Hogan
Lovells

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ENERFLEX US HOLDINGS INC. AND
EXTERRAN ENERGY SOLUTIONS, L.P.,

Claimants,

v.

UNITED MEXICAN STATES

Respondent.

REQUEST FOR ARBITRATION

Hogan Lovells BSTL, S.C.
Paseo de los Tamarindos 150 - PB
Bosque de las Lomas
Ciudad de México, México

Hogan Lovells US LLP
555 13th Street, NW
Washington, DC 20004
USA

Attorneys for Claimants

June 16, 2023

I. Introduction:

1. Enerflex US Holdings Inc. (formerly Exterran Corporation) ("Enerflex USA") and Exterran Energy Solutions, L.P. ("Exterran Energy USA") (collectively, "Claimants" or the "Investors") serve this Request for Arbitration ("RFA") against the United Mexican States ("Mexico" or "Respondent" or the "State") under Annex 14-C of United States-Mexico-Canada Agreement, which entered into force on July 1, 2020 ("USMCA"),[1] Articles 1116, 1117, 1119, and 1120 of the North America Free Trade Agreement, which entered into force on January 1, 1994 ("NAFTA"),[2] and pursuant to Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"). Enerflex USA, Exterran Energy USA, and Mexico are collectively referred to as the "Parties."

2. Claimants submit this RFA on their own behalf, and on behalf of an enterprise duly constituted or organized in Mexico that they own and control directly or indirectly: Gas Conditioning of México, S. de R.L. de C.V. ("Gas Conditioning").

3. Claimants in this arbitration are two U.S. investors that hold investments in Mexico, including in the form of a local company incorporated under Mexican law: Gas Conditioning. Exterran Energy USA and Gas Conditioning were direct victims of an unlawful labor award rendered by a Mexican labor board that awarded ***approximately US$120 million in damages***, purportedly to compensate a single former employee of Gas Conditioning for alleged labor-related compensation payments. This contradicts, reverses, and replaces a 2017 decision by the same Mexican labor board as ordered by a Mexican federal court, that awarded ***approximately US$80,000*** to this former employee based on several of the same claims. This dispute arises out of this Mexican labor board's award, which violates the USMCA, NAFTA, and international law, causing serious harm to the Investors.

4. Mexico is responsible for the Mexican labor board's unlawful acts. Through this RFA, the Investors seek to hold Mexico liable for its breaches of the USMCA, NAFTA, and international law. The Mexican labor board's unfair and inequitable actions, among other breaches, are arbitrary, lack due process, and deny justice. The Mexican labor board's actions unlawfully expropriated the Investors' investment without due process of law and without public purpose. Mexico also violated national treatment and most-favored-nation treatment by treating the Investors less favorably than Mexican investors and investors from third countries. The Investors seek monetary damages to compensate for these breaches.

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1 *See* **Exhibit CL-1**, Agreement between the United States of America, the United Mexican States, and Canada ("USMCA"), entered into force on July 1, 2020.

2 *See* **Exhibit CL-2**, North American Free Trade Agreement ("NAFTA"), entered into force on January 1, 1994.

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II. The Parties:

A. Claimants:

5. The Claimants are Enerflex USA and Exterran Energy USA, enterprises constituted or organized under the laws of the State of Delaware, United States of America ("USA")[3] and headquartered in Houston, Texas, USA.

6. The Investors and Gas Conditioning confirm that they have taken all necessary internal actions to authorize this RFA, and the Investors and Gas Conditioning consent to arbitration in accordance with NAFTA Articles 1121 and 1122.[4]

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[3] *See* **Exhibit C-1**, Notice of Intent dated February 28, 2023, Exhibit A (evidencing the Investors' U.S. Nationality).

[4] *See* **Exhibit C-2**, Consent and Waiver by the Investors and Gas Conditioning. *See also* **Exhibit C-3**, Investors' authorization of the Request for Arbitration.

8. The Investors are represented in these proceedings by Hogan Lovells BSTL, S.C. and Hogan Lovells US LLP.[5] All required notifications should be addressed to:

Luis Omar Guerrero Rodríguez
Juan Francisco Torres Landa Ruffo
Richard Charles Lorenzo
Michael Grant Jacobson
Orlando Federico Cabrera Colorado

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B. Respondent:

9. The Respondent, Mexico, is a sovereign State located in the southern area of North America. Mexico is the most populous Spanish-speaking country in the world and the fifth largest country in the Americas.

10. Mexico has appointed the General Directorate of International Legal Commerce (*Dirección General de Consultoría Jurídica de Comercio Internacional*) to receive official notifications under USMCA.[6]

Dirección General de Consultoría Jurídica de Comercio Internacional
Secretaría de Economía
Pachuca #189, piso 19
Condesa, Cuauhtémoc
06140 Ciudad de México, México

Attention:

Alan Bonfiglio Ríos, Esq.
Director General
Dirección General de Consultoría Jurídica de Comercio Internacional
Secretaría de Economía
+52 55 57299100 ext 15200
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5 *See* **Exhibit C-1**, Notice of Intent dated February 28, 2023 (see Exhibit C for the relevant powers of attorney).

6 *See* **Exhibit CL-1**, USMCA, Chapter 14, Appendix 1 Service of Documents on an Annex Party; **Exhibit CL-3**, Internal Regulations of the Ministry of Economy (*Reglamento Interior de la Secretaría de Economía*), publicado en el Diario Oficial de la Federación el 17 de octubre de 2019, Art. 48, IX.

