requests", and referred to their document

[1] Reconsideration Request, p. 1

[2] The Armenta-Bartolo Report dated 7 March 2023 is authored by Dr. Angélica Armenta Pichardo and Mr. Francisco Elías Bartolo Sánchez and was submitted with the Respondent's Rejoinder on the Merits.

[3] Annex A to the Reconsideration Request.

[4] Response to the Reconsideration Request, p. 7.

> requests nos. 2, 4 and 7 (see p. 6 of the Claimants' application dated June 5, 2023). The Parties are invited to comment on whether and why the thirteen email exchanges fall or do not fall within those requests, and, if the response is in the affirmative, why the emails were not produced.
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> 2. The Parties are invited to comment on whether, under Mexican laws and regulations, a former government official is allowed, after retiring from a government entity, to (a) keep their professional email account associated to the government entity either for personal use or as a dormant account; and (b) keep in a private email account emails related to the work undertaken during the term as government official."

5. On 4 August 2023, the Parties filed their respective responses.

6. On 8 August 2023, the Parties submitted their respective list of witnesses and experts to be cross-examined during the Hearing.

7. On 15 August 2023, the Respondent informed the Tribunal that its expert, Dr. Armenta Pichardo, who the Claimants had called for cross-examination on 8 August, would not be able to attend the Hearing.

8. On 16 August 2023, the Tribunal invited the Claimants to file any comments they may have on the Respondent's 15 August letter by 21 August.

9. On 21 August 2023, the Claimants filed their response to the Respondent's 15 August letter requesting that Mexico make Dr. Armenta available for cross-examination or, otherwise, that the Armenta-Bartolo report be excluded from the record. On the same day, the Respondent sought leave to file a reply.

10. On 22 August 2023, the Tribunal informed the Parties that it did not require any further pleadings on the matter, and that the Parties would have an opportunity to be heard on this issue during the pre-hearing organizational meeting scheduled for 5 September 2023.

11. On 1 September 2023, the Tribunal informed the Parties that it would ask procedural questions on the Reconsideration Request during the pre-hearing organizational meeting.

12. On 5 September 2023, the President of the Tribunal and the Parties held a pre-hearing organizational meeting via Zoom.

13. On 7 September 2023, and in accordance with the Tribunal's instructions in Procedural Order No. 11, the Parties submitted a joint expert report by Mr. Alejandro Corral Serrano and Mr. Francisco Elías Bartolo Sánchez (the "**Joint Report**" or the "**Bartolo-Corral Joint Report**").

III. THE RECONSIDERATION REQUEST

A. THE CLAIMANTS' POSITION

(1) Mr. Muñana is not Within the Claimants' Control

14. The Claimants submit that the Emails were not in their possession, custody or control until they were provided to them in May 2023.[5]

15. According to the Claimants, the Tribunal's ruling in Procedural Order No. 11 denying their request is based on the incorrect assumption that the custodian of the Emails, their witness Mr. Muñana, is within the Claimants' control.[6]

16. The Claimants submit that Mr. Muñana is a former Mexican government official, without any affiliation to the Claimants or their principals, who agreed to testify as a non-party witness.[7] The Claimants say that there is a distinction between a party witness and a non-party witness. While parties have unfettered access to a party witness and the documents that are in their possession, parties typically have no control over non-party witnesses and, accordingly, have no right to access all sources of data and the full repository of documentary evidence that belong to them. According to the Claimants, the differing

[5] Reconsideration Request, p. 4.
[6] Reconsideration Request, p. 2.
[7] Reconsideration Request, p. 1.

positions on party control over different types of witnesses is acknowledged in international arbitration practice and procedure.[8]

17. While the Claimants relied on Mr. Muñana to locate relevant documents in his files, they say that they were unable to seize and image his electronic devices or download his entire e-mail accounts in the same way they could for company employees or party representatives.[9]

18. The Claimants submit that Mr. Muñana confirmed that he only discovered that he had the Emails in his possession in May 2023, when he searched through an archived folder of a seldom used email account. According to the Claimants, Mr. Muñana was unaware that he had access to the Emails before May 2023. This was simply an oversight made in good faith. Once he located the Emails, he immediately notified the Claimants and shared them with the Claimants.[10]

19. The Claimants contend that the only individuals who had access to the Emails other than Mr. Muñana were the other Mexican government officials who were copied on the Emails. Because the Emails address official business of the Government, the Claimants should not be held responsible for their late discovery.[11]

(2) The Emails Contain Crucial Evidence

20. The Claimants submit that the documents are material to the fair resolution of this arbitration. Their exclusion from the record, they say, would amount to a substantial deprivation of the Claimants' right to present evidence. It would further deprive the Tribunal from evidence that may affect its ability to reach correct factual conclusions in this case.[12]

[8] Reconsideration Request, pp. 2-3.
[9] Reconsideration Request, p. 4.
[10] *Id*.
[11] *Id*.
[12] Reconsideration Request, p. 4.

21. The Claimants submit that the Emails go to "the heart of the arbitration" because they relate to the veracity of important documents in this arbitration, which form the foundation of the Claimants' investment. In particular, the Emails unequivocally show that in May and June 2018 government officials deliberately altered documents to the government's favour that had been finalized, signed and executed in 2016.[13]

22. The Claimants submit that, if it were useful for the Tribunal to evaluate their Reconsideration Request, they would be willing to provide a summary of each of the Emails. Further, if considered appropriate, the Tribunal could preliminarily consider an *in camera* review of the Emails by the President of the Tribunal in order to understand better their content.[14]

(3) The Circumstances are Sufficiently "Special" to Justify the Submission of the Emails

23. The Claimants submit that the Emails are sufficiently material due to their content to satisfy the "special circumstances" threshold. According to the Claimants, there are many instances of tribunals admitting into the record new documents that meet a "certain materiality threshold" during the course of a hearing or even after a hearing has concluded in certain circumstances. The ICSID Rules further entitle under certain conditions the submission of new evidence after the closure of proceedings before an award has been rendered, and the ICSID Convention allows a party to submit new evidence discovered following the issuance of an award in the context of revision proceedings.[15]

24. According to the Claimants, in reconsidering their request and determining whether "special circumstances" exist, the Tribunal shall take into account all of the factors relating to the Emails' submission into the record, including the fact that the Claimants did not know of the Emails' existence before May 2023, and that the custodian of the Emails,

[13] Reconsideration Request, pp. 2, 5-7.
[14] Reconsideration Request, p. 7.
[15] Reconsideration Request, p. 9.

