

ICSID CASE No. UNCT/18/5

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN
ACCORDANCE WITH THE AGREEMENT BETWEEN THE GOVERNMENT OF THE
UNITED MEXICAN STATES AND THE GOVERNMENT OF THE REPUBLIC OF
SINGAPORE ON THE PROMOTION AND RECIPROCAL PROTECTION OF
INVESTMENTS

AND

UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW 2010

B E T W E E N:

PACC OFFSHORE SERVICES HOLDINGS LTD

Claimant

-and-

THE UNITED MEXICAN STATES

Respondent

CLAIMANT'S REPLY

February 12, 2020

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TABLE OF CONTENTS

I.	INTRODUCTION.....	8
II.	EXECUTIVE SUMMARY	9
III.	POSH’S DECISION TO INVEST IN MEXICO (2011).....	13
	A. PEMEX WAS IN NEED OF FOREIGN VESSELS	13
	B. POSH CONDUCTED APPROPRIATE DUE DILIGENCE BEFORE INVESTING IN MEXICO..	15
	1. POSH conducted appropriate due diligence on the Mexican market	16
	2. POSH conducted appropriate due diligence on Mexican operators	18
	3. POSH conducted appropriate due diligence on OSA	21
	(a) OSA was PEMEX’s largest contractor and the largest offshore marine services company in Latin America.....	22
	(b) OSA presented significant competitive advantages over its Mexican competitors.....	26
IV.	POSH’S INVESTMENT IN MEXICO (2011–2013)	33
	A. THE PURPOSE OF THE INVESTMENT WAS TO SERVE PEMEX	34
	B. POSH AND GOSH COMPLIED WITH MEXICAN LAW	34
	C. THE LOAN, THE TRUST AND THE AGREEMENT WITH OSA.....	38
V.	POSH’S OPERATIONS AND ECONOMIC PROSPECTS IN MEXICO (2013)....	46
	A. OSA’S FINANCES AND FUTURE PROSPECTS WERE SOLID	47
	B. POSH’S FUTURE PROSPECTS WERE SOLID	53
	1. POSH’s projections showed continued growth	53
	(a) PosH had legitimate expectations that the existing contracts would be renewed or new contracts would be awarded by PEMEX.....	54
	(b) It was reasonable to expect that POSH’s operations with OSA would continue to grow	55
	2. It was reasonable to expect that new contracts would be awarded to OSA through PEMEX’s public procurement processes	59
VI.	MEXICO’S UNSUBSTANTIATED ACCUSATIONS AGAINST OSA.....	64
VII.	THE GOVERNMENT’S CAMPAIGN AGAINST OSA	70
	A. MEXICO’S POLITICAL MOTIVATION FOR THE MEASURES	71
	B. MEXICO UNLAWFULLY SANCTIONED OSA.....	74

C.	THE UNLAWFUL SANCTION PROMPTED THE SUSPENSION OF OSA’S FACTORING FACILITY	77
VIII.	THE CRIMINAL PROCEEDINGS AGAINST OSA	79
A.	MEXICO LAUNCHED AN ARBITRARY AND UNSUPPORTED INVESTIGATION FOR MONEY LAUNDERING AND FRAUD.....	80
B.	MEXICO ARBITRARILY AND UNLAWFULLY SEIZED AND TOOK FULL CONTROL OF OSA	86
1.	The Seizure Order was the most extreme precautionary measure available in the Mexican criminal system, and had never before been ordered in Mexican history	87
2.	The Seizure Order was adopted [REDACTED]	88
3.	The Seizure Order was contrary to Mexican Law	90
(a)	A seizure order must be appropriate, pertinent, sufficient, and indispensable.....	90
(b)	In this case, the Seizure Order was not appropriate, pertinent, sufficient and indispensable	91
4.	The PGR recklessly rushed to act before it had any time to assess whether there was any factual or legal basis for its measures	96
5.	The Seizure Order was excessive and disproportionate	98
6.	The Seizure Order had catastrophic consequences for POSH’s Investment	100
C.	MEXICO APPOINTED A PRESIDENTIAL INSIDER AS OSA’S ADMINISTRATOR.....	101
D.	MEXICO UNLAWFULLY AND ARBITRARILY DETAINED THE 10 VESSELS OWNED BY POSH’S SUBSIDIARIES	102
1.	POSH cooperated despite the unlawful Detention Order, and withdrew its vessels only because Mexico refused to pay for their services.....	103
2.	The detention of the vessels was unlawful, unreasonable and disproportionate	106
E.	THE TERMS OF THE LIFTING OF THE SEIZURE AGAIN CONFIRM THAT THE SEIZURE ORDER AND ITS EXTENSION RESTED ON IMPROPER LEGAL GROUNDS	109
F.	MEXICO INITIATED SEVERAL OTHER UNSUPPORTED CRIMINAL INVESTIGATIONS AGAINST OSA’S SHAREHOLDERS FOR FINANCIAL FRAUD.....	111
IX.	THE INSOLVENCY PROCEEDING	112
A.	MEXICO ORDERED THAT OSA SUSPEND WORK FOR PEMEX AND BLOCKED ALL PAYMENTS TO THE SUBSIDIARIES.....	112

B.	THE UNLAWFUL SANCTION WAS THE PROXIMATE CAUSE OF THE INSOLVENCY ...	113
C.	SAE SOUGHT AND OBTAINED THE DIVERSION ORDER	117
D.	THE DIVERSION ORDER WAS UNLAWFUL, ARBITRARY AND DISPROPORTIONATE ..	119
	1. The Diversion Order violated POSH’s legitimate rights, and created a judicial exception to <i>pacta sunt servanda</i> that is prohibited by law.....	119
	2. The Diversion Order violated POSH and the Subsidiaries’ due process rights	122
	3. The Diversion Order unlawfully authorized the transfer of OSA’s resources to the Government	123
	4. The Diversion Order violated the public authorities’ constitutional duty to state the reasons for their decisions	125
E.	THE AMPARO DECISION ISSUED BY MEXICO’S OWN COURTS CONFIRMED THAT THE DIVERSION ORDER WAS UNLAWFUL, ARBITRARY AND DISPROPORTIONATE	126
	1. The Amparo Decision confirmed the unlawfulness of the Diversion Order	126
	2. The Revision Decision then wrongfully deprived POSH and the Subsidiaries of standing to challenge the Diversion Order.....	129
F.	THE ISOLATED DECISION REPRESENTS AN UNLAWFUL <i>EX-POST</i> ATTEMPT TO JUSTIFY THE UNLAWFUL DIVERSION ORDER	130
	1. The Isolated Decision is not a binding precedent, is not the applicable law in Mexico, and has been contradicted by a subsequent decision.....	131
	2. The Isolated Decision is contrary to Mexican Law	133
	(a) The Insolvency Court never relied on the argument that the two contracts for the assignment of rights that fell within the Clawback Period were ineffective; the argument was entirely an invention of the 3rd Collegiate Court.....	133
	(b) The Insolvency Court never extended the Clawback Period up to three years prior to the declaration of insolvency.....	135
	(c) The validity and enforceability of the Irrevocable Trust and the Assignment of rights do not automatically become ineffective as a result of the declaration of insolvency	136
	(d) The Isolated Decision does not even attempt to set out a legal basis for directing payments to the government’s bank account	138
G.	MEXICO ARBITRARILY PREVENTED PEMEX FROM RESCINDING THE CONTRACTS WITH OSA AND REPLACING THEM WITH NEW CONTRACTS WITH THE SUBSIDIARIES	139

H.	SAE OPERATED UNDER A CONFLICT OF INTEREST, APPROPRIATED OSA’S FUNDS, ACTED IN A NON-TRANSPARENT MANNER, AND IMPROPERLY FORCED OSA TO RELEASE SAE FROM ALL LIABILITY	143
I.	FURTHER MITIGATION OF DAMAGES	148
J.	LOAN DEFAULT AND SALE OF THE VESSELS.....	153
X.	CONCLUSION ON THE EVENTS OF THE CASE	155
XI.	THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE	158
A.	MEXICO HAS NOT MET THE BURDEN OF PROVING ITS OBJECTIONS TO JURISDICTION AND ADMISSIBILITY	158
B.	THE TRIBUNAL HAS JURISDICTION <i>RATIONE PERSONAE</i> AND <i>RATIONE MATERIAE</i>	160
1.	Mexico’s objections based on POSH’s ownership and control are groundless	161
(a)	The Treaty does not require majority ownership of the Subsidiaries. POSH owned or controlled the Subsidiaries at all times	161
(b)	POSH’s de facto control over the Subsidiaries did not violate Mexican law	164
(c)	POSH’s Investment comprises, <i>inter alia</i> , equity and debt	166
2.	Mexico’s objection based on a purported “proximate causation requirement” necessarily fails.....	167
(a)	The Tribunal’s jurisdiction under the Treaty is not subject to a “proximate causation requirement”	168
(b)	Even if the Tribunal’s jurisdiction were subject to a “proximate causation requirement,” the requirement would be satisfied here	173
C.	THE TRIBUNAL HAS JURISDICTION <i>RATIONE TEMPORIS</i>	176
1.	The statute of limitation included in article 11(8) of the treaty is an admissibility, not a jurisdictional, requirement.....	177
2.	Mexico’s measures constituted a composite act	179
3.	POSH did not have actual or constructive knowledge of both breach and injury prior to May 4, 2014.....	184
XII.	MEXICO BREACHED ITS OBLIGATIONS UNDER THE TREATY AND INTERNATIONAL LAW.....	187
A.	THE MEASURES ARE ATTRIBUTABLE TO MEXICO, CONSTITUTED A COMPOSITE ACT, AND RESULTED IN DIFFERENT VIOLATIONS OF THE TREATY.....	188

B.	MEXICO EXPROPRIATED THE INVESTMENT MADE BY POSH AND ITS SUBSIDIARIES	189
1.	Observations regarding the legal standard.....	190
(a)	Expropriation can be effected through measures issued by any State organ, including a judicial organ	190
(b)	Expropriation may be effected indirectly and incrementally.....	197
2.	Mexico has expropriated the investment made by POSH and the Subsidiaries.....	200
(a)	Mexico directly expropriated amounts owed to POSH under the Irrevocable Trust.....	201
(c)	Mexico indirectly expropriated the rest of POSH’s Investment.	204
3.	Mexico’s expropriation was unlawful	208
C.	MEXICO TREATED POSH’S AND ITS SUBSIDIARIES UNFAIRLY AND INEQUITABLY, AND IMPAIRED THEM THROUGH UNREASONABLE AND ARBITRARY MEASURES	209
1.	Observations regarding the legal standard.....	209
(a)	The standard has evolved over time.....	209
(b)	The standard comprises several elements	214
(i)	Safeguarding legitimate expectations	215
(ii)	Other elements of the standard.....	217
2.	Mexico breached the fair and equitable treatment standard	221
D.	MEXICO FAILED TO PROVIDE FULL PROTECTION AND SECURITY TO POSH’S INVESTMENT	229
1.	Observations regarding the standard.....	230
2.	Mexico violated the obligation to provide full protection and security..	232
XIII.	CLAIMANT HAS PROVEN MEXICO’S BREACHES DESTROYED THE INVESTMENT.....	234
A.	THE CAUSATION STANDARD.....	235
B.	MEXICO CAUSED CLAIMANT’S INJURIES.....	236
1.	The Measures caused the destruction of POSH’s Investment	237
2.	Prior to this arbitration, Mexico acknowledged that the Unlawful Sanction was the proximate cause of OSA’s insolvency.....	241
3.	OSA was a viable company and had solid prospects for the future.....	245
C.	MEXICO’S THEORIES FOR THE REDUCTION OF DAMAGES ARE INAPPOSITE.....	248
1.	Assumption of risk and contributory negligence	248
(a)	The legal standards	249

(b)	Claimant adequately assessed the risks of its Investment and Claimant’s losses are attributable to the Measures, not to an alleged lack of due diligence on OSA.....	250
2.	Mitigation of damages	254
(a)	The legal standard.....	254
(b)	Claimant took reasonable steps to mitigate its damages.....	255
XIV.	CLAIMANT HAS PROVEN THE DAMAGES ATTRIBUTABLE TO MEXICO’S BREACHES OF THE TREATY	257
A.	THE BURDEN AND STANDARD OF PROOF FOR DAMAGES	258
1.	The burden of proof for damages.....	258
2.	The standard of proof for damages	259
B.	CLAIMANT’S UPDATED CALCULATION OF DAMAGES	260
C.	MEXICO’S OBJECTIONS TO CLAIMANT’S DAMAGES ARE GROUNDESS	261
1.	Historical losses	262
(a)	Amounts owed for work performed and invoiced	262
(b)	Charter hire for the detention period.....	263
(c)	Demobilization fees and repair costs	264
(d)	Updated historical losses.....	265
2.	The lost value of Claimant’s Investment	265
(a)	The Cornerstone Report reflects methodological errors that invalidate its conclusions	265
(b)	Contract Renewal.....	267
(c)	Utilization rates.....	269
(d)	Day rates	271
(e)	Operating costs.....	272
(f)	Depreciation	273
(g)	GOSH’s Discount Rate	273
3.	Pre-award interest	275
4.	Conclusion	277
XV.	REQUEST FOR RELIEF	278

I. INTRODUCTION

1. Pursuant to Annex 1 of Procedural Order No. 1 dated November 28, 2018, as amended by the Tribunal's directions of December 24, 2019, Claimant submits its Reply with accompanying exhibits, legal authorities, witness statements and expert reports.

2. Claimant's submission is accompanied by factual exhibits numbered sequentially C-247 to C-357 and legal authorities numbered sequentially CL-162 to CL-216. The submission is further supported by one statement from a witnesses with personal knowledge of the relevant events that culminated in the destruction of the investment made by Claimant and its subsidiaries in Mexico, and four expert reports, namely:

- i. the Second Witness Statement of José Luis Montalvo Sánchez Mejorada, CEO of Inversiones Costa Afuera, S.A. de C.V.;¹
- ii. the Second Expert Legal Opinion of Diego Ruiz Durán on Mexican criminal law;²
- iii. the Second Expert Legal Opinion of Luis Manuel C. Meján Carrer on Mexican insolvency law;³
- iv. the Second Expert Industry Report of Jean Richards of Quantum Shipping Services Ltd., on the offshore oil and gas supply industry;⁴ and
- v. the Second Expert Valuation Report of Kiran Sequeira and Garret Rush of Versant Partners, on the valuation of the assets and business lost by Claimant as a result of Mexico's Treaty violations.⁵

¹ Second Witness Statement by José Luis Montalvo Sánchez Mejorada dated 12 February 2020 (**Second Witness Statement by José Luis Montalvo**).

² Second Expert Legal Opinion on Mexican Criminal Law by Diego Ruiz Durán dated 12 February 2020 (**Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán**).

³ Second Expert Legal Opinion on Mexican Insolvency Law by Luis Manuel C. Meján Carrer dated 12 February 2020 (**Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján**).

⁴ Second Expert Report on the Offshore Maritime Industry by Jean Richards dated 12 February 2020 (**Second Expert Industry Report by Jean Richards**).

⁵ Second Expert Report on Damages by Versant Partners dated 12 February 2020 (**Second Expert Damages Report by Versant**).

II. EXECUTIVE SUMMARY

3. This case arises from a politically-motivated “hunt”⁶ carried out by the Mexican Peña Nieto Administration—in the words of several Mexican Senators—“against [Oceanografía] the company [that had been] spoiled by [PEMEX] during the Calderón [administration],”⁷ which was an act of “revenge against the PAN”⁸ political party. Mexico aggressively deployed the full powers of the State, from public procurement sanctions to criminal investigations to insolvency proceedings to asset seizures and diversion orders, and did so in a rushed and haphazard manner that further highlights the political motivations behind its campaign against Oceanografía, S. A. de C.V. (OSA), Claimant’s joint venturer, without regards to the rights of investors under international law.

4. Mexico’s campaign included, *inter alia*, the following: Mexico issued an unlawful public procurement sanction banning OSA from entering into any public contract with PEMEX (which represented 97% of OSA’s income); Mexico launched unsupported criminal investigations against OSA and its shareholders (that have resulted in *no convictions to date*, six years later), and *fabricated evidence* to support its actions in those investigations (a witness later declared under oath that he had been abducted by the authorities, deprived of food and water, and forced to sign a false statement in support of the government’s actions); *in less than 24 hours* from the commencement of the investigation, Mexico seized OSA and all of its assets, *a measure never before adopted in Mexican history*; Mexico drove OSA into insolvency, suspended payments to OSA’s creditors and diverted payments owed by PEMEX to a trust, in which Claimant was the beneficiary, to the government’s bank account instead; Mexico deprived Claimant of the ability to challenge this unlawful diversion order; Mexico mis-appropriated millions that were owed by PEMEX to OSA’s creditors, including to Claimant; and finally Mexico prevented Claimant and its subsidiaries from contracting directly with PEMEX for services they were previously rendering via OSA. These actions were excessive, unreasonable, arbitrary and/or unlawful, and resulted not

⁶ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 12.

⁷ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**.

⁸ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 4, 12.

only in OSA's demise but also, directly and foreseeably, in the complete destruction of Claimant's investment.

5. In light of these serious accusations, one would expect Mexico to have produced with the Statement of Defense a panoply of documents purporting to demonstrate the basis and propriety of Mexico's actions. Mexico did no such thing. It did not voluntarily produce a single piece of contemporaneous evidence explaining the bases for its actions. Upon the Tribunal's order, however, Mexico was forced to exhibit to Claimant certain—very few—documents from the criminal proceedings against OSA. Claimant's review of those documents suggests why Mexico worked so hard to withhold them: the documents confirm the unlawfulness and the unsupported nature of the criminal investigation that enabled Mexico to directly seize control of OSA.

6. While it has not provided contemporaneous documents to try to justify its actions, Mexico did attempt an assortment of other lines of defense in its Statement of Defense, not only with respect to the criminal investigations, but as to all of its other measures as well. Those attempted defenses fail, because they lack evidentiary support or worse yet are contradicted by the evidence on the record. Their defects are numerous:

7. *First*, Mexico tries to put distance between itself (in the form of PEMEX) and Claimant (POSH), by insisting that POSH had a contractual relationship only with OSA, not with PEMEX and the Mexican State.⁹ Any such distance is artificial, however, because Mexico does not dispute that POSH's decision to invest in Mexico relied on PEMEX's expansion plans and its need for additional, modern vessels to support them, and that POSH's plan and purpose was to serve PEMEX, the State-controlled sole oil and gas producer in Mexico and the ultimate client for all offshore operations in Mexico's waters. Moreover, there is no real question that Mexico's Measures had a fatal impact on POSH and the Subsidiaries, culminating in the destruction of their investment.

8. *Second*, Mexico baldly claims that POSH did not conduct adequate due diligence prior to effecting its investment in Mexico, trying to suggest that POSH should have known better than to do business with OSA. Mexico makes that claim speculatively, without citing any evidence

⁹ Statement of Defense, para. 43.

to back it up. Furthermore, the claim is incorrect. The record shows, instead, that POSH conducted appropriate due diligence on the Mexican market, on OSA, and on several other Mexican operators with which it explored potential collaborations. POSH's due diligence showed that OSA was PEMEX's largest contractor, having secured more than 150 PEMEX contracts in the preceding 15 years that were worth in excess of USD 3.2 billion. In fact, the latter meant that Mexico itself (through PEMEX) had already repeatedly assessed and confirmed OSA's technical and financial *bona fides* for some 15 years by the time of Claimant's investment in 2011.

9. *Third*, POSH established its investment in Mexico in three phases and, by 2013, POSH had 10 vessels in Mexico directly or indirectly servicing PEMEX. Mexico claims that POSH's corporate structure violated the ownership restrictions imposed by the Mexican Foreign Investment Law (**FIL**) and that POSH did not comply with its disclosure obligations under the FIL. Neither of these allegations withstands scrutiny. As Claimant explained in the SOC with the support of a report from foreign investment and maritime law expert Dr. David Enriquez, the FIL's ownership restrictions in question simply "do not apply to POSH's Subsidiaries."¹⁰ Mexico has not produced any expert evidence to contest this conclusion, and in fact, its own documents demonstrate that POSH was in compliance with its disclosure obligations under Mexican law.

10. *Fourth*, as of the end of 2013, OSA was a viable company and had solid prospects for the future. Mexico claims the opposite, in an effort to avoid its own responsibility for OSA's demise. But Mexico does not produce a single, contemporaneous, document that would give a true and fair picture of OSA's finances or value as of the end 2013. To be sure, OSA faced occasional cash-flow strains, significantly due to PEMEX's (*i.e.* Mexico's) delays in its payments to OSA. But contemporaneous third-party valuations of OSA by Citigroup and others show that its long term viability was intact and its prospects were positive as of late 2013, valuing OSA at around USD \$3 billion and OSA's contracts at USD \$2.73 billion.

11. *Fifth*, the record shows that POSH had legitimate grounds to believe that the Mexico operation would continue to grow, and that OSA's existing contracts with PEMEX would be renewed—*i.e.*, replaced with new contracts for the same services. As explained by offshore

¹⁰ Expert Legal Opinion on Mexican Foreign Investment Law by David Enríquez (**Expert Legal Opinion on FIL by David Enríquez**), para. 34.

marine services industry expert Ms. Jean Richards, who has 45 years of experience in the sector including in Mexico, PEMEX's consistent business practices showed that it typically continued to work with known and trusted operators and owners with Mexican flag tonnage over the trading life of the vessels. Mexico's only arguments to dispute this conclusion is that OSA could have breached the contracts with OSA, that the oil and gas market suffered a cyclical downturn at the end of 2014, and that PEMEX awards its contracts through a public tender process. These arguments do not affect Ms. Richards' conclusion. Mexico is forced to focus on speculative scenarios that are inconsistent with the industry's practice and on market conditions that were not foreseeable at the valuation date (a date to which Mexico does not object).

12. *Sixth*, in an attempt to divert attention away from its own responsibility for the destruction of Claimant's investment, Mexico dedicates much of its factual discussion in the SOD to a smear campaign against OSA, claiming that OSA had "a history of irregularities that caused it to be investigated by various authorities"¹¹ and that it was not a "healthy company"¹² because it faced "a large number of legal contingencies..."¹³ Yet, Mexico does not produce *a single piece of evidence* actually showing any "irregularity" by OSA, nor can it point to any conviction of OSA or any of its directors, shareholders, or employees. Claimant addresses in this Reply each unsubstantiated accusation made by Mexico, not to defend OSA (which Claimant does not need, nor is in a position, to do), but to illustrate Mexico's "fast and loose" litigation tactics, which the Tribunal should bear in mind as it weighs the credibility of the rest of Mexico's allegations

13. *Seventh*, Mexico's act and omissions against OSA and Claimant were unlawful, unreasonable and arbitrary. The Measures, which were outlined above will be detailed in the sections that follow, were inextricably linked as part of political campaign against OSA, and they specifically targeted OSA and its business partners with, *inter alia*, three main objectives: to strain OSA's liquidity, to take control of OSA's assets and operations, and to divert OSA's resources to the government.

¹¹ Statement of Defense, para. 144.

¹² Statement of Defense, para. 182.

¹³ Statement of Defense, para. 182.

14. Mexico's acts and omissions destroyed POSH's Investment in Mexico. OSA could not contract with PEMEX; the vessels were detained for several months; POSH's Subsidiaries did not receive any payments from OSA or PEMEX but still incurred costs maintaining the vessels, paying the crews, and repaying the loans to POSH; the Subsidiaries could not contract directly with PEMEX for the services they previously rendered through OSA; and funds owed to POSH's Subsidiaries were being siphoned to the government's bank account. Because of Mexico's wrongful actions, the Subsidiaries were left with no cash flow, no commercial operations, and (for several months) not even their vessels.

15. Mexico's conduct has breached the provisions of the Treaty prohibiting expropriation without just, effective and prompt compensation, as well as the provisions requiring Mexico to afford fair and equitable treatment and full protection and security. These Treaty breaches caused direct and substantial harm to Claimant and its subsidiaries. In accordance with well-settled principles of international law, Claimant seeks full reparation for the losses resulting from Mexico's violations of the Treaty and international law, in the form of monetary compensation sufficient to wipe out the consequences of Mexico's wrongful acts.

16. This Statement of Claim is structured as follows. Section III to X describes Mexico's mischaracterization of the facts relevant to the dispute, based on contemporaneous information. Section XI discusses Mexico's fabricated objections to the Tribunal's jurisdiction and the admissibility of the claims. Section XII provides an analysis of Mexico's obligations under the Treaty and International Law, and how Mexico breached these obligations. Section XIII discusses the causal link between Mexico's measures and Claimant's damages. Section XIV discusses the damages proved by Claimant and its subsidiaries. Section XV contains Claimant's request for relief.

III. POSH'S DECISION TO INVEST IN MEXICO (2011)

A. PEMEX WAS IN NEED OF FOREIGN VESSELS

17. By 2011, PEMEX, Mexico's State-owned oil and gas company, was in need of foreign vessels to help improve its offshore operations.

18. As explained in the Statement of Claim (SOC), Mexico is the 11th largest producer of oil in the world, the 4th largest in the Western Hemisphere, and the 13th largest in net exports in the world.¹⁴ The Mexican State tightly controls the Mexican oil and gas industry, and it has assigned the exploration and extraction of oil to PEMEX, a State-owned Mexican enterprise and one of the leading oil and gas companies in the world.

19. Mexico's economy relies heavily on PEMEX's oil production: "[t]he oil sector generates approximately 15% of the country's export earnings... [and] the government relies upon earnings from the oil industry for about 30% of total government revenues; therefore, any decline in production of PEMEX has a direct effect upon the country's overall fiscal balance."¹⁵

20. In 2011, PEMEX's efforts to exploit Mexico's oil resources in the Gulf of Mexico faced capital and technical constraints. PEMEX was reported to be four years behind in the repair and maintenance program of their oil field infrastructure, which substantially impaired PEMEX's oil production.¹⁶ PEMEX's Business Plan for 2010-2014 underscored "the emergency of maintaining and increasing the current levels of production of hydrocarbons,"¹⁷ "increase[ing] the reserves of hydrocarbons... maintain[ing] and increasing production... and maintain[ing] efficiency levels."¹⁸

21. In order to accomplish these goals, "PEMEX require[d] an investment of USD\$25-30Bn per year during [the next] decade, irrespective of overall economic conditions and the oil price."¹⁹ And "[g]iven Pemex's relative inexperience in the sector, *considerable foreign*

¹⁴ U.S. Energy Information Administration, *Total Petroleum and Other Liquids Production – 2017*, retrieved from <https://www.eia.gov/beta/international/rankings/#?cy=2017> (last accessed 20 March 2019), **C-25**.

¹⁵ Vessels Acquisition Memorandum by Banco Nacional de México, S.A., June 2012, **C-251**, p. 21.

¹⁶ Lucy Miller, *Pemex looks to develop deepwater assets*, July 2011, **C-252**. According to the report, PEMEX's crude oil production had declined from a maximum of 3,400 Mbd in 2004 to 2,550 Mbd in 2011. This was mostly due to underinvestment in exploration and production. As a result and given PEMEX's strategic relevance for the country's fiscal balance, there was a pressing need to counter Mexico's oil production decline and increase production to a target of 3,000 Mbd by 2018.

¹⁷ Pemex Presentation "Petróleos Mexicanos and Subsidiary Agencies Business Plan 2010-2024", **C-253**, p. 9.

¹⁸ Pemex Presentation "Petróleos Mexicanos and Subsidiary Agencies Business Plan 2010-2024", **C-253**, p. 15.

¹⁹ Vessels Acquisition Memorandum by Banco Nacional de México, S.A., June 2012, **C-251**, p. 21.

expertise [would] likely be required, especially in key areas such as deepwater drilling, subsea hardware and floating production systems.”²⁰

22. As explained in the SOC, POSH was ideally placed to respond to PEMEX’s need for foreign expertise and capital investments. POSH was, and is, a world-leading offshore marine services provider—the largest in Asia—and its vessels are specifically designed to provide logistical support services to offshore drilling rigs, pipe laying, oil manufacturing platforms, and subsea installations used in the exploration and production activities of oil and gas projects. These were precisely the services needed by PEMEX. As a result, by 2011, POSH decided to enter the Mexican market in order to service PEMEX.

23. In the SOD, Mexico distances POSH from PEMEX, by insisting that POSH had a contractual relationship with OSA, not with PEMEX.²¹ Any such distance is artificial, however, because Mexico does not dispute that POSH’s decision to invest in Mexico relied on PEMEX’s expansion plans, and that POSH’s plan and purpose was to serve PEMEX, the State-controlled sole oil and gas producer in Mexico and the ultimate client for all offshore operations in Mexico’s waters.

B. POSH CONDUCTED APPROPRIATE DUE DILIGENCE BEFORE INVESTING IN MEXICO

24. Mexico speculates, without evidence, that POSH did not conduct adequate due diligence prior to effecting its investment in Mexico.²² The record shows that POSH did conduct appropriate due diligence on the Mexican market, on OSA, and on several other Mexican operators with which it explored potential collaborations. POSH’s key condition for choosing a Mexican partner was that it had a long-standing relationship with PEMEX, and OSA met that condition.

²⁰ Lucy Miller, *Pemex looks to develop deepwater assets*, July 2011, **C-252** (emphasis added).

²¹ Statement of Defense, para. 43.

²² Statement of Defense, para. 655.

1. POSH conducted appropriate due diligence on the Mexican market

25. In early 2011, POSH prepared a comprehensive study on the Mexican offshore market assessing viable alternatives to establish operations supporting PEMEX (the **Market Analysis**).²³

26. The Market Analysis highlighted PEMEX’s “plans to increase production in the [following] two years” and the “increasing demand in the [jack up] and floaters market.”²⁴ On that basis, POSH’s initial plan was to lease vessels directly to PEMEX for three to five-year terms,²⁵ with the expectation, based on PEMEX’s consistent business practices,²⁶ that PEMEX would award subsequent leases and continue the collaboration once POSH had established itself as a reliable service provider.²⁷

27. The Market Analysis revealed, however, that “[o]nly a Mexican Shipping Entity c[ould] sign direct contracts with PEMEX” and that “[f]oreign players will have to sign a ‘back-to-back’ [charter] with a local company, with the necessary shipping license and [that is] ‘pre-qualified’ by PEMEX.”²⁸ As a result, “most international players who wish to grow their presence in this market, have tied up with other local players, to market and operate their vessels under the Mexican flag.”²⁹

28. The Market Analysis was clear that, to successfully participate in PEMEX tenders and make a long-term investment in the Mexican offshore sector, POSH needed to partner with a Mexican company that already had an established relationship with the State-owned company. The driving motivation for this partnership was to do business with PEMEX, which was—and still

²³ Presentation “POSH – Overview of the Market – Opportunity for POSH”, C-208.

²⁴ Presentation “POSH – Overview of the Market – Opportunity for POSH”, C-208, pp. 3-4.

²⁵ Email from L. Keng-Lin to D. Tay *et al.*, March 8, 2011, C-30; Email from G. Seow to W. Long Peng, June 27, 2011, C-254.

²⁶ Second Expert Industry Report by Jean Richards, para. 6.1.

²⁷ Email from L. Keng-Lin to D. Tay *et al.*, March 8, 2011, C-30; Witness Statement by Gerald Seow, p. 2-3.

²⁸ Presentation “POSH – Overview of the Market – Opportunity for POSH”, C-208, p. 5.

²⁹ Presentation “POSH – Overview of the Market – Opportunity for POSH”, C-208, p. 6.

is—the only oil and gas producer, and the ultimate client of all marine offshore operations, in Mexico. As memorialized by POSH in a contemporaneous email:

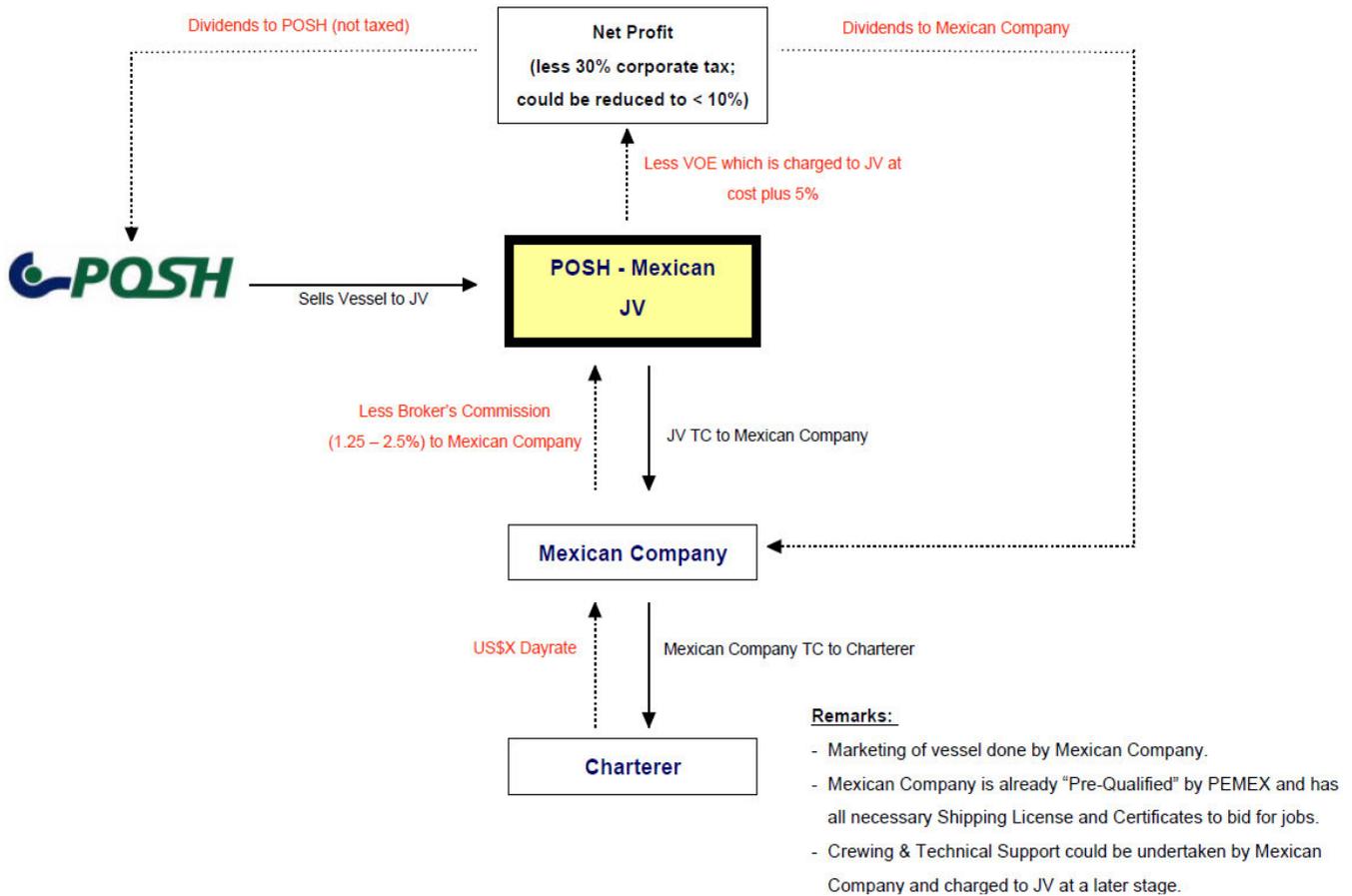
We recognize the complexities of dealing directly with PEMEX, and the need to work with a reputable and established Mexican partner who are well connected to PEMEX and the overall Mexican offshore market.³⁰

29. In light of this Market Analysis, POSH developed the following business model: POSH would incorporate a Mexican joint-venture (**JV**) with a Mexican partner that had a long-standing relationship with PEMEX and was pre-qualified for PEMEX tenders; the JV would then acquire offshore services vessels (**OSV**); and it would charter them to the Mexican business partner, which would in turn charter them to PEMEX. This model, under which POSH proceeded, was graphically outlined at the time, as follows:³¹

³⁰ E-mail from G. Seow to ██████████ *et al.*, May 20, 2011, **C-255**.

³¹ Presentation “POSH – Overview of the Market – Opportunity for POSH”, **C-208**, p. 11.

Proposed Working Model in Mexico



2. POSH conducted appropriate due diligence on Mexican operators

30. POSH also conducted appropriate research on potential candidates with which it could collaborate in Mexico. Initially, POSH’s Market Analysis focused on three major Mexican operators: [REDACTED]

31. [REDACTED] had been founded “[REDACTED] and operate[d] in the Gulf of Mexico and in the Pacific.”³² It had “corporate offices in Mexico City,”³³ and it was the “[o]nly Mexican shipping company that buil[t] offshore boats in México.”³⁴ [REDACTED] main business lines

³² Presentation “POSH – Overview of the Market – Opportunity for POSH”, C-208, p. 13.

³³ Presentation “POSH – Overview of the Market – Opportunity for POSH”, C-208, p. 13.

³⁴ Presentation “POSH – Overview of the Market – Opportunity for POSH”, C-208, p. 13.

were “Maritime Operations, Offshore Services, Oil & Gas Industry Solutions [and] Procurement Services.”³⁵

32. ██████ was “[a] privately owned company [that] was founded ██████ with some 135 employees.”³⁶ According to the Market Analysis, ██████ “[f]ully complie[d] with all certifications required by Mexican Authorities to operate vessels in Mexico and [was] prequalified under [the] new Pemex Law and bidding rules to participate in Pemex tenders.”³⁷ ██████ however, was already involved in two other joint-ventures—with ██████ (a POSH competitor from the United States) in Mexico, and with Brazil Supply in Brazil.³⁸

33. ██████ had been incorporated in ██████ and was listed on the Mexican and New York stock exchange.³⁹ It was “one of the largest integrated logistics and transportation companies in Mexico” with three main business divisions: shipping operations and maritime (65%), logistics and inland operations (27%), and ports and terminals (8%).⁴⁰ ██████ however, had suffered losses of USD\$80.8 million in 2010, and was already down USD\$41.9 million in the first quarter of 2011.⁴¹ The “[l]osses [we]re mainly attributed to huge financing cost[s] (total net debt was US\$775.1M as of Mar-11) and exchange losses (appreciation of peso vs US\$).”⁴²

34. In early 2011, POSH engaged in discussions and held several business meetings with these three operators. In May 2011, POSH met with ██████ in Houston.⁴³ In June, 2011, POSH’s representatives traveled to Ciudad del Carmen (Mexico) to pursue further

³⁵ Presentation “POSH – Overview of the Market – Opportunity for POSH”, C-208, p. 13.

³⁶ Presentation “POSH – Overview of the Market – Opportunity for POSH”, C-208, p. 14.

³⁷ Presentation “POSH – Overview of the Market – Opportunity for POSH”, C-208, p. 14.

³⁸ Presentation “POSH – Overview of the Market – Opportunity for POSH”, C-208, p. 14.

³⁹ Presentation “POSH – Overview of the Market – Opportunity for POSH”, C-208, p. 18.

⁴⁰ Presentation “POSH – Overview of the Market – Opportunity for POSH”, C-208, p. 18.

⁴¹ Presentation “POSH – Overview of the Market – Opportunity for POSH”, C-208, p. 20.

⁴² Presentation “POSH – Overview of the Market – Opportunity for POSH”, C-208, p. 20.

⁴³ E-mail from G. Seow to A. Bibb *et al.*, May 7, 2011, C-256.

discussions with potential JV partners. On June 15th, POSH met with ██████⁴⁴ and on June 16th, POSH met with ██████ in the morning and with ██████ in the afternoon.⁴⁵

35. POSH decided that none of these operators was a suitable partner for its Mexico business plan, for various reasons:

- ██████ held a strong position in the Mexican market but it already had established partnerships with other offshore marine services companies similar to POSH. As POSH later explained in an email closing out the discussions with ██████

██████████ has several partnerships with other very reputable and large companies, such as ██████████
██████████ I think this is a very good strategy for ██████
██████████ and I am sure will propel your company forward and upwards.

Posh is a very small company as compared to the likes of ██████████. We therefore have to look for a more exclusive partnership... Therefore, we have decided that we will continue to look for a partner with a better fit for Posh.⁴⁶

- The same was true of ██████

██████████ [s]et up a JV with ██████████ retains 100% ownership of the vessels and a trust is established, - where payment from Pemex goes direct to the trust, with the agreed amount going direct to ██████████ while remaining amount goes to ██████████

Also in a Brazilian JV which was set up in 2008 with Brazil Supply.⁴⁷

⁴⁴ E-mail from G. Seow to K. Teo *et al.*, June 3, 2011, C-257; E-mail from G. Seow to ██████████ *et al.*, June 3, 2011, C-258; E-mail from G. Seow to K. Teo, June 10, 2011, C-259.

⁴⁵ E-mail from G. Seow to K. Teo *et al.*, June 3, 2011, C-257; E-mail from G. Seow to ██████████ *et al.*, June 3, 2011, C-258; E-mail from G. Seow to K. Teo, June 10, 2011, C-259.

⁴⁶ E-mail from G. Seow to A. Reynoso, August 1, 2011, C-260.

⁴⁷ Presentation “POSH – Overview of the Market – Opportunity for POSH”, C-208.

- [REDACTED] wanted to focus on international markets and, more importantly, its relationship with PEMEX had eroded over the years. As summarized in POSH correspondence during the due diligence period [REDACTED] had stated:

‘Additionally, we [REDACTED] are pursuing longer-term contracts through the operation of our offshore vessels in international markets. Our focus is to find ways to remain positioned to seize high return opportunities...’ [POSH also concluded that] *their outlook in Pemex is not very good.* They once sued the current CEO of PEMEX, and he doesn’t want to have much to do with them.⁴⁸

3. POSH conducted appropriate due diligence on OSA

36. Contrary to Mexico’s assertions, POSH conducted appropriate and extensive due diligence on OSA prior to making its investment. During its trip to Mexico in June 2011, POSH was approached by OSA to explore a potential partnership.⁴⁹ POSH held multiple meetings with OSA to assess its operations, its financials, and the synergies of a potential collaboration before making its investment decision.

37. In the Statement of Defense (SOD), Mexico asserts that, by 2011, OSA presented several red flags that POSH disregarded⁵⁰ and blindly assumes that POSH “did not perform... due diligence”⁵¹ on OSA. Mexico further devotes 20 pages of the SOD (some 15% of its entire factual discussion of the case)⁵² to trying to discredit OSA, claiming that the company had “a history of irregularities that caused it to be investigated by various authorities”⁵³ and cataloging all manner of unsubstantiated accusations to paint a negative portrait of OSA.

38. Mexico’s allegations are false, unsubstantiated, or based on an intentional distortion of the timeline (or all three).⁵⁴ To be clear, Claimant’s case does not require it to defend OSA

⁴⁸ E-mail from G. Seow to [REDACTED] *et al.*, May 20, 2011, C-255; E-mail from G. Seow to A. Aas, August 17, 2011, C-261; *See also* E-mail from G. Seow to Captain Yeok Huat Kooi, November 28, 2011, C-262 (describing [REDACTED] as “very cash-strapped”).

⁴⁹ Memorandum from Gerald Seow to POSH Board of Directors, August 3, 2011, C-29.

⁵⁰ Statement of Defense, para. 654.

⁵¹ Statement of Defense, para. 169.

⁵² Statement of Defense, pages 31-52.

⁵³ Statement of Defense, para. 144.

⁵⁴ Mexico indistinctly conflates allegations about purported events that would have taken place in 2008, 2011, 2014 (after the Measures), or even in 2018.

against, or to disprove, Mexico's allegations. It is sufficient to establish that POSH made a legitimate and reasonable business judgment to partner with OSA. Nevertheless, Mexico's attacks are patently defective in several material ways, as Claimant will address in Sections IV to VI below.

39. First, however, Claimant will explain in this section POSH's appropriate due diligence on OSA in 2011, based on contemporaneous evidence, and its consistency with Mexico's own due diligence on OSA, which was PEMEX's largest contractor and the largest offshore services company in Latin America. This alone suffices to repeal Mexico's unsupported defense that POSH did not conduct appropriate due diligence on OSA.

(a) OSA was PEMEX's largest contractor and the largest offshore marine services company in Latin America

40. OSA was founded in 1968, initially to provide technical services to the Mexican Government.⁵⁵ It soon expanded its operations to include geotechnical engineering, supervisory diving, inspection, maintenance and repair of underwater pipelines, material supply services, personnel transport services, and dredging.⁵⁶

41. OSA's operations grew exponentially over the years. As Mexico itself admits, "[i]n 2002, Oceanografía became one of the main Mexican shipping companies thanks to the considerable number of contracts entered into with Pemex."⁵⁷ From 2002 to 2011, "OSA ha[d] been constantly winning contracts through bidding processes [106 contracts]. By the end of 2011,

⁵⁵ Statement of Defense, para. 120.

⁵⁶ Statement of Defense, para. 121.

⁵⁷ Statement of Defense, para. 123. *See* Expansion, *Oceanografía, la preferida de PEMEX*, March 3, 2014, retrieved from <https://expansion.mx/negocios/2014/02/28/Oceanografia-pemex-fraude-barco> (last accessed 20 March 2019), **C-134**: "Entre 1999 y 2013, Oceanografía obtuvo poco más de 160 licitaciones públicas nacionales e internacionales para proveer servicios y obra pública, principalmente para Petróleos Mexicanos (PEMEX) y su subsidiaria Exploración y Producción (PEP), relacionados con labores de inspección, monitoreo, reforzamiento, mantenimiento, flete, transportación, hospedaje, alimentación, rehabilitación de pozos y construcciones, por un monto que superaría los 31,000 millones de pesos (mdp). Lo anterior llevó a esta empresa a ser una de las principales contratistas de la paraestatal durante los gobiernos de Vicente Fox y Felipe Calderón."

the complete fleet was serving a [PEMEX] contract directly or as a support of a [PEMEX] contract for a larger vessel.”⁵⁸

42. Thus, at the time that POSH was contemplating investments in Mexico and looking for a JV partner, OSA was the largest offshore services company in Latin America⁵⁹ and, more importantly, it was PEMEX’s largest contractor, having secured more than 150 PEMEX contracts in the preceding 15 years⁶⁰ that were worth in excess of USD 3.2 billion.⁶¹ OSA’s contracts accounted for 35% of all of PEMEX’s contracts for offshore supply and maintenance services,⁶² and OSA’s fleet in the Bay of Campeche made up 12% of the whole fleet that was at PEMEX’s service in that area, as illustrated in a contemporaneous presentation:⁶³

⁵⁸ Vessels Acquisition Memorandum by Banco Nacional de México, S.A., June 2012, **C-251**, p. 17. (Emphasis added).

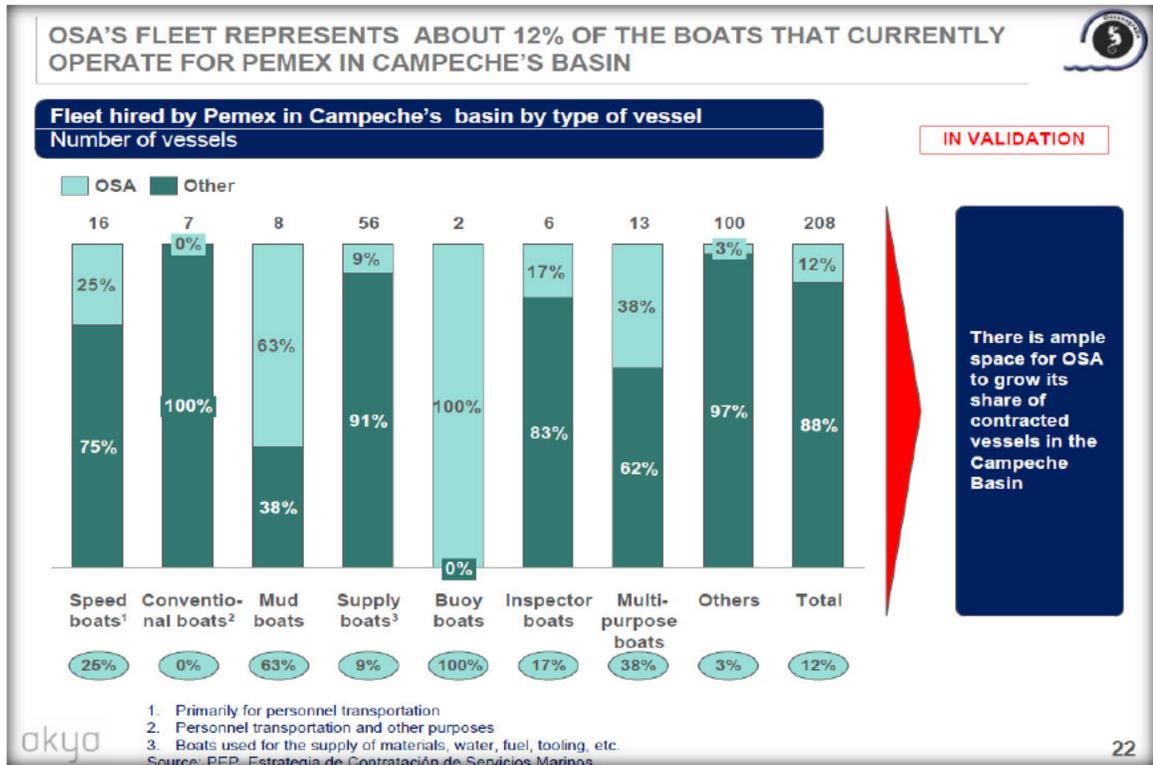
⁵⁹ Lorraine Bailey, *Oil Firm Accused of Fraud Points Finger at Citibank*, March 1, 2017, retrieved from <https://www.courthousenews.com/oil-firm-accused-fraud-points-finger-citibank/> (last accessed 12 February 2020), **C-247**.

⁶⁰ Expansión, *Oceanografía, la preferida de PEMEX*, March 3, 2014, **C-134**.

⁶¹ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 10.

⁶² Presentation “Analysis of the Gulf of Mexico offshore market environment for maritime personnel transport, suppliers, specialized services and support vessels for rendering maintenance services”, January 17, 2012, **C-263**.

⁶³ Akya Report “Oceanografía SA de CV— Company Description and Short Term Liquidity Perspectives”, May 4, 2011, **C-264**, p. 22.



43. As Mexico also acknowledges, “[f]rom 2003 to 2012, Oceanografía had 106 contracts with Pemex, all of them awarded by public tender.”⁶⁴ Significantly, in order to participate in PEMEX’s tenders, OSA had to produce voluminous information proving its experience, technical expertise, and financial solvency, and PEMEX had to review that extensive documentation for each of those tenders. At the end of each of those tender processes, PEMEX concluded that, among the participating companies, OSA was the most suitable candidate to receive those 106 contracts.

44. Pursuant to PEMEX’s standard financial requirements, for each of the 106 tenders that OSA won, OSA was required to submit, and PEMEX would have reviewed and accepted as accurate and reliable, the following documentation:

- A copy of OSA’s Financial Statements formulated in accordance Mexico’s Financial Information Regulations, and audited by an independent public accountant registered with Mexico’s Tax Administration Authority.⁶⁵ At a minimum, PEMEX was required to verify that the Financial Statements had

⁶⁴ Statement of Defense, para. 123.

⁶⁵ Pemex, Document D-2 “Financial Capacity Requirements and Evaluation Criteria”, C-265.

been prepared in accordance with the Financial Information Regulations, complied with the applicable legal requirements, included the relevant notes, and had been properly filed.⁶⁶

Using the Financial Statements, PEMEX was also required to verify that the company had the financial solvency to perform on the contract under the economic model Z2 ALTMAN, created by Edward Altman, and based on the following formula:

$$Z2 = (6.56 * X1) + (3.26 * X2) + (6.72 * X3) + (1.05 * X4)$$

Where:

6.56, 3.26 and 1.05 are the weighing factors assigned to each of the financial element by the author of the model:

X1 = Working Net Capital against Total Assets

X2 = Retained earnings against Total Assets

X3 = Earnings before Taxes and Interests against Total Assets

X4 = Total Equity against Total Assets⁶⁷

- A copy of the Independent Audit Report on OSA's Financial Statements. PEMEX was required, *inter alia*, to verify that the audit report had been prepared in accordance with Mexico's International Audit Regulations, to confirm it had been filed with the authorities, and to check the directors' liability with respect to the financial statements, the auditor's liability, the description of the auditing process, and the auditor's opinion. Moreover, PEMEX had to check that the auditor's opinion did not include any negative caveats or withhold any opinion that could indicate risks associated with the company's financial capacity.⁶⁸
- A certificate showing the public auditor's registration with the Tax Authorities. PEMEX was required to verify that the registration was in force on the date of the report.⁶⁹
- Letters showing credit facilities authorized by licensed banking or financial institutions that were available to OSA. PEMEX would have verified that the letters of credit contained the required information, were current, and were issued by financial institutions authorized by Mexico's financial regulators.⁷⁰

⁶⁶ Pemex, Document D-2 "Financial Capacity Requirements and Evaluation Criteria", C-265.

⁶⁷ Pemex, Document D-2 "Financial Capacity Requirements and Evaluation Criteria", C-265, p. 1.

⁶⁸ Pemex, Document D-2 "Financial Capacity Requirements and Evaluation Criteria", C-265, p. 2.

⁶⁹ Pemex, Document D-2 "Financial Capacity Requirements and Evaluation Criteria", C-265, pp. 3-4.

⁷⁰ Pemex, Document D-2 "Financial Capacity Requirements and Evaluation Criteria", C-265, pp. 4-5.

45. In sum, as of 2011, OSA was PEMEX’s largest contractor and the largest offshore marine services company in Latin America. OSA was in sound financial condition, as confirmed by Mexico itself in 106 PEMEX tenders that were awarded to OSA. For each of them, PEMEX was obliged to carry out due diligence on OSA, reviewing OSA’s experience, expertise, economic capacity and financial solvency. At the conclusion of that process, PEMEX concluded that OSA was the most suitable bidder for each of those 106 contracts. In other words, Mexico itself (through PEMEX) had already repeatedly assessed and confirmed OSA’s technical and financial *bona fides* for some 15 years by the time of Claimant’s investment in 2011. Mexico’s criticism of POSH now for reaching the very same conclusion about OSA that PEMEX reached at the time is a transparent litigation tactic.

(b) OSA presented significant competitive advantages over its Mexican competitors

46. Contrary to Mexico’s assumptions, prior to its investment, POSH obtained appropriate and detailed background information about OSA. In May 2011, for example, POSH analyzed a comprehensive report prepared by an independent consulting firm, Akya Shipping Agencya & Trading, on OSA’s operations, financial condition and future prospects (the **Akya Report**).⁷¹

47. The Akya Report showed that OSA had been operating in Mexico for more than 40 years and had USD\$252 million in sales in in 2010.⁷² The company “had a fleet of 53 boats... including mud boats, supplier boats, transportation passenger boats, tugboats and crane-boats...”⁷³ and “4,650 full time employees, mainly composed of technical and operational personnel.”⁷⁴

48. As Akya noted, OSA focused almost exclusively on “providing services to Pemex,”⁷⁵ so PEMEX’s own expansion prospects provided a clear growth opportunity for OSA:⁷⁶

⁷¹ Akya Report “Oceanografia SA de CV— Company Description and Short Term Liquidity Perspectives”, May 4, 2011, **C-264**.

⁷² Akya Report, **C-264**, p. 3.

⁷³ Akya Report, **C-264**, p. 3.

⁷⁴ Akya Report, **C-264**, p. 3.

⁷⁵ Akya Report, **C-264**, p. 3.

⁷⁶ Akya Report, **C-264**, p. 3.

PROJECTED INVESTMENT WILL TRANSLATE INTO NUMEROUS PROJECTS
IN WHICH OSA CAN PARTICIPATE

PEMEX PEP Offshore infrastructure development and repair plan
Units

	2010	2011	2012	2013	2014	2015	TOTAL
New wells to drill	1,109	1,154	1,285	1,694	1,752	1,792	8,785
New pipes to lay (km)	3	136	164	189	167	158	817
Major repairs	860	845	890	907	890	918	5,310
New platforms	4	5	8	10	19	11	57

49. The Akya Report identified that OSA presented clear competitive advantages vis-à-vis other Mexican operators:

- OSA had the largest Mexican-flagged fleet, which afforded OSA preferential treatment by PEMEX as a result of Mexican regulations:

Since Oceanografía's fleet consists primarily of Mexican flagged vessels, it often receives preferential bid treatment.

Competitors cannot easily reflag their vessels as Mexican. In accordance to the CNL, Mexican vessels are those that have secured both a Mexican flag and a matriculate [registration in the Mexican registry]. Only Mexican individuals or entities are entitled to secure the flag and matriculate for a vessel, and they can do so only if they own the vessel or lease it through a financial leasing company which is either a Mexican company or a foreign company authorized to act as a financial leasing company in Mexico.⁷⁷

- OSA's fleet was technically advanced:

The Company maintains a diverse fleet of vessels and diving systems, that is among the most technically advanced in the industry. Its saturation diving fleet utilizes DP, multi-chamber systems for split-level operations, and moon pool deployment, which allow the Company to operate effectively in challenging offshore environments.⁷⁸

⁷⁷ Akya Report, C-264, p. 13.

⁷⁸ Akya Report, C-264, p. 14.

- OSA had a modern fleet, which allowed for better operating margins:

The average age of Oceanografía's fleet is substantially lower than that of its competitors in Mexico, hence, it allows the Company to operate more efficiently and achieve better margins. Oceanografía builds or buys relatively new vessels to operate in Campeche, while other competitors have traditionally sent their oldest vessels instead, when these become too inefficient to operate in the US or elsewhere

Oceanografía has several vessels with Dynamic Positioning DP-2 and DP-3 which are considered state of the art technology (the OSA Goliath, the Caballo Maya, Don Amado and Amado Daniel are the only vessels of their kind in Mexico).⁷⁹

- OSA had an excellent, long-standing and unrivalled relationship with PEMEX:

Oceanografía has built a reputation as a premier diving services contractor during more than 40 years of operation.

The Company has a *detailed and unrivaled knowledge of all PEMEX's offshore pipelines*, allowing it to provide optimal solutions, which is key to winning new contracts.

There is close contact between Oceanografía and PEMEX. The CEO of Oceanografía meets with the Director of PEMEX PEP at least 5-6 times a year and there is daily contact by at least 20 people a day at various levels (local managers, logistics, drilling, etc.).

Amado Yañez, the CEO of Oceanografía is the only CEO of any company working for PEMEX in the Campeche area that was committed enough to move his family and made Ciudad del Carmen his main residence.⁸⁰

- OSA had an advantageous geographical position, which reduced transportation costs vis-à-vis foreign investors:

Better vessel fuel efficiency: up to 50% fuel savings is achieved by having a diesel generator- which in turn powers the electric engines that move the propellers – as opposed to a diesel engine directly (very similar to railroad engines)...⁸¹

The proximity of its operations and construction yards in Campeche to where the Company conducts its business – eliminates transportation costs

⁷⁹ Akya Report, C-264, p. 15. (Emphasis added).

⁸⁰ Akya Report, C-264, p. 16. (Emphasis added).

⁸¹ Akya Report, C-264, p. 17.

and allows for better and more flexible work scheduling and more efficient supervising the different building processes.⁸²

50. On that basis, the Akya Report concluded that “none of the relevant competitors by business line holds a significant advantage against Oceanografía,”⁸³ as illustrated in the comparative charts below:⁸⁴

NONE OF THE RELEVANT COMPETITORS BY BUSINESS LINE HOLDS A SIGNIFICANT ADVANTAGE AGAINST OCEANOGRAFÍA (1/2)		
Business line	Key competitors	Competitive assessment
Personnel transportation	<ul style="list-style-type: none"> • Naviera Integral • Transportación Marítima Mexicana • GOIMAR • Mantenimiento Express Marítimo • Cotemar 	<ul style="list-style-type: none"> • Consolidated national companies with Mexican flagged vessels that comply with PEMEX specifications • Have consistently been able to renew their contracts • Hold no clear advantages against Oceanografía
Supply vessels	<ul style="list-style-type: none"> • Transportación Marítima Mexicana • Mantenimiento Express Marítimo • Edison Chouest Offshore México • Naviera Petrolera Industrial • Naviera Tamaulipas 	
Mud boats	<ul style="list-style-type: none"> • Cotemar 	<ul style="list-style-type: none"> • Cotemar is the Company's key competitor, with no strong advantages or disadvantages • Other competitors have participated

⁸² Akya Report, C-264, p. 18.