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11. Under the Internal Regulations of the Ministry of Economy, this Directorate is responsible to "[c]oordinate the defense in dispute settlement proceedings instituted in accordance with international trade treaties to which Mexico is a party."[7]

12. Mexico has appointed the General Directorate of Foreign Investment (*Dirección General de Inversión Extranjera*) to receive official notifications under NAFTA.[8]

Dirección General de Inversión Extranjera
Secretaría de Economía
Av. de los Insurgentes Sur 1940
Col. La Florida
Ciudad de México, México

13. The Investors are filing this RFA with the International Centre for Settlement of Investment Disputes ("ICSID"). The Investors are also serving a courtesy copy to the above Directorates of the Government of Mexico.

III. Statement of Facts:

14. This matter is about a grave injustice carried out by Mexico's administrative and judicial branches against the Investors and their investments in Mexico. In short, Mexican administrative and judicial bodies have rendered a shocking award of ***approximately US$120 million*** based on a single former employee's claims. This decision contradicts, reverses, and replaces a 2017 decision by the same Mexican administrative and judicial bodies that awarded ***approximately US$80,000*** to this Mexican worker based on several of the same claims. This unlawful decision has caused serious harm to the Investors and risks destruction of the entirety of the Investors' investments in Mexico. The events leading up to this unlawful result are summarized below.

A. The Labor Claim:

15. On May 26, 2015, a Mexican individual who used to work as a Business Manager for Gas Conditioning (the "Plaintiff") filed a labor claim against Exterran Energy Mexico, S. de R.L. de C.V. ("Exterran Energy Mexico"), Gas Conditioning, Exterran Energy USA, and five other individuals linked with the Investors (together the "Defendants") before the Local Conciliation and Arbitration Board of the State of Tabasco, with residence in the City of Villahermosa. This authority received the complaint and assigned it to Special Board Three (the "Board"), handling the case under file number 2715/2015.

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7 See **Exhibit CL-3,** Internal Regulations of the Ministry of Economy (*Reglamento Interior de la Secretaría de Economía*), publicado en el Diario Oficial de la Federación el 17 de octubre de 2019, Art. 48, VII.

8 See **Exhibit CL-4**, Decree authorizing the Government of Mexico's *Dirección General de Inversión Extranjera* to receive official notifications under NAFTA, dated June 12, 1996.

16. The Plaintiff claimed three months of severance in the form of constitutional indemnity, one year of lost wages, and seniority premium. The Plaintiff also claimed additional labor benefits, among them: (1) Christmas bonus; (2) overtime; (3) mandatory rest days worked; (4) food vouchers; (5) seventh days; (6) Sunday bonus; (7) punctuality and productivity bonuses; (8) vacation and vacation bonus; (9) salary increase; (10) attendance bonus; (11) profit sharing for the 2014 fiscal year; (12) contributions to the Retirement Fund ("AFORE") and to the Housing Fund ("INFONAVIT"); (13) differences of the contributions paid to the Social Security Institute ("IMSS") and INFONAVIT; (14) the annulment of all documents allegedly signed by the Plaintiff against his will; (15) interest over fifteen months of salary; (16) twenty days of salary for each year worked; (17) measurement of the value of all the benefits with the allegedly higher salary; and (18) litigation costs.

17. The Plaintiff asserted that he was an employee of all the Defendants since June 29, 2006; that his last daily integrated full salary as Business Manager was MXP$21,735.24 payable in U.S. dollars (or approximately US$1,200 per day);[9] and that his working hours were from Monday to Saturday from 8:00 a.m. to 8:00 p.m. The Plaintiff also alleged that he worked on Sundays without pay but was supposed to rest on Sundays; thus, he claimed payment for the seventh day and overtime.

18. On May 26, 2015, the Board allowed the matter to proceed.

19. Exterran Energy USA and Exterran Energy Mexico filed a joint answer to the complaint denying the existence of a labor relationship. They asserted that the Plaintiff did not meet the labor law standards to become an employee of these companies. Consequently, Exterran Energy USA and Exterran Energy Mexico denied all the prayers of relief claimed by the Plaintiff.

20. Gas Conditioning (1) answered the complaint and (2) filed a motion for ancillary proceeding for a partial confessed judgment (*incidente de allanamiento parcial*).

B. Gas Conditioning's Answer to the Complaint and Motion for Ancillary Proceeding for Partial Confessed Judgment:

21. Gas Conditioning's answer to the Plaintiff's complaint asserted that it was the sole and exclusive employer of the Plaintiff and thus was solely responsible for the employment relationship. Gas Conditioning included evidence to contest the Plaintiff's allegations. Exterran Energy USA, Exterran Energy Mexico, and the five individual defendants denied any labor relationship with the Plaintiff.

22. Gas Conditioning also filed a motion for ancillary proceeding for a partially confessed judgement, which sought to finally resolve the following elements of the Plaintiff's claims: (1) three months of severance in the form of constitutional indemnity, (2) one year of lost wages, and (3) seniority premium. Gas Conditioning admitted that it owed the Plaintiff a small portion of the amount claimed. After the conclusion of the ancillary proceeding, any continuation of the lawsuit would be limited to the remainder of the (lesser) benefits claimed by the Plaintiff.

