

**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. 20

ON THE FORMAT OF 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

18 February 2022

I. Procedural Background

1. In its communication dated 11 November 2021, the Tribunal informed the Parties of its preference for the Hearing to take place in person, whenever possible, and invited the Parties to explore the possibility of holding the Hearing at some Latin American country, if it were impossible for it to take place in Washington, D.C. as contemplated in Section 22.1 of Procedural Order No. 1, due to the restrictions in force in connection with the COVID-19 pandemic.
2. On 28 January 2022, the Tribunal sent a communication to the Parties inviting them to inform the Tribunal of the status of their negotiations regarding the venue of the Hearing. Pursuant to Section 21.1 of Procedural Order No. 1, the Tribunal also invited the Parties to confirm their availability to hold a pre-hearing organizational meeting on March 10 or 11, 2022.
3. On 11 February 2022, the Parties sent their communications to the Tribunal regarding the format of the Hearing and the dates for the pre-hearing organizational meeting. The Claimants expressed their preference for the Hearing to take place in person; and that it be held in Washington, D.C., as agreed in Procedural Order No. 1. For its part, the Respondent argued that due to the current COVID-19 health crisis and the Omicron variant, it is necessary to hold the Hearing in virtual format. In particular, the Respondent argued that:
 - a. the fact that the city of Washington, D.C. is in a state of “public emergency” and that the World Bank headquarters will remain closed until the end of March is an indication that Washington, D.C. is not a viable option for the Hearing to take place, due to health reasons;
 - b. some members of the Mexican counsel team, as well as some of its witnesses and experts, will not be able to travel to the United States because they have not received the COVID-19 vaccines accepted by said country. According to the Respondent, even if they could benefit from an exception, they would have to quarantine for 7 days after arrival in the United States; and
 - c. some members of the Respondent’s counsel team, as well as some of its witnesses and experts have not been able to renew their US visas due to delays in the processing of visas by the United States’ Embassy and consulates in Mexico, and they would therefore not be able to enter the country.
4. According to the Respondent, if the Tribunal were to decide to hold an in-person Hearing to which only one of the Parties could attend, this would violate procedural balance and fairness and would infringe upon the principle of equality of arms. In Claimants’ view, the Respondent’s reasons for opposing an in-person Hearing are unfounded as the

Respondent's legal representatives travelling to the United States for official travel would not be subject to the COVID-19 related restrictions on entry into the United States.

5. Lastly, both Parties argued against the Tribunal's proposal to hold the Hearing in person in another Latin American country, either because of Claimants' fear of travelling outside the United States of America due to the risk of Mexico issuing arrest warrants against them or due to the greater logistical difficulty, greater cost, and the health risk that this would entail.

II. The Tribunal's Analysis

6. First, the Tribunal is grateful to the Parties for making themselves available to hold the pre-hearing organizational meeting on the dates proposed by the Tribunal. The meeting is scheduled for **Friday, 11 March** at 10 am EST.
7. Second, with respect to the format of the Hearing, the Tribunal has repeatedly indicated that, whenever reasonably possible, it is preferable to hold an in-person Hearing rather than virtually. In this case, the reasons relied upon by the Respondent to oppose an in-person Hearing in Washington, D.C. have not convinced the Tribunal that the virtual format is preferable, for the reasons set out below.
8. First of all, the Tribunal informs the Parties that since its last communication and in view of the apparent improvements in COVID-19 infection rates in Washington, D.C., the World Bank currently allows events of up to a maximum of 10 people per room at its headquarters in Washington, D.C.¹ Therefore, as long as the circumstances do not change, the Hearing will take place at said venue, pursuant to Section 22.1 of Procedural Order No. 1. ICSID will inform the Parties as soon as possible if the World Bank's policies are modified, whether in relation to the adoption of new restrictions that make it impossible to hold the Hearing at said venue, as well as in the opposite sense, that is, to increase the number of people allowed per room.
9. The abovementioned and the fact that other arbitration hearings are being held in Washington, D.C. with the participation of attendees from various origins, confirms that, at present, it is viable to organize the Hearing as planned.
10. Regarding the restrictions concerning vaccination schemes, this is an issue that may vary with time. In any event, the Tribunal expects to receive specific information regarding each participants' situation. This will allow the Tribunal to analyze the specific impact of said restrictions on the parties' ability to effectively participate in the Hearing.

¹ ICSID has reserved two hearing rooms for this case (each with a maximum capacity of 10 people), as well as two breakout rooms, with a maximum capacity of 6 people each.

11. In relation to the visas required to enter the United States, the Tribunal has confirmed that ICSID can provide, at the request of the Parties, travel certificates that may be submitted together with visa applications to the United States consulate in Mexico. These certificates certify that the reason the Respondent's legal representatives, its witnesses and experts travel to the United States is for participating in an arbitration hearing in a NAFTA case.
12. In any event, if a person is ultimately prevented from participating in person, the Tribunal will guarantee that he or she can participate remotely, subject to the protocol to be established in due course.
13. In this context, the Tribunal does not see any situation that could constitute a violation of due process in this specific case.
14. Lastly, in the Tribunal's experience, given the time differences between the Parties and the members of the Tribunal, the virtual format would necessarily imply that the daily duration of the Hearing would be significantly reduced and, consequently, that it would be necessary to add days to the Hearing. This issue has already been discussed between the Parties and the Tribunal and it was concluded that the only possibility was to divide the Hearing into two phases quite distant from each other, due to the difficulties in finding dates on which all the participants were available. In this regard, both Parties expressed their preference not to divide the Hearing into several phases.
15. Considering all the above, the Tribunal decides that the Hearing will take place in person, at the ICSID facilities in Washington, D.C., on the agreed dates. Participants who cannot attend the Hearing in person due to duly justified exceptional circumstances may participate remotely. To this end, the Tribunal invites the Parties to provide a list of participants, indicating those that will attend the Hearing in person and those that will need to connect remotely, as well as the reasons why they cannot attend in person, no later than **9 March 2022**.

III. Order

16. On the basis of the foregoing considerations, the Tribunal decides as follows:
 - a. the Parties shall provide to the Tribunal a list of participants no later than **Wednesday, 9 March 2022**, indicating the participants that will attend the Hearing in person and those that would need to connect remotely, as well as the reasons why they cannot attend in person;
 - b. the pre-hearing organizational meeting shall take place on **Friday, March 11** at 10 am EST; and

- c. the Hearing shall be held in person in Washington, D.C. between the **24 April and 1 May 2022**, with the possibility for remote participation of people who justifiably cannot attend in person.

On behalf of the Tribunal,

[Signed]

Professor Diego P. Fernández Arroyo
President of the Tribunal
Date: 18 February 2022
Seat of the arbitration: Toronto, Canada