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-

ODYSSEY MARINE EXPLORATION, INC. (USA)

(the "Claimant")

and

THE UNITED MEXICAN STATES

(the "Respondent")

ICSID Case No. UNCT/20/1

PROCEDURAL ORDER No. 8
The Tribunal's Decision on the Claimant's Request to Exclude the Expert Report Submitted by Taut Solutions Ltd

Members of the Tribunal
Mr. Felipe Bulnes Serrano, Presiding Arbitrator
Dr. Stanimir Alexandrov, Arbitrator
Prof. Philippe Sands, Arbitrator

Secretary of the Tribunal
Ms. Anna Toubiana, ICSID

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14 January 2022

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I. PROCEDURAL BACKGROUND

1. On 16 December 2021, the Claimant submitted an application to exclude the expert report entitled "*Marine Operations Review by Taut Solutions Ltd*" (the "**Taut Report**"), which was submitted with the Respondent's Rejoinder on 19 October 2021 (the "**Application**").

2. On 20 December 2021, the Tribunal invited the Respondent to submit any comments it may have on the Application by 28 December 2021.

3. On 21 December 2021, the Respondent requested that the Tribunal extend the deadline for the Respondent to submit its response to the Application until 7 January 2022.

4. On 22 December 2021, the Tribunal granted the Respondent an extension until 4 January 2022 to submit its response to the Application.

5. On 4 January 2022, the Respondent submitted its response to the Application (the "**Response**").

II. SUMMARY OF THE PARTIES' POSITIONS

A. THE CLAIMANT'S POSITION

6. In its Application, the Claimant asks that the Tribunal use its discretion to exclude the Taut Report "*on due process and fundamental fairness grounds since its untimely submission deprives Claimant of the opportunity to meaningfully respond, and because the Taut Report's non-responsiveness renders it immaterial to the outcome of this proceeding*."[1]

7. First, the Claimant submits that the Tribunal has the power to exclude evidence, including expert reports, when the evidence is non-responsive or is irrelevant or immaterial, and cites to Article 25(6) of the UNCITRAL Arbitration Rules ("**UNCITRAL Rules**") and Articles 9(1) and 5(3) of the IBA Rules on the Taking of Evidence in International

[1] Claimant's Letter to the Tribunal, 16 December 2021 ("**Application**"), ¶ 2.

Arbitration (2010 edition) ("**IBA Rules**") in support of its argument.[2] In its Application, the Claimant states that the Taut Report is "*non-responsive and immaterial, and that permitting it to remain on the record would be unfair and would create an inequality of arms between Claimant and Respondent*."[3]

8. Second, the Claimant argues that the Taut Report fails to respond to the Claimant's Reply or engage with the Claimant's case in that the Taut Report is limited to the review of a single document, [redacted] submitted with the Claimant's Memorial on 4 September 2020.[4] The Claimant submits that the Taut Report does not respond to the Claimant's Reply submissions of 29 June 2021, but rather offers an independent view of the [redacted] and thus fails to acknowledge or address the relevant evidence submitted by the Claimant.[5]

9. According to the Claimant, this creates two problems: (i) "*the Taut Report raises new criticisms of the* [redacted] *for the first time in the Rejoinder, which deprives Claimant of the opportunity to effectively respond*" to issues including the "*marine weather conditions at the Don Diego site*," and the "*mooring spread and systems proposed for the Don Diego Project's ('Project') FPSP to maintain its position*," and that the Respondent failed to call Mr. Gruber and Mr. Fuller to testify; and (ii) "*the Taut Report lists a series of criticisms that rest on the premise that* [redacted]*, when in fact, documentation accompanying the Claimant's Memorial clearly indicates that they were*."[6]

[2] *Ibid.*, ¶¶ 3, 4.

[3] *Ibid.,* ¶ 5.

[4] *Ibid.*, ¶¶ 6, 7.

[5] *Ibid.*, ¶ 8.

[6] *Id*.