Mr. Muñana, was not under their control, and he did not realize until May 2023 that he had access to these Emails.[16]

25. Moreover, excluding the Emails, they say, will create "an awkward situation" where Mr. Muñana will be testifying at the hearing with knowledge about the Emails' existence, but the Tribunal would be deprived of reviewing his testimony against the documents themselves.[17]

26. Furthermore, the Claimants contend that the fact that they obtained the Emails at all is a "special circumstance". The Claimants managed to secure Mr. Muñana's cooperation which, in turn, created the opportunity for the Claimants and the Tribunal to have access to these Emails. The Emails are the only opportunity for the Tribunal to have access to contemporaneous internal government discussions relating to the government's oversight of the Concession and the Concession documents.[18]

27. According to the Claimants, contemporaneous evidence showing the altering of documents that one party relies on should nearly always be admissible regardless of the stage of the proceeding at which the documents are discovered.[19]

28. Finally, the Claimants state that the documents are not the Claimants' documents but are documents from the Mexican governments reflecting government business. Accordingly, adding them into the record at this stage should not be prejudicial to Mexico. Furthermore, the Respondent has sufficient time before the hearing to review the documents and make any further submissions it wishes prior to (or at) the final hearing. The Claimants submit that they would not object to Mexico placing on the record any documents which are reasonably responsive to any points the Emails may raise.[20]

[16] Reconsideration Request, p. 8.
[17] *Id*.
[18] Reconsideration Request, p. 9.
[19] *Id*.
[20] Reconsideration Request, p. 2.

(4) The Claimants' Responses to the Tribunal's Questions

a. The Emails are Responsive to the Claimants' Document Requests

29. The Claimants submit that the Emails fall within the scope of the Claimants' document requests.[21]

30. According to the Claimants, the Emails contain evidence on the alteration by Mexico of the constitutive documents relating to the granting of the Concession, which explains how the conflicting versions of those documents came into existence. Further, through the alteration Mexico has raised its defense that Lusad was only granted a "*proyecto de concesión*".[22]

31. The Claimants submit that the Emails are responsive to their document request No. 7, under which the Claimants sought "[a]ll Documents in the possession, custody, or control of the Comité Adjudicador de Concesiones relating to Lusad, Claimants, the L1bre Group, or the Concession, from May 2016 to November 2018." The Claimants explained that these documents were relevant to demonstrate Semovi's forgery of documents and bear directly on the validity of documents submitted to the Tribunal. The Tribunal granted the request insofar as it was limited to documents relating to the Concession.[23]

32. According to the Claimants, the Emails respond to the subject of their document request No. 7, relate to the Concession and fall within the time period of the request. Furthermore, all but one of the Emails were in the possession, custody or control of the members of the *Comité Adjudicador de Concesiones* and, by extension, Mexico, as one of the Committee's members, Ms. Balandrán, is listed as a recipient in 12 of the 13 Emails.[24]

33. The Claimants further submit that the Emails are responsive to their document request No. 2, pursuant to which they sought correspondence sent to or from Semovi officials relating to the Concession. Although the request was limited to the time period immediately

[21] The Claimants' letter to the Tribunal, 4 August 2023, p. 1.
[22] The Claimants' letter to the Tribunal, 4 August 2023, pp. 1-2.
[23] The Claimants' letter to the Tribunal, 4 August 2023, p. 2.
[24] *Id*.

surrounding the award and amendment of the Concession, the Emails contain attachments now relied upon by Mexico that were backdated to this time period and, accordingly, the Emails are responsive to this request.[25]

34. According to the Claimants, Mexico's failure to produce the Emails under these requests show that Mexico failed to conduct a "reasonable search" in "good faith" as mandated by Procedural Orders Nos. 1 and 4.[26]

b. Mexican Law Did Not Require the Deletion of the Emails

35. According to the Claimants, what is determinative of whether a document should be preserved is not the type of email account used, but rather whether the communication in question is related to a public official's functions.[27]

36. The Claimants submit that the General Law on Transparency and Access to Public Information provides that all public officials have the obligation to document and keep record of every act related to their public function. Further, the General Law on Public Archives requires public officials to preserve all documents related to any and all acts they carry out in the exercise of their public functions. Accordingly, documents relating to the adjudication of a concession must be preserved by current or former government officials regardless of whether they were transmitted via a governmental or non-governmental email account.[28]

37. The Claimants contend that, pursuant to Mexican law, a government official who retires from a governmental entity is further required to transfer their records to the individual who replaces them. Until that transfer takes place, the former official may not delete or destroy copies of those records created during their functions. In the case of Mr. Muñana, once he left office he could not delete or destroy any documents relating to government

[25] The Claimants' letter to the Tribunal, 4 August 2023, p. 3.
[26] The Claimants' letter to the Tribunal, 4 August 2023, p. 4.
[27] *Id*.
[28] *Id*.

business in his possession or control, including the Emails, pending their transfer to his successor.[29]

38. Moreover, the Claimants say that Mexican law requires the highest authority within the entity to keep a complete record of the documents relevant to that entity. Accordingly, Semovi's Secretary was also obligated to ensure that a complete record was preserved.[30]

39. The Claimants conclude that the Emails should be admitted regardless of the regulations concerning document retention by Mexican former officials and considering that the use of private emails for government business in Mexico City is "pervasive". Further, it would be a "perverse incentive" if a government could avoid discovery by having employees email about them in private email accounts. According to the Claimants, any question as to whether Mr. Muñana was entitled to maintain the documents in his private email account after leaving office is a matter for municipal concern. The fact that he maintained copies of the documents should not bar their admission, particularly when these Emails establish wrongdoing.[31]