⁸³ Akya Report, C-264, pp. 20-21.

⁸⁴ Akya Report, C-264, pp. 20-21.

NONE OF THE RELEVANT COMPETITORS BY BUSINESS LINE HOLDS A SIGNIFICANT ADVANTAGE AGAINST OCEANOGRAFÍA (2/2)

Business line	Key competitors	Competitive assessment
IMR ¹	<ul style="list-style-type: none"> • Constructora Subacuática Diavaz • Protexa • Grupo R • Construcciones Integrales del Carmen • Cotemar 	<ul style="list-style-type: none"> • Large, consolidated Mexican companies with ample experience in the business • Oceanografía's advantage consists of having its own vessels and these having a Mexican flag
Laying of pipelines ²	<ul style="list-style-type: none"> • Protexa • Global Offshore México (publicly traded) • Cal Dive, formerly known as Hoc Offshore (publicly traded) 	<ul style="list-style-type: none"> • Large, consolidated Mexican companies with ample experience in the business, with generally owned vessels for pipeline laying • Oceanografía's advantage is having diverse specialties to offer integrated services (i.e., diving and positioning), as well as having its own DP vessels
Construction	<ul style="list-style-type: none"> • Grupo R • Constructora Subacuática Diavaz • Cotemar • De Mar Instalaciones 	<ul style="list-style-type: none"> • Grupo R is the largest competitor, OSA owns 2 yards while Grupo R owns 3. • Requires good capital structure • Oceanografía already participates in this market, but it wants to grow

1. Inspection, maintenance and repair services
2. As has been mentioned, this business is being phased out due to large working capital requirements

21

51. The Akya Report also assessed OSA's existing fleet and the vessels that were expected to be delivered within the months to follow.⁸⁵ It further assessed OSA's operating cash-flow, financial commitments, and liquidity prospects for the coming years.

52. At the time in 2011, it was a matter of public knowledge that, in 2008, OSA had faced financial difficulties due to the acquisition of several new vessels in the midst of the global financial downturn⁸⁶—and so POSH appropriately considered that history as part of its due diligence as well. The 2008 episode had been addressed in 2009 by Martín Díaz acquiring 20% of OSA and implementing a structural reorganization of the company. As a result, OSA was on a clear upward trajectory and, as reflected in a later (June 2012) analysis, it was “positioned one step ahead of its competitors since the fleet is new and available to serve PEMEX's increasing needs.”⁸⁷ Overall, the Akya Report assessed that OSA's financial prospects were promising in 2011, for several reasons.

⁸⁵ Akya Report, C-264, p. 32.

⁸⁶ Vessels Acquisition Memorandum by Banco Nacional de México, S.A., June 2012, C-251, p. 19.

⁸⁷ Vessels Acquisition Memorandum by Banco Nacional de México, S.A., June 2012, C-251, p. 19.

53. *First*, “new contracts and the optimization of the fleet [would] translate into a significant boost to cash flow.”⁸⁸

IMPORTANT NEW CONTRACTS, AS WELL AS THE OPTIMIZATION OF FLEET ASSIGNMENT WILL TRANSLATE INTO A SIGNIFICANT BOOST TO CASH FLOW

Per year cash flow contribution of new contracts
Million USD

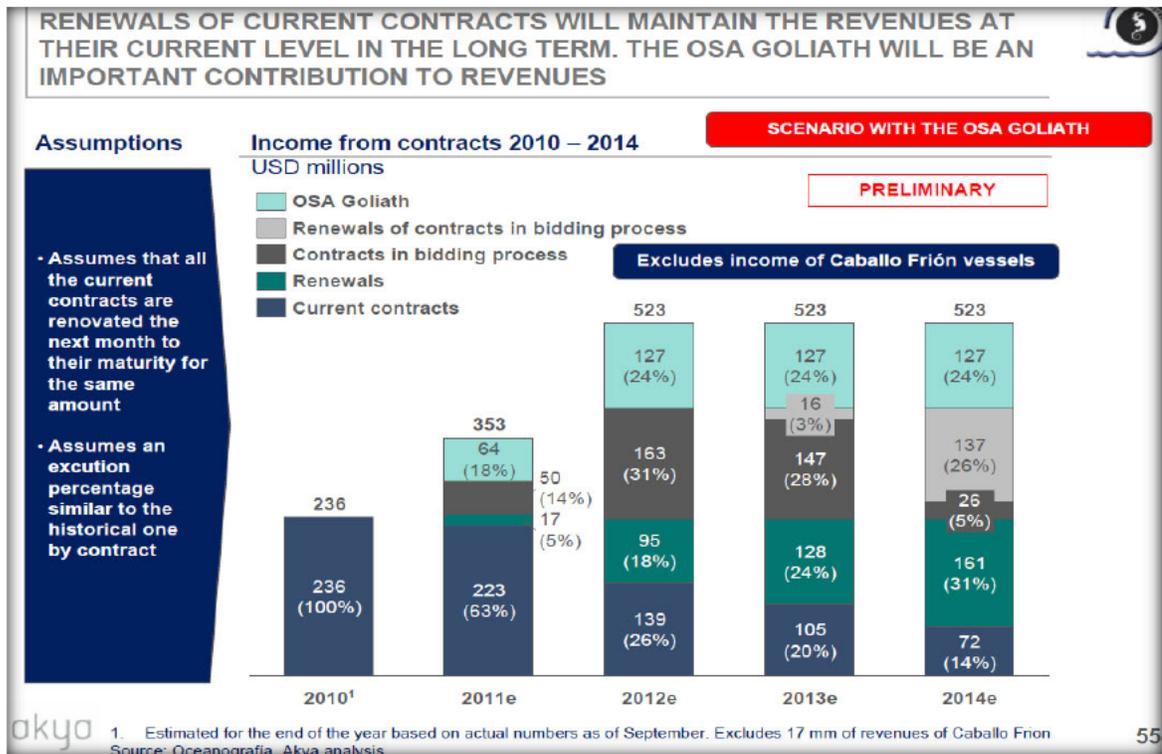
	OSA Goliath		Caballo Azteca		DLB-801		Caballo Maya		Titán		Total		Diff.
	Curr.	Pot.	Curr.	Pot.	Curr.	Pot.	Curr.	Pot.	Curr.	Pot.	Curr.	Pot.	
Income	71	127	-	48	-	38	NA	71	NA	51	71	335	264
Lease cost	80	54	-	-	-	-	NA	24	NA	12	80	89	9
Depreciation	-	-	1	1	3	3	NA	-	NA	-	4	4	-
Opex	22	37	-	17	-	15	NA	22	NA	15	22	105	83
PBT contrib.	-31	36	-1	30	-3	20	NA	25	NA	25	-35	136	172
+Depreciation	-	-	1	1	3	3	NA	-	NA	-	4	4	-
Cash flow contrib	-31	36	-	31	-	23	NA	25	NA	25	-31	140	172

- The OSA Goliath becomes profitable, with a daily income of 348,309 usd, lease cost of 150,000 usd and operating expenses of 105,000 usd/day. Two currently idle leased boats are utilized under the new contract for the OSA Goliath
- The Caballo Maya is utilized immediately upon arrival, making the original Caballo Azteca contract profitable, with revenues of 195,646 usd/day, lease cost of 65,000 usd/day and operating expenses of 61,360 usd/day
- The Caballo Azteca and DLB-801 become profitable, with no lease cost as they are owned by the company
- A new boat called Titán should arrive in May and execute a new important already granted contract

54. *Second*, the renewals of existing OSA-PEMEX contracts were expected to maintain revenues at their then-current levels, while the addition of OSA Goliath—one of OSA’s main subsidiaries—and expected new contracts were expected to boost the company’s revenues from USD\$236 million in 2010, to an estimated USD\$353 million in 2011, and an estimated USD\$532 million in 2012.⁸⁹

⁸⁸ Akya Report, C-264, p. 49.

⁸⁹ Akya Report, C-264, p. 55.



55. *Third*, after an adjustment process in 2011, OSA’s projected operating cash flows (cash generated from customers minus cash paid by suppliers) would be nearly triple the amount expected to be needed to service OSA’s debt in the years to follow (USD\$182 million of estimated cash flow against USD\$50 million of interest and debt repayment in 2012, and USD\$178 million of estimated cash flows against USD\$49 million of interest and debt repayment in 2013).⁹⁰

56. In sum, in 2011, POSH had in hand a third party report based on contemporaneous information that assessed OSA’s finances and competitive advantages vis-à-vis other Mexican operators. The Akya Report concluded, *inter alia*, that OSA had an “unrivalled knowledge of PEMEX”⁹¹ and was ideally suited for a potential partnership with POSH. On the basis of its strategic planning, market analysis, and due diligence, POSH decided to partner with OSA to serve PEMEX’s needs in the Gulf of Mexico. As memorialized in a contemporaneous email by POSH, “[f]ollowing our extensive meetings last week with the various candidates for a closer relationship

⁹⁰ Akya Report, C-264, p. 72.

⁹¹ Akya Report, C-264, p. 16.

for Posh approach to the Mexican Offshore Business, in the end we chose to focus on Oceanografia as the best prospect for a long term association.”⁹²

IV. POSH’S INVESTMENT IN MEXICO (2011–2013)

57. As explained in the Statement of Claim, POSH established its investment in Mexico in three phases and, by 2013, POSH had 10 vessels in Mexico directly or indirectly servicing PEMEX.

58. With respect to the establishment of the Investment, Mexico raises an assortment of largely unrelated complaints. Mexico contends that (i) “the vessels were made available to OSA and not to Pemex”⁹³ which, according to Mexico, means that POSH’s legitimate expectations were generated by OSA, not PEMEX; (ii) GOSH may have violated Mexico’s Foreign Investment Law (FIL) because of alleged “irregularities in GOSH’s records before the RNIE regarding the company’s foreign capital because Mayan’s 49% shareholding in GOSH was never reported,”⁹⁴ and the structure of POSH’s investment indicates bad faith because it must have been conceived to circumvent the restrictions imposed by the FIL; and (iii) “the relationship between POSH and OSA was fragmented by [2013]” based on the fact that OSA and POSH entered into an Irrevocable Trust whose “objective... was [exclusively] to guarantee Oceanografia’s debts to POSH.”⁹⁵

59. These allegations are either untrue or irrelevant to the case. The record shows that the whole purpose of the JV investment was to put vessels at PEMEX’s service; that POSH’s investment complied with Mexican law at all times; and that the Irrevocable Trust was a widely used tool in Mexico for foreign investors and was not specific to OSA, and moreover, it was agreed upon from the outset (*i.e.*, in 2011) for a particular purpose, namely to guarantee repayment of a loan granted to GOSH to purchase the vessels, once the final financial structure was put into place (which ultimately happened in 2013).

⁹² Email from ██████████ to J. Teo *et al.*, June 21, 2011, C-242.

⁹³ Statement of Defense, §II.A.1, p. 6.

⁹⁴ Statement of Defense, para. 37.

⁹⁵ Statement of Defense, para. 101.

A. THE PURPOSE OF THE INVESTMENT WAS TO SERVE PEMEX

60. As explained above, the very purpose of POSH's investment was to serve PEMEX's needs in the Gulf of Mexico. However, POSH learned that, due to Mexico's regulations, it could not carry out that investment plan directly; instead, it would have to partner with a local operator who had an established relationship with PEMEX.

61. This was one of the key reasons for choosing OSA as a business partner. POSH believed that "an active association with OSA via 50/50 asset ownership joint venture between POSH Group and OSA Group or the principal shareholders of OSA Group *will provide important access to PEMEX contracts* in the Bay of Campeche... The partners are established players and *well connected to PEMEX, which facilitate the securing of the PEMEX contracts.*"⁹⁶ POSH would provide state-of-the-art vessels to serve PEMEX's offshore needs, and OSA would "endeavour to secure contracts with PEMEX and... employ [POSH's] vessels..."⁹⁷

62. Mexico does not dispute—nor does it produce evidence to refute—any of these facts. It is therefore undisputed that the driver for, and foundation of, POSH's Investment was the business opportunity to render services (whether directly or indirectly) to PEMEX. POSH's expectations for that investment were necessarily founded on PEMEX and its contracts, not only on OSA, because OSA was, above all, simply a means to render services to PEMEX.

B. POSH AND GOSH COMPLIED WITH MEXICAN LAW

63. Mexico claims that POSH's corporate structure violated the FIL and that POSH did not comply with its disclosure obligations under the FIL. Neither of these allegations withstands scrutiny.

64. *First*, POSH complied with the FIL in making its investments. Mexico argues that Article 7 FIL provides that foreign ownership of "shipping companies engaged in commercial exploitations of ships for inland and coastal navigation"⁹⁸ cannot exceed 49%; that POSH

⁹⁶ Memorandum from Gerald Seow to POSH Board of Directors, August 3, 2011, **C-29**. (Emphasis added).

⁹⁷ Master Collaboration Agreement, entered into between PACC Offshore Services Holdings Pte. Ltd., [REDACTED], Amado Omar Yáñez Osuna, and Martín Díaz Álvarez, August 12, 2011, **C-33**.

⁹⁸ Mexican Foreign Investment Law (*Ley de Inversión Extranjera*), **CL-15**, Art. 7.

“structured its investments with this restriction in mind, and that it financed and controlled the actions of ICA so that it had control over GOSH and SMP”⁹⁹ and, consequently, “the foreign capital allowed for companies to participate in ‘commercial exploitation of vessels’ was exceeded.”¹⁰⁰ This is without merit.

65. As Claimant explained in the SOC with the support of a report from foreign investment and maritime law expert Dr. David Enriquez, the FIL’s restrictions “do not apply to POSH’s Subsidiaries, which have complied therewith,”¹⁰¹ because POSH’s Subsidiaries are ship-owning companies that bareboat charter, but do not operate, the vessels. In other words, the 49% foreign ownership restriction for shipping companies operating vessels in Mexico simply does not apply to them in the first place. As Mr. Enriquez explained, and as has been confirmed by Mexican Administrative Authorities:

[o]wning vessels and bareboat chartering them in exchange for a rate or providing technical or crew management services do not qualify as ‘commercial exploitation of vessels’ for the purposes of the FIL. The Mexican Administrative authorities have so confirmed by means of the confirmation of criteria number DAJCNIE. 3-1-5.-14.92 issued by the Ministry of Economy.

Fourth, HONESTO, HERMOSA and GOSH engaged in bareboat chartering vessels to OSA. PFSM provided technical and crew management services to OSA. Under Mexican Law, these activities do not qualify as “commercial exploitation of vessels” for the purposes of the FIL.

Fifth, the ownership restrictions provided under Article 7 of the FIL do not apply to POSH’s Subsidiaries.¹⁰²

66. Mr. Enriquez referred in his expert report to a decision issued by the Mexican Directorate General of Foreign Investment confirming this conclusion.¹⁰³ Subsequently, the Tribunal ordered Mexico to produce all relevant decisions interpreting this ownership requirement under the FIL, and Mexico produced another decision from its own Directorate General of Foreign

⁹⁹ Statement of Defense, para. 544.

¹⁰⁰ Statement of Defense, para. 545.

¹⁰¹ Expert Legal Opinion on FIL by David Enríquez, para. 34.

¹⁰² Expert Legal Opinion on FIL by David Enríquez, paras. 38-40.

¹⁰³ Annex 3 to Expert Legal Opinion on FIL by David Enríquez.

Investment again confirming Mr. Enriquez's conclusion.¹⁰⁴ Mexico did not adequately comply with the Tribunal's order, however. Mr. Enriquez has further obtained another five decisions issued by the Directorate General of Merchant Shipping confirming the conclusions expressed in his report.¹⁰⁵

67. Mexico has not mentioned, questioned or disputed Mr. Enriquez's conclusions, nor has it produced an expert report to assess or rebut them.¹⁰⁶ Mexico therefore cannot persist in a vague claim that POSH violated the FIL, when the unrebutted expert evidence, supported by Mexican legal authorities, is that POSH has fully complied with the FIL in making its investments.

68. *Second*, GOSH's shareholdings were properly disclosed to the Mexican authorities. To recall, on August 26, 2011, the [REDACTED] incorporated GOSH,¹⁰⁷ with a view to subsequently transferring the shares to the final joint-venture partners. Mr. [REDACTED] initially owned 49% and Mr. [REDACTED] owned 51%.¹⁰⁸ After the [REDACTED] decided to withdraw from the joint-venture, on October 20, 2011, ICA (owned by Mr. Montalvo) acquired 51% from [REDACTED] and POSH (through its wholly owned subsidiary Mayan Investments) acquired 49% from [REDACTED]. Subsequently, after the terms of the joint-venture were agreed with OSA, Mr. Amado Yáñez and Mr. Martín Díaz each bought a 25% stake from ICA.

¹⁰⁴ General Directorate of Foreign Investment (*Dirección General de Inversión Extranjera*), Official Letter N. 315.05.7335, August 30, 2005, **C-266**.

¹⁰⁵ Directorate General of Merchant Shipping, Official Letter No. DAJCNIE.315.14.290, April 14, 2014, **C-336**; Directorate General of Merchant Shipping, Official Letter No. SAJIE.315.17.236, July 6, 2017, **C-337**; Directorate General of Merchant Shipping, Official Letter No. SAJIE.315.17.457, October 26, 2017, **C-338**; Directorate General of Merchant Shipping, Official Letter No. SAJIE.315.17.143, May 29, 2017, **C-339**; Directorate General of Merchant Shipping, Official Letter No. SAJIE.315.17.418, October 11, 2017, **C-340**.

¹⁰⁶ Mexico had the chance to produce an expert report assessing Mr. Enriquez's conclusions but decided not to. In the event that Mexico produces such expert report with the Rejoinder, Claimant reserves its right to produce a further expert report assessing its reasoning and conclusions. Otherwise, Claimant would be deprived of its due process rights as a result of Mexico's bad faith strategy.

¹⁰⁷ Public Deed No. 54,723 recording the Articles of Incorporation for Servicios Marítimos GOSH, S.A. de C.V., August 29, 2011, **C-35**.

¹⁰⁸ GOSH registrations with the RNIE, **R-001**.

69. GOSH's final equity composition, therefore, was as follows: POSH owned 49% of the share capital, through Mayan Investments;¹⁰⁹ Mr. Montalvo owned 1%, through ICA; Mr. Yáñez owned 25% (through his company Arrendadora); and Mr. Díaz owned the remaining 25% (through his company GGM).¹¹⁰ As explained in the SOC, POSH had, at all times, full control over ICA and GOSH.¹¹¹ Mexico does not dispute this fact.¹¹²

70. Mexico complains that “[e]very Mexican company with foreign capital has the obligation to report to the National Registry of Foreign Investment (RNIE) the *foreign capital* that it has received, or *that has been modified*” and that there were “irregularities in GOSH’s records before the RNIE... because Mayan’s 49% shareholding in GOSH was *never* reported.”¹¹³ This is untrue, as demonstrated by Mexico’s own documents.

71. Article 32 of the FIL provides that “Mexican entities in which there is participation... of foreign investment...”¹¹⁴ must register with the RNIE. Article 33 FIL further provides that the Mexican company in which there is foreign investment must provide to the RNIE, *inter alia*, the “[n]ame, trade or corporate name, nationality and stay status if applicable, domicile

¹⁰⁹ GOSH registrations with the RNIE, **R-001**; Public Deed No. 41,537 recording the May 18, 2012 shareholders meeting, July 25, 2012, **C-36**; Servicios Marítimos GOSH, S.A. Shares Registry Book, September 26, 2014, **C-9**.

¹¹⁰ Public Deed No. 41,537 recording the May 18, 2012 shareholders meeting, July 25, 2012, **C-36**, p. 10. Amado Yáñez held his interests through Arrendadora Caballo de Mar III, S.A. de C.V. (Arrendadora), and Martín Díaz through GGM Shipping, S.A. de C.V. (GGM) (which later changed its name to Shipping Group Mexico SGM, S.A.P.I. de C.V.).

¹¹¹ Statement of Claim, para. 269-270, POSH retained both corporate and economic rights over ICA’s shares in GOSH. POSH’s Board of Directors made clear that (i) 1% of GOSH shares “is held for POSH interest by a Mexican company;” [Minutes of the 8th Board of Directors meeting of PACC Offshore Services Holdings Pte. Ltd., August 18, 2011, **C-40**] (ii) it was “for the benefit of POSH;” [Memorandum from Gerald Seow to POSH Board of Directors, February 14, 2012, **C-41**] (iii) was “financed by POSH and secured by share pledge;” [Memorandum from Gerald Seow to POSH Board of Directors, May 8, 2012, **C-42** p. 1] (iv) “ICA [was] owned by a Mexican *nominated* by us, *funded* by POSH and we ensure appropriate *security* over the 1%;” [Memorandum from Gerald Seow to POSH Board of Directors, May 8, 2012, **C-42**, p. 1] and, in sum, that (iv) “the 1% is essentially for POSH’s benefit, to ensure that we *have control over 50% of GOSH*.” [Memorandum from Gerald Seow to POSH Board of Directors, May 8, 2012, **C-42** p. 1] POSH would, at all times, have full control over GOSH. POSH controlled a 50% stake, was the largest shareholder and directly managed all of GOSH’s operations. Mr. Yáñez and Mr. Díaz were “silent investors and had no involvement in the management of the company. [Witness Statement of José Luis Montalvo, para. 20].

¹¹² Statement of Defense, para. 37.

¹¹³ Statement of Defense, paras. 33, 37.

¹¹⁴ Mexican Foreign Investment Law (*Ley de Inversión Extranjera*), **CL-15**, Arts. 32 and 33.

of the foreign investors.”¹¹⁵ Article 33 thus requires that the Mexican company inform the RNIE about the identity of any foreign investors.

72. GOSH complied with this legal requirement. As shown by Mexico’s own documents, on October 2012, GOSH directly informed the National Registry of Mayan Investment’s 49% equity interest in GOSH,¹¹⁶ which remains the same to this day. That is, Mayan Investments currently owns 49% of GOSH and its RNIE listing accurately reflects that shareholding. This is in compliance with FIL requirements. Mexico is flatly mistaken in its claim that the Mayan shareholding was never reported.

C. THE LOAN, THE TRUST AND THE AGREEMENT WITH OSA

73. As explained in the SOC, GOSH’s shareholders agreed that GOSH would initially acquire six vessels, flag them in Mexico, and put them at the service of OSA’s ongoing contracts with PEMEX. The purchase of the vessels would be financed by bank loans (80%) and shareholder equity (20%), and the payment of the loans would be secured through an irrevocable trust (of which the lending bank would be the primary beneficiary) that would receive all payments owed by PEMEX in connection with the OSA-PEMEX contracts.¹¹⁷

74. Mexico claims that there was a different purpose for the trust that the parties finally put into place in 2013. It contends that the purpose of the trust was not to secure repayment of GOSH’s loan, but instead generally “to guarantee Oceanografía’s debts to POSH”¹¹⁸ that accrued in 2013. On that basis, Mexico infers that OSA was in poor financial health, that that condition was known to Claimant who continued to do business with OSA (albeit while trying to protect itself via the trust), and ultimately that Mexico therefore cannot be blamed for OSA’s demise and Claimant’s resulting damages. Mexico is wrong because: (i) the trust was conceived years earlier, in 2011, for the particular purpose of satisfying the lenders’ need for security for their loan; (ii) while OSA faced financial constraints in its operations, these constraints were partially caused,

¹¹⁵ Mexican Foreign Investment Law (*Ley de Inversión Extranjera*), **CL-15**, Arts. 32 and 33.

¹¹⁶ GOSH registrations with the RNIE, **R-001**.

¹¹⁷ Witness Statement by Gerald Seow, para. 27; Witness Statement by José Luis Montalvo, para. 22.

¹¹⁸ Statement of Defense, para. 101.

and certainly aggravated, by PEMEX, its only client and responsible for 97% of OSA's income,¹¹⁹ which was "a poor paymaster"¹²⁰ and incurred substantial delays in its payments to OSA; and (iii) the reason behind the trust agreement between POSH and OSA was not OSA's debts, but rather POSH's extension of the final loan to GOSH, just as had been originally conceived in 2011. A brief explanation of these issues follows.

75. *First*, the trust was conceived in 2011 to secure the loan that GOSH was going to obtain to purchase the vessels. As Claimant explained in the SOC, one of the main advantages of the trust is indeed that it "secure[s] the payments originating from PEMEX and shield[s] them from any contingency affecting OSA."¹²¹ The trust was therefore useful to avoid any delays in payment by OSA, by diverting PEMEX's payments owed to OSA directly to the trust instead. However, it was not OSA's outstanding payments in 2013 that inspired the parties to conceive of a trust; rather, contemporaneous records show that GOSH's shareholders envisioned the establishment of the trust back in 2011, at the outset of the investment, as a way to secure the repayment of the bank loan that would be used to purchase the vessels.

76. For example, an internal document prepared by GOSH's shareholders titled "OSA Mexican joint venture structure and concept" and dated July 2011, contemplated the establishment of the trust:

OSA in turn time charters the vessel to PEMEX under an irrevocable standing instruction to *pay charter hire to a Mexico bank account*.¹²²

77. An internal POSH email dated August 2, 2011, explained—in granular detail—the purpose and operation of the trust. The first beneficiary would be "the bank granting the loan"

¹¹⁹ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.'s case, Report of the period between September 2017 and April 2018, **C-125**, p. 5.

¹²⁰ Email and attachment from L. Peng Wu, October 22, 2013, **C-122**.

¹²¹ Statement of Claim, para. 72.

¹²² "OSA Mexican Joint Venture Structure and Concept", July 28, 2011, **C-267** (Emphasis added).

and the second beneficiary would be the joint-venture company.¹²³ In subsequent emails during August 2011, GOSH's shareholders continued discussions about the establishment of the trust.¹²⁴

78. In sum, contemporaneous documentation demonstrates that the joint-venture partners had already planned to establish the Irrevocable Trust in July-August 2011 at the outset of the investment, in order to provide an additional security to the third-party bank loan that would be used to purchase the vessels.

79. *Second*, Mexico's claim that, by mid-2013, "Oceanografia had accumulated millions in debts that were owed to POSH"¹²⁵ is misleading. Mexico overdramatizes OSA's financial situation. Due to the high level of investment required by the offshore service industry, including the purchase of technically advanced, and high-priced vessels, OSA occasionally faced short-term liquidity strains. At the same time, OSA maintained numerous contracts with PEMEX that generated recurring cash flows and secured its long-term financial position. OSA's financial strength is supported by strong evidence: in 2013, an independent third party valued OSA's existing contracts with PEMEX at USD\$2.73 billion.¹²⁶

80. That is not to say that OSA had no financial strains—specifically, cash flow strains—in 2013. But the problems that OSA did have were at least partially caused, and certainly

¹²³ Email from ██████████ to W. Long Peng *et al.*, August 5, 2011, C-268: *The trust document* is a very lengthy contract in Spanish. It follows a standard format established by the Mexican Banking Commission that [we] believe you will find satisfactory once it is translated. A Trust in Mexico is deemed by banks as the highest quality form of guarantee. The sponsor of the trust is **OSA, which would contribute its rights to collect charter hire from Pemex to the Trust**, with specific instructions as to how these funds are to be managed. There is a Letter of Agreement from **Pemex, in which it confirms to the Trust that the charter hire will be paid to it rather than to OSA. The order of the payments is the bank in the first place, the fiduciary expenses in second place, then the vessel operating expenses, any taxes or dues payable and, eventually, the surplus goes to the SPV** (although in the case of Banamex, the terms apparently establish that the surplus should go for accelerated loan repayment). **The beneficiary, in first place, is the bank granting the loan and, in second place, the SPV owning the vessel.** It would appear that OSA would also be required by Banamex to contribute its rights over the bareboat charter to the Trust, so that actual control of the asset is turned over as a non-recourse guarantee to the Trust. For accounting purposes, the Trust does not have a separate entity but consolidates within the accounts of the Sponsor. Therefore, the reporting of the Trust status to the beneficiaries (SPV) need to be considered in the JVA (and in the set-up of the Trust itself). [emphasis added]

¹²⁴ Email from W. Long Peng to ██████████ *et al.*, August 5, 2011, C-269; Email from ██████████ to W. Long Peng *et al.*, August 8, 2011, C-270.

¹²⁵ Statement of Defense, para. 107.

¹²⁶ Citigroup Management Presentation "Oceanografia", January 2014, C-248, p. 25.

aggravated, by Mexico—*i.e.* by PEMEX, which was OSA’s only client and responsible for 97% of OSA’s income. PEMEX regularly incurred substantial delays in its payments to OSA and, as a result, OSA was delayed in paying the Subsidiaries. OSA always acknowledged these debts and promised to settle them just as soon as it received the corresponding payments from PEMEX.

81. In particular, Mexico’s admission that “payments from PEP [to OSA] could take longer than expected”¹²⁷ is a significant understatement. A brief explanation of PEMEX’s invoicing process is necessary:

PEMEX would first issue a COPADE, a document that was necessary for OSA to issue the relevant invoice. Then OSA would issue the relevant invoice(s) to PEMEX for services performed under the GOSH and SMP Service Contracts. Finally, PEMEX would pay the invoice(s) to OSA, which would, in turn, pay the corresponding charter hire to Subsidiaries under the GOSH and SMP Charters. Therefore, payments by OSA to the Subsidiaries depended on payments by PEMEX to OSA.¹²⁸

82. In this process, PEMEX regularly delayed paying OSA in two ways, as explained by Mr. Montalvo, “are consistent with PEMEX’s normal business practices.”¹²⁹ First, at times of tight liquidity, “PEMEX would delay the issuance of the COPADE document with respect to work that was completed by OSA,” which prevented OSA from issuing the relevant invoice(s).¹³⁰ Second, “even after OSA did issue the relevant invoice(s) for services performed, PEMEX would further delay actually paying the invoices.”¹³¹

83. As a result of these practices, at the beginning of 2013, PEMEX’s outstanding payments to OSA were close to USD\$50 million for different services: as noted in contemporaneous communications, “payments for construction and pipe-laying has been delayed, and currently Pemex owes OSA close to 40 million”¹³² and “[t]he amount owed by Pemex in the

¹²⁷ Statement of Defense, para. 160.

¹²⁸ Second Witness Statement by José Luis Montalvo, para. 7.

¹²⁹ Second Witness Statement by José Luis Montalvo, para. 8.

¹³⁰ Second Witness Statement by José Luis Montalvo, para. 8.

¹³¹ Second Witness Statement by José Luis Montalvo, para. 8.

¹³² Email from G. Seow to J. Phang *et al.*, April 15, 2013, C-271.

maintenance contract is... USD\$6 million...”¹³³ These delays “affected OSA’s liquidity”¹³⁴ and prompted OSA, in turn, to delay payments that it owed to the Subsidiaries. By January 2013, OSA’s outstanding payments for charter hire to the Subsidiaries, adjusted to account for some modifications and OPEX costs, amounted to USD \$3,316,288.86.¹³⁵

84. *Third*, Mexico’s claim that, in 2013, “[f]aced with the accumulation of debts that Oceanografia owed to POSH, both companies negotiated to restructure OSA’s debt,”¹³⁶ is also misplaced. In 2013, GOSH, POSH and OSA merely formalized the pre-existing funding arrangement that was put in place beginning in 2011. As part of POSH’s extension of the final ship purchase loan to GOSH, POSH and OSA entered into the Irrevocable Trust agreement in order to additionally secure POSH’s commitment of more than USD\$140 million to GOSH.

85. To recall, in 2011, GOSH was seeking a third-party bank loan to finance the purchase of the vessels. GOSH was under time constraints, however, and it could not readily reach an agreement with Banamex. As a result, in 2011, POSH decided to extend a temporary bridge loan to GOSH for \$142.75 million so that it could proceed to purchase the six GOSH Vessels without waiting to conclude negotiations with Banamex (the **Bridge Loan**).¹³⁷ GOSH’s shareholders agreed to continue discussions with Banamex to obtain external financing that would eventually replace the Bridge Loan; they expected to establish the trust as security for the replacement loan(s) once that external financing became available.¹³⁸

¹³³ Email from J. Phang to G. Seow *et al.*, April 15, 2013, **C-272**.

¹³⁴ Second Witness Statement by José Luis Montalvo, para. 10.

¹³⁵ Email from Jose Luis Mantalvo to J. Phang *et al.*, March 5, 2013, **C-273**.; Settlement Agreement between PACC Offshore Services Holdings PTE LTD, Servicios Maritimos GOSH, S.A.P.I. de C.V., Mayan Investment PTE, LTD, Inversiones Costa Afuera, S.A. de C.V., Shipping Group Mexico SGM, S.A.P.I. de C.V., Arrendadora Caballo de Mar III, S.A. de C.V. and Oceanografia, S.A. de C.V., July 1, 2013, **C-274**.

¹³⁶ Statement of Defense, para. 90.

¹³⁷ Credit Agreement between Servicios Marítimos GOSH, S.A.P.I. de C.V. and PACC Offshore Services Holdings Pte. Ltd., July 1, 2013, **C-49**; Public Deed No. 33,341, recording the ship mortgage cancellation for Caballo Argentó, September 24, 2014, **C-50**; Public Deed No. 34,704, recording the ship mortgage cancellation for Caballo Babieca, March 10, 2015, **C-51**; Public Deed No. 33,345, recording the ship mortgage cancellation for Don Casiano, September 24, 2014, **C-52**; Public Deed No. 33,342, recording the ship mortgage cancellation for Caballo Copenhagen, September 24, 2014, **C-53**; Public Deed No. 33,343, recording the ship mortgage cancellation for Caballo Monoceros, September 24, 2014, **C-54**; Public Deed No. 33,344, recording the ship mortgage cancellation for Caballo Scarto, September 24, 2014, **C-55**; Public Deed No. 41,537 recording the May 18, 2012 shareholders meeting, July 25, 2012, **C-36**.

¹³⁸ Witness Statement by Gerald Seow, para. 26.

86. As of the beginning of 2013, GOSH was still continuing discussions with Banamex to obtain a final credit facility to replace the Bridge Loan. Negotiations were close to an agreement and, in early 2013, GOSH's shareholders adopted a resolution authorizing the company to:

negotiate and to take out a loan... with... Banamex... to be used... to pay... the unpaid outstanding balance... of loans... provided by [POSH]... and *sign or execute* . . . any documents . . . related with the Banamex Loan... including but not limited to, the execution of *an irrevocable administration, source of payment and security trust agreement*... to be entered into by and between the Company, Oceanografía S.A. de C.V., Posh and Banco Invex....¹³⁹

87. Ultimately, however, Banamex's final conditions for the loan to finance GOSH's acquisition of the vessels were unacceptable for GOSH, and POSH decided to take over the financing permanently.¹⁴⁰ GOSH's shareholders (including POSH and OSA) agreed that (i) POSH would grant a final loan to GOSH for the purchase of the vessels; (ii) the parties, as initially agreed, would establish a trust to receive payments owed by PEMEX to OSA; and (iii) the trust would apply those payments to the repayment of the final loan granted by POSH. Thus, the same trust arrangement that had originally been planned as security for a third-party lender like Banamex was now to be put in place to secure POSH's loan.

88. POSH wanted OSA to settle the outstanding amounts owed to GOSH for charter hire prior to granting the final loan. To that end, on July 1, 2013, POSH, GOSH, GOSH's shareholders and OSA entered into an agreement (the **July 2013 Agreement**) providing that "POSH is willing to continue financing the debt [by granting a final loan] . . . provided that the terms and conditions of this agreement are fully complied with by OSA and GOSH's shareholders."¹⁴¹ The main terms and conditions were as follows:

- OSA acknowledged the outstanding balance it owed to GOSH for charter hire until January 2013, which, adjusted to account for some payments owed to OSA, was US\$3,316,299.86¹⁴² (the **Outstanding Balance**). OSA undertook to settle the

¹³⁹ Written Confirmation of the unanimous consent resolutions adopted by the shareholders of GOSH, in lieu of a meeting, January 18, 2013, **C-275** (emphasis added).

¹⁴⁰ Witness Statement by Gerald Seow, para. 26.

¹⁴¹ Settlement Agreement, July 1, 2013, **C-274**, p.2.

¹⁴² Settlement Agreement, July 1, 2013, **C-274**, p. 5.

Outstanding Balance in accordance with a schedule of payments (the **Schedule of Payments**).¹⁴³

- POSH undertook to grant a final credit facility to GOSH in the amount of the Bridge Loan.¹⁴⁴
- “As security for the full performance of OSA’s obligation... as well as to secure GOSH’s obligation to pay the debt”¹⁴⁵ the parties agreed to establish the Irrevocable Trust to receive all payments owed by PEMEX in connection with the OSA-PEMEX contracts associated with GOSH’s Vessels. As the lender on the final loan, POSH would be designated as the primary beneficiary of the Irrevocable Trust, and payments received by the Trust would be directly applied to repay the loan to be granted by POSH to GOSH.
- OSA also undertook to seek and obtain authorization from PEMEX to assign the rights arising from the PEMEX-OSA contracts associated with GOSH’s Vessels to the Irrevocable Trust.

89. As a result, on July 1, 2013, POSH granted a final credit facility to GOSH, converting the Bridge Loan into a final loan (the **Loan**).¹⁴⁶ Also under the Loan, GOSH undertook to enter into the Irrevocable Trust “as security for the full performance of GOSH’s obligations under... [the Loan].”¹⁴⁷ The Irrevocable Trust was then established, as planned, on August 9, 2013 among POSH, GOSH and OSA.¹⁴⁸ As had been agreed in July, OSA requested authorization from PEMEX to assign its rights arising from the six PEMEX-OSA contracts associated with GOSH’s Vessels to the Irrevocable Trust. On the same day, August 9, 2013, PEMEX issued the authorization for four of the contracts. However, and for no stated reason at all, PEMEX did not issue the authorization in connection with the other two contracts until November 20, 2013.¹⁴⁹

¹⁴³ Settlement Agreement, July 1, 2013, **C-274**, Clause 2.

¹⁴⁴ Settlement Agreement, July 1, 2013, **C-274**, Clause 1. 3.

¹⁴⁵ Settlement Agreement, July 1, 2013, **C-274**, Clause 1. 3.

¹⁴⁶ Credit Agreement between Servicios Marítimos GOSH, S.A.P.I. de C.V. and PACC Offshore Services Holdings Pte. Ltd., July 1, 2013, **C-49**, Clause 7.

¹⁴⁷ Credit Agreement between Servicios Marítimos GOSH, S.A.P.I. de C.V. and PACC Offshore Services Holdings Pte. Ltd., July 1, 2013, **C-49**.

¹⁴⁸ Public Deed No. 1,015, recording the Trust Agreement, August 9, 2013, **C-70**.

¹⁴⁹ Public Deed No. 1,143, recording the assignment of rights agreement in respect to Caballo Argento, November 20, 2013, **C-71**; Public Deed No. 1,144, recording the assignment of rights agreement in respect to Caballo Babiaca, November 20, 2013, **C-72**.

PEMEX's inaction prevented POSH from receiving payments from the Trust in connection with the two contracts for months.

90. In any event, as also agreed in July 2013 Agreement, OSA paid the Outstanding Balance to GOSH by mid-2013, in accordance with the Schedule of Payments.¹⁵⁰ And, as of November 2013, all payments due from PEMEX to OSA by virtue of its contracts with OSA in connection with GOSH's Vessels were directly applied from the Trust to the repayment of POSH's Loan. As long as the Subsidiaries' Vessels were in operation, POSH would receive the proceeds directly from the Irrevocable Trust.¹⁵¹

91. Mexico acknowledges that PEMEX was routinely late in its payments to OSA, which caused OSA to be late in its payments to the Subsidiaries.¹⁵² Typically, these situations were resolved once OSA received its outstanding payments from PEMEX. This is what happened in mid-2013, as well: OSA confirmed its obligation to pay the Outstanding Balance to GOSH, and as soon as it was paid by PEMEX, OSA fulfilled that obligation. At the same time, POSH granted the final Loan to GOSH, and the parties established the Irrevocable Trust, which—as had always been anticipated by the parties since 2011—served to “secure GOSH's obligation to pay the debt [to POSH] under the loan,”¹⁵³ as well as “security for the full performance of OSA's obligations...”¹⁵⁴ The 2013 Irrevocable Trust was not, as Mexico would have it, some kind of harbinger of OSA's inevitable financial collapse or a last-minute effort to defraud OSA's other creditors. It was the execution of a long-standing plan to provide security for the new, final Loan used to purchase the GOSH vessels, which was coupled with a clearing of OSA's overdue payments.

¹⁵⁰ Chart reflecting calculations of payments between OSA and GOSH, **C-276**.

¹⁵¹ In the SOD, Mexico also points an arrangement it labels “the Autofin Trust”, which OSA apparently established with entities other than POSH, as evidence of OSA's financial weakness prior to the Measures. Mexico even goes so far as to complain that “Claimant had not mentioned” the Autofin Trust in the SOC, notwithstanding its own express acknowledgment that “the Autofin Trust does not mention POSH, POSH Honesto or POSH Hermosa, or any other subsidiary related to POSH.” (SOD, paras. 109-112)¹⁵¹ Understandably, Claimant did not, and does not, know anything about this trust and can hardly be criticized for not discussing it in the SOC—indeed, as a stranger to the Autofin arrangement, Claimant has no ability to engage on the subject even today.

¹⁵² Statement of Defense, paras. 155, 292.

¹⁵³ Settlement Agreement, July 1, 2013, **C-274**, Clause 1.3.

¹⁵⁴ Settlement Agreement, July 1, 2013, **C-274**, Clause 1.3.

V. POSH'S OPERATIONS AND ECONOMIC PROSPECTS IN MEXICO (2013)

92. As explained in the SOC, by the end of 2013, POSH had implemented the three phases of its Investment (GOSH, SEMCO and SMP), and all ten vessels that were owned directly or indirectly by POSH were in full operation in Mexico and had revenues in excess of USD\$30 million that year (MEX\$612 million).¹⁵⁵ POSH's outlays for the Investment exceeded USD\$190 million and spanned multiple Mexican and Singaporean companies, including two holding companies (SMP and ECLIPSE), five vessel-owning companies (GOSH, HONESTO, HERMOSA, SEMCO I and SEMCO II) that owned 10 vessels with a combined asset value of USD\$215 million,¹⁵⁶ and two supporting companies (PFSM and OSCA). POSH's operations were expanding and the projections showed continued financial growth.

93. In contrast, Mexico argues that, by the end of 2013, POSH's economic prospects were grim because OSA was "in a state of pre-insolvency."¹⁵⁷ That claim is factually incorrect and unsubstantiated; Mexico does not support it with a single contemporaneous, document that would give a true and fair picture of OSA's finances or value as of the end 2013. In addition, even if OSA were under any short-term financial strains at the time, the documents in the record demonstrate that the outlook for OSA's long-term viability was still positive—at least until the Mexican government unleashed its arsenal against OSA. As will be detailed in Sections VII to X below, the measures that directly and irreparably affected OSA's long-term viability and caused its demise were the Unlawful Sanction, the subsequent suspension of the Banamex factoring facility, and SAE's taking control of, and mis-managing OSA, as explicitly admitted by Mexico (during the insolvency proceeding). Thus, whatever the financial condition of OSA may have been prior to the measures (and the evidence indicates that it was solid, contrary to Mexico's claims), it was Mexico's actions that caused OSA's financial collapse.

¹⁵⁵ POSH Subsidiaries' Income Statements, 2013, **C-354**; POSH Subsidiaries' Revenue, 2013, **C-355**.

¹⁵⁶ Bill of Sale for Caballo Babieca, September 13, 2011, **C-44**; Bill of Sale for Don Casiano, September 9, 2011, **C-45**; Bill of Sale for Caballo Copenhagen, August 13, 2011, **C-46**; Bill of Sale for Caballo Monoceros, December 15, 2011, **C-47**; Bill of Sale for Caballo Scarto, August 31, 2011, **C-48**; Bill of Sale for Rodrigo DPJ, March 2, 2015, **C-115**; Bill of sale for Caballo Grano de Oro, February 25, 2015, **C-116**; Certificate of Valuation of Salvirile, July 23, 2007, **C-119**; Certificate of Valuation of Salvision, July 23, 2007, **C-120**.

¹⁵⁷ Statement of Defense, para. 492.

94. Mexico also distorts the timeline, conflating events that took place prior to the Measures with later, post-Measures events, in order to try to paint a negative portrait of OSA. Mexico is forced to play fast and loose with the timeline to deflect attention from its own responsibility for OSA's demise and the destruction of POSH's Investment.

95. For the sake of clarity, Claimant will present a chronological account of the facts based on contemporaneous documents. In this section, Claimant will explain OSA's financial situation as of the end of 2013 and POSH's operations and prospects prior to the Measures. Then, in Section VI below, Claimant will explain the unsubstantiated and irrelevant nature of Mexico's assertions.

A. OSA'S FINANCES AND FUTURE PROSPECTS WERE SOLID

96. Mexico relies on OSA delays in its charter hire payments to GOSH as of November 2013 to assert that OSA was "in a state of pre-insolvency."¹⁵⁸ This is both unsupported and incorrect.

97. As a threshold matter, OSA's delays in its payments to the Subsidiaries were at least partially attributable to PEMEX—and thus ultimately to Respondent. If OSA was facing any cash flow difficulties or behind on its payments to the Subsidiaries, it was significantly due to Respondent's (PEMEX's) own actions. Respondent should not be permitted to cite OSA problems of Mexico's own making in order to claim that OSA was doomed to financial collapse and that the State's treaty-breaching measures thus were irrelevant. PEMEX was responsible for putting OSA into whatever financial bind it faced, in at least two ways.

98. One, PEMEX initially authorized OSA to assign to the Irrevocable Trust the rights arising out of only four out of the six PEMEX-OSA contracts associated with GOSH Vessels. With respect to these contracts, POSH reported internally in October 2013 that "[m]onies have just started to be paid onto the Trust account."¹⁵⁹ However, for unknown reasons, PEMEX initially did not authorize the assignment of rights arising from the remaining two contracts: "[t]he remaining 2 vessels (PSV) are still... awaiting PEMEX's approval (of the assignment of

¹⁵⁸ Statement of Defense, para. 492.

¹⁵⁹ Email from W. Long Peng to P. Ma *et al.*, October 23, 2013, C-330.

collectibles) and further documentation, notarization etc. Such is how these are set up in Mexico; it is bureaucratic and slow.”¹⁶⁰ Until PEMEX finally authorized those last two assignments of rights on November 22, 2013, PEMEX did not make any payments into to the Irrevocable Trust with respect to those two contracts. As a result, for the months leading up that authorization, there was a shortfall in the sums paid into the Irrevocable Trust and thus a shortfall in the payments owed to the Subsidiaries.

99. Two, as of late 2013, PEMEX was (as usual) late in the payments that it owed to the Irrevocable Trust (for four contracts) and to OSA (for two) for the services of the Subsidiaries’ vessels. As a POSH representative explained in an internal communication: “[w]e are still struggling with determining the outstanding debt position between OSA/PEMEX... The complication is that PEMEX themselves are poor paymasters...”¹⁶¹ Nevertheless, OSA was confident that PEMEX would remedy these delays shortly, as it had in past practice. Consequently—as it had done in mid-2013—OSA undertook in November 2013 to settle all outstanding amounts to GOSH in the two months to follow (*i.e.* by the end of January 2014):

AY said he wants to clear all the outstanding owed by Oceanografia S.A. de C.V. (“OSA”) and does not dispute that there are amounts owing to GOSH. AY suggested a meeting with GOSH and OSA’s accountants to undertake a complete reconciliation of OSA accounts’ with GOSH’s accounts for GOSH owned vessels and shall provide GOSH with all supporting documents to evidence the amounts they include in the accounts.¹⁶²

AY agreed that OSA shall make payment for the outstanding amounts owed to GOSH for the GOSH owned vessels as follows: a) USD10 million on or before 31 December 2013 (Singapore time); and b) Remaining Outstanding Amount for GOSH by 31 Jan 2014.¹⁶³

100. Even if OSA’s delays had not been attributable to PEMEX (which they were), it is demonstrably false that OSA was in a state of “pre-insolvency” by the end of 2013, as Mexico contends. Remarkably, Mexico made that dramatic assertion without citing a single

¹⁶⁰ Email from W. Long Peng to P. Ma *et al.*, October 23, 2013, **C-330**.

¹⁶¹ Email and attachment from L. Peng Wu, October 22, 2013, **C-122**.

¹⁶² Minutes of the meeting held between POSH and OSA on pending matters in relation to the services of GOSH and Sermagosh2 (SMP), November 28, 2013, **R-013**, p.1.

¹⁶³ GOSH and SMP Meeting Minutes, 28 November 2013, **R-013**, p.1.

contemporaneous, independent document showing OSA's financial situation at the time.¹⁶⁴ As explained above, OSA may have faced occasional financial strains that affected OSA's short-term liquidity. But third party, independent valuations of OSA show that its long term viability was intact and its prospects were positive as of late 2013—prior to Mexico's Unlawful Sanction and all the measures that followed it.

101. As of the end of 2013, Citigroup's Latin America Investment Banking Group based in New York prepared an investor presentation describing OSA's business and finances, including the cash flow from its contracts with PEMEX (the **Citigroup Valuation**). Citigroup's analysis, dated January 2014, is conclusive evidence of the positive financial condition of OSA at the time, particularly given that Mexico has not produced any comparable, independent assessment of OSA's finances.

102. As explained in the Citigroup Valuation, major financial institutions (Citigroup, BBVA, and Bancomer) valued OSA's existing contracts with PEMEX at around USD\$2.73 billion.¹⁶⁵ Far from suggesting "pre-insolvency" in December 2013, this figure was in line with, and even more bullish than other recent independent valuations of OSA. In September 2013, for example, Blackstone Energy Partners valued OSA at USD\$2.8 billion.¹⁶⁶ And the prior year Advent International, another private equity firm, had valued OSA at USD\$2.6 billion.¹⁶⁷

¹⁶⁴ Mexico only produced a document containing OSA's financial statements for the year 2013 (R-0023) which was prepared by SAE, as OSA's administrator, in **April 2014**. The very same financial statements explain that, as a result of all the Measures adopted by Mexico against OSA, the lack of documentary evidence given by SAE to the auditor, and the fact that the statements do not include the information pertaining to four of OSA's most profitable subsidiaries (Caballo Frión Arrendadora, S.A. de C.V., Arrendadora Caballo del Mar II, S.A. de C.V., Arrendadora OSA Goliath, S.A. de C.V, and Ultramar Unipessoal, LDA) the auditor refused to issue an opinion confirming that the financial statements presented a true and accurate view of OSA's financial situation. This self-serving document was prepared by SAE in April 2014 and, according to the auditor, does not reflect an accurate view of OSA's finances. This document cannot be relied upon to prove OSA's financial condition by the end of 2013.

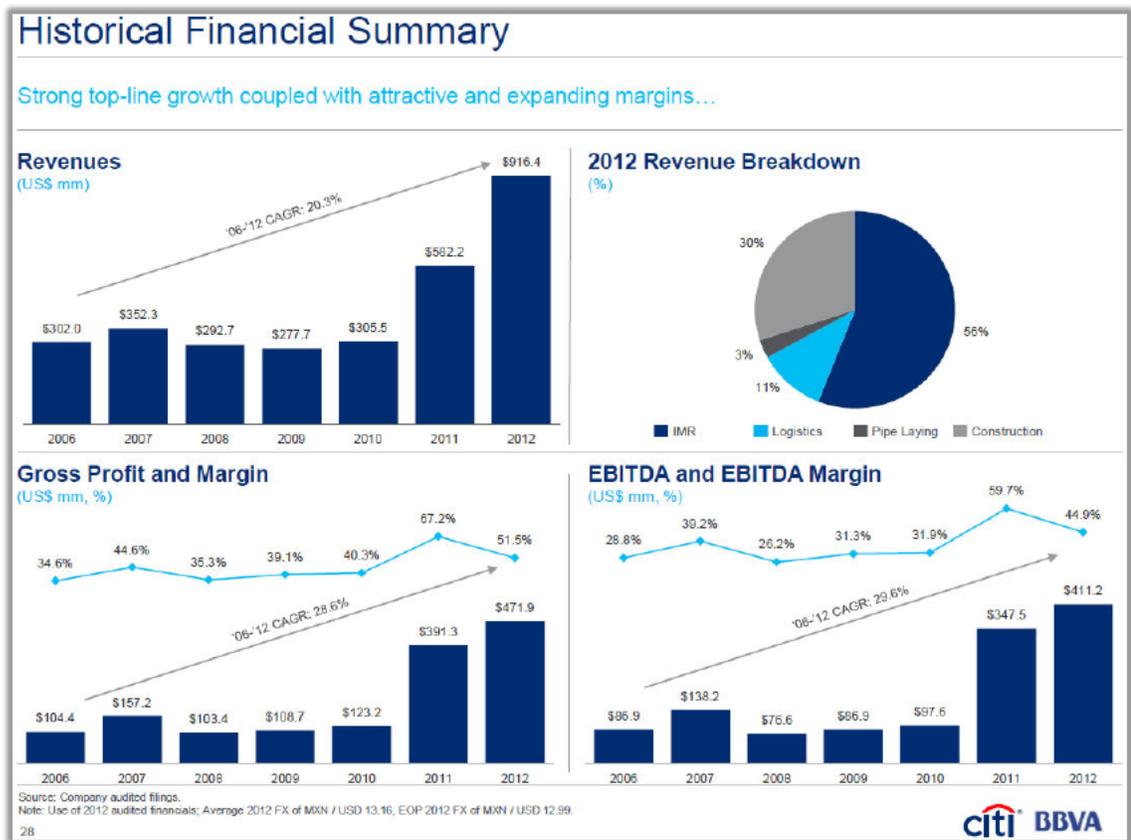
¹⁶⁵ Citigroup Management Presentation "Oceanografía", January 2014, **C-248**. The Citigroup Valuation was later echoed by the press: "Oceanografía... Latin America's largest oil and gas company, was reportedly valued at about \$3.5 billion." Lorraine Bailey, *Oil Firm Accused of Fraud Points Finger at Citibank*, March 1, 2017, **C-247**.

¹⁶⁶ Summary of Terms between Oceanografía S.A. de C.V., and Blackstone Energy Partners L.P., September 1, 2013, **C-249**

¹⁶⁷ Letter from Advent International to Oceanografía S.A. de C.V., November 21, 2012, **C-250**.

103. These documents make clear that Mexico’s assertion that OSA was on the verge of financial ruin at the end of 2013 has no basis. A closer look at the Citigroup Valuation reveals not only OSA’s viability at the time, but also its solid prospects for the future.

104. For example, as shown on the following slide from the Citigroup Valuation, from 2010 to 2012, OSA’s revenues had tripled, from USD\$305 to USD\$916 million, as a result of OSA’s financial reorganization, an increase in public contracts, and the acquisition of new vessels.¹⁶⁸ Moreover, in 2012, OSA’s gross profit exceeded USD\$741 million and OSA’s margin was 51%. Finally, the same year, OSA EBITDA exceeded USD\$411 million and OSA’s EBITDA margin was 44%.



105. The Citigroup Valuation assessed not only extant OSA contracts but also expected new or to-be-renewed PEMEX contracts (see the 7 “Nueva Construcción” contracts listed in the

¹⁶⁸ Citigroup Management Presentation “Oceanografía”, January 2014, C-248, p. 28.

slide included in the attached presentation, all with start dates in June 2014),¹⁶⁹ and valued OSA's current contracts by the end of 2013 at USD\$2.73 billion:

Current Contracts Value of US\$2.73 bn (As end 2013)

CONTRACT	VESSEL	LINE OF BUSSINES	START DATE	END DATE	TOTAL NUM OF DAYS	CONTRACT IN MXP	CONTRACT IN USD
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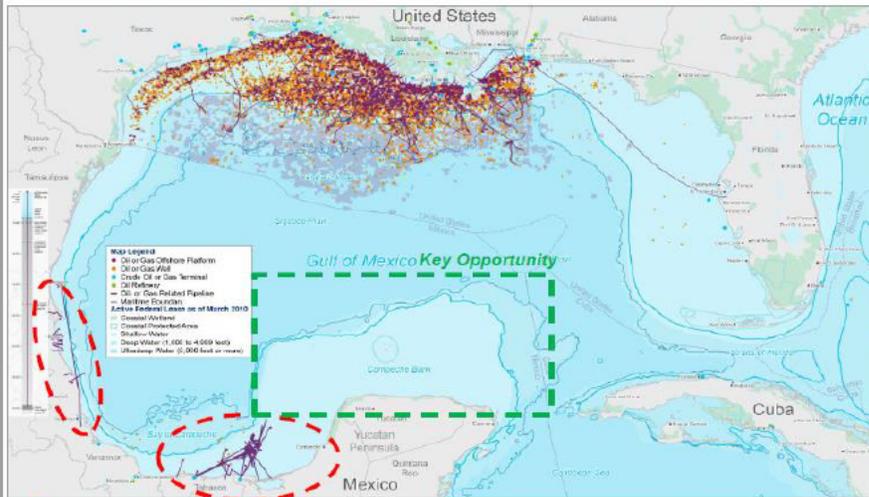
106. The Citigroup Valuation discussed the growth prospects for OSA. It noted that PEMEX intended to expand its offshore infrastructure to support an increase in exploration and production of oil, and that the offshore fleet was expected to double in size by 2015:

Pemex Expected Investments and Production Platform

Production Outlook

- Pemex expects to significantly expand off-shore infrastructure to support the increase in exploration and production
 - Technical plans show a need to triple the off-shore oil & gas services fleet by 2015 in order to support the Company's production target
 - Given global shipbuilding capacity constraints, the actual fleet is expected to double by 2015
- Pemex has strongly focused on investing on E&P to meet their main objectives which include the stabilization of production and the replacement rate for the production reserves

Gulf of Mexico Oil Exploration Landscape – Significant Underdevelopment of Mexican Waters



- Mexican waters of the Gulf of Mexico are significantly underdeveloped in terms of exploration and infrastructure
- Pemex, given its exclusive rights, has an extensive area for exploration and further development yet to be explored or developed
 - The Campeche Bank is a key opportunity
- US and international companies have settled on US waters on the Gulf and have successfully exploited their region

Pemex's Current Activities

Source: SENER, Pemex.