10. Third, and based on the above, the Claimant states that, because the Taut Report fails to respond to the Reply by making new claims and limiting its analysis to one document and ignoring the broader case, the Tribunal must exclude the Taut Report as inadmissible.[7]

11. The Claimant argues that the Taut Report is non-responsive and should be excluded as untimely, citing to the decision in *South American Silver*.[8] It argues that the Taut Report should have been submitted with the Respondent's Counter-Memorial of 23 February 2021 and should not be permitted to be introduced into the record at this stage, "*in clear violation of Article 5(3) of the IBA Rules*."[9]

12. Further, the Claimant submits that the Tribunal should exclude the Taut Report to ensure equality of arms in the arbitration, based on Article 15(1) of the UNCITRAL Rules and Article 9(2)(g) of the IBA Rules.[10] Because the Taut Report has been introduced by the Respondent a few months before the hearing and only with the Respondent's last written pleading, the Claimant has effectively been deprived of its right to reply.[11]

13. Finally, the Claimant argues that the Taut Report is irrelevant and immaterial as it "*fails to meet the materiality test as it purports to comment upon the processing and engineering configuration of the Don Diego Project without discussing any of Claimant's extensive evidence in this regard.*"[12] According to the Claimant, the Tribunal will derive little or no benefit from the Taut Report as it does not give any consideration to the information and analysis submitted by the Claimant on the same issues.[13] The Tribunal should thus

[7] *Ibid.*, ¶ 9.

[8] *Ibid.*, ¶ 10.

[9] *Ibid.*, ¶ 11.

[10] *Ibid.*, ¶ 12.

[11] *Ibid.*, ¶¶ 13, 15.

[12] *Ibid.*, ¶ 18.

[13] *Id*.

conclude that the Taut Report "*lacks sufficient relevance*" and is "*not material to the outcome*" of the case under Article 9(2)(a) of the IBA Rules.[14]

B. THE RESPONDENT'S POSITION

14. In its Response, the Respondent asks that the Tribunal dismiss the arguments raised by the Claimant in its Application.

15. The Respondent first argues that the Taut Report relates to the legal arguments presented in the Rejoinder and is relevant to the Respondent's defense. It submits that the Taut Report was submitted with its Rejoinder in accordance with Article 24(1) of the UNCITRAL Rules.[15] According to the Respondent, the Taut Report was necessary to explain certain issues related to the alleged maritime operations, which the second expert report of Watts, Griffis and McOuat Limited ("**WGM Second Report**") could not address.[16] For the Respondent, the analyses in the Taut and WGM reports must be considered as a whole.[17]

16. The Respondent contends that the Taut Report relates to the "*technical and economic feasibility of the Don Diego Project from the point of view of the maritime operations. In particular, it examines whether the maritime operations described in the* [redacted] *are reasonable and technically feasible.*"[18] The Respondent disagrees with the Claimant's assertion that the Taut Report is irrelevant and submits that the Claimant failed to state that the WGM Second Report contains several references to the Taut Report.[19] In its Response, the Respondent does not deny that the Taut Report's main objective is to analyse the [redacted] and opine on the technical feasibility

[14] *Id*.

[15] Respondent's response to Claimant's Application, 4 January 2022 ("**Response**"), ¶ 1.

[16] *Ibid.*, ¶ 2.

[17] *Id.*

[18] *Ibid.*, ¶ 3.

[19] *Ibid.*, ¶¶ 4, 5.

of the maritime operations contained therein.[20] The Respondent submits that the "*Taut Report focuses on the* [redacted] *because it is virtually the only contemporary evidence that describes the purported operation of the Project*."[21]

17. Further, the Respondent is of the opinion that the Claimant's arguments according to which the Taut Report does not address all the evidence submitted by the Claimant go to the merits of the arbitration and are not a valid reason to contest the admissibility of the Taut Report.[22] The Respondent also observes that Procedural Order No. 1 gives the parties the right to call their own witnesses and experts for direct examination and notes that the Claimant did not call Mr. Gruber to testify.[23]

18. The Respondent dismisses the Claimant's claim that the Taut Report is irrelevant as the report is "*related to the Respondent's legal strategy and to facts that were referred to in the Statement of Claim*."[24] It adds that the Taut Report "*accurately addresses various technical aspects of the standard by which the operation could be performed safely in the development of marine projects, as well as various findings, deficiencies, and inconsistencies in the marine project and the marine mining operation for phosphate dredging as proposed by Odyssey*."[25]

19. The Respondent further submits that in accordance with Article 25(6) of the UNCITRAL Rules, the Tribunal is to determine the relevance of the evidence submitted and recalls that the IBA Rules are not binding on the Tribunal in accordance with Section 16 of Procedural Order No. 1.[26] For the Respondent, the exclusion of the Taut Report cannot be based on it

[20] *Ibid.*, ¶ 6.

