

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

- and -

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

- between -

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

(the “Claimants”)

and

THE UNITED MEXICAN STATES

(the “Respondent”)

ICSID Case No. UNCT/18/4

**PROCEDURAL ORDER No. 4
DECISION ON THE AD HOC GROUP OF BONDHOLDERS’
APPLICATION FOR LEAVE TO INTERVENE**

Tribunal

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

Secretary of the Tribunal

Ms. Celeste E. Salinas Quero

June 24, 2019

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I. Introduction and Procedural background

1. On April 19, 2019, Alterna Capital Partners LLC (US), Asia Research & Capital Management Ltd. (HK), Contrarian Capital Management, LLC (US), CQS (UK) LLP for and on behalf of funds managed and or advised by it, GHL Investments Ltd. (Europe), and Ship Finance International Limited (UK Territory/Bermuda) (together, the “**Applicants**”) submitted to ICSID an application for leave to file a non-disputing party submission in this arbitration (the “**Application**”) pursuant to § 1.3 of Procedural Order No. 2 (“**PO 2**”) and § 4 of the Statement of the NAFTA Free Trade Commission on Non-Disputing Party Participation (the “**Recommendations**”). Along with the Application, the Applicants attached a proposed submission (the “**Submission**”).
2. On April 23, 2019, the Secretary of the Tribunal transmitted the Application and Proposed Submission to the Members of the Tribunal.
3. Following the instructions of the President of the Tribunal, on April 26, 2019, the Secretary of the Tribunal transmitted the Application and Submission to the Parties. In the same communication, the Parties were invited to submit comments on the Application by May 6, 2019, pursuant to § 1.3 and § 1.4 of PO 2 and Section B(5) of the Recommendations.
4. On April 26, 2019, Claimants indicated that “[i]t was procedurally improper for the Ad Hoc Group of Bondholders to attach their substantive submission along with their application to the Tribunal requesting leave to file that submission.” Claimants further requested that the Tribunal “not review the Bondholders’ substantive submission until the Tribunal issues a decision on their pending application.”¹
5. On April 29, 2019, the Tribunal informed the Parties that it intended to consider the Application only, in addition to any comments thereon from the Parties. The Tribunal further stated that it would review the Submission only if it were admitted, in which case, pursuant to section 1.4 of Procedural Order No. 2 and section B(8) of the Recommendations, the Parties would be afforded an opportunity to comment on the Submission.
6. On May 3, 2019, Claimants submitted a request for an extension of the deadline to submit comments on the Application.
7. On the same date, the Tribunal invited Respondent to submit comments on Claimants’ communication by May 8, 2019.

¹ Communication from Claimants to ICSID of April 26, 2019.

8. On May 6, 2019, Claimants resubmitted their request for an extension of the deadline to submit comments on the Application, along with an exhibit related to bankruptcy proceedings.
9. Further to the Tribunal's invitation, on May 8, 2019, Respondent submitted its comments on Claimants' request of May 3, 2019.
10. On May 9, 2019, Claimants submitted a brief response to Respondent's comments of May 8, 2019.
11. On May 13, 2019, the Tribunal invited the Parties to submit by May 20, 2019, their respective comments on the Application.
12. Further to the Tribunal's invitation, on May 20, 2019, the Parties provided their comments on the Application.

II. The Application

A. The Applicants

13. The Applicants describe themselves as an *ad hoc* group of bondholders pursuant to a Bond Agreement, which "[...] purchased and hold approximately 55.56% of that certain 7.50% Oro Negro Drilling Pte. Ltd. Senior Secured Bond Issue 2014/2019 USD (the "Bonds") issued by Oro Negro Drilling Pte. Ltd." The Applicants explain that the Bonds were issued to finance the Oro Negro oilfield project, subject of this arbitration.²
14. The Applicants affirm not to be affiliated, directly or indirectly, with any disputing party. They also affirm not having received direct financial or other assistance from any third party in making the application.³

B. The nature of the Applicants' interest

15. The Applicants explain that Claimants own 43.2% of the shares in Integradora de Servicios Oro Negro, S.A.P.I. de C.V. ("**Integradora**"). Integradora ultimately owns 100% of the shares in Perforadora Oro Negro, S. de R.L. de C.V. ("**Perforadora**") (Perforadora and Integradora are referred together as "**the Company**").