4



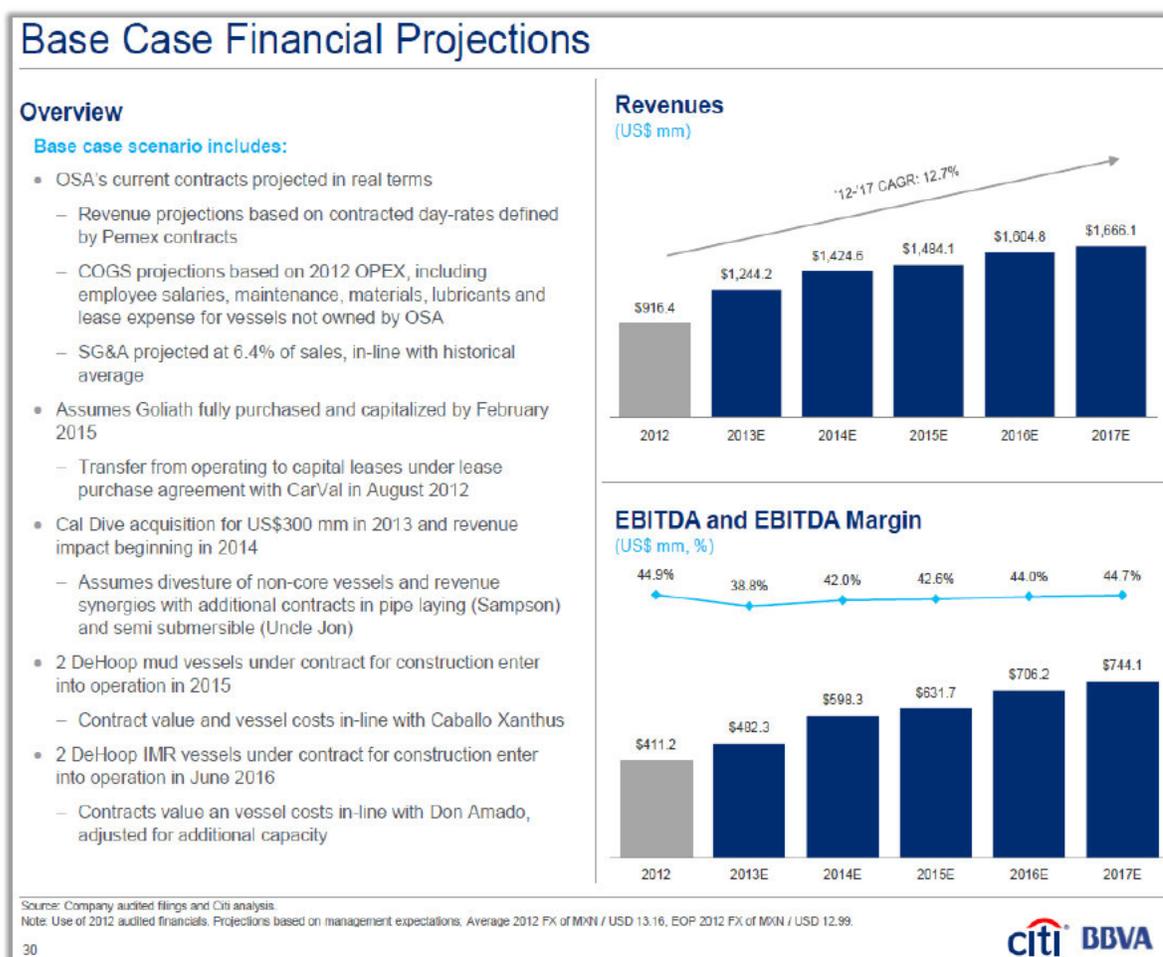
107. Citigroup explained that OSA was in an ideal position to benefit from PEMEX expansion projects, given that it had, *inter alia*, the largest Mexican-flagged fleet (75 vessels),

¹⁶⁹ Citigroup Management Presentation “Oceanografia”, January 2014, C-248, p. 25.

¹⁷⁰ Citigroup Management Presentation “Oceanografia”, January 2014, C-248, p. 25.

which “ha[d] been operating at full capacity over the last 10 years,”¹⁷¹ an excellent and long-standing relationship with PEMEX, and partnerships with leading international marine service companies (such as POSH, which is expressly mentioned in the presentation).¹⁷²

108. The “base case” (*i.e.* most likely scenario) projections of the Citigroup Valuation anticipated that OSA’s revenues would continue to grow—from USD\$1,244 million in 2013 to USD\$1,666 million in 2017—and so would OSA’s EBITDA—from USD\$485 million in 2013 to USD\$744 in 2017.



109. In sum, the evidence on the record shows that, as of the end of 2013, OSA was financially viable and projected to experience continued growth. While OSA experienced

¹⁷¹ Citigroup Management Presentation “Oceanografia”, January 2014, C-248, p. 24.

¹⁷² Citigroup Management Presentation “Oceanografia”, January 2014, C-248, p. 9.

occasional short-term cash-flow needs, as is the case with many profitable companies, there was no evidence that they impaired the company's long-term viability. To the contrary, the value of OSA's contracts alone was nearly USD\$3 billion at the time, OSA's EBITDA exceeded USD\$411 million and OSA's EBITDA margin was 44%.

B. POSH'S FUTURE PROSPECTS WERE SOLID

1. POSH's projections showed continued growth

110. As explained in the SOC, as of the end of 2013, POSH's Investment was also on solid grounds, with strong future prospects. The 10 vessels were all in operation directly or indirectly servicing PEMEX, and POSH had protected its investment in GOSH through the Irrevocable Trust. POSH planned to grow in Mexico, and even intended to use its Mexican platform to expand into other regions of Latin America.¹⁷³

111. POSH's projections at the time showed continued growth.¹⁷⁴ Near the end of 2013, the Investment was projected to grow its revenues to \$127.68 million in 2014 and \$192.94 million in 2015.¹⁷⁵ GOSH expected to completely repay the financing to purchase GOSH's vessels by the third quarter of 2016,¹⁷⁶ based on an estimated annual EBITDA of \$33.66 million for a payback period of 4.6 years. Thereafter, the profit was expected to increase substantially.¹⁷⁷ Mexico has not produced a single piece of contemporaneous evidence to rebut those projections.

112. By early 2014, certain of the contracts with OSA had expired and POSH was in discussions with OSA for their renewal.

- The SMP Charters expired on January 31, 2014¹⁷⁸ and POSH was discussing their renewal with OSA.

¹⁷³ POSH Initial Public Offering Prospectus, April 17, 2014, **C-121** Witness Statement by Keng-Lin, para. 27.

¹⁷⁴ Witness Statement by Keng-Lin, para. 28.

¹⁷⁵ Email and attachment from L. Peng Wu, October 22, 2013, **C-122**.

¹⁷⁶ Memorandum from Gerald Seow to POSH Board of Directors, May 8, 2012, **C-42**

¹⁷⁷ Witness Statement by Keng-Lin, paras. 28-29.

¹⁷⁸ Bareboat Charter for GOSH Caballo Grano de Oro between GOSH Caballo Grano de Oro S.A.P.I. de C.V. and Oceanografía S.A. de C.V., April 30, 2013, **C-95**; Bareboat Charter for POSH Plover (tbr Rodrigo DPJ) between GOSH Rodrigo DPJ S.A.P.I. de C.V. and Oceanografía, S.A. de C.V., June 22, 2012, **C-96**. Addendum No. 1 to Barecon 2001 in respect of M.V. Caballo Grano de Oro between GOSH Caballo de Oro S.A.P.I. de C.V. and OSA, September 24, 2013, **C-277**; Addendum No. 2 to Barecon 2001 in respect of M.V.

- The SEMCO Charters expired on February 21, 2014.¹⁷⁹ The vessels assigned to those contracts were Singaporean-flagged and had temporary permits to navigate Mexican waters for up to two years. POSH intended to flag and register the SEMCO Vessels in Mexico, through a Mexican subsidiary, and continue their operations in Mexico.¹⁸⁰
- The GOSH Charters, employing six vessels, were still in force. Discussions for their renewal were not expected until closer to the dates of expiration of the charters, *i.e.* at the end of 2015 and end of 2016.¹⁸¹

(a) Posh had legitimate expectations that the existing contracts would be renewed or new contracts would be awarded by PEMEX

113. As explained in the SOC, POSH had legitimate grounds to believe that the Mexico operation would continue to grow, and that OSA’s existing contracts with PEMEX would be extended or new contracts for the same services would be awarded. As explained by offshore marine services industry expert Ms. Jean Richards, who has 45 years of experience in the sector including in Mexico, PEMEX’s consistent business practices showed that “it generally continue[d] to work with known and trusted operators and owners with Mexican flag tonnage” over the “trading life” of the vessels and “at least... until [they are] approximately 20 years old.”¹⁸² The value of “long term relationships... [and] the initial costs of mobilization and modifications to suit a particular market argue strongly against swopping between owning partners”¹⁸³ Therefore, “a

Caballo Grano de Oro between GOSH Caballo Grano de Oro S.A.P.I. de C.V. and OSA, November 22, 2013, **C-278**; Addendum No. 3 to Barecon 2001 in respect of M.V. Caballo Grano de Oro between GOSH Caballo Grano de Oro, S.A.P.I. de C.V. and OSA, December 30, 2013, **C-334**; Addendum No. 1 to Barecon 2001 in respect of M.V. Rodrigo DPJ between GOSH Rodrigo DPJ S.A.P.I. de C.V. and OSA, June 22, 2012, **C-279**; Addendum No. 2 to Barecon 2001 in respect of M.V. Rodrigo DPJ between GOSH Rodrigo DPJ S.A.P.I. de C.V. and OSA, July 11, 2013, **C-280**; Addendum No. 3 to Barecon 2001 in respect of M.V. Rodrigo DPJ between GOSH Rodrigo DPJ S.A.P.I. de C.V. and OSA, August 1, 2013, **C-281**; Addendum No. 4 to Barecon 2001 in respect of M.V. Rodrigo DPJ between GOSH Rodrigo DPJ S.A.P.I. de C.V. and OSA, September 24, 2013, **C-282**. Addendum No. 5 to Barecon 2001 in respect of M.V. Rodrigo DPJ between GOSH Rodrigo DPJ S.A.P.I. de C.V. and OSA, November 22, 2013, **C-283**; Addendum No. 6 to Barecon 2001 in respect of M.V. Rodrigo DPJ between GOSH Rodrigo DPJ S.A.P.I. de C.V. and OSA, December 30, 2013, **C-335**.

¹⁷⁹ Bareboat Charter for Salvirile between Semco Salvage (IV) Pte. Ltd. and Oceanografía, S.A. de C.V., December 27, 2011, **C-20**; Bareboat Charter for Salvision between Semco Salvage (IV) Pte. Ltd. and Oceanografía, S.A. de C.V., December 27, 2011, **C-21**.

¹⁸⁰ Witness Statement by Keng-Lin, para. 32.

¹⁸¹ Witness Statement by José Luis Montalvo, para. 35.

¹⁸² Expert Industry Report by Jean Richards, para. 7.14.

¹⁸³ Expert Industry Report by Jean Richards, para. 7.12.

renewal of an existing contract would... always be the preferred route.”¹⁸⁴ The successive renewals granted to the Gannet, which is servicing PEMEX to this day, supports Ms. Richards’ conclusion.¹⁸⁵

114. The eight vessels owned by POSH’s Subsidiaries were all less than three years old and, therefore, had a long service life (around 22 more years) ahead of them.¹⁸⁶ It was eminently reasonable for POSH to expect that PEMEX would extend the contracts with OSA or award new contracts for the same services at least until the vessels reached the age of 20 years.¹⁸⁷ POSH’s business plan for its Investment was, therefore, a long-term one.¹⁸⁸

115. Mexico contends that POSH had no grounds to expect that PEMEX would renew the contracts or award new contracts for the same or new services,¹⁸⁹ citing two reasons: (i) the prospect that OSA could have breached the Subsidiaries’ contracts;¹⁹⁰ and (ii) the facts that PEMEX awards contracts only through public procurement processes and the applicable rates are dependent on developments in the industry, such that it would be hard to predict whether PEMEX would have awarded new contracts and the applicable rates of those contracts.¹⁹¹ These proffered reasons do not hold up to scrutiny.

(b) It was reasonable to expect that POSH’s operations with OSA would continue to grow

116. Over the course of the first two years of the Investment (2012-2013), OSA repeatedly reached out to POSH to request the addition of new vessels to service PEMEX.¹⁹² In

¹⁸⁴ Expert Industry Report by Jean Richards, para. 7.13.

¹⁸⁵ Second Expert Industry Report by Jean Richards, para. 6.7.

¹⁸⁶ Expert Industry Report by Jean Richards, para. 7.14.

¹⁸⁷ Expert Industry Report by Jean Richards, para. 7.14.

¹⁸⁸ Memorandum from Gerald Seow to POSH Board of Directors, May 8, 2012, C-42, p. 3.

¹⁸⁹ This is an additional example of Mexico’s distortion of the timeline. In pages 51 to 121. Mexico addresses the Measures on which this claim is based. Then, in pages 122 to 125, Mexico addresses POSH’s expectations for renewal of the contracts *prior to the Measures*.

¹⁹⁰ Statement of Defense, paras. 471-477.

¹⁹¹ Statement of Defense, paras. 478-489.

¹⁹² As a result of OSA’s requests, POSH established the second phase of the investment, including SEMCO and its two Singaporean-flagged vessels, and the third phase of the investment, including SMP (Honesto and Hermosa), and its two Mexican-flagged vessels.

light of PEMEX's projected expansion, and OSA's position as the largest offshore company in Mexico,¹⁹³ it was only logical that OSA would obtain new contracts in connection with the new works involved in PEMEX's projected expansion, and that OSA would use POSH's vessels, which were already successfully and reliably performing work for PEMEX and consolidating their good reputation in Mexico. Mexico fails to mention any of these inconvenient facts.

117. Mexico contends, instead, that it was not reasonable for POSH to assume that it would have a long-term relationship with OSA. Mexico cites the following reasons why, it claims, POSH could not legitimately have expected that its business with OSA would continue into the future¹⁹⁴: (i) there could be *force majeure* issues, like a decrease in demand for offshore vessels; (ii) the contracts between the Subsidiaries and POSH did not have long durations; (iii) OSA could breach the contracts with the Subsidiaries, which might then choose not to renew them (as it claims was the case with the SEMCO and SMP Charters, which were not renewed in January/February 2014); and (iv) the vessels could under-perform, leading PEMEX to cancel the contracts. It is clear on their face that these scenarios are speculative and not consistent with both POSH's experience and PEMEX's practices at the time.

118. *First*, it is very telling that Mexico mentions "force majeure"—by definition, meaning exceptional, unexpected, and unforeseeable circumstances—as the first factor that could possibly have affected the POSH relationship with OSA. Evidently, Mexico finds it difficult to imagine ordinary, expectable, and foreseeable circumstances that could adversely affect POSH's contracts with OSA. Additionally, Mexico's proposition that *force majeure* events could or should be anticipated because "market conditions suggested that there would be a constraint on the demand for services of offshore support vessels" is factually incorrect. As explained by Ms. Richards,

Pemex had discovered several new fields in 2013-2014 and ... it was clear from the growth of the offshore industry that demand for offshore support vessels of all sizes was likely to continue by May 2014. DP [Mexico's expert] acknowledges the discovery of new wells by 2014 but argues that, from 2014 to 2018 the number of wells, levels of investments, drilling

¹⁹³ Lorraine Bailey, *Oil Firm Accused of Fraud Points Finger at Citibank*, March 1, 2017, C-247.

¹⁹⁴ Statement of Defense, paras. 471 et seq.

equipment and proven reserves have shown a downward trend. This is misleading and incorrect.

...DP does not distinguish between onshore wells and offshore wells, which are the relevant ones for the offshore industry. The number of onshore wells has been declining for several years, but the number of gas fields...has increased, and the number of offshore fields has remained relatively stable. Therefore, even today, it is reasonable to assume that offshore activity will increase in the future. Also, DP fails to take into account that Pemex's investments decreased only for two years (until the end of 2016) and has started to recover, and further mischaracterizes the data for drilling equipment and proven reserves. Consequently, I confirm my conclusion that by May 2014 the offshore industry was likely to continue to grow, an expectation that is true today, based on current information.¹⁹⁵

119. *Second*, Mexico's statement that the contracts between the Subsidiaries and OSA had short durations misses the mark as a practical matter. The Charters entered into by GOSH¹⁹⁶-had terms ranging between one and three years, and were periodically renewed—as Mexico explicitly admits¹⁹⁷—to continue serving under the GOSH Service Contracts between OSA and PEMEX, which had terms ranging between three and five years.¹⁹⁸ Consequently, it was reasonable for POSH to expect that the contracts would be renewed as long as OSA had corresponding contracts with PEMEX.¹⁹⁹ That was one of the very foundations of the association between POSH and OSA: POSH would provide state-of-the-art vessels and, under the Master Collaboration Agreement, OSA had a specific obligation to “endeavour to secure contracts with PEMEX and... employ [POSH's] vessels...”²⁰⁰ The term appearing on the face of a given contract is not the dispositive factor here; it is the duration of the overall contractual relationship that matters.

¹⁹⁵ Second Expert Industry Report by Jean Richards, paras. 2.5-2.6.

¹⁹⁶ GOSH is the only ship-owning company with respect to which POSH is claiming future damages based on a discounted cash-flow analysis, and as such is the only company whose future contracts are at issue.

¹⁹⁷ Statement of Defense, para. 51.

¹⁹⁸ Statement of Claim, para. 76.

¹⁹⁹ Second Expert Industry Report by Jean Richards, para. 2.4.

²⁰⁰ Master Collaboration Agreement, entered into between PACC Offshore Services Holdings Pte. Ltd. [REDACTED], Amado Omar Yáñez Osuna, and Martín Díaz Álvarez, August 12, 2011, C-33, Art. 2.7.2.

120. *Third*, Mexico asserts that OSA might possibly have breached the charters, which could then be terminated by POSH as a result. Mexico cites the SEMCO Charters and the SMP Charters (which were not renewed in 2014) as an example. Mexico's examples are inapposite and its proposition is speculative. The examples are inapposite because POSH is claiming future damages only with respect to GOSH—whose charters with OSA were in force at the time of the Measures. To be conservative, Claimant and its quantum experts have not put forward-looking damages claims with respect to SMP or SEMCO's vessels, whose charters had expired at the time the Measures were imposed. In addition, the SMP Charters and SEMCO Charters presented characteristics different to those of GOSH. The SMP Vessels were not permanently assigned to a Service Contract with PEMEX (unlike GOSH's vessels), due to certain technical requirements that were being addressed by OSA. And the SEMCO Vessels were Singaporean-flagged and operated in Mexico under temporary permits (also unlike GOSH's Vessels, which were Mexican-flagged). In order for the SEMCO vessels to operate in Mexico permanently, the vessels would have had to be sold to a Mexican entity and reflagged in order to obtain a permanent authorization. Again, to be conservative, Claimant has not proposed to assume that such an authorization would have been obtained. Thus, POSH's claims already exclude the uncertainties that Mexico is trying associate with the SEMCO and SMP examples.

121. Mexico's examples also fail on their face to establish that OSA breaches and resulting POSH terminations of vessel leases should be assumed and should bar POSH's claims that rely on a long-term business relationship. On the facts, the SEMCO and SMP Charters do not even offer a viable example of the scenario Mexico posits: they were not terminated due to OSA's breaches, but rather due to the expiration of their contractual terms. More importantly, the reason why POSH and OSA did not renew the SEMCO and SMP Charters was due to the Measures. The SMP Charters expired on January 31, 2014,²⁰¹ just 10 days before Mexico issued the Unlawful

²⁰¹ Bareboat Charter for GOSH Caballo Grano de Oro between GOSH Caballo Grano de Oro S.A.P.I. de C.V. and Oceanografía S.A. de C.V., April 30, 2013, **C-95**; Bareboat Charter for POSH Plover (tbr Rodrigo DPJ) between GOSH Rodrigo DPJ S.A.P.I. de C.V. and Oceanografía, S.A. de C.V., June 22, 2012, **C-96**; Addendum No. 1 to Barecon 2001 in respect of M.V. Caballo Grano de Oro between GOSH Caballo de Oro S.A.P.I. de C.V. and OSA, September 24, 2013, **C-277**; Addendum No. 2 to Barecon 2001 in respect of M.V. Caballo Grano de Oro between GOSH Caballo Grano de Oro S.A.P.I. de C.V. and OSA, November 22, 2013, **C-278**; Addendum No. 3 to Barecon 2001 in respect of M.V. Caballo Grano de Oro between GOSH Caballo Grano de Oro, S.A.P.I. de C.V. and OSA, December 30, 2013, **C-334** Addendum No. 1 to Barecon 2001 in respect of M.V. Rodrigo DPJ between GOSH Rodrigo DPJ S.A.P.I. de C.V. and OSA, June 22, 2012, **C-279**; Addendum No. 2 to Barecon 2001 in respect of M.V. Rodrigo DPJ between GOSH Rodrigo DPJ S.A.P.I.

Sanction banning OSA from entering into any public contract, including with PEMEX, and the SEMCO Charters expired on February 21, 2014,²⁰² 11 days after the Unlawful Sanction was imposed. It was Mexico, not OSA, that made the renewal of those charters impossible. OSA had bigger problems by that time.

122. *Fourth*, Mexico asserts that assuming a long-term relationship between POSH and OSA was not reasonable because PEMEX might have cancelled contracts on the grounds that the vessels did not operate around the clock, which Mexico claims is “a situation that was considered by PEP at the time of terminating Oceanografía’s contracts.”²⁰³ The argument is again misleading. PEMEX cancelled the OSA contracts because OSA was banned from entering into new contracts, cut off from financing, and found itself insolvent. Any curtailment of the vessels’ operations at that time was a result of the Measures, which deprived OSA of sufficient liquidity to operate the vessels. Here again, Mexico conflates POSH expectations that were reasonable based on circumstances prior to the Measures with events and scenarios that were, and in most cases could only have been, brought about by the Measures.

2. It was reasonable to expect that new contracts would be awarded to OSA through PEMEX’s public procurement processes

123. Based on the expert report prepared by Duff & Phelps (the **DP Report**), Mexico asserts that POSH did not have solid grounds to believe that PEMEX would renew the contracts with OSA. Mexico rests that assertion on the following factors: (i) key prices of oil started to decrease in the second half of 2014, which affected the Mexican offshore industry;²⁰⁴ (ii) PEMEX does not “renew” contracts as such, but rather but awards new contracts through a public

de C.V. and OSA, July 11, 2013, **C-280**; Addendum No. 3 to Barecon 2001 in respect of M.V. Rodrigo DPJ between GOSH Rodrigo DPJ S.A.P.I. de C.V. and OSA, August 1, 2013, **C-281**; Addendum No. 4 to Barecon 2001 in respect of M.V. Rodrigo DPJ between GOSH Rodrigo DPJ S.A.P.I. de C.V. and OSA, September 24, 2013, **C-282**. Addendum No. 5 to Barecon 2001 in respect of M.V. Rodrigo DPJ between GOSH Rodrigo DPJ S.A.P.I. de C.V. and OSA, November 22, 2013, **C-283**; Addendum No. 6 to Barecon 2001 in respect of M.V. Rodrigo DPJ between GOSH Rodrigo DPJ S.A.P.I. de C.V. and OSA, December 30, 2013, **C-335**.

²⁰² Bareboat Charter for Salvirile between Semco Salvage (IV) Pte. Ltd. and Oceanografía, S.A. de C.V., December 27, 2011, **C-20**; Bareboat Charter for Salvision between Semco Salvage (IV) Pte. Ltd. and Oceanografía, S.A. de C.V., December 27, 2011, **C-21**.

²⁰³ Statement of Defense, para. 476.

²⁰⁴ Statement of Defense, paras. 479-481.

procurement process;²⁰⁵ and (iii) the likelihood of a vessel being chartered depends not only on the vessel's age, but on market conditions. These statements are either factually incorrect or rely on mischaracterizations of Ms. Richards' expert analysis (or both).

124. *As to oil prices*, neither Mexico nor the DP Report dispute the fact that, in May 2014 (the Valuation Date), the offshore market both globally and in Mexico was strong, charter rates were either increasing slightly or steady, and increasing demand for offshore oil production was predicted both world-wide and in Mexico. In fact, as explained by Ms. Richards, "the DP data confirms that the Mexican offshore industry was in a strong position in mid-2014: the price of oil had remained near \$100 per barrel from late 2010 through May 2014; crude oil production levels had remained steady between 2010 and 2014; and PEMEX's capital expenditures in oil exploration had increased each year between 2011 and 2014."²⁰⁶

125. The DP Report "focuses instead on the drop in oil prices that took place towards the end of 2014 and which continued to end 2015/early 2016. DP's reliance on hindsight data for late 2014 and 2015 does not provide any assistance in assessing the expectations of the industry in the first half of 2014."²⁰⁷ The legitimacy of POSH's expectations, and the quantum of its damages, should be assessed on an *ex ante* basis, taking into account what a reasonable investor in its shoes would have anticipated when making the investment or at the latest, shortly prior to the imposition of the adverse measures.

126. The DP Report instead inappropriately relies on hindsight and *ex post* analysis. Even if that were permissible, however, the conclusions drawn in the DP Report based on its *ex post* analysis of market conditions subsequent to May 2014 are incorrect, as explained by Ms. Richards:

Contrary to DP's assertions, there is a correlation between price trends for different blends of crude oil; there has not been a steady decrease in Pemex's capital investment since 2014; and the drop in oil price has not

²⁰⁵ Statement of Defense, para. 484.

²⁰⁶ See Second Expert Industry Report by Jean Richards, para. 3.3.

²⁰⁷ Second Expert Industry Report by Jean Richards, paras. 3.3-3.4.

substantively affected Pemex's oil production, which has stabilized and is expected to grow.....²⁰⁸

Consequently, even taking into account data subsequent to May 2014, it is unreasonable to believe that the contracts would have been renewed over the trading life of the vessels.²⁰⁹

127. *As to public procurement procedures*, the fact that PEMEX awards its contracts through a public procurement process does not make renewals or new contracts for OSA any less likely for two reasons, neither of which has been successfully refuted by Mexico or the DP Report. One, PEMEX values long-term relationships with reliable suppliers, as explained by Ms. Richards:

The fact that the procurement process is conducted in accordance with Mexican Law does not change the fact that Pemex values long-standing relationships with trusted service providers. In fact, Pemex's procurement system involves a list of pre-qualifying companies, which are able to participate in public tenders. I confirm my conclusion that Pemex would prefer to do repeat business with known and trusted suppliers, as it normally does. DP has not provided any reason to believe otherwise..²¹⁰

128. Two, any ship-owner with an existing PEMEX contract is in a better position to be awarded subsequent contracts for the same or similar services to PEMEX, because it has already incurred the significant mobilization and modification costs associated with putting the vessels in service in that location, and therefore will be able to offer lower prices than a competitor trying to access the contract anew:

The economics of the offshore services industry weigh strongly against swapping between owning partners. Specifically, awarding a new contract to the same vessel/ charterer permits the charterer to avoid the initial mobilization and modification costs associated with a change between owning partners. DP does not dispute these economic incentives involved in the renewal process.

The fact that the new contract may be awarded through a public tender, as contended by DP, makes no difference. The ship-owners that already paid modification and relocation costs would have an advantage against their competitors. DP fails to explain why the procurement policies would

²⁰⁸ Second Expert Industry Report by Jean Richards, para. 3.35.

²⁰⁹ Second Expert Industry Report by Jean Richards, para. 3.36.

²¹⁰ Second Expert Industry Report by Jean Richards, para. 2.12.

reduce the likelihood of renewal to the same ship-owner, given the evident and undisputed cost incentives.²¹¹

129. *As to vessel conditions*, Mexico is battling a straw man when it insists that “the expectation of successfully chartering a vessel is [not] ensured by the age of a vessel” but rather by market conditions—because neither Claimant nor Ms. Richards has ever asserted otherwise.²¹² Ms. Richards conducted a thorough analysis of the market conditions in Mexico in May 2014 and of PEMEX’s historical chartering practices. On the basis of that specific analysis, she concluded that it was PEMEX’s consistent business practice to “generally continue to work with known and trusted operators and owners with Mexican flag tonnage” over the “trading life” of the vessels and “at least... until [they are] approximately 20 years old.”²¹³ The value of “long term relationships... [and] the initial costs of mobilization and modifications to suit a particular market argue strongly against swapping between owning partners.”²¹⁴ Neither Mexico nor the DP Report has provided any evidence to refute this assertion.

130. Moreover, PEMEX’s practice of renewing contracts with reliable business partners and OSA’s expectations in that regard were memorialized by Banamex in a presentation prepared to assess the financing of GOSH in June 2012. The following slide from that presentation illustrates the market’s contemporaneous understanding of PEMEX’s renewal habits:

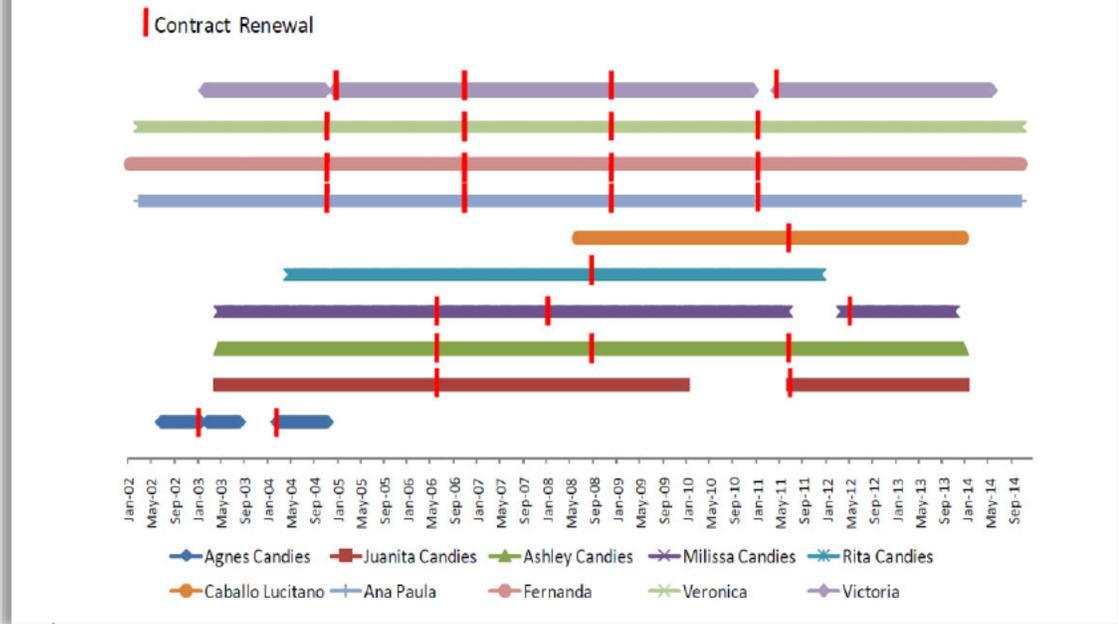
²¹¹ Second Expert Industry Report by Jean Richards, paras. 6.5-6.6.

²¹² Statement of Defense, para. 489.

²¹³ Expert Industry Report by Jean Richards, para. 7.12.

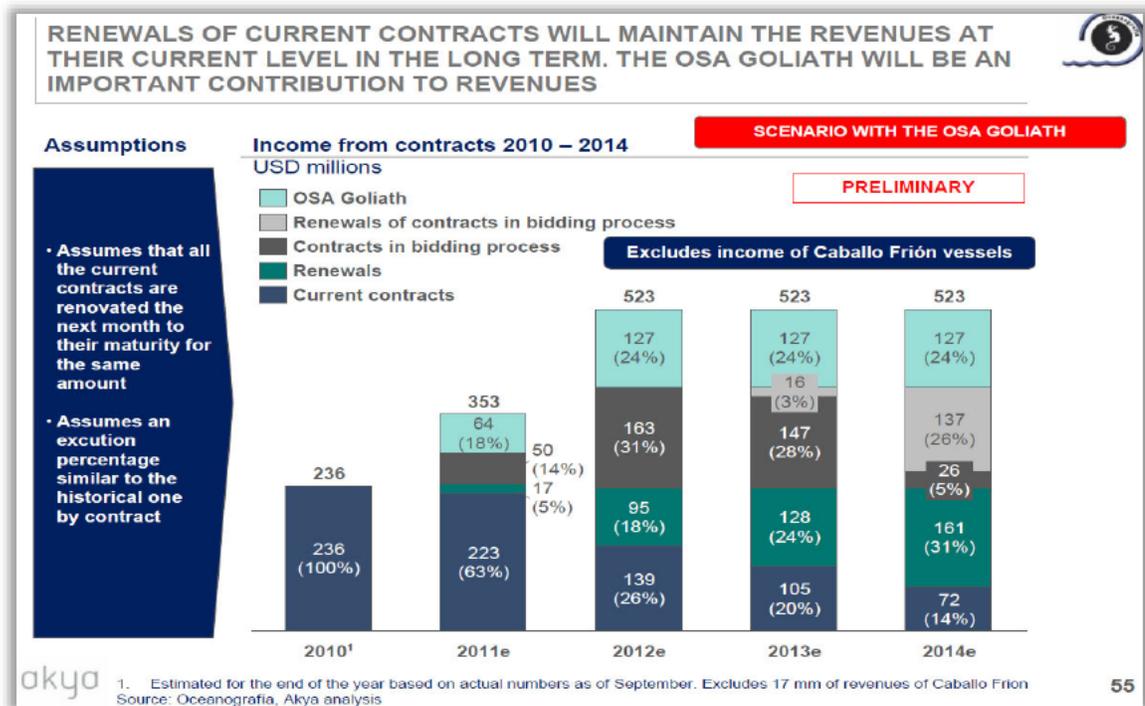
²¹⁴ Expert Industry Report by Jean Richards, para. 7.12.

Some MSCs and Personal Transportation Contracts similar to the ones that OSA is going to operate have been re-contracted for over ten years as shown below:



131. The Akya Report also based its financial forecasts for OSA on the renewal of OSA’s existing contracts with PEMEX, as explained in the following slide:²¹⁵

²¹⁵ Akya Report, C-264, p. 55.



132. Finally, the independent, contemporaneous Citigroup Presentation also memorialized that “Contracts [with PEMEX] were typically renewed through a public tender,” and that OSA had successfully obtained renewals so that its “fleet ha[d] been operating at nearly 100% capacity over the last 10 years.”²¹⁶

133. In sum, given the market conditions at the time and PEMEX’s consistent business practices, POSH had solid and legitimate expectations that OSA’s contracts with PEMEX would be renewed or new contracts would be awarded for the same services. Mexico improperly relies on data subsequent to 2014 and, in any case, fails to rebut any of the foundations for that conclusion.

VI. MEXICO’S UNSUBSTANTIATED ACCUSATIONS AGAINST OSA

134. Mexico dedicates much of its factual discussion in the SOD²¹⁷ to a smear campaign against OSA. Mexico claims that OSA had “a history of irregularities that caused it to be

²¹⁶ Citigroup Management Presentation “Oceanografía”, January 2014, C-248, p. 24.

²¹⁷ Statement of Defense, paras. 116-193.

investigated by various authorities”²¹⁸ and that it was not a “healthy company”²¹⁹ because it faced “a large number of legal contingencies in contractual, labor, social security and financial investigations.”²²⁰ On that basis, Mexico purports to show that (i) POSH’s due diligence on OSA in 2011 was incomplete or inaccurate, suggesting that POSH should have known better than to invest through a JV with OSA; and (ii) OSA was “pre-insolvent” in late 2013, suggesting that OSA would have inevitably become insolvent, irrespective of the Measures.

135. The aspersions cast against OSA by Mexico are entirely unsubstantiated and do nothing to prove either of the propositions Mexico hopes to establish. Mexico does not produce a single piece of evidence actually showing any “irregularity” by OSA, nor can it point to any conviction of any of OSA’s directors, shareholders, or employees. Instead, Mexico distorts the factual timeline, conflating facts that took place prior to and after the Measures, and inappropriately relies on facts that resulted from the Measures.²²¹

136. In Section III.B and V.A above, Claimant explained POSH’s appropriate due diligence on OSA in 2011, and OSA’s financial viability and prospects as of the end of 2013, both based on contemporaneous supporting evidence. This suffices to rebut both of Mexico’s propositions. Accordingly, this section will briefly walk through Mexico’s assorted attacks on OSA—not to defend OSA, because it is not Claimant’s burden nor within its capacity to do so (OSA is an unrelated entity not a party to this proceeding), but rather to illustrate the lack of substance behind Mexico’s rhetoric.

- Mexico states that “[OSA] has been involved in *several scandals* and has been the subject of various news articles.”²²² Mexico does not provide any supporting evidence from, or about, any of these alleged scandals. Instead, Mexico cites a single news article dated July 11, 2019, five years after the Measures, discussing

²¹⁸ Statement of Defense, para. 144.

²¹⁹ Statement of Defense, para. 182.

²²⁰ Statement of Defense, para. 182.

²²¹ Mexico conflates (i) facts that took place several years prior to POSH’s investment, which are entirely irrelevant to POSH’s due diligence in 2011 or to OSA’s financial situation in 2013; (ii) investigations that were launched after the early 2014 Measures or as a part thereof, which have resulted in no convictions and which again are irrelevant to POSH’s 2011 due diligence or to OSA’s 2013 condition; and (iii) other legal proceedings initiated by, or against, OSA after the Measures, the outcome of which Mexico does not document and the relevance of which to this arbitration is never explained.

²²² Statement of Defense, para. 128.

an alleged investigation during which an unidentified person allegedly “mentioned” OSA.²²³

- Mexico states that “in 2007, an Oversight Commission was created within the Chamber of Deputies to investigate possible abuses by [OSA],”²²⁴ but fails to produce a single official document from that governmental Commission.
- Mexico states that in March 2014 “a Special Commission was created in the Senate Chamber... with the purpose of following up on the allegations made against the company,”²²⁵ but fails to mention that several Senators serving on that Special Commission stated publicly that the Government’s measures against OSA were part of a political campaign to bring down OSA.²²⁶
- Mexico describes Mr. Yáñez’s lifestyle as “extravagant”²²⁷ and claims that he led “an authentic sheik’s life,”²²⁸ but quite apart from the fact that it produces no reliable documentation to establish such facts, Mexico does not even attempt to explain how Mr. Yáñez’s personal habits would be relevant to this arbitration.²²⁹
- Mexico states that Mr. Yáñez and Mr. Díaz are subject to criminal proceedings,²³⁰ but fails to mention that those proceedings, which were launched in 2014, are in fact part of the very same wrongful Measures on which POSH bases the present claim.
- Mexico states that “it is understood that Mr. Rodríguez Borgio [an OSA shareholder] has been investigated for the possible crime of money laundering and is linked to the alleged fraud in the Caja Libertad case”²³¹ but, once again, fails to produce any supporting evidence from or about this investigation or establish its purported relevance to this arbitration.
- Mexico states that OSA “*superficially seemed* to have the necessary solvency... [and] *seemed to have the technical requirements* to fulfill the contracts signed with Pemex,”²³² but fails to produce any financial analysis showing that OSA did not,

²²³ Statement of Defense, para. 182.

²²⁴ Statement of Defense, para. 129.

²²⁵ Statement of Defense, para. 129.

²²⁶ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 4, 12.

²²⁷ Statement of Defense, para. 134.

²²⁸ Statement of Defense, para. 134.

²²⁹ Mexico refers to a news article and to a legal complaint drafted by certain lawyers, without reference to any supporting documentation or any definitive finding by a court.

²³⁰ Statement of Defense, paras. 135, 138.

²³¹ Statement of Defense, para. 141.

²³² Statement of Defense, para. 142. (Emphasis added).

in fact, have the solvency and technical requirements necessary to fulfill its PEMEX contracts.²³³

- Mexico also states that “the resources received by Oceanografía were transferred to different bank accounts of the company, or diverted to various subsidiaries, or were apparently used for purposes other than those for which they were intended to be used.”²³⁴ Despite the gravity of the accusation, Mexico does not even try to prove its statement.
- Mexico asserts that “the poor management of Oceanografía and the abuse of these financing mechanisms, together with probable illicit behaviors, would worsen the financial situation of the company.”²³⁵ Again, Mexico makes this bald statement without even attempting to prove the grave allegations.
- Mexico states that “[b]etween 2005 and 2009, the Superior Audit of the Federation (ASF) detected serious irregularities in Oceanografía operations,”²³⁶ again without putting forward any evidence to prove the existence of any such finding by the ASF, and admits immediately thereafter that “[i]n the end, the PGR considered that there were *no elements to prosecute [OSA]*.”²³⁷
- Mexico states that “[f]rom this moment [2009] on, *it was found* that [OSA] was operating in an opaque manner and later on other elements emerged that would demonstrate the precarious administration of the company....”²³⁸ This assertion of a “finding” is made with no reference to the record, no citation of any kind, and no specification as to who would have made that purported finding in what context.
- Mexico states that “Oceanografía [made] three debt bond issues [sic]” in 2008, 2013 and 2014, and that the bondholders have not been able to recover their investment.²³⁹ Mexico further states that OSA had several credit lines with banking institutions.²⁴⁰ On these bases alone, Mexico concludes that OSA had a dangerously high level of liabilities, which it treats as proof that POSH “failed to consider the financial contingencies of [OSA].”²⁴¹ Mexico’s conclusion does not follow from the facts it sets out, and it is incorrect.

²³³ Worse yet, Mexico’s insinuations run contrary to its own actions, in the form of PEMEX’s financial due diligence on each of the 106 contracts awarded to OSA, as discussed in Section III.B.3(a) above.

²³⁴ Statement of Defense, para. 142. (Emphasis added).

²³⁵ Statement of Defense, para. 143. (Emphasis added).

²³⁶ Statement of Defense, para. 145.

²³⁷ Statement of Defense, para. 145. (Emphasis added).

²³⁸ Statement of Defense, para. 146. (Emphasis added).

²³⁹ Statement of Defense, para. 148.

²⁴⁰ Statement of Defense, paras. 153-155.

²⁴¹ Statement of Defense, para. 156.

- Mexico does not compare OSA’s liabilities with its assets, incorrectly assuming that all debt is necessarily problematic. It can be economically reasonable and fiscally sound for an offshore marine service company with contracts valued at \$2.73 billion and 75 vessels to utilize different sources of financing, including credit lines and debt issuances.
 - Prior to every bond issuance or the opening of any line of credit, one or more independent third parties (the underwriter, the lender, etc.) will have thoroughly examined the company’s finances and business prospects and confirmed OSA’s financial solvency
 - Contemporaneous third-party analyses set OSA’s valuation in 2013 in the range of USD\$3 billion.²⁴²
 - The fact that the bondholders have not been able to recover their investment is the result of the very Measures at issue in this case. What Mexico presents as purported red-flags that would have alerted POSH to the risks of doing business with OSA are rather Mexico’s own internationally wrongful acts.
- Mexico attempts to convey the impression—without expressly saying so—that OSA engaged in some type of wrongdoing in connection with the Banamex factoring facility,²⁴³ which is unsupported and untrue.
 - As will be addressed in Section VII.C, the investigations jointly led by Banamex and PEMEX of the factoring facility were prompted by the Unlawful Sanction and are part of the Measures on which this claim is based. Mexico tries to present its own internationally wrongful acts as purported red flags of warning against OSA.
 - The Insolvency Court held that OSA did *not* owe Banamex any money from the factoring cash advances, and that decision was upheld on appeal.²⁴⁴
 - The record shows, and Mexico acknowledges,²⁴⁵ that the only entity that has ever been sanctioned as a result of the investigations is Banamex—not OSA.²⁴⁶
 - Mexico states that “at the time of submitting the insolvency application, the PGR identified that Oceanografía was facing 5 cases before civil courts in Mexico

²⁴² Letter from Advent International to Oceanografía S.A. de C.V., November 21, 2012, **C-250**; Citigroup Management Presentation “Oceanografía”, January 2014, **C-248**, p. 25; Summary of Terms between Oceanografía S.A. de C.V., and Blackstone Energy Partners L.P., September 1, 2013, **C-249**, p. 1.

²⁴³ Statement of Defense, paras. 157-161.

²⁴⁴ Judgment on Recognition of Credits, October 23, 2014, **C-165**, p. 41.

²⁴⁵ *See* Statement of Defense, para. 222.

²⁴⁶ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.’s case, 2015 Activities Report, **C-126**, p. 38.

City.”²⁴⁷ Under order by the Tribunal, Mexico produced documents from four out of the five proceedings. In all four of those proceedings, the outcome (never mentioned by Mexico in the SOD) was actually *favorable to OSA*—meaning that Mexico referred to the civil proceedings as indicators of OSA wrongdoing in the SOD either in bad faith (knowing the outcomes) or negligently (not bothering to check them).²⁴⁸

- Mexico states that “[o]n May 6, 2014, the SAE and [OSA]... mentioned that... they had detected more than 10 lawsuits initiated by different companies against [OSA]...,”²⁴⁹ but fails to introduce a single piece of documentation from those ten alleged proceedings, nor did it provide any detail thereof.²⁵⁰
- Mexico states that, in 2008, two companies “submitted an insolvency application against [OSA],”²⁵¹ but immediately admits that “based on the audited financial statements of 2005, 2006 and 2007, and the interim financial statements as of July 2008, [the court] considered that [OSA] *had sufficient resources to fulfill its obligations.*”²⁵²
- Mexico mentions that certain employees sued OSA seeking payment of their salaries, and that OSA had stopped paying fees owed to the Mexican public entities IMMS or Infonavit,²⁵³ but omits to explain that both those developments were subsequent to, and a result of, the Measures.²⁵⁴
- Mexico mentions²⁵⁵ criminal proceedings launched against OSA in March 2014, which again was a part of the Measures complained of in this case.
- Mexico invokes a lawsuit brought by OSA and Mr. Yañez against Citibank and Banamex before US courts, to suggest that OSA blames Banamex, not Mexico, for

²⁴⁷ Statement of Defense, para. 171.

²⁴⁸ Out of the four proceedings, three claimants discontinued their claims against OSA and the courts dismissed the fourth claim against OSA. Eighteenth Civil Court from Mexico City, in relation to file 485/2012, submitted by Deutsche Forfait Aktiengesellschaft, **C-318**; Sixty-Eighth Civil Court from Mexico City, in relation to file 485/2012, submitted by PNC Bank N.A., **C-319**; Forty-Ninth Civil Court from Mexico City, in relation to 472/2012, submitted by Deutsche Forfait Aktiengesellschaft, **C-320**; Forty-Eighth Civil Court from Mexico City, in relation to file 336/2010, submitted by ESEASA Construcciones S.A. de C.V., **C-321**.

²⁴⁹ Statement of Defense, para. 172.

²⁵⁰ Mexico did not establish the date when the alleged proceedings were initiated (before or after the Measures), their factual and legal bases, their outcomes, or their relevance to this case. Given the fate of the cases cited in paragraph 171, one can hardly assume that these ones would be any better indicators of OSA wrongdoing.

²⁵¹ Statement of Defense, para. 174.

²⁵² Statement of Defense, para. 174, footnote 152.

²⁵³ Statement of Defense, paras. 176-181.

²⁵⁴ This makes Mexico’s allegations irrelevant to the question of POSH’s legitimate expectations and its knowledge of OSA prior to the Measures.

²⁵⁵ Statement of Defense, para. 181.

OSA's demise.²⁵⁶ But Banamex's wrongdoing, sanctioned by the Mexican government (as will be explained in Section VII.C below), in no way reduces Mexico's responsibility in issuing the Unlawful Sanction, seizing OSA's assets, or detaining the vessels. Also, Mexico tries to rely on a complaint that has no probative value when divorced from the evidence filed in support it, which this Tribunal has no way of accessing or assessing, and notably, Mexico again fails to mention the case's outcome: the US court dismissed OSA's claim.²⁵⁷

- Mexico alludes²⁵⁸ to a lawsuit brought by certain creditors against OSA and Mr. Yañez before US courts, which Mexico claims is an indication that OSA was responsible for its own demise. Once again, Mexico bases its accusation on a complaint that has no probative value in a vacuum, without the evidence filed in support thereof, and once again, Mexico fails to mention that the US court dismissed the claim against OSA.²⁵⁹

137. The length of this list is no accident. It illustrates Mexico's mudslinging approach to its SOD: Mexico presents a collection of unsubstantiated accusations, devoid of evidentiary proof, which do not withstand scrutiny, and mistakenly hopes that the Tribunal will not be diligent enough to examine them. Claimant asks the Tribunal to bear in mind Mexico's "fast and loose" litigation tactics here, as the Tribunal weighs the credibility of the rest of Mexico's allegations and arguments.

VII. THE GOVERNMENT'S CAMPAIGN AGAINST OSA

138. The speed of the events, and their destructive impact, in this case is remarkable. As of the end of 2013, POSH's operations in Mexico and future prospects were solid. Six months later, by July 2014, POSH's Investment was destroyed and the Subsidiaries were left with nothing. This was the result of a politically motivated campaign led by the new Mexican administration to bring down OSA, along with its contractors and business partners—including POSH's Subsidiaries—due to OSA's ties with Mexico's prior administrations, which had been led by a different political party. Mexico calls these facts "exaggerated allegations" but does not produce a single piece of evidence to rebut them.

²⁵⁶ Statement of Defense, paras. 186-188.

²⁵⁷ *Osuna et al v. CitiGroup Inc.*, No. 17-cv-1434, 2018 WL 6547205 S.D.N.Y. Sept. 28, 2018, at *13 (S.D.N.Y. Sept. 28, 2018), **C-284**.

²⁵⁸ Statement of Defense, paras. 189-193.

²⁵⁹ *Otto Candies, LLC et al v. Citigroup Inc.*, No. 16-cv-20725 (S.D. Fla. June 15, 2018), **C-285**.

A. MEXICO'S POLITICAL MOTIVATION FOR THE MEASURES

139. Several Senators serving on the Senate Committee expressly stated that, in early 2014, Mexico engaged in “a hunt against [OSA,] the company [that had been] spoiled by [PEMEX] during the Calderón [administration],”²⁶⁰ and called it an act of “revenge against the PAN”²⁶¹ political party and “the opportunity to use this voluminous file as a political weapon to obtain [a]... cooperative attitude from that party.”²⁶² Unsurprisingly, Mexico makes no reference to this clear and categorical acknowledgement by Mexican Senators about the State’s motives for the Measures against OSA.

140. As explained in the SOC, OSA had benefitted from close ties with Mexico’s former presidents Mr. Vicente Fox and Mr. Felipe Calderón²⁶³ (the **PAN Administrations**).²⁶⁴ The new administration, however, led by Mr. Enrique Peña Nieto (the **PRI Administration**)²⁶⁵ wanted to remove those who had “benefited from PAN administrations, especially from (Vicente) Fox.”²⁶⁶ The press readily noted that this case went “beyond [OSA’s] legal issues,”²⁶⁷ and was driven by the political agenda of the PRI Administration.²⁶⁸

141. The Wall Street Journal (**WSJ**) captured the political implications of the case in a contemporaneous article:

Over the past decade, Amado Yáñez Osuna gained a reputation throughout Mexico as a highflying CEO with good political ties. He turned up at events

²⁶⁰ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 4.

²⁶¹ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 4.

²⁶² PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 4.

²⁶³ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 4.

²⁶⁴ Acronym in Spanish for *Partido de Acción Nacional*.

²⁶⁵ Acronym in Spanish for *Partido Revolucionario Institucional*.

²⁶⁶ Expansión, *Oceanografía, la preferida de PEMEX*, March 3, 2014, **C-134**.

²⁶⁷ British Broadcasting Corporation (BBC), *Pemex y Banamex: radiografía de un escándalo financiero a gran escala*, March 4, 2014, retrieved from <https://perma.cc/P69K-VEMB> (last accessed 20 March 2019), **C-139**.

²⁶⁸ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 4.

with prominent ruling-party members, and lent his private jet to party officials.

*But then the party lost power.*²⁶⁹

142. The WSJ also explained that the Measures were of a political nature and sought to remove OSA from its position of preeminence as PEMEX's main contractor, without regard for the rights of its business partners:

Under the six-year term of Mr. Calderon, Oceanografía's power grew...

Oceanografía's luck started to change when the PAN lost the 2012 presidential election. Mr. Peña Nieto named former [REDACTED] of Pemex...²⁷⁰

143. The Mexican press was categorical. Newspaper *Expansión* stated that "it is clear that Peña Nieto has used this case politically as a commodity to blackmail the... *panism* [PAN Party political movement] that did not govern well over 12 years..."²⁷¹ The evidence on the record is consistent with this conclusion, and demonstrates that the Government implemented a series of excessive, unreasonable, arbitrary, and even unlawful measures against OSA and its business partners, in order to remove OSA from its position of preeminence with PEMEX.

144. This political explanation behind the Measures against OSA is important not only as context, but because it often is the only logical explanation for otherwise inexplicable actions taken by Mexico's authorities, as will be discussed in the next sections. A political "order" to the investigators and prosecutors to move against OSA is really the only possible explanation, for example, for how they could have based draconian and disproportionate seizure actions against the company on inconsistent, or irrelevant "proof", all rushed through in a matter of mere hours in a single day. The political motive also explains, for example, why prosecutors would coerce witnesses into making complaints, or why different authorities would accidentally name different

²⁶⁹ The Wall Street Journal, *Oil-Tinged Graft Scandal Roils Mexico*, May 29, 2014, retrieved from <https://www.wsj.com/articles/oil-tinged-graft-scandal-roils-mexico-1401409692> (last accessed 12 February 2020), C-286.

²⁷⁰ The Wall Street Journal, *Oil-Tinged Graft Scandal Roils Mexico*, May 29, 2014, C-286.

²⁷¹ Ricardo Mejia Berdeja, *Oceanografía: El escandalo y la verguena continuan*, La Silla Rota, May 7, 2015 retrieved from <https://lasillarota.com/opinion/columnas/oceanografia-el-escandalo-y-la-verguena-continuan/84304>, C-331, para. 4.

“crimes” whose funds were supposedly being laundered. Without that context, the reader might fail to understand why such a flimsy record led to utterly overblown “provisional” measures that had the actual effect of demolishing the company before they could be undone, too late, and why no actual charges ever emanated from those investigations.

145. Unfortunately, this is not an isolated incident in Mexico, which “has ranked increasingly worse on corruption and impunity in recent years. Its overall rule of law has dramatically deteriorated as well.”²⁷² This is true by reference to most international standards:

- In 2017, Transparency International “ranked Mexico 135 out of 180 countries using its CPI [Corruption Perception Index]. Astonishingly, Mexico had dropped 40 places on this index between 2015 and 2017,”²⁷³ reflecting the impact of the PRI’s approach to the rule of law in Mexico.
- Moreover, the 2017 CPI also shows that Mexico was ranked “as the most corrupt country in both the Organization for Economic Co-operation and Development (OECD) and the G-20.”²⁷⁴
- Mexico’s 2017 CPI is “below the average CPI of Latin American and Caribbean countries. In fact, Mexico is only ranked higher than Guatemala, Nicaragua, Venezuela, and Haiti.”²⁷⁵
- The Political Risk Services group has a similar assessment of Mexico: “In 2017, Mexico scored 1.5 out of 6 and was ranked 126 out of 140 countries using the **corruption component** of the ICRG [International Country Risk Guide]. **Mexico dropped 25 places from 2012 to 2017...**”²⁷⁶
- As does the World Bank Group (WBG): “In 2017, Mexico scored 16 out of 100 on this indicator, and the WBG ranked it 175 out of 209 countries, which again indicates that *Mexico is one of the most corrupt countries in the world.*”²⁷⁷

146. Mexican political corruption extends to PEMEX as well. As a Senate leader expressed at the time, PEMEX “has traditionally served as a cash register for the Government in

²⁷² Jose I. Rodriguez-Sanchez, *Measuring Corruption in Mexico*, December 2018, retrieved from <https://www.bakerinstitute.org/media/files/files/b190ca73/bi-pub-rodriguez-sanchezcorruption-121118.pdf> (last accessed 12 February 2020), **C-287**, p. 9.

²⁷³ Jose I. Rodriguez-Sanchez, *Measuring Corruption in Mexico*, December 2018, **C-287**, p. 9.

²⁷⁴ Jose I. Rodriguez-Sanchez, *Measuring Corruption in Mexico*, December 2018, **C-287**, p. 9.

²⁷⁵ Jose I. Rodriguez-Sanchez, *Measuring Corruption in Mexico*, December 2018, **C-287**, p. 9.

²⁷⁶ Jose I. Rodriguez-Sanchez, *Measuring Corruption in Mexico*, December 2018, **C-287**, p. 9.

²⁷⁷ Jose I. Rodriguez-Sanchez, *Measuring Corruption in Mexico*, December 2018, **C-287**, p. 9.

power.”²⁷⁸ In fact, in the twenty-first century alone, PEMEX has suffered five large-scale political scandals.²⁷⁹ POSH has brought this claim to hold Mexico accountable for the measures adopted in just one of those scandals, in which POSH’s Investment was destroyed by no fault of its own.

B. MEXICO UNLAWFULLY SANCTIONED OSA

147. As explained in the SOC, the first measure adopted by the Mexican Government—which triggered the rest of the Measures and ultimately led to OSA’s demise and the destruction of POSH’s Investment—was the Unlawful Sanction.

148. On February 10, 2014, the Mexican agency responsible for overseeing public contracts and Government spending (*Secretaría de la Función Pública*, **SFP**) accused OSA of failing to provide performance bonds covering 10% of the value of nine of OSA’s contracts with PEMEX. The SFP declared that OSA had violated Article 8, Part IV, of the Federal Anticorruption Law on Public Procurement (**FALPP**), and banned OSA from entering into any public contracts, including contracts with PEMEX (the **Unlawful Sanction**).²⁸⁰ The Unlawful Sanction was arbitrary, disproportionate, and contrary to Mexican Law, as illustrated by Mexico’s own subsequent actions: Mexican courts suspended the Sanction’s effects just five months later in July 2014,²⁸¹ revoked it altogether in November 2014,²⁸² and confirmed that revocation on appeal in June 2015.²⁸³

149. In the SOD, Mexico openly acknowledges that, although the Unlawful Sanction severely punished OSA, “Mexican courts [later] considered that the conduct of Oceanografía was not punishable...”²⁸⁴ Faced with this unsurmountable fact, Mexico attempts to distract attention from it by insisting that OSA was in breach of the contracts with PEMEX—

²⁷⁸ Alto Nivel, *The 5 biggest scandals of Pemex in the XI century (Los 5 escándalos más grandes de Pemex en el Siglo XXI)*, March 14, 2017, **C-288**.

²⁷⁹ Alto Nivel, *The 5 biggest scandals of Pemex in the XI century (Los 5 escándalos más grandes de Pemex en el Siglo XXI)*, March 14, 2017, **C-288**.

²⁸⁰ Letter from D. Ramírez Ruiz to Senator L. Hernández Lecona, May 2, 2014, **C-127** (attachment containing the administrative procedure adopted against Oceanografía, S.A. de C.V.).

²⁸¹ Judgement of the Court of Appeals for the 10th Circuit, June 4, 2015, **C-128**.

²⁸² Judgement of the Court of Appeals for the 10th Circuit, June 4, 2015, **C-128**.

²⁸³ Judgement of the Court of Appeals for the 10th Circuit, June 4, 2015, **C-128**.

²⁸⁴ Statement of Defense, para. 212.

which, in any event, would not legally justify the Unlawful Sanction—and by trying to downplay the impact of the Unlawful Sanction on OSA’s finances (“to think that the Disqualification ‘caused irreparable damage to OSA... *is an exaggeration...*”).²⁸⁵ Mexico’s arguments are flawed, as demonstrated by its own admissions and by documents on the record.

150. *First*, Mexico points out that OSA was in breach of the PEMEX-OSA contracts for failing to produce the performance bonds. Mexico’s analysis is incomplete and misplaced. Under Mexican law, a simple breach of contract might generate contractual liability for the breaching party. It does not justify, however, an administrative sanction under the FALPP (which governs anticorruption practices), much less an extreme and serious one, such as a ban preventing the company from entering into any public contract. This is, in effect, a death sentence for any company whose business is built on public contracts. As explained by the High Court for the 10th Circuit, the entire alleged breaches of contract were not valid grounds to justify the Unlawful Sanction:

[I]n order to sanction a breach of contract in an administrative capacity under the Federal Anticorruption Law on Public Procurement, *an additional element of reproach to the actions of the breaching party is needed, that is, the action of breaching the contract must be coupled with an illicit intent and a profit...* [Since] the Federal Judge found that there was no evidence showing... [the company’s] illicit intent... but instead that the company acted negligently... *there was no violation of Article 8, Part IV, of the Federal Anticorruption Law on Public Procurement.*²⁸⁶

151. *Second*, there is no question that the Unlawful Sanction irreparably damaged OSA’s finances. Mexico candidly admits that “[i]t is undisputed that Oceanografía’s viability depended on the OSA-PEP Contracts.”²⁸⁷ Claimant agrees. OSA was PEMEX’s largest contractor. Since 2003, OSA had entered into more than 150 contracts with PEMEX (45 awarded in the 2011-2013 period alone),²⁸⁸ which represented fully 97% of its income.²⁸⁹ OSA relied on those contracts to

²⁸⁵ Statement of Defense, para. 208. (Emphasis added).