23. Gas Conditioning attached thirty salary receipts from the period of February 17, 2014 and March 29, 2015 to the motion for ancillary proceeding to evidence Gas Conditioning's payments

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[9] The estimated exchange rate applied throughout this RFA is 17 MXP per 1 U.S. Dollar.

to the Plaintiff. The Plaintiff signed the majority of these receipts. An excerpt from one such receipt signed by the Plaintiff is set forth below:[10]

GAS CONDITIONING OF MEXICO, S DE R.L. DE C.V.
Calle Blvd. Loma Real Num.1160 Col. Loma Real
Reynosa, Tam. CP 88715 R.F.C. ESM9709142R7 Reg. Pat. E7553071100

NUMERO	NOMBRE	R.F.C.	I.M.S.S.
5475	Garcia Lerma, Jesus David	GAL[illegible]-717	23-91-75-2931-7

PERIODO	Catorcena	DURACION JORNADA	TIPO DE SALARIO
31/Mar/14 Al 13/Abr/14	7	96	FIJO VARIABLE X

SALARIO	SALARIO DIARIO	2,596.65	SALARIO INTEGRADO	1,682.25

FECHA DE INGRESO	CURP	FECHA DE PAGO
29 de Junio de 2006	GALJ751223HSLRRS03	11/Abr/14

AREA	NOMINA
VENTAS	Confianza

PUESTO
Gerente de Negocios

HORAS	PERCEPCIONES		DEDUCCIONES	
12.00	1 SUELDO ORDINARIO	31,159.80	51 IMSS	642.25
2.00	2 SEPTIMO DIA	5,193.30	52 IMPTO SOBRE LA RENTA	9,363.01

SUBTOTAL	36,353.1	10,005.2

RECIBI DE GAS CONDITIONING OF MEXICO, S. DE R.L. DE C.V., LA CANTIDAD ANOTADA EN TOTAL PERCEPCIONES POR CONCEPTO DE MI SALARIO QUE INCLUYE EL IMPORTE DE LAS HORAS ORDINARIAS Y EXTRAORDINARIAS, SEPTIMO DIA, DIAS FESTIVOS Y DEMAS PRESTACIONES CORRESPONDIENTES AL PERIODO QUE TERMINA HOY SIN QUE A LA FECHA SE ME ADEUDE NINGUNA CANTIDAD POR CUALQUIER OTRO CONCEPTO, HABIENDOSEME HECHOS LOS DESCUENTOS DE LEY Y LOS CONVENIDOS PARTICULARMENTE.

26,347.84
NETO A PAGAR

0.00
SALDO DE FONDO DE AHORRO

Garcia Lerma, Jesus David

ORIGINAL
CUENTA BANCARIA 0550676[illegible]

PATRON

[10] **Exhibit C-4**, Receipt of Payment signed by the Plaintiff for the period dated March 31, 2014 to April 13, 2014.

24. Additionally, Gas Conditioning's motion for an ancillary proceeding included the Plaintiff's employment agreement dated June 29, 2006, the fifth clause of which states that Gas Conditioning would pay the Plaintiff the salary in pesos, the official currency of Mexico:[11]

> **QUINTA.-** El Trabajador recibirá como remuneración por sus servicios la cantidad de 5,500.00 (Cinco mil quinientos pesos 00/100 M.N.) en moneda oficial de los Estados Unidos Mexicanos en forma mensual menos las deducciones legales que le correspondan. Esta cantidad será pagadera en dos partes iguales, siendo los días quince y último de cada mes. Contra el pago de cualquier salario ordinario o extraordinario, El Trabajador recibirá un recibo de nómina por parte de La Empresa con la fecha que se realice el pago, mismo que será firmado por El Trabajador, en el entendido de que la firma de dicho recibo implicará un finiquito total del la obligación de La Empresa de pagar hasta la fecha del recibo correspondiente.

25. In addition to the Plaintiff's employment agreement and salary receipts, Gas Conditioning filed requests for evidence, including an expert accountant report, an inspection of Gas Conditioning's 2014 and 2015 banking statements, a request to the National Banking and Securities Commission ("CNBV") to issue a report attesting that Gas Conditioning transferred funds to the Plaintiff by wire transfers, and evidence of the Plaintiff's ownership of the bank account. Gas Conditioning also requested IMSS to issue reports.

26. The Plaintiff opposed the ancillary proceeding. The Board agreed with the Defendants and held the ancillary proceeding. On October 23, 2015, the Board held a hearing for the ancillary proceeding for partial confessed judgment.

C. The Interlocutory Decision in the Ancillary Proceeding:

27. Following the Board's hearing in the ancillary proceeding, the Board notified the Defendants, including Gas Conditioning, of its interlocutory decision on December 15, 2015. The Board noted that the Plaintiff claimed a salary of MXP$21,735.24 "to be paid in dollars." Despite the fact that Gas Conditioning offered receipts of payment signed by the Plaintiff as evidence that the Plaintiff was paid in pesos, the Board did not address that evidence in the interlocutory decision. The Board, however, stated the following findings regarding the Plaintiff's lack of evidence to support the Plaintiff's allegations:

a. The Board determined: "Now, taking into consideration that there was controversy in as to the salary earned by the plaintiff, that is, the plaintiff stated that he earned the amount of [MXP]$21,735.24 (twenty-one thousand seven hundred and thirty-five

[11] **Exhibit C-5**, Plaintiff's Employment Agreement dated June 29, 2006.

pesos 00/24 Mexican currency), **without having proven it with any means of evidence**."[12]

b. The Board ultimately found, for the payment of severance in the form of constitutional indemnity and lost wages, that the Plaintiff's integrated daily salary was MXP$4,608.82.

c. The Board decided: (1) to admit the ancillary proceeding; (2) to order Gas Conditioning to pay the Plaintiff severance in the form of constitutional indemnity, lost wages, and seniority premium; and (3) to order Gas Conditioning to pay lost wages based on an integrated daily salary of MXP$4,608.82 from March 28, 2015 to the date when Gas Conditioning issued payment of these indemnities.

d. The Board also dismissed the claims asserted against Exterran Energy USA, Exterran Energy Mexico, and the five individual defendants, finding that the Plaintiff did not evidence a labor relationship with these defendants.

e. The Board decided that its administrative procedures should continue regarding the other (lesser) benefits claimed by the Plaintiff that Gas Conditioning did not accept. The Board set January 28, 2016 as the date to hold the next hearing on the offering and admission of evidence.