B. THE RESPONDENT'S POSITION

(1) The Claimants Failed to Support Their Request to add the Emails into the Record

40. The Respondent submits that in their Reconsideration Request the Claimants seek to reargue matters which they already had a chance to address in their initial application dated 5 June 2023, seeking the incorporation of the Emails into the record, as well as in their reply submission on this matter of 13 June 2023.[32]

41. The Respondent submits that a party's right to be heard entails that each party has a reasonable, rather than an exhaustive, opportunity to present its case. According to the Respondent, the Claimants had ample opportunities to show that their request meets the standard in paragraph 16.3 of Procedural Order No. 1. However, the Claimants failed to

[29] *Id.*
[30] The Claimants' letter to the Tribunal, 4 August 2023, p. 5.
[31] The Claimants' letter to the Tribunal, 4 August 2023, p. 5.
[32] Response to the Reconsideration Request, p. 1.

explain why Mr. Muñana provided the Emails only after submitting his witness testimony, thereby forfeiting their opportunity to explain what "special circumstances" exist that would justify their request.[33]

42. The Respondent disputes the Claimants' position that they would be prejudiced if the Tribunal does not reconsider its decision in Procedural Order No. 11. The Tribunal gave the Claimants opportunities to support their request to have the Emails added into the record. There is therefore no due process violation.[34]

43. The Respondent contends that, in contrast, Mexico would be gravely prejudiced if the Tribunal were to reconsider its decision. The Respondent says that it would be unjust to allow the Claimants to make new submissions without granting the Respondent the opportunity to respond, or to only allow it to do so within a limited time period or with limitations as to the evidence it may rely on. While the Claimants do not oppose Mexico filing any documents which are reasonably responsive to the Emails, the Respondent submits that, to address the Emails, it requires to undertake investigations and potentially submit one or more supporting testimonies. Furthermore, the Respondent says that the Claimants do not offer a new round of document production.[35]

44. Finally, the Respondent submits that the Claimants have not only provided the dates of the Emails, as well as information on the individuals involved and the topics discussed, but they have also described in detail the Emails' contents. This, it says, contravenes paragraphs 16.3.1 and 17.2 of Procedural Order No. 1.[36]

(2) The Claimants were Responsible for Ensuring that Mr. Muñana's Witness Statement was Accompanied by all Relevant Supporting Documents

45. The Respondent submits that by labelling Mr. Muñana as a non-party witness the Claimants are in a way claiming that he should be treated as an independent third party.

[33] Response to the Reconsideration Request, pp. 2-3.
[34] Response to the Reconsideration Request, p. 1.
[35] Response to the Reconsideration Request, pp. 3-4.
[36] Response to the Reconsideration Request, p. 4.

The authorities relied on by the Claimants concerning non-party witnesses do not support the Claimants' position because they refer to a party's availability to obtain documents during the document production phase, which is not the stage in which this proceeding is at. Furthermore, there is no legal authority supporting the Claimants' hypothesis that an independent third party shall be allowed to submit evidence belatedly.[37]

46. The Respondent says that the way in which Mr. Muñana decided to support his witness testimony is of the Claimants' exclusive responsibility. The Respondent submits that Article 4.5(b) of the IBA Rules on the Taking of Evidence, concerning the requirements that a witness statement shall meet, does not differentiate between party witnesses and non-party witnesses. It applies equally to any type of witness. Thus, the Claimants were responsible for ensuring that Mr. Muñana's witness statement was accompanied by all supporting documents.[38]

(3) The Claimants do not Meet the Standard in Paragraph 16.3 of Procedural Order No. 1

47. The Respondent says that Mr. Muñana's good faith oversight and the Claimants' trust in Mr. Muñana are not valid reasons to overcome their failure to properly present their evidence. According to the Respondent, it is surprising that a witness like Mr. Muñana, who has recounted events and addressed documents from seven years ago ignores the fact that his personal email address contains information relevant for this case.[39]

48. In any event, the Respondent says, the Reconsideration Request does not meet the standard in paragraph 16.3 of Procedural Order No. 1. An essential element of this standard is the availability of the documents. The Commentary on the IBA Rules gives a party additional opportunities to present its arguments only when it was not possible to make those arguments at the time. Neither the Claimants nor Mr. Muñana have submitted that the

[37] Response to the Reconsideration Request, pp. 4-5.
[38] Response to the Request for Reconsideration, p. 5.
[39] Response to the Request for Reconsideration, p. 6.

documents were not available when preparing the Claimants' Reply, only that they were not located at that time.[40]

49. Furthermore, the Respondent says that the Claimants do not explain how the Emails ended up in Mr. Muñana's hotmail account. The fact that they were stored in that account further implies that there may be other personal emails from Mr. Muñana that may be relevant for this case but that the Claimants have not disclosed because they may be prejudicial to them.[41]

(4) The Respondent's Responses to the Tribunal's Questions

a. The Emails do not Fall Within the Scope of the Claimants' Document Requests

50. The Respondent submits that the Emails do not fall within the scope of the Claimants' document requests nos. 2, 4 or 7.[42]

51. The Respondent says that, under request No. 2, the Claimants requested correspondence exchanged between officials of Semovi relating to Lusad and the Concession between April and June 2016, or between January 2017 and March 2017. The Emails are dated between May and June 2018. Accordingly, they do not fall within the time period of this request.[43]

52. The Respondent further argues that, under request No. 7, the Claimants sought documents in the possession, custody or control of the *Comité Adjudicator de Concesiones* relating to Lusad, the Claimants, the L1bre Group, or the Concession from May 2016 to November 2018. According to the Respondent, the Emails do not fall within the request's scope. In particular, the *Comité Adjudicator* was a decision-making body formed by representatives of Semovi, Sedema, Sedeco and the General Director of Transport of Semovi, and did not keep a record of documents. It was the *Dirección General de Servicio de Transporte*

[40] *Id*.
[41] *Id*.
[42] The Respondent's letter to the Tribunal, 4 August 2023, p. 1.
[43] The Respondent's letter to the Tribunal, 4 August 2023, pp. 1-2.