²⁸⁶ Judgement of the Court of Appeals for the 10th Circuit, June 4, 2015, **C-128**, p. 248.

²⁸⁷ Statement of Defense, para. 382.

²⁸⁸ Letter from J. Márquez Serralde to Senator L. Hernández Lecona, October 23, 2014, **C-124** (attachment containing the list of contracts entered into by OSA and PEMEX between 2003 and 2014).

²⁸⁹ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.’s case, Report of the period between September 2017 and April 2018, **C-125**, p. 5.

obtain cash flows to operate the vessels and pay its debts, including the obligations owed to POSH's Subsidiaries. Without any new public contracts, OSA would be forced to shut down.

152. Additionally, as Mexico also confirms, “there are no automatic renewals or extensions of [PEMEX’s] contracts...”²⁹⁰ The adjudication of contracts is done according to public procurement procedures.”²⁹¹ This means that, for companies such as OSA that are entirely reliant on PEMEX contracts, a sanction banning them from entering into public contracts has two devastating effects: (i) the company cannot obtain new contracts for any *new services*, so it cannot grow its business; and most importantly, (ii) when its current contracts start expiring, the company cannot secure renewals (*i.e.*, contracts for the *same services* it was already rendering) and so it cannot even maintain its existing business. As already discussed, in practice, PEMEX’s contracts for the same services typically operate like renewals, in which the company that was previously rendering the services is awarded the contract again, and again.²⁹² Frequently, in fact, that company is the only bidder. That was OSA’s consistent experience with PEMEX, to such an extent that “OSA’s fleet ha[d] been operating at nearly 100% capacity over the last 10 years.”²⁹³

153. During the time that the Unlawful Sanction was in force, OSA’s contracts with PEMEX were expiring, as Mexico admits: “[t]he terms of the OSA-PEP Contracts were effectively ending.”²⁹⁴ OSA needed to obtain new contracts for the same services (renewals) in order to keep its fleet active at the vessels’ existing locations and generating revenues, but it was barred from bidding for those contracts (or any others). As a result, OSA’s financial situation rapidly deteriorated, and so did its ability to perform on the contracts with POSH’s Subsidiaries. It is undisputed that, by the time the Unlawful Sanction was suspended in July 2014, OSA was insolvent, had stopped performing on its contracts with the Subsidiaries, and could no longer meet

²⁹⁰ Statement of Defense, para. 487.

²⁹¹ Statement of Defense, para. 117.

²⁹² Organisation for Economic Co-operation and Development (OECD), *Fighting Bid Rigging in Public Procurement: A review of the procurement rules and practices of PEMEX in Mexico*, 2016 retrieved from <https://www.oecd.org/daf/competition/OECD-PEMEX-review-2016.pdf> (last accessed 12 February 2020), **C-289**; Houston Chronicle, *Mexican officials limit bidding on new Pemex refinery to four companies*, March 18, 2019 retrieved from <https://www.houstonchronicle.com/business/energy/article/Mexico-officials-limit-bidding-documents-on-new-13697598.php> (last accessed 12 February 2020), **C-290**.

²⁹³ Citigroup Management Presentation “Oceanografía”, January 2014, **C-248**, p. 29.

²⁹⁴ Statement of Defense, para. 381.

PEMEX's financial requirements to bid for any future public tenders.²⁹⁵ That is, even after the Unlawful Sanction was lifted, OSA could no longer contract with PEMEX, which was effectively its only client.

154. Any dispute as to the relevance and effect of the Unlawful Sanction is more apparent than real. Mexico's own courts have confirmed that Mexico's actions were unlawful and disproportionate. Mexico admits that "[i]t is undisputed that Oceanografía's viability depended on the OSA-PEP Contracts."²⁹⁶ It undisputed that "[t]he terms of the OSA-PEP Contracts were effectively ending,"²⁹⁷ and that OSA could not obtain new contracts for the same services (renewals). It is undisputed that, even after the Unlawful Sanction was suspended, OSA could not resume participating in PEMEX tenders, because it could no longer meet PEMEX's financial solvency and stability requirements.²⁹⁸ And it is undisputed that, in the wake of the Unlawful Sanction, OSA was never again awarded a single contract by PEMEX.

155. The record shows, in sum, that the Unlawful Sanction was indeed a death sentence for OSA and, therefore, for POSH's Investment. It damaged OSA's finances irreparably and destroyed the main reason and premise for POSH's Investment. Moreover, it also precipitated a series of other Government measures, discussed next, that contributed to OSA's liquidation and completed the destruction of POSH's Investment.

C. THE UNLAWFUL SANCTION PROMPTED THE SUSPENSION OF OSA'S FACTORING FACILITY

156. Mexico acknowledges that the Unlawful Sanction was the direct cause of subsequent joint investigations launched by Mexico and Banamex to examine OSA's factoring facility: "[the Unlawful Sanction] caught the attention of Citibank and generated an investigation regarding the financial factoring between Banamex and [OSA]...²⁹⁹ [and] Citibank and Pemex jointly performed a review of the documentation of the financial factoring system"³⁰⁰ (the

²⁹⁵ Email from J. Phang to G. Seow *et al.*, July 18, 2014, C-130.

²⁹⁶ Statement of Defense, para. 382.

²⁹⁷ Statement of Defense, para. 381.

²⁹⁸ Email from J. Phang to G. Seow *et al.*, July 18, 2014, C-130.

²⁹⁹ Statement of Defense, para. 215.

³⁰⁰ Statement of Defense, para. 216.

Factoring Investigation). To launch that investigation, Mexico and Banamex claimed at the time that more than USD\$400 million “had been awarded to [OSA] without supporting documents, or with inadequate and possibly falsified documentation.”³⁰¹ On that basis, OSA’s factoring facility was suspended at the outset of the investigation, effectively destroying OSA’s liquidity.

157. Under the factoring facility, Banamex had granted cash advances to OSA upon OSA’s submission of invoices that it had sent to PEMEX for work that OSA performed. Mexico acknowledges that the whole purpose of the factoring facility was “to obtain resources quickly since payments from [PEMEX] could take longer than expected.”³⁰² It is clear, therefore, that the Unlawful Sanction squeezed and destroyed OSA’s liquidity in at least two ways: OSA could not secure any new contracts with PEMEX (renewals or otherwise), and, due to the resulting suspension of the factoring facility, it could no longer even obtain liquidity from its ongoing PEMEX contracts.

158. At the end of the day, however, only Banamex—*not* OSA—was sanctioned in connection with this investigation. After a thorough investigation, the Mexican National Commission for Banking and Capital Markets (CNBV, the acronym in Spanish) concluded that Banamex had acted improperly in reviewing the relevant documentation pertaining to the cash advances and had failed to implement required supervisory mechanisms. As a result, in Mexico’s own words, “the CNBV imposed 34 fines against Banamex, which totaled \$29,962,035.00 pesos (approximately \$1.5 million dollars)” and, subsequently, “3 additional fines against Banamex equivalent to \$1,188,450.00 pesos (approximately \$60,620)” were imposed.³⁰³ The CNBV’s decision details all types of wrongdoing by Banamex, including inadequate procedures, personnel and systems, incorrect accounting and reconciliation of payments in connection with the financing mechanisms, lack of risk control, errors in the legal articulation of the financing mechanisms and many others.³⁰⁴

³⁰¹ Statement of Defense, para. 219.

³⁰² Statement of Defense, para. 160.

³⁰³ Statement of Defense, para. 222.

³⁰⁴ Deputy General Directorate of Administrative Sanctions, Memorandum No. DGASA “A”1/2020, January 8, 2020, **C-341**.

159. In contrast, neither OSA, nor any of its shareholders, directors, or employees were ever found to have carried out any wrongdoing in connection with the factoring facility.³⁰⁵ In fact, the record shows that Mexican courts confirmed that Mr. Yáñez had not forged any documents to obtain cash advances,³⁰⁶ and that OSA did not owe any amount to Banamex arising from the factoring facility.³⁰⁷ As later explained by the Senate Committee, the “insolvency judge... rejected [Banamex] as a legitimate creditor” of OSA³⁰⁸ because it failed to prove that OSA actually owed the ~450 million dollars claimed by Banamex.³⁰⁹ To reach that conclusion, the judge held that the documentation of the debt claimed by Banamex “was not solid enough to validate its status as a creditor.”³¹⁰

160. In sum, the Unlawful Sanction itself, as well as the factoring suspension it triggered, damaged irreparably OSA’s financial situation. The record shows that OSA became insolvent by mid-2014 not because it was already “pre-insolvent in 2013”—as Mexico incorrectly asserts—but as a result of the Unlawful Sanction and the other Measures it spawned.

VIII. THE CRIMINAL PROCEEDINGS AGAINST OSA

161. Triggered by the Unlawful Sanction and the Factoring Investigation, in February 2014, Mexico launched a separate arbitrary and unsupported criminal investigation against OSA and its shareholders for money laundering (the **Money Laundering Investigation**), which despite all the dramatic rhetoric in Mexico’s SOD, has resulted in no convictions to date. Pursuant to the Money Laundering Investigation, Mexico unlawfully and disproportionately ordered the seizure of the whole company (OSA)—a draconian measure never before used in Mexican history, which

³⁰⁵ Neither OSA, nor any of its shareholders, directors or employees were ever administratively sanctioned, criminally convicted, or even held contractually liable in connection with the Factoring Investigation.

³⁰⁶ Expert Legal Opinion Criminal Law by Diego Ruiz Durán, para. 81; Excelsior, *Liberan a Amado Yáñez con brazaletes*, April 14, 2017, retrieved from <https://www.excelsior.com.mx/nacional/2017/04/14/1157635> (last accessed March 20 2019), **C-164**.

³⁰⁷ Judgment on Recognition of Credits, October 23, 2014, **C-165**.

³⁰⁸ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.’s case, 2015 Activities Report, **C-126**, p. 38.

³⁰⁹ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.’s case, 2015 Activities Report, **C-126**, p. 38.

³¹⁰ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.’s case, 2015 Activities Report, **C-126**, p. 38.

was based on unfounded or fabricated evidence—the Seizure Order) and then detained the Subsidiaries’ vessels as well (the Extension of the Seizure).

162. Surprisingly, in the SOD Mexico did not voluntarily provide to this Tribunal a single contemporaneous document showing any misdeed by OSA or its representatives to try to justify the Money Laundering Investigation, the Seizure Order, or the Extension of the Seizure. Mexico chose to hide all those documents, preventing the Tribunal from assessing their content and relevance.³¹¹ Mexico therefore failed to meet its burden of proving the appropriateness of the criminal investigation and proceeding.

163. By Order of the Tribunal, Mexico gave Claimant access to certain—indeed, very few—documents regarding the factual basis on which the PGR issued the Seizure Order. On Claimant’s review, it has become clear why Mexico would not want to exhibit or produce the documents, and tried instead to make its arguments without documentary support. These documents confirm the unlawfulness, arbitrariness and disproportionateness of the criminal investigation, the Seizure Order, and the Extension of the Seizure. The documents further confirm that the seizures were effected for a purpose other than permitted by law and that the PGR went as far as to fabricate evidence, threatening a witness and forcing him to give false testimony (which the very same witness confessed under oath).

A. MEXICO LAUNCHED AN ARBITRARY AND UNSUPPORTED INVESTIGATION FOR MONEY LAUNDERING AND FRAUD

164. On February 27, 2014, the UIF filed a criminal complaint before the PGR claiming that OSA and its shareholders had engaged in money laundering and requesting the seizure of OSA and all its assets (the **UIF Complaint**, which launched the Money Laundering Investigation).³¹²

³¹¹ Mexico even tried to rely on Claimant’s lack of access to any such documentation as a defense (“neither POSH nor Mr. Ruíz Durán have had, nor can they have access, to the records of the criminal investigations related to Oceanografía because POSH is not a party to these procedures nor can it prove legal interest to obtain the information”, Statement of Defense, para. 228) and complains about the fact that Claimant managed to obtain access to some—albeit few—documents from those investigations (“Respondent does not explain how POSH and Mr. Ruiz Durán were able to obtain copies of certain documents related to criminal investigations, including the Complaint of the UIF and the Extension of the Banamex Complaint.”, Statement of Defense, para. 229). This is not the behavior of a party that has engaged in no misconduct at all and wants to prove its innocence.

³¹² Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury, February 27, 2014, **C-140**.

As explained in the SOC, the facts show that the UIF Complaint and the resulting Money Laundering Investigation were arbitrary and unsupported, as a matter of Mexican law. Mexico has not produced any evidence to rebut these fatal defects of the UIF Complaint and the subsequent Money Laundering Investigation.

165. As explained in the SOC, the facts show that the UIF Complaint and the resulting Money Laundering Investigation were arbitrary and unsupported, as a matter of Mexican law: (i) there were no reasonable signs of money laundering; (ii) the UIF was in such a rush that it requested the seizure of OSA, without having the information and documentation from the Banamex Complaint, and citing a crime different to the one that would be eventually cited by the PGR in the Seizure Order; and (iii) the UIF requested the most serious and intrusive measure at its disposal without evidentiary support; and (iv) the PGR has never pressed any charges for money laundering or fraud against OSA or its shareholders. Mexico has not produced any evidence to rebut the defects of the UIF Complaint and the subsequent Money Laundering Investigation.

166. *First*, the record shows that, contrary to the allegations of the UIF Complaint, there were no reasonable signs or evidence of money laundering by OSA. As explained in the SOC, the sole stated factual basis of the UIF Complaint is a list of offshore transactions to and from OSA. Pointing to that list, the UIF asserted that “there were significant movements of resources with characteristics that attract the attention of this Unit,”³¹³ that the transactions had “unusual characteristics,”³¹⁴ and that they “[did] not comport with the economic activity of the company.”³¹⁵ On that basis alone, without any further elaboration, the UIF concluded that “there [was] a *high level of probability* that [the assets in these transactions] stem from illegal activity.”³¹⁶ The UIF did not explain the connection between the assets and the alleged illegal activity, or the reasons why the transactions did “not comport” with the company’s activity.³¹⁷ The UIF did not explain

³¹³ Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury, February 27, 2014, **C-140**.

³¹⁴ Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury, February 27, 2014, **C-140**.

³¹⁵ Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury, February 27, 2014, **C-140**.

³¹⁶ Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury, February 27, 2014, **C-140**.

³¹⁷ Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury, February 27, 2014, **C-140**.

what was the connection between the assets and the alleged illegal activity, or what were the reasons why the transactions did “not comport” with the company’s activity.³¹⁸

167. Mexico’s attempts to justify the UIF Complaint in the SOD are unavailing. Mexico argues that “[i]n the case of Oceanografía, the UIF considered that it carried out an *unusual and significant number of financial transactions* that exceeded the risk models followed by the UIF.”³¹⁹ But Mexico does not produce any evidence substantiating the existence of the UIF’s supposed “risk models,” showing that UIF compared OSA’s transactions to those risk models, illustrating how OSA’s transactions exceeded these risk models, or demonstrating why the UIF’s actions might otherwise be justified. Likewise, Mexico’s expert on criminal law did not refer to any such UIF risk models or address how OSA’s transactions compared to those the risk models. Such an unsupported claim cannot provide a *post hoc* justification for the UIF Complaint.

168. Mexico’s criminal law expert’s explanation for the lack of evidentiary support of the UIF Complaint is equally unavailing. Mr. Paz claims that Mexico did not actually need to have any evidence at all in order for the UIF to file its Complaint: “a report *does not need to be grounded in or supported by evidence* of the commission of a crime to be admitted and processed through a preliminary investigation... the UIF report... did not—legally—need to contain *demonstrations* on the illegal source of the resources operated by OSA and its shareholders.”³²⁰ The expert did not cite to or analyze any evidence that might have justified the launching of the investigation. He opted instead to assert that there was no legal obligation for the UIF to possess any evidence at all, nor for PGR to assess any evidence before opening its investigation. This is incorrect as a matter of Mexican law and is inconsistent with the UIF’s practice.

169. As explained by Mr. Ruiz, Claimant’s criminal law expert, “Article 15 of the Internal Regulations of the Finance and Public Credit Ministry (the “SHCP Regulations”) provides that... [the UIF] shall be charged with: [reporting crimes and]... *incorporating the relevant evidence*.”³²¹ Mexico itself admits that “the UIF is... required to provide *indicia* regarding the

³¹⁸ Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury, February 27, 2014, **C-140**.

³¹⁹ Statement of Defense, para. 239. (Emphasis added).

³²⁰ Expert Report of Mr. Javier Paz, para. 98. (Emphasis added).

³²¹ Internal Regulations of the Secretariat of Finance and Public Credit, with Reforms of September 27, 2017, **C-344**, Article 15, Sections X and XIII. (Emphases added).

crimes that were likely committed.”³²² But Mexico has not established the existence of any such proper indicia.

170. As noted above, the UIF merely stated that “there were significant movements of resources with characteristics that attract the attention of this Unit,”³²³ that the transactions had “unusual activity,”³²⁴ and that they “do not comport with the economic activity of the company.”³²⁵ However, as Mr. Ruiz notes, “the ordinary course of OSA’s business was the exploitation of vessels in support of the oil industry... As part of such business, transfers of millions of dollars made to and from other countries were not infrequent. The UIF should have provided evidence explaining and establishing why it believed the funds had an illicit origin here. The UIF did not provide any such evidence.”³²⁶

171. In addition, the UIF Complaint did not comport with the UIF’s own standard practices. The “UIF’s usual practice is to provide various annexes with evidence consisting of documentation obtained from the National Banking and Securities Commission (“CNBV”, for its Spanish acronym), banks or other financial entities, or the Tax Administration Service (“SAT” for its Spanish acronym). These documents also typically specific in detail the reason why each operation is considered suspicious or related to illicit activities.”³²⁷ In this case, the UIF did not provide any such evidence.

172. *Second*, the UIF was in such a rush that it requested the seizure of OSA, without having the information and documentation from the Banamex Complaint, and citing a crime different to the one that would be eventually cited by the PGR in the Seizure Order. The crime of money laundering—which is the effort to disguise and sanitize the monetary proceeds of a crime—requires the existence of an “original” or “preceding” criminal activity whose proceeds are being

³²² Statement of Defense, para. 242.

³²³ Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury, February 27, 2014, **C-140** p. 2.

³²⁴ Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury, February 27, 2014, **C-140**, p. 3.

³²⁵ Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury, February 27, 2014, **C-140**, p. 2.

³²⁶ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 28.

³²⁷ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 29.

laundered. Without such prior, illicit conduct, there is no “laundering” to be done. The UIF, however, was in such a rush to file its complaint and request the seizure of OSA that it only briefly mentioned any alleged illicit activity, and even then, it pointed to an obscure alleged crime that was never mentioned again during the investigation. The supposed illicit activity the PGR ultimately cited when seizing OSA for suspected money laundering (related to the Banamex factoring) was never mentioned in the UIF Complaint, but rather in a completely different complaint filed hours after UIF filed its complaint.

173. Mexico and Mr. Paz acknowledge that UIF identified the supposed illicit origin of funds in a completely different transaction that was never again mentioned in the investigation. The UIF Complaint named as its alleged preceding crime the supposed use of a PEMEX invoice to obtain a credit facility from Banco Nacional de Comercio Exterior, S.A. de C.V. (BNCE).³²⁸ The Seizure Order, by contrast, [REDACTED]

[REDACTED]³²⁹

174. The UIF Complaint and the Seizure Order therefore refer to different documents, different contracts, and different financial institutions. As explained by Mr. Ruiz, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

³²⁸ Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury, February 27, 2014, **C-140**, p. 5 (“It is further known that Banco Nacional de Comercio Exterior authorized a credit facility in favor of OCEANOGRAFIA, S.A. DE C.V., in the amount of US\$ 30 million, drawn down pursuant to invoice 15172, derived from agreement PEP-O-IE-504/05, held by the company with PEMEX. Such invoice was nonetheless rejected by PEMEX. This evidences the obtaining of illicit funds, acquired in favor of OCEANOGRAFIA, S.A. DE C.V.”)

³²⁹ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

175. All of this rings of targeted political pressure on OSA. Despite the UIF’s lack of evidence of any alleged crime (the only thing it could find to cite being a credit application that was never mentioned again in the entire investigation), it recklessly rushed to file the UIF Complaint requesting the most draconian measure ever applied in Mexico: the seizure of OSA and all its assets.³³¹ There is no other viable explanation for UIF’s rush to file its complaint and request a seizure on the flimsiest of supposed factual grounds.

176. *Third*, in this case, as explained by Mr. Ruiz, “there is a stark contrast between the lack of evidence of the UIF Complaint and the seriousness and exceptional nature of the measures requested by the UIF and subsequently ordered by PGR.”³³² As explained in the SOC, the seizure of a company constitutes “the most serious, exceptional and intrusive measure that public authorities can adopt against a company”³³³ and it had never before been adopted by Mexican public authorities. In this case, “[t]he UIF Complaint vaguely alludes to a series of transfers to and from foreign countries and to an invoice that was allegedly “rejected by PEMEX” (a statement that is unsupported), and nevertheless requests the full transfer of the control and administration of the company to the State. There is no legal explanation for this completely unfounded request of such a grievous nature.”³³⁴ Again, all evidence (or absence thereof) points to a political motivation behind the Measures.

177. *Fourth*, subsequent events confirmed the lack of evidence for the UIF Complaint and the Joint Investigation. The PGR has never pressed any charges for money laundering or fraud against OSA or its shareholders.³³⁵ Mexico attempts to convey the idea that it is still investigating

³³⁰ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 62.

³³¹ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, paras. 39-41. *See also*, Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, paras. 49-51.

³³² Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 41.

³³³ Statement of Claim, para. 383.

³³⁴ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 41.

³³⁵ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 151.

OSA for money laundering even today, yet it fails to cite or exhibit any proof of any ongoing investigative activity over the last four years.

178. In sum, the Money Laundering Investigation was inherently bogus. There was no basis to launch the investigation, much less a basis to seize the whole company. Even if the UIF Complaint and the ensuing Money Laundering Investigation had been well-founded as a matter of Mexican law—which it was not—it was arbitrary and disproportionate under international law. Based solely on this arbitrary investigation, Mexico recklessly rushed to order the seizure of OSA and took full control of the company. All evidence (or lack thereof) suggests that the investigation was the result of targeted political pressure on OSA.

B. MEXICO ARBITRARILY AND UNLAWFULLY SEIZED AND TOOK FULL CONTROL OF OSA

179. As explained in the SOC, on February 28, 2104, *the day after* the UIF filed the unsupported UIF Complaint accusing OSA of money laundering, the PGR rushed to order the seizure of the entirety of OSA³³⁶ (the **Seizure Order**). The Seizure Order was subsequently extended to additional assets in OSA’s possession that had not initially been included in the Seizure Order (the **Extension of the Seizure**), including the POSH Subsidiaries’ vessels.³³⁷ In reliance upon the Seizure Order, just two days later on March 1, 2014, the PGR ordered SAE to take control of OSA.³³⁸ Thereafter, SAE blocked OSA from making any and all payments owed by OSA to the Subsidiaries and also diverted to SAE’s bank account any and all payments owed by PEMEX to POSH via the Irrevocable Trust.³³⁹ Mexico thus effectively blocked any and all returns on POSH’s Investment.

180. The Seizure Order (and, likewise, its Extension) was unlawful, arbitrary, and disproportionate. The PGR [REDACTED]

³³⁶ Seizure Order (*Acuerdo de Aseguramiento*), issued by the Special Unit for the Investigation of Illicit Funds Operations and Forgery or Alteration of Money, February 27, 2014, **C-141**.

³³⁷ Statement of Claim, para. 129. The Seizure Order was subsequently extended to additional assets in OSA’s possession that had not been initially included in the Seizure Order: Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.’s case, 2015 Activities Report, **C-126**.

³³⁸ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.’s case, 2015 Activities Report, **C-126**.

³³⁹ Witness Statement by José Luis Montalvo, para 48.

[REDACTED]
[REDACTED]
[REDACTED] and (v) violated the principle of proportionality.

1. The Seizure Order was the most extreme precautionary measure available in the Mexican criminal system, and had never before been ordered in Mexican history

181. The seizure of OSA must be placed in context. As already noted, the seizure of a company is “the most unusual, extreme and intrusive measure”³⁴⁰ available in the Mexican criminal law system. It deprives shareholders and directors of the management of their company and its assets, *before* they have a chance to plead their case. Therefore, as explained by Claimant’s expert Mr. Ruiz, “[t]he seizure of a company as a whole may solely be ordered in the most exceptional of circumstances, with the clearest indicia, supported by the most solid evidence”³⁴¹ and “signs of criminal activity must be evident and widespread.”³⁴²

182. Mexico does not dispute this: “Plaintiff characterizes the Preliminary Attachment as ‘unusual, intrusive and extreme,’ [but] it remains *legal*.” Yet that misses the point: Claimant has never claimed that the Seizure Order was illegal in the abstract or outside the PGR’s statutory powers. Rather, Claimant argues that it was *used* improperly by Mexico in the case at hand, for political reasons.

183. Unfortunately, Mexico has suffered numerous corruption scandals prior to OSA’s. Many of these scandals involved the fraudulent use of companies, money laundering, or organized crime, and the amounts defrauded ranged from the hundreds of millions to billions of dollars.³⁴³

³⁴⁰ Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 46.

³⁴¹ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 51.

³⁴² Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 158.

³⁴³ The New York Times, *Mexico Charges Former Oil Official With Bribery in Anticorruption Drive*, May 28, 2019 retrieved from <https://www.nytimes.com/2019/05/28/world/americas/mexico-corruption-prosecution-oil-company.html> (last accessed 12 February 2020), C-291.

But Mexico does not dispute that in not a single one of those scandals did the Mexican public authorities ever order the seizure of a whole company and all of its assets.³⁴⁴

2. The Seizure Order was adopted [REDACTED]

184. The stated purposes of the Seizure Order were to [REDACTED]

[REDACTED]³⁴⁵ The full quote of the Seizure Order is as follows:

[REDACTED]

[REDACTED]

185. Mexico and Mr. Paz concur with the PGR on the stated purposes of the Seizure Order. Mexico states that the Seizure Order was adopted to protect “public policy and social interest, since the national energy market had to be safeguarded”,³⁴⁷ to protect the jobs and rights

³⁴⁴ Expert Legal Opinion on Criminal Law by Diego Ruiz Durán., para. 46.

³⁴⁵ [REDACTED]

³⁴⁶ [REDACTED]

³⁴⁷ Statement of Defense, paragraph 252.

of OSA’s workers,³⁴⁸ and “to preserve the company’s business operations.”³⁴⁹ Similarly, Mr. Paz claims that the seizure of the company as a whole “was appropriate... to maintain [the] operating effectiveness [of OSA]” and also that of PEMEX “in its strategic activity for the Mexican economy.”³⁵⁰

186. However commendable those objectives might sound, they are not permissible objectives for a seizure order as a matter of Mexican law. Thus, Mexico’s recitation of those noble-sounding goals in fact serves to establish that the Seizure Order was unlawful. None of the purposes cited are valid reasons to seize a company under Mexican law.

187. The only legally permitted purpose of a seizure order, as explained by Mr. Ruiz, “is to preserve the elements of the alleged crime during the pendency of the investigation and to avoid their alteration, destruction, or disappearance.”³⁵¹ Mr. Paz himself, Mexico’s own expert, correctly describes a seizure as a “[p]reliminary injunction declared by a judge or the Public Prosecutor’s Office to prevent the *concealment or loss of the objects related to the crime*, which are necessary or relevant to the process.”³⁵² Mr. Paz’s statement is consistent with the provisions of Article 181 CFPP (“The instruments, objects or products of the offense... shall be seized so that these are not altered, destroyed or made disappeared”),³⁵³ and with unambiguous Mexican jurisprudence.³⁵⁴

188. Accordingly, under Mexican law, the PGR was not authorized to order a seizure to



³⁴⁸ Statement of Defense, paragraph 252.

³⁴⁹ Statement of Defense, paragraph 252.

³⁵⁰ Expert Report of Mr. Javier Paz, paras. 111-112. Also see Expert Report of Mr. Javier Paz, para. 119 (claiming that the purpose of the seizure of OSA was “*maintaining the commercial operating effectiveness of OSA, protecting the fundamental rights of its workers and protecting the energy sovereignty of the country*”).

³⁵¹ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 147.

³⁵² Expert Report of Mr. Javier Paz, footnote 8. (Emphasis added).

³⁵³ Federal Code of Criminal Procedures, **CL-6**, Art. 181. (“The **instruments, objects or products of the offense**, as well as the goods on which there are traces of or which could bear a relation to this offense **shall be seized so that these are not altered, destroyed or made to disappear**. The Public Prosecutor, the police and the experts during the investigation and at any stage of the criminal proceeding, will follow the rules referred to in Articles 123 Bis to 123 Quintus. The goods seized will be managed in accordance with applicable law.”)

³⁵⁴ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 125.

[REDACTED]³⁵⁵ As Mr. Ruiz explains, the Seizure Order “is contrary to Mexican law as it was adopted [REDACTED] This is a breach of the principle of legality governing the actions of public entities in Mexico and constitutes an abuse of power by the public powers.”³⁵⁶

3. The Seizure Order was contrary to Mexican Law

189. [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Given that dramatic example of the claimed “evidence”, one can understand why Mexico continues to conceal the rest of the documentation pertaining to the criminal investigations of OSA.

(a) A seizure order must be appropriate, pertinent, sufficient, and indispensable

190. Notwithstanding the PGR’s attempt to justify the Seizure Order with its list of purported evidence, Mr. Paz, Mexico’s criminal law expert, asserts that the Seizure Order is not required to “include or contain advances of evidence on the facts that it seeks to probe”³⁵⁷ This is incorrect as a matter of Mexican Law.

191. As explained by Mr. Ruiz, “the standard for the adoption of a seizure measure is extremely high. The Supreme Court of Justice in Mexico has established, repeatedly and undisputedly, that the means used by the public authorities within a criminal investigation must be “*appropriate, pertinent, and sufficient*, to establish that an act that the law considers a crime has been committed.”³⁵⁸ In addition, Mexican law provides that the public authorities may adopt “the

³⁵⁵ [REDACTED]
[REDACTED]

³⁵⁶ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 58.

³⁵⁷ Expert Report of Mr. Javier Paz, para. 48.

³⁵⁸ Expert Report of Mr. Javier Paz, para. 48.

precautionary measures of preventive detention, seizure, or that are *indispensable* for the preliminary investigation...”³⁵⁹

192. A seizure is therefore an exceptional measure that may only be adopted when it is “appropriate”, “pertinent”, “sufficient” and “indispensable”. None of these requirements was met in the case at hand.

(b) In this case, the Seizure Order was not appropriate, pertinent, sufficient and indispensable

193. The Seizure Order [REDACTED]
[REDACTED]
[REDACTED] the PGR ordered the complete seizure of OSA and all its assets. None [REDACTED] [REDACTED]
[REDACTED] [REDACTED] the PGR scrambled to gather whatever slivers of purported evidence it could find, regardless of whether they were even related to the crime being investigated, in order to try make the Seizure Order look well-founded and cloak it in the (illusory) appearance of legality. [REDACTED] lacking evidence, the PGR went so far as to fabricate it, [REDACTED]
[REDACTED]
[REDACTED].

194. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

³⁵⁹ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 64.

³⁶⁰ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 71.

196. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] pursuant to Mexican case law, journalistic notes lack any evidentiary value in a criminal investigation.”³⁶²

197. [REDACTED] *Witness statement of* [REDACTED] *dated February 27, 2014.* This witness statement warrants particular attention. In the statement cited in the Seizure Order, [REDACTED] an [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

198. The reality, however, is much worse than “curious on its face.” It turns out that [REDACTED] witness statement was obtained by the PGR through force and coercion and the content of his testimony was false (the **Coerced Statement**), according to later testimony from [REDACTED] before a judge and under oath (the **Sworn Testimony**) within the Criminal Proceedings 96/2014 conducted against Mr. Yáñez, one of OSA’s shareholders, for fraud (as already explained, this proceeding has resulted in no convictions to date).

199. On May 26, 2015, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

³⁶¹ Seizure Order (*Acuerdo de Aseguramiento*), issued by the Special Unit for the Investigation of Illicit Funds Operations and Forgery or Alteration of Money, February 27, 2014, **C-141**.

³⁶² Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 158.5.

[REDACTED]⁶³ The full quote of Mr. [REDACTED] testimony leaves no room for doubt:

[REDACTED]

200. In his cross-examination, [REDACTED] further testified to the coercion exerted by the PGR: [REDACTED]

[REDACTED]

[REDACTED] The full extract of [REDACTED] testimony to the judge reads as follows:

[REDACTED]

³⁶³ Witness statement of [REDACTED], in a hearing held on May 26, 2015, C-292.

³⁶⁴ Witness statement of [REDACTED], in a hearing held on May 26, 2015, C-292.

[REDACTED]

201. [REDACTED] further explained in the Sworn Testimony that [REDACTED]
[REDACTED]. This means that “the PGR issued the Seizure Order [on February 27, 2014] on the basis of [REDACTED] that was later illegally manufactured and backdated.”³⁶⁶

202. [REDACTED] Sworn Testimony is simply terrifying.³⁶⁷ It reveals the manufactured nature of the OSA investigation and demonstrates that the Coerced Statement, [REDACTED] “was illegally obtained... and... its contents are clearly false.”³⁶⁸

203. Even considered on a stand-alone basis, the content of the Coerced Statement is extraordinarily implausible. In the Coerced Statement, [REDACTED] said that on February 27, 2014 he voluntarily decided to come forward and give his statement because he had become aware that Martín Díaz, OSA’s shareholder, was being investigated for money laundering. But as Mexico has reiterated throughout this arbitration, criminal investigations are secret in Mexico and are not disclosed to the public. [REDACTED]

[REDACTED] Accordingly, as explained by Mr. Ruiz, “it is not credible that, on February 27, 2014, [REDACTED] of [REDACTED] same [REDACTED] Mr. Ruiz’s conclusion is categorical:

³⁶⁵ Witness statement of [REDACTED], in a hearing held on May 26, 2015, C-292, pp. 23-24. (Emphasis added).

³⁶⁶ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 83.

³⁶⁷ The actions denounced in the Sworn Testimony are contrary to the Universal Declaration of Human Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

³⁶⁸ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 82.

³⁶⁹ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 158.5.iii.

“In my entire professional career, I have never encountered a case in which a witness voluntarily appears to give a statement about an investigation, on the same day that the UIF filed a complaint. It is simply implausible.”³⁷⁰ Of course, now we know now from the Sworn Testimony why the Coerced Statement made no sense.

204. [REDACTED]

205. [REDACTED]

[REDACTED]

206. [REDACTED]

³⁷⁰ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 79.
³⁷¹ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 87.
³⁷² Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, paras. 87-88.

³⁷³ [REDACTED]

[REDACTED]

207. This leads Mr. Ruiz, the criminal law expert, to conclude that [REDACTED] does not meet the minimum requirements for such complaints that are set out in the Mexican criminal code.³⁷⁵

208. [REDACTED]

209. As summarized by Mr. Ruiz, “[REDACTED] do not constitute any evidence, nor do they offer any indication, of the alleged commission of the preceding crime of fraud against Banamex.³⁷⁸ On the contrary, it seems [REDACTED]

[REDACTED]

4. The PGR recklessly rushed to act before it had any time to assess whether there was any factual or legal basis for its measures

210. As noted in the SOC, the PGR could not possibly have conducted any meaningful factual or legal analysis of whether the Seizure Order against OSA was appropriate, given that the Seizure Order was issued *on the day immediately after* the UIF Complaint was filed. On February

³⁷⁴ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 91.

³⁷⁵ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 92.

³⁷⁶ [REDACTED]

³⁷⁷ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 93.

³⁷⁸ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 94.

³⁷⁹ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 94.

27, 2014, the UIF filed the UIF Complaint and on February 28, 2014, the PGR ordered the most extreme and intrusive measure available under the Mexican criminal law system, which had never previously been used in the history of Mexico.

211. Given the gravity of a seizure order, the public authorities have a legal duty to assess the factual and legal grounds and to balance the interests involved. This is particularly so because a seizure order is issued *ex parte*, before the accused party has had any chance to defend itself.³⁸⁰ The PGR typically takes weeks or months to grant even seizures of specific assets, such as bank accounts.³⁸¹ Here—it cannot be stressed enough—the PGR issued the Seizure Order in less than 24 hours. As Claimant’s expert Dr. Ruiz explains, “[i]t is physically impossible to properly assess the implications of such a complex case and weigh the interests at stake in just a few hours, particularly given the lack of evidence in the UIF Complaint and [REDACTED].”³⁸² The PGR’s rush to seize OSA is one of the best illustrations of the new Mexican administration’s political mandate to act swiftly against OSA, whether or not the authorities had an objective legal or factual basis for such an extreme action (they did not).

212. Mexico has made no attempt to deny or even address these allegations in the SOD. Mexico’s expert does make an attempt to that effect, but without success. Mr. Paz argues that the public authorities were able to adopt the Seizure Order in such a short period of time because “the [seizure] of goods also does not require... prior evidence of the *corpus delicti* or of the probable liability of any person to be validly declared, but rather only requires to inform on the need of preservation of instruments, objects or proceeds of the crime...”³⁸³ Again, Mexico’s expert relies on a mischaracterization of the legal standard. As already discussed in paragraph 191 above, while definitive proof of a crime (e.g. the *corpus delicti*) indeed was not required, the PGR *did* have to verify whether the seizure of the whole company and all its assets was “suitable, pertinent, and sufficient” and “indispensable” in the case at hand. Not only did the PGR fail to do so, but it was materially impossible for the PGR to have done so, given that it adopted the most extreme

³⁸⁰ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 50.

³⁸¹ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, paras. 101 and 160.2.

³⁸² Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 97.

³⁸³ Expert Report of Mr. Javier Paz, para. 103.

precautionary measure in the history of Mexico in less than 24 hours. The facts speak for themselves.

5. The Seizure Order was excessive and disproportionate

213. As explained in the SOC, even if there had been signs of criminal activity by OSA (*quod non*), the Seizure Order would have been disproportionate under both Mexican law and the Treaty. As Mr. Ruiz explains, “Mexican jurisprudence has confirmed that seizing bank accounts (more so seizing an entire company) affects and ‘directly violates the fundamental right to property and, indirectly depending on the circumstances of each case, may affect rights such as food or health or freedom of commerce.’ For these purposes, ‘[t]he *principle of proportionality* [...] is a tool [...] to examine the constitutional legitimacy of any state measure that affects people’s fundamental rights.’”³⁸⁴ Mexico did not abide by this principle of Mexican constitutional law. It is noteworthy that the PGR, Mexico and Mr. Paz do not even agree today on what the justifications were for the seizure of the whole company, instead of, for example, just the company’s bank accounts.

214. *First*, the PGR did not explain why the Seizure Order was warranted. The Seizure Order boldly stated that:

[REDACTED]

215. [REDACTED]

³⁸⁴ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 105.

³⁸⁵ [REDACTED]

[REDACTED]

216. The PGR further claimed in the Seizure Order that [REDACTED]

[REDACTED]

[REDACTED]. The only legally permitted purpose for a seizure is to preserve the instruments and objects of the crime during the pendency of the investigation. And Mexico did not even mention how the whole corporate structure was an instrument or object of a crime.

217. *Second*, Mexico’s justification in the SOD for the seizure of the whole company was different from PGR’s is in the Seizure Order. Mexico has argued that: “the attachment of Oceanografía’s bank accounts was not sufficient because its shareholders could sell the company’s assets or hide assets.”³⁸⁸ Mexico does not even mention [REDACTED]

[REDACTED] Mexico is attempting to provide a *post hoc* rationalization for the sake of the arbitration; in any case, the rationalization is meritless. Mexico provides no evidentiary support for its assertions and not even an explanation, for example, of why or how OSA’s assets were particularly vulnerable to liquidation or dissipation (a very hard case to make for a business based on large, easily-tracked marine vessels and public services contracts), or of how or why OSA’s shareholders were particularly well positioned to hide assets while being scrutinized by the state. Mexico’s hypothetical is empty and unsupported.

³⁸⁶ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 112.

³⁸⁷ [REDACTED]

³⁸⁸ Statement of Defense, para. 254.

218. *Third*, Mr. Paz, in turn, makes yet another claim: that “it [had been] argue[d] and grounded with *sufficient indications* that OSA, as a corporation, had been used in its entirety for the commission of the crime...”³⁸⁹ However, Mr. Paz’s justification for the Seizure Order is not (i) to counteract OSA’s commercial relationship with PEMEX [REDACTED]; (ii) to prevent OSA’s insolvency [REDACTED] or (iii) the risk of OSA dissipating assets (Mexico’s theory in the SOD). In any event, even if Mr. Paz’s theory were relevant (it is not), it does not hold up to scrutiny. As Mr. Ruiz observes, “neither [REDACTED] nor Mr. Paz in his report, analyze, explain or even identify the alleged ‘sufficient indications’ allowing the conclusion that the entire corporate structure of OSA was used to commit the alleged crime. In fact, [REDACTED] [REDACTED]”³⁹⁰ Absent any explanation of what “sufficient indicators” he (but apparently not [REDACTED] Mexico) had in mind, the Seizure Order was improper under Mexican Law.

219. In sum, the Seizure Order was excessive and disproportionate. Mexico has offered no argument or evidence that rebuts Claimant’s position: Even if evidence of a potential crime had been identified—which was not the case—there was no basis for seizing the whole of OSA and its assets. More appropriate, proportionate measures were available, such as the seizure or strict monitoring of OSA’s bank accounts involved in the alleged money laundering. But a more reasonable measure would not have achieved Mexico’s political goal of taking control of OSA, the company owned by a political enemy of Mexico’s new President. Achieving that political goal required seizing the entire company.

6. The Seizure Order had catastrophic consequences for POSH’s Investment

220. As explained in the SOC, the Seizure Order meant that OSA lost managerial control of its operations. As will be discussed next in Section VIII.B-C, those operations were transferred to SAE, a Government entity with no knowledge or experience in the Offshore Marine Services Industry (**OMS Industry**); the SAE, in turn, appointed a relative of President Peña Nieto as the administrator of OSA. Immediately after taking control of OSA, SAE blocked all payments owed

³⁸⁹ Expert Report of Mr. Javier Paz, para. 111.

³⁹⁰ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 106.

by OSA to the Subsidiaries, and subsequently even blocked payments by PEMEX to POSH (through the Irrevocable Trust). Mexico has not denied any of these facts.

221. The Unlawful Sanction destroyed the main premise for POSH's Investment, which was OSA's contracts and long-standing relationship with PEMEX. The Seizure Order, in turn, destroyed POSH's ability to benefit from its investment, since SAE used its administrators' powers to effectively block all payments to POSH and the Subsidiaries. (Adding to those injuries, the Seizure Order was even used by the PGR to order the detention of POSH's Vessels (discussed in section VIII.D below).) As this Section has explained, the Seizure Order was unlawful and motivated by the State's intention to cripple OSA. Even if the Seizure Order had been lawful under Mexican law—and it was not—it was arbitrary and disproportionate under international law, particularly as to POSH, which had no role in any alleged wrongdoing by OSA.

C. MEXICO APPOINTED A PRESIDENTIAL INSIDER AS OSA'S ADMINISTRATOR

222. The Seizure Order was a key step in the political campaign against OSA led by the Peña Nieto Administration. The Seizure Order guaranteed the Government's control over OSA, permitting it to cripple the company and manage its remaining operations according to the political agenda of the ruling party.

223. A glaring indicator of the political agenda behind the Measures is that, on March 14, 2014, SAE appointed Mr. Luis Alfonso Maza Ureta (**Mr. Maza**) as OSA's administrator, with a salary of approximately USD\$30,000 per month. Mr. Maza was not an independent and impartial industry expert, as would have been appropriate—instead, he was a member of President Peña Nieto's extended family with *no* experience in the OMS industry. From that point forward, this relative of the President of Mexico would be the person ultimately responsible for OSA's finances and operations. Mexico's own Senate Committee condemned this act of nepotism in clear terms:

The highly-paid managers of Oceanografía.- SAE appointed Luis Alfonso Maza Urueta as general manager of Oceanografía, *brother-in-law of former Mexico State governor Alfredo del Mazo González, uncle of the current president*. For his new task, Maza Urueta charges fees of more than 619,000 pesos per month. Enrique Bazúa Witte and Alfonso Salvador Antonio Compeán Gallardo, auditors at Luz y Fuerza del Centro (LFC) and in Ferronales, joined the management of Oceanografía with Maza Urueta. These managers live in luxury because, according to the newspaper

Reforma, they charge a fee of 200,000 pesos per month. These salaries became known when the director of SAE broke the promise to pay back wages to the workers, who, being on the payroll of outsourcing companies contracted by Oceanografía, not only lack the benefits of a formal job but also receive starvation salaries.

224. Moreover, one of Mr. Maza's first actions as OSA's administrator was to suspend payment of charter hire fees to the Subsidiaries.³⁹¹ There was no legal reason for this measure, and none has been invoked by Mexico.

D. MEXICO UNLAWFULLY AND ARBITRARILY DETAINED THE 10 VESSELS OWNED BY POSH'S SUBSIDIARIES

225. As explained in the SOC, on March 19, 2014, under the auspices of the Joint Investigation for money laundering and fraud, the PGR extended the scope of the Seizure Order and ordered the detention of certain vessels controlled by OSA, including the vessels of the POSH Subsidiaries (the **Extension of the Seizure**).³⁹² On the same day, POSH and the Subsidiaries were notified of the detention of the vessels (the **Detention Order**). These measures were unlawful, unreasonable and disproportionate.

226. Mexico artificially distances itself from POSH by arguing that the Extension of the Seizure did not specifically target POSH or the Subsidiaries and also affected other shipping companies that had vessels under contract to OSA.³⁹³ But the breadth of the measure does not immunize it from Claimant's claims. A particular government measure may affect more than one group of companies at the same time and yet be challenged by a subset of those affected. Indeed, POSH's is not the only challenge to the Extension of the Seizure. Claimant understands that two of the other companies also affected by the Extension of the Seizure have already filed a separate investment treaty claim against Mexico on that basis.³⁹⁴

³⁹¹ See Witness Statement by José Luis Montalvo, para. 48. ("The moment SAE took control of OSA, SAE began blocking all payments owed by OSA to Posh's Subsidiaries").

³⁹² Record of Service of the March 19, 2014 decision that orders the seizure of GOSH's vessels, March 28, 2014, **C-143**.

³⁹³ Statement of Defense, para. 344.

³⁹⁴ *Shanara Maritime International, S.A. and Marfield Ltd. Inc. v. United Mexican States*, Notice of Arbitration, June 17, 2015, **C-293**.

1. POSH cooperated despite the unlawful Detention Order, and withdrew its vessels only because Mexico refused to pay for their services

227. Despite the unlawfulness of the Detention Order, POSH's Subsidiaries cooperated with Mexico and engaged in good faith discussions to obtain the safe return of their vessels.³⁹⁵ Ultimately, POSH's Subsidiaries had to withdraw the vessels from service to OSA and PEMEX, because they were not being paid. Mexico nevertheless complains that "the Subsidiaries caused the Vessels to be unavailable to [OSA] to provide services to PEP."³⁹⁶ This suggestion that POSH and the Subsidiaries were uncooperative or somehow share the blame for hastening OSA's demise is false and unfair.

228. Mexico had damaged OSA's finances irreparably with the Unlawful Sanction, and after taking control of OSA in February 2014, the SAE-appointed administrator refused to pay the charter hire to the Subsidiaries or to properly maintain the Subsidiaries' vessels. Consequently, the Subsidiaries had no income and were on the brink of financial collapse. As a result of Mexico's actions, the Subsidiaries were forced to withdraw the vessels from the contracts with OSA. Even as it tries to criticize POSH and the Subsidiaries for acting to protect their interests, Mexico does not dispute any of the following facts about its conduct toward them:

229. *First*, on March 28, 2014, as soon as POSH learned about the detention of its vessels under OSA's control, it submitted documentation to the PGR proving its ownership of its 10 vessels and requested their release.³⁹⁷ Mexico ignored POSH's petition. On April 29 and May 7, the Subsidiaries filed two further petitions with the PGR requesting the release of the vessels, which Mexico again ignored.³⁹⁸

³⁹⁵ Email from G. Seow to R. Granguillhome Morfin, May 12, 2014, **C-148**; Witness Statement by José Luis Montalvo, paras. 49, 51.

³⁹⁶ Statement of Defense, para. 354.

³⁹⁷ Email from J. Phang to G. Seow *et al.*, February 28, 2014, **C-144**. Email subject to attorney client-privilege. Redacted to preserve privileged information from counsel. Writ filed by José Luis Montalvo Sánchez Mejorada, on behalf of GOSH, March 28, 2014, **C-145**.

³⁹⁸ Writ filed by José Luis Montalvo Sánchez Mejorada, on behalf of GOSH, April 29, 2014, **C-146**; Writ filed by José Luis Montalvo Sánchez Mejorada, on behalf of GOSH, May 7, 2014, **C-147**.

230. *Second*, SAE did not make a single charter hire payment to GOSH after taking control of OSA on February 28, 2014. As a result, after months of non-payment, GOSH had no choice but to withdraw the vessels from the GOSH Charters on May 16, 2014.³⁹⁹ But even then, GOSH did not recover the full and free use of its vessels. The Extension of the Seizure legally restricted GOSH's vessels to servicing PEMEX, which meant that even after the withdrawal, GOSH could not deploy them elsewhere or lease them to any other customers.⁴⁰⁰ The vessels remained inoperative for the rest of the detention period and PFSM had to bear all of their repair, maintenance, and crew costs during this period.⁴⁰¹

231. *Third*, the SMP Charters had already expired on January 31, 2014, even before SAE took control of OSA—and yet Mexico applied the Extension of the Seizure and the Detention Order to the SMP vessels as well. As a result, the SMP Vessels remained in dock and inoperative for the whole of the detention period. Moreover, OSA was in charge of paying the crew for these vessels but SAE did not have OSA make the required payments, leading the crew to threaten to stop working and abandon the vessels.⁴⁰² SMP negotiated with the crew and port authorities to regain possession of the vessels, which it did on March 7 and 10, 2014.⁴⁰³ However, as with the GOSH vessels, the SMP vessels' operations were restricted by Extension of the Seizure and thus the vessels were forced to remain inoperative during the detention period. SMP was obliged to cover all of the maintenance and crew costs during that time.⁴⁰⁴

232. *Fourth*, the SEMCO Charters had also expired on February 28, 2014, prior to the Extension of the Seizure—and yet it was applied to the SEMCO vessels as well, which then remained in dock and inoperative for the whole of the detention period. OSA was in charge of

³⁹⁹ Witness Statement by José Luis Montalvo, para. 50.

⁴⁰⁰ Witness Statement by José Luis Montalvo, para. 50.

⁴⁰¹ Credit Recognition Request filed by POSH Fleet Services Mexico, S.A. de C.V., September 3, 2014, **C-149**; Witness Statement by José Luis Montalvo, para. 52; *See* Expert Damages Report by Versant, para. 118: “During the period over which the 10 vessels were detained, they were unable to earn service payments or undergo routine maintenance.”

⁴⁰² Witness Statement by José Luis Montalvo, para. 50.

⁴⁰³ Act of Protest, recording the delivery of the vessel Rodrigo DPJ, March 7, 2014, **C-150**; Act of Protest, recording the delivery of the vessel Caballo Grano de Oro, March 10, 2014, **C-151**.

⁴⁰⁴ Credit Recognition Request filed by POSH Honesto, S.A.P.I. de C.V., September 3, 2014, **C-152**; Credit Recognition Request filed by POSH Hermosa, S.A.P.I. de C.V., September 3, 2014, **C-153**; Witness Statement by José Luis Montalvo, para. 51; Expert Damages Report by Versant, para. 53.

paying the crew, which it did pay in this case. But because of the Extension of the Seizure, SEMCO could not regain possession of its vessels, nor could it deploy the vessels elsewhere, until the end of the detention period.⁴⁰⁵ SEMCO eventually had to assume all of the maintenance and repair costs in order to get the vessels operative.⁴⁰⁶

233. *Fifth*, it is undisputed that the SEMCO vessels remained seized for more than 4 months—they were not released from the reach of the Detention Order until June 26, 2014.⁴⁰⁷ And Mexico also admits that GOSH’s vessels and the SMP vessels remained seized for more than 5 months—Mexico did not inform POSH about the lifting of their detention until July 16, 2014.⁴⁰⁸

234. Mexico does not dispute any of these facts about the Extension of the Seizure, which obviously crippled the Subsidiaries by immobilizing their only assets and further burdening them with the vessels’ costs. Yet Mexico suggests that the Subsidiaries are somehow blameworthy for eventually withdrawing the vessels from the contracts with OSA (the “Subsidiaries caused the Vessels to be unavailable to Oceanografía to provide services to PEP”).⁴⁰⁹ There is no basis to criticize the Subsidiaries, however, for protecting their interests and declining (after many months of non-payment) to continue to provide uncompensated services to OSA/PEMEX.

235. By that point, the harm to POSH’s Investment was irreversible. Mexico had destroyed the main premise for POSH’s Investment, which was OSA’s ability to contract with PEMEX. It had prevented the Subsidiaries from receiving any income from the existing contracts with OSA by blocking their charter hire payments upon gaining control of OSA. And it had seized POSH’s vessels, leaving them to generate costs but no income for the Subsidiaries. The Subsidiaries’ position could be summed up in six words: no contracts, no income, and no vessels.

⁴⁰⁵ Witness Statement by José Luis Montalvo, paras. 52-53.

⁴⁰⁶ Witness Statement by José Luis Montalvo, para. 52.

⁴⁰⁷ Record of Service of the June 24, 2014 decision that orders the lifting of the interim measures and the release of the vessels *Salvision* and *Salvirile*, June 26, 2014, **C-155**.

⁴⁰⁸ Record of Service of the July 16, 2014, decision that orders the lifting of the interim measures and the release of the vessel *Rodrigo DPJ*, July 16, 2014, **C-156** Record of Service of the July 16, 2014 decision that orders the lifting of the interim measures and the release of the vessels *Caballo Scarto*, *Don Casiano*, *Caballo Monoceros*, *Caballo Babieca*, *Caballo Copenhagen* and *Caballo Argentó*, July 16, 2014, **C-157**; Record of Service of the July 16, 2014 decision that orders the lifting of the interim measures and the release of the vessel *Caballo Grano de Oro*, July 16, 2014, **C-158**.

⁴⁰⁹ Statement of Defense, para. 354.

2. The detention of the vessels was unlawful, unreasonable and disproportionate

236. The PGR purported to justify the Extension of the Seizure by pointing to the following factual and legal grounds: [REDACTED]

[REDACTED]

[REDACTED]⁴¹⁰ As explained in Section VIII.B.3 above, [REDACTED]

[REDACTED]⁴¹¹

237. As a threshold matter, it is clear on the face of [REDACTED]

[REDACTED]

[REDACTED]⁴¹² It further held that [REDACTED]

410 [REDACTED]

411 Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 127. For example, Article 12 CNUCIB, [REDACTED] is not a valid ground for the detention of the vessels, inasmuch as it is not even applicable to this case. As explained by Mr. Ruiz, [REDACTED]

See United Nations Convention on Conditions For Registration of Ships, February 7, 1986, United Nations, Treaty Series, Chapter XII, 7, CL-162., Art. 12.

412 [REDACTED]

240. Respondent's expert Mr. Paz also creates out of whole cloth a different argument that was never invoked by PGR at the time. He claims that the seizure of the vessels was justified due to the existence of a "shareholding link between companies related with Amado Omar Yáñez Osuna and Martín Díaz Álvarez and POSH".⁴²⁰ This *post hoc* invention is also baseless. As Mr. Ruiz observes, "the PGR had no knowledge of the equity relation between OSA and POSH (through GOSH) until it was informed thereof by POSH on May 7, 2014, when it requested the release of the vessels."⁴²¹ Furthermore, in any event, "[t]he existence of a 'shareholding link' or 'commercial relation' is not a valid reason to adopt a seizure order under Mexican Law."⁴²² Such facts simply do not show that the POSH vessels were the objects or instruments of a crime.

241. Remarkably, Mexico impliedly *admits* that there was no relationship between the vessels and the alleged OSA wrongdoing that it was purporting to investigate. Mexico states that "the Subsidiaries only had to prove that they owned the vessels for the attachment to be lifted,"⁴²³ and Mexico's expert Mr. Paz similarly maintains that POSH "showed sufficient documentation to justify the lifting the attachment [seizure] of the POSH vessels... [and Mexico] resolved in favor of the lifting of the attachment based on the documentary information contributed by POSH..."⁴²⁴ If the seized vessels had been somehow factually linked to OSA's alleged misconduct during the investigation, that link's existence would not depend on each vessel's ownership. As explained by Mr. Ruiz, "[h]ad there been, or had reference been made to, or indicia been provided, of any type of relationship between the vessels and the alleged crime, or had such relationship been invoked or supported by the evidence, proof that the vessels did not belong to OSA would not have been 'sufficient documentation to justify' lifting the seizure."⁴²⁵ By making the vessel's ownership the sole criterion for its release, Mexico implicitly concedes that the Extension of the Seizure and

release of the vessels Caballo Scarto, Don Casiano, Caballo Monoceros, Caballo Babieca, Caballo Copenhagen and Caballo Argentó, July 16, 2014, **C-157**; Record of Service of the July 16, 2014 decision that orders the lifting of the interim measures and the release of the vessel Caballo Grano de Oro, July 16, 2014, **C-158**.

⁴²⁰ Expert Report of Mr. Javier Paz, para. 86.

⁴²¹ Expert Report of Mr. Javier Paz, para. 86.

⁴²² Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 159(2).

⁴²³ Statement of Defense, para. 357.

⁴²⁴ Statement of Defense, paras. 115-116.

⁴²⁵ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 133.

the Detention Order did not meet the proper legal standard of showing a link between the assets seized and alleged crime.

242. Mexico's statements about the requirements for lifting the seizure confirm yet another flaw in its own actions: if "the Subsidiaries only had to prove that they owned the vessels for the attachment to be lifted,"⁴²⁶ as Mexico claims, then the multi-month delays in lifting the seizure were not justified. POSH filed the necessary documentation proving its ownership of the vessels with the PGR on March 28, 2014, yet POSH's vessels were not all fully and officially released until July 26, 2014. Moreover, Mexico already had or should have had information regarding the ownership of eight out of the ten vessels, which were Mexican-flagged, even before the Detention Order was issued. The ownership information for those vessels was instantly available by checking the Mexican National Registry, the very purpose of which is to gather and make available information about the ownership of Mexican-flagged vessels. Instead, Mexico detained the vessels and forced the Subsidiaries to file three different pleadings establishing their ownership with the PGR before they finally obtained the release of their vessels from the Detention Order.

243. In sum, the Detention order was issued for impermissible purposes, was arbitrary and contrary to Mexican law.

E. THE TERMS OF THE LIFTING OF THE SEIZURE AGAIN CONFIRM THAT THE SEIZURE ORDER AND ITS EXTENSION RESTED ON IMPROPER LEGAL GROUNDS

244. As explained in the SOC, on June 2017, three years after ordering the seizure of OSA, the PGR ordered the lifting of the seizure—all without ever bringing even a single criminal charge against OSA (the **Lifting of the Seizure**).⁴²⁷ Quite apart from what that fact says about the (lack of a) substantive basis for the Seizure or its Extension, the language of the Lifting of the Seizure also confirms that, as discussed in Section VIII.B.3 above, the Seizure and its Extension claimed to serve purposes that were outside the range of the permissible purposes for such measures defined in the Mexican Federal Code for Criminal Procedure.