D. Gas Conditioning's Amparo Action:

28. On January 8, 2016, Gas Conditioning contested the Board's interlocutory decision by filing an indirect amparo lawsuit.[13] Gas Conditioning argued that the integrated salary considered by the Board for payment of severance in the form of constitutional indemnity and lost wages was incorrect.

29. The Fifth District Court in the State of Tabasco, Mexico heard Gas Conditioning's amparo and rendered a decision. Gas Conditioning appealed to the Collegiate Court in Criminal and Labor Matters for the Tenth Circuit in the State of Tabasco, Mexico (the "Collegiate Court") for further review.

30. On March 24, 2017, the Collegiate Court ruled in Gas Conditioning's favor in the amparo in review 309/2016. The Collegiate Court: (1) vacated the Board's December 2015 interlocutory decision; and (2) ordered the Board to issue a new decision based on the Collegiate Court's findings that the Plaintiff's daily wage (inclusive of his daily ordinary wage (MXP$2,856.32),

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[12] **Exhibit C-6**, Board's Interlocutory Decision dated December 3, 2015 at page 6 (emphasis added).

[13] An amparo lawsuit is a remedy under Mexican law for the protection of constitutional rights. One type of amparo is an indirect amparo, which is filed against an act, failure to act, or general law. Another type of amparo is a direct amparo, which is filed against a final decision or judgment that puts an end to a trial.

short-term incentives bonus, vacation bonus, and Christmas bonus) was lower than what had been previously determined by the Board.[14]

E. New Interlocutory Decision:

31. On April 24, 2017, the Board issued a new interlocutory decision to comply with the Collegiate Court's judgment.[15]

32. The Board confirmed the appropriateness of the ancillary proceeding. The Board ordered Gas Conditioning to pay the Plaintiff the following, plus interest until the date of Gas Conditioning's payment: (1) severance in the form of the constitutional indemnity (three months of salary) at a lower integrated salary of MXP$3,579.76 per day; (2) lost wages for an additional 12 months, from March 28, 2015 to March 28, 2016 at the same integrated salary rate; and (3) seniority premium. Regarding the Plaintiff's position that he was to be paid in "dollars," the Board underscored that the Plaintiff "never proved his statement with any means of evidence."[16] Gas Conditioning did not dispute the integrated salary confirmed by the Board.

33. The Board again dismissed claims against Exterran Energy USA, Exterran Energy Mexico, and the five individuals, finding that the Plaintiff did not evidence a labor relationship with these defendants.

34. Because Gas Conditioning did not agree that it owed the Plaintiff any payment based on the other benefits claimed by the Plaintiff, the Board decided that its administrative proceeding should continue to assess the remaining claimed benefits. The Board set May 29, 2017 as the date to continue the proceeding to assess the remaining claimed benefits. In the meantime, Gas Conditioning complied with the Board's April 24, 2017 interlocutory decision by submitting a check addressed to the Plaintiff in the amount of MXP$1,417,621.95 (or approximately US$80,000).

35. On June 13, 2017, the Plaintiff filed a brief requesting the Board to deliver the payment from Gas Conditioning in accordance with the Board's interlocutory decision.

36. On June 15, 2017, the Plaintiff personally appeared before the Board in order to receive Gas Conditioning's payment in the form of a check in the amount of MXP$1,417,621.95 (approximately US$80,000) to satisfy the Board's April 24, 2017 interlocutory decision. Upon the completion of this payment, the Board stated in an official order that Gas Conditioning complied in full with the payment in accordance with the April 24, 2017 interlocutory decision. The Board also determined that the labor relationship between the parties was terminated as of May 29, 2017.

37. Thereafter, the Board held several hearings, including related to the offering and admission of evidence regarding the Plaintiff's claims for benefits that were not part of the Board's April 24, 2017 interlocutory decision. These proceedings were mired with delays and procedural irregularities, including the Board losing documents without reasonable explanation and rescheduling

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14 **Exhibit C-7**, Amparo Judgment dated March 24, 2017, rendered by the Collegiate Court in Criminal and Labor Matters of the Tenth Circuit, court docket: *Amparo en Revisión* 309/2016 at page 83.

15 **Exhibit C-8**, Board's Interlocutory Decision dated April 24, 2017.

16 *Id.*, page 7.

several hearings. This process took nearly five years and culminated in a January 2022 labor award described below.

F. The Labor Award:

38. On January 31, 2022, the Board issued a shocking award that ordered all of the Defendants to pay the Plaintiff ***MXP$2,151,666,326.01 (approximately US$120 million)*** (the "Labor Award").[17]

39. The circumstances under which the Labor Award was issued, and the rationale therefore, defy foundational principles of justice. In 2017, the Board had set an integrated salary of MXP$3,579.76 per day. In direct contradiction to its prior determination and award, and without explanation, the Labor Award improperly and egregiously reversed the Board's prior decision, in violation of the principle of res judicata, and set the Plaintiff's salary as **US$21,735.24, per day**. In so doing, the Board ignored and contradicted the Collegiate Court's March 24, 2017 judgment and the Board's April 24, 2017 decision. The Board's Labor Award also ignored and contradicted substantial evidence on the record of the Board's proceeding, including the Plaintiff's employment agreement, receipts of payment, and even the Plaintiff's own prior admission that his salary was ***MXP$***21,735.24 per day. It appears that, despite an approximately 17-to-1 exchange rate between Mexican Pesos and U.S. Dollars, the Board assumed a 1-to-1 exchange rate.