Público Individual (DGSTPI) which was in charge of preserving all relevant information. Mr. Muñana further stated that starting June 2018, he was the *Director of Normatividad* under the *Dirección General Jurídica y de Regulación*, which means that from that date onwards he was acting outside of the scope of the *Comité Adjudicador*. The Respondent submits that, despite there not existing responsive documents, in accordance with the principle of good faith and after an exhaustive search, it still produced all documents it found that related to the Committee and the Lusad Concession.[44]

53. The Respondent contends that, in their letter of 5 June 2023, the Claimants do not mention their document request no. 4, which the Tribunal rejected. Under this request, the Claimants sought documents pertaining to the committee meetings of the *Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales* concerning the Concession. The Emails do not fall within the request because they do not relate to the Institute's committee meetings.[45]

54. Finally, the Respondent contends that during the document production phase and after the Claimants' 5 June 2023 letter Semovi undertook a search of documents, but did not find the Emails in its server. This, the Respondent says, casts doubt on their authenticity.[46]

b. Mexican Law does not Allow Former Government Officials to Keep Their Government Email Accounts or Information Concerning Their Employment in Personal Email Accounts

55. The Respondent submits that government officials can only use government email accounts during their employment. Government email accounts are to be used only for official matters, and not for personal use. Once a government official retires, their government email account is deactivated.[47]

[44] The Respondent's letter to the Tribunal, 4 August 2023, p. 2.
[45] The Respondent's letter to the Tribunal, 4 August 2023, p. 3.
[46] *Id*.
[47] The Respondent's letter to the Tribunal, 4 August 2023, pp. 3-4.

56. The Respondent further submits that former government officials cannot keep emails related to their employment in their personal email accounts as doing so would entail subtracting governmental information.[48]

57. The Respondent submits that, with respect to the government of Mexico City, the AIDP is the agency in charge of issuing guidelines on the use of IT assets and services. These guidelines prohibit (i) sending or forwarding via email confidential, false, defamatory or offensive information; (ii) sending or forwarding via email, among others, chain letters or advertising unrelated to the entity in question; (iii) using the government equipment to access local or remote equipment to which the user has no explicit authorization; and (iv) sending messages anonymously.[49] Furthermore, the Respondent says that the *Ley General de Responsabilidades Administrativas* (LGRA) and the *Ley General de Transparencia y Acceso a la Información Pública* (LGTAIP), which apply to all authorities in Mexico, state that the subtraction of governmental information is a punishable conduct. Accordingly, a former official is not entitled to subtract, much less keep in a private account information to which they had access during their employment.[50] The conduct will be deemed aggravated if the information is privileged and if the former official did not hand the information over upon their employment's termination.[51]

58. Finally, the Respondent submits that government officials are also bound by the ethic codes of their respective agencies. In the case of the government of Mexico City, officials commit to obtain information, data, access or facilities to carry out their powers through legal means.[52]

[48] The Respondent's letter to the Tribunal, 4 August 2023, p. 4.
[49] The Respondent's letter to the Tribunal, 4 August 2023, p. 3.
[50] The Respondent's letter to the Tribunal, 4 August 2023, p. 4.
[51] The Respondent's letter to the Tribunal, 4 August 2023, p. 5.
[52] The Respondent's letter to the Tribunal, 4 August 2023, p. 7.

IV. DR. ARMENTA'S AVAILABILITY FOR CROSS-EXAMINATION

A. THE RESPONDENT'S POSITION

59. The Respondent submits that Dr. Armenta is unable to attend the hearing because her professional relationship with the company "*Corporativo de Servicios de Investigación, Protección de Documentos y Ciencias Forenses*" has terminated.[53]

60. The Respondent says that Mr. Bartolo, who is the co-author of the Armenta-Bartolo Report, is the leader of the Armenta-Bartolo Report, and that he will attend the Hearing and will be able to answer any questions on the Armenta-Bartolo Report.[54]

B. THE CLAIMANTS' POSITION

61. The Claimants submit that the Respondent cannot unilaterally decide which witnesses will appear for cross-examination. The Claimants rely on paragraph 18.2 of Procedural Order No. 1, which states that *"[b]efore a hearing and within the time limit to be set by the Tribunal, a party may be called upon by the Tribunal or the other party to produce at the hearing, for examination and cross-examination, any witness or expert whose testimony has been advanced with the party's pleadings*" and that "*[i]f a witness or expert has been called to testify by the adverse party but the witness or expert does not appear at the hearing, that witness' or expert's testimony shall be stricken from the record unless extraordinary circumstances exist that prevent him or her from testifying*."[55]

62. The Claimants say that the Respondent has not submitted any evidence of Dr. Armenta's supposed change of employer. In any event, for the Claimants Dr. Armenta's change of employment does not constitute an "extraordinary circumstance" and should not prevent the Claimants from cross-examining her.[56]

[53] The Respondent's letter to the Tribunal, 15 August 2023.
[54] *Id*.
[55] The Claimants' letter to the Tribunal, 21 August 2023, p. 1.
[56] The Claimants' letter to the Tribunal, 21 August 2023, pp. 1-2.