⁴²⁶ Statement of Defense, para. 357.

⁴²⁷ Writ filed by the PGR to inform the lifting of the seizure of OSA, June 16, 2017, **C-142**.

245. The PGR [REDACTED]

[REDACTED]

[REDACTED] The text of the Lifting of the Seizure reads as follows:

[REDACTED]

[REDACTED]

246. Respondent’s expert Mr. Paz likewise states that the Lifting of the Seizure was the result of the “exhaustion of the purposes for which the attachments and its extensions were declared.”⁴²⁹ Those purposes, according to Mr. Paz, consisted of “maintaining the commercial operating effectiveness of OSA, protecting the fundamental rights of its workers and protecting the energy sovereignty of the country”.⁴³⁰

247. [REDACTED]

[REDACTED]

[REDACTED] As previously explained in Section VIII.B.2, the only legally permitted purpose of a seizure under Mexican law is to preserve the instruments or objects of the alleged crime during the pendency of the investigation, and to prevent their

428 [REDACTED]

[REDACTED]

429 Expert report of Mr. Javier Paz, para. 120.

430 Expert Report of Mr. Javier Paz, para. 119.

alteration, destruction, or disappearance.⁴³¹ Thus, [REDACTED]

F. MEXICO INITIATED SEVERAL OTHER UNSUPPORTED CRIMINAL INVESTIGATIONS AGAINST OSA’S SHAREHOLDERS FOR FINANCIAL FRAUD

248. As explained in the SOC, when the Joint Investigation was finding no basis to charge OSA with money laundering, Mexico opened several new investigations against OSA’s shareholders for purported financial fraud (*see* Section V.C.4 of the SOC). Importantly, these additional investigations against OSA’s shareholders were initiated *after* the Seizure Order, its Extension, and the Detention Order and therefore could not have had any bearing on whether those measures were justified or not.⁴³² To date, they also have not resulted in any convictions. They remain part of this story, however, because they illustrate the politically motivated nature of Mexico’s Measures.

249. Mexico acknowledges the existence of these investigations and criminal proceedings, as well as the fact that no convictions have been obtained. Mexico attempts to suggest otherwise, however, by repeatedly referring to “crimes” in connection with OSA: “These *crimes* cannot be taken lightly. The fact that other agencies have initiated criminal actions against [OSA] is of great relevance and *demonstrates total negligence and disregard* for the fulfillment of various obligations on the part of [OSA]...”⁴³³ The constant repetition of the word “crime” by Mexico does not change the fact that no such “crimes” have ever been admitted by or proven in a court against anyone.

250. Even setting aside Mexico’s improper pleading tactics, the additional investigations have shown, not crimes, but rather the extent of the politically motivated campaign against OSA and its shareholders.⁴³⁴ As characterized by members of the Senate Committee, the investigations illustrate the political “a hunt against [OSA,] the company [that had been] spoiled by PEP during

⁴³¹ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 147.

⁴³² Statement of Claim, para. 152; Expert Legal Opinion Criminal Law by Diego Ruiz Durán, para. 78.

⁴³³ Statement of Defense, para. 280. (Emphasis added).

⁴³⁴ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, C-135, p. 4.

the Calderón [administration]”⁴³⁵ as an act of “revenge against the PAN”⁴³⁶ political party. Five years after that campaign started, launching all manner of investigations using all of the coercive powers of the State, Mexico has not a single conviction for any “crime” to show for its efforts.

IX. THE INSOLVENCY PROCEEDING

251. As a result of the Unlawful Sanction and the suspension of the Banamex factoring facility, OSA’s illiquidity quickly reached a point of no return. On April 9, 2014, the PGR filed involuntary insolvency proceedings against OSA (the **Insolvency Claim**) before a Federal Court in Mexico (the **Insolvency Court**).⁴³⁷

252. Mexico’s initiation and handling of the insolvency proceedings are among the Measures at issue in this case because they cemented OSA’s demise and the destruction of POSH’s Investment. Mexican authorities retained full control of OSA throughout the insolvency proceeding, mismanaged its finances, appropriated OSA’s funds, and adopted measures depriving POSH and the Subsidiaries of their lawful rights that resulted in the destruction of the Investment. Mexico took all of these actions without regard for the international law and treaty rights of foreign investors like POSH, who were strangers to any alleged improper actions by OSA and were never even accused by Mexico of any improper conduct.

A. MEXICO ORDERED THAT OSA SUSPEND WORK FOR PEMEX AND BLOCKED ALL PAYMENTS TO THE SUBSIDIARIES

253. As explained in the SOC, the Insolvency Court admitted the Insolvency Claim against OSA (**Writ of Admission**) on April 14, 2014.⁴³⁸ Thereafter, Mexico appointed SAE as the insolvency Visitor—*i.e.* the State actor in charge of evaluating the financial situation of the

⁴³⁵ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**.

⁴³⁶ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**.

⁴³⁷ Statement of Claim, para. 160.

⁴³⁸ Insolvency Court decision (admitting the filing of PGR’s complaint), April 14, 2014, **C-169**.

company that is alleged to be insolvent. SAE accepted the appointment and, in turn, assigned this task to Mr. José Antonio de Anda Turati.⁴³⁹

254. As “precautionary” measures at the outset of the Insolvency proceedings, the Writ of Admission also ordered that (i) any execution proceedings against OSA be suspended; (ii) all payments in favor of any and all of OSA’s creditors be suspended; (iii) all payments owed to OSA be made instead to SAE, as OSA’s Administrator (the role given to SAE in the Seizure Order); and (iv) SAE, again in its capacity as OSA’s Administrator, make only payments that were “indispensable” to OSA’s continued operation (the **Insolvency Measures**).⁴⁴⁰

255. Upon taking over the administration of OSA, SAE refused to pay the charter hire or vessel costs owed by OSA to SEMCO, HONESTO and HERMOSA. Payments owed by OSA to GOSH were supposed to be (and for a brief time were) protected by the Irrevocable Trust, but the Insolvency Court soon destroyed that protection by unlawfully extending the effect of the Precautionary Measures to the Irrevocable Trust as well. SAE further ordered all of the vessels to stop work for PEMEX. As a result, OSA breached its charters with PEMEX, generating contractual penalties from PEMEX as well.

B. THE UNLAWFUL SANCTION WAS THE PROXIMATE CAUSE OF THE INSOLVENCY

256. As noted above, Mexico argues that OSA “was in a state of insolvency long before the Insolvency Proceedings began.”⁴⁴¹ Yet, tellingly, Mexico does not specify when OSA allegedly became insolvent, nor has it produced any contemporaneous documentation presenting a fair and accurate view of OSA’s financial situation prior to the Measures. In contrast, Claimant has brought forward evidence that, prior to the Measures, OSA was valued at more than USD\$2 billion and as much as USD\$3 billion by independent third parties (see Section V.A above).⁴⁴² There hardly seems any doubt that the difference between OSA’s position prior to the Measures

⁴³⁹ Writ filed by Servicio de Administración y Enajenación de Bienes (requesting the appointment of José Antonio de Anda Turati as the formal visitor for the insolvency proceeding), April 25, 2014, **C-170**.

⁴⁴⁰ Insolvency Court decision (admitting the filing of PGR’s complaint), April 14, 2014, **C-169**, pp. 1, 3.

⁴⁴¹ Statement of Defense, para. 130.

⁴⁴² Letter from Advent International to Oceanografía S.A. de C.V., November 21, 2012, **C-250**; Summary of Terms between Oceanografía S.A. de C.V., and Blackstone Energy Partners L.P., September 1, 2013, **C-249**, p.1; Citigroup Management Presentation “Oceanografía”, January 2014, **C-248**, p. 25.

(i.e. a valuation in the US billions at the end of 2013) and after the Measures (i.e. insolvency by April 2014) was the impact of the Measures themselves. And indeed, Mexico's own statements in the Insolvency Proceedings (and in the SOD) further confirm that it was the Unlawful Sanction and its follow-ons, such as the suspension of the factoring facility that drove OSA into insolvency.

257. On May 6, 2014, SAE (on behalf of OSA, as its Administrator under the Seizure Order) filed the Answer to the PGR's Insolvency Claim,⁴⁴³ expressly underscoring that the Unlawful Sanction was seriously undermining OSA's viability, because some contracts with PEMEX had expired and OSA was not eligible to enter into new ones.⁴⁴⁴ In the SOD, Mexico similarly admits that that the Unlawful Sanction affected OSA's viability and that, as of late June 2014, 40% of OSA's contracts with PEMEX had already ended—without the possibility of a renewal—resulting in the loss of large portions of OSA's revenue:

380. ... On June 27, 2014, the SAE indicated that, due to the Disqualification and different applicable legal provisions, Pemex and its subsidiaries (e.g., PEP) were prevented from awarding contracts in favor of Oceanografía.

381. *The terms of the OSA-PEP Contracts were effectively ending. Similarly, some of these contracts had been terminated by PEP due to breaches of contract by Oceanografía. The SAE specified that this meant that 40% of the service contracts had been terminated.*³⁸³

382. *It is undisputed that Oceanografía's viability depended on the OSA-PEP Contracts.*⁴⁴⁵

258. As a result, on May 15, 2014, SAE asked the Insolvency Court for interim relief in the form of suspending the effects of the Unlawful Sanction. In doing so, SAE again underscored, in granular detail, the Unlawful Sanction's fatal impact on OSA's finances:

(i) SAE stated that the Unlawful Sanction prevented OSA from contracting with its main client, PEMEX.⁴⁴⁶

⁴⁴³ Writ filed by Servicio de Administración y Enajenación de Bienes (answering the insolvency claim on behalf of OSA), May 6, 2014, **C-181**.

⁴⁴⁴ Insolvency Court decision (declaring the insolvency of Oceanografía S.A. de C.V.), July 8, 2014, **C-182**.

⁴⁴⁵ Statement of Defense, paras. 380-382.

⁴⁴⁶ Writ filed by Servicio de Administración y Enajenación de Bienes, June 26, 2014, **C-184**, p. 2. ("The disqualification referred to herein, decided by Pemex Exploration and Production's Internal Control Organ,

- (ii) SAE explained that, since the issuance of the Unlawful Sanction, ten contracts with PEMEX had expired and five had been rescinded, severely limiting the company's income.⁴⁴⁷
- (iii) SAE indicated that the Unlawful Sanction also limited the cash flow that the company relied upon to operate the vessels and pay salaries.⁴⁴⁸
- (iv) SAE warned that the Unlawful Sanction would lead to the stagnation of the company, preventing it from generating any income, ultimately resulting in the cancelation of other companies' operations and contracts with OSA.⁴⁴⁹
- (v) Finally, SAE warned that the Unlawful Sanction would only aggravate the company's financial difficulties, placing it under an imminent risk of complete shutdown.⁴⁵⁰

means that Oceanografía, S.A. de C.V. is unable to take part in new tenders and to enter into new contracts which constitute the company's main source of income.") Translated by counsel from the original in Spanish. ("La inhabilitación de referencia, que resolvió el Órgano Interno de Control en Pemex Exploración y Producción, trae como consecuencia que Oceanografía, S.A. de C.V. esté imposibilitada para participar en nuevos procedimientos de contratación así como para celebrar nuevos contratos con quien representa su principal fuente de ingresos [...].")

⁴⁴⁷ Writ filed by Servicio de Administración y Enajenación de Bienes, June 26, 2014, **C-184**, p. 2-3. ("[i]t needs to be considered that nearly 40% of the contracts that Oceanografía had entered into and from which received an income, have expired (10 contracts) or have been terminated (5 contracts), so the number of contracts that can provide income to the alleged insolvent has been sensibly reduced in the last months.") Translated by counsel from the original in Spanish. ("[e]s de considerar que cerca del 40% de los contratos que Oceanografía S.A. de C.V. tenía en operación y de los cuales recibía algún recurso, han concluido su vigencia (10 contratos) o bien han sido rescindidos (5 contratos), por lo que el número de contratos que pueden proveer de recursos a la presunta concursada se ha visto sensiblemente reducido en los últimos meses.")

⁴⁴⁸ Writ filed by Servicio de Administración y Enajenación de Bienes, June 26, 2014, **C-184**, p. 3. ("These conditions substantially restrict the cash flow needed to operate and pay the salaries of the employees required to continue rendering services.") Translated by counsel from the original in Spanish. ("Estas condiciones restringen de manera sustancial el flujo necesario para operar y pagar la /lamina de los empleados requeridos para continuar la prestación de los servicios.")

⁴⁴⁹ Writ filed by Servicio de Administración y Enajenación de Bienes, June 26, 2014, **C-184**, p. 4. ("In the event that Oceanografía, S.A. de C.V. is prevented from participating in tenders for new contracts, this would cause the stagnation of the insolvent company, limiting the exercise of the company's purpose for which it was created, preventing new income and displacing it from the market, which in turn would lead to the cancellation of its operations and contracts with subcontractors, providers, workers, etc., with the fatal consequences that this would entail, in particular for the employees of the alleged insolvent.") Translated by counsel from the original in Spanish. ("En el evento de que se impida a Oceanografía, S.A. de C.V. participar en licitaciones de nuevos contratos, provocaría el estancamiento de la concursada, limitando el ejercicio del objeto para el que fue constituida, impidiendo el ingreso de nuevos recursos y permitiendo que sea desfasada del mercado, lo que a la postre conduciría a la cancelación de sus operaciones y contratos con los subcontratistas, proveedores, trabajadores, etc., con las funestas consecuencias que ello acarrearía, de manera particular para los trabajadores de la presunta concursada.")

⁴⁵⁰ Writ filed by Servicio de Administración y Enajenación de Bienes, June 26, 2014, **C-184**, p. 4. ("The requested interim measure will prevent the aggravation of the company's financial situation and, indeed, addresses the imminent risk that Oceanografía, S.A. de C.V., would completely shut down its operations putting at risk, not only the employment sources, but also, in some way, the oil exploitation by the Mexican State through Pemex Exploration and Production.") Translated by counsel from the original in Spanish. ("La

259. The only ray of hope mentioned by SAE was, in fact, a false hope. SAE stated that there were PEMEX tenders in which OSA could participate and generate cash flow.⁴⁵¹ In reality, however, it turned out that OSA was not permitted to bid in those tenders.

260. On July 8, 2014, the Insolvency Court issued its judgment on the Insolvency Claim (the **Judgment**),⁴⁵² holding that OSA was, in fact, insolvent. The Judgment again underscored the expiration or termination of nearly 40% of OSA's contracts with PEMEX and OSA's ineligibility to enter into any new ones. It reiterated that the Unlawful Sanction was severely limiting OSA's ability to operate and pay its obligations.⁴⁵³

medida cautelar que se solicita evitará que se agrave la situación financiera de la empresa y desde luego acota el riesgo inminente de que Oceanografía, S.A. de C.V., suspenda por completo sus operaciones poniendo en riesgo no sólo las fuentes de empleo, sino de alguna manera la explotación petrolera que lleva a cabo el Estado Mexicano a través de Pemex Exploración y Producción.”)

⁴⁵¹ Writ filed by Servicio de Administración y Enajenación de Bienes, June 26, 2014, **C-184**, p. 5. (“According to the information published in the ‘Annual Program of Acquisitions, Leases, Works and Services 2014 Update’ by PEMEX Exploration and Production...the alleged insolvent could participate in different tenders, considering that it has the experience and operational capacity. In case the insolvent were to be awarded with the relevant resolutions, it would count with enough resources to render the services offered, which would generate a considerable number of employments, as well as a positive impact in the economy of the Sonda de Campeche.”) Translated by counsel from the original in Spanish. (“De acuerdo a la información publicada en el “Programa Anual de Adquisiciones, Arrendamientos, Obras y Servicios Actualización 2014” por PEMEX Exploración y Producción...la presunta concursada podría participar en diversas licitaciones, considerando que cuenta con la experiencia y capacidad operativa. En caso de que la concursada fuese favorecida con los fallos correspondientes, y contara con recursos suficientes para proporcionar los servicios ofertados, generaría un número considerable de fuentes de empleo, así como un impacto positivo en la economía de la sonda de Campeche.”)

⁴⁵² Insolvency Court decision (declaring the insolvency of Oceanografía S.A. de C.V.), July 8, 2014, **C-182**.

⁴⁵³ Insolvency Court decision (declaring the insolvency of Oceanografía S.A. de C.V.), July 8, 2014, **C-182**, p. 37. (“[federal instrumentalities], which shall abstain from accepting proposals or entering into contracts with Oceanografía, S.A. de C.V., as it is disqualified for the term of a year, nine months, and twelve days, so it cannot take part in new contracting proceedings with Pemex Exploration and Production. Under this scenario, in the word of Petitioner, close to forty per cent of the contracts with Oceanografía, S.A. de C.V., have expired (ten contracts) or have been terminated (five contracts), which substantially limits the flow needed to operate and pay its employees’ payroll needed to continue with the rendering of services, in this sense and concerning the legislation that regulates Pemex Exploration and Production, it is prevented from contracting with the insolvent.”) Translated by counsel from the original in Spanish. (“[f]ederativas, que deberán abstenerse de aceptar propuestas o celebrar contratos con Oceanografía, sociedad anónima de capital variable, por encontrarse inhabilitada por el plazo de un año, nueve meses y doce días, por lo que no puede participar en nuevos procedimientos de contratación con Pemex Exploración y Producción. Situación por la cual, a decir de la promoviente, cerca del cuarenta por ciento de los contratos de Oceanografía, sociedad anónima de capital variable, han concluido su vigencia (diez contratos) o bien han sido rescindidos (cinco contratos), lo que limita de manera sustancial el flujo necesario para operar y pagar la nómina de los empleados que se requieren para continuar con la operación de servicios, de esta manera y atendiendo a la legislación que rige a Pemex Exploración y Producción, el impide contratar con la concursada.”)

261. To address this issue, the Judgment adopted a further set of precautionary measures, including a suspension of the effects of the Unlawful Sanction. The court believed that the Unlawful Sanction had led to OSA's insolvency and, if it was not immediately suspended, could lead to OSA's liquidation. The Insolvency Court's interim relief represents a further acknowledgement by Mexico that the State act that critically affected OSA's viability, and OSA's capacity to continue its operations, was, above all, Mexico's Unlawful Sanction.⁴⁵⁴

C. SAE SOUGHT AND OBTAINED THE DIVERSION ORDER

262. As explained in the SOC, on May 2, 2014, SAE filed a writ informing the Insolvency Court of the existence of trusts whereby OSA had assigned its receivables arising from the OSA-PEMEX contracts. SAE requested the extension of the Precautionary Measures to those trusts and asked the Court to order PEMEX to make the trust payments to SAE instead.⁴⁵⁵ On May 7, 2014, the Insolvency Court ruled that the Precautionary Measures applied to these trusts and, as requested by SAE, it ordered PEMEX to make the payments to SAE's bank account instead of to the trusts or to OSA (the **Diversion Order**).⁴⁵⁶ On May 9, 2014, the Insolvency Court further clarified that the Diversion Order applied to all trusts entered into by and between OSA and PEMEX, including the Irrevocable Trust that had been created for the benefit of GOSH and PFSM.⁴⁵⁷

263. The Diversion Order was unlawful for many reasons, as explained below. It deprived POSH of its legitimate rights as the primary beneficiary of the Irrevocable Trust and it is a further illustration of the government's campaign against OSA, given that SAE requested, and the Insolvency Court ordered, that payments owed to the relevant trusts should be made *directly*

⁴⁵⁴ As explained in the SOC, the Insolvency Court's precautionary measures came too late and could not cure the irreparable injury to OSA (and consequently to POSH) already caused by Mexico's Measures. By that time, OSA could no longer qualify to participate in PEMEX's tenders, due to its insolvent financial position, thereby cutting off all of its future business opportunities. As a result of the Unlawful Sanction, PEMEX did not award a single new contract to OSA ever again, and OSA could do nothing but watch its old contracts with PEMEX expire at a rapid pace. There truly can be no question that the Unlawful Sanction was the proximate cause of OSA's insolvency.

⁴⁵⁵ Writ filed by Servicio de Administración y Enajenación de Bienes (responding to Oceanografía S.A. de C.V.'s request to participate in the administration of the company), May 2, 2014, **C-172**.

⁴⁵⁶ Insolvency Court decision (ordering PEMEX to make payments to the Servicio de Administración y Enajenación de Bienes), May 7, 2014, **C-175**.

⁴⁵⁷ Insolvency Court decision (affirming the diversion order), May 9, 2014, **C-177**, pp. 3-4.

to SAE's bank account, instead of into the OSA insolvency estate. There was no legitimate reason to order the diversion of OSA's resources to the government's bank account. To this day, no one except Mexico knows what it did with OSA's funds that were diverted to the Mexican government.

264. In the SOD, Mexico brought forward three court decisions that warrant particular attention and will guide the narrative in this section: (i) an amparo decision whereby a Mexican court confirmed that the Diversion Order was unlawful, arbitrary, and disproportionate for the same reasons invoked by Claimant herein (the **Amparo Decision**);⁴⁵⁸ (ii) a revision decision whereby a Mexican court did not assess the merits of the Amparo Decision, but nevertheless revoked it on purely procedural grounds, which were contrary to Mexican law, depriving POSH and the Subsidiaries of legal standing to challenge the Diversion Order and violating their due process rights (the **Revision Decision**);⁴⁵⁹ and (iii) an isolated decision (which under Mexican law is given the designation *Tesis Aislada*, in Spanish),⁴⁶⁰ issued over a year after the Diversion Order, which held, *inter alia*, that the trusts and assignments of rights in the OSA case were presumed to have been part of a fraudulent practice against creditors (the **Isolated Decision**).⁴⁶¹

265. Of these three, the Isolated Decision is Mexico's only authority to claim that the Diversion Order was legal. That decision, however, is contrary to Mexican law and the Mexican constitution, does not bind Mexican courts, does not reflect the applicable law in Mexico, is contrary to the jurisprudence issued by Mexican Collegiate Courts (which entertain and resolve *amparo* challenges against judgments), and has since been overruled by a subsequent Collegiate Court decision. In addition, such a ruling issued in 2015 could not have been a predicate or a basis for the 2014 Diversion Order and it would not have answered any of the constitutional, due process, and insolvency law defects of the Diversion Order that are set out in the next section below.

266. For the sake of clarity, Claimant will explain the legal basis (or absence thereof) of each of the decisions in the following, chronological order: the Diversion Order, the Amparo Decision, the Revision Decision and the Isolated Decision. Mexico has not assessed the legal basis

⁴⁵⁸ Indirect Amparo Judgment 450/2014, issued by the Sixth District Court, January 7, 2015, **C-322**.

⁴⁵⁹ Judgment of the Review Appeal 45/2015, issued by the Third Collegiate Court, February 17, 2016, **R-062**.

⁴⁶⁰ Isolated opinion issued by the Third Collegiate Court derived from the judgment of the Review Appeal 96/2015, **R-066**.

⁴⁶¹ Judgment of the Review Appeal 96/2015, issued by the Third Collegiate Court, May 28, 2015, **C-294**.

of any of the first three decisions, relying exclusively on the content of the fourth one, *i.e.*, the Isolated Decision. Consequently, Claimant will respond to Mexico's specific arguments when assessing the unlawfulness of the Isolated Decision.

D. THE DIVERSION ORDER WAS UNLAWFUL, ARBITRARY AND DISPROPORTIONATE

1. The Diversion Order violated POSH's legitimate rights, and created a judicial exception to *pacta sunt servanda* that is prohibited by law

267. The Diversion Order was contrary to Mexican Law for several independent reasons. Mexico has not provided any legal analysis of any of these violations of Mexican law, relying instead exclusively on the Isolated Decision, which does not address any of them.

268. *First*, the Diversion order violated POSH's legitimate rights arising from valid, binding and enforceable contracts. As explained in the SOC, at the time the Insolvency Court issued the Diversion Order, OSA, as the original creditor under the PEMEX-OSA contracts, had already assigned its collection rights to the Irrevocable Trust for the benefit of POSH's Subsidiaries, who had become the new creditors of PEMEX. Under Mexican Law, "the assignment of collection rights to a trust entails a transfer of ownership of these rights. The assignor (in this case OSA) loses the ownership of the rights to the assignee (the Trust), which becomes the new owner of these rights. The assignee replaces the assignor as the creditor."⁴⁶² Therefore, the collection rights were no longer part of OSA's patrimony (property) and had become part of an "autonomous patrimony, separate from the persons involved in its creation" and whose "ownership corresponds" to the Irrevocable Trust and its beneficiaries.⁴⁶³ In simple terms, OSA did not own the collection rights; the Irrevocable Trust owned them. When the Insolvency Court extended the Precautionary Measures to the Irrevocable Trust, it violated the Trust's title to the collection rights arising from the contracts signed between OSA and PEMEX.

269. *Second*, the Diversion Order created a judicial exception to the principle of *pacta sunt servanda* that is prohibited by Mexican Law. Under the Mexican Insolvency Law, (MIL), the general rule is that, "[w]ith the exceptions indicated in this Law, the provisions on obligations

⁴⁶² Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 34.

⁴⁶³ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 36.

and contracts, as well as the stipulations of the parties, will continue to be applied.”⁴⁶⁴ Valid, binding and enforceable contracts remain so, irrespective of the insolvency proceeding.⁴⁶⁵ In other words, *pacta sunt servanda*. The MIL provides for only two exceptions whereby a valid, binding and enforceable agreement may be deprived of legal effect in the insolvency process: (i) contracts that were meant to defraud creditors may be annulled (upon an appropriate finding by the court)⁴⁶⁶ and (ii) contracts can be rejected by the insolvency Conciliator (who is in charge of preserving the insolvent entity’s estate) if it determines that doing so is in the interests of the insolvency estate.⁴⁶⁷ Neither of those exceptions was invoked by SAE or the Insolvency Court here.⁴⁶⁸

270. Accordingly, as explained by Claimant’s insolvency law expert, Mr. Luis Manuel C. Meján, “the Diversion Order violated the legitimate rights of the parties under valid and binding

⁴⁶⁴ Mexican Insolvency Law (*Ley de Concursos Mercantiles*), **C-345**, Art. 86.

⁴⁶⁵ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, paras. 39-40.

⁴⁶⁶ Mexican Insolvency Law (*Ley de Concursos Mercantiles*), **C-345**, Art. 113. (“All acts entered to defraud the creditors will be ineffective with respect to the Estate.”) As explained by Claimant’s Expert on Mexican Insolvency Law, Mr. Luis Manuel C. Meján, “[t]his provision enables the conciliator (in this case, SAE) to request the court to declare ineffective certain contracts entered into by the insolvent party. The request must be resolved through a procedure established in article 267 of the MIL, which involves the submission of a claim and statement of defense, the submission of evidence, the holding of a hearing, and finally, a ruling on the request in a reasoned judicial decision. To succeed in the request, the conciliator must prove that the contract was meant to defraud creditors; the insolvent party can challenge the request by establishing the nonexistence of fraud. At the end of the proceedings, the court must issue a decision ruling on the request, and, if it is granted, declaring the contract to be ineffective. [...] In this case...the conciliator (SAE) [did not] petition for a declaration of ineffectiveness of the Irrevocable Trust and the Assignments of Rights based on a claim that they were executed to defraud creditors, and the Insolvency Court never declared them to be ineffective on such grounds.” (Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, paras. 43, 46.)

⁴⁶⁷ Mexican Insolvency Law (*Ley de Concursos Mercantiles*), **C-345**, Art. 92. (“The contracts, preparatory or final, pending execution shall be fulfilled by the Merchant, unless the conciliator opposes in such a way to agree to the interests of the Estate.”) As explained by Claimant’s Expert on Mexican Insolvency Law, Mr. Luis Manuel C. Meján, “[t]his article enables the conciliator of the insolvency proceeding to cancel contracts whose execution is still pending, when adhering to the contracts is contrary to the interests of the bankruptcy estate. For this, the conciliator must inform the other contracting parties of his intention to cancel the contract, under the supervision of the court. [...] In this case...the conciliator [did not] cancel the fulfillment of the Irrevocable Trust and the Assignments of Rights because he deemed them contrary to the interest of the estate.” (Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, paras. 45-46.)

⁴⁶⁸ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 46. (“In this case, the Mexican authorities did not rely on either of the two exceptions that exist in the MIL. Neither did the conciliator (SAE) petition for a declaration of ineffectiveness of the Irrevocable Trust and the Assignments of Rights based on a claim that they were executed to defraud creditors, and the Insolvency Court never declared them to be ineffective on such grounds. Nor did the conciliator cancel the fulfillment of the Irrevocable Trust and the Assignments of Rights because he deemed them contrary to the interest of the estate.”)

contracts, which were never annulled or canceled during the Insolvency Proceeding.”⁴⁶⁹ Mr. Meján continues, “[t]he Diversion Order constitutes an exception to the principle of *pacta sunt servanda* that is prohibited by the MIL.”⁴⁷⁰

271. *Third*, the Diversion Order unlawfully exceeded the legal scope for precautionary measures under Mexican law. In Mexico, the Insolvency Court has the power to adopt precautionary measures that revolve around the insolvent party, but it is not authorized to interfere with legal relationships that run entirely between third parties. As Mr. Meján explains, “Article 37 of the MIL authorizes the insolvency court to prohibit the transfer of funds by the insolvent party... or to prevent the continuation of lawsuits against the insolvent party that may entail the transfer of funds... All of the measures set out in article 37 pertain to the assets and rights that make up the estate of the insolvent party.”⁴⁷¹ The Insolvency Court cannot, through a precautionary measure, “interfere in legal relationships established exclusively between third parties, not with OSA.”⁴⁷² This is exactly the case of the Irrevocable Trust, and OSA’s Assignment of Rights to the Irrevocable Trust, which resulted in a legal relationship that ran exclusively between PEMEX and the Trust (and its beneficiaries) and that no longer included OSA.⁴⁷³ As a result, “[t]he Insolvency Court exceeded its authority and interfered in a legal relationship between third parties by extending the Diversion Order to control Pemex’s payments owed to the Irrevocable Trust. Such interference is not authorized by the MIL.”⁴⁷⁴

⁴⁶⁹ First Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 62. *See also*, Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 38.

⁴⁷⁰ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 48.

⁴⁷¹ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C: Meján, para. 50.

⁴⁷² First Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján., para. 65. *See also*, Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, paras. 50-52.

⁴⁷³ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 51. (“When the Court issued the Diversion Order, the collection rights against Pemex no longer formed part of OSA’s estate. By that time, the creditor-debtor relationship existed exclusively between (i) the Irrevocable Trust and its beneficiaries (the creditors) and (ii) Pemex (the debtor)—OSA was no longer any part of that legal relationship.”)

⁴⁷⁴ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 52.

2. The Diversion Order violated POSH and the Subsidiaries' due process rights

272. As just noted, the Irrevocable Trust created an independent legal relationship between PEMEX as debtor, and the Trust and its beneficiaries (POSH and GOSH) as PEMEX's creditors, separate and apart from OSA.

273. As a matter of fundamental due process, any interference with this legal relationship required that the Trust and its beneficiaries be afforded an opportunity to be heard and to defend their lawfully acquired rights. As Mr. Meján explains, “[u]nder Mexican law, no person can be deprived of a right without first having been heard by a competent authority. The right to be heard, or right to a hearing, is a fundamental component of the right to due process enshrined in the Mexican legal system.”⁴⁷⁵

274. The Insolvency Court, however, issued the Diversion Order on a precautionary basis, without ever holding an adversarial proceeding that would have allowed the Trust, Invex (the Trustee), POSH (the primary beneficiary) or GOSH (the secondary beneficiary) to be heard. This meant, in Mr. Meján's words, that “the Insolvency Court deprived the Trust and its beneficiaries of their legitimate rights through a precautionary measure, without hearing any pleadings or evaluating the evidence that Invex, POSH, and GOSH may have brought forth. Merits proceedings of this nature were never conducted. The Diversion Order violated the due process right to be heard of Invex, POSH and GOSH.”⁴⁷⁶

275. Had the Insolvency Court followed one of the MIL's two authorized paths to invalidate a contract and render it unenforceable,⁴⁷⁷ the standard MIL procedures would have protected due process and the rights of Invex, POSH and/or GOSH. But the Insolvency Court did not do so. Although POSH and GOSH were (briefly) able to challenge the Diversion Order via an *amparo* proceeding (until they were deprived of standing to pursue that challenge also, as

⁴⁷⁵ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 54.

⁴⁷⁶ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 56.

⁴⁷⁷ Namely, a declaration of ineffectiveness by the Insolvency Court, or cancellation of the contract by the Conciliator.

discussed below), there is no question that their right to be heard in the first instance proceedings was irrevocably denied.

3. The Diversion Order unlawfully authorized the transfer of OSA's resources to the Government

276. Throughout the SOD, Mexico argues that the Insolvency Proceeding was initiated to safeguard OSA's viability. Any such intention, however, is clearly negated by the evidence on the record. The most glaring example is the diversion of OSA's resources away from OSA or its creditors and into the pockets of the government instead.

277. Mexico violated OSA's fundamental rights, harming OSA's creditors and business partners (including the Subsidiaries), when SAE requested that payments owed to OSA should be made directly to SAE's bank account. Mexico openly admits this in the SOD: "SAE requested that any sum of money in favor of Oceanografía be deposited *in an account in the SAE itself...*"⁴⁷⁸ The Insolvency Court granted SAE's request without further analysis or elaboration.

278. This decision (the Diversion Order) was clearly irregular and unlawful. As explained by Mr. Meján, "[n]o legal text—neither the MIL nor any other law—allows the insolvency court to order that the payments owed to the insolvent party be deposited into bank accounts opened in the name of a governmental institution such as SAE (or any other third party). The Insolvency Court did not offer any legal basis that explains or justifies this decision."⁴⁷⁹

279. In the SOD, Mexico does not attempt to explain the legal basis for this decision either. Mexico simply asserts that the Court ordered payments be directed to SAE "so that [SAE] could have resources at its disposal and carry out the necessary actions to maintain the ordinary operation of the company, including payment of wages, purchases of inputs, payments to suppliers, among others."⁴⁸⁰ This is groundless. SAE was already administering OSA, had access to all of OSA's records and bank accounts, and had full authority to act on behalf of OSA, including in the use of any funds in OSA's bank accounts. SAE did not need to receive any resources in its *own*

⁴⁷⁸ Statement of Defense, para. 369. (Emphasis added).

⁴⁷⁹ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 64.

⁴⁸⁰ Statement of Defense, para. 369.

bank account to “maintain the ordinary operation of the company...”⁴⁸¹ SAE could have maintained OSA’s operations by using the funds deposited in OSA’s bank accounts, with all proper transparency. As explained by Mr. Meján, “[t]here is no legal explanation that justifies that the payments be made to the bank accounts of a governmental entity, and not in those of the insolvency party.”⁴⁸²

280. The only logical inference is that the diversion was a further element of the government’s campaign to cripple OSA. The government not only took full control over OSA but also improperly diverted OSA’s resources to the government’s own bank account. As will be explained further below, around USD\$24.8 million owed to POSH’s Irrevocable Trust⁴⁸³ was deposited in the SAE bank account over the course of the Insolvency Proceedings, and to this day the government has never accounted for a single dollar of those funds. Claimant further understands that, altogether, SAE received in its bank account funds owed to OSA’s creditors in excess of USD\$100 million. Mexico, however, has attempted to block any possibility of demonstrating this to the Tribunal by unlawfully withholding the relevant documentation in breach of the Tribunal’s orders. To recall, the Tribunal ordered Mexico “to produce SAE’s bank statements showing during OSA’s insolvency, PEMEX payments received by SAE on behalf of OSA.”⁴⁸⁴ The Tribunal ordered the production of documents showing *all* payments received by SAE, not just those which were owed to POSH and the Subsidiaries. Mexico, however, only produced heavily redacted documents showing deposits on SAE’s bank accounts totaling around USD\$24.8 million,⁴⁸⁵ which roughly coincides with the amounts owed to POSH’s Irrevocable Trust. Mexico has unilaterally decided to breach the Tribunal’s order and limit the production of

⁴⁸¹ Statement of Defense, para. 369.

⁴⁸² Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 66.

⁴⁸³ Expert Damages Report by Versant, para. 117 - USD\$27.8 million minus the adjustment of USD\$2.93 million included in Second Expert Damages Report by Versant, para. 57.

⁴⁸⁴ Revised Procedural Order No. 4, dated November 7, 2019, p. 115.

⁴⁸⁵ Status of Account No. 0195530431 (produced by Respondent as Document 31.1 on December 5, 2019), **C-323**; Status of Account No. 0195530431 (produced by Respondent as Document 31.2 on December 5, 2019), **C-324**; Status of Account No. 0195530431 (produced by Respondent as Document 31.3 on December 5, 2019), **C-325**; Status of Account No. 0195530431 (produced by Respondent as Document 31.4 on December 5, 2019), **C-326**; Status of Account No. 0157851499 (produced by Respondent as Document 31.5 on December 5, 2019), **C-327**; Status of Account No. 0157851499 (produced by Respondent as Document 31.6 on December 5, 2019), **C-328**; Status of Account No. 0157851499 (produced by Respondent as Document 31.7 on December 5, 2019), **C-329**. Additional Payments owed by PEMEX to OSA’s creditors that were made to SAE instead, **C-356**.

documents to suit its needs. The most glaring evidence of Mexico’s violation is that Claimant has come to know that SAE received further diverted payments—that were owed by PEMEX to trusts established by OSA’s creditors—totaling, at least, an additional USD\$46.96 million (which, together with POSH’s diverted funds exceed USD\$71 million).⁴⁸⁶ Claimant denounces Mexico’s violations in the most categorical terms and reserves its rights to produce additional documentation and make further requests to the Tribunal, including that the Tribunal draw adverse inferences that SAE received in excess of USD\$100 million in its bank account.

4. The Diversion Order violated the public authorities’ constitutional duty to state the reasons for their decisions

281. Article 16 of the Mexican Constitution provides that public authorities have a duty to state the reasons underlying their decisions, which has been interpreted to require them to “state the legal grounds and factual reasons considered in making the decision, which must be real, truthful and be based on sufficient legal grounds to provoke the act of authority.”⁴⁸⁷

282. The Insolvency Court did not fulfill this constitutional requirement when it issued the Diversion Order. The Insolvency Court’s exclusive justification for the Diversion Order was the need to safeguard OSA’s operations, as set forth below:

[After payment to the trust] the remainder it receives is not enough to safeguard the continuity of the merchant’s operations, which is why it is necessary to suspend the effects of such schemes, in such a way that the amounts that Pemex Exploration and Production pays *to go directly to SAE* in their capacity as the Administrator of Oceanografía... to preserve the economic value of the company or the Assets and rights that comprise it through the respective procedure in which the product of the sale is maximized by giving fair and equitable treatment to the trade and its creditors; and furthermore, that it is in the public interest to preserve the companies and avoid that the generalized breach of the payment obligations jeopardizes their viability...⁴⁸⁸

⁴⁸⁶ Additional Payments owed by PEMEX to OSA’s creditors that were made to SAE instead, **C-356**.

⁴⁸⁷ Second Expert Legal Opinion on Insolvency Law by Luis Manuel Meján, para. 60, citing Chamber One of the Supreme Court of Mexico, Case 1a./J. 139/2005, published in the Judicial Journal of the Federation and its Gazette, Volume XXII, December 2005, **C-295**.

⁴⁸⁸ Insolvency Court decision (ordering PEMEX to make payments to the Servicio de Administración y Enajenación de Bienes), May 7, 2014, **C-175**.

283. This reasoning in no way satisfies the public authorities’ constitutional duty to explain the basis for their actions, because it provides no explanation for how the Court purported to resolve any of the problems just discussed. The Insolvency Court did not explain the legal basis and reasoning for (i) effectively annulling valid, binding, and enforceable contracts; (ii) depriving third parties of their legal rights by means of a precautionary measure; (iii) not affording affected third parties their rights to due process and a court hearing; and (iv) diverting OSA’s resources to the government’s bank account.

E. THE AMPARO DECISION ISSUED BY MEXICO’S OWN COURTS CONFIRMED THAT THE DIVERSION ORDER WAS UNLAWFUL, ARBITRARY AND DISPROPORTIONATE

284. POSH successfully challenged the Diversion Order—at least temporarily. Pursuant to an *amparo* challenge filed by POSH, a Mexican court assessed the merits of the Diversion Order and concluded that it violated Mexican law and the Mexican Constitution on the same grounds that Claimant explained in Section IX.D above.

1. The Amparo Decision confirmed the unlawfulness of the Diversion Order

285. Mexico acknowledges that “[o]n May 15, 2014, POSH filed an amparo against the [Diversion Order]. This challenge was referred to the Sixth District Court and was registered with file 450/2014.”⁴⁸⁹ Mexico explains that, in this challenge, “POSH argued that the [Diversion Order] violated its right to legality and legal certainty, since the collection rights no longer belonged to OSA but to [the Trustee]. Furthermore, it also argued that the [Diversion Order] failed to legally explain why it was the SAE’s responsibility to... obtain the payments.”⁴⁹⁰ Finally, as Mexico also admits, “[o]n January 6, 2015, the Sixth District Court issued a judgement providing constitutional protection (*amparo*) to POSH, or in other words, agreed with [POSH]. *This [judgment] stated that the [Diversion Order] exceeded its objectives.*”⁴⁹¹ The January 6, 2015 judgment described by Mexico is referred to in this submission as the Amparo Decision.

⁴⁸⁹ Statement of Defense, para. 404.

⁴⁹⁰ Statement of Defense, para. 405.

⁴⁹¹ Statement of Defense, para. 406.

286. The Amparo Decision warrants a careful read. It is notable because it confirmed that the Diversion Order violated Mexican law and the Mexican Constitution, based on each of the grounds just discussed in Section IX.D above:

- The Amparo Decision held the Diversion Order violated Mexican Law because the trusts and the assignments of rights were valid, binding and enforceable contracts and “the only collection rights that could be affected should have been those of Oceanografía [not those of the Irrevocable Trust]”.⁴⁹²
- The Amparo Decision held that the Diversion Order violated Mexican Law since the precautionary measure “exceeded the scope provided under the Insolvency Law,” and precautionary measures “may not affect third parties” “and may never create, modify or extinguish validly created legal relationships.”⁴⁹³

⁴⁹² Amparo Decision, C-322, p. 16. (“[T]he collection rights for Pemex Exploración y Producción, had already been removed from the patrimony of the insolvent party OCEANOGRAFÍA, SOCIEDAD ANÓNIMA DE CAPITAL VARIABLE, which nullified the assignments of collection rights of Pemex Exploración y Producción. In any event, the sole rights that may be affected would be those of OCEANOGRAFÍA, SOCIEDAD ANÓNIMA DE CAPITAL VARIABLE, in its position of secondary beneficiary.”). Translated from the original text in Spanish. (“Así se tiene que los derechos de cobro ante Pemex Exploración y Producción, ya habían salido del patrimonio de la concursada OCEANOGRAFÍA, SOCIEDAD ANÓNIMA DE CAPITAL VARIABLE, con lo cual se anulan las cesiones de derechos de cobro de Pemex Exploración y Producción, aunado también a que en todo caso los derechos que corresponderían afectarse deberían ser solamente los de OCEANOGRAFÍA, SOCIEDAD ANÓNIMA DE CAPITAL VARIABLE, en su carácter de fideicomisaria en segundo lugar.”)

⁴⁹³ Amparo Decision, C-322, pp. 15-16, 23-24. (“[T]he precautionary measures ordered by the court exceeded their intrinsic teleological purposes in affecting the rights of third parties, and specifically...the rights assigned to the trusts created prior to the submission of the claim [...].”)

[T]he precautionary measures ordered by the responsible court exceeds the provisions established in the insolvency law and lack the due interpretation and application of article 37 of the Insolvency Law, applicable to the case, in the first place because these measures, and in general the precautionary measures in Procedural Law, are meant to protect certain legal situations that are in conflict, provided that this arises among the parties involved in said conflict, and should never affect third parties outside of the procedural relationship, least of all affect, modify, extinguish or annul validly created legal situations, but rather only maintain a determined status.

In the present case, the precautionary measures, which include the prohibition of payments, suspension of execution, underwriting of goods, etc. must be solely referred to the patrimony of the insolvent party, making its assets untouchable. These measures cannot have third parties as recipients because this would have a different purpose, it would become an action that deprives rights, and would therefore be unconstitutional.”) Translated from the original text in Spanish. (“Es así que las medidas precautorias decretadas por el juez excedieron de sus fines teleológicos intrínsecos al afectar los derechos de terceros y en concreto... los derechos afectos a un fin determinado, es decir a los fideicomisos celebrados con anterioridad a la presentación siquiera de la demanda...”)

Las providencias precautorias dictadas por la autoridad señalada como responsable, rebasan los extremos establecidos en la ley concursal y carecen de la debida interpretación y aplicación del artículo 37 de la Ley de Concursos Mercantiles, aplicable al caso, en primer lugar porque tales medidas y en general las providencias precautorias en Derecho Procesal tienen como finalidad proteger ciertas situaciones jurídicas que estén en conflicto, siempre que ello se suscite entre las partes involucradas en dicho conflicto, más nunca

- The Amparo Decision held that the Diversion Order violated Mexican Law because it directed payments to SAE’s bank account: “exceeds the scope of a precautionary measures, given that, not only does it order to restrict payment in favor of [the trust] but it orders it be made to SAE.”⁴⁹⁴
- The Amparo Decision held that the Diversion Order violated the public authorities’ constitutional duty to explain the basis for their decisions: “[the decisions] are illegal and lack the required legal basis and motivation.”⁴⁹⁵
- The Amparo Decision held that the Diversion Order violated POSH’s right to be heard: “the precautionary measure issued by the judge of origin, were issued without having heard [POSH] in the insolvency proceeding, which constitutes a violation of its right to be heard.”⁴⁹⁶ It also held that the Diversion Order violated the Mexican Constitution’s principle of proportionality.⁴⁹⁷

deben afectar a terceros extraños a la relación procesal, ni mucho menos afectar, modificar, extinguir o anular situaciones jurídicas válidamente creadas, sino solamente mantener un estado determinado.

En el caso que acontece, las medidas precautorias a saber, prohibición de pagos, suspensión de ejecución, aseguramiento de bienes y demás, debieran referirse únicamente al patrimonio del concursado haciendo que el patrimonio de éste se mantenga intocado, más no tener como destinatarios a terceros ya que se perseguiría con ello un fin distinto, por tanto se convertiría en un acto privativo de derechos, y por ende inconstitucional.”)

⁴⁹⁴ Amparo Decision, **C-322**, pp. 14, 30. (“This is an overreach of the purpose of a precautionary measure, given that it not only orders to restrict payments in favor of its represented party, but also orders that these payments be made to SAE. The reasons of illegality set forth above are grounded and sufficient to grant the amparo and protection of the federal court...”). Translated by counsel from the original in Spanish. (“Con lo que rebasan la finalidad de una medida cautelar, dado que no solamente ordena restringir el pago a favor de su representada, sino que ordena se realice al SAE. Los conceptos de violación sintetizados son fundados y suficientes para conceder el amparo y protección de la justicia federal...”)

⁴⁹⁵ Amparo Decision, **C-322**, p. 23. (“This results in both decisions, and the third decision as a factual consequence of the forgoing, being illegal and lacking due grounding and reasoning, given that the record shows that what Pemex, Exploración y Producción, attempted to state was that there were other trusts whose collection rights had been assigned to third parties, in addition to those already put on the record, and the court did not rule properly regarding such contracts, which resulted in the affectation of these third parties, as is the case herein.”) Translated by counsel from the original in Spanish. (“Lo que resulta en que ambos proveídos y el tercero como consecuencia fáctica de los anteriores son ilegales y *carecen de la debida fundamentación y motivación*, ya que de las constancias de autos, se desprende que lo que Pemex, Exploración y Producción, intentó decir fue que además de los ya denunciados en el concurso, fideicomisos cuyos derechos de cobro fueron cedidos en favor de terceros, de esta manera el juez fue omiso pronunciarse correctamente sobre tales contratos, lo que devino en la afectación de estos terceros, como es el caso de la aquí quejosa.”)

⁴⁹⁶ Amparo Decision, **C-322**, pp. 16, 25. (“In addition to the above, in this case it is stated that the precautionary measures ordered by the original court were issued without having heard the petitioner in the insolvency process, which constitutes a violation of the right to be heard.”) Translated by counsel from the original in Spanish. (“Aunado a lo anterior, en el presente caso se advierte que las providencias precautorias dictadas por el juez de origen fueron dictadas sin haber escuchado a la aquí quejosa en el proceso concursal, lo cual constituye una violación al derecho de audiencia.”)

⁴⁹⁷ Amparo Decision, **C-322**, p. 25. (“The foregoing is grounded on the principle of proportionality that is enshrined in our Constitution as a requirement of the principle of legality, which is the constitutional prohibition of the authorities from acting beyond their powers or arbitrarily. [...] This is the case, because

287. In sum, in a review on the merits, Mexico’s own judiciary concluded that the Diversion Order was unlawful, arbitrary and disproportionate for all the reasons invoked by Claimant in this arbitration. It is telling that, in its Statement of Defense, Mexico did not dispute any of the substantive rulings of the Amparo Decision that confirmed the Diversion Order’s multiple violations of Mexican law and the Mexican Constitution. Because it has no response to the substance of the Amparo Decision, Mexico tries to dismiss the significance of that Decision based on its subsequent procedural history (discussed next) and to rely instead on a different, outlier court decision (the so-called Isolated Decision, discussed in Section IX.F below). However, neither one undermines the persuasive force of the Amparo Decision.

2. The Revision Decision then wrongfully deprived POSH and the Subsidiaries of standing to challenge the Diversion Order

288. On April 8, 2015, SAE, PEMEX and the Public Prosecutor challenged the Amparo Decision. On June 3, 2015, the 14th Collegiate Court revoked the Amparo Decision (the Revision Decision)—but importantly, it did so on purely formalistic and procedural grounds.⁴⁹⁸

289. The Revision Decision did not reach the merits to assess whether the Diversion Order was consistent with Mexican law and the Mexican Constitution, whether it properly respected POSH’s contractual rights, whether diverting payments to SAE was legally justified, whether the decision was proportional or adequately reasoned, and so on.

290. Instead, the court held that POSH and the Subsidiaries had lacked standing to file the *amparo* action. The court held that, in order to file an *amparo* challenge against a government measure, the challenging party must have a “legal interest,” and not merely a “legitimate interest.” Citing that fine distinction, the court found that, in the case of the Irrevocable Trust, while the trustee (Invex) would have had a “legal interest,” the beneficiaries (such as POSH) only had a “legitimate interest” and therefore lacked standing to challenge the Diversion Order. GOSH’s

with the issuance of the precautionary measures...severe damage is caused against the rights of third parties, here the petitioner of the amparo, because the assets of trust being affected.”) Translated by counsel from the original in Spanish. (“Lo anterior, encuentra su fundamento en el principio de proporcionalidad que se deduce de nuestra Carta Magna básicamente, como exigencia del principio de legalidad, de la prohibición constitucional que exige a las autoridades no actuar en exceso de poder o de manera arbitraria.... Ello es así, porque con la emisión de las providencias precautorias... se causa un grave perjuicio en contra de derechos de terceros, aquí peticionario del amparo, en virtud de que se estarían afectando los bienes fideicomitidos.”)

⁴⁹⁸ 14th Court in Civil Matters for the 10th Circuit decision (dismissing POSH’s appeal), June 3, 2015, **C-180**.

separate but parallel *amparo* challenge met the same fate, with the court also holding that GOSH lacked a “legal interest” on which to ground a challenge to the Diversion Order.⁴⁹⁹

291. The Revision Decision is both wrongly decided and unfair. As explained by Mr. Meján:

Under Mexican law, the standing to appeal a judicial decision corresponds to the “owner of a subjective right that is personally and directly affected.”¹ Under the assignment of collection rights, the Irrevocable Trust and its beneficiaries (POSH) had become creditors of these rights, and therefore had the ability and standing to claim for monies that were legally owed to them. Invex, the trustee, had a legal interest derived from the Assignments of Rights. And POSH, the beneficiary, had a legal interest deriving from the Assignments of Rights and the Irrevocable Trust. Both interests derive from the contractual obligations agreed with OSA. OSA assigned the collection rights of the contracts with PEMEX to the Trust, and OSA entered into the Trust, whereby PEMEX payments would be directed to POSH. Both Invex and POSH were “owners of a subjective right that was personally and directly affected.” Consequently, both Invex and POSH had a “legal interest” and were entitled to request the protection of their rights through an *amparo*.⁵⁰⁰

292. The key consequence of the Revision Decision was that it deprived POSH and the Subsidiaries of any means to challenge the Diversion Order before Mexican courts, despite that Order’s clearly destructive impact on their rights to receive payments from PEMEX under the Irrevocable Trust. That loss of access to justice is a further, serious deprivation of due process.

F. THE ISOLATED DECISION REPRESENTS AN UNLAWFUL *EX-POST* ATTEMPT TO JUSTIFY THE UNLAWFUL DIVERSION ORDER

293. On September 17, 2014, Invex (the trustee of the Irrevocable Trust) challenged the Judgment issued in the Insolvency Proceeding, requesting that the Court revoke the Diversion Order. This challenge was dismissed.⁵⁰¹ Invex then appealed against the dismissal (*recurso de revisión*) before the 3rd Collegiate Court, which dismissed that challenge on May 22, 2015, issuing

⁴⁹⁹ Court for the 31st Circuit decision (dismissing GOSH’s appeal), February 17, 2016, **R-062**, p. 53.

⁵⁰⁰ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 78.

⁵⁰¹ Isolated Decision, **C-294**.

a one-off decision that is Mexico’s only ground for its attempted defense of the legality of the Diversion Order (the Isolated Decision).

294. The Isolated Decision held that the Irrevocable Trust and the Assignment of Rights were ineffective, and therefore that the collection rights could be subjected to the Diversion Order.⁵⁰² Mexico’s attempted justification of the Diversion Order relies entirely on the Isolated Decision, as Mexico contends that this decision “resulted in an interpretative [judicial] precedent.”⁵⁰³ That is not the case. As will be discussed in the next sub-sections, the Isolated Decision was specifically engineered for the OSA case and thus is not entitled to any weight; it ran contrary to all prior jurisprudence of the Mexican Collegiate Courts; it has since been contradicted by a subsequent decision of a Collegiate Court; it is not binding precedent in Mexico; and it is contrary to Mexican law and the Mexican Constitution.

1. The Isolated Decision is not a binding precedent, is not the applicable law in Mexico, and has been contradicted by a subsequent decision

295. Both Mexico and its expert present the Isolated Decision as if it were a statement of universally applicable law in Mexico. That characterization is simply wrong.

296. *First*, the Isolated Decision is not a binding precedent, and it does not state or represent the law of the land in Mexico. Under Mexican law, “[a]n *Isolated Thesis* [such as the Isolated Decision] does not become binding jurisprudence in Mexico until its reasoning is endorsed by five consecutive and unanimous rulings by collegiate courts (which entertain and rule on, *inter alia*, amparo challenges).”⁵⁰⁴ That is not the case here. Tellingly, Mexico itself titled Exhibit R-65 containing the Isolated Decision as the “Isolated Thesis” (*Tesis Aislada*, in Spanish). The reason for this (correct) title is that Mexican courts have only espoused this particular interpretation of the MIL with respect to trusts and assignments of rights *in one single instance in Mexican history*: the OSA case. Neither Mexico nor its expert claim otherwise.

297. *Second*, as discussed further below, the Isolated Decision is contrary to Mexican Law and to “the longstanding and consistent jurisprudence that had been previously issued by the

⁵⁰² Isolated Decision, **C-294**, pp. 83-84.

⁵⁰³ Statement of Defense, para. 428.

⁵⁰⁴ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 84.

Mexican collegiate courts regarding the legal regime of trusts in insolvency cases.”⁵⁰⁵ Prior precedents of the Collegiate Courts contradict the Isolated Decision. Consequently, “[e]ven if it were binding (it is not), the Isolated Decision would constitute a radical turn in the applicable legal regime for trusts in insolvency proceedings.”⁵⁰⁶

298. *Third*, a subsequent decision of a Mexican Collegiate Court has repudiated the Isolated Decision. On August 3, 2018, a Collegiate Court unanimously ruled that rights assigned to a trust are no longer owned by the insolvent party and do not form part of the insolvency estate. That court’s reasoning is clear:

The estate so affected has the object of fulfilling a determined purpose, such that the estate of the trust does not allow any possibility of confusion with the particular assets of the subjects who make up the trust [...] when dealing with a trust in guarantee of payment, this translates into the credit no longer forming part of the ordinary liabilities of the debtor, subject to the insolvency rules, to the extent that that liability is affected to the asset granted as a guarantee, which is to say that when this asset is specifically earmarked to pay the debt, in the event of the payment not being made.⁵⁰⁷

299. Therefore, as explained by Mr. Meján, “[t]he rule embraced by the Mexican courts has been and continues to be that assets assigned to a trust do not form part of the insolvency estate. The only way that they can return to the estate is through one of the two procedures established in the MIL...namely, the declaration of nullity or cancelation of the contracts through which the trust was constituted and the assignment of rights were made.”⁵⁰⁸ Neither was followed in the OSA case.

300. Briefly stated, the Isolated Decision is not binding on Mexican courts, is not the law of the land in Mexico, and is contrary to the both the prior and subsequent decisions of the Mexican Collegiate Courts. These reasons alone suffice to dismiss Mexico’s arguments, even without assessing the specific reasoning of the Isolated Decision. Any such assessment, however,

⁵⁰⁵ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 85.

⁵⁰⁶ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 86.

⁵⁰⁷ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 87, citing Amparo in review 70/2018. Misiones de Casa Real, S.A. de C.V., May 30, 2018. Unanimous vote. Judge: Abraham S. Marcos Valdés. Secretary: Patricia Villa Rodríguez, **C-296**.

⁵⁰⁸ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 88.

reinforces to the same outcome: the Isolated Decision is unfounded under Mexican Law and the Treaty.

2. The Isolated Decision is contrary to Mexican Law

301. The Isolated Decision concluded that the Irrevocable Trust and the Assignments of Rights were ineffective, and thus that the PEMEX payments were properly subject to the Diversion Order, for three reasons: (i) some of the contracts were entered into during the statutory clawback period of the insolvency and as a result were deemed to be means of defrauding creditors, leading to the contracts being declared ineffective ; (ii) some of the contracts were entered into before the clawback period, but because that period *could have been* extended up to the three years before the declaration of insolvency, these contracts were also deemed to be means of defrauding creditors and declared ineffective; and (iii) in any event, all contracts for the assignment of rights to a trust automatically become ineffective upon a declaration of insolvency, for public policy reasons. None of those reasons withstands even the most superficial scrutiny. Moreover, the Isolated Decision does not even attempt to justify the diversion of the funds to the government's bank account.

(a) **The Insolvency Court never relied on the argument that the two contracts for the assignment of rights that fell within the Clawback Period were ineffective; the argument was entirely an invention of the 3rd Collegiate Court**

302. The Insolvency Court set the clawback date for OSA's insolvency at October 11, 2013 (the **Clawback Date**). Two of the contracts for the Assignments of Rights entered into by OSA were dated on November 20, 2013 (Deeds Nos. 1143 and 1144)⁵⁰⁹ and thus fell within the clawback period (the **Clawback Period**). On that basis alone, the Isolated Decision concluded that these two contracts should be deemed to defraud OSA's creditors and automatically rendered ineffective.⁵¹⁰ This is unlawful and contrary to Mexican Law. Under the MIL, the Insolvency Court can declare the ineffectiveness of a contract only in a judgment that is issued after conducting

⁵⁰⁹ Public Deed No. 1,143, recording the assignment of rights agreement in respect to Caballo Argento, November 20, 2013, **C-71**; Public Deed No. 1,144, recording the assignment of rights agreement in respect to Caballo Babiaca, November 20, 2013, **C-72**.

