

**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. 18

**ON THE RESPONDENT'S REQUEST IN RELATION TO
MR. YANUS' APPEARANCE AT THE HEARING**

Tribunal

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

Secretary of the Tribunal

Ms. Patricia Rodríguez Martín

September 23, 2021

I. Procedural Background

1. On 16 August 2021, the Parties submitted the lists of fact and expert witnesses that each intended to call for examination at the Hearing on the Merits, scheduled to take place between 25-29 April 2021 (the **Hearing**). In its communication, the Claimants called Mr. Yanus, its own fact witness, for examination at the Hearing. The Respondent did not, however, call Mr. Yanus for examination.
2. On 20 August 2021, the Respondent sent a communication to the Tribunal requesting that the Tribunal reject the appearance of Mr. Yanus as a witness at the Hearing (the **Respondent's Request**) given that the Respondent had decided not to cross-examine Mr. Yanus.
3. On 23 August 2021, the Tribunal invited the Claimants to comment on the Respondent's Request. On that same date, the Tribunal invited the Parties to confer among themselves and inform the Tribunal (by 3 September 2021) whether, in their view, more days had to be reserved for the Hearing in light of the number of witnesses and experts called for examination.
4. On 30 August 2021, the Claimants submitted a letter, rejecting the Respondent's Request and requesting the Tribunal to permit Mr. Yanus' appearance at the Hearing for limited direct examination by the Claimants and to answer the Tribunal's questions. Among others, the Claimants argued that Mr. Yanus should be permitted to rebut, through oral testimony at the Hearing, new arguments raised by Mexico in its Rejoinder Memorial.
5. On 1 September 2021, the Respondent sent a letter responding to the Claimants' communication of 30 August 2021. The Respondent argued that the Claimants intended to use Mr. Yanus' appearance at the Hearing to present new factual testimony and that this is contrary to §20.7 of Procedural Order No. 1, which limits the scope of direct examination. The Respondent requested the Tribunal to confirm that §20.7 of Procedural Order No. 1 is fully applicable and reiterated its request that the Tribunal reject the appearance of Mr. Yanus at the Hearing. The Respondent also asked the Tribunal to extend the deadline to respond whether additional Hearing days were necessary, until the Tribunal issued its decision on Mr. Yanus' appearance at the Hearing.
6. On 3 September 2021, the Claimants requested leave to respond to the Respondent's new communication. On that same date, the Claimants informed the Tribunal that they proposed that the Parties also reserve the week of May 2-6 for the Hearing. According to the Claimants, the Respondent did not agree with Claimants' proposal and did not indicate whether Respondent's counsel, witnesses, and experts were available during the week of May 2-6. The Claimants' said that the Respondent indicated that it considered that two additional hearing days were sufficient.

7. On 7 September 2021, the Tribunal granted leave to the Claimants to respond by 13 September 2021.
8. On 13 September 2021, the Claimants submitted a letter, rejecting the Respondent's arguments raised in its letter of 1 September 2021. Among others, the Claimants argued that the Respondent raised new arguments and presented new evidence with its Rejoinder Memorial, which should have been filed with the Statement of Defense. The Claimants requested that the Tribunal allow the Claimants to examine all of its witnesses and experts with regards to arguments and evidence raised by the Respondent in its Rejoinder Memorial; and allow the appearance of Mr. Yanus for direct examination at the Hearing.