² Application, p. 1 and § I.

³ Application, § I.

16. The Applicants contend that their interest derives from their status as first-priority secured creditors in relation to the Company, thereby having rights to the assets of the Company, including to the Company's claims to lost revenue under the drilling contracts that the Company concluded with Pemex.⁴
17. The Company has obtained a favorable judgment (currently on appeal) from a Mexican civil court in a suit against Pemex for damages resulting from Pemex's termination of the drilling contracts. The Company is also in bankruptcy proceedings in Mexico. In the bankruptcy proceedings, the Applicants presented claims to the Company's assets, including claims to lost revenues resulting from Pemex's termination of the drilling contracts and claims to 100% of the shares of Perforadora.⁵
18. According to the Applicants, through Claimants' NAFTA claims –whereby Claimants seek damages for Pemex's termination of the drilling contracts– Claimants are attempting to obtain compensation to which the Applicants are first entitled as first-priority secured creditors in the bankruptcy proceedings. Applicants add that any award in favor of Claimants would undermine the Company's ability to recover and thereby undermine their financial position.⁶

C. Issues of fact and law addressed in the submission

19. On issues of fact, the Applicants maintain that their submission addresses their status as the principal investor in the Oro Negro project and their financial relationship to Claimants that establishes the Applicants as first-priority secured creditors of the Company.
20. On issues of law, the Applicants maintain that their submission analyses NAFTA's applicable standing provisions, including Articles 1116 and 1117, to demonstrate that the Claimants seek to distort Chapter 11 of the NAFTA by claiming as minority shareholders the derivative losses of the Company.⁷

D. Considerations to determine whether to grant the Application

21. The Applicants sustain that the Tribunal should admit the proposed submission, because they offer a different perspective from the disputing parties. The Applicants allege to possess unique knowledge and insights that Respondent does not possess and that Claimants “may not be willing to share”⁸ resulting from the Applicants' involvement in

⁴ Application, pp. 1, 2.

⁵ Application, pp. 1, 2.

⁶ Application, § II.

⁷ Application, § III.

⁸ Application, § IV(i).

- bankruptcy litigation with Claimants in Mexico, the U.S. and other jurisdictions. For example, information on events of default under the Bond Agreement and the Company's initiation of the bankruptcy proceedings on behalf of the issuer of the Bonds.⁹
22. The Applicants state that they seek to address matters within the scope of the dispute; namely, the operation of Chapter 11's standing provisions, and the limitations on Claimants' standing to claim indirectly, as minority shareholders, for the losses of the Company.¹⁰
23. The Applicants argue that the significant interest standard is met when an applicant has more than a general interest in the proceeding, such as when the outcome of the arbitration may have a direct or indirect impact on the rights or principles that the applicant represents or defends.¹¹ They further state that if Claimants are awarded damages based on the Company's direct losses under the drilling contracts, this would affect the Applicants' ability to recover their full losses arising out of the same events in other fora.¹²
24. The Applicants also maintain that there is a public interest in the subject-matter of the arbitration. An award in favor of Claimants would negatively impact the entire community of bondholders by putting their investment in the Bonds at risk. Also, they allege, the outcome of this case may shape perceptions about the effectiveness of standing provisions in modern investment treaties.¹³
25. The Applicants seek to intervene further in the proceedings and request that the Tribunal:
- (i) grants the Application to file the proposed submission,
 - (ii) grants the Applicants access to the parties' pleadings and evidence as soon as possible, once they are submitted into the record.¹⁴

⁹ Application, § IV(i).

¹⁰ Application, § IV(ii).

¹¹ Application, § IV(iii), referring, among other, to *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 February 2007, § 53.

¹² Application, § IV(iii).

¹³ Application, § IV(iv).

¹⁴ Application, § V.

