

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN AN ARBITRATION UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW (1976)

between

MR. JOSHUA DEAN NELSON

Claimant

and

THE UNITED MEXICAN STATES

Respondent

ICSID Case No. UNCT/17/1

CORRECTIONS TO THE FINAL AWARD OF 5 JUNE 2020

Members of the Tribunal

Dr. Eduardo Zuleta, President

Mr. V.V. Veeder, QC

Mr. Mariano Gomezperalta Casali

Secretary of the Tribunal

Ms. Sara Marzal Yetano

31 July 2020

I. PROCEDURAL BACKGROUND

1. On 5 June 2020, the Tribunal rendered the final award in this arbitration (the “**Award**”).
2. On 4 July 2020, Claimant requested the Tribunal to make certain “*technical corrections*” to the Award (the “**Request**”), pursuant to Article 36 of the Arbitration Rules of the United Nations Commission on International Trade Law adopted by the United Nations General Assembly on 15 December 1976 (the “**UNCITRAL Rules**”). In his Request, Claimant expressly “*consent[ed] to the authority of the truncated Tribunal to make such corrections.*”
3. Upon the Tribunal’s invitation, on 10 July 2020, Respondent submitted its comments to the Request and, on 16 July 2020, confirmed that it had no objections to the Request being decided by the remaining Members of the Tribunal.

II. THE PARTIES’ POSITIONS

A. THE CLAIMANT’S REQUEST

(1) First Request

4. Pursuant to Article 38(a) of the UNCITRAL Rules, Claimant requests that rather than including a single lump sum figure indicating the fees of the Tribunal, paragraph 392 of the Award include a breakdown of the fees of each arbitrator.

(2) Second Request

5. Claimant requests corrections in connection with the use of the terms “cost submission” and “submission on costs” in the Award. Specifically, Claimant claims that on 24 September 2019, the Tribunal invited the Parties to consult with each other and to submit (if possible) a joint proposal on the timing and the format of the pleadings on costs, including whether the Parties wished to submit such pleadings as submissions on costs, *i.e.*, including arguments as to who should bear the costs, or merely statements on costs.

The Parties did not agree and on 8 October 2019, Claimant indicated his choice to make a submission on costs, *i.e.*, a pleading including arguments. On 19 October 2019, the Tribunal ordered the Parties to submit statements of costs.

6. Claimant indicates that on 15 January 2020, he submitted his Statement of Costs with the following introductory paragraph:

Pursuant to Procedural Order No. 1 and the Tribunal's instructions provided on October 9, 2019 that the parties should submit a Statement of Costs, as opposed to an argumentative Submission on Costs, Claimant hereby lists his costs incurred in connection with these proceedings in accordance with Article 38 of the UNCITRAL Arbitration Rules. This Statement of Costs is accompanied by statements by the representatives of each firm for the limited purpose of attesting to the veracity of the amounts billed. Supporting documentation is available upon the Tribunal's request. For the avoidance of any doubt, Claimant takes the position that Respondent should bear all of Claimant's costs.

7. According to Claimant, even though under the heading "Procedural History," the Award correctly indicates that on 15 January 2020, the Parties submitted their respective statements of costs ("**Statements of Costs**"), under paragraphs 386, 387 and 388 the Award incorrectly indicates that Claimant made a submission on costs and suggests that Claimant argued on costs even though Claimant was not permitted to make arguments. Claimant therefore requests that:

- a) The terms "cost submissions" and "submission on costs" as used in the Award be replaced with the terms "cost statements" and "statement on costs";
- b) The word "argues" in paragraph 386 be replaced with the word "submits" for accuracy and for alignment with the description of Respondent's statement on costs in paragraph 388; and
- c) Paragraph 387 be stricken from the Award.

(3) Third Request

8. Claimant requests the Tribunal to delete all references to the ICSID Convention from paragraphs 389 and 391 of the Award, related to the decision on costs, because these proceedings are conducted in accordance with the UNCITRAL Rules, except to the extent that they are modified by Section B, Chapter 11 of NAFTA, but not by the ICSID Convention.