63. The Claimants dispute the Respondent's contention that Mr. Bartolo is the leader of the Armenta-Bartolo Report. They say that this allegation is inconsistent with the Report, which was co-signed by both experts, with Dr. Armenta's name appearing first. Furthermore, it was Dr. Armenta, not Mr. Bartolo, who conducted the inspection of the original documents, and which constitutes the basis for the analysis contained in the Report. Thus, the analysis of the Report depends on Dr. Armenta's ability to defend the rigor of the inspections and analysis she performed.[57]

64. For the Claimants, the fact that Mr. Bartolo did not examine any of the original documents make him unable to opine on their authenticity. Any familiarity Mr. Bartolo may have with photos or copies of the documents prepared by Dr. Armenta cannot support the conclusions of the Report, which itself states that a valid forensic document analysis can only be done from original files.[58]

V. TRIBUNAL'S ANALYSIS

A. THE RECONSIDERATION REQUEST

65. As a starting point, the Tribunal considers it necessary to recall the timeline of the witness statements of Mr. Muñana, the Claimants' Second Application, and the Reconsideration Request:

a. Mr. Muñana signed his witness testimony in Miami on **28 September 2022**, and his testimony was submitted on **4 November 2022** with the Claimants' Reply memorial.

b. The Respondent submitted its Rejoinder on **7 March 2023**, that is, **over five months** after Mr. Muñana had signed his witness statement. The Rejoinder included the Armenta-Bartolo Report, which analysed the authenticity of the signatures in certain

[57] The Claimants' letter to the Tribunal, 21 August 2023, p. 2.
[58] The Claimants' letter to the Tribunal, 21 August 2023, pp. 2-3.

exhibits filed by the Claimants and the Respondent, specifically, exhibits "**C-0007, C-0009, C-0018, C-0019, C-0055 R-0080 and R-0081**."[59]

c. On **5 June 2023**, that is, **three months** after the Rejoinder and eight months after the submission of the first witness statement of Mr. Muñana, the Claimants submitted the Second Application to incorporate the Emails into the record. According to the Claimants, the Emails are relevant because the Parties have submitted inconsistent versions of various documents concerning the granting of the Concession to Lusad, including "*the 2016, 2017, and 2018 Concessions (Exhibits **C-0057, C-0007, C-0020** vs Exhibit **R-0069**); a document establishing Eduardo Zayas's presence while receiving the Concession in June 2016 and altered Concession in November 2018 (Exhibits **C-0052, C-0051, C-0167**); the June 2016 Adjudication Committee Minutes (Exhibit **C-0051** vs Exhibit **R-0068**); and Oficio DGJR-1291 of 29 June 2016 (Exhibit **C-0009** vs Exhibits **R-0068 and C-0168**) (altogether the "Disputed Documents")*."[60]

d. On **9 June 2023**, Mexico responded to the Second Application requesting the Tribunal to reject it. The Claimants requested leave to file a reply, which the Tribunal granted on 11 June 2023. Accordingly, on **13 June 2023,** the Claimants filed an additional brief in support of the Second Application. On **16 June 2023,** Mexico filed its response to the Claimants' second brief, reiterating that the Claimants had not proven the existence of special circumstances justifying the admission of the Emails.

e. On **3 July 2023**, the Tribunal issued Procedural Order No. 11 deciding, *inter alia,* the Second Application. The Tribunal denied the request to incorporate the Emails because the Claimants had failed to prove the existence of "*special circumstances*", as required by Section 16.3 of Procedural Order No. 1, to justify the admission of additional evidence at that stage of the proceedings:[61]

[59] The Armenta-Bartolo Report, ¶ 28.

[60] Second Application, p. 3.

[61] Procedural Order No. 1, § 16.3: "*Neither party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that special circumstances exist based on a reasoned written request followed by observations from the other party*."

"[…] *110. As the Claimants indicate in their submissions, Procedural Order No. 1 does not define which situations can amount to a "special circumstance" justifying the introduction of new evidence outside the regular procedural opportunities granted to each Party. In the absence of such definition, the Tribunal finds in the IBA Rules and its Commentary a valuable guidance. The Commentary on the IBA Rules states that "further Considerations of efficiency and good faith weigh in favour of giving a party a single opportunity to present its arguments and allowing additional opportunities only when it was not possible to make those arguments at the time."*

111. The Tribunal is not persuaded that the Claimants have demonstrated that it was not possible for them to submit the Emails with Mr. Muñana's testimony, at the corresponding procedural stage. The Claimants merely argue that the Emails were only recently provided by Mr. Muñana, a witness of the Claimants and under the control of the Claimants, but fail to provide any reasonable explanation for the delay of their own witness in providing Claimants with the Emails […]."[62]

f. On **13 July 2023,** that is, 10 days after the issuance of Procedural Order No. 11 and over 9 months after the first witness statement of Mr. Muñana, the Claimants filed the Reconsideration Request asking the Tribunal to reconsider its decision recorded in Procedural Order No. 11 to grant the Claimants leave to incorporate the Emails into the record. Together with the Reconsideration Request, the Claimants introduced as evidence to support the existence of "*special circumstances*" a second witness statement of Mr. Muñana.

g. On **19 July 2023**, Mexico filed its Response to the Reconsideration Request asking the Tribunal to "*reject outright*" the Reconsideration Request for breaching Sections 17.2 and 16.3 of Procedural Order No. 1.[63]

66. As a threshold matter, the Tribunal first observes that the Claimants are requesting the reconsideration of the decision on the Second Application because Mr. Muñana is not a

[62] Procedural Order No. 11, ¶¶ 110-111, 113(6).
[63] Response to the Reconsideration Request, p. 7.

party witness and, therefore, they did not have access or control over his "*full repository of documentary evidence*."[64] The Tribunal is not persuaded by this allegation.

67. Mr. Muñana is a witness of the Claimants. The submission by the Claimants to the effect that Mr. Muñana is some sort of an independent non-party witness has no support. The doctrine cited by the Claimants refers to the control over a person in connection with the production of documents. The Claimants quote the doctrine on document production as if it referred to witness statements, but it does not. The Claimants do not explain why the same doctrine should apply to the control of a party over a witness for purposes of preparing witness statements, nor do they cite any authority or decision that supports that this doctrine is applicable to witness statements.

68. Mr. Muñana's first witness statement was submitted by the Claimants as evidence to support their case, and was prepared in Miami,[65] where the offices of the Claimants' counsel are located, instead of Mexico, where he resides.[66] Moreover, according to the second witness statement of Mr. Muñana, as soon as he found the Emails, he delivered them to the Claimants, as he considered that they were relevant for this case.[67] However, it is not clear whether – if he is a non-party witness and a former Mexican official – he should have delivered the entire file he claimed to have found in his email account to his successor in office, as required by Mexican law, and why such documents are not in the possession of the Respondent.