III. Parties' observations

A. Claimants

(i) The Bondholders would be intervening as an additional party

26. Claimants argue that the Applicants are attempting to intervene as a party, disguising their intervention as a non-disputing party. An arbitration agreement exists between Claimants and Mexico resulting from Claimants' acceptance of Mexico's offer to arbitrate contained in NAFTA. They add that Applicants are not privy to that arbitration agreement. The Applicants could have filed their own treaty claim against Mexico or sought consolidation under NAFTA Article 1126.¹⁵

(ii) The Application is based on a misrepresentation

27. Further, Claimants contend that the Application should be rejected because the Applicants, contravening Section B(2)(d) of the FTC Statement, falsely represented to the Tribunal that they are not affiliated, directly or indirectly, with any disputing party. However, according to Claimants, the Applicants conspired and colluded with Mexico to put Perforadora and Integradora out of business. Claimants allege that they worked with Pemex to terminate the drilling contracts and give those contracts to the Applicants. Claimants also contend that the Applicants and others, assisted by Mexico, launched a campaign to criminally prosecute Integradora, Perforadora, and their directors and employees. They state that in October 2018 the Applicants, aided by Mexico, tried to physically take over one of Claimants' rigs. According to them, this collusion shows that the Applicants are affiliated with Mexico, antagonistic to Claimants and that the Application is based on a false assertion of independence. Therefore, Claimants argue that the Application should be denied.¹⁶

(iii) The Bondholder's application does not meet the requirements of the FTC Statement

28. In addition, Claimants argue that the Application should be rejected because (a) it fails to meet any of the requirements of Section 6 of the FTC Statement; and (b) the Tribunal will not be able to ensure that the submission does not disrupt the proceeding or unduly burdens the disputing parties.

¹⁵ Claimants' observations, § I.

¹⁶ Claimants' observations, § II.

a) *The Application fails to meet the criteria of the Section 6 of the FTC Statement*

29. *First*, Claimants contend that the proposed submission would not address matters within the scope of the dispute. They allege that the Application operates under the misconception that this is a case for breach of contract brought by Perforadora against Pemex, while this is a NAFTA claim brought against Mexico by a group of shareholders in Integradora.
30. *Second*, Claimants argue that the proposed submission would not assist the Tribunal in the determination of a factual or legal issue related to this arbitration. The Applicants, as creditors of a company in which Claimants have invested, have only a financial interest in the outcome of domestic bankruptcy proceedings, which is irrelevant to determine whether Mexico is liable for a breach of its obligations under NAFTA.
31. *Third*, according to Claimants the Applicants' alleged ability to assist the Tribunal is based on a speculative and false assertion that Claimants may not be willing to share certain information with the Tribunal. However, the parties have not made their main pleadings yet; thus, the Applicants cannot know what information Claimants will and will not share with the Tribunal. In any event, they argue that Claimants –not the Applicants– are in the best position to inform the Tribunal of the developments in the bankruptcy proceedings. For them, any additional information that the Applicants seek to provide is based on their financial interests and desire to take and operate Claimants' rigs.¹⁷
32. *Fourth*, Claimants state that the Applicants' objective to challenge Claimants' standing in this arbitration is not an appropriate role for a third party. As decided by the Tribunal in *UPS v. Canada*, it is not appropriate for applicants to make submissions on questions of jurisdiction. Respondent is able to raise any jurisdictional objections on its own.¹⁸
33. *Fifth*, Claimants argue that the Applicants don't have a significant, legitimate interest in the arbitration. Their interest lies in having the Tribunal adopt interpretations of NAFTA favouring their own financial interest in the domestic dispute. Further, their intention to take over Claimants' investment in Mexico is not a legitimate interest.¹⁹
34. *Sixth*, for Claimants there is no public interest in the subject-matter of this arbitration. They state that the Applicants represent only their own private financial interests in the outcome of a domestic dispute.²⁰

¹⁷ Claimants' observations, § III(A).

¹⁸ Claimants' observations, § III(A), referring to *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2007, § 71.

¹⁹ Claimants' observations, § III(A).

