

**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

Claimants

v.

The United Mexican States

Respondent

PROCEDURAL ORDER NO. 21

**ON THE CLAIMANTS' REQUEST TO SUBMIT A THIRD QUANTUM EXPERT
REPORT**

Tribunal

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

Secretary of the Tribunal

Ms. Patricia Rodríguez Martín

4 March 2022

I. Procedural Background

1. On 18 February 2022, the Claimants sent a letter to the Tribunal, requesting leave to submit a third quantum expert report of Pablo Spiller and Carla Chavich. Among others, the Claimants argued that there is good cause to grant the Claimants request because: (i) submitting a third expert report would allow them to update their damages estimate to a date of valuation closer to the hearing date, when the short-term impact of the pandemic has subsided; and (ii) the third expert report would respond to new assertions made in Dr. José Alberro's expert report submitted together with the Respondent's Rejoinder of 12 July 2021. In Claimants' view, the filing of this additional expert report would not prejudice the Respondent, as the Claimants' experts already announced that they would update their calculations in their second report and because the Respondent would still have sufficient opportunity to make observations in advance of the Hearing.
2. On 22 February 2022, the Tribunal invited the Respondent to comment on the Claimants' request, by 28 February 2022.
3. On 28 February 2022, the Respondent sent a letter to the Tribunal, objecting to the Claimants' request. The Respondent argued that the Claimants cannot choose the date of valuation at will and that, in any event, the date of valuation in this case should not be the date of the award. The Respondent also argued that the new information contained in the Rejoinder and Dr. Alberro's expert reports does not constitute "exceptional circumstances" that would justify the filing of a third expert report and that the Claimants can rebut Dr. Alberro's calculations during cross-examination at the Hearing. Furthermore, in Respondent's view, the fact that Claimants have had more than seven months to submit this request, and yet have chosen to do so a few weeks before the Hearing, proves that the Claimants are seeking to benefit from rising oil prices. Finally, the Respondent argued that granting the Claimants' request would breach due process, in that the Respondent would not have sufficient time to prepare both a rebuttal expert report and for the upcoming Hearing.

II. The Tribunal's Analysis

4. The Tribunal recalls that the Claimants' request can only be entertained on the basis of Procedural Order No. 1 § 18.3, i.e. exceptionally and upon showing of good cause. Put differently, a Party may only submit additional evidence into the record, including expert reports, in exceptional circumstances with leave from the Tribunal. In principle, and as is done in virtually every international arbitration proceeding such as the present one, no further evidence is expected at this stage of the proceeding when the Hearing is just about to start.

5. In the present case, the Tribunal notes that both Parties have invoked their fundamental right to fully present their case to support their position. The Tribunal is mindful of its duty to ensure an equal treatment of the Parties in this regard.
6. On the one hand, the Claimants argue that the new report should be admitted in order for them to reply to new assertions made by Respondent and its quantum expert, Dr. José Alberro in the Rejoinder of 12 July 2021. The Tribunal concludes that the Claimants will in any event be able to discuss these assertions in the relevant cross-examination stage of the upcoming Hearing.
7. On the other hand, the Tribunal finds that the Respondent would effectively be put at a clear disadvantage if the Claimants' request were to be accepted. Respondent would evidently have to be afforded an opportunity to reply to the additional evidence. The Tribunal decides that it simply cannot impose such reply within the short remaining time frame as it may very well affect the Respondent's ability to prepare the Hearing.
8. The Tribunal accordingly rejects the Claimants' request to produce additional evidence at this stage of the proceeding, with the understanding that both Parties retain the full opportunity to discuss the topic of damage calculation during the Hearing and that the Tribunal will not hesitate to request additional clarification and evidence, if it deems it necessary, in the post-hearing phase. In deciding on this request, the Tribunal further emphasizes for the sake of clarity that it has not prejudged any question of damage calculations.

III. Order

9. On the basis of the foregoing considerations, the Tribunal rejects the Claimants' request to submit a third quantum expert report by Prof. Spiller and Ms. Chavich.

On behalf of the Tribunal,

[Signed]

Professor Diego P. Fernández Arroyo
President of the Tribunal
Date: 4 March 2022
Seat of the arbitration: Toronto, Canada