B. THE RESPONDENT'S POSITION

(1) First Request

9. Respondent does not oppose to the inclusion in the Award of a breakdown of each arbitrators' fees.

(2) Second Request

10. Respondent requests the Tribunal to recall the context in which it ordered the Parties to present their statements of costs. On 8 October 2019, Claimant informed the Tribunal on behalf of the Parties that they had exchanged proposals on the form and timing of their statements/submissions on costs. Claimant's proposal was that the Parties file submissions on costs, including arguments of the Parties on who should bear the costs of the proceeding, and Respondent's position was that it did not consider it necessary that the Parties make such arguments. The Parties jointly requested the Tribunal's ruling on the matter.
11. Respondent also recalls the decision of the Tribunal on the matter dated 9 October 2019, in which the Tribunal stated:

The Tribunal has reviewed and considered the positions of the Parties expressed in the said communications. The Tribunal is of the view that the Parties have already indicated their positions as to costs in the various submissions in this arbitration. Therefore, the Parties shall only present a statement of costs, with no further allegations, on or before January 15, 2020.

12. According to Respondent, the above decision from the Tribunal confirms that the Parties in their submissions presented their positions on costs, which were not complicated: costs follow the event, except in exceptional circumstances that do not exist in this case. Respondent further indicates that, despite the instructions from the Tribunal, in his Statement of Costs of 15 January 2020, Claimant made an additional argument: *“For avoidance of any doubt, Claimant takes the position that Respondent should bear all of Claimant’s costs”*.
13. Based on the above, Respondent considers that:
- a) if the intent of the Tribunal when referring to “submissions on costs” was to include only the “statements of costs” presented on 15 January 2020, then Respondent would not oppose the requested correction; but if the intent of the Tribunal was to refer to the statements of cost and the submissions on costs presented by the Parties throughout the arbitration, then no correction should be made.
 - b) the word “agues” should not be replaced by the word “submits” because Claimant elected to include arguments in its statement of 15 January 2020. The change of the word “argues” for “submits” is not an “error in computation”, “a clerical or typographical error” or an “error of a similar nature” in the sense of Article 36 of the UNCITRAL Rules, but a request for the Tribunal to ignore that Claimant included arguments in its Statement of Costs. Respondent therefore opposes the requested correction.
 - c) There is no basis for the elimination of paragraph 387 of the Award. Claimant elected to refer to Article 38 of the UNCITRAL Rules in his Statement of Costs of 15 January 2020 and the fact that he did not accurately describe the “purpose” of such reference to Article 38 is not an error of the ones provided for under Article 36 of the UNCITRAL Rules. Respondent therefore opposes the requested correction.

(3) Third Request

14. According to Respondent, even though the proceedings are governed by the UNCITRAL Rules, nothing prevents the Tribunal from referring also to the ICSID Convention. If the

references to the ICSID Convention were a mistake, rather than eliminating such references, the Respondent suggests that the Tribunal consider replacing them with references to Article 40 of the UNCITRAL Rules.

III. THE TRIBUNAL'S CONSIDERATIONS ON THE REQUEST

15. Article 36(1) of the UNCITRAL Rules provides as follows:

Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative

16. The Request was submitted by Claimant within the thirty-day term provided for under Article 36(1) of the UNCITRAL Rules and therefore is timely.

17. The aforementioned provision clearly refers to “errors” and to the fact that the purpose of the procedure is to “correct” such errors. The correction procedure applies to “errors”, such errors must be “in the award” and must be computational, clerical, typographical or have a “similar nature” to a computational, clerical or typographical error.

18. Article 36(1) of the UNCITRAL Rules provides, on the one hand, for the powers of the Tribunal and, on the other, for a limitation of such powers as regards correction. It expressly authorizes the Tribunal to rectify errors, but such power extends only to the correction of errors that are computational, clerical, typographical or have a “similar nature”. Therefore, the procedure for correction does not encompass any alleged mistake of law or any factual determination or discretionary assessment made by the Tribunal.