⁵¹⁰ Isolated Decision, **C-294**.

an adversarial proceeding in which it has heard all interested parties. Such an adversarial proceeding never took place in this case.

303. As explained by Mr. Meján, the clawback period in the insolvency proceeding “is period prior to the declaration of insolvency in which any legal acts entered into by the insolvent party *can* be declared ineffective if it is determined that they were entered with the intention to defraud creditors.”⁵¹¹ The declaration of ineffectiveness is governed by Articles 113 *et seq.* of the MIL. Article 113 of the MIL provides that “all acts made with fraud to creditors [during the claw back period] will be ineffective with respect to the Estate”,⁵¹² and Articles 114 to 117 list a series of acts that, if performed during the claw back period, will be *presumed* to defraud the creditors.⁵¹³

304. These presumptions, however, are not conclusive. As explained by Mr. Meján “[t]hey are not assumptions *iuris et de iure*, but rather *iuris tantum*, that is, they can be proved wrong.”⁵¹⁴ The insolvency court must therefore expressly declare the ineffectiveness of a contract entered into during the claw back period. after an adversarial proceeding conducted under the rules applicable to ancillary processes (*trámite incidental*), which requires “the submission of a complaint, answer to the complaint, a hearing, and a court ruling.”⁵¹⁵ This is consistent with other developed jurisdictions and with the UNCITRAL Legislative Guide, which provides as follows:

Conduct of annulment proceedings a) Parties which can initiate a proceeding... In general, the annulment of a specific transaction requires that a request is filed with the Tribunal to be declared null...⁵¹⁶

305. No such proceeding ever took place in the OSA case in connection with the Diversion Order.⁵¹⁷ The Isolated Decision was therefore unfounded. It improperly declared that

⁵¹¹ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 92. (Emphasis added).

⁵¹² Mexican Insolvency Law (*Ley de Concursos Mercantiles*), **C-345**. 113.

⁵¹³ Mexican Insolvency Law (*Ley de Concursos Mercantiles*), **C-345**. Art. 114-117.

⁵¹⁴ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 94.

⁵¹⁵ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, 100.

⁵¹⁶ Legislative Guide on Insolvency Law, U.N. Commission on International Law, New York, 2006, **CL-163**, para. 198.

⁵¹⁷ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 119.

certain contracts were automatically ineffective, without following the specific procedures provided under the MIL for that purpose.

(b) The Insolvency Court never extended the Clawback Period up to three years prior to the declaration of insolvency

306. The Isolated Decision acknowledged that the Irrevocable Trust and four out of the six contracts for the Assignments of Rights were entered into on August 9, 2013, “sixty three days before the retroactivity date”⁵¹⁸ of October 11, 2013. Surprisingly, the court held that these contracts nevertheless fell within the Clawback Period because the court possessed the power—which it had never in fact exercised—to extend the Clawback Period up to three years prior to the declaration of insolvency. On this ill-conceived basis, even the contracts that fell outside the Clawback Period were deemed made to defraud creditors and therefore declared to be ineffective. This reasoning is groundless and contrary to Mexican law.

307. Under Article 112 of the MIL, (i) the insolvency court may extend the claw back period up to three years;⁵¹⁹ *provided that* this extension is based (ii) “upon [a] petition of the Conciliator, the Trustee, the administrators or any creditor...;” (iii) which must be filed “prior to the Credit Recognition Decision;” (iv) and which is “resolved in an ancillary [*i.e.* adversarial and on-notice] proceeding...;”⁵²⁰ (v) by way of a Judgment; (vi) that must be published in the Official Gazette.⁵²¹

308. It is undisputed that none of these requirements was met in the present case. Taking them in the same order, (i) the Insolvency Court never extended the Clawback Period up to three years; because (ii) none of the Conciliator, the Trustee, administrator(s) or any of OSA’s creditors ever requested such an extension; (iii) whether prior to the Creditor Recognition Resolution or thereafter; and thus, (iv) no ancillary proceeding was ever conducted for this purpose; and (v) no judgment was ever issued or (vi) published in the Official Gazette. The Isolated Decision itself could not (and did not purport to) grant such an extension of the Clawback Period either, because

⁵¹⁸ Isolated Decision, **C-294**, p. 79.

⁵¹⁹ Mexican Insolvency Law (*Ley de Concursos Mercantiles*), **C-345**, Art. 112.

⁵²⁰ Mexican Insolvency Law (*Ley de Concursos Mercantiles*), **C-345**, Art. 112.

⁵²¹ Mexican Insolvency Law (*Ley de Concursos Mercantiles*), **C-345**, Art. 112.

under Article 112 MIL, the Collegiate Court did not possess the authority to do so in the context of a revision challenge (*Recurso de Revisión*, in Spanish).⁵²²

309. In sum, while in theory the Insolvency Court could have extended the Clawback Period up to three years prior to the declaration of insolvency, it never actually did so. In addition, if it had considered doing so, the Insolvency Court would have to have conducted an adversarial proceeding in order to hear all interested parties before declaring the contracts falling outside of the Clawback Period ineffective. It never did so. The Isolated Decision therefore constitutes an impermissible *ex-post* attempt to justify the prior unlawfulness of the Diversion Order. Two wrongs do not make a right.

(c) The validity and enforceability of the Irrevocable Trust and the Assignment of rights do not automatically become ineffective as a result of the declaration of insolvency

310. Finally, as a catch-all and backup argument, the Isolated Decision held that any and all valid, binding and enforceable trusts and assignments of rights—whether within or beyond the clawback period—immediately and automatically become ineffective upon a declaration of insolvency, due to the public interest in insolvency proceedings. The text of the Isolated Decision on this point stated as follows:

[U]nder ordinary circumstances such a distribution of future remunerations would invariably be binding on the businessman, exactly as stipulated, according to the principle of *pacta sunt servanda*, under which the contracts must be carried out as the supreme will of the parties. However the inflexibility of that private contract must be subordinate to the provisions of public order that come into play when the assignor or trust founder is subject to the provisions of the commercial insolvency proceeding.

[T]he payment system, pre-established according to the autonomy of the businessman's will is destined to rule in ordinary financial circumstances; but in the case of a insolvency proceeding those private provisions are displaced by exhaustive rules that order the form of preserving, administering and applying the future assets of the insolvent party...⁵²³

⁵²² Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 105 (noting that, under Article 112 of the MIL, the authority to extend the clawback period rests solely with the Insolvency Court).

⁵²³ Isolated Decision, **C-294**, p. 83, 88. (“[E]n circunstancias ordinarias tal disposición de remuneraciones futuras indefectiblemente obliga al comerciante, en la exacta medida de lo estipulado, conforme al principio *pacta sunt servanda*, en cuya virtud los contratos deben ser cumplidos, como voluntad suprema entre las

311. This reasoning is both flawed and contrary to Mexican law, for several reasons. Further, it illustrates the lengths to which Mexico has been willing to go to annul the Irrevocable Trust and the Assignments of Rights, even absent any legal justification.

312. *First*, the Isolated Decision does not cite any legal ground to justify its holding. The Isolated Decision vaguely alludes to principles such as “the public interest to preserve companies,”⁵²⁴ and the protection of “the interests of creditors.”⁵²⁵ But it fails to cite a single provision of the MIL or Mexican jurisprudence that would expressly authorize such an intrusive measure that effectively deprives third parties of their lawfully acquired rights without allowing them a chance to be heard. No such legal basis exists.

313. *Second*, the Isolated Decision violated the MIL. As previously explained, the principle of *pacta sunt servanda* provides that valid, binding and enforceable contracts must be complied with by the parties who entered into them. As explained by Mr. Meján, “[t]here are very few exceptions to this principle, which must be clearly established by law and narrowly construed.”⁵²⁶ Indeed, Article 86 of the MIL explicitly provides that “[w]ith the exceptions established by this Law, the provisions on obligations and contracts, as well as the stipulations of the parties, shall continue to apply.”⁵²⁷ In other words, “*pacta sunt servanda* remains applicable after the declaration of insolvency, and the only exceptions to this principle are those expressly contemplated in the Law.”⁵²⁸ As explained preciously in Section IX.D.1, the MIL contemplates two specific exceptions to this general principle: the annulment of contracts that were meant to

partes. Sin embargo, la inflexibilidad de ese pacto privado debe ceder ante las disposiciones de orden público que entran en juego cuando el cedente o fideicomitente queda sujeto a las disposiciones del concurso mercantil... porque tal sistema de pagos preestablecido conforme a la autonomía de la voluntad del empresario se encuentra destinado a regir en circunstancias patrimoniales ordinarias; pero en caso de concurso mercantil esas disposiciones privadas quedan desplazadas por las reglas taxativas que ordenan la forma de preservar, administrar y aplicar los activos futuros del concursado...”)

⁵²⁴ Isolated Decision, **C-294**, p. 80. (“De ahí que se justifique que la juez responsable haya decretado una providencia precautoria tendente a proteger esos recursos, en aras de tutelar la masa, la preservación de la empresa y los intereses de todos sus acreedores.”) (Emphasis added).

⁵²⁵ Isolated Decision, **C-294**, p. 81. (“[L]os referidos actos privados de transmisión de derechos de cobro futuros no podrían prevalecer sobre las normas públicas del concurso mercantil, incluyendo las que regulan sus providencias precautorias.”) (Emphasis added).

⁵²⁶ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, paras. 39, 113.

⁵²⁷ Mexican Insolvency Law (*Ley de Concursos Mercantiles*), **C-345**, Art. 86.

⁵²⁸ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 125.

defraud creditors⁵²⁹ and the rejection of contracts by the Conciliator in the interest of the estate.⁵³⁰ It is undisputed that neither of those exceptions were established in this case.⁵³¹

314. In light of the foregoing, the Isolated Decision is arbitrary, unfounded, and contrary to the express terms of the MIL. The Isolated Decision declared a self-serving judicial exception to the principle of *pacta sunt servanda*, which is expressly prohibited by Article 86 of the MIL.

(d) The Isolated Decision does not even attempt to set out a legal basis for directing payments to the government’s bank account

315. As explained above, the Diversion Order not only violated the Irrevocable Trust, but then also unlawfully diverted the payments owed to the Trust into the government’s bank account. In the SOD, Mexico does not even attempt to explain the legal basis for this decision. The Isolated Decision does no better. The court’s only justification for such an unnecessary commingling of finances is that “SAE... was OSA’s administrator and therefore the administrator of OSA’s Estate.”⁵³² This is no answer.

316. The Isolated Decision did not cite any legal grounds—whether in statutes or in jurisprudence—to justify its endorsement of the diversion of funds. No such grounds exist. SAE was OSA’s administrator at the time and, as such, it had access to all of OSA’s records and bank accounts and had full authority to act on behalf of OSA, should it have needed the funds for the benefit of OSA or the insolvency estate. Instead, it appropriated the funds to its own accounts. It is clear that, as Mr. Meján confirms, “there was no legitimate or lawful reason to divert OSA’s funds to the government’s bank account.”⁵³³

⁵²⁹ Mexican Insolvency Law (*Ley de Concursos Mercantiles*), **C-345**, Art. 113. (“All acts entered to defraud the creditors will be ineffective with respect to the Estate. Acts entered to defraud creditors are those that the Merchant has completed before the declaration of insolvency, knowingly defrauding the creditors if the third party who intervened in the act was aware of this fraud. This last requirement will not be necessary in free acts.”)

⁵³⁰ Mexican Insolvency Law (*Ley de Concursos Mercantiles*), **C-345**, Art. 92. (“The contracts, preparatory or final, pending execution shall be fulfilled by the Merchant, unless the conciliator opposes in such a way to agree to the interests of the Estate.”)

⁵³¹ *See*, Section IX.D.1 *supra*.

⁵³² Isolated Decision, **C-294**, p. 95.

⁵³³ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 64.

G. MEXICO ARBITRARILY PREVENTED PEMEX FROM RESCINDING THE CONTRACTS WITH OSA AND REPLACING THEM WITH NEW CONTRACTS WITH THE SUBSIDIARIES

317. While the Measures' impacts were felt most severely by OSA and its contractors, PEMEX's operations were also imperiled. As PEMEX did not want its operations interrupted, it was willing to rescind OSA's GOSH and SMP Service Contracts and to award new contracts for the same services directly to GOSH and SMP.⁵³⁴ In an attempt to save its operations in Mexico, POSH engaged in discussions with PEMEX to that effect. However, SAE blocked this path forward by refusing to cancel the GOSH Charters, citing the interest of preserving the insolvency estate, and the Insolvency Court did not permit PEMEX to rescind the GOSH and SMP Service Contracts until it was too late. These arbitrary and unreasonable measures directly impacted OSA's business partners, including the Subsidiaries, and ultimately sealed the destruction of the Investment.

318. Mexico disputes that PEMEX ever had in mind to award new contracts to the Subsidiaries, on two grounds: (1) Mexico argues that "[a]ll contracts awarded by Pemex must go through a public procurement process,"⁵³⁵ which takes time, so it would be "unrealistic to think that Pemex would 'assign' the PEP Contracts in favor of the Subsidiaries through verbal promises and without a public procurement procedure."⁵³⁶ (2) Mexico argues that it was POSH who "prevented the Subsidiaries from continuing to charter their vessels to [OSA],"⁵³⁷ because it withdrew its vessels from the contracts with OSA. Mexico mischaracterizes Claimant's statements, and its conclusions are incorrect.

319. *First*, Claimant has never asserted that PEMEX would have awarded contracts to the Subsidiaries "through verbal promises and without a public procurement process,"⁵³⁸ as Mexico suggests. Mexico has no citation to any place in the SOC where such a statement was

⁵³⁴ Email from J. Phang to G. Seow *et al.*, February 28, 2014, C-144 Redacted to preserve privileged information. The SEMCO Vessels were not in direct contract with PEMEX so there was no possibility of switching to a direct contract with PEMEX there.

⁵³⁵ Statement of Defense, para. 461.

⁵³⁶ Statement of Defense, para. 461.

⁵³⁷ Statement of Defense, section II.D.1.b.

⁵³⁸ Statement of Defense, para. 461.

made. Instead, Claimant asserted that PEMEX wanted to avoid an interruption of its operations and that it was willing to enter into new contracts with the Subsidiaries for the same services that the vessels were already performing through OSA. The contracts presumably would be awarded through public procurement processes, but the Subsidiaries had a clear competitive advantage: they had already incurred the mobilization and modification costs necessary to utilize the vessels in that location and they were already on location working for PEMEX. Thus, not only could they offer lower prices than any potential replacements, they also could immediately (or close thereto) commence work once a contract was signed.⁵³⁹

320. Mexico's (mis)characterization of Claimant's argument seems to rely on POSH's use of the expression "assign the contracts" instead of "award new contracts" in various contemporaneous emails memorializing POSH's discussions with PEMEX. This complaint about POSH's use of business shorthand phrases does little to advance Mexico's argument. Claimant explained the issue clearly in the SOC: "PEMEX did not want [its operations] interrupted and was willing to *rescind* the GOSH and SMP Service Contracts and assign *new contracts* directly to GOSH and SMP."⁵⁴⁰ Mexico has not disputed the advantages that the Subsidiaries' vessels would have enjoyed in competing for such contracts.

321. *Second*, Claimant has produced (uncontradicted) evidence of the content of POSH's negotiations with PEMEX, in the form of a witness statement by José Luis Montalvo Rodríguez (**Mr. Montalvo**), who personally engaged in discussions with PEMEX and SAE about obtaining new contracts for the Subsidiaries' vessels. In his statement, Mr. Montalvo details the content and outcome of his successive meetings with PEMEX and SAE. Claimant has also produced numerous contemporaneous communications memorializing the discussions with PEMEX and SAE.⁵⁴¹ Mexico refuses to concede that these discussions took place, but cannot dispute the authenticity of these communications.

The Complainant also states that in February 2014 (*i.e.*, prior to the Disqualification and Insolvency Proceeding), it began discussing with Pemex the option of terminating the service contracts between OSA and

⁵³⁹ Second Expert Industry Report by Jean Richards, paras. 7.4-7.5.

⁵⁴⁰ Statement of Claim, para. 189.

⁵⁴¹ Statement of Claim, paras. 192-194.

PEP and awarding them directly to the Subsidiaries. *Assuming without conceding that such discussions had occurred*, this fact only proves that the business relationship between POSH and Oceanografía was fragmented *prior* to the Disqualification and Insolvency Proceedings [Note by Claimant: This statement is untrue. As explained by Mr. Montalvo, the discussions with PEMEX began by the end of February 2014, *after* the Unlawful Sanction and the Seizure of OSA].⁵⁴²

322. In stark contrast, Mexico has not produced a single piece of evidence to refute the documentary trail produced by Claimant. Mexico has not produced a witness statement by any of the PEMEX officials who Claimant asserted were involved in the negotiations—e.g., ██████████ ██████████ ██████████. Either of them could have categorically denied having had any negotiations about awarding new contracts to the Subsidiaries. But Mexico offers no such testimonial denials.

323. Nor has Mexico brought forward any contemporaneous communications of PEMEX or SAE regarding the termination of the contracts with OSA. Claimant asked, and the Tribunal ordered, Mexico to produce such documents. But Mexico produced no responsive documents, claiming that such documents do not exist. It is simply not credible that not a single person at PEMEX or SAE ever prepared a single communication about the possible cancelation of the contracts with OSA involving the Subsidiaries' vessels, particularly given PEMEX's evident concerns over interruptions to its operations and Mexico's oft-stated concern for protecting the Mexican oil industry. Claimant requests that the Tribunal draw the adverse inference that PEMEX wanted to award new contracts to the Subsidiaries and was not permitted to do so by SAE and the Insolvency Court.

324. *Third*, Mexico complains that “POSH, on its own initiative, decided to terminate its business relationship with Oceanografía and withdraw its vessels, which led to the service contracts with PEP being rescinded and terminated early.”⁵⁴³ With this, Mexico attempts to convey the idea that POSH's services to PEMEX (via OSA) ceased by choice and, therefore, that Mexico would not be responsible for the end of the commercial relationship. The factual predicate is untrue—POSH did not terminate the OSA contracts because it wished to stop servicing PEMEX.

⁵⁴² Statement of Defense, para. 462.

⁵⁴³ Statement of Defense, para. 470.

POSH engaged in discussions with PEMEX to obtain new contracts because, as a result of the Measures, it was no longer being paid for the vessels' services, forcing its Subsidiaries to withdraw the vessels from the charters with OSA. The sole purpose of these discussions was to continue servicing PEMEX.

325. It is undisputed that, by June 2014, (i) the SFP had prevented OSA from entering into new contracts with PEMEX by issuing the Unlawful Sanction; (ii) the PGR had seized the Subsidiaries' vessels; (iii) SAE had stopped paying SEMCO, HONESTO and HERMOSA; and (iv) the Insolvency Court had diverted to SAE the payments owed to GOSH through the Irrevocable Trust. At that point, POSH had no contracts, no revenue, and no vessels. But the Subsidiaries still had to pay the crew and maintenance costs for the vessels and repay their vessel purchase loans to POSH. POSH was forced to withdraw the vessels from the contracts with OSA in order to shut off some of its financial outflows. Had POSH done otherwise, Mexico would now surely be claiming that POSH did not make its best efforts to mitigate its own damages.

326. But POSH did act for the purpose of mitigating its damages. As explained in the SOC, in August 2014, POSH intensified the discussions with SAE and PEMEX to secure contracts for the same services that the vessels had been performing via OSA. The window for this solution was very narrow. Without immediate action, POSH's Subsidiaries would not survive. As memorialized in a contemporaneous email: "[t]he reality is that GOSH has no more equity left... There is no goodwill since the contracts are no longer here."⁵⁴⁴ POSH was "bleeding in Mexico and any work for [POSH's] vessels, even short term in nature will help to stem [the] losses."⁵⁴⁵ Such work, however, never came. While POSH's discussions with SAE and PEMEX were underway, OSA—under SAE's administration—requested that the Insolvency Court forbid PEMEX from rescinding OSA's GOSH and SMP Service Contracts, among others.⁵⁴⁶ On August 15, 2014, the Insolvency Court so ordered.⁵⁴⁷ This prevented POSH's Subsidiaries from attempting to save POSH's Investment by contracting directly with PEMEX. Moreover, PEMEX

⁵⁴⁴ Email from G. Seow to G. Yeoh *et al.*, July 25, 2014, **C-189**.

⁵⁴⁵ Email from G. Yeoh to G. Seow *et al.*, July 24, 2014, **C-190**.

⁵⁴⁶ Writ filed by Servicio de Administración y Enajenación de Bienes (requesting an injunction regarding contractual penalties), June 27, 2014, **C-191**.

⁵⁴⁷ Insolvency Court decision (granting the injunction requested by SAE), August 15, 2014, **C-192**.

still had the vessels registered under the contracts with OSA⁵⁴⁸ so, the Subsidiaries could not even render services to PEMEX via a third party.

327. Despite the undisputed evidence that, at that point (mid-August 2014), OSA no longer had the liquidity to operate and maintain the vessels, PEMEX did not terminate the OSA contracts associated with the Subsidiaries' vessels until September 30, 2014 (for the vessels Argento and Babieca), October 15, 2014 (Monoceros, Scarto and Casiano), October 29, 2015 (Grano de Oro), January 2, 2015 (Rodrigo) and May 22, 2015 (Copenhagen).⁵⁴⁹ By then it was too late: POSH's Investment had been completely destroyed.

H. SAE OPERATED UNDER A CONFLICT OF INTEREST, APPROPRIATED OSA'S FUNDS, ACTED IN A NON-TRANSPARENT MANNER, AND IMPROPERLY FORCED OSA TO RELEASE SAE FROM ALL LIABILITY

328. As previously explained, when the PGR issued the Seizure Order in February 2014, it appointed SAE as OSA's administrator. The Insolvency Court subsequently appointed SAE also to serve as the OSA insolvency Visitor, Conciliator, and Trustee. In those roles, however, SAE engaged in gross misconduct, including: (i) by creating an obvious conflict of interest when it served simultaneously as OSA's Administrator, Visitor, Conciliator, and also as the Trustee; (ii) SAE received payments belonging to OSA's creditors in its own bank account in excess of USD\$71 million (as far as Claimant knows, but may well be in excess of USD\$100 million)⁵⁵⁰ without ever accounting for its use of those funds; (iii) SAE behaved in an opaque manner throughout the Insolvency Proceeding, as noted by the Senate Committee; and (iv) SAE then forced OSA to release and hold SAE harmless from any liability to OSA due to any of SAE's

⁵⁴⁸ Email from J. Phang to G. Seow *et al.*, June 25, 2014, **C-193**.

⁵⁴⁹ Statement of Defense, para. 469.

⁵⁵⁰ Status of Account No. 0195530431 (produced by Respondent as Document 31.1 on December 5, 2019), **C-323**; Status of Account No. 0195530431 (produced by Respondent as Document 31.2 on December 5, 2019), **C-324**; Status of Account No. 0195530431 (produced by Respondent as Document 31.3 on December 5, 2019), **C-325**; Status of Account No. 0195530431 (produced by Respondent as Document 31.4 on December 5, 2019), **C-326**; Status of Account No. 0157851499 (produced by Respondent as Document 31.5 on December 5, 2019), **C-327**; Status of Account No. 0157851499 (produced by Respondent as Document 31.6 on December 5, 2019), **C-328**; Status of Account No. 0157851499 (produced by Respondent as Document 31.7 on December 5, 2019), **C-329**; Additional Payments owed by PEMEX to OSA's creditors that were made to SAE instead, **C-356**. Additional Payments owed by PEMEX to OSA's creditors that were made to SAE instead, **C-356**.

actions. Mexico baldly denies these accusations without providing any plausible alternative explanations for SAE's actions, much less any proof in support of its denials.

329. *First*, exploiting an anomaly in the Mexican Insolvency Law, SAE served in a quadruple capacity in OSA's Insolvency Proceeding, acting as OSA's Administrator, Visitor, Conciliator, and Trustee.⁵⁵¹ Mexico denies any conflict of interest, on the basis that this role is "provided for in the Mexican legal system."⁵⁵² It further argues that "neither OSA, POSH nor the Subsidiaries challenged the appointment of the SAE as administrator, much less its appointment as visitor, conciliator and trustee."⁵⁵³ This statement mischaracterizes Claimant's position and does not undermine the conflict of interest objection.

330. Neither Claimant nor Claimant's expert Mr. Meján has ever asserted that SAE's quadruple role is prohibited by Mexican Law, and so it is no surprise that neither POSH nor any other party moved to challenge SAE's concurrent appointment(s) on that ground. As Mr. Meján explained, "[w]hat I have alleged—and maintain—is that this possibility derives from an anomaly in the Mexican law, which is contrary to insolvency laws of other developed countries, to international standards, and even to the general criteria of the MIL, which prohibits the appointment of persons with a direct or indirect interest in the insolvency process as visitors, conciliators, and trustees. Mr. Oscós does not deny that SAE, as OSA's administrator (i.e. representing the interests of the company), necessarily had an interest in the insolvency process of OSA."⁵⁵⁴

⁵⁵¹ Mexico claims that (i) the Law governing SAE provides SAE is subject to a control and monitoring system and that (ii) SAE's actions are supervised by the Insolvency Court. These assertions are without merit. *First*, as explained by Mr. Meján, "Mr. Oscós does not explain what the control and monitoring system of SAE would be, nor how SAE's conflict of interest would be solved in this case. Nor does he explain how this control and monitoring was supposedly carried out in this case, or identify any specific measures that were adopted for this purpose." (Second Expert Legal Opinion on Insolvency Law by Luis Manuel Meján, para. 25). *Second*, as also explained by Mr. Meján, "the insolvency proceeding is an adversarial process in which the insolvent party must invoke its rights in the proceeding. The court supervises and monitors the insolvency proceeding but is not empowered to act on behalf of the insolvent party. In the OSA case, any supervision of SAE's actions by the Insolvency Court was not sufficient guarantee that SAE's actions, under any of its many conflicting roles, did not damage the insolvent party or its creditors (Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 27).

⁵⁵² Statement of Defense, para. 298.

⁵⁵³ Statement of Defense, para. 303.

⁵⁵⁴ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 24.

331. Mr. Meján elaborated on the specific conflict of interest that arises from this anomaly in the MIL: “SAE acting concurrently as administrator of OSA during the insolvency proceeding (as representative of the company’s interests in the proceeding) and as visitor, conciliator and trustee of the company (as a purported independent expert in charge of analyzing the company’s economic viability, negotiating with the creditors, and ultimately trying to sell the company in the creditors’ interests) represents a clear conflict of interest, which derives from an anomaly in Mexican law.”⁵⁵⁵ One clear conflict came as SAE acted as OSA’s Administrator (the party) with a mandate to represent the interests of the company, and at the same time acted as the supposedly *independent* expert in charge of assessing OSA’s financial situation (*i.e.* an expert independent from the party). The conflict is self-evident, and Mexico can do little to defend it.

332. *Second*, as previously noted, the Insolvency Court ordered that PEMEX make payments that were owed to OSA (and to the trusts) to SAE’s bank account instead of to OSA’s account. Mexico’s explanation for this highly irregular practice keeps changing over time. In the SOD, Mexico stated that the court diverted payments to SAE’s bank account “so that [SAE] could have resources at its disposal and carry out the necessary actions to maintain the ordinary operation of the company, including payment of wages, purchases of inputs, payments to suppliers, among others.”⁵⁵⁶ Claimant already explained the flaws in this statement, given SAE’s access to any needed resources through its full authority over OSA and OSA’s accounts. But then, in a letter to the Tribunal dated December 5, 2014 in connection with document production, Mexico argued instead that the PEMEX funds had to be deposited in SAE’s bank account because “no bank accepted to open an account on behalf of [OSA].”⁵⁵⁷ This is unsupported and equally groundless. OSA had numerous bank accounts in financial institutions across the country, all of which were placed under SAE’s control with the Seizure Order; no “opening” of an account would have been needed. Mexico’s changing justifications illustrate Mexico’s obvious struggle to explain a misappropriation of funds that simply has no good explanation.

⁵⁵⁵ Second Expert Legal Opinion on Insolvency Law by Luis Manuel C. Meján, para. 29.

⁵⁵⁶ Statement of Defense, para. 369.

⁵⁵⁷ Letter from Respondent to Tribunal regarding the Production of Disputed Documents, December 5, 2019, **C-297**.

333. *Third*, as discussed in the SOC, SAE acted in an opaque manner vis-à-vis the funds that were deposited in its own bank as well as in its overall administration of OSA. SAE received in excess of USD\$71 million belonging to OSA’s creditors in its own bank account.⁵⁵⁸ This irregular commingling of finances should have obliged SAE to account for every dollar that entered and exited its bank account, and to explain thoroughly its use of the funds. SAE never did so. Mexico simply declares that “SAE’s actions were adequate and transparent,” but fails to include a single citation or exhibit a single document demonstrating that purported transparency. SAE surely must have prepared reports accounting for its management of the company during the Insolvency Proceeding and tracking the use of OSA’s funds. Mexico had the opportunity to produce all such documents and permit their assessment by the Tribunal, but it has put nothing of the kind on the table. Moreover, Mexico’s claim is contradicted by several members of the Senate Committee, who roundly criticized SAE’s breach of fiduciary duties and lack of transparency in administering OSA:

It is not known whether SAE has performed crucial tasks regarding [OSA] because of the opacity exercised in the preparation of the diagnosis of goods, assets and liabilities of the shipping company. SAE has also failed to provide the investigative commission of this Senate with the details of the technical assessment it should have made of [OSA] in order to fully understand the nature of the fraud... It can be concluded that *SAE did not meet its fiduciary responsibilities in the [OSA] case in terms of transparency and sufficient disclosure of information.*⁵⁵⁹

334. *Fourth*, on June 15, 2017, PGR lifted OSA’s seizure and returned OSA’s administration to its shareholders. Mexico tries to make much of the fact that OSA’s shareholders, as part of the process of retaking control of OSA, purportedly (in Mexico’s words) “agreed that the performance of the SAE and the PGR was adequate, further accepting that the SAE used its

⁵⁵⁸ Status of Account No. 0195530431 (produced by Respondent as Document 31.1 on December 5, 2019), **C-323**; Status of Account No. 0195530431 (produced by Respondent as Document 31.2 on December 5, 2019), **C-324**; Status of Account No. 0195530431 (produced by Respondent as Document 31.3 on December 5, 2019), **C-325**; Status of Account No. 0195530431 (produced by Respondent as Document 31.4 on December 5, 2019), **C-326**; Status of Account No. 0157851499 (produced by Respondent as Document 31.5 on December 5, 2019), **C-327**; Status of Account No. 0157851499 (produced by Respondent as Document 31.6 on December 5, 2019), **C-328**; Status of Account No. 0157851499 (produced by Respondent as Document 31.7 on December 5, 2019), **C-329**.

⁵⁵⁹ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 15.

own resources in excess of USD\$105 million dollars to maintain Oceanografía's operation."⁵⁶⁰ Mexico hopes to create the impression that SAE did not engage in any misconduct and that SAE even invested its own money for OSA's benefit. That impression is false.

335. To begin with, any after-the-fact statement by OSA's shareholders, whether praising or criticizing SAE's actions, is irrelevant. It would not be a statement of POSH's or the Subsidiaries' views, of course. It also would not be as probative as the contemporaneous record of SAE's actual conduct. The fact that OSA's shareholders may have released SAE from liability would not do anything to change to facts (the existence or not) of any SAE misconduct.

336. Moreover, there is every reason to believe that OSA's release of SAE from liability under Mexican law was obtained only under duress and as a precondition imposed by the government before it would return control of the company to its rightful owners. It is difficult to imagine OSA's shareholders—recently released from unlawful imprisonment by Mexico—being in any position to resist a request to release PGR, SAE, or any other authority from liability.

337. It is also crystal clear that the document cited by Mexico that memorializes OSA's release of SAE from liability⁵⁶¹ is a self-serving instrument that was drafted by the government as cover for its own misconduct. The liability release is two pages long, is drafted in the broadest possible terms, and releases SAE and the PGR from any and all possible liability arising from any and all of its actions, under any and all of their respective roles vis-à-vis OSA.⁵⁶² This is a hostage's statement made at gun-point; it is simply not credible to treat it as OSA's voluntary and fair assessment of SAE's actions. Far from establishing the propriety of the government's measures, the release does far more to highlight just how concerned government apparently was, in hindsight, about the legality of its actions and the liability that it might have incurred as a result.

338. Perhaps most implausible is Mexico's suggestion that SAE invested its own funds to maintain OSA's operations. This is false, as demonstrated by the evidence on the record. SAE invoiced OSA for services rendered and expenses incurred. These amounts "[were] considered as credits in favour of SAE and at bankruptcy estate's expense, in accordance with articles 224, 225

⁵⁶⁰ Statement of Defense, para. 304.

⁵⁶¹ OSA Shareholders' Meeting Minutes of July 5, 2017, **R-046**.

⁵⁶² OSA Shareholders' Meeting Minutes of July 5, 2017, **R-046**.

and all articles that apply from the Insolvency Law.”⁵⁶³ That is, SAE’s claims for services rendered to OSA were considered obligations of the OSA bankruptcy estate, which have priority over any other kind of obligation in the Insolvency Proceeding. In contrast, SAE has yet to account for what it did with the USD\$71 million belonging to OSA’S creditors that were deposited in its bank account during the Insolvency Proceeding.⁵⁶⁴ Far from investing its own funds, SAE seems to have come out ahead by appropriating OSA’s funds in the Insolvency Proceeding.

339. In sum, SAE engaged in gross misconduct in its administration of OSA. SAE served a quadruple role in the insolvency Proceeding, creating a conflict of interest; it diverted in excess of USD\$71 million into its own bank accounts without accounting for a single dollar;⁵⁶⁵ it breached its fiduciary duties and acted in an opaque manner, as expressly noted by the Senate Committee; and then SAE forced OSA to release it from liability for any and all of its actions.

I. FURTHER MITIGATION OF DAMAGES

340. As explained in the SOC, POSH employed its best efforts to mitigate damages, including within the Insolvency Proceeding. As discussed in Section IX.G above, the Insolvency Court blocked POSH from attempting to contract directly with PEMEX to save its operations in Mexico. POSH’s Subsidiaries filed the claims as creditors of OSA in the Insolvency Proceeding,

⁵⁶³ OSA Shareholders’ Meeting Minutes of July 5, 2017, **R-046**, p. 13.

⁵⁶⁴ Status of Account No. 0195530431 (produced by Respondent as Document 31.1 on December 5, 2019), **C-323**; Status of Account No. 0195530431 (produced by Respondent as Document 31.2 on December 5, 2019), **C-324**; Status of Account No. 0195530431 (produced by Respondent as Document 31.3 on December 5, 2019), **C-325**; Status of Account No. 0195530431 (produced by Respondent as Document 31.4 on December 5, 2019), **C-326**; Status of Account No. 0157851499 (produced by Respondent as Document 31.5 on December 5, 2019), **C-327**; Status of Account No. 0157851499 (produced by Respondent as Document 31.6 on December 5, 2019), **C-328**; Status of Account No. 0157851499 (produced by Respondent as Document 31.7 on December 5, 2019), **C-329**. Additional Payments owed by PEMEX to OSA’s creditors that were made to SAE instead, **C-356**.

⁵⁶⁵ Status of Account No. 0195530431 (produced by Respondent as Document 31.1 on December 5, 2019), **C-323**; Status of Account No. 0195530431 (produced by Respondent as Document 31.2 on December 5, 2019), **C-324**; Status of Account No. 0195530431 (produced by Respondent as Document 31.3 on December 5, 2019), **C-325**; Status of Account No. 0195530431 (produced by Respondent as Document 31.4 on December 5, 2019), **C-326**; Status of Account No. 0157851499 (produced by Respondent as Document 31.5 on December 5, 2019), **C-327**; Status of Account No. 0157851499 (produced by Respondent as Document 31.6 on December 5, 2019), **C-328**; Status of Account No. 0157851499 (produced by Respondent as Document 31.7 on December 5, 2019), **C-329**.

but the chances of recovery are non-existent.⁵⁶⁶ POSH further employed all its efforts to mitigate damages outside the Insolvency Proceeding. It spent substantial amounts repairing and reconfiguring the vessels and sought new charters.

341. Mexico complains that “Claimant blames Mexico for the inability to conclude business relating to the vessels it chartered to [OSA] in México,”⁵⁶⁷ and that “[f]rom the evidence provided by POSH it does not appear that the Subsidiaries actually participated in any public bidding.”⁵⁶⁸ Mexico tries to suggest that POSH and the Subsidiaries exacerbated, or alternatively failed to mitigate, their damages. That suggestion is both misleading and untrue.

342. *First*, Claimant has explained that Mexico prevented PEMEX from awarding contracts to the Subsidiaries during the Insolvency Proceeding, and that attempts to re-charter the vessels in Mexico outside the Insolvency Proceeding faced virtually insurmountable difficulties because of the reluctance by PEMEX and other market participants to do business with OSA’s former partners. Mexico has not produced any evidence refuting these explanations.

343. PEMEX is the sole producer of oil and gas in Mexico and, therefore, the sole end client for the oil and gas offshore services industry.⁵⁶⁹ But the Insolvency Court blocked POSH’s ability to re-contract with PEMEX for the services that the vessels had previously rendered to PEMEX through OSA. Even after the lifting of that prohibition, given the hostility of the new Government toward all things associated with OSA, PEMEX was wary of entering into contracts for the use of any vessels that previously serviced the PEMEX-OSA contracts. Similarly, given the lack of transparency and publicly available information about the proceedings involving OSA, Mexican counterparts in the OMS Industry were very reluctant to do business with companies that were affected by or even distantly involved in the OSA “scandal.” Mexico itself acknowledges

⁵⁶⁶ Even if the Third Agreement is upheld in appealed and OSA is able to comply with it, which is highly unlikely, ordinary creditors would have still foregone 96% of their claims.

⁵⁶⁷ Statement of Defense, para. 495.

⁵⁶⁸ Statement of Defense, para. 499.

⁵⁶⁹ Presentation “POSH – Overview of the Market – Opportunity for POSH”, **C-208**.

this fact.⁵⁷⁰ Thus, opportunities in Mexico were practically non-existent.⁵⁷¹ As summarized by Jean Richards, expert on the Maritime Industry:

Absent any renewals with PEMEX, I consider that there was no market and no viable alternatives for POSH's Subsidiaries in Mexico. PEMEX has a monopoly in the Mexican oil and gas industry and is the main charterer. Therefore, for any vessel to find period time-charter employment it would have been with PEMEX. I consider it to be extremely unlikely that the Vessels could have found any chartering employment in Mexico following termination of the contracts. Even if a third party Mexican manager could have been found as an alternative manager to OSA the outcome would, in my opinion, have been the same. Any local operator, owner or manager would trade their vessels with PEMEX as the end user. Such local operators would know that the Vessels in the POSH fleet had been terminated and would not wish to take the risk of association with these particular vessels.⁵⁷²

344. *Second*, the evidence on the record categorically refutes Mexico's assertion that the Subsidiaries never submitted a tender or proposal to contract with PEMEX, as set forth below:

- As early as March 2014, after the Unlawful Sanction and the government's seizure of OSA, POSH sent two letters to PEMEX offering the vessels Rodrigo and Caballo de Oro (owned by HONESTO and HERMOSA, respectively) for potential contracts with PEMEX.⁵⁷³ Both vessels were stationed in Ciudad del Carmen, flew Mexican flag, and would be available as of April 2014, following the expiration of the charters with OSA.⁵⁷⁴
- On April 4, 2014, POSH received an invitation from PEMEX to submit these three vessels for potential work with PEMEX.⁵⁷⁵ POSH submitted the Rodrigo (to be renamed POSH Honesto—**Honesto**) and the Caballo de Oro (to be renamed POSH Hermosa—**Hermosa**) for PEMEX's consideration.⁵⁷⁶ PEMEX did not award

⁵⁷⁰ Statement of Defence, para. 496 ("As a matter of common sense, it is unlikely that anyone (domestic or foreign company) would seek a business partner with serious legal contingencies and hundreds of millions of dollars in liabilities, as was the case with Oceanografia.")

⁵⁷¹ Witness Statement by Gerald Seow, paras. 43-44.

⁵⁷² Expert Industry Report by Jean Richards, para. 2.8.

⁵⁷³ Letters from Jose Luis Montalvo Mejorada to [REDACTED], March 10, 2014, **C-298**.

⁵⁷⁴ Letters from Jose Luis Montalvo Mejorada to [REDACTED], March 10, 2014, **C-298**.

⁵⁷⁵ Email from J. Phang to G. Seow *et al.*, April 11, 2014, **C-299**.

⁵⁷⁶ Letter from Jose Luis Montalvo Mejorada to [REDACTED], April 4, 2014, regarding "Caballo Grano de Oro", **C-300**; Letter from Jose Luis Montalvo Mejorada to [REDACTED], April 4, 2014

contracts to these vessels because, as expressed informally by the State-owned company, the vessels still appeared in their systems as being under contract with PEMEX.⁵⁷⁷ PEMEX requested that the vessels be renamed before being resubmitted.

- POSH complied and submitted the renamed vessel Honesto for a further PEMEX tender.⁵⁷⁸ Despite the Honesto offering the lowest price, PEMEX did not award the contract to the Honesto.⁵⁷⁹ As memorialized in contemporaneous emails, PEMEX “claim[ed] that the vessel [was] technically still on charter through OSA. This contradict[ed] the earlier advice that the vessel w[ould] be eligible for Pemex charters once the name is changed.”⁵⁸⁰
- On or around September 2014, following the termination of GOSH’s charters with OSA, GOSH likewise submitted the vessel Babieca for a long-term charter with PEMEX, which would be awarded by direct assignment. As memorialized by POSH in contemporaneous communications, however, “Pemex awarded the charter to another vessel, which is not Mexican flagged, and not currently in Mexico. The standard Pemex practise is that Mexican flagged vessels in Mexico always ha[ve] priority over foreign-flagged vessels. It does not seem to be the case in this instance.”⁵⁸¹
- At that point, it became apparent that PEMEX did not want to do business with the Subsidiaries. As memorialized in contemporaneous emails, POSH learned that PEMEX had “blacklisted Amado [Yáñez] and OSA,”⁵⁸² and that “[t]he actual reason why POSH Honesto was disqualified was because Pemex felt that POSH Honesto [wa]s still partly owned by Amado”⁵⁸³ (although that was not the case). In September 2014, POSH submitted the Argento for another PEMEX tender,⁵⁸⁴ but was not awarded the contract.
- In December 2014, POSH made a final attempt to contract with PEMEX and offered nine out of the ten vessels that previously worked with OSA.⁵⁸⁵ Seven of

regarding “Rodrigo DPJ”, **C-301**; Email from Jose Luis Montalvo to [REDACTED], April 9, 2014, **C-302**.

⁵⁷⁷ Email from J. Phang to G. Seow *et al.*, April 11, 2014, **C-299**.

⁵⁷⁸ Email from G. Seow to Ean Kuok, August 26, 2014, **C-303**.

⁵⁷⁹ Email form L. Keng Lin to Ean Kuok, September 26, 2014, **C-304**; Chart containing information on vessels and prospective charters, **C-305**.

⁵⁸⁰ Email form L. Keng Lin to Ean Kuok, September 26, 2014, **C-304**.

⁵⁸¹ Email from G. Seow to Ean Kuok, September 10, 2014, **C-306**.

⁵⁸² Email from J. Phang to J. L. Montalvo Sánchez Mejorada, October 14, 2014, **C-210**.

⁵⁸³ Email from J. Phang to J. L. Montalvo Sánchez Mejorada, October 14, 2014, **C-210**.

⁵⁸⁴ Status chart, September 23, 2014, **C-307**. For Caballo Argento, *see* also Chart containing information on Pemex tenders in which the Subsidiaries have participated, **C-308**.

⁵⁸⁵ Letter from J. L. Montalvo Mejorada to Ing. Juan Javier Hinojosa Puebla, December 3, 2014, **C-309**; Email from Reginald Albert Mcnee to Pedro Luis Diaz Ramirez *et al.*, December 20, 2014, **C-310**.

those were Mexican-flagged vessels. PEMEX, however, did not offer any contract to the Subsidiaries' vessels. All evidence suggested that PEMEX had instructions not to contract vessels previously operated by OSA.

345. *Third*, POSH employed its best efforts to continue doing business with other Mexican operators instead. POSH engaged in negotiations with ██████████ to either (i) establish a joint venture analogous to that previously established with OSA; (ii) sell the Subsidiaries' vessels to ██████████ or (iii) charter the Subsidiaries' vessels to ██████████⁵⁸⁶ Unfortunately, ██████████ decided not to move forward with any of these alternatives. POSH also engaged in discussions to charter the Honesto and the Hermosa to ██████████ for spot charters on PEMEX's tenders.⁵⁸⁷ Ultimately, ██████████ decided not to move forward with the collaboration.

346. POSH also attempted to secure spot charters, including outside of Mexico, and engaged in discussions with several operators for that purpose. The GOSH Vessels and SMP Vessels were Mexican-flagged and based in Mexico and most had been specially configured as mud processing vessels for PEMEX. The very high costs of reconfiguration and redeployment substantially impaired potential deals.

347. Despite these difficulties, POSH sent a charter proposal to ██████████ for the Monoceros, but received no answer.⁵⁸⁸ POSH further attempted to secure two spot charters for the Babieca and the Argento in West Africa, but the vessels could not be redeployed from the Gulf of Mexico to Africa by the required commencement dates.⁵⁸⁹ Ultimately, POSH managed to secure spot charters for these two vessels (notably, the only vessels that had not been reconfigured to serve PEMEX). The Argento worked for ██████████ in Mexico between August and September,

⁵⁸⁶ Email from G. Seow to J. L. Montalvo Mejorada *et al.*, October 7, 2014, C-311. *See also*, Email from Ing. Jose A. Monoya Sanchez to G. Seow *et al.*, October 6, 2014, C-312.

⁵⁸⁷ Draft Binding Memorandum of Agreement between POSH and ██████████ October 15, 2014, C-313.

⁵⁸⁸ Status chart, September 23, 2014, C-307; Email from Gerardo Silva to J. Phang *et al.*, August 28, 2014, C-314.

⁵⁸⁹ Email from K. Teo to C. Tay *et al.*, September 21, 2014, C-315.

2014.⁵⁹⁰ The Babieca worked in Congo beginning in October 2014.⁵⁹¹ Despite numerous attempts, the Subsidiaries could not secure any charters for the other eight vessels prior to their sale in satisfaction of the loans with POSH.

348. In sum, POSH employed its best efforts to re-charter the vessels to PEMEX and to other operators, including outside of Mexico. Neither PEMEX nor other Mexican operators, however, wanted to do business with the Subsidiaries as a result of their previous relationship with OSA.

J. LOAN DEFAULT AND SALE OF THE VESSELS

349. As explained in the SOC, Mexico's acts and omissions caused the Subsidiaries to default on their loans from POSH, leading to the loans' foreclosure and enforcement against the collateral that had been posted by the companies and their shareholders.

350. To mitigate damages arising from GOSH's default on the Loan, on December 15, 2014, POSH entered into an agreement with GOSH to sell the GOSH Vessels and repay the Loan with the sale proceeds thereof (the **GOSH Settlement**). Pursuant to the Settlement, GOSH's Vessels were all reflagged and eventually acquired by other entities designated by POSH.⁵⁹² The same happened to the SMP Vessels. On February 25 and March 2, 2015, the vessels Hermosa and Honesto were sold to other entities designated by POSH in order to repay the loans from POSH.⁵⁹³ The SEMCO vessels, the Salvirile and Salvision, left Mexico to be laid up in Batam

⁵⁹⁰ Time Charter Party for Offshore Service Vessels for Caballo Argento between Servicios Marítimos Gosh, S.A.P.I. de C.V., and Aprovevisionamientos Marítimos y Petroleros, S.A. de C.V., August 9, 2014, **C-211**; Time Charter Party for Offshore Services Vessels for Caballo Argento between Servicios Marítimos Gosh, S.A.P.I. de C.V., and Aprovevisionamientos Marítimos y Petroleros, S.A. de C.V., August 16, 2014, **C-212**.

⁵⁹¹ Agreement for the hire of PSV POSH Kittiwake between Petro S. Management Consulting FZE and Posh Semco Pte. Ltd., October 1, 2015, **C-213**; Time Charter Party for Offshore Services Vessels between Petro Services Congo SARL and Posh Semco Pte. Ltd., November 6, 2014, **C-214**; Agreement for the hire of PSV "Caballo Babieca" between Petro S. Management Consulting FZE and Posh Semco Pte. Ltd., November 15, 2014, **C-215**; Email from K. Teo to J. Phang *et al.*, November 11, 2014, **C-316**.

⁵⁹² Bill of Sale for POSH Generoso (former Caballo Scarto), February 25, 2015, **C-224**; Bill of Sale for POSH Sincero (former Caballo Argento), February 26, 2015, **C-220**; Bill of Sale for POSH Gitano (former Don Casiano), February 26, 2015, **C-221**; Bill of Sale for POSH Gentil (former Caballo Copenhagen), August 20, 2015, **C-222**; Bill of Sale for POSH Galante (former Caballo Monoceros), February 26, 2015, **C-223**; Bill of Sale for POSH Kittiwake (former Caballo Babieca), April 28, 2015, **C-219**.

⁵⁹³ Bill of Sale for POSH Honesto (former Rodrigo DPJ), March 2, 2015, **C-226**; Bill of Sale, for POSH Hermosa (former Caballo Grano de Oro) to Adara Limited, February 25, 2015, **C-228**.

Indonesia and were later sold for scrap. By August 2015, the Subsidiaries did not own a single vessel in Mexico.

351. Mexico points out that POSH (through other affiliates) remains in possession of most of the Subsidiaries' vessels and some of these vessels have been registered in Mexico again.⁵⁹⁴ Mexico fails to explain the relevance of those allegations for this arbitration, although the suggestion seems to be that Claimant has no grounds to complain unless every asset was seized or had to be sold for scrap. Of course that is not the case, and the current status of POSH's vessels is not relevant to the merits of this arbitration, for several reasons:

352. *First*, the fact that the Subsidiaries sold the vessels to foreign entities designated by POSH outside of Mexico is irrelevant to this arbitration. Claimant has asserted a claim against Mexico with respect to *its Investment in Mexico* in connection with OSA. The Investment consisted of equity and debt in several Mexican companies, including the ship-owning companies GOSH, HONESTO and HERMOSA. POSH held a portion of the shares, and granted loans to these companies to purchase eight vessels, which were ultimately chartered to PEMEX. Between February and August 2015, however, as a result of the Measures, GOSH, HONESTO and HERMOSA were forced to sell the vessels to foreign companies outside of Mexico to repay the loans to POSH. They had no income, no contracts with PEMEX, and no vessels. The value of these companies was zero and POSH's Investment in Mexico was destroyed. The entities that acquired the vessels were neither Mexican nor parties to this arbitration. Claimant has not asserted any claim arising out of POSH's supposed investments in these other foreign entities.

353. *Second*, Respondent's assertion that two vessels have been registered in Mexico is also irrelevant to this arbitration. A brief review of the facts is sufficient to illustrate this.

354. On March 2015, HONESTO sold the vessel Rodrigo (renamed Honesto) to Adara Ltd. (**Adara**) for USD\$19,663,278.61⁵⁹⁵ and used the proceeds to repay the loan granted by POSH.⁵⁹⁶ At this point, POSH's investment in HONESTO (the company) was destroyed. Two

⁵⁹⁴ Statement of Defense, paras. 502-503.

⁵⁹⁵ Bill of Sale for POSH Honesto (former Rodrigo DPJ), March 2, 2015, **C-226**.

⁵⁹⁶ Bill of Sale for POSH Honesto (former Rodrigo DPJ), March 2, 2015, **C-226**.

years after the destruction of POSH's Investment, Adara—not POSH—made a new investment in HONESTO, which is unconnected to OSA or to POSH's prior Investment. On June 26, 2017, Adara granted a loan to HONESTO to purchase the vessel Honesto. HONESTO agreed to pay the price of the vessel in twelve installments and mortgaged the vessel in favor of Adara.⁵⁹⁷ Adara is not a party to this arbitration. Adara's debt investment in HONESTO, three years after the Measures, bears no relationship with POSH's claim.

355. Similarly, on August 20, 2015, GOSH sold the vessel Copenhagen (renamed Gentil) to Adara for \$23,500,000,⁵⁹⁸ and used the proceeds to repay the Loan granted by POSH. At this point, POSH's investment in GOSH was destroyed. Later, Adara—not POSH—made a new investment in a different company, POSH SKUA S.A. de C.V (SKUA), which is unconnected to OSA or to POSH's prior investment. POSH granted a loan to SKUA to purchase the vessel Gentil. SKUA agreed to pay the price of the vessel in 31⁵⁹⁹ installments and mortgaged the vessel in favor of POSH.⁶⁰⁰ Neither Adara nor SKUA are parties to this arbitration. POSH's debt investment in SKUA bears no relationship with POSH's claim.

X. CONCLUSION ON THE EVENTS OF THE CASE

356. As explained in the SOC and elaborated in this Reply, Mexico engaged in a campaign to bring down OSA and its shareholders, along with its contractors, creditors and business partners, which happened to include POSH's Subsidiaries. In its quest to cripple OSA, Mexico adopted several measures indiscriminately but knowingly injuring third parties, like POSH, who were neither accused nor suspected of complicity in any wrongdoing. This arbitrary campaign against OSA ultimately destroyed Claimant's Investment in Mexico. By and large, Mexico has not refuted any of these facts. To sum up:

- *Mexico launched and vigorously pursued a multi-front, politically motivated campaign against OSA.* Several senators have publicly confirmed that the

⁵⁹⁷ Memorandum of Agreement between Adara Limited and POSH Honesto S.A.P.I. de C.V., June 26, 2017, **C-317**.

⁵⁹⁸ Bill of Sale for POSH Gentil (former Caballo Copenhagen), August 20, 2015, **C-222**.

⁵⁹⁹ Loan Agreement between PACC Offshore Services Holdings Limited and POSH SKUA S.A. de C.V., **C-332**, Clause 4.1.

⁶⁰⁰ Loan Agreement between PACC Offshore Services Holdings Limited and POSH SKUA S.A. de C.V., **C-332**, Clause 2.3; Second Witness Statement of Jose Luis Montalvo, para. 16.

campaign was “a hunt against [OSA,] the company [that had been] spoiled by PEP during the Calderón [administration],”⁶⁰¹ and called it an act of “revenge against the PAN”⁶⁰² [political party] and “an opportunity to use this voluminous file to obtain a... cooperative attitude from that party.”⁶⁰³ Political, rather than legal, motivations drove the Measures. Unfortunately, this is not an isolated incident in Mexico.

- *Mexico unlawfully destroyed OSA’s liquidity and viability (the Unlawful Sanction).* Mexico issued the Unlawful Sanction, banning OSA from entering into any public contract while its ongoing contracts were rapidly expiring, which irreparably harmed OSA’s financial situation. The Unlawful Sanction also precipitated a series of events, such as the Factoring Investigation led by Pemex and Banamex that accelerated the damage to OSA’s financial situation. The Factoring Investigation resulted in the suspension of the Banamex factoring facility (although only Banamex was sanctioned at the end of that investigation). Mexico does not dispute the unlawfulness of the Unlawful Sanction or its severe impact on OSA’s liquidity and viability.
- *Mexico launched an unsupported criminal investigation against OSA for alleged money laundering (the UIF Complaint).* Mexico did not identify any sign of illegal activity, since none were present, but nevertheless requested the most serious and intrusive measure available in the Mexican criminal system—the seizure of the entire company and all its assets—a measure never previously adopted in the history of Mexico. Ultimately, Mexico never pressed any charges for money laundering, much less obtained any convictions.
- *Mexico unlawfully seized all of OSA’s assets and took control over OSA (the Seizure Order).* Without any factual evidence, PGR rushed recklessly to order the seizure of OSA less than 24 hours after the filing of the UIF Complaint, placing OSA under SAE’s administration. This measure was unlawful, arbitrary and disproportionate. Even if signs of criminal activity had existed, which is not the case, the more reasonable and proportionate measure would have been the seizure of the bank accounts, not the entire company. This measure directly impacted POSH because, upon taking control of OSA, the State blocked OSA from paying its debts to POSH’s subsidiaries.
- *Mexico unlawfully seized the ten vessels owned by POSH’s Subsidiaries (the Detention Order).* The Detention Order, directly targeted at POSH’s Subsidiaries and other charterers to OSA, was fatally flawed because, *inter alia*, it stemmed from the unlawful criminal investigation and seizure of OSA. Mexico never explained

⁶⁰¹ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 2.

⁶⁰² PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 4.

⁶⁰³ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 4.

any relationship between the vessels and the alleged crimes. In fact, Mexico released the vessels when the Subsidiaries established their ownership thereof, implicitly conceding the absence of any relationship between the vessels and the alleged (but unspecified) OSA crime.

- *Mexico has acknowledged that the Unlawful Sanction drove OSA into insolvency (the Insolvency Proceeding).* The Unlawful Sanction deprived OSA of the cash flow necessary to operate the vessels or pay its debts and the suspension of the factoring facility eliminated OSA's access to financing. In both the Insolvency Proceeding and the SOD, Mexico has acknowledged that OSA's viability depended on the contracts with PEMEX, and that the Unlawful Sanction placed a critical strain on OSA's liquidity. These measures, in turn, set the stage for Mexico to initiate the Insolvency Proceeding against OSA and to appoint SAE as OSA's Visitor, Conciliator and Trustee, ensuring SAE's full control over the company.
- *Mexico suspended all payments to creditors, and unlawfully diverted the payments owed by PEMEX to the Irrevocable Trust for the benefit of POSH (the Diversion Order).* After blocking payments owed by OSA to POSH's Subsidiaries upon taking over OSA, Mexico officially suspended all payments to creditors within the subsequent Insolvency Proceeding. Mexico then went further and blocked all payments owed by PEMEX to POSH via the Irrevocable Trust. This measure was unlawful, arbitrary and disproportionate, since it deprived POSH of its lawful rights as beneficiary of the Trust and created an impermissible exception to the principle of *pacta sunt servanda*. Mexican courts confirmed the illegality of the measure, but then unlawfully deprived POSH and the Subsidiaries of legal standing to challenge it.
- *Mexico issued the Isolated Decision as an arbitrary ex-post attempt to justify the Diversion Order (the Isolated Decision).* Mexico's only justification for the 2014 Diversion Order is the Isolated Ruling, issued more than a year later. However, the Isolated Decision was contrary to Mexican jurisprudence issued by the Collegiate Courts before the Isolated Decision, is not binding precedent in Mexico, and has since been contradicted by at least one subsequent Collegiate Court decisions.
- *Mexico unreasonably and arbitrarily prevented POSH's Subsidiaries from contracting directly with PEMEX.* PEMEX wanted to cancel the OSA contracts and award them directly to POSH's Subsidiaries in order to avoid interruption of service. The Subsidiaries' vessels had a clear competitive advantage against other vessels, because they had already incurred mobilization and modification costs necessary to move them into service—indeed they were already in the service of PEMEX—and would therefore be able to offer the most competitive bid for a new contract. However, SAE refused to cancel OSA's contracts and the Insolvency Court prohibited PEMEX from rescinding them, fatally condemning POSH's Subsidiaries' operations in Mexico.
- *SAE created conflicts of interest, appropriated OSA's funds and never accounted for them, acted in a non-transparent manner, and forced OSA to give the*

government a release from any liability. SAE simultaneously acted as OSA’s administrator and “independent” financial expert, among other conflicting roles. Further, SAE received in excess of USD\$71 million belonging to OSA’s creditors—including Claimant—in its own bank account and never accounted for a single dollar of those funds.⁶⁰⁴ Senators on the Senate Committee expressly declared that SAE breached its fiduciary duties and acted in an opaque manner. These are all signs of the political campaign orchestrated against OSA, without regard for the lawful rights of international investors like POSH.