69. In is clear for this Tribunal that, pursuant to Section 13 of Procedural Order No. 1, ICSID Arbitration Rule 24, and Article 4(b) of the IBA Rules on the Taking of Evidence in International Arbitration, Mr. Muñana must have submitted with his witness statement the source of the declaration and any documents supporting the same.

[64] Reconsideration Request, p. 3.

[65] First witness statement of Mr. Agustín Muñana, p. 31.

[66] First witness statement of Mr. Agustín Muñana, p. 2, ¶ 1.

[67] Reconsideration Request, p. 4; Second witness statement of Mr. Agustín Muñana, ¶ 7.

70. The Second Application was not rejected, as argued by the Claimants, because Mr. Muñana was a witness under the control of the Claimants. The Second Application was rejected because the Tribunal considered that the Claimants had failed to prove the existence of "*special circumstances*" since (i) they did not demonstrate "*that it was not possible for them to submit the Emails with Mr. Muñana's testimony*"[68] and (ii) the Tribunal did not accept that the relevance of a document in and of itself is a "*special circumstance*."

71. Second, in the Reconsideration Request the Claimants insist that the alleged relevance of the Emails is in and of itself a "*special circumstance*" and refer to decisions of arbitral tribunals that admitted evidence shortly before the hearing and even after the hearing. The Tribunal is not persuaded that investment tribunals have considered that the potential relevance of a document can amount by itself to a "*special circumstance*." If that were the rule, a party could submit evidence at any time only by claiming and proving that the evidence is relevant. Instead, the Tribunal is of the view that the relevance of the documents must be pondered with other elements to consider that there is indeed a "*special circumstance*."

72. Third, only after the filing of the Reconsideration Request, in their responses to the Tribunal's questions of 2 August 2023, did the Claimants provide a full explanation of the allegation raised in the Second Application that the Emails were responsive to the Claimants' document production request Nos. 2 and 7.[69]

73. Mexico disputed the Claimants' allegations regarding the document production requests Nos. 2 and 7 in its response to the Second Application dated 9 June 2023[70] and in its

[68] Procedural Order No. 11, ¶ 111.

[69] Second Application, p. 6. In the Second Application, the Claimants merely asserted that "*[f]urther, many of these Semovi e-mails are responsive to the Claimants' Redfern Document Requests, and Mexico should have made an inquiry into documents responsive to those requests eight months ago.*", without providing further explanation.

[70] The Respondent's response to the Second Application, 9 June 2023, p. 5.

response to the Tribunal's questions dated 4 August 2023, arguing that the Emails are not within the scope of any of the Claimants' document production requests.[71]

74. Request No. 2 was limited to "*All Correspondence sent to or from Semovi officials (or on which Semovi officials werecopied), between April and June 2016, or between January 2017 and March 2017, relating to Lusad, the L1breGroup, or the award, issuance, or status of any concession agreement involving Lusad*."[72] The Respondent argues, and the Tribunal agrees, that the Emails are all from 2018,[73] that is to say, a period not included in the request No. 2.

75. Request No. 7 referred to "*All Documents in the possession, custody, or control of the Comité Adjudicador de Concesiones relating to Lusad, Claimants, the L1bre Group, or the Concession, from May 2016 to November 2018*".[74] The Respondent has argued that the Adjudication Committee was not an "*organ that keeps information*" and, therefore, that there is no "*information repository*" or record, and that the "*subjects of the Emails do not reference at all any member of the Adjudication Committee*." The Tribunal is not persuaded by these allegations. On the one hand, the order to produce was not restricted to an official record or repository but to "all documents" of the Adjudication Committee related to the Concession and, in fact, the Respondent was able to produce certain documents. On the other hand, and most importantly, it is incorrect to state that the Emails "*do not reference at all any member of the Adjudication Committee*." As noted in Annex B to the Second Application, Ms. Alejandra Balandrán was apparently copied in 12 of the 13 Emails,[75] and as evidenced in exhibit R-00079 – which was cited by the Respondent in its 4 August 2023 submission – Ms. Balandrán was a member of the Adjudication Committee.

[71] The Respondent's rejoinder on the Second Application, 16 June 2023, p. 2, "*Por último, las Demandantes no disputan que los Correos Electrónicos no se encuentran en el ámbito de ninguna de sus solicitudes de documentos, de la fase pasada de producción de documentos que culminó con la Resolución Procesal 9, del 15 de noviembre de 2022*."

[72] Procedural Order No. 4, p. 10, Annex A: Claimants' Redfern Schedule, Request No. 2, second column.

[73] Second Application, p. 3 and Annex B.

[74] Procedural Order No. 4, p. 23, Annex A: Claimants' Redfern Schedule, Request No. 7, second column.

[75] The Claimants' letter to the Tribunal, 4 August 2023, p. 2.

76. The foregoing facts raise doubts as to whether the Emails were information outside of Mexico's reach or whether they were documents that Mexico could have produced in response to the Claimants' document production requests. The Tribunal considers that there is a founded concern that the Claimants' inability to access the Emails at the relevant procedural stage may rest on the Respondent's alleged failure to produce such documents. In the Tribunal's view, these circumstances may amount to "*special circumstances*."

77. The Tribunal further observes that, in its response to the Claimants' document production request No. 1, the Respondent argued that the request related to the *Secretaría de Medio Ambiente* and the *Secretaría de Desarrollo*, and that these entities were "*irrelevant for the case and even less substantial given that Semovi was the authority that presided the Adjudication Committee*" and therefore agreed to "*produce the record related to Lusad that is found within the Semovi*."[76] As noted in Annex B to the Second Application, the subjects of the 13 Emails and their attachments all appear to relate directly to Lusad and the Concession, and involve personnel from the Semovi. This only creates additional doubts as to whether the Emails should have been produced during the document production phase, as part of the Semovi records of the Concession and Lusad between 2016 and 2018, since it was the Adjudication Committee's presiding authority.