19. The Tribunal therefore needs to determine whether that which the Claimant seeks to be corrected are errors of the type mentioned in Article 36(1) of the UNCITRAL Rules.

(1) First Request

20. The Award includes the total amount paid to the Tribunal and ICSID as a lump sum but not a discrimination of the breakdown of the amounts paid. The tribunal considers that strictly this request does not relate to the correction of an error that is computational, clerical, typographical or of a similar nature but rather to the Tribunal's appreciation of a rule of law set forth in Article 38 of the UNCITRAL Rules. However, both Parties agree on the correction and the Tribunal has no objection to proceed with the requested amendment.

(2) Second Request

21. The Tribunal considers that the reasons submitted by Claimant are no grounds for correction. The Parties discussed whether to present their submissions on costs including arguments as to which party should bear the costs or to file a mere statement of costs. The Tribunal decided that the Parties should present only a statement of costs because the view of the Tribunal was that "*the Parties ha[d] already indicated their positions as to costs in the various submissions in this arbitration.*"
22. Rather than a correction, Claimant seems to be making a claim that he was not granted the opportunity to submit his position on costs and that the Award should reflect such allegation. As indicated in the decision of 9 October 2019, the Tribunal had received allegations on costs in the various submissions made by the Parties during the proceedings and considered that no further allegations were necessary. The Claimant, still, indicated in his Statement of Costs of 15 January 2020 that for the avoidance of doubt his position was that Respondent should bear all costs.
23. The Award therefore refers to "submission on costs" and to arguments by the Parties to reflect the position taken by each Party throughout the proceedings and not only in the Statements of Costs of 15 January 2020.
24. Based on the above conclusions, the Tribunal finds no reason to modify paragraphs 386 and 388 of the Award or to strike paragraph 387 from the Award.

(3) Third Request




25. The Tribunal considers that the reference to the ICSID Convention is irrelevant given the reference made in the Award to Article 40(1) and (2) of the UNCITRAL Rules, as a ground for the Tribunal’s decision on costs. In any event, it is a clerical error that qualifies as an error under Article 36(1) of the UNCITRAL Rules Convention.

IV. THE TRIBUNAL’S DECISION ON THE REQUEST

26. For the reasons above, the Tribunal decides to correct the Award as follows:

a) Paragraph 392 of the Award shall read:

392. In the present case, the arbitrators’ fees and expenses and ICSID’s administrative fees and direct expenses, amount to (in USD)

<i>Arbitrators’ fees and expenses</i>	
<i>Dr. Eduardo Zuleta (Presiden</i>	
<i>Mr. Mariano Gomezperalta</i>	
<i>Mr. V. V. Veeder QC</i>	
<i>ICSID’s administrative fees</i>	<i>116,000.00</i>
<i>Direct expenses</i>	<i>141,316.38</i>
<i>Total</i>	<u><i>948,375.03</i></u>

b) Paragraph 389 of the Award is deleted in its entirety and left blank; and

c) Paragraph 391 of the Award shall read:

391. This provision gives the Tribunal discretion to allocate all costs of the arbitration. Article 40(1) of the Arbitration Rules states that although “the costs of arbitration shall in principle be borne by the unsuccessful party [...] the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case” and Article 40(2), which refers to the reasonable costs for legal

representation and assistance of the successful party claimed during the arbitral proceedings — as stated in Article 38(e) — reiterates that the tribunal “taking into account the circumstances of the case” is “free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.”

27. All other requests for correction are denied.

Date: 31 July 2020

Place of Arbitration: Toronto, Canada

V.V. Veeder QC
Arbitrator

[*Signed*]

Mariano Gomezperalta Casali
Arbitrator

[*Signed*]

Eduardo Zuleta
President of the Tribunal