357. Mexico’s acts and omissions destroyed POSH’s Investment in Mexico. OSA could not contract with PEMEX; the vessels were detained for several months; POSH’s Subsidiaries did not receive any payments from OSA or PEMEX but still incurred costs maintaining the vessels, paying the crews, and repaying the loans to POSH; the Subsidiaries could not contract directly with PEMEX for the services they previously rendered through OSA; and OSA’s funds were being siphoned to the government’s account. Because of Mexico’s wrongful actions, the Subsidiaries were left with no cash flow, no commercial operations and (for several months) not even their vessels.

XI. THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE

A. MEXICO HAS NOT MET THE BURDEN OF PROVING ITS OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

358. POSH has the burden to present a *prima facie* case that its claims are subject to the jurisdiction of the Tribunal.

359. POSH has met that burden by providing all relevant evidentiary support to satisfy each of the jurisdictional requirements for bringing its claims pursuant to the Treaty in both its Notice of Arbitration and in its Statement of Claim.

⁶⁰⁴ Status of Account No. 0195530431 (produced by Respondent as Document 31.1 on December 5, 2019), **C-323**; Status of Account No. 0195530431 (produced by Respondent as Document 31.2 on December 5, 2019), **C-324**; Status of Account No. 0195530431 (produced by Respondent as Document 31.3 on December 5, 2019), **C-325**; Status of Account No. 0195530431 (produced by Respondent as Document 31.4 on December 5, 2019), **C-326**; Status of Account No. 0157851499 (produced by Respondent as Document 31.5 on December 5, 2019), **C-327**; Status of Account No. 0157851499 (produced by Respondent as Document 31.6 on December 5, 2019), **C-328**; Status of Account No. 0157851499 (produced by Respondent as Document 31.7 on December 5, 2019), **C-329**; Additional Payments owed by PEMEX to OSA’s creditors that were made to SAE instead, **C-356**. Additional Payments owed by PEMEX to OSA’s creditors that were made to SAE instead, **C-356**.

360. In order to make out a defense based on objections to the Tribunal’s jurisdiction, Mexico bears the burden of proof to show that POSH and its investments do not meet one or more of the requirements for protection under the Treaty. In other words, Mexico has to prove the factual and legal assertions on which its admissibility and jurisdictional objections are based.⁶⁰⁵

361. Article 27 of the UNCITRAL Rules states that “[e]ach party shall have the burden of proving the facts relied on to support its claim or defence.”⁶⁰⁶ That rule, in turn, comports with the well-established and non-contested principle that “he who asserts must prove,” which is widely accepted by arbitral tribunals.⁶⁰⁷ As explained in *Pezold v. Zimbabwe*:

The general rule is that the party asserting the claim bears the burden of establishing it by proof. Where claims and counterclaims go to the same factual issue, each party bears the burden of proof as to its own contentions. There is no general notion of shifting of the burden of proof when jurisdictional objections are asserted. The Respondent in this case therefore bears the burden of proving its objections... the general principle applies to require the Respondent to produce sufficient evidence to establish its objections to jurisdiction.⁶⁰⁸

362. Applying this principle, POSH has produced sufficient evidence to prove establish jurisdiction. It has demonstrated its valid incorporation in Singapore,⁶⁰⁹ as well as its ownership and control over its Subsidiaries. Hence, it is now for Mexico to not only *allege*—but to positively *prove*—the factual basis for its jurisdictional objections. Instead, however, Mexico has made a series of unsubstantiated claims that are incorrect as a matter of fact and law. As a result, Mexico’s objections fail.

⁶⁰⁵ Statement of Defense, para. 504.

⁶⁰⁶ United Nations Commission on International Trade Law, Arbitration Rules, 2010, **CL-164**, Art 27(1).

⁶⁰⁷ See, e.g., *Limited Liability Company Amtó v. Ukraine*, SCC Case No. 080/2005, Final Award, March 26, 2008, **CL-165**, para. 64. (“The burden of proof of an allegation in international arbitration rests on the party advancing the allegation, in accordance with the maxim *onus probandi actori incumbit.*”)

⁶⁰⁸ *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, **CL-166**, paras. 174-176.

⁶⁰⁹ Memorandum and Articles of Association of PACC Offshore Services Holdings Pte Ltd, including certificate of conversion, March 7, 2006, **C-1**; Certificate confirming PACC Offshore Services Holdings Pte Ltd’s conversion to a public company and change of name to PACC Offshore Services Holdings Ltd., April 7, 2014, **C-2**, p. 1.

B. THE TRIBUNAL HAS JURISDICTION *RATIONE PERSONAE* AND *RATIONE MATERIAE*

363. Article 1(8) of the Treaty defines protected investors as, *inter alia*:

[a]n enterprise which is either constituted or otherwise organized under the law of a Contracting Party, and is engaged in substantive business operations in the Area of that Contracting Party...

having made an investment in the Area of the other Contracting Party.⁶¹⁰

364. As explained in the SOC, POSH is incorporated in and under the laws of Singapore, has its headquarters in Singapore and engages in substantive business operations in Singapore,⁶¹¹ thereby satisfying the definition of a Singaporean “investor” set forth in Article 1(8)(b) of the Treaty. Mexico does not dispute any of these facts.

365. POSH’s claims arise out of Measures that harmed POSH’s protected “investments” within the broad definition of Article 1(7) of the Treaty. As explained in the SOC,⁶¹² pursuant to these broad definition, Claimant’s covered investments included *inter alia*:

- an “asset owned or controlled, directly or indirectly by investors of one Contracting Party” (*i.e.* each of the Subsidiaries, and, in turn, the Subsidiaries’ respective assets including their vessels, their contracts, and their contract rights with OSA and PEMEX)
- an “enterprise” (*i.e.* GOSH, SMP, HONESTO, HERMOSA and PFSM);
- “shares, stocks, and other forms of equity participation in an enterprise” (*i.e.* POSH’s shareholdings in the Subsidiaries);
- “loans to an enterprise” (*i.e.* the loans POSH extended to GOSH, HONESTO and HERMOSA for the acquisition of the vessels);
- “interests arising from the commitment of capital or other resources in the Area of a Contracting Party to economic activity in such Area” such as “contracts involving the presence of an investor’s property in the Area of the other Contracting Party” and “contracts where remuneration depends substantially on the production, revenues or profits of an enterprise” (*i.e.*, the GOSH, SMP, and SEMCO Charters, among others);

⁶¹⁰ Mexico-Singapore BIT, **CL-1**, Art. 1(8)(b).

⁶¹¹ Statement of Claim, para. 240. As discussed below in Section XI.B.1.c, POSH has “made in an investment in the Area of the other Contracting Party”—Mexico.

⁶¹² Statement of Claim, para. 243.

- “movable or immovable property, and related rights such as leases, mortgages, liens or pledges, acquired in the expectation or used for the purpose of economic benefit or other business purposes” (*i.e.* the vessels as well as the mortgages on GOSH’s and SMP’s vessels);
- “intellectual property rights” (*i.e.* POSH’s and its Subsidiaries’ goodwill and reputation); and
- “claims to money” (*i.e.*, claims to money under the Charters and under the terms of the Irrevocable Trust, among others).

366. As also explained in the SOC, POSH “owned” and directly and indirectly “controlled” its Subsidiaries and their assets at all times.⁶¹³ Consequently, under Article 11 of the Treaty, POSH is entitled to bring this claim both in its own name (Article 11(1)) and on behalf of its Subsidiaries (Article 11(2)).⁶¹⁴

1. Mexico’s objections based on POSH’s ownership and control are groundless

(a) The Treaty does not require majority ownership of the Subsidiaries. POSH owned or controlled the Subsidiaries at all times.

367. Mexico asserts that “Article 1(2)’s explicit language requires [POSH] to have ownership, *i.e.*, more than 51% of shares over the Subsidiaries to claim them as covered investments under the [Treaty].”⁶¹⁵ Because POSH owned only 49% of GOSH and SMP, Mexico concludes that POSH does not “own” those Subsidiaries (or, presumably, their assets) for the purposes of the Treaty. Mexico’s argument fails, however, because there simply is no rule, in Article 1(2) or anywhere else in the Treaty, that only majority-owned assets constitute covered investments under the Treaty. Even if such a requirement did exist (it does not), Mexico fails to explain whether it believes this would impact POSH’s ability to submit claims to arbitration in its own name (Article 11(1)), or on behalf of the Subsidiaries (Article 11(2)), or both. In any case, the argument is baseless.

⁶¹³ Statement of Claim, para. 248.

⁶¹⁴ Both sources of jurisdiction are independent. Therefore, even if the tribunal did not have jurisdiction to hear the claim brought on behalf of the Subsidiaries (it does), it would have jurisdiction over POSH’s own claims.

⁶¹⁵ Statement of Defense, para. 539.

368. *First*, POSH is entitled to submit a claim on its own behalf, regardless of its proportion of ownership in the Subsidiaries. As stated above, Article 1(7) defines investment as, *inter alia*, an “asset owned or controlled, directly or indirectly by investors of one Contracting Party,” including “an enterprise,” “shares, stock and other forms of equity participation,” and “loans to an enterprise.” There is no reference to the proportion of the investor’s ownership in any of the above; it does not require an investor to own the majority of the shares of a company in order to submit a claim to arbitration. One single share of a Mexican company is an asset and thus a protected investment, as are 49% of the shares of a Mexican company. There is no question, therefore, that POSH holds protected investments under the Treaty, at a minimum, in the form of the Subsidiaries’ equity and debt—49% ownership of GOSH and SMP, 99% ownership of PFSM, and the loans extended to GOSH and SMP to purchase eight vessels.⁶¹⁶ Moreover, as will be explained in the next section, POSH’s investments comprise the *entirety* of GOSH and SMP, not only a minority ownership interest in the companies, because POSH controlled them at all times. Article 1(7) defines an investment as an asset “owned *or controlled*” by an investor. Thus, there is no barrier to POSH proceeding with claims in its own name (Article 11(1)), based on the impact of Mexico’s Measures on any and all of POSH’s investments.

369. *Second*, POSH is also entitled to submit a claim on behalf of the Subsidiaries. Article 11(2) of the Treaty permits investors to file a claim on behalf of local subsidiaries that the investor “owns or controls, directly or indirectly”. The text of the Treaty provides that:

⁶¹⁶ There is no barrier to claims by minority shareholders against measures damaging their subsidiaries and their investments in those subsidiaries. This was expressly acknowledged, for example, by the tribunal in *CMS v Argentina*, a case involving a claim by a minority shareholder in one of the two privatized gas transportation companies (TGN):

The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders... [this] can now be considered the general rule, certainly in respect of foreign investments and increasingly in respect of other matters... The Tribunal concludes that jurisdiction can be established under the terms of the specific provisions of the BIT. Whether the protected investor is in addition a party to a concession agreement or a license agreement with the host state is immaterial for the purpose of finding jurisdiction under those treaty provisions, since there is a direct right of action of shareholders. It follows that the Claimant has *jus standi* before this Tribunal under international law, the 1965 Convention and the Argentina-United States Bilateral Investment Treaty.”

CMS Gas Transmission Company v. Republic of Argentina, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, July 17, 2003, **CL-33**, paras. 48, 65.

An investor of a Contracting Party, on behalf of an enterprise legally constituted pursuant to the laws of the other Contracting Party that is a legal person such investor owns *or controls, directly or indirectly*, may submit to arbitration a claim that the other Contracting Party has breached an obligation set forth in Chapter II, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.⁶¹⁷

370. In the SOC,⁶¹⁸ Claimant established that, under international law, the ordinary meaning of the word “control” included both legal and *de facto* control, and that tribunals have found *de facto* control where the investor possessed “the ability to exercise a significant influence on the decision-making of [the enterprise]”⁶¹⁹ or “whenever it is clearly shown that a... shareholder ‘dominated the company decision-making structure’.”⁶²⁰ Citing many of the same precedents noted in the SOC,⁶²¹ and interpreting treaty language identical to Article 11(2) of the Treaty here—NAFTA’s Article 1117—, the tribunal in *B-Mex et al. v. Mexico* recently confirmed “that ‘control...’ in [the treaty], in accordance with its ordinary meaning, means both legal capacity to control and *de facto* control... [and] no... binding agreement is required among shareholders to establish that they collectively control the company.”⁶²²

371. POSH has proven its ownership and/or *de facto* control over the Subsidiaries. In the SOC,⁶²³ Claimant established that POSH (i) owned 99% of PFSM;⁶²⁴ (ii) controlled SMP (and its wholly owned subsidiaries HONESTO and HERMOSA) through its 49% ownership interest and its control over ICA’s 51% stake;⁶²⁵ and (iii) possessed full control over GOSH, through its 49% ownership (which made it GOSH’s largest shareholder), its control over an additional 1%,

⁶¹⁷ Mexico-Singapore BIT, **CL-1**, Art. 11(2). (Emphasis added).

⁶¹⁸ Statement of Claim, paras. 248, *et seq.* (incorporated herein by reference).

⁶¹⁹ *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006, **CL-26**, para. 106.

⁶²⁰ *Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, March 2, 2015, **CL-31**, para. 194. (Emphasis added).

⁶²¹ Statement of Claim, para. 256. *See International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006, **CL-26**, para. 106.

⁶²² *B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, **CL-167**, paras. 221-222.

⁶²³ Statement of Claim, paras. 265-273 (incorporated herein by reference).

⁶²⁴ Statement of Claim, para. 265.

⁶²⁵ Statement of Claim, para. 269.

and its actual direct management of all of GOSH's operations at all times (Mr. Yáñez and Mr. Díaz "were silent investors and had no involvement in the management of the company.").⁶²⁶

372. Mexico does not dispute POSH's 99% ownership of PFSM; accepts that POSH "owns 49% of the shares of GOSH, and 49% of the shares of SMP (which completely owns HONEST[O] and [HERMOSA]);"⁶²⁷ and concedes that POSH "maintain[ed] control over ICA and thus control of the Subsidiaries."⁶²⁸ However, in a directly contradictory statement, Mexico in the next breath claims that POSH "never controlled the Subsidiaries."⁶²⁹ That bald assertion is left unexplained. Mexico does not explain the basis for this assertion, nor does it point to any facts calling into question POSH's actual control of the Subsidiaries, nor does it identify who else, if not POSH, it believes did exert control over them. Mexico offers no actual refutation of POSH's proof of its control over the Subsidiaries.⁶³⁰ Under Article 11(2) of the Treaty, therefore, POSH is entitled to bring this claim on behalf of its Subsidiaries.

(b) POSH's de facto control over the Subsidiaries did not violate Mexican law

373. Having timidly disputed POSH's actual control over the Subsidiaries, Mexico relies more heavily on an argument that that actual control was improper. Mexico asserts that POSH structured its investments to circumvent Article 7 of the FIL, which restricts "foreign investment to a maximum of 49% shipping companies engaged in the commercial exploitation of vessels for inland waterways and cabotage..."⁶³¹ Mexico further asserts that, "[b]ecause Claimant has conceded that it intentionally evaded this requirement, the Tribunal lacks jurisdiction *ratione materiae*; alternatively, the claim should be viewed as inadmissible because of the Claimant's bad faith."⁶³²

⁶²⁶ Statement of Claim, para. 270 (quoting Witness Statement of José Luis Montalvo, para. 20).

⁶²⁷ Statement of Defense, para. 540.

⁶²⁸ Statement of Defense, para. 545.

⁶²⁹ Statement of Defense, para. 534.

⁶³⁰ Should Mexico provide an explanation of the basis of its assertion in the future, Claimant reserves all its rights to file a rebuttal to Mexico's assertions.

⁶³¹ Statement of Defense, para. 543.

⁶³² Statement of Defense, para. 542.

374. As a threshold matter, it should be clear that this is a gross mischaracterization of Claimant’s position. Claimant never “conceded” that it “intentionally evaded” the FIL’s requirements, nor does the structure of Claimants’ investments evidence any bad faith of any kind. The restriction in Article 7 of the FIL simply does not apply to Claimant’s Investments, which complied with Mexican law at all times. The Investment was indeed “‘established or acquired in accordance with the laws and regulations’ of Mexico, as required by the Treaty.”⁶³³

375. In the SOC,⁶³⁴ POSH produced an expert report on the Mexican Foreign Investment Law (FIL) prepared by Mr. David Enriquez, who has over 25 years of experience in Mexican Investment and Maritime Law. In the report, Mr. Enríquez established that the FIL’s restrictions on foreign ownership of shipping companies engaged in the commercial exploitation of vessels “do not apply to POSH’s Subsidiaries, which have complied therewith.”⁶³⁵ Mr. Enriquez further explained the basis for his conclusion:

Owning vessels and bareboat chartering them in exchange for a rate or providing technical or crew management services do not qualify as ‘commercial exploitation of vessels’ for the purposes of the FIL. *The Mexican Administrative authorities have so confirmed by means of the confirmation of criteria number DAJCNE.315.14.92...*

HONESTO, HERMOSA and GOSH engaged in bareboat chartering vessels to OSA. PFSM provided technical and crew management services to OSA. Under Mexican Law, these activities do not qualify as “commercial exploitation of vessels” for the purposes of the FIL...

[T]he ownership restrictions provided under Article 7 of the FIL do not apply to POSH’s Subsidiaries.⁶³⁶

376. Mexican authorities have confirmed Mr. Enriquez’s analysis. Mr. Enriquez cited an official resolution issued by the Directorate of Foreign Investment confirming that foreign companies that own and charter, but do not operate, vessels are not affected by the FIL’s ownership

⁶³³ Statement of Claim, para. 244. See Mexican Foreign Investment Law (*Ley de Inversión Extranjera*), **CL-15**, Art. 7.

⁶³⁴ Statement of Claim, para. 244, which Claimant incorporates by reference into this Reply.

⁶³⁵ Expert Legal Opinion on FIL by David Enríquez, para. 34.

⁶³⁶ Expert Legal Opinion on FIL by David Enríquez, paras. 38-40.

restrictions.⁶³⁷ In document production, Mexico produced a further administrative resolution issued by the Directorate General of Foreign Investment confirming this same position.⁶³⁸ Mexico has failed to produce an expert report—or any other evidence—making any attempt to rebut Mr. Enriquez’s conclusions, which therefore stand as uncontroverted evidence.⁶³⁹ The FIL’s restrictions do not apply to Claimant, which has complied with Mexican law at all times, and Mexico’s jurisdictional/admissibility objection based on the structure of POSH’s Investment necessarily fails.

(c) POSH’s Investment comprises, *inter alia*, equity and debt

377. Finally, Mexico argues that “the availability of vessels, the contracts with OSA and OSA’s ability to contract with PEMEX” are not covered investments under the Treaty.⁶⁴⁰ Mexico makes gross errors in this argument.

378. In the SOC, Claimant clearly explained that POSH’s investment comprised, *inter alia*, equity and debt in the Subsidiaries.⁶⁴¹ As just discussed above, the Treaty’s illustrative list of investment includes, *inter alia*, “shares, stock and other forms of equity participation,” and “loans to an enterprise,” among many other assets. Therefore, at a minimum, Claimant’s equity and debt investments in the Subsidiaries are covered investments under the Treaty. Additional covered investments are noted above.

379. In the SOC, Claimant also explained that the investment made by POSH and its Subsidiaries *relied* on three essential pillars: the availability of vessels, the contracts with OSA

⁶³⁷ Annex 3 to Expert Legal Opinion on FIL by David Enriquez. (Emphasis added).

⁶³⁸ General Directorate of Foreign Investment (*Dirección General de Inversión Extranjera*), Official Letter N. 315.05.7335, August 30, 2005, **C-266**; Directorate General of Merchant Shipping, Official Letter No. DAJCNIE.315.14.290, April 14, 2014, **C-336**; Directorate General of Merchant Shipping, Official Letter No. SAJIE.315.17.236, July 6, 2017, **C-337**; Directorate General of Merchant Shipping, Official Letter No. SAJIE.315.17.457, October 26, 2017, **C-338**; Directorate General of Merchant Shipping, Official Letter No. SAJIE.315.17.143, May 29, 2017, **C-339**; Directorate General of Merchant Shipping, Official Letter No. SAJIE.315.17.418, October 11, 2017, **C-340**.

⁶³⁹ Should Mexico submit an expert report on the FIL in the future and, given that this is Claimant’s last written pleading, Claimant reserves its right to submit a report assessing and, if applicable, rebutting its conclusions.

⁶⁴⁰ Statement of Defense, para. 549.

⁶⁴¹ Statement of Claim, para. 241.

and OSA’s ability to contract with PEMEX.⁶⁴² Mexico has taken this statement out of context in order to construct a straw man for a jurisdictional objection. Claimant did not characterize these “pillars” as covered investments for purposes of Article 1(7) of the Treaty, as Mexico claims, but rather it described them, factually, as necessary premises for the Investment to succeed. As explained in the SOC:

The investment *would succeed so long as* the vessels of POSH’s subsidiaries remained available to provide maritime services, OSA was able to perform under its bareboat charters with POSH subsidiaries including pay the charter hire, and OSA was able to contract with PEMEX to provide maritime services with the vessels owned by POSH’s subsidiaries.⁶⁴³

380. Mexico’s attempt to manufacture jurisdictional objection in clear disregard of Claimant’s words and the text of the Treaty is as transparent as it is empty.

2. Mexico’s objection based on a purported “proximate causation requirement” necessarily fails

381. Mexico also claims that Article 11 of the Treaty sets forth a “proximate causation requirement,” whereby the Tribunal has jurisdiction *rationae personae* and *rationae materiae* “only with respect to claims where the alleged loss or damage is by reason of, or arising out of, [a] breach [of the Treaty].”⁶⁴⁴ With these allegations, Mexico attempts to invent a purported “proximate causation requirement” into the Treaty’s text, which includes no such requirement. To that effect, Mexico relies on two sets of awards: (i) awards that elaborate upon the general principle of causation (the causal connection between the State’s wrongful act and the damages suffered by the investor), such as the ones issued in the *Lusitania* or *Trail Smelter* cases; and (ii) NAFTA awards that elaborate upon the NAFTA-specific provision establishing that Chapter 11 of NAFTA only applies to measures “relating to” investors and their investments, such as the ones issued in the *Methanex* or *Bayview* cases (known as the “relating-to requirement”).

382. On this ill-conceived basis, Mexico then contends that POSH’s claims do not meet that putative requirement, because “[t]he procurement law sanction, the insolvency proceedings

⁶⁴² Statement of Claim, paras. 103, 330.

⁶⁴³ Statement of Claim, para. 6.

⁶⁴⁴ Statement of Defense, para. 509.

and the criminal investigation were related to OSA, not POSH or its Subsidiaries. OSA is not a POSH investment...”⁶⁴⁵ and that, as a result, the Tribunal lacks jurisdiction over POSH’s claims. This objection fails at both steps of Mexico’s analysis. The Tribunal’s jurisdiction is not subject to a “proximate causation requirement” and, even if it were, that requirement would be satisfied in the present case.

(a) The Tribunal’s jurisdiction under the Treaty is not subject to a “proximate causation requirement”

383. The scope of the Tribunal’s jurisdiction hinges on the definitions of “investor” and “investment” contained in Article 1 of the Treaty. Mexico’s proposed “proximate causation requirement” bears no relationship with the Treaty’s definition of investor or investment. Several considerations inform this conclusion.

384. *First*, the text of the Treaty imposes no “proximate causation requirement” on the Tribunal’s jurisdiction. Article 11 of the Treaty, which Mexico cites as basis for its argument, provides:

1. An investor of a Contracting Party may submit to arbitration a claim that the other Contracting Party has breached an obligation set forth in Chapter II, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor of a Contracting Party, on behalf of an enterprise legally constituted pursuant to the laws of the other Contracting Party that is a legal person such investor owns or controls, directly or indirectly, may submit to arbitration a claim that the other Contracting Party has breached an obligation set forth in Chapter II, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.⁶⁴⁶

385. Article 11 is silent with respect to the purported “proximate causation requirement” invoked by Mexico. Article 11’s sole jurisdictional requirement is that the claimant be “an investor of a Contracting Party.” The other elements of that article—whether “the other Contracting Party has *breached an obligation* set forth in Chapter II” and whether “the investor has *incurred loss or damage*” and whether the loss or damage is “by reason of or arising out of, that breach”—are

⁶⁴⁵ Statement of Defense, para. 523.

⁶⁴⁶ Mexico-Singapore BIT, **CL-1**, Art. 11.

merits issues, not jurisdictional ones. They bear no relationship to the Treaty's definition of investor or investment, or to the Tribunal's jurisdiction *rationae personae* or *materiae*.

386. The Tribunal must abide by the express terms of the Treaty, without imposing any extra-textual requirements, such as the "proximate causation requirement" invoked by Mexico. As explained in *Saluka v. Czech Republic*:

[T]he Tribunal must always bear in mind the terms of the Treaty under which it operates. Those terms expressly give a legal person constituted under the laws of The Netherlands - such as, in this case, Saluka - the right to invoke the protection of the Treaty. To depart from that conclusion requires clear language in the Treaty, but there is none. The parties to the Treaty could have included in their agreed definition of "investor" some words which would have served, for example, to exclude wholly-owned subsidiaries of companies constituted under the laws of third States, but they did not do so... [I]t is beyond the powers of this Tribunal to import into the definition of "investor" some requirement relating to such a relationship having the effect of excluding from the Treaty's protection a company which the language agreed by the parties included within it.⁶⁴⁷

387. *Second*, Mexico's attempts to import a "proximate causation requirement" for jurisdiction on the basis of a "general principle" of causation are misplaced and incorrect. Mexico asserts that, under the "general principle of law of legal causation...,"⁶⁴⁸ "the onus is on the Claimant to establish that its alleged losses are proximately caused by the alleged measures and not remote."⁶⁴⁹ In support of these statements, Mexico cites the *Trail Smelter* case,⁶⁵⁰ *PSEG Global Inc., et al. v. Turkey*,⁶⁵¹ and the *Lusitania* decision.⁶⁵² Neither the general principle of causation, nor the decisions cited by Mexico, have any bearing on the Tribunal's jurisdiction.

⁶⁴⁷ *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, March 27, 2006, **CL-83**, para. 241.

⁶⁴⁸ Statement of Defense, para. 510.

⁶⁴⁹ Statement of Defense, para. 509.

⁶⁵⁰ *Trail Smelter Case (US v. Canada)*, III RIAA 1905, April 16, 1938 and March 11, 1941, **RL-001**.

⁶⁵¹ *PSEG Global Inc., et al. v. The Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, June 4, 2004, **RL-005**.

⁶⁵² Statement of Defense, para. 512. See *Provident Mutual Life Insurance Company and Others v. Germany (Life-Insurance Claims)*, United States-Germany Mixed Claims Commission, VII RIAA 91, September 18, 1924, **RL-002**.

388. As explained above, the general principle of causation requires a causal link between the State’s *wrongful act* and the *damages* incurred by the investor. This is a merits issue unrelated to the Treaty’s jurisdictional boundaries, such as definition of investor or investment. The cases cited by Mexico do not provide otherwise. In *Trail Smelter*, the Tribunal found that the damages were “too indirect, remote and uncertain”⁶⁵³ vis-à-vis the alleged wrongful acts. In the *Lusitania* decision, as Mexico explains, the “commission held that damages must be the ‘immediate cause’ of the harmful act [sic].”⁶⁵⁴ In *PSEG*, the Tribunal did not assess the principle of causation at all.⁶⁵⁵ In none of the cases cited by Mexico did the tribunal address, let alone find, a “proximate causation requirement” in the context of assessing its jurisdiction. In none of these cases did the Tribunal find that it lacked jurisdiction because there was no causal connection between the wrongful act and the damages. Whatever they may say in general terms about the need to establish causation, these cases do not support Mexico’s *jurisdictional* objection.

389. *Third*, Mexico also attempts to import a jurisdictional “proximate causation requirement” by citing two cases (*Methanex* and *Bayview*) that interpret a NAFTA-specific provision—Article 1101(1) of NAFTA. Mexico contends that these cases support the proposition that the Claimant must establish a “legally significant connection” between the *disputed measure* and the *investor/investment*.⁶⁵⁶ Those cases are simply inapposite.

390. Article 1101(1) of NAFTA states that NAFTA’s Chapter 11 “applies to measures adopted or maintained by a Party *relating to*: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.”⁶⁵⁷ The Treaty here, however, does not include

⁶⁵³ *Trail Smelter Case (US v. Canada)*, III RIAA 1905, April 16, 1938 and March 11, 1941, **RL-001**, p. 1931, para. 5.

⁶⁵⁴ *Provident Mutual Life Insurance Company and Others v. Germany (Life-Insurance Claims)*, United States-Germany Mixed Claims Commission, VII RIAA 91, September 18, 1924, **RL-002**, p. 113.

⁶⁵⁵ There, the Tribunal held that the matter concerned an “intra-corporate” dispute, instead of a dispute between the investor and the Contracting State. *PSEG Global Inc., et al. v. The Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, June 4, 2004, **RL-005**, paras. 191-192 (“a matter which concerns intra-corporate arrangements that are separate and distinct from a Treaty connection between NACC and the Respondent. As such, while it may possibly result in a claim by NACC against PSEG, it does not give rise to a Treaty claim by NACC against the Respondent.”)

⁶⁵⁶ Statement of Defense, para. 514. See *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1), Award, June 19, 2007, **RL-004**, para. 101.

⁶⁵⁷ North American Free Trade Agreement, 32 ILM 289, 605 (1993), **CL-21**, Art. 1101(1). (Emphasis added).

NAFTA’s “relating to” requirement, nor does this requirement form part of customary international law. Mexico has not contended otherwise. As explained above, it is well established that tribunals must abide by the express terms of the treaty without imposing extra-textual requirements.⁶⁵⁸ Accordingly, Mexico’s attempt to import a NAFTA-specific provision into the text of the Treaty is incorrect as a matter of international law.

391. Furthermore, NAFTA decisions have established that the “relating to” requirement is easily satisfied. The requirement is met where the disputed measure “affects” the investor or its investments, and it does not mandate a “legally significant connection” between the disputed measure and the investment.

392. In *Pope & Talbot*, Canada sought dismissal on the ground that the measures at issue merely “‘affect[ed]’ an investor or investment,” but did not “‘relate’ to the investor or investment in a ‘direct and substantial’ way.”⁶⁵⁹ Canada further argued that if the challenged measure was related to trade in goods under NAFTA Chapter 3, then it could not also relate to an investment under Chapter 11.⁶⁶⁰ The Tribunal rejected these arguments for the following reasons:

[T]he fact that a measure may primarily be concerned with trade in goods does not necessarily mean that it does not also relate to investment[s] or investors. By way of example, an attempt by a Party to require all producers of a particular good located in its territory to purchase all of a specified necessary raw material from persons in its territory may well be said to be a measure relating to trade in goods. But it is clear from the terms of Article 1106 that it is also a measure relating to investment insofar *as it might affect an enterprise owned by an investor of a Party*.

For these reasons, *the Tribunal rejects Canada’s submissions that a measure can only relate to an investment if it is primarily directed at that investment....*⁶⁶¹

⁶⁵⁸ *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, March 27, 2006, **CL-83**, para. 241.

⁶⁵⁹ *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Preliminary Motion, January 26, 2000, **CL-168**, para. 27.

⁶⁶⁰ *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Preliminary Motion, January 26, 2000, **CL-168**, para. 32.

⁶⁶¹ *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Preliminary Motion, January 26, 2000, **CL-168**, paras. 33-34 (emphases added).

393. The separate opinion of Dr. Bryan Schwartz in *S.D. Myers* also discussed the general nature of the “relating to” requirement of NAFTA Article 1101(1).⁶⁶² Dr. Schwartz asked the question: “how high a hurdle is presented by the requirement that a measure be ‘relating to’ an investor or an investment?”⁶⁶³ Dr. Schwartz rejected the idea that the “relating to” requirement was difficult to satisfy. In fact, he explained that most BITs (like the Treaty here) do not include a “relating to” requirement, and he argued that the interpretation of NAFTA should be consistent with these BITs:

Canada suggests that “relating to” in Article 1101 of NAFTA has this effect: measures that “incidentally” or “inadvertently” affect foreign investors or investment cannot be the subject of Chapter 11 (investment) challenges.

Is it always true that any measure that only “incidentally” or “inadvertently” affects investors is outside the scope of Chapter 11 (Investment)? I would think not... Inadvertence would not necessarily be a successful defence. The most sensible approach to understanding “relating to” in Article 1101 avoids viewing that phrase in isolation. Rather, a tribunal must read Article 1101 in conjunction with the specific provisions of NAFTA that protect investors. It would be rare that the clear purpose and scope of such provisions will be frustrated by reference to Article 1101.

* * * *

Chapter 11 (Investment) largely incorporates norms that have a long history of being incorporated into BITs (*Bilateral Investment Treaties*). *These agreements generally do not say that they apply to measures “relating to” investments. Rather, BITs generally define investment and then provide a series of norms that protect investments. It seems obvious that the framers of NAFTA, in incorporating standard phrases from BITs, intended that they would have their standard meaning, or something very close to it. It is implausible that the phrase “relating to” at the beginning of Article 1101 is somehow a signal that these norms are generally weaker, or have less scope or application, in NAFTA than they do elsewhere.*⁶⁶⁴

394. It is also worth noting that at least one of the two NAFTA cases cited by Mexico does not make the case for dismissing claims on the basis of the “related to” requirement. In

⁶⁶² *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Separate Opinion by Dr. Bryan P. Schwartz (on the Partial Award), November 12, 2000, **CL-169**.

⁶⁶³ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Separate Opinion by Dr. Bryan P. Schwartz (on the Partial Award), November 12, 2000, **CL-169**, para. 49.

S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Separate Opinion by Dr. Bryan P. Schwartz (on the Partial Award), November 12, 2000, **CL-169**.

Bayview, the tribunal concluded that the claimants—U.S. nationals who made investments in Texas—did not qualify as “investors of another Party” within the meaning of NAFTA Article 1101(1).⁶⁶⁵ The tribunal concluded it lacked jurisdiction because the claimants were “domestic investors in Texas” not “foreign investors’ in Mexico...”⁶⁶⁶ The *Bayview* tribunal did not base its determination on the lack of a “proximate causal link between [the claimants]... and the alleged measures taken by the Respondent,” as Mexico claimed in its SOD here.⁶⁶⁷ In fact, Mexico misquoted the passage of *Bayview* and omitted the first sentence analyzing “investor of another Party” in terms of the nationality of the investor and the location of the investment.⁶⁶⁸ The full quote (with the missing sentence in italics) is as follows:

*The Tribunal considers that in order to be an “investor” within the meaning of NAFTA Art. 1101(a), an enterprise must make an investment in another NAFTA State, and not in its own... The simple fact that an enterprise in one NAFTA State is affected by measures taken in another NAFTA State is not sufficient to establish the right of that enterprise to protection under NAFTA Chapter Eleven: it is the relationship, the legally significant connection, with the State taking those measures that establishes the right to protection, not the bare fact that the enterprise is affected by the measures.*⁶⁶⁹

395. The first sentence shows that the “legally significant connection with the State” referenced in that award was *the investment* made by the investor in the host State, and the tribunal concluded that the investor had not made such an investment.

(b) Even if the Tribunal’s jurisdiction were subject to a “proximate causation requirement,” the requirement would be satisfied here

396. Even if the Treaty were held to include a “relating to” provision requiring a legally significant connection between the measure and the investor/investment (it does not), the present

⁶⁶⁵ *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1), Award, June 19, 2007, **RL-004**, para. 104.

⁶⁶⁶ *Bayview Irrigation v. Mexico*, Award, **RL-004**, para. 104.

⁶⁶⁷ Statement of Defense, para. 515.

⁶⁶⁸ Statement of Defense, para. 514.

⁶⁶⁹ *Bayview Irrigation v. Mexico*, Award, **RL-004**, para. 101 (emphasis added).

claim would satisfy such a requirement. Mexico's Measures were directly linked to POSH and the Investment.

397. Mexico contends that "Claimant confuses itself with OSA. The procurement law sanction, the insolvency proceedings and the criminal investigation were related to OSA, not POSH or its Subsidiaries. OSA is not a POSH investment..."⁶⁷⁰ On that basis, Mexico concludes that the Measures were not related to POSH or the Investment. But while Mexico invokes NAFTA's "relating to" requirement, as interpreted in *Methanex*, it then fails to apply the very standard it invokes. As explained by the United States in *Methanex*, the purpose behind demanding a "legally significant connection" between the measures and the investor and investment, was to exclude "measures of *general application*," "likely to affect a *vast range of actors*," and that have only "an *incidental impact* on an investor or investment."⁶⁷¹ The text of the award is clear:

Measures of general application, especially measures aimed at the protection of human health and the environment (such as those at issue here), are, by their nature, *likely to affect a vast range of actors and economic interests*. Given their potential effect on enormous numbers of investors and investments, there must be a legally significant connection between the measure and the claimant investor or its investment... Otherwise, untold numbers of local, state and federal measures that merely have an *incidental impact* on an investor or investment might be treated, quite wrongly, as "relating to" that investor or investment.⁶⁷²

398. The present case does not meet that standard. Mexico's Measures were not "measures of general application," they "were [not] likely to affect a vast range of actors and economic interests," and they did not have only an "incidental impact on an investor or investment." Quite the opposite. The Measures specifically targeted OSA and its commercial partners, including POSH and the Subsidiaries, and they directly and irreparably impacted POSH and the Investment.

⁶⁷⁰ Statement of Defense, para. 523.

⁶⁷¹ *Methanex v. United States*, UNCITRAL, Partial Award, August 7, 2002, **CL-170**, para. 130. (Emphasis added).

⁶⁷² *Methanex v. United States*, UNCITRAL, Partial Award, August 7, 2002, **CL-170**, para. 130. (Emphasis added).

399. Some Measures did specifically target OSA, which was POSH's business partner, a co-owner of GOSH, and the Subsidiaries' only client. *Inter alia*, Mexico waged a politically motivated campaign to bring down OSA,⁶⁷³ adopted measures, such as the Unlawful Sanction, specifically designed to undermine OSA's viability,⁶⁷⁴ initiated baseless criminal investigations⁶⁷⁵ in order to usurp control of OSA,⁶⁷⁶ mis-managed OSA's finances and diverted payments owed to OSA to the government's bank account instead.⁶⁷⁷ Other Measures, however, were specifically directed against POSH and the Subsidiaries. Upon taking control of OSA, SAE stopped payments to SEMCO, HONESTO and HERMOSA,⁶⁷⁸ unlawfully diverted payments owed to POSH and GOSH away from the Irrevocable Trust to the government's bank account,⁶⁷⁹ ordered the detention of the Subsidiaries' vessels,⁶⁸⁰ and prevented PEMEX from awarding new contracts to the Subsidiaries for the services they previously rendered via OSA.⁶⁸¹

400. None of Mexico's Measures were measures of general application. They all specifically affected OSA and its business partners, including POSH and the Subsidiaries, and they all directly and irreparably impacted POSH and its Investment. Mexico has not shown otherwise. NAFTA tribunals have confirmed that measures not directly targeting, but rather "adversely affecting" investors and their investment may nevertheless give rise to a breach of the treaty. For example, in *Corn Products International, Inc. v. United Mexican States*,⁶⁸² and *Archer Daniels*

⁶⁷³ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**.

⁶⁷⁴ Statement of Claim, para. 180.

⁶⁷⁵ Statement of Claim, p. 58; Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury, February 27, 2014, **C-140**.

⁶⁷⁶ Statement of Claim, para. 158.

⁶⁷⁷ Statement of Claim, paras. 120, 387.

⁶⁷⁸ Statement of Claim, paras. 129, 138

⁶⁷⁹ Statement of Claim, paras. 169

⁶⁸⁰ Statement of Claim, para. 139; Record of Service of the March 19, 2014 decision that orders the seizure of GOSH's vessels, March 28, 2014, **C-143**.

⁶⁸¹ Statement of Claim, para. 162; Letter from M. Fuentes Méndez to J. H. Ruiz Reynaud, April 4, 2014, **C-167**, p. 2.

⁶⁸² *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility, January 15, 2008, **CL-212**.

Midland Company et al. v. Mexico,⁶⁸³ the investors were producers of High Fructose Corn Syrup (HFCS), which brought NAFTA claims precisely against Mexico, based on an excise tax levied on the *use*—not the production—of HFCS. The tax was addressed to soft drink manufacturers, which *used* HFCS, rather than to producers of HFCS, which logically *produced*, but did not use, HFCS. Both tribunals concluded, however, that Mexico’s measure “*adversely affected*” HFCS producers, such as the investors, and therefore gave rise to a treaty breach. In particular, the *Archer Daniels Midland* tribunal concluded that “[b]ased on the evidence presented, the Tribunal concludes that the *introduction of the Tax adversely affected the business of Claimants*.”⁶⁸⁴ Likewise, in *Corn Products International*, “CPI... contended that the HFCS tax, although formally levied on the soft drink bottlers, was, in its *effects*, treatment of CPI with respect to the operation of its investment...”⁶⁸⁵ The tribunal agreed and concluded that “it would be the triumph of form over substance to hold that the fact was structured as a tax on the bottlers, rather than [CPI], precluded [the tax] from amounting to treatment of [CPI] for the purposes of Article 1102.”⁶⁸⁶

401. Mexico’s measures, whomever Mexico intended to address them to, “adversely affected” POSH and the Subsidiaries, effectively destroying their Investment in Mexico. Accordingly, even if the Treaty contained a “relating to” requirement interpreted as Mexico contends, and applicable here, Claimant would satisfy such a requirement.

A. THE TRIBUNAL HAS JURISDICTION *RATIONE TEMPORIS*

402. Article 27 of the Treaty provides that:

[The Treaty] applies to investments made before or after its entry into force, but not to claims or dispute arising out of events which occurred, or to claims or disputes which had been settled, prior to that date.⁶⁸⁷

⁶⁸³ *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, November 21, 2007, **CL-213**.

⁶⁸⁴ *Archer Daniels v. Mexico*, Award, **CL-213**, para. 287.

⁶⁸⁵ *Corn Products v. Mexico*, Decision on Responsibility, **CL-212**, para. 96.

⁶⁸⁶ *Corn Products v. Mexico*, Decision on Responsibility, **CL-212**, para. 119.

⁶⁸⁷ Mexico-Singapore BIT, **CL-1**, Art. 27.

403. The Treaty was signed on November 12, 2009, and entered into force on April 3, 2011. Mexico does not contest that this dispute arose following the Treaty’s entry into force. Accordingly, the Tribunal possesses jurisdiction *ratione temporis*.

404. In addition, however, Mexico claims that “the three-year time limit contained in Article 11(8) is... [a] *jurisdictional*”⁶⁸⁸ limitation and that POSH’s claims in connection with events that took place before May 4, 2014—three years prior to the Notice of Arbitration—are time-barred.

405. As Claimant has explained, under international law, compliance with a statute of limitations like Article 11(8) is an admissibility, rather than a jurisdictional, requirement. More importantly, however, none of POSH’s claims is excluded by Article 11(8). Mexico’s Measures are a composite act that extending well beyond May, 4, 2014 (recall that, *e.g.*, SAE’s administration of OSA did not end until June 15, 2017). Moreover, POSH did not possess actual or constructive knowledge of *both* the Treaty breach and its injury before May 4, 2014, as it must before it could be barred under Article 11(8) of the Treaty. Mexico has not shown, and cannot show, otherwise. Claimant therefore submitted its claims within the Treaty’s statute of limitations.

1. The statute of limitation included in article 11(8) of the treaty is an admissibility, not a jurisdictional, requirement

406. Article 11(8) of the Treaty provides that:

A dispute may be submitted to arbitration provided that the investor has delivered to the disputing Contracting Party its notice of intent... no later than three years from the date that either the investor, or the enterprise of the other Contracting Party that is a legal person that the investor owns or controls, directly or indirectly, first acquired or should have first acquired knowledge of the alleged breach and knowledge that the investor or the enterprise has incurred loss or damage.⁶⁸⁹

407. Prominent scholars agree that a claim’s compatibility with a statute of limitations is an issue of admissibility. Professor Paulsson explained that the question of “whether [a] claim was formally submitted within the time limits provided for in the relevant treaty” “[is]...[a]

⁶⁸⁸ Statement of Defense, para. 551.

⁶⁸⁹ Mexico-Singapore BIT, **CL-1**, Art. 11(8).

matter... of admissibility.”⁶⁹⁰ Accordingly, “[t]imeliness issues are unrelated to jurisdiction *ratione temporis*, which limits the scope of the tribunal’s authority to disputes having their origin in—or after or before—a particular time period.”⁶⁹¹ Similarly, Professor Park has characterized “[t]he statute of limitations... [as] a matter of admissibility...”⁶⁹²

408. Multiple international tribunals have confirmed this proposition. In *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, the tribunal established that the limitations provision of the Mexico-Spain BIT—which is worded similarly to Article 11(8) at issue here—established an admissibility requirement rather than a jurisdictional one:

Title II(5) of the Appendix to the [Mexico-Spain BIT] provides the following: ‘The investor may not submit a claim under this Agreement if more than three years have elapsed since the date on which the investor had or should have had notice of the alleged violation, as well as of the loss or damage sustained.’

73. In the opinion of the Arbitral Tribunal, the defense[] filed by the Respondent, relying on Title II...(5) of the Appendix to the Agreement, do[es] not relate to the jurisdiction of the Arbitral Tribunal but rather to (non)compliance with certain requirements of the Agreement governing the *admissibility of the foreign investor’s claims*.⁶⁹³

409. In *CME Czech Republic B.V. v. Czech Republic*, the tribunal addressed the “[t]imewise [l]imitation” under the Czech Republic-Netherlands BIT in the section of its award assessing “The Substance of the Claimant’s Case,” rather than as part of the tribunal’s discussion

⁶⁹⁰ Jan Paulsson, “Jurisdiction and Admissibility” in *Global Reflections on International Law, Commerce and Dispute Resolution* 601, Liber Amicorum in honour of Robert Briner, ICC Publishing (Nov. 2005), **CL-171**, p. 609.

⁶⁹¹ J. Paulsson, “Jurisdiction and Admissibility”, **CL-171**, p. 614, n. 36. *See also* Gary B. Born, *International Commercial Arbitration* (Second Edition), Kluwer Law International (2014), **CL-172**, pp. 911-12 (“[A] statute of limitations or similar time bar defense to the underlying claim” “[is] non-jurisdictional, and instead go[es] to the substance of the dispute before the arbitrators.”); Hanno Wehland, “Chapter 8: Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules” in *ICSID Convention after 50 Years: Unsettled Issues*, Kluwer Law International (2016), **CL-173**, p. 238 (“[L]imitation periods regarding assertion of claims... clearly relate to the admissibility of a claim.”)

⁶⁹² William W. Park, *Determining an Arbitrator’s Jurisdiction: Timing and Finality in American Law*, 8 Nev. L. J. 135, 153 (2007), **CL-174**, p. 153.

⁶⁹³ *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, **CL-47**, paras. 72-73. (Emphasis added).

of jurisdiction *ratione temporis*.⁶⁹⁴ In rejecting an argument that the claims were time-barred, the CME tribunal held that “the [c]laimant’s case [was] admissible and there [was] no time bar to CME’s claim...”⁶⁹⁵

410. Other international tribunals discussing the time bars in NAFTA Articles 1116(2) and 1117(2) have likewise characterized these provisions as establishing non-jurisdictional defenses.⁶⁹⁶ Unsurprisingly, Mexico has not cited any legal authority taking the position that a statute of limitations limits the tribunal’s jurisdiction. It does not.

411. In any event, regardless of whether it is considered as an issue of admissibility or jurisdiction, Article 11(8) is not a barrier to any of POSH’s claims in this case—as discussed in the next two sections.

2. Mexico’s measures constituted a composite act

412. In the SOD, Mexico insists that each of Mexico’s measures should be considered in isolation, citing the approach taken in the award issued in *Rusoro v. Venezuela*. Mexico’s allegations are misguided and the standard in *Rusoro* is mischaracterized.

413. *First*, it is undisputed that a State can breach its international obligations by way of composite acts. Article 15(1) of the Articles on State Responsibility provides as follows:

The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.⁶⁹⁷

⁶⁹⁴ *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award, September 13, 2001, **CL-62**, para. 407.

⁶⁹⁵ *CME*, Partial Award, **CL-62**, para. 426.

⁶⁹⁶ *See Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award by Arbitral Tribunal in relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim from the Record (“The Harmac Motion”), February 24, 2000, **CL-175**, para. 11 (stating that a timeliness objection under NAFTA Articles 1116(2) and 1117(2) “is in the nature of an affirmative defense...”); *Marvin Roy Feldman v. United Mexican States*, ICSID Case No ARB(AF)/99/1, Award, December 16, 2002, **CL-152**, para. 63, (holding that the time bar under NAFTA Articles 1116(2) and 1117(2) establish a “limitations defense”).

⁶⁹⁷ International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, **CL-14**, p. 62 (emphasis added).

414. Several arbitral tribunals have confirmed this conclusion. The tribunal in *Pac Rim Cayman v. El Salvador* explained that even a series of lawful State actions can comprise, in the aggregate, a composite breach of a BIT:

[S]everal legal acts (of which each by itself is not unlawful) can become unlawful as the composite aggregation of those legal acts; or a series of unlawful acts interfering with an investment (which by themselves are not expropriatory) can by their aggregation result in an unlawful expropriation.⁶⁹⁸

415. The tribunal in *Société Générale v. Dominican Republic* also recognized composite breaches, noting that this is a standard fact pattern in situations of creeping (or indirect) expropriation and denial of justice:

The same reasoning applies to composite acts. While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation, when the treaty obligation will have come into force. This is what normally will happen in situations in which creeping or indirect expropriation is found, and could also be the case with a denial of justice as a result of undue delays in judging a case by a municipal court.⁶⁹⁹

⁶⁹⁸ *Pac Rim Cayman L.L.C. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, June 1, 2012, **CL-176**, para. 2.71.

⁶⁹⁹ *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, UNCITRAL, Award on Preliminary Objections to Jurisdiction, September 19, 2008, **CL-177**, para. 91; see also *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **CL-178**, para. 516; *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, July 6, 2012, **CL-179**, para. 275. The *Siemens A.G. v. Germany* tribunal also addressed this issue, and aptly summarized the applicable standard in the context of creeping expropriation: “By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel’s back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.” (*Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, February 6, 2007, **CL-56**, para. 263.)

416. *Second*, it is undisputed that, in the case of a composite act, the duration of the internationally wrongful act extends from the first to the last act of the chain. Article 15(2) of the Articles on State Responsibility provides:

In [the event of a composite act], the breach *extends over the entire period* starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

417. The Commentary to the Articles on State Responsibility further explains that: “[c]omposite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct,” and that “the act should be regarded as having occurred *over the whole period* from the commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined.”⁷⁰⁰

418. In turn, a key consequence of Article 15(2) of the Articles on State Responsibility is that, in the event of a composite act, the relevant statute of limitations begins to run only upon the last of the relevant acts that form part of the chain.

419. Several arbitral tribunals have confirmed this conclusion. In *Feldman v. Mexico*, the tribunal concluded that “state action beginning more than three years before the claim but continuing after that date” is not barred under the treaty’s statute of limitations.⁷⁰¹ The Tribunal in *UPS v. Venezuela* agreed and elaborated on this point as follows:

The generally applicable ground for our decision is that, as UPS urges, *continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly*. This is true generally in the law, and Canada has provided no special reason to adopt a different rule here... The *Feldman* tribunal’s conclusion on this score buttresses our own.⁷⁰²

⁷⁰⁰ ILC Articles, **CL-14**, pp. 62-63 (emphasis added).

⁷⁰¹ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, December 6, 2000, **CL-180**.

⁷⁰² *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, **CL-181**, para. 28. (Emphasis added).

420. *Third*, Mexico’s reliance on *Rusoro v. Venezuela* and its claims that the *Rusoro* tribunal adopted a different standard and “absolutely rejected the same ‘totality’ approach that the Claimant has argued in its Statement of Claim”⁷⁰³ are misplaced. Mexico has greatly misrepresented the approach suggested in *Rusoro*.

421. In *Rusoro*, the tribunal explained that “[t]here are two possible approaches” to address when the statute of limitations starts running in the event of a composite act. The first approach, which the tribunal deemed “legally sound,” consisted of considering the totality of the State’s wrongful acts “as a unity not affected by the time bar.” This “fact specific” approach was appropriate when “a connection exist[ed] between the acts performed before the Cut-Off Date... and those which occurred thereafter.”⁷⁰⁴ The full excerpt of the *Rusoro* discussion of that approach is as follows:

A first approach would be to consider that a connection exists between the acts performed before the Cut-Off Date (the 2009 Measures) and those which occurred thereafter (the 2010 Measures and the Nationalization Decree). *If such linkage is found the continuing character of the acts and the composite nature of the breach may justify that the totality of acts be considered as a unity not affected by the time bar.* Certain investment tribunals have found that the linkage existed and disregarded the time-bar defence.

This approach, although *legally sound*, is very fact-specific and depends on the circumstances of the case.⁷⁰⁵

422. The second approach consisted of “breaking down each alleged composite claim into individual breaches”⁷⁰⁶ for the purposes of the statute of limitations. The *Rusoro* tribunal concluded that this approach was appropriate when no connection existed between the measures. The tribunal held that, based on “the specific circumstances of [that] case,” the second approach was more appropriate there, since the disputed measures were contradictory and irreconcilable

⁷⁰³ Statement of Defense, para. 561.

⁷⁰⁴ *Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016, **CL-40**, para. 228-229.

⁷⁰⁵ *Rusoro v. Venezuela*, Award, **CL-40**, para. 229-230. (Emphasis added).

⁷⁰⁶ *Rusoro v. Venezuela*, Award, **CL-40**, para. 231.

(some “[m]easures went in the opposite direction” and others “took a totally different stance”).⁷⁰⁷

The full excerpt of the award is as follows:

In the present dispute, there is no clear linkage between the 2009 Measures, the 2010 Measures and the Nationalization Decree. The 2009 Measures imposed strict limitations on the export of gold, increased the exchange control requirements for gold exporters and created two distinct regimes, one for privately owned, and the other for Government owned gold companies. The 2010 Measures went in the opposite direction: export limitations were reduced, the regime was unified and the general exchange control system was overhauled. The Nationalization Decree took a totally different stance: it ordered the nationalization of the whole gold sector.

*(ii) For this reason, the Tribunal finds that, in the specific circumstances of this case, the better approach for applying the time bar consists in breaking down each alleged composite claim into individual breaches, each referring to a certain governmental measure, and to apply the time bar to each of such breaches separately.*⁷⁰⁸

423. Under the standard set in *Feldman* and *UPS*, composite acts “constitute continuing breaches of legal obligations and renew the limitation period accordingly.”⁷⁰⁹ The tribunal’s analysis in *Rusoro* is consistent with *Feldman* and *UPS*. The tribunal required a “connection” or “linkage” between the measures that form part of the composite act—but such a “connection” requirement is not new, as it is arguably a definitional element of a “composite” act in the first place.

424. In any event, any necessary “connection” and “linkage” was certainly present among Mexico’s Measures in this case. As explained in the SOC and the Reply, OSA benefitted from close ties with Mexico’s former presidents from the PAN Administrations. The new PRI Administration, however, adopted the Measures with the consistent objective of “removing those who benefited from the PAN administrations, especially from (Vicente) Fox.”⁷¹⁰ As expressly stated by several Senators serving on the Senate Committee, Mexico’s Measures were the result of “a hunt against [OSA,] the company [that had been] spoiled by PEP during the Calderón

⁷⁰⁷ *Rusoro v. Venezuela*, Award, **CL-40**, para. 230.

⁷⁰⁸ *Rusoro v. Venezuela*, Award, **CL-40**, paras. 230-231.

⁷⁰⁹ *UPS v. Canada*, Award on the Merits, **CL-181**, para. 28.

⁷¹⁰ Expansión, *Oceanografía, la preferida de PEMEX*, March 3, 2014, **C-134**.

[administration],”⁷¹¹ and described the Measures as an act of “revenge against the PAN”⁷¹² political party and “the opportunity to use this voluminous file to obtain a... cooperative attitude from that party.”⁷¹³ Therefore, the Measures are the unitary result of Mexico’s concerted campaign against OSA—a campaign motivated by political objectives rather than OSA’s alleged misconduct.

425. Unlike the measures that the *Rusoro* tribunal assessed separately, all of Mexico’s Measures had the same target, namely OSA’s financial viability, management, or assets—or those of its business partners—and all of them aimed in the same direction, against OSA. The government, *inter alia*, (i) strained OSA’s financial viability through the Unlawful Sanction; (ii) opened baseless criminal investigations to take full control of OSA and its assets; (iii) stopped payments to OSA’s contractors thereby placing OSA in breach of its contractual obligations; (iv) filed insolvency proceedings against OSA; (iv) detained all vessels under OSA’s control; (v) mis-managed OSA’s finances; and (v) mis-appropriated OSA’s funds by diverting payments owed to OSA, to the government’s bank account instead (SAE ceased to be OSA’s administrator in June 2017 and never accounted for these amounts). All these Measures directly targeted OSA and its business partners, and had a clear and unitary objective: severing OSA’s ties with PEMEX.

426. It is clear that the Measures form part of the same political campaign against OSA. Accordingly, the Measures comprise a composite act under international law. Therefore the Treaty’s statute of limitations runs from the date of the last of the Measures, June 15, 2017. POSH filed its Notice of Intent on May 4, 2017, one month prior to the last action of the composite act, and filed its Request for Arbitration on May 4, 2018, well within the three years that followed that last Measure. POSH’s claims are not time-barred.

3. POSH did not have actual or constructive knowledge of both breach and injury prior to May 4, 2014

⁷¹¹ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**.

⁷¹² PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 4, 12.

⁷¹³ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 4.

427. Mexico claims that all measures adopted by Mexico prior to May 4, 2014 (three years prior to POSH's Notice of Intent) are time-barred. In making this claim, Mexico mischaracterizes the standard under Article 11(8) of the Treaty, exclusively takes into account the date of the measures, and disregards the date on which POSH acquired knowledge of the Treaty breach and the resulting losses and damages. This is inconsistent with the Treaty. Even if the Measures were not treated as a composite act (they should be), POSH did not acquire, and could have not acquired, knowledge of all the breaches and its own losses until after May 4, 2014.

428. Article 11(8) of the Treaty requires the submission of a claim within three years after the investor "first acquired or should have acquired *knowledge* of the alleged *breach* and knowledge that the investor or the enterprise has incurred *loss or damage*."⁷¹⁴ The determinative factor is not the date of the specific Measures, as Mexico contends, but rather the date on which POSH acquired actual or constructive knowledge that the measures constituted a breach of the Treaty and that it had incurred loss or damage arising from that breach. As explained in *Mobil Investments Canada Inc. v. Government of Canada* in connection with a similarly worded treaty (NAFTA):

[T]he limitation period starts to run only when the investor or enterprise has not only acquired (or ought to have acquired) knowledge of the alleged breach but also has acquired (or ought to have acquired) knowledge that it has incurred loss or damage as a result. The date on which an investor or enterprise first acquires (or ought to have acquired) knowledge that it has suffered loss or damage may not be the same as the date on which it first acquires (or ought to have acquired) knowledge of the alleged breach which causes that damage.

Moreover, the language of Article 1116(2) and Article 1117(2) is quite clear in requiring knowledge that loss or damage has been incurred. It is impossible to know that loss or damage has been incurred until that loss or damage actually has been incurred.⁷¹⁵

⁷¹⁴ Mexico-Singapore BIT, **CL-1**, Art. 11(8). (Emphasis added).

⁷¹⁵ *Mobil Investments Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, July 13, 2018, **CL-182**, paras. 153-154.