78. Together with the Reconsideration Request, the Claimants provided, in support of their allegation of special circumstances, a second witness statement of Mr. Muñana. According to the Claimants and Mr. Muñana's second witness statement, he became aware of the Emails in May 2023 as a result of "*an oversight made in good faith*."[77]

79. The Respondent is correct in that Mr. Muñana's second witness statement was submitted in violation of Sections 17.2 and 16.3 of Procedural Order No. 1[78] and the Tribunal could

[76] Procedural Order No. 4, p. 7, Annex A: Claimants' Redfern Schedule, Request No. 1, fifth column.

[77] Reconsideration Request, p. 4.

[78] Section 17.2 provides that "[N]*either party shall be permitted to submit any testimony that has not been filed with the written submissions, unless the Tribunal determines that special circumstances exist based on a reasoned written request followed by observations from the other party (following the procedure outlined in §16.3)*". In turn, Section 16.3 of Procedural Order No. 1 provides that "*16.3. Neither party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that special*

proceed to reject said witness statement. Moreover, under ICSID Arbitration Rules 35 and 26, and Section 18 of Procedural Order No. 1, the Tribunal could proceed to allow Mexico to cross-examine Mr. Muñana on his second witness statement even before the Tribunal decides on whether the witness statement constitutes sufficient evidence to support the existence of special circumstances.

80. However, the second witness statement of Mr. Muñana cannot be analyzed in isolation. On the one hand, as already indicated in paragraph 62 above, the Tribunal has doubts as to whether the Emails were documents that Mexico could have produced in response to the Claimants' document production requests. On the other, the testimony of Mr. Muñana raises questions as to the custody and possession of official documents under Mexican laws, including the documents kept by Mr. Muñana.[79]

81. Even though the Emails are being incorporated into the record on grounds other than Mr. Muñana's second witness statement, namely, the fact that they are Mexico's documents that could have been submitted during the document production phase, the Tribunal cannot simply ignore the allegations of Mexico on the legitimacy of such Emails and their possession by Mr. Muñana. The Tribunal needs to strike a balance between the Respondent's due process right and the Tribunal's obligation to take measures necessary to gather the evidence required to issue an informed decision when there are allegations that evidence has been improperly withheld, falsified, or submitted in violation of laws or rules that could make the submission illegitimate.

circumstances exist based on a reasoned written request followed by observations from the other party. 16.3.1. Should a party request leave to file additional or responsive documents, that party may not annex the documents that it seeks to file to its request. 16.3.2. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other party is afforded sufficient opportunity to make its observations concerning such a document.

[79] Including the legality of the alleged "practice" of keeping official records in private emails, the legality of using documents kept by former officials in private emails as evidence, and the reasons why the Respondent has not found a significant number of documents in its records.

82. Section 16.3 of Procedural Order No. 1 provides that if the Tribunal admits additional evidence, it shall ensure that the other party is afforded "*sufficient opportunity to make its observations*."

83. Accordingly, the Tribunal orders that the Respondent be provided with immediate access to the 13 Emails held by the Claimants and grants the Respondent the opportunity to submit additional evidence exclusively in connection with the 13 Emails and Mr. Muñana's second witness statement. Moreover, Respondent may request the Claimants to produce additional documents that may be related to the 13 Emails and that Mr. Muñana may have kept in the file where he allegedly found the Emails. The Tribunal will not admit allegations or evidence submitted in violation of this ruling and stresses the obligation of both Parties to abide by the rule in Sections 16 and 17 of Procedural Order No. 1.

84. Considering the timing of the Second Application and the Reconsideration Request, that the Respondent requires "*sufficient opportunity*" to file evidence, and the issues raised by the Bartolo-Corral Joint Report further described in paragraphs 92-96 *infra*, the Tribunal decides to postpone the Hearing scheduled for 16-20 October 2023.

B. DR. ARMENTA'S AVAILABILITY FOR CROSS-EXAMINATION

85. The Claimants have notified Mexico and the Tribunal that they are calling Dr. Armenta and Mr. Bartolo, as the co-authors of the Armenta-Bartolo Report, for cross-examination at the Hearing.

86. Mexico has indicated that Dr. Armenta will not be able to attend the Hearing because she changed her employer and no longer works with Mr. Bartolo. However, the Respondent asserts that Mr. Bartolo will attend the Hearing for the Claimants' cross-examination on the Armenta-Bartolo Report and that he is principally responsible for the Report.

87. The Claimants, in turn, request the Tribunal to strike from the record the Armenta-Bartolo Report, in accordance with Section 18.2 of Procedural Order No. 1, if Mexico does not make Dr. Armenta available for cross-examination at Hearing.[80]

88. Section 18.2 of Procedural Order No. 1 states that "*If a witness or expert has been called to testify by the adverse party but the witness or expert does not appear at the hearing, that witness' or expert's testimony shall be stricken from the record unless extraordinary circumstances exist that prevent him or her from testifying.*" Neither Section 18.2 nor the ICSID Arbitration Rules expressly deal with the scenario of expert reports prepared by more than one individual.

89. It is uncontested that the Armenta-Bartolo Report was signed by both Dr. Armenta and Mr. Bartolo, and that there is no section that explicitly attributes "*the entirety or specific parts*" of such report to either expert.[81] Moreover, throughout the Armenta-Bartolo Report, and particularly in the conclusions section, the experts jointly affirm that the conclusions expressed in the report are "*truthful and ours*" in accordance with "*our knowledge and experience in the matter*."[82] In this sense, the language used in the Report indicates that it is a joint report that can be attributed indistinctively to both Dr. Armenta and Mr. Bartolo.