40. As part of this Labor Award, the Board also ordered the Defendants to pay salary differences, even when the Plaintiff never claimed these benefits in the complaint. The Board also ordered payment of lost wages for several years after the end of the Plaintiff's labor relationship, contrary to the Board's prior order. The Board also ordered that Defendants pay the Plaintiff excessive overtime, including 387 extra double hours and 645 extra triple hours.

41. The Board also held that all Defendants—including Gas Conditioning, Exterran Energy USA, Exterran Energy Mexico, and the individuals—were jointly and severally liable to pay the Labor Award. The Board improperly and egregiously overturned its own prior dismissal of Exterran Energy USA, Exterran Energy Mexico, and the individuals.

G. Events Since the Board's Issuance of the Labor Award:

42. There are ongoing amparos that arise directly out of the Labor Award, which are intertwined with the Labor Award.

43. To contest the unlawful Labor Award, on March 14, 2022, the Investors filed two direct amparos before the First Collegiate Court on Labor Matters of the Tenth Circuit:

a. Direct Amparo 721/2022 filed by Gas Conditioning, and

b. Direct Amparo 722/2022 filed by Exterran Energy Mexico, Exterran Energy USA, and the individual defendants.

44. Today, these amparos remain pending.

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[17] *See* **Exhibit C-1**, Notice of Intent dated February 28, 2023, Exhibit D; **Exhibit C-9**, Board's Labor Award dated January 31, 2022.

45. On September 6, 2022, the Plaintiff filed a petition for an indirect amparo against an act attributed to the Board. The Plaintiff is challenging an August 22, 2022 order in file 2715/2015 in which the Board did not grant the Plaintiff the fixation of sustenance in his favor (the "Challenged Act"), because the Board had found that the former employee's representative did not have legal capacity to sign the petition for sustenance. This amparo was turned over to the Fifth District Court in Tabasco (the "Fifth District Court"). On September 8, 2022, the Fifth District Court admitted the amparo and ordered its registration under file number 1556/2022-VIII-1. On March 22, 2023, the Fifth District Court granted the amparo sought by the Plaintiff and instructed the Board to: (a) vacate the Challenged Act and to issue a new order with supporting legal grounds; (b) find that counsel to the Plaintiff had legal capacity at the time of signing the petition for sustenance; and (c) rule on the petition for sustenance.

IV. Jurisdiction:

46. All jurisdictional and procedural requirements of USMCA, NAFTA, and the ICSID Convention have been met.

A. Legacy Claim and Consent to Arbitration Arising Out of a Legacy Investment:

47. In USMCA Annex14-C, Article 1, Mexico:

> . . . consents with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under (a) Section A of Chapter 11 (Investment) of NAFTA 1994 . . . .

48. Under USMCA Annex 14-C, Article 1, Mexico's consent expires three years after NAFTA's termination. NAFTA terminated as of July 1, 2020, and was replaced by the USMCA.[18] Thus, consent will expire on July 1, 2023. This RFA has been timely submitted under the requirements of the USMCA.

49. Under USMCA Annex 14-C, Article 6, a "legacy investment" means "an investment of an investor of another Party in the territory of the Party established or acquired between January 1 1994 and the date of NAFTA's termination, and in existence on the date of the entry into force of USMCA."

50. USMCA Annex 14-C permits submission of claims under NAFTA Chapter 11, Section B to allege a breach by Mexico of an obligation under NAFTA Chapter 11, Section A with respect to a legacy investment in Mexico by U.S. investors.

51. Enerflex USA and Exterran Energy USA are both U.S. enterprises, which have invested in Mexico through their 100% direct or indirect ownership interests in Gas Conditioning.[19] In accordance with NAFTA Article 1139, the Investors' investments in Mexico include Gas Conditioning itself, the equity security of Gas Conditioning, the interest in Gas Conditioning that entitles the Investors to a share in income or profits of Gas Conditioning, and the real estate property, tangible or

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[18] *See* **Exhibit CL-5**, Protocol replacing NAFTA with USMCA, dated June 29, 2020.

[19] *See* **Exhibit C-1**, Notice of Intent dated February 28, 2023, Exhibit A (evidencing the Investors' U.S. Nationality and investments in Gas Conditioning).

intangible, acquired in the expectation or used for the purpose of economic benefit or business purposes held by Gas Conditioning.

52. The Investors' investments predated the date of NAFTA's termination, and were made during the period that NAFTA was in force. On September 14, 1997, Gas Conditioning was constituted as a Mexican legal entity.[20] The Investors have directly or indirectly held 100% ownership of Gas Conditioning and have controlled Gas Conditioning since 2005. Therefore, the Investors have made legacy investments in Mexico that qualify under USMCA Annex 14-C.

53. Mexico has thus consented to arbitration of legacy investment claims under USMCA Annex 14-C and NAFTA Chapter 11. Claimants have legacy investments, and through this RFA, Claimants have submitted claims to arbitration in accordance with Section B of NAFTA Chapter 11 and USMCA Annex 14-C alleging a breach of Mexico's obligations under Section A of NAFTA Chapter 11.[21]

54. Under USMCA Annex 14-C, Mexico's consent to the submission of a claim to arbitration under NAFTA Chapter 11, Section B and USMCA Annex 14-C also expressly satisfies the requirements of ICSID Convention Chapter II (Jurisdiction of the Centre).[22]

B. The Jurisdictional Requirements of NAFTA are Met:

1. Description of the Investors and their investment:

55. NAFTA Article 1139 defines "investor of a Party" as a "national or an enterprise of such Party, that seeks to make, is making or has made an investment." NAFTA Article 1139 defines "enterprise of a Party" as including "an enterprise constituted or organized under the law of a Party . . . ." Enerflex USA and Exterran Energy USA are constituted in and organized under the laws of the USA, and thus are enterprises of the USA and investors of the USA. The Investors notify the intent to bring these claims on their own behalf in accordance with NAFTA Article 1116 and on behalf of Gas Conditioning in accordance with NAFTA Article 1117.