[21] *Id.*

[22] *Ibid.*, ¶¶ 7, 8.

[23] *Ibid.*, ¶ 9.

[24] *Ibid.*, ¶ 11.

[25] *Id.*

[26] *Ibid.*, ¶¶ 12, 13.

being untimely or unnecessary as the relevance of the report should be assessed by the Tribunal on the merits of the arbitration.[27]

20. Second, the Respondent argues that there is equality of arms and procedural fairness between the parties as the Claimant chose to submit its Application on 16 December 2021, *i.e.,* almost two months after the submission of the Respondent's Rejoinder and one month before the hearing.[28] The Respondent submits that the Claimant's Application is "*procedurally inappropriate given the tight timing of the arbitration, particularly the immediacy of the merits hearing*."[29]

21. In addition, the Respondent asserts that "[t]*he Claimant confuses the Respondent's right to assert its prerogatives to rely on and submit evidence in the arbitration (pursuant* [sic] *article 24.1 of the [UNCITRAL] Rules) and the submission of the Taut Report, with an alleged breach of the principle of equality of arms if the report is kept in the record of the arbitration*."[30] The fact that the Respondent is the party to submit the last written pleading is due solely to a procedural matter, in accordance with the Procedural Calendar, set forth in the Procedural Order No. 1.[31] The Respondent also states that the Claimant is violating Article 15(1) of the UNCITRAL Rules, citing to the tribunal in *Methanex v. USA* and points out that the Claimant submitted reports with its Reply from experts who were not present in its Memorial submission.[32]

22. Finally, the Respondent submits that the Claimant has had the opportunity to respond to the Taut Report in the comments it formulated in its Application.[33] The Respondent adds

[27] *Ibid.*, ¶ 14.

[28] *Ibid.*, ¶ 15.

[29] *Id.*

[30] *Ibid.*, ¶ 17.

[31] *Id.*

[32] *Ibid.*, ¶¶ 18, 19.

[33] *Ibid.*, ¶ 22.

that the Claimant is entitled to cross-examine Mr. Graham Curren, author of the Taut Report, thus preserving its procedural rights.[34]

23. In light of the above, the Respondent requests that the Tribunal apply the "*flexibility granted to it by article 15(1) of the 1976 UNCITRAL Arbitration Rules, so that the Respondent may have the full opportunity to assert its rights in this arbitration and the Claimant's request to exclude the Taut Report be dismissed*." It further points the Tribunal to a "*more flexible approach*," which has been universally adopted in the admission of evidence in international arbitration.[35]

III. THE TRIBUNAL'S ANALYSIS

24. The Tribunal observes that the discussion on the Application revolves around two main issues. First, the relevance and materiality of the Taut Report, and second, the opportunity of the submission of the Taut Report and the right of the Claimant to respond to it.

25. Before addressing these issues, the Tribunal notes that the power of the Tribunal to exclude evidence from the record is expressly recognised in Article 25(6) of the UNCITRAL Rules, and no party has questioned such prerogative. Therefore, there is no debate on the power of the Tribunal to decide on the admissibility of evidence submitted in this arbitration. Having determined its authority to decide on the admissibility of evidence, the Tribunal will proceed to analyse the matters under discussion.

26. On the first issue, the relevance and the materiality of the Taut Report, the Tribunal agrees with the Respondent in the sense that those objections relate more to the merits of the evidence than to its admissibility. Therefore, and to avoid any risk of prejudice, the Tribunal does not deem that the Taut Report could be excluded from the record in the present case based on these arguments.

[34] *Ibid.*, ¶ 23.

[35] *Ibid.*, ¶ 24.