²⁰ Claimants' observations, § III(A).

b) Admittance of the submission would disrupt the proceeding and unduly burden the parties

35. Claimants argue that allowing the Applicants to participate at this juncture, before the parties have had the opportunity to present their arguments or evidence, would disrupt the proceeding and unduly burden and prejudice Claimants. It would divert Claimants from preparing their Memorial (due in August), while having to litigate against a second opponent, responding to the Applicants' arguments. Also, Claimants would be prejudiced because the Applicants' views serve to amplify Mexico's arguments in this case. In addition, Claimants would be forced to litigate in this arbitration the Company's domestic litigation claims.²¹
36. They finally add that if the Tribunal was minded to allow the proposed submission, the Bondholders should be ordered to advance the costs associated with their intervention.²²
37. To sum up, Claimants request that the Tribunal:
- (i) declares that the Bondholders are not eligible to intervene as a party with any substantive rights to this dispute;
 - (ii) declares that the Bondholders are not eligible to intervene as an amicus to this dispute because they do not meet the requirements laid out in the Recommendations; and
 - (iii) declares that the Bondholders must bear the parties' costs and attorneys' fees associated with responding to their Application and, if admitted, substantive submission.

*B. Respondent*²³

38. Respondent argues that the proposed submission should be admitted, since it would assist the Tribunal in the determination of factual and legal issues related to the arbitration, and it would address matters within the scope of the dispute. Respondent maintains that the Application brings clarity about the role of different companies relevant to this case, including, Integradora, Perforadora, Oro Negro Drilling Pte. Ltd., and Nordic Trustee AS.²⁴

²¹ Claimants' observations, § III(B).

²² Claimants' observations, § III(B).

²³ Respondent's observations were submitted in Spanish. This summary is based on a free translation by the Tribunal.

²⁴ Respondent's observations, § 2.

39. Respondent states that the Application also addresses Oro Negro Drilling's issuance of Bonds and its legal consequences, while the Notice of Arbitration merely mentions the issuance of the Bonds, failing to address the matter in detail. They add that from the Application it is clear that Oro Negro Drilling issued Bonds in a large amount, and that those bonds were secured with different instruments. There is a Bond Agreement, whereby bondholders were granted a first-priority status as creditors.²⁵
40. According to Respondent the Application also addresses the legal consequences of the bankruptcy proceedings of Perforadora and other subsidiaries. The legal standing of Claimants as minority shareholders of Integradora is thereby put into question in the terms of NAFTA Articles 1116 and 1117. Also, as the Application²⁶ explains, there are other proceedings pending in other jurisdictions that may have an impact on this arbitration. In addition, this arbitration is of public knowledge and interest, as the articles published in the press show.²⁷
41. They further state that considering the complex factual background and the multiple proceedings that are pending, the Tribunal would benefit from analyzing the Applicants' proposed submission. The submission would address matters within the scope of the dispute, the Applicants have a significant interest in the arbitration, and there is a public interest in the subject matter of the arbitration. Therefore they contend that the submission should be admitted.²⁸
42. Respondent adds that the Tribunal must ensure that the phases established in the procedural calendar should be respected. In the future, it would be preferable that any non-disputing party, including the Applicants, present any request at the stage foreseen therefore in the procedural calendar.²⁹
43. Respondent suggests that the Tribunal admit the submission and that Claimants and Respondent respond to the Submission in the Statement of Claim and in the Statement of Defense, respectively.³⁰

²⁵ Respondent's observations, §§ 3, 4.

²⁶ Respondent's observations, § 6, referring to the Application, § 4.

²⁷ Respondent's observations, § 7.

²⁸ Respondent's observations, § 8.

²⁹ Respondent's observations, § 10.

³⁰ Respondent's observations, § 11.

IV. Tribunal's analysis

44. According to § 1.3 of PO 2, the Tribunal shall follow the FTC Statement (“**Recommendations**”) in respect of any application for permission to file a submission in this arbitration by a person or entity that is not a party to the dispute, other than non-disputing NAFTA Parties.
45. According to § 1.5 of PO 2, the Tribunal shall issue a ruling on any such application considering the Recommendations.
46. Sections B(6) and B(7) of the Recommendations provide as follows:
- 6. In determining whether to grant leave to file a non-disputing party submission, the Tribunal will consider, among other things, the extent to which:*
- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*
 - (b) the non-disputing party submission would address matters within the scope of the dispute;*
 - (c) the non-disputing party has a significant interest in the arbitration; and*
 - (d) there is a public interest in the subject-matter of the arbitration.*
- 7. The Tribunal will ensure that:*
- (a) any non-disputing party submission avoids disrupting the proceedings; and*
 - (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.*
47. The Tribunal must decide whether the Applicants meet the four criteria set forth in Section B(6) of the Recommendations. The Tribunal must further ensure that the participation of the Applicants would not disrupt the proceedings or unduly burden either disputing party as set out in Section B(7).
48. The Tribunal has carefully considered and followed the Recommendations to decide on the Application. In doing so, it was mindful to take into consideration the reasoning of arbitral tribunals faced with applications for permission to file a non-disputing party submission. In this regard, the Tribunal underscores that it is not aware of any prior decision in which a creditor of the company whose shareholders are the claimant has submitted an application.