56. Under NAFTA Article 1139, "investment" means, *inter alia*: "(a) an enterprise; (b) an equity security of an enterprise; . . . (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; . . . (g) real estate property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or business purposes." As a result of each of Enerflex USA's and Exterran Energy USA's direct and indirect 100% ownership interests in Gas Conditioning that entitle the Investors to income or profits of Gas Conditioning, and the real estate property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or business purposes held by Gas Conditioning, Enerflex USA, and Exterran Energy USA have investments under NAFTA Article 1139.

2. Ownership of the Investors' investments:

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[20] The company was constituted as "Hanover Compressor de México, S. de R.L. de C.V." and its corporate name has changed to "Exterran Services de México, S. de R.L. de C.V." and most recently to "Gas Conditioning of México, S. de R.L. de C.V."

[21] *See* **Exhibit CL-1,** USMCA, Annex 14-C, Art. 1(a).

[22] *See* **Exhibit CL-1,** USMCA, Annex 14-C, Art. 2.

57. The legacy investments' ownership has been described in Section II.A, above.

3. Mexico and the Investors have consented to submit this dispute to arbitration:

58. NAFTA Article 1116 provides that "[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under (a) section A" of NAFTA Chapter 11 on Investment.

59. Similarly, NAFTA Article 1117 provides that "[a]n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that another Party has breached an obligation under (a) Section A" of NAFTA Chapter 11 on Investment.

60. NAFTA Article 1122 provides that "[e]ach Party consent to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement."

61. Both Mexico and the USA are parties to the ICSID Convention. Mexico expressly consented in NAFTA to submit to arbitration all investment disputes with U.S. investors related to Mexico's obligations under NAFTA. In accordance with NAFTA Article 1121.3, the Investors provide their written consent to arbitrate through the filing of this RFA.

62. Therefore, both Mexico and the Investors have expressed their consent, in writing, to submit this investment dispute to arbitration under NAFTA.

4. Waiver:

63. NAFTA Article 1121 provides the following:

> Article 1121: Conditions Precedent to Submission of a Claim to Arbitration
> 1. A disputing investor may submit a claim under Article 1116 to arbitration only if:
> . . .
> (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
>
> 2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:
> . . .
> (b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117,

> except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

64. Pursuant to NAFTA Article 1121, the Investors and Gas Conditioning waive their right to initiate or continue before any administrative tribunal or court under the law of any Party to the NAFTA, or other dispute settlement procedures, any proceedings with respect to the measures that the Investors allege to be a breach of Articles 1116 or 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of Mexico. The Investors and Gas Conditioning have executed these waivers, attached as **Exhibit C-2**.[23]

65. The Investors acknowledge that there exist two amparos challenging the January 31, 2022 Labor Award not yet judicially decided before the First Collegiate Court on Labor Matters of the Tenth Circuit: 721/2022 filed by Gas Conditioning, and 722/2022 filed by Exterran Energy USA and the other defendants. However, both amparos fall within the exception "for proceedings for injunctive, declaratory or other extraordinary relief not involving the payment of damages before an administrative tribunal or court under the law of the disputing Party."

5. More than ninety days have elapsed since the filing of the Notice of Intent to Submit a Claim to Arbitration, and Consultations have occurred:

66. NAFTA Article 1119 provides that "[t]he disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted." On February 28, 2023, the Investors served a formal Notice of Intent to Submit a Claim to Arbitration ("NOI") to Mexico.[24] The Investors have thus timely submitted this RFA in accordance with NAFTA Article 1119.

67. NAFTA Article 1118 provides that "[t]he disputing parties should first attempt to settle a claim through consultation or negotiation." Through the NOI, the Investors pursued amicable resolution with Mexico. The Investors and Mexico held an in-person meeting in Mexico City, Mexico on April 27, 2023 to seek to amicably resolve this dispute through consultations. Regrettably, Mexico has refused to acknowledge its NAFTA breaches and to pay compensation, or otherwise take steps to resolve this matter. More than ninety days have passed since the Investors served the NOI, and the dispute remains unresolved.

6. More than six months have elapsed since the events giving rise to the dispute:

68. NAFTA Article 1120 provides that an investor may submit a claim to arbitration "provided that six months have elapsed since the events giving rise to a claim." The events that gave rise to the claim commenced on January 31, 2022 when the Board rendered its Labor Award (which was served on the Respondent on February 23, 2022). Consequently, more than six months have elapsed since the events giving rise to the dispute. The Investors have thus timely submitted this RFA in accordance with NAFTA Article 1120.

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23 See **Exhibit C-2**, Consent and Waiver by the Investors and Gas Conditioning.

24 *See* **Exhibit C-1**, Notice of Intent dated February 28, 2023.

7. The three-year limitation period has not elapsed:

69. NAFTA Article 1116 provides that "[a]n investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."

70. As discussed above, the Labor Award giving rise to this dispute was notified to the Respondent on February 23, 2022. The three-year limitation period has not elapsed. The Investors have thus timely submitted this RFA in accordance with NAFTA Article 1116.

