

**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 -

**JOSHUA DEAN NELSON, IN HIS OWN RIGHT AND ON BEHALF OF TELE FÁCIL
MÉXICO, S.A. DE C.V., AND JORGE LUIS BLANCO**

(the “Claimants”)

and

THE UNITED MEXICAN STATES

(the “Respondent”)

ICSID Case No. UNCT/17/1

PROCEDURAL ORDER NO. 11

Tribunal

Dr. Eduardo Zuleta (President)
Mr. V.V. Veeder, QC (Arbitrator)
Mr. Mariano Gomezperalta Casali (Arbitrator)

Secretary of the Tribunal

Ms. Marisa Planells-Valero

22 October 2018

I. Procedural history

1. Procedural Order No. 10, dated 4 September 2018, (i) formalized the Parties' agreement with respect to the deadline for the submission of Respondents Rejoinder, which was set for 10 September 2018; and (ii) lifted the suspension for filing Respondent's Rejoinder.
2. On 10 September 2018, Respondent filed its Rejoinder, which was accompanied, *inter alia*, by an expert report of Dr. Paolo Buccirossi ("the Report").
3. On 28 September 2018, Claimants requested the Tribunal to reject the Report on grounds that it (i) violated Procedural Order No. 1 and (ii) contravened Claimants rights to equal treatment and a full opportunity to present their case ("Claimants' Request").
4. On 5 October 2018, pursuant to the Tribunal's invitation, Respondent sent its comments to Claimants' Request.

II. Position of the Parties

A. Claimants

5. Claimants assert that (i) the submission of the Report violates section 19.3 of Procedural Order No. 1, because no evidence may be presented after the last submission of a party, except in exceptional circumstances and with prior leave from the Tribunal; (ii) Respondent failed to identify any exceptional circumstances which warranted the submission of an additional damages report.¹
6. According to Claimants, rather than responding to the critiques made by Dr. Dippon and Dr. Mariscal to Mr. Obrador's report, the Report undertakes an entire new critique of both Dr. Dippon's and Dr. Mariscal's original reports. Respondent should not be granted a second chance to rebut the damages case that Claimants and Claimants' experts have made since the opportunity to rebut the opening reports of Dr. Dippon and Dr. Mariscal was in the Statement of Defense.²
7. According to Claimants, Respondent as well as both Dr. Buccirossi and Mr. Obrador are aware that Dr. Buccirossi was retained to present a second effort to critique the report and models of Dr. Dippon and Dr. Mariscal.³
8. In sum, Claimants state that the Report cannot be considered part of the last rebuttal submission because it presents new material on earlier reports, without proper leave from the Tribunal or a proper showing of exceptional circumstances.⁴

¹ Claimants' Letter to the Tribunal, 28 September 2018, p. 1.

² *Ibid.*, p. 2.

³ *Ibid.*, p. 3.

⁴ *Ibid.*, p. 3.

9. Claimants stress that the filing of the Report violates Claimants' rights to equal treatment and a full opportunity to present their case, citing Article 15(1) of the 1976 UNCITRAL Rules, Preamble (3) of the IBA Rules on the Taking of Evidence in International Arbitration, and the decisions in (i) *Vera-Jo Miller Aryeh et al and The Islamic Republic of Iran*, and (ii) *Henry F. Teichman and Hamadan Glass Co's*.⁵
10. Claimants, citing *Teichman and Hamadan Glass Co's*, asserts that the Report does not meet the definition of rebuttal evidence because (i) it contains entirely new economic analysis and (ii) attempts to supplant Mr. Obradors' original report and the critiques that it received. Finally, Claimants submit that the Report deprives them of the opportunity to address significant new material.⁶

B. Respondent

11. Respondent alleges that the filing of the Report does not violate Section 19.3 of Procedural Order No. 1 because the Report accompanied Respondent's Rejoinder, and therefore, Respondent was not obliged to request prior leave from the Tribunal.⁷
12. According to Respondent, the Report was submitted in accordance with section 19.1 of Procedural Order No. 1 and with Article 24.1 of the 1976 UNCITRAL Rules.⁸
13. Respondent states that the Report was introduced to verify if the criticism made in the Claimants' reply to Mr. Obrador's expert report were founded, and, to rebut the content of Dr. Dippon's and Dr. Mariscal's second expert reports submitted with Claimants' Reply. Therefore, in order to accomplish its work, Mr. Buccirosi had to consider the economic aspects of their initial reports.⁹
14. Respondent asserts that the submission of the Report does not violate the principle of equal treatment of the Parties and notes that Claimants, will have the opportunity during the Hearing to cross examine Mr. Buccirosi and present opening and closing arguments¹⁰.
15. Respondent states that it would not oppose if Tribunal grants an opportunity for Claimants to reply to the Report promptly and limiting it to its rebuttal¹¹.
16. According to Respondent, rejecting the Report as requested by Claimants, would contravene Respondent's full opportunity to present its case and its right to be heard. Therefore, Respondent requests the Tribunal to reject the Request, and, if adequate, to grant Claimants the opportunity to reply to the Report ¹².

⁵ Ibid., p. 4.

⁶ Ibid., p. 5.

⁷ Respondent's Letter to the Tribunal, 5 October 2018, p.1.

⁸ Ibid., p.2.

⁹ Ibid., p.2.

¹⁰ Ibid., p.2.

¹¹ Ibid., p.2.

¹² Ibid., p.3.

III. Analysis of the Tribunal

17. The Tribunal has carefully reviewed the submissions of the Parties and is not persuaded that the rule contained in section 19.3 of Procedural Order No. 1 applies to the situation at hand, as pleaded by Claimants. Section 19.3 refers to submissions after the last round of submissions of both Parties have been filed, which is not the case.
18. However, the Tribunal agrees with Claimants that the right of a party to present its case could be affected if the other party submits evidence that it could or should have submitted with its first submission in the arbitration and as a result thereof the given party is deprived from the right to rebut such evidence.
19. In this particular case, Claimants are correct in that the Report, which accompanied Respondent's Rejoinder, contains new material that refers to reports submitted with the Statement of Claim and therefore, could be considered as material that should have been submitted at an earlier stage of this arbitration. However, the Report also contains statements that refer to critiques and material submitted with the Reply and, therefore, rejecting the Report would result in a deprivation of the right of defense of Respondent.
20. Considering the above and noting that Respondent does not oppose to the granting to Claimants of an opportunity to reply to the Report, the Tribunal will grant Claimants an opportunity to reply to the Report and submit the corresponding evidence, but solely to rebut the new material contained in the report and referring to earlier reports submitted by Claimants with its Statement of Claim.

VI. The Tribunal's Decision

21. Based on the foregoing reasons, the Tribunal grants Claimants until **21 November 2018** to reply to the Report and submit the corresponding evidence, but solely to rebut the new material contained in the Report and referring to earlier reports submitted by Claimants with their Statement of Claim.

On behalf of the Tribunal,

[*Signed*]

Dr. Eduardo Zuleta
Presiding Arbitrator
Date: 22 October 2018