90. In sum, the Armenta-Bartolo Report is a co-authored report, which does not appear to attribute any specific section to either of its co-authors. Therefore, in the Tribunal's view, there are no grounds to determine that the entirety or a specific part of the Armenta-Bartolo Report can only be attributed to Dr. Armenta as her expert testimony and that not being able to cross examine Dr. Armenta is a valid ground to strike the entirety of the report based on Section 18.2 of Procedural Order No. 1. The fact that only one of the two experts who signed the Report attended the inspection of the original documents does not change the Tribunal's views on this matter.

[80] The Respondent's letter to the Tribunal, 21 August 2023, p. 3.

[81] IBA Rules on the Taking of Evidence in International Arbitration, Article 5(2)(i).

[82] Armenta-Bartolo Report, ¶ 212, "*Confirmamos que las conclusiones y opiniones expresadas en el presente informe son verdaderas y propias, de conformidad sobre la revisión de los documentos expuestos, de acuerdo a nuestros conocimientos y experiencia en la materia.*"

91. The Tribunal further observes that the heading of the Armenta-Bartolo Report identifies the company "*Corporativo de Servicios de Investigación, Protección de Documentos y Ciencias Forenses*" of which Mr. Bartolo claims to be the "director" as set forth in his *curriculum vitae* attached as exhibit FEBS-00002-SPA of the Armenta-Bartolo Report. Moreover, in the Bartolo-Corral Joint Report, Mr. Bartolo repeatedly refers to the Armenta-Bartolo Report as "[his] *report*."[83]

92. All of the above indicates that Mr. Bartolo may have been the leading expert in the Armenta-Bartolo Report, as claimed by the Respondent. This, added to the fact that the Respondent has confirmed Mr. Bartolo's attendance at the Hearing for his cross-examination, reinforces the Tribunal's conclusion that there are not sufficient grounds to exclude the Armenta-Bartolo Report from the record under Section 18.2 of Procedural Order No. 1.

C. THE BARTOLO-CORRAL JOINT REPORT

93. On 7 September 2023, the Tribunal received the joint expert report prepared by Mr. Alejandro Corral Serrano, expert of the Claimants, and Mr. Francisco Elías Bartolo Sánchez, expert of the Respondent, as required by Procedural Order No. 11.

94. After a preliminary review of the Bartolo-Corral Joint Report, the Tribunal observes with concern the expert's assertion that "*no points of agreement exist*" between them on the authenticity analysis of the documents that were the subject to the Armenta-Bartolo Report, *i.e.* exhibits C-0007, C-0009, C-0018, C-0019 and C-0055, and of the documents used in the Armenta-Bartolo Report for such analysis, including exhibits FEBS-0017-SPA through FEBS-0046-SPA.[84] Particularly, the Tribunal observes that the experts were unable to reach any consensus on the methodology and standards applicable to their analysis.

95. In this regard, the Tribunal emphasizes that the experts of both Parties have a duty to cooperate in good faith to "*reach agreement on the issues within the scope of their Expert*

[83] The Bartolo-Corral Joint Report, ¶¶ 38, 109, 110, 111, 116, 125, 126, 127, 149, 150, 159, 183, 184, 187, 190, 193, 206, 207, 212, 215, 238, 242, and § (vii).

[84] The Bartolo-Corral Joint Report, pp. 41, 59, 74, 86, and 99.

Reports."[85] However, it appears that the experts barely made such attempt when preparing the Bartolo-Corral Joint Report.

96. Additionally, the Tribunal also notes Mr. Corral's allegation that the originals of exhibits FEBS-0021-SPA, FEBS-0022-SPA, FEBS-0023-SPA, and FEBS-0024-SPA, were not provided in their complete version during the inspection.[86]

97. In light of the foregoing, the Tribunal reserves the right to submit questions to the experts before the Hearing, order the submission of additional documents and order an expert conferencing at the Hearing pursuant to Section 18.4.8. of Procedural Order No. 1, without prejudice to the Parties' right to cross-examine the experts.

VI. DECISION

98. For the reasons indicated above, the Tribunal:

a. Orders the Claimants to provide the Respondent with immediate access to the 13 Emails.

b. Grants the Respondent the opportunity to submit additional evidence exclusively in connection with the 13 Emails and Mr. Muñana's second witness statement, **no later than 30 October 2023**.

c. Except with prior leave from the Tribunal that will only be granted in exceptional circumstances, no additional pleadings may be submitted with the aforementioned evidence and no pleadings or additional evidence may be submitted by the Claimants in response to the evidence.

d. Grants the Respondent the right and opportunity to request the Claimants to produce additional documents that may be related to the 13 Emails and that may have been kept in the file where Mr. Muñana allegedly found them, **no later than 18 September**

[85] IBA Rules on the Taking of Evidence in International Arbitration, Article 5(4).
[86] The Bartolo-Corral Joint Report, ¶¶ 65, 131; 73, 133; 80, 135; and 88, 137.

2023. The Claimants shall produce such documents –if any– to the Respondent only and/or reply to such requests **by 25 September 2023**. Any dispute in connection with the production of these documents will be decided by the Tribunal at the request of either Party.

e. Recalls the obligation of both Parties to abide by Sections 16 and 17 of Procedural Order No. 1.

f. Recalls the that the experts of both Parties have a duty to cooperate in good faith to attempt to reach agreements regarding the scope of the Bartolo-Corral Joint Report. In this regard, the Tribunal reserves its right to pose questions on the Bartolo-Corral Joint Report in advance of the Hearing, and to order an expert conferencing at the Hearing pursuant to Section 18.4.8. of Procedural Order No. 1.

g. Reserves its right to order the submission of additional documents.

h. Decides not to exclude the Armenta-Bartolo Report from the record under Section 18.2 of Procedural Order No. 1.

i. Postpones the Hearing scheduled for 16-20 October 2023. The Tribunal will set the new Hearing dates in a separate decision, after consultation with the Parties.

j. Defers the decision on costs to a later stage of the proceedings.

For and on behalf of the Tribunal,

[Signed]

Mr. Eduardo Zuleta Jaramillo
President of the Tribunal
Date: 13 September 2023