C. The Investors Meet the ICSID Convention Jurisdictional Requirements:

71. Article 25(1) of the ICSID Convention states:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

72. There are four elements to jurisdiction under ICSID Convention Article 25(1): (1) the arbitration must be between a Contracting State and a national of another Contracting State; (2) there must exist a legal dispute; (3) the legal dispute must arise directly out of an investment; and (4) the Contracting State and the investor must have consented in writing to ICSID arbitration.

1. The arbitration is between a Contracting State and a national of another Contracting State:

73. The present arbitration is between Mexico, an ICSID Contracting State, and the Investors that are nationals of the USA, which is also another ICSID Contracting State.

2. There exists a legal dispute:

74. The Investors have a legal dispute. As addressed throughout this RFA, the Investors dispute the Labor Award and the related actions and inactions of the Board and the judiciary, which are unlawful under NAFTA. Mexico and the Investors have not resolved the dispute through consultations. Thus, a legal dispute exists.

3. The legal dispute arises directly out of an investment:

75. The legal dispute arises directly out of the Investors' investments in Mexico within the meaning of ICSID Convention Article 25(1). The Investors' investments are described in Section IV.B, above. The Investors' investments in Gas Conditioning and Gas Conditioning's operation have been

in place since 2005. The legal dispute described in this RFA directly relates to the Investors' investments in Mexico.

4. The Parties have consented to submit the dispute to ICSID:

76. The Parties have consented in writing to submit this dispute to arbitration before ICSID. As discussed above, USMCA Annex 14-C and NAFTA Article 1122 contain Mexico's consent in writing to submit investment disputes to ICSID arbitration. The Investors consent to arbitration in this RFA.[25]

5. The Investors have complied with other procedural requirements:

77. The Investors have taken all internal actions necessary to authorize this RFA, in accordance with ICSID Institution Rule 2(1)(f).[26]

78. The Investors confirm that they have paid the US$25,000 filing fee to ICSID required under Regulation 16 of the ICSID Administrative Financial Regulations. A copy of the wire transfer information is attached as an exhibit to this RFA.[27]

79. Accordingly, all procedural requirements under ICSID Convention and the ICSID Institution Rules are fulfilled.

V. Mexico Breached NAFTA:

80. The actions and inactions of the Board and the Mexican courts breach Mexico's obligations under NAFTA. Specifically, Mexico violated NAFTA Articles 1105, 1110, 1102, and 1103.

A. The Actions and Inactions of the Board and the Mexican Courts, Including the Labor Award, Are Attributable to Mexico under NAFTA and International Law:

81. Under NAFTA Article 105, Mexico agreed to ensure to take all necessary measures to give effect to NAFTA's provisions, including actions taken by state and provincial governments. NAFTA Article 201(2) provides that references to states or provinces include local governments of that state or province. NAFTA thus expressly provides that Mexico is responsible for the actions of Mexico's state and local governments. This includes the actions and inactions of the Board and the Mexican courts.

82. Further, Article 4 of the International Law Commission's Article on State Responsibility provides that "[t]he conduct of any State organ shall be considered an act of that State under international law."[28] Accordingly, Mexico is also responsible under international law for the actions and inactions of the Board and the Mexican courts.

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25 See **Exhibit C-2**, Consent and Waiver by the Investors and Gas Conditioning.

26 See **Exhibit C-3**, Investors' authorization of the Request for Arbitration.

27 *See* **Exhibit C-10**, Wire transfer information.

28 *See* **Exhibit CL-6**, International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 4(1).

B. Mexico Did Not Afford the Investors Fair and Equitable Treatment nor Full Protection and Security:

83. NAFTA Article 1105 states that Mexico "shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

84. This fair and equitable treatment ("FET") standard of protection includes, for example, the prohibition of denials of justice, the guarantee of procedural propriety and due process, the prohibition of arbitrary and inconsistent measures, the prohibition of discriminatory measures, the requirement of transparency, the duty to safeguard legitimate expectations, and the requirement to act in good faith.

85. For the reasons addressed in Section III, above, the Board's Labor Award and its related procedures breach the FET standard. The Board's actions amount to a denial of justice, including through procedural defects and irrational and abusive outcomes. The Board acted arbitrarily and inconsistently, by directly contradicting its prior interlocutory decision and multiplying the magnitude of the Labor Award without reason or logic. The Board acted discriminatorily, by singling out U.S. companies and their Mexican subsidiary through an unprecedented Labor Award. The Board's processes and actions in this case lack transparency, including conducting several years of legal proceedings without offering any reasonable indication of this potential result, and then issuing a Labor Award many times greater than the amounts claimed by the Plaintiff or otherwise supported by evidence. The Board's actions are also in clear violation of the principle of res judicata. The Board and Mexico have frustrated the Investors' legitimate expectations, by violating Mexican labor law and all reasonable labor standards, thereby impeding or preventing the Investors to continue their course of business, including through their investments in Gas Conditioning. These harmful acts are contrary to good faith—indeed, amounting to bad faith.

86. Additionally, the standard of full protection and security ("FPS") requires the State to enforce its laws in a manner reasonably expected under the circumstances to protect covered investments; it is a standard of due diligence. Mexico's actions withdrew and withheld legal protections from the Investors' investment, in violation of its obligation to provide FPS under NAFTA.

C. Mexico Expropriated the Investors' Investment Without Compensation:

87. Under NAFTA Article 1110, Mexico agreed not to expropriate: (i) without public purpose, (ii) on a non-discriminatory basis, (iii) in accordance with due process of law, and (iv) without compensation.