27. With regards to the second issue, the opportunity of the submission of the Taut Report and the Claimant's right to reply to it, the Tribunal notes the criticisms set out in the Claimant's Application. The Taut Report addresses aspects of the discussion presented as early as in the Claimant's Memorial and, due to the fact that it was filed with the Rejoinder, the last written pleading on this arbitration, the Claimant has not had the opportunity to exercise a right to reply to it. In the Tribunal's view, the reasons offered by the Responded to have postponed the submission of the Taut Report are not entirely persuasive, and deems that the deferred submission of said report might pose a risk to the application of the principle of equality of arms. In this sense, the Tribunal tends to agree with the *Joshua Dean Nelson v. Mexico* tribunal on that relevant procedural rights might "*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*."[36]

28. However, similar if not more damage to relevant procedural rights could be caused if the Tribunal excludes the Taut Report from the record under the present circumstances. In this regard, the Respondent has stated that said report, in its opinion, is relevant and important, is connected with other expert reports and is needed to sustain its case. Therefore, excluding the Taut Report from the record could impair the Respondent's opportunity to fully present its case.

29. The Tribunal agrees with the *Methanex v. USA* tribunal, cited by the Respondent, on that "*Article 15(1) is intended to provide the broadest procedural flexibility within fundamental safeguards, to be applied by the arbitration tribunal to fit the particular needs of the particular arbitration*."[37] Also, the Tribunal notes that in the *South American Silver v. Bolivia* case, cited by the Claimant, the tribunal excluded from the record witness

[36] **CL-0247**, *Joshua Dean Nelson, in his own right and on behalf of Tele Fácil México, S.A. de C.V., and Jorge Luis Blanco v. The United Mexican States*, ICSID Case No. UNCT/17/1, Procedural Order No. 11, 22 October 2018, ¶ 18.

[37] **RL-0146**, *Methanex Corporation v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to intervene as "*amicus curiae*," 15 January 2001, ¶¶ 26, 27.

statements based on a strict or peremptory rule not present in this case.[38] In consequence, in the absence of a strict rule such as the one in the *South American Silver v. Bolivia* case and in use of the flexibility recognised in *Methanex v. USA*, the Tribunal does not find in this case enough grounds to sustain a decision as far-reaching as to exclude from the record an expert report submitted months ago.

30. Considering the above, the Tribunal will allow the Taut Report to remain on the record, but wishes to ensure that the Claimant has an opportunity to address and respond to it at the hearing. In the Tribunal's view, this approach properly balances the parties' concerns and rights, and protects the principle of equality of arms, as invoked both by the Claimant and the Respondent as a guide to be considered when deciding on the Application.

31. For this purpose, the Tribunal will provide the Claimant: (i) 10 additional minutes during the Claimant's opening to address the Taut Report; (ii) 15 additional minutes for direct presentation of any of the Claimant's experts who – in the Claimant's view – may provide views on the Taut Report; and (iii) 15 additional minutes for cross-examination of any expert that appears at the hearing as author of the Taut Report.

[38] **CL-0250**, *South American Silver v. Plurinational State of Bolivia,* UNCITRAL, Procedural Order No. 15, 9 April 2016, that decided on the exclusion of evidence, quoted Procedural Order No.1 stating the following:

"*Indeed, paragraph 6.2 of Procedural Order No. 1 provides:*

'The Parties shall submit with their written submissions ***all evidence and authorities on which they intend to rely*** *in support of the factual and legal arguments advanced therein, including witness statements, expert reports, documents, and all other evidence in whatever form.'*

25. Subsequently, when referring expressly to the Reply and Rejoinder, paragraph 6.3 of Procedural Order No.1 provides:

*'****In their rebuttal submissions (i.e., Reply and Rejoinder)****, the Parties shall submit* ***only*** *additional written witness testimony, expert opinion testimony and documentary or other* ***evidence to respond to or rebut matters raised in the other Party's prior written submission****, except for new evidence they receive through document production*.'" (Emphasis in original).

IV. DECISIONS

32. For the reasons set forth above, the Tribunal renders the following decisions:

1) Rejects the application to exclude the Taut Report from the record; and

2) Grants the Claimant the opportunities set forth in paragraph 31 above to address its observations to the Taut Report.

On behalf of the Tribunal:

[Signed]

Mr. Felipe Bulnes Serrano
Presiding Arbitrator