49. The Tribunal is of the view that the Application fails to meet several criteria set out in Section B(6) of the Recommendations.
50. *Firstly*, the Tribunal finds that the Applicants would not assist in the determination of factual issues related to this arbitration as required by Section B(6)(a). The Tribunal is already aware of the existence of the bankruptcy proceedings and could, if necessary, request to the parties further information in the future. The Tribunal further finds it unlikely that the Applicants would be able to provide a particular perspective or insight different from the disputing parties as regards the legal issues related to this arbitration.
51. *Secondly*, the Tribunal finds that the Applicant's submission does not address matters within the scope of the dispute as required by Section B(6)(b). The Applicants' interest finds its origin in a distinct domestic bankruptcy procedure which is to be distinguished from the present proceeding under NAFTA. Tribunals may admit non-disputing party submissions to facilitate their "process of inquiry into, understanding of, and resolving that very dispute which has been submitted to [them] in accordance with the consent of the disputing parties."³¹ In the view of the Tribunal, the Applicants' intended submission departs from that standard. The Applicants seek to protect their financial position in the domestic bankruptcy procedure by preventing Claimants from succeeding in this Arbitration. The domestic bankruptcy procedure has no bearing on this Tribunal, which could in any event only determine a possible breach of the NAFTA by Respondent. In the view of the Tribunal, accepting the Application would result in the Applicants defending their own interests before this Tribunal.
52. *Thirdly*, the Tribunal accepts that the Applicants have a "significant" interest in this arbitration within the meaning of Section B(6)(c). The outcome of this arbitration could impact the Applicants, which precisely motivates their Application.
53. *Lastly*, the Tribunal must further consider the extent to which the public interest in the subject matter of the arbitration justifies admission of the Application. The Tribunal agrees with the *Apotex v. USA* Tribunal that such a public interest exists "when the decisions to be issued in [the] arbitration are likely to affect individuals or entities beyond the Disputing Parties."³² In the view of this Tribunal, the *Apotex v. USA* Tribunal convincingly clarified that a "particular and professional interest"³³ is not a "public interest" within the meaning

³¹ *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001, § 60.

³² *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, Mr Barry Appleton, as a Non-Disputing Party, 4 March 2013, § 42.

³³ *Ibid.* § 43.

of Section B(6)(d). There may well be a particular interest of creditors in like circumstances in the outcome of this arbitration, as argued by the Applicants. Yet, the Tribunal finds that the Application seeks to primarily defend the Applicant's particular interests as a creditor in the domestic procedure. It is not clear to the Tribunal that such interest would constitute a genuine "public interest" within the meaning of Section B(6)(d). Further, for the Tribunal to accept the Application, it is not sufficient the fact that its decision could impact an entire community of bondholders. In any event, in light of the foregoing, the Tribunal does not need to reach a conclusion on this point.

54. The Tribunal notes that the criteria set out in the Recommendations are not exhaustive. In reaching its decision, the Tribunal has been mindful of the potential consequences of allowing a creditor of a company closely related to an investment arbitration dispute to file an *amicus curiae* submission.
55. The Tribunal does not need to consider Section B(7) of the Recommendations, as it has already concluded that the Application does not meet the criteria set out in Section B(6) of the Recommendations.

V. Order

56. On the basis of the foregoing considerations, the Tribunal, by majority (Mr. Bottini dissenting):
- a) does not grant the Applicants permission to file the submission in this arbitration, and,
 - b) does not grant the Applicants access to the parties' pleadings and evidence.

On behalf of the Tribunal,

[Signed]

Prof. Diego P. Fernández Arroyo
Presiding Arbitrator
Date: June 24, 2019