88. Mexico breached its obligation under NAFTA Article 1110 by indirectly expropriating the Investors' investments, or committing acts tantamount to an expropriation, without any public purpose, discriminatorily, without due process or just or fair cause, and without compensation. The Labor Award erases the entire value of the Investors' investment in Mexico.

D. Mexico Discriminated Against the Investors:

89. NAFTA Article 1102 provides that Mexico must treat foreign investors and investments no less favorably than its own national investors and investments:

> Article 1102: National Treatment
> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

90. NAFTA Article 1103 provides that Mexico must treat foreign investors and investments no less favorably than investors of other countries and their investments:

> Article 1103: Most-Favored-Nation Treatment
> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

91. Mexico breached its obligations by treating the Investors and their investments less favorably than any Mexican or third country investors and their investments in like circumstances. Mexican labor boards, including the Board, have adjudicated other labor disputes and issued other labor awards that are fair, reasonable, proportionate, and lawful, including in cases involving very similar claims brought against Mexican nationals and third country nationals. Consequently, the Investors and their investments received treatment less favorable than that afforded to Mexican nationals and third country nationals and their investments in like circumstances. As such, Mexico violated the National Treatment standard included in NAFTA Article 1102 and the Most-Favored-Nation standard included in NAFTA Article 1103.

92. The Investors also reserve their right to invoke NAFTA Article 1103, to the extent that Mexico has treated investors of other countries and their investments more favorably under other investment treaties than Mexico treats U.S. investors and their investments under NAFTA.

VI. Relief Requested:

93. NAFTA Articles 1116 and 1117 permit the Investors to seek monetary damages based on claims that the Investors and/or Gas Conditioning have suffered "loss or damage by reason of, or arising out of" Mexico's breach(es) of NAFTA Chapter 11.

94. Mexico's breaches of NAFTA Chapter 11 have caused substantial damages to the Investors. These damages include, without limitation: (i) compensatory damages; (ii) lost profits; (iii) lost business opportunities; and (iv) incidental damages.

95. The Board's Labor Award imposes a liability of approximately US$120 million. The Investors' and Gas Conditionings' participation in the Board's legal and administrative proceedings and related court proceedings also involved significant costs to the Investors and Gas Conditioning, including but not limited to the costs of the dispute and related legal actions. The Investors thus request an award of damages in an amount of at least US$120 million, exclusive of interest, costs, and fees.

96. The Investors reserve the right to adjust the relief requested during the course of the arbitration.

VII. Procedural Matters:

A. Arbitrator:

97. Article 37(2)(a) of the ICSID Convention states: "The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree." The NAFTA Parties agreed to arbitrator appointment in NAFTA Article 1123, which states: " . . . the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties."

98. Under NAFTA Article 1123 and in accordance with Rule 5(1) of the ICSID Arbitration Rules, the Investors hereby notify the Secretary-General of their designation of Prof. Dr. Stephan Schill, a national of Germany, as their party-appointed arbitrator, and ask that the Secretary-General proceed to formally confirm his acceptance in accordance with Rule 5(2) of the ICSID Arbitration Rules. Prof. Dr. Schill's contact details are as follows:

Prof. Dr. Stephan Schill
Max Planck Institute for Comparative Public Law and International Law
Im Neuenheimer Feld 535
69120 Heidelberg
Germany
S.W.B.Schill@uva.nl

B. Place of the Arbitration Proceeding:

99. NAFTA Article 1130 provides that: "Unless the Parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a Party that is a party to the New York Convention, selected in accordance with . . . the ICSID Convention . . . ."

100. Under ICSID Convention Article 62, "arbitration proceedings shall be held at the seat of the Centre" which is Washington D.C., USA.

C. Language of the Arbitration:

101. NAFTA does not prescribe the language of the arbitration. Under ICSID Arbitration Rule 7, the Investors propose that English be used as the procedural language of the arbitration.

D. Registration:

102. The Investors respectfully request that the Secretary-General (a) acknowledge receipt of this RFA, (b) register this RFA as soon as possible, and (c) notify the parties to this dispute of the registration as soon as possible, in accordance with ICSID Institution Rule 6(1).

VIII. Reservation of Rights:

103. The Investors reserve the right to seek interim or conservatory measures at the appropriate time or as necessary. The Investors also reserve the right to alter, amend, and/or supplement their claims during the arbitration, and to submit any facts, pleadings, arguments, damages, claims, exhibits, and evidence as needed.

IX. Request for Relief:

104. Based on the above, without limitation, and fully reserving their rights to supplement this RFA, Investors respectfully request that the Tribunal:

a. DECLARE that it has jurisdiction to decide this dispute;

b. DECLARE that Mexico breached NAFTA Articles 1105, 1110, 1102, and 1103;

c. ORDER Mexico to compensate the Investors for all of the Investors' and Gas Conditioning's losses resulting from Mexico's breaches of NAFTA and international law, in an amount to be determined at a later stage in these proceedings, such compensation to be paid without delay, be effectively realizable and be freely transferable, and bear (pre and post award) interest at a compound rate sufficient fully to compensate the Investors for the loss of the use of this capital as from the date of Mexico's NAFTA breaches;

d. DECLARE that: (i) the award of damages and interest (ii) be made net of all Mexico's taxes and (iii) Mexico may not deduct taxes in respect of the payment of the award of damages and interest;

e. AWARD such other relief as the Tribunal considers appropriate; and

f. ORDER Mexico to pay all of the costs of the proceeding.

Yours faithfully,

Hogan Lovells, BSTL, S.C. and Hogan Lovells US LLP

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