II. The Tribunal's Analysis

A. The Parties' conflicting interpretations over §20 of PO1

9. The Respondent requested the Tribunal to confirm that §20.7 of Procedural Order No. 1 is fully applicable. The Claimants requested the Tribunal to allow the Claimants to examine all of its witnesses and experts with regards to arguments and evidence raised by the Respondent in its Rejoinder Memorial. The Tribunal understands that both Parties' requests, albeit phrased in different terms, invite the Tribunal to interpret the scope of the Parties' agreement as it is enshrined in PO1 for the specific question of the scope of direct examinations. In other words, neither the Respondent nor the Claimants are presently requesting any amendment to PO1.
10. The Tribunal finds that the very wording of §20.7 of PO1 indeed allows a Party to directly examine a witness she has presented, only with regard to the content of said witness' corresponding statement. Claimants emphasize the wording of §20.2. The Tribunal finds no contradiction between the two provisions. §20.2 essentially indicates whom as well as under which circumstances a party may call to testify. The form and scope of the "direct examination" is however limited by the wording of §20.7.
11. Accordingly, the Tribunal and the Parties are bound to the agreement reached in PO1. Claimants argue that Respondent raised "many new arguments" and provided only discrete and limited examples. The Claimants' have not requested any amendment to PO1. The Tribunal highlights that it will, at all times, pay due regard to the fundamental procedural rule according to which both Parties must be afforded an equal opportunity to present their case in conformity with the rules agreed upon by the Parties and the Tribunal in PO1.

B. The Respondent's Request to exclude Mr. Yanus' appearance at the Hearing

12. The specific question of Mr. Yanus' examination during the hearing must be addressed by reference to the applicable rules, in this case to be found in §20 of PO1. The Tribunal has

already concluded that arguably new arguments and evidence may not be reviewed during the direct examination pursuant to §20.7.

13. Regardless of the previous finding, the Tribunal however recalls that it enjoys broad powers when it comes to the question of witness or expert examination. In fact, the Tribunal may decide to examine witnesses not indicated by the Parties. The power to do so is unmistakably enshrined in §20.5 of PO1. The general wording of §20.5 confirms the discretion of the Tribunal in this regard. The Tribunal does not need to venture into a specific justification to call a witness or expert pursuant to §20.5.
14. In the present case, the Tribunal is satisfied that *prima facie*, Mr. Yanus' testimony could be relevant. In addition, the Tribunal finds that the Respondent has not provided any compelling argument against Mr. Yanus' examination. Such *prima facie* assessment of the testimony's relevance evidently does not prejudice any final conclusion to be reached by the Tribunal during its final deliberations.
15. In this vein, the Tribunal directly calls Mr. Yanus as a witness of the Tribunal. Both Parties could examine Mr. Yanus, according to the terms established in the PO1.

C. Hearing dates

16. The Parties have decided to call a number of witnesses and experts that make it difficult to hear all of them in only one week, as it has been scheduled in the Procedural Calendar. According to the Claimants, both Parties have proposed to add days to the Hearing. While the Claimants consider that one more week would be needed, the Respondent would have stated –always in Claimants' words, not confirmed by Respondent– that only two days would be sufficient. On its own, the Tribunal has calculated that approximately 8 days in total would be necessary.
17. Taking into consideration that the Tribunal is not available in the weeks prior to or following the scheduled week for the Hearing (25-29 April 2022), and with the purpose to avoid any delays that could jeopardize the efficient conduct of these proceedings, the Tribunal considers that all factual witnesses called by the Parties should be heard in the scheduled week. As to the expert witnesses, the Tribunal invites the Parties to consider the possibility that they be heard, if agreeable, online, in dates to be fixed.
18. All in all, the Tribunal requests the Parties to discuss about the extension and modalities of the Hearing and to communicate the results of these discussions no later than 11 October 2021.

III. Order

19. On the basis of the foregoing considerations, the Tribunal:

- a. rejects Respondent's request to exclude Mr. Yanus from testifying during the Hearing;
- b. directly calls Mr. Yanus as a witness of the Tribunal to testify during the Hearing. Mr. Yanus will be examined by the Tribunal pursuant to rules to be found in §20 of PO1; for the sake of clarity, the Tribunal confirms that Mr. Yanus will be examined on the contents of his witness statement and on issues that, despite not being addressed in his witness statement, are issues that Mr. Yanus knows or should reasonably be expected to know;
- c. requests the Parties to discuss about the extension and modalities of the Hearing and to communicate the results of these discussions no later than 11 October 2021.

On behalf of the Tribunal,

[Signed]

Professor Diego P. Fernández Arroyo
President of the Tribunal
Date: September 23, 2021
Seat of the arbitration: Toronto, Canada