429. In the present case, POSH did not acquire, and could have not acquired, knowledge of its losses until some point after May 4, 2014 (the **Cut-Off Date**). A brief analysis of the Measures suffices to demonstrate this.

430. On February 10, 2014, Mexico adopted the Unlawful Sanction, which triggered the Factoring Investigation and the suspension of Banamex factoring facility. These measures strained OSA's finances irreparably. However, at the time, it was uncertain what losses—if any—POSH and the Subsidiaries would incur. Mexico could have quickly reversed or overturned the Unlawful Sanction, before irreversible damage occurred. (Ultimately, Mexico did not lift the Sanction until July 2014, after the Cut-Off Date). In addition, the payments arising from the GOSH Charters (the only charters in force at the time) were protected by the Irrevocable Trust, which meant that, so long as OSA continued operating and servicing PEMEX, POSH would receive payments from PEMEX via the Irrevocable Trust. At the time of the initial Measures, therefore, it was impossible to know whether, and until when, OSA would remain operational, and what losses, if any, POSH and the Subsidiaries would incur.

431. It was not until May 6, 2014—after the Cut-Off Date—that the Insolvency Court issued the Diversion Order, later clarified on May 9, 2014, ordering that PEMEX must make payments owed to the Irrevocable Trust to SAE's bank account instead.⁷¹⁶ This was the first moment when POSH and the Subsidiaries could have acquired at least partial knowledge of the damages sustained as a result of the Measures. At that point, they learned that the Irrevocable Trust no longer protected the payments arising out of the GOSH Charters from the contingencies affecting OSA. As of that moment, POSH was therefore exposed to damages irrespective of whether or for how long OSA remained operational vis-à-vis PEMEX. This key event took place after the Cut-Off Date—May 4, 2014—and within the three-year limitation period established in the Treaty.

432. Even at that point in time in early May, however, POSH and the Subsidiaries could not have known about other subsequent breaches and the damages arising therefrom. At that time, it was entirely uncertain (i) when Mexico would lift OSA's seizure (it did not do so until June 15,

⁷¹⁶ Insolvency Court decision (ordering PEMEX to make payments to the Servicio de Administración y Enajenación de Bienes), May 7, 2014, **C-175**.

2017); (ii) when it would release the vessels (it did not do so until June and July 2014); (iii) whether the Subsidiaries would be allowed to contract directly with PEMEX for the services they were previously rendering via OSA (Mexico blocked this possibility in July 2014); (iv) how SAE would use the funds that were rightfully owed to the trusts, and illegally diverted to SAE's bank account (SAE returned OSA's administration to its rightful owners upon the lifting of the OSA's seizure, in June 15, 2017, without ever accounting for these funds); and (v) whether Mexico would adequately administer OSA, permitting POSH and the Subsidiaries to recover the amounts owed by OSA in the Insolvency Proceeding (POSH and the Subsidiaries withdrew their claims in the insolvency proceeding in 2017, after it was clear that they would not recover anything).

433. In sum, as of May 4, 2014, POSH knew about very few—not most—of Mexico's Treaty breaches, and at that time, POSH could have never known about other breaches, nor about the losses or damages arising from all the Measures. POSH and the Subsidiaries only knew, or had reason to know, about these breaches and damages after the Cut-Off Date. Under Article 11(8) in the Treaty, even if the Measures were not a composite act (they were), POSH's claims would still be timely.

XII. MEXICO BREACHED ITS OBLIGATIONS UNDER THE TREATY AND INTERNATIONAL LAW

434. As explained in the SOC, Mexico has breached its obligations under the Treaty through a series of omissions and measures taken by State authorities and state-owned companies, including the UIF, PGR, SAE, PEMEX, the Insolvency Court, the Third Collegiate Court, and the Fourteenth Collegiate Court.

435. In summary, Mexico has breached:

- the obligation not to expropriate Claimant's investments without compensation arising under Article 6 of the Treaty;
- the obligation to accord Claimant's investments fair and equitable treatment arising under Article 4(1) of the Treaty; and
- the obligation to accord Claimant's investments full protection and security arising under Article 4(1) of the Treaty.

A. THE MEASURES ARE ATTRIBUTABLE TO MEXICO, CONSTITUTED A COMPOSITE ACT, AND RESULTED IN DIFFERENT VIOLATIONS OF THE TREATY

436. Mexico has breached its obligations under the Treaty through a series of acts and omissions taken by several State Authorities and State-owned entities, including the UIF, PGR, SAE, PEMEX, the Insolvency Court, the Third Collegiate Court, and the Fourteenth Collegiate Court.

437. Mexico complains that the Measures “are attributed to approximately nine different government bodies”, that “Claimant fails to distinguish how the obligations it invokes apply differently to these entities,” and that Claimant “repeats the same allegations in support of each of its claims... as though the content of each obligation were identical.”⁷¹⁷ Although these complaints are mentioned only in passing in the SOD, Claimant will take a moment to explain that they are inapposite.

438. *First*, Mexico’s observation that the Measures are attributed to several different State entities is entirely irrelevant. Mexico does not question the customary international law principle of attribution included in the ILC Articles on State Responsibility, whereby, conduct will be attributable to a state if it can be established that the impugned conduct was carried out by: (i) an “organ” of the state, recognized as such either expressly in law or *de facto*;⁷¹⁸ (ii) an entity empowered by a state to exercise elements of “governmental authority”, and in relation to the specific acts in question, acting under the cloak of that governmental authority;⁷¹⁹ or (iii) an entity or individual acting in accordance with the instructions, or under the direction or control, of the State in relation to the specific acts in question.⁷²⁰ In the SOC, Claimant established that all entities

⁷¹⁷ Statement of Defense, para. 7.

⁷¹⁸ ILC Articles, **CL-14**, Art. 4.

⁷¹⁹ ILC Articles, **CL-14**, Art. 5. *See Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitral Award, September 22, 2005, **CL-41**, para. 2.2.2 (“It is generally recognised, in international law, that States are responsible for acts of their bodies or agencies that carry out State functions”).

⁷²⁰ ILC Articles, **CL-14**, Art. 8.

involved in the Measures were Mexican organs—which Mexico does not dispute—and, therefore, all of the relevant acts and omissions were attributable to Mexico under international law.⁷²¹

439. *Second*, Claimant has not separately itemized each individual breaching act or omission of each individual entity because, as already established in Section XI.B above, the Measures constituted a composite act for purposes of Article 15(1) of the Articles on State Responsibility.⁷²² As also explained in *Pac Rim Cayman v. El Salvador*, a series of lawful State actions can comprise, in the aggregate, a composite breach of a BIT,⁷²³ which is the case here. To be sure, several of Mexico’s Measures (such as the Diversion Order) are sufficient to constitute Treaty breaches standing on their own. But there is no question that, taken together, the Measures have breached Mexico’s Treaty obligations.

440. *Third*, Claimant does not contend that the content of each Treaty obligation is identical. Mexico ignores that it is well-established—and indeed very common in practice—that the same set of facts may constitute different BIT violations.⁷²⁴

B. MEXICO EXPROPRIATED THE INVESTMENT MADE BY POSH AND ITS SUBSIDIARIES

441. As explained in the SOC, Mexico breached Article 6 of the Treaty by directly and indirectly expropriating POSH’s Investment on a discriminatory basis, without a legitimate public purpose, and without affording POSH and the Subsidiaries due process or compensation. Mexico

⁷²¹ In the event that, in a tactical manouvre, Mexico disputes this issue in the Re-Joiner, Claimants reserves its right to file a rebuttal.

⁷²² ILC Articles, **CL-14**, Art. 15.1. (“The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.”)

⁷²³ *Pac Rim Cayman L.L.C. v. Republic of El Salvador*, Decision on Jurisdictional Objections, **CL-176**, para. 2.71. (“[S]everal legal acts (of which each by itself is not unlawful) can become unlawful as the composite aggregation of those legal acts; or a series of unlawful acts interfering with an investment (which by themselves are not expropriatory) can by their aggregation result in an unlawful expropriation.”)

⁷²⁴ See, eg, *Valores Mundiales, SL y Consorcio Andino, SL v. Bolivarian Republic of Venezuela* (ICISD Case No ARB/13/11) Award, July 25, 2017, **RL-020**, paras 523-527; *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award, December 19, 2014, **CL-101**, para. 208; *Vigotop Limited v Hungary* (ICSID Case No ARB/11/22) Award, October 1, 2014, **CL-183**, paras. 310-311; *CME*, Partial Award, **CL-62**, paras. 610-612; *Flemingo DutyFree Shop Private Limited v Poland* (UNCITRAL) Award (Redacted), August 12, 2016, **CL-184**, para. 597; *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, **CL-27**, para. 264; see also Christoph H. Schreuer, “Fair and Equitable Treatment (FET): Interactions with Other Standards” in *Investment Protection and the Energy Charter Treaty* (2008), **CL-185**, pp. 86-88.

directly expropriated funds owed to POSH under the Irrevocable Trust pursuant to the Diversion Order, the Revision Decision, and the Isolated Decision, and indirectly expropriated the Investment by depriving POSH and the Subsidiaries of their use and enjoyment of their assets.⁷²⁵

442. Mexico questions certain aspects of the expropriation standard (*e.g.*, the legitimacy of judicial expropriations), denies that there was a direct “taking” or a creeping expropriation of POSH’s Investments, and alleges that all the Measures were adopted in “the normal course of action of the Mexican authorities”⁷²⁶ (*i.e.*, the Measures were allegedly lawful under Mexican Law). Mexico’s contentions are misguided, incorrect as a matter of fact and law, and in no way assist Mexico in making the argument that the Investment was not expropriated. In the interest of clarity, Claimant will address certain aspects of the expropriation standard and will then explain how Mexico breached that standard in the case at hand.

1. Observations regarding the legal standard

(a) Expropriation can be effected through measures issued by any State organ, including a judicial organ

443. Mexico does not question the expropriation standard or that it can be breached by the State’s executive or legislative organs. Mexico claims, however, that expropriation *cannot* be effected by judicial organs and, even if it could, that Claimant already had recourse to the Mexican judicial system to challenge the Diversion Order. According to Mexico, having taken that path, Claimant cannot submit a claim before an international tribunal now. (That argument, of course, mistakes an expropriation claim for one of denial of justice.)

444. Mexico claims that Claimant has not met “the burden of identifying a rule of international law by means of conventions and customary international law” that prohibits judicial expropriation,⁷²⁷ and merely relies on scholarly works and awards, which are secondary sources of international law. Mexico cites the litigation positions adopted by the United States and Canada in two arbitration proceedings (a position one of the tribunals already rejected—the other case is still ongoing). Mexico also misconceives Claimant’s expropriation claim as a claim of denial of

⁷²⁵ See Section IX, *supra*.

⁷²⁶ Statement of Defense, para. 585.

⁷²⁷ Statement of Defense, paras. 593-94.

justice, arguing that Claimant was already served justice by Mexico's courts. None of this puts Mexico's judiciary beyond the reach of the Treaty's expropriation obligation.

445. *First*, Claimant has clearly identified the Treaty's provision prohibiting unlawful expropriation, has explained the principle of attribution whereby the State is responsible for the acts of its organs—including judicial organs—and has provided legal authorities (scholarly works and awards from international tribunals) explaining, interpreting and applying the concept of judicial expropriation.

446. As Mexico notes, Article 38 of the Statute of the International Court of Justice (**ICJ Statute**) identifies the following sources of international law:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. *international conventions*, whether general or particular, establishing rules expressly recognized by the contesting states;

b. *international custom*, as evidence of a general practice accepted as law;

c. the *general principles of law* recognized by civilized nations;

d. subject to the provisions of Article 59, [i.e. that only the parties bound by the decision in any particular case,] *judicial decisions* and the *teachings of the most highly qualified publicists* of the various nations, as subsidiary means for the determination of rules of law

447. Contrary to Mexico's complaints, in the SOC, Claimant did identify relevant authorities in support of the position that uncompensated expropriation is prohibited under international law, and that expropriatory acts can be effected by any state organ, including by judicial organs, per Article 38 of the ICJ Statute. Claimant cited the applicable *international convention*⁷²⁸ prohibiting unlawful expropriation, which is Article 6 of the Treaty. This provision states that neither Contracting Party shall expropriate investments of nationals of the other Contracting Party, except under certain conditions.⁷²⁹ Claimant also cited *international custom*⁷³⁰

⁷²⁸ Statute of the International Court of Justice, 1945, **CL-186**, Art. 38.1.a.

⁷²⁹ Mexico-Singapore BIT, **CL-1**, Art. 6.

⁷³⁰ Statute of the ICJ, 1945, **CL-186**, Art. 38.1.b.

explaining that the acts and omissions of any organ of the State, including judicial organs, are attributable to the State, which is Article 4 of the ILC Articles. This provision states as follows:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, *judicial* or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

448. The Commentary to the ILC Articles explicitly says “the reference to a State organ... is intended in the most general sense” and “[n]o distinction is made for this purpose between legislative, executive or *judicial organs*.”⁷³¹ Under the Treaty and the ILC Articles, therefore, any state organ, including a judicial organ, can adopt expropriatory measures.

449. Claimant also produced the *teachings of the most highly qualified commentators* confirming the notion that expropriation can be effected judicially. For example, Newcombe and Paradell note that:

[A] court may also violate an IIA standard – not as a denial of justice – but as a direct breach of the IIA attributable to the respondent state with no requirement to exhaust local remedies. For example, a court decree freezing assets is a measure attributable to the state and an IIA claim might be made without the requirement to exhaust local remedies. An unjustified, complete and permanent freezing order on assets, for example, might well amount to an expropriation, for which the state would be responsible.⁷³²

450. And finally, Claimant also produced *judicial decisions*⁷³³ interpreting and applying the concept of judicial expropriation. For example, in *Rumeli v. Kazakhstan*, the tribunal held that:

Whereas most cases of expropriation result from action by the executive or legislative arm of a State, a taking by the judicial arm of the State may also amount to an expropriation...It is a characteristic of judicial expropriation that it is usually instigated by a private party for his own benefit, and not

⁷³¹ ILC Articles, **CL-14**, Commentary to Article 4, p. 40. (“[T]he reference to a State organ in Article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind of classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. *No distinction is made for this purpose between legislative, executive or judicial organs.*”) (Emphasis added).

⁷³² A. Newcombe and L.I. Paradell, *Law and Practice of Investment Treaties*, 244 (2009), **CL-67**, p. 244.

⁷³³ Statute of the ICJ, 1945, **CL-186**, Art. 38.1.d.

that of the State. This is no doubt a relevant consideration, although not in itself decisive, as has already been observed. The Tribunal considers however, and Respondent indeed accepted in paragraph 259 of its Rejoinder, that a transfer to a third party may amount to an expropriation attributable to the State if the judicial process was instigated by the State.⁷³⁴

451. In *Saipem v. Bangladesh*, the tribunal held that:

[t]here is no reason why a judicial act could not result in an expropriation. Nothing in the BIT indicates such a limitation. Moreover, Bangladesh did not cite any decision supporting the opposite view. Quite to the contrary, the Tribunal notes that the European Court of Human Rights had no hesitation to hold that court decisions can amount to an expropriation.⁷³⁵

452. And in *Sistem v. Kyrgyzstan* the tribunal also found that the claimant's investment, consisting of the construction and operation of a hotel, was expropriated by local court decisions, which abrogated its ownership rights in the hotel.⁷³⁶

453. In sum, Claimant has produced relevant authorities in support of the proposition that uncompensated expropriation is prohibited under the Treaty, and can be effected through executive, legislative or judicial decisions.

454. In stark contrast, Mexico has not put forward any appropriate authorities negating the possibility of judicial expropriation. Mexico claims that "there can be no judicial expropriation under the [BIT],"⁷³⁷ but, in the words of Article 38 ICJ Statute cited by Mexico, it produces no *international convention*, *international custom* or *judicial decision* that would support such a proposition. Mexico simply (i) claims that "diverse States categorically reject the concept of "judicial expropriation", (ii) relies exclusively on the litigation advocacy of the United States and

⁷³⁴ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, **CL-68**, paras. 702-704.

⁷³⁵ *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction, March 21, 2007, **CL-215**, para. 132.

⁷³⁶ *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, September 9, 2009, **CL-70**, para. 122. See *Valeri Belokon v. Kyrgyz Republic*, UNCITRAL, Award, October 24, 2014, **CL-71**, para. 215.

⁷³⁷ Statement of Defense, section III.B.1.a.

Canada in two international arbitrations (the *Eli Lilly*⁷³⁸ and *Gramercy*⁷³⁹ cases); and (iii) states that “Respondent takes the same position” as the United States and Canada in those cases.

455. It is widely recognized that submissions made by State parties in the context of an arbitration reflect the litigation positions of those States and have no interpretative value of the relevant treaty.⁷⁴⁰ As pointed out by Jack Coe and Clyde Pearce, such submissions “are unlikely to endorse interpretations and theories of recovery that enlarge... exposure to claims.”⁷⁴¹ Another scholar explained the obviously partial position undertaken by States in the context of an arbitration: “there is no evidence available that any NAFTA government has ever provided an Article 1128 submission... contain[ing] arguments in favor of the position of investors from its own territory.”⁷⁴² Accordingly, “argument[s] made by a [state] party in the context of an arbitration” have no interpretative value for the relevant treaty, whether under Article 31(3) of the Vienna Convention or otherwise.⁷⁴³ For example, in *Telefónica S.A. v Argentine Republic*, the tribunal stated:

[T]he Tribunal is not convinced that positions on interpretation of a treaty provision, expressed by a Contracting State in its defensive brief filed in an international direct arbitration initiated against it by an investor of the other

⁷³⁸ See *Eli Lilly and Company and Government of Canada*, UNCITRAL, Case No. UNCT/14/2, Submission of the United States of America, March 18, 2016, **RL-011**, para. 29; *Eli Lilly and Company v. Government of Canada*, UNCITRAL, Case No. UNCT/14/2, Canada’s Counter-Memorial, January 27, 2015, **CL-187**, para. 214.

⁷³⁹ United States-Peru Trade Promotion Agreement (“US-Peru TPA”), April 12, 2006, **CL-188**. See *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, June 21, 2019, **RL-012**, para. 28.

⁷⁴⁰ Kendra Magraw, *Investor State Disputes and the Rise of Recourse to State Party Pleadings As Subsequent Agreements or Subsequent Practice under the Vienna Convention on the Law of Treaties*, 1 ICSID REV. 142, 166 (2015), **CL-189** (Surveying multiple awards, including NAFTA awards, and noting “[i]t is clear from the above jurisprudence that many tribunals are hesitant to determine that [state party pleadings] can constitute a subsequent agreement or subsequent practice under Articles 31(3)(a) and (b) of the VCLT.”).

⁷⁴¹ Clyde C. Pearce and Jack Coe, Jr., “Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections upon the First Case Filed Against Mexico,” 23 HASTINGS INT’L & COMP. L. REV. 311, 338 (2000), **CL-190**.

⁷⁴² Todd Weiler, “NAFTA Investment Law in 2001: As the Legal Order Starts to Settle, the Bureaucrats Strike Back,” 36 INT’L LAWYER 345, 348 (2002), **CL-191**.

⁷⁴³ *Gas Natural SDG S.A. v Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, June 17, 2005, **CL-192**, para. 47 n.12 (“We do not believe, however, that an argument made by a party in the context of an arbitration reflects practice establishing agreement between the parties to a treaty within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.”).

Contracting State, amounts to ‘practice’ of that State, as this requirement is understood in public international law, nor does it appear relevant in order to ascertain ‘how the treaty has been interpreted in practice’ by the parties thereto.⁷⁴⁴

456. Moreover, the State submissions that Mexico relies upon cite no authority to support their respective positions. In *Eli Lilly*, neither the United States nor Canada cited any awards holding that judicial acts cannot amount to expropriation. For its part, the United States based its position on the purported “‘dearth’ of international precedents on whether judicial acts may be expropriatory.”⁷⁴⁵ As the authorities cited above make clear, however, no such “‘dearth” of awards exist.⁷⁴⁶ For these reasons, the *Eli Lilly* tribunal rejected the position adopted by Canada and the United States (the *Gramercy* case is still pending decision):

[T]he judiciary is an organ of the State. Judicial acts will therefore in principle be attributable to the State by reference to uncontroversial principles of attribution under the law of State responsibility. As a matter of broad proposition, therefore, *it is possible to contemplate circumstances in which a judicial act (or omission) may engage questions of expropriation under NAFTA Article 1110*, such as, perhaps, in circumstances in which a judicial decision crystallizes a taking alleged to be contrary to NAFTA Article 1110.⁷⁴⁷

457. *Second*, Mexico’s attempts to turn this expropriation claim into one of denial of justice—and then to dismiss it because POSH had (limited) access to Mexico’s courts—necessarily fail. Mexico contends that “Claimant has tried to argue a claim of denial of justice ‘disguised’ as judicial expropriation” and cites Newcombe and Paradell for the proposition that,

⁷⁴⁴ *Telefónica S.A. v Argentine Republic*, ICSID Case No ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, May 25, 2006, **CL-193**, para. 112. (Internal quotations omitted).

⁷⁴⁵ *Eli Lilly and Company and Government of Canada*, UNCITRAL, Case No. UNCT/14/2, Submission of the United States of America, March 18, 2016, **RL-011**, para. 29.

⁷⁴⁶ Similarly, the United States submission in *Gramercy* cited only one decision in support of its claim that judicial acts cannot result in an expropriation, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*. See *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, June 21, 2019, para. 28 n.46. **RL-012**. Even in that case, however, the tribunal held only that “[i]n the circumstances of **th[at] case**, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen establishes a denial of justice under Article 1105.” *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, **CL-194**, para. 141.

⁷⁴⁷ *Eli Lilly and Company and Government of Canada*, UNCITRAL, Case No. UNCT/14/2, Final Award, March 16, 2017, **CL-195**, para. 221. (Emphasis added).

in denial of justice claims, “local remedies must be exhausted.”⁷⁴⁸ Claimant does not entirely follow Mexico’s argument, because Mexico does not expressly claim that Claimant has not exhausted local remedies in this case, but instead complains that Claimant has availed itself of the Mexican legal system.

458. In any case, it is clear that Claimant has presented an expropriation claim, not a claim for denial of justice, the nature and requirements of which are entirely different. Mexico also omits a very relevant portion of the quote from Newcombe and Paradell, explaining that claims for denial of justice require the exhaustion of local remedies, but claims for expropriation, such as “a court decree freezing assets,” do not include such as requirement:

When there has been a breach of protection or security due to deficiencies in the administration of justice, it is arguable that the delict in question is a denial of justice. IIA tribunals, consistent with international authorities, have stated that *local remedies must be exhausted (to a degree of reasonableness) in order to claim a denial of justice.*

The basis for a claim of denial of justice is that the judicial system has failed to provide justice. Special considerations apply to judicial systems in terms of international minimum standards of procedural due process. Further, a judicial system is specifically designed to allow for review and the correction of due process errors. A due process failure can only be made out where the judicial system has been tested and exhausted. An IIA claim arising as a result of the conduct of the executive branch, for example the denial of a business permit by a government department, gives rise to a categorically different type of claim, which may arise based on various IIA standards, such as national treatment, fair and equitable treatment or expropriation. Finally, a court may also violate an IIA standard – not as a denial of justice – but as a direct breach of the IIA attributable to the respondent state with no requirement to exhaust local remedies. For example, a court decree freezing assets is a measure attributable to the state and an IIA claim might be made without the requirement to exhaust local remedies. An unjustified, complete and permanent freezing order on assets, for example, might well amount to an expropriation, for which the state would be responsible.⁷⁴⁹

⁷⁴⁸ Statement of Defense, paras. 600-601.

⁷⁴⁹ A. Newcombe and Ll. Paradell, *Law and Practice of Investment Treaties*, 244 (2009), **CL-67** (Emphasis added).

459. In sum, Mexico’s assertion that a judicial measure cannot result in an expropriation is unsubstantiated and should be rejected.

(b) Expropriation may be effected indirectly and incrementally

460. Mexico claims that “nothing was ‘taken’ from the claimant,”⁷⁵⁰ and, based on a misunderstanding of Claimant’s Investment, also contends that the “vessels were not expropriated,” “the supply contracts with OSA were not taken,” and “OSA’s ability to contract with Pemex was not expropriated.”⁷⁵¹ Mexico does not expressly question the Treaty’s restrictions on indirect and incremental expropriation, but seems to consider that, in the absence of a direct ‘taking’ by the government (a forced transfer of title), there would be no violation of the Treaty’s obligations. This is incorrect as a matter of international law.

461. As explained in the SOC, Article 6 of the BIT encompasses both “direct and indirect expropriation”⁷⁵² as well as measures “the effect of which is tantamount to expropriation”⁷⁵³ (also known as *de facto* expropriation).

462. This encapsulates the well-established principle that expropriation may occur directly, through formal acts of outright seizure or transfer of property to the State, or indirectly, when the State’s measures in respect of a foreign national’s property or investment have the same practical effect as a direct expropriation—namely, the substantial deprivation of the use or economic benefit of property.⁷⁵⁴ As the tribunal in *Metalclad v Mexico* explained:

[E]xpropriation... includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected

⁷⁵⁰ Statement of Defense, section III.B1.b.

⁷⁵¹ Statement of Defense, sections III.B1.b (i)-(iii).

⁷⁵² Statement of Claim, para. 301. *See* Mexico-Singapore BIT, **CL-1**, Art. 6.

⁷⁵³ Mexico-Singapore BIT, Art. 6, **CL-1**.

⁷⁵⁴ *Metalclad Corporation v. United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, August 30, 2000, **CL-43**, para. 103. *See, e.g., Middle East Cement Shipping and Handling Co SA v. Arab Republic of Egypt*, ICSID Case No ARB/99/6, Final Award, April 12, 2002, **CL-11**, para. 107; *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No ARB/96/1, Final Award, February 17, 2000, **CL-44**, para. 77.

economic benefit of property even if not necessarily to the obvious benefit of the host State.⁷⁵⁵

463. Expropriation encompasses not only forced transfers of title, but also other types of interference with property. The 1961 Harvard Draft Convention classically provided that “[a] ‘taking of property’ includes not only an outright taking of property but also any such *unreasonable interference with the use, enjoyment, or disposal of property* as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.”⁷⁵⁶

464. Many significant investment treaty awards are to similar effect.⁷⁵⁷ As Professors Michael Reisman and Robert Sloane explain:

⁷⁵⁵ *Metalclad v. Mexico*, Award, **CL-43**, para. 103.

⁷⁵⁶ L. Sohn and R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 1961 (55) AM. J. INT’L L. 545, **CL-45**, p. 553. (Emphasis added) See United Nations Conference on Trade and Development (“UNCTAD”), *Taking of Property* (2000), **CL-46**, pp. 3-4, 20 (“The taking of property by Governments can result from legislative or administrative acts that transfer title and physical possession. Takings can also result from official acts that effectuate the loss of management, use or control, or a significant depreciation in the value, of assets. Generally speaking, the former can be classified as ‘direct takings’ and the latter as ‘indirect takings.’ Direct takings are associated with measures that have given rise to the classical category of takings under international law. They include the outright takings of all foreign property in all economic sectors, takings on an industry-specific basis, or takings that are firm specific [...] In contrast, some measures short of physical takings may amount to takings in that they result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor [...] Some particular types of such takings have been called ‘creeping expropriations’, while others may be termed ‘regulatory takings’. All such takings may be considered ‘indirect takings’... It is not the physical invasion of property that characterizes nationalizations or expropriations that has assumed importance, but the erosion of rights associated with ownership by State interferences.”).

⁷⁵⁷ See, e.g., *Compañía de Aguas v. Argentina*, Award, **CL-52**, para. 7.5.18 (“[I]t has been clear since at least 1903, in the *Rudolff case*, that the taking away or destruction of rights acquired, transmitted and defined by contract is as much a wrong entitling the sufferer to redress as the taking away or destruction of a tangible property.”). *CME*, Partial Award, **CL-62**, para. 591 (finding claimant’s contract rights had been expropriated where the challenged measures “destroyed... the commercial value of the investment”). *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, May 20, 1992, **CL-61**, para. 165 (“[I]t has long been recognized that contractual rights may be indirectly expropriated.”). *Pope & Talbot, Inc. v. Canada*, UNCITRAL, Interim Award, June 26, 2000, **CL-63**, para. 96 (holding that an investor’s access to the US softwood lumber market was regarded as a property right protected by the NAFTA and stating that “the seizure of property and the seizure of rights to cash flows have exactly the same consequences...”). *Santa Elena v. Costa Rica*, Final Award, **CL-44**, para. 77 (“[A] property has been expropriated when the effect of the measures taken by the state... deprive the owner of... the benefit and economic use of his property.”). *AES Summit Generation Limited and AES-Tisza Erőmű Kft v Republic of Hungary*, ICSID Case No ARB/07/22, Award, September 23, 2010, **CL-51**, para 14.3.1 (holding that an expropriation occurs when the investor is “deprived, in whole or significant part, of the property in or

[F]oreign investments may be expropriated ‘indirectly through measures tantamount to expropriation or nationalization.’ This phrase [...] also captures the multiplicity of inappropriate regulatory acts, omissions, and other deleterious conduct that undermines the vital normative framework created and maintained by BITs – and by which governments can, in effect but not name, now be deemed to have expropriated a foreign national’s investment. The major innovation of the ‘tantamount’ clause, found in substance in almost all BITs, therefore consists in extending the concept of indirect expropriation to an egregious failure to create or maintain the normative ‘favorable conditions’ in the host state.⁷⁵⁸

465. The critical factor in determining whether a government measure constitutes an expropriation is the effect that the measure has on the asset in question, *i.e.* its *use, value or economic benefit for the investor*. Measures that amount to expropriation can also include conduct which deprives the investor of its ability to manage, use or control its property in a meaningful way.⁷⁵⁹ As held by the tribunal in *Compañía del Desarrollo de Santa Elena v Costa Rica*:

There is ample authority for the proposition that a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property.⁷⁶⁰

466. Similarly, in *AES v Hungary*, the tribunal held that an expropriation occurs when the investor is “deprived, in whole or significant part, of the property in or effective control of its investment: or for its investment to be deprived, in whole or significant part, of its value.”⁷⁶¹

467. Neither the State’s intent, nor its subjective motives, nor the form of the action, constitute relevant criteria for finding whether a measure amounts to expropriation.⁷⁶²

effective control of its investment: or for its investment to be deprived, in whole or significant part, of its value...”).

⁷⁵⁸ M. W. Reisman and R. D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, Faculty Scholarship Series (2004) Paper 1002, **CL-49**, p. 118-119.

⁷⁵⁹ UNCTAD, “Expropriation: A Sequel, UNCTAD Series on Issues in International Investment Agreements II” (2012) UNCTAD/DIAE/IA/2011/7, **CL-50**, p. 21.

⁷⁶⁰ *Santa Elena v. Costa Rica*, Final Award, **CL-44**, para. 77 (emphasis added).

⁷⁶¹ *AES Summit Generation Limited and AES-Tisza Erömu Kft v Republic of Hungary*, ICSID Case No ARB/07/22, Award, September 23, 2010, **CL-51**, para 14.3.1.

⁷⁶² See, e.g., *Santa Elena v. Costa Rica*, Final Award, **CL-44**, para. 77; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007, **CL-52**, para. 7.5.20. See also *Tipetts, Abbett, McCarthy, and Stratton v TAMS-AFFA Consulting Engineers*

468. In sum, the question of whether a measure constitutes an expropriation depends upon the actual effect of the measures on the investor's property. A series of measures that deprive an investor of the use or enjoyment of its investment, including the deprivation of all or a significant part of the economic benefit of its property, amounts to expropriation. If the Measures at stake have these effects (as they did), there is no need to inquire into the motives, intentions or form of the measures in order to conclude that an expropriation has occurred. This is what happened in the case at hand.

2. Mexico has expropriated the investment made by POSH and the Subsidiaries

469. As explained above, Mexico claims, from a factual perspective, that “[n]othing was ‘taken’ from the claimant,”⁷⁶³ (e.g. the “vessels were not expropriated,” “the supply contracts with OSA were not taken,” and “OSA’s ability to contract with Pemex was not expropriated.”)⁷⁶⁴ and that “there was no creeping expropriation” because the measures “are too remote from each other, and too remote from POSH and the Subsidiaries.” These allegations are baseless. The expropriation of the Investment made by POSH and the Subsidiaries in Mexico was both direct and indirect, and had a creeping nature.

470. As explained in the SOC, POSH’s Investment in Mexico comprised, *inter alia*, POSH’s equity and debt stakes in eight different companies in Mexico and exceeded USD\$190 million. The Investment *relied* on three essential pillars: the availability of vessels, the contracts with OSA and OSA’s ability to contract with PEMEX.⁷⁶⁵ Contrary to Mexico’s suggestion,

of Iran and others, Award, June 22, 1984, Iran-US Claims Tribunal Report (1984-Volume 6), **CL-53**, p. 4 (emphasis added). “While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.”

⁷⁶³ Statement of Defense, para. 588.

⁷⁶⁴ Statement of Defense, p. 153.

⁷⁶⁵ Statement of Claim, paras 103, 330.

Claimant did not characterize these “pillars” as investments themselves, as Mexico contends, but rather as necessary premises for the investment to succeed.⁷⁶⁶

471. In any case, consistent with the provisions of the Treaty, an “investment is not a single right but is, like property, correctly conceived of as a bundle of rights, some of which are inseparable from others and some of which are comparatively free-standing.”⁷⁶⁷ As Judge James Crawford explained in a statement adopted by the tribunal in *ADC v. Hungary* in analogous circumstances, “what was expropriated was that bundle of rights and legitimate expectations.”⁷⁶⁸

472. POSH and the Subsidiaries had a bundle of rights and legitimate expectations in relation to its Investment in the Mexican offshore oil and gas sector in partnership with OSA. As discussed in next in this Section, through a series of measures, acts, and omissions, Mexico *directly* expropriated funds owed POSH through the Irrevocable Trust, and *indirectly* expropriated the rest of POSH’s investment, by depriving it of the value, benefit, use and enjoyment of its rights and investments, as the Subsidiaries’ operations were frustrated and in effect taken entirely.

473. The expropriation of the Investment was both direct and indirect, and had a creeping nature. As mentioned above, although Mexico need not have intended to expropriate POSH’s Investment, in this case it is noteworthy that the State knowingly and intentionally engaged in a politically motivated campaign to cut off OSA’s ties with PEMEX, without regard for the affected rights of international investors. As also mentioned, although the legality of the Measures under local law is not determinative either, in this case Mexico consistently violated Mexican Law, which is a further testament to the force of the politically motivated campaign led by the new administration.

(a) Mexico directly expropriated amounts owed to POSH under the Irrevocable Trust

⁷⁶⁶ See para. 37, *supra*.

⁷⁶⁷ *ATA Construction, Industrial and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, May 18, 2010, **CL-72**, para. 96.

⁷⁶⁸ *ADC Affiliate Ltd. et. al. v. Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, **CL-73**, para. 303-304. See *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, September 13, 2006, **CL-74**, para. 67 (“The Tribunal considers that [...] the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value.”).

474. The Diversion Order directly expropriated the receivables owed to POSH pursuant to the Irrevocable Trust by diverting those funds to SAE's bank account. Mexico denies the existence of other direct takings that Claimant has not invoked (the vessels, contracts with OSA, or OSA's ability to contract with PEMEX), but does not address this specific direct taking that Claimant has in fact invoked as basis for its expropriation claim. Mexico only asserts that the Diversion Order and the Isolated Decision were legal under Mexican Law. That is no answer to Claimant's direct expropriation claim.

475. As explained above, whether the specific measure is legal under local law or not is not determinative of a violation of the Treaty (although in this case, Claimant has established that the Diversion Order and Isolated Decision are contrary to Mexican Law and the Mexican Constitution). The relevant elements to assess are (i) whether the measure was expropriatory in nature; and (ii) whether it was lawful or not under the Treaty—rather than under local law. In the SOD, Mexico has questioned the first element of the analysis (that is, Mexico claims that the measures did not constitute a taking—“nothing was taken”) but has not questioned the second one (that is, Mexico does not claim or attempt to establish that the Measures were lawful under the Treaty). In any case, Mexico's allegations with regard to the first element of the analysis do not withstand scrutiny.

476. The expropriatory nature of the Diversion Order and the Isolated Decision is hard to dispute. As explained by Mr. Meján, “the assignment of collection rights to a trust entails a *transfer of ownership* of these rights. The assignor (in this case OSA) loses the ownership of the rights to the assignee (the Trust), which becomes the new owner of these rights. The assignee replaces the assignor as the creditor.”⁷⁶⁹ In this case, OSA had assigned the rights arising from the OSA-PEMEX Contracts to the Irrevocable Trust, in which POSH was the primary beneficiary. By diverting those payments to the government's bank account, Mexico directly took POSH's beneficial ownership rights, as primary beneficiary of the Trust, over the collection rights arising from the contracts between OSA and Pemex. Mexico directly expropriated POSH's rights that had been lawfully acquired through valid, binding and enforceable contracts.

⁷⁶⁹ Second Expert Legal Opinion on Mexican Insolvency Law by Luis Manuel Meján, para. 33.

477. As explained in the SOC, and as has not been contradicted by Mexico, numerous authorities confirm that rights and interests under contracts may be expropriated and that such expropriations occur when a State uses its governmental authority to deprive a foreign investor of the use, enjoyment, or value of such rights. As Christie observed in his classic study of the subject, “contract and many other so-called intangible rights can, under certain circumstances, be expropriated, even by indirect interference...”⁷⁷⁰ Several other authorities confirm this point.⁷⁷¹

478. The award issued in the *Deutsche Bank AG v. Sri Lanka* case is particularly instructive in this regard. There, the Tribunal held that a decision issued by the Sri Lankan Supreme Court and a directive issued the Sri Lankan Central Bank that prohibited payment of a debt owed to Deutsche Bank under a hedging agreement constituted an expropriation of the claimant’s property. As the Tribunal explained:

[T]he Arbitral Tribunal decides that (i) the Supreme Court’s Interim Order of 28 November 2008 and (ii) the Central Bank’s letter of 16 December 2008 indeed amount to an expropriation of Claimant’s claim to debt under the Hedging Agreement. The *Supreme Court’s Order prevented payment by CPC to Deutsche Bank*. On 16 December 2008, the Monetary Board of the Central Bank sent a letter to Deutsche Bank Colombo and other banks requesting them not to proceed with, or give effect to, the transactions. On 27 January 2009, when the Supreme Court withdrew its Order, the Central Bank issued a press release confirming that the 16 December 2008 Directions to the banks would remain in force. The Central Bank reinforced and later extended and made permanent the interference begun by the Supreme Court. It is clear that from 28 November 2008 onwards, the coordinated actions of the Supreme Court and the Central Bank prevented Deutsche Bank from receiving payment under the Hedging Agreement. They deprived Deutsche Bank of the economic value of the latter. An expropriation of Deutsche Bank’s rights consequently took place on 28 November 2008 before it decided to terminate the Hedging Agreement on 3 December 2008. From 28 November 2008 onwards, no payment was permitted pursuant to the Hedging Agreement.⁷⁷²

⁷⁷⁰ G. C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 BRIT. Y. B. INT’L L. 307 (1962), **CL-58**, pp. 318-319.

⁷⁷¹ Statement of Claim, paras. 316-322.

⁷⁷² *Deutsche Bank AG v. Sri Lanka*, ICSID Case No. ARB/09/02, Award, October 31, 2012, **CL-196**, paras. 520-21.

479. The *Deutsche Bank* tribunal also noted that the “the entire value of Deutsche Bank’s investment was expropriated for the benefit of Sri Lanka itself” and “the actions of the Supreme Court and Central Bank... involved excess of powers and improper motive as well as serious breaches of due process, transparency and... a lack of good faith.”⁷⁷³

480. The circumstances surrounding the expropriation of the amounts owed POSH under the Irrevocable Trust are analogous: (i) the Diversion Order and subsequently the Revision Decision and the Isolated Decision prevented POSH from receiving payment through the Irrevocable Trust, thereby depriving POSH of the economic value of its rights thereunder, (ii) the funds were diverted for the benefit of Mexico, (iii) and, as discussed in the fact section above, the actions of SAE and the Mexican courts “involved excess of powers and improper motive as well as serious breaches of due process, transparency and... a lack of good faith.”⁷⁷⁴

481. In sum, Mexico directly expropriated POSH’s lawful rights arising from valid, binding and enforceable contracts.

(c) Mexico indirectly expropriated the rest of POSH’s Investment

482. Mexico alleges that there was no “creeping” expropriation because the Measures are “too remote from each other, and too remote from POSH and the Subsidiaries,” and because some of them were temporary in nature, such as the Unlawful Sanction and the detention of the vessels.

483. The determinative factor in assessing whether certain government measures constitute an indirect expropriation is not the duration of the measures but their effect on the claimant’s investment. Several tribunals have explained this. For example, in *UP and C.D. Holding Internationale v. Hungary*, the tribunal explained that, after Hungary evicted Claimants’ Hungarian subsidiary from a market “represent[ing] 97% of its business,” the subsidiary “was in a desperate position *within months* after the implementation of the [measures]...”⁷⁷⁵ The tribunal

⁷⁷³ *Deutsche Bank v. Sri Lanka*, Award, **CL-196**, para. 523.

⁷⁷⁴ *Deutsche Bank v. Sri Lanka*, Award, **CL-196**, para. 523, (“The Arbitral Tribunal considers that the Hedging Agreement is an asset... It is a claim to money...”).

⁷⁷⁵ *UP and C.D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, October 9, 2018, **CL-197**, paras. 352-353.

concluded that, despite the short period in which the measures had been in effect, “[t]he destruction of the value of Claimants’ shareholding was permanent, or at least sufficiently permanent for the purposes of expropriation. Under these circumstances, the Tribunal accepts that Claimants’ decision to shut down as of 2013 and to repatriate some of CD Hungary’s reserves after CD Hungary started to collapse following the 2011 Reform was inevitable. This was a legitimate and reasonable decision justified to avoid further losses...”⁷⁷⁶ Similarly, in the tribunal in *Inmaris v. Ukraine* explained that: “*The ban was wrongful and should never have been imposed. As it remained in place beyond the start of the 2006 season, Claimants did what was necessary to cancel the bookings. The ban remained in force for a year, and, at that point, the damage to Claimants became irreversible.*”⁷⁷⁷

484. These tribunals are clear that the determinative factor in assessing whether measures constituted an indirect expropriation is not the duration of the measures or the claimants’ retention of legal ownership of assets. Rather, as in this case, an indirect expropriation may result from nominally temporary measures that have the effect of permanently destroying the viability of the enterprises constituting the claimant’s investment.⁷⁷⁸

485. As has been explained over the course of this Reply, it is clear that the Measures were inextricably linked as part of political campaign against OSA, and they specifically targeted OSA and its business partners with, *inter alia*, three main objectives: to strain OSA’s liquidity, to take control of OSA’s assets and operations, and to divert OSA’s resources to the government. To that effect, Mexico adopted a series of measures that deprived POSH and the Subsidiaries of the

⁷⁷⁶ *UP and C.D. v. Hungary*, Award, **CL-197**, para. 353.

⁷⁷⁷ *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Award, March 1, 2012, **CL-198**, para. 381.

⁷⁷⁸ Mexico’s reliance on *Valores Mundiales, S.L. y Consorcio Andino S.L. c. Bolivarian Republic of Venezuela*, is misplaced. In that case, found, as a factual matter, that the claimants had not proven that the challenged measures deprived, either individually or cumulatively, deprived them of *de iure* control of their Venezuelan subsidiaries or “reduced the value of their share ‘virtually to zero.’” *Valores Mundiales, SL y Consorcio Andino, SL v. Bolivarian Republic of Venezuela* (ICISD Case No ARB/13/11) Award, July 25, 2017, **RL-020**, paras. 380, 458 (“[N]one of the actions alleged by Claimants had the scope and effect attribute to them with respect to the control of the investment.”), 478 (“[I]n the balance of the evidence the Tribunal considers... that the value of the Companies is not ‘zero’ as claimed by Claimants.”). In contrast, in this case the essential facts of the Subsidiaries financial condition are not in dispute. Mexico does not dispute the nonpayment of amounts owed under the OSA Charters, that the Vessels were detained, or that OSA was disqualified from seeking new PEMEX contracts. Accordingly, *Valores Mundiales* is simply inapposite.

use, value, and benefit of the Investment. The expropriatory nature and effect of the Measures is undisputable. In summary:

- It is public knowledge that the PRI Administration initiated a politically motivated campaign against OSA to sever the ties it had established with PEMEX during the PAN Administrations. Certain Senators from the Senate Committee admitted that there was “a hunt against [OSA,] the company [that had been] spoiled by PEP during the Calderón [administration],”⁷⁷⁹ as an act of “revenge against the PAN”⁷⁸⁰ [Political Party], “to obtain a... cooperative attitude from that party...”⁷⁸¹
- Mexico unlawfully banned OSA from entering into any public contracts, including with PEMEX, harming OSA’s financial situation irreparably, impairing its ability to perform on the contracts with the Subsidiaries and leading to its demise. This measure led to the suspension of the Banamex factoring facility, which further strained OSA’s finances. This Unlawful Sanction was later revoked by Mexican Courts, but it was too little, too late. By that time, OSA was already undergoing insolvency proceedings and did not meet PEMEX’s financial requirements for new contracts. This Measure destroyed OSA’s ability to contract with PEMEX.
- Mexico initiated an unsupported criminal investigation against OSA for alleged money laundering and fraud. Mexico never pressed any charges, which is indicative of the political nature of the investigation. This investigation was a necessary tool to take control of OSA.
- Mexico abducted, threatened and coerced a witness, forcing him to sign a false testimony in support of the politically motivated criminal investigation against OSA.
- Based on the unfounded investigation, Mexico unlawfully seized all OSA’s assets and took control of OSA. The PGR ordered the “temporary seizure” of OSA and placed it under SAE’s administration. Thereafter, SAE blocked all payments to POSH’s Subsidiaries (by simply refusing to effect payment) and to POSH (by not processing PEMEX’s invoices for work performed). OSA remained seized for more than 3 years. No charges were ever pressed as a result of the investigation, but the investigation served the government’s purpose of taking control of OSA.

⁷⁷⁹ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**.

⁷⁸⁰ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**.

⁷⁸¹ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 1.

- Based on the same investigation, Mexico also detained the ten vessels owned by POSH's Subsidiaries. For several months, POSH's Subsidiaries were deprived of their main income-generating asset.
- Mexico drove OSA into insolvency. As a result of the Unlawful Sanction and the suspension of the Banamex factoring facility, OSA did not have enough cash flow to operate the vessels and pay its debts. Thereafter, Mexico initiated OSA's Insolvency Proceeding and appointed SAE as OSA's Visitor, Conciliator and Trustee, retaining full control over the company.
- Mexico suspended all payments to creditors, including to POSH's Subsidiaries, which payments had already been blocked by SAE upon taking control of OSA. Moreover, as explained above, Mexico unlawfully diverted the payments owed by PEMEX to POSH via the Irrevocable Trust. This deprived POSH of any value, use or benefit of the vessels or the contracts with OSA. Regardless of whether OSA remained in operation, POSH would not receive payments for its services.
- Mexico blocked POSH's Subsidiaries from contracting directly with PEMEX as an alternative. SAE refused to cancel OSA's contracts and the Insolvency Court prohibited PEMEX from rescinding them, fatally condemning the Subsidiaries' operations in Mexico.
- Finally, SAE mis-appropriated OSA's funds. SAE received payments belonging to OSA's creditors in its own bank account in excess of USD\$71 million without ever accounting for its use of those funds. This measure obviously harmed OSA's already strained finances even more.

486. The relationship between the politically motivated measures and their expropriatory nature vis-à-vis POSH's Investment is clear. All of the measures were intended to strain OSA's finances, take control of OSA, or divert OSA's resources to the government, without regard to the rights of international investors that were OSA's business partners, like Claimant. All of the Measures either directly impacted or specifically targeted POSH's Subsidiaries and deprived them of the value, use, and benefit of the Investment: the vessels were detained for several months; POSH's Subsidiaries did not receive any payments from the contracts with OSA (from OSA or PEMEX through the Irrevocable Trust) while still incurring in costs to preserve the vessels and pay the crews; and the Subsidiaries could not contract directly with PEMEX for the services they were previously rendering through OSA. There was no cash flow, no activity and, even no vessels (for a time). Under these conditions, a few months were sufficient to see the Investment completely destroyed.

487. This case represents a clear illustration of indirect expropriation. Through all these measures, Mexico rendered POSH's Investment worthless. Claimant has demonstrated the expropriatory nature of the Measures. As described above, the Measures entailed an abandonment of the law, repudiation of rights, and manifest abuse of power. Claimant has also demonstrated that the Measures deprived POSH of the use, value, and benefit of its Investment, as the Subsidiaries were deprived of any income and forced to sell the vessels and use the proceeds as re-payment for the loans. In February 2015, one year after Mexico initiated its political crusade against OSA, the Subsidiaries had no vessels, no contracts with OSA, and no possibility to contract with PEMEX. The value of their Investment was zero.

488. Claimant has also demonstrated the Measures substantially interfered with and frustrated entirely POSH's distinct, reasonable, investment-backed expectations, including the most basic expectation that the host country will follow the law. Mexico stopped at nothing in its quest to take control of OSA, without regard to the rights of international investors, like POSH, which had incurred no wrongdoing.

3. Mexico's expropriation was unlawful

489. As explained in the SOC, Mexico's expropriation of Claimant's investment was unlawful because it (a) was not accompanied by compensation, (b) lacked due process, (c) was discriminatory, and (d) lacked any public benefit. The wording of Article 6 is clear that if any one of these shortcomings is established, the expropriation must be deemed unlawful.⁷⁸²

490. Mexico does not question the unlawfulness of the expropriation, but rests instead on its contention that there was no "taking" in the first place, as the Measures were adopted in "the normal course of action of the Mexican authorities."⁷⁸³ In the first place, Mexico's abduction of, physical coercion and threats towards individuals to obtain false statements, and Mexico's other

⁷⁸² Arbitral tribunals have consistently held that when a treaty cumulatively requires several conditions for a lawful expropriation, failure of any one of those conditions makes the expropriation wrongful. *See, e.g., Compañía de Aguas v. Argentina*, Award, **CL-52**, para. 7.5.21, ("If we concluded that the challenged measures are expropriatory, there will be a violation of Article 5(2) of the Treaty [on expropriation], even if the measures might be for a public purpose and non-discriminatory, because no compensation has been paid"); *Bernardus Henricus Funnekotter & Ors. v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, April 22, 2009, **CL-76**, para. 98 ("The Tribunal observes that the conditions enumerated in Article 6 are cumulative. In other terms, if any of those conditions is violated, there is a breach of Article 6").

⁷⁸³ Statement of Defense, para. 585.

violations of Mexican law, are not legitimate. In any event, as explained above, this has no bearing on the lawfulness or lawfulness of the expropriation under the Treaty. Mexico has no answer to the facts that the expropriation (a) lacked compensation, (b) lacked due process, (c) was discriminatory, and (d) lacked any public benefit. Should Mexico take up these issues for the first time only in the Rejoinder, in a tactical move to deprive Claimant of the opportunity to rebut them, Claimant reserves the right to file an additional brief specifically addressing this point.

C. MEXICO TREATED POSH’S AND ITS SUBSIDIARIES UNFAIRLY AND INEQUITABLY, AND IMPAIRED THEM THROUGH UNREASONABLE AND ARBITRARY MEASURES

491. In the SOC, Claimant described the content of the obligation to accord fair and equitable treatment (**FET**), as contained in the Treaty, and demonstrated that Mexico’s (mis)treatment of POSH’s Investment was in breach of the Treaty.

492. In response, Respondent offers a variety of arguments regarding the content of the FET standard and asserts that the Measures “were taken in the normal course of processes and were reasonable.” Mexico’s legal arguments are incorrect as a matter of law, and its factual arguments disregard the record of the case.

1. Observations regarding the legal standard

493. Review of investment treaty tribunal decisions shows that there is a significant convergence regarding the content of the fair and equitable treatment standard, regardless of whether the standard is expressed as being tied to the customary international law minimum standard of treatment. The range of decisions discussing and describing the application of that standard in various analogous circumstances that was set forth in the SOC demonstrates that Mexico’s treatment of POSH’s Investment was in breach of the standard, however expressed.

(a) The standard has evolved over time

494. Mexico claims that “the standard for finding a violation of customary international law of the minimum treatment standard is high” based on decisions citing the *Neer* case from 1926, which requires that that conduct must be “egregious” to violate the standard of treatment. These argument is without merit.

495. The content of the minimum standard of treatment is not delimited by the *Neer* case. Numerous investment treaty decisions addressing the content of the fair and equitable treatment standard, as expressly tied to the customary international minimum standard, describe the standard as having evolved and reject the notion that it is limited to egregious conduct as described in the *Neer* case.

496. For example, the distinguished tribunal in *Mondev v. United States*⁷⁸⁴ emphasized that the reference to the *Neer* case as a relevant touchstone for the content of the standard was “unconvincing” and made the following observations:

[T]here is insufficient cause for assuming that provisions of bilateral investment treaties, and of NAFTA, while incorporating the Neer principle in respect of the duty of protection against acts of private parties affecting the physical security of aliens present on the territory of the State, are confined to the Neer standard of outrageous treatment where the issue is the treatment of foreign investment by the State itself... Neer and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the protection of international investments, were far less developed than they have since come to be... In the light of these developments it is unconvincing to confine the meaning of ‘fair and equitable’ and ‘full protection and security’ of foreign investments to what those terms – had they been current at the time – might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.⁷⁸⁵

497. The *Mondev* tribunal considered that the content of the customary rules of international law in regard to the protection of foreign investment necessarily has been influenced by the “vast number” of bilateral and regional investment treaties currently in force:

In the Tribunal’s view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law. It would be surprising if this practice and the vast number of provisions it reflects were to be interpreted

⁷⁸⁴ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, **CL-84**, paras. 115-116.

⁷⁸⁵ *Mondev International v. USA*, Award, **CL-84**, paras. 115-116.

as meaning no more than the Neer Tribunal (in a very different case) meant in 1927.⁷⁸⁶

498. The *Mondev* tribunal concluded that, in view of the evolving nature of customary international law, “the content of the minimum standard today cannot be limited to the content of customary international law as recognized in arbitral decisions in the 1920s.”⁷⁸⁷ Referring instead to the description of arbitrary conduct in the *ELSI* case, the tribunal concluded that the question is whether one can conclude, in the light of all the available facts, that an impugned decision “was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.”⁷⁸⁸

499. The *Waste Management v. Mexico* tribunal thereafter also described the customary international minimum standard, without reference to the Neer case or to any requirement of “egregious” or “outrageous” conduct:

[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant. Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.⁷⁸⁹

500. It is this articulation of what the standard entails that has since been adopted by very many investment treaty tribunals to describe the content of the obligation to accord fair and equitable treatment, regardless whether it is expressly tied to the customary international law minimum standard. It reflects the significant convergence of views among investment treaty

⁷⁸⁶ *Mondev International v. USA*, Award, **CL-84**, para. 117.

⁷⁸⁷ *Mondev International v. USA*, Award, **CL-84**, para. 123.

⁷⁸⁸ *Mondev International v. USA*, Award, **CL-84**, para. 127.

⁷⁸⁹ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **RL-027**, paras. 98-99.

tribunals as to the type of conduct that breaches the obligation to provide fair and equitable treatment.⁷⁹⁰

501. Again, in *Thunderbird v. Mexico*, the tribunal emphasized that “[t]he content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law.”⁷⁹¹ The tribunal noted that there had been evolution since the *Neer* case, although the threshold for a violation of the standard still remains high, and cited with agreement the description of the standard in *Waste Management and Mondev*, stating that it views “acts that would give rise to a breach of the minimum standard of treatment ... as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.”⁷⁹² The *Thunderbird* tribunal also underscored the relevance in this analysis of the principle of good faith in international law which animates an assessment of when the State’s conduct “creates reasonable and justifiable expectations on the part of an investor

⁷⁹⁰ Statement of Claim, paras. 349-350. See, e.g., *Rusoro v. Venezuela*, Award, **CL-40**, paras. 520-521 (The customary international minimum standard “has developed and today is indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter. The whole discussion of whether [...] the BIT incorporates or fails to incorporate the [customary international minimum] Standard when defining FET has become dogmatic: there is no substantive difference in the level of protection afforded by both standards.”); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, **CL-68**, para. 611 (The tribunal “shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law.”); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006, **CL-81**, para. 361 (“[T]he minimum requirement to satisfy this standard [fair and equitable treatment] has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law.”); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, **CL-82**, para. 592 (“[T]he Tribunal also accepts, as found by a number of previous arbitral tribunals and commentators, that the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law.”); *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, March 27, 2006, **CL-83**, para. 291 (“[I]t appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied.”).

⁷⁹¹ *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006, **CL-26**, para. 194.

⁷⁹² *International Thunderbird v. Mexico*, Award, **CL-26**, para. 194.

(or investment) to act in reliance of said conduct, such that a failure by the [State] to honour those expectations could cause the investor (or investment) to suffer damages.”⁷⁹³

502. The tribunal in *Merrill & Ring v. Canada*⁷⁹⁴ likewise rejected the notion that the *Neer* case defined the standard, emphasized the evolutionary nature of the law, and concluded that fair and equitable treatment itself “has become part of customary law”:

State practice with respect to the standard for the treatment of aliens in relation to business, trade and investments, while varied and sometimes erratic ... shows that the restrictive *Neer* standard has not been endorsed or has been much qualified. . . . The situation is rather one in which the customary law standard has led to and resulted in establishing the fair and equitable treatment standard as different stages of the same evolutionary process.

A requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris* [T]he standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness...

[A]gainst the backdrop of the evolution of the minimum standard of treatment discussed above, the Tribunal is satisfied that fair and equitable treatment has become a part of customary law.⁷⁹⁵

503. On this basis the *Merrill & Ring* tribunal emphasized the focus must be on reasonableness:

[T]he Tribunal finds that the applicable minimum standard of treatment of investors is found in customary international law. . . . Specifically this standard provides for the fair and equitable treatment of alien investors within the confines of reasonableness. The protection does not go beyond that required by customary law [for NAFTA], as the FTC has emphasized. Nor, however, should protected treatment fall short of the customary law standard.⁷⁹⁶

⁷⁹³ *International Thunderbird v. Mexico*, Award, **CL-26**, para. 147.

⁷⁹⁴ *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award, March 31, 2010, **CL-86**.

⁷⁹⁵ *Merrill v. Canada*, Award, **CL-86**, paras. 209-211. *See also Merrill v. Canada*, Award, **CL-86**, paras. 204-209.

⁷⁹⁶ *Merrill v. Canada*, Award, **CL-86**, para. 213.

504. Thus, Respondent’s argument that to breach the standard of fair and equitable treatment in the Treaty requires a showing of State conduct that is Neer-level “egregious” or “grossly unfair” is unsupported. Rather, the authorities show, as Claimant have demonstrated, that there is significant convergence in practice today among investment treaty tribunals as to the content of the standard of fair and equitable treatment, regardless of whether the standard is expressed as being tied to the customary international law minimum standard of treatment.

(b) The standard comprises several elements

505. Mexico criticizes the concept of legitimate expectations and states, with no support for its assertions, that “Claimant’s other points regarding the standard of fair and equitable treatment, that it includes transparency and due process, unreasonable and discriminatory measures, ‘acting for a proper purpose,’ and ‘good faith’ are trite, vague and do not provide useful guidance.”⁷⁹⁷ In effect, Mexico attempts to question the well-established concept of fair and equitable treatment under international law without any support for its assertions.

506. Mexico’s arguments rely exclusively on the fact that the fair and equitable treatment standard is open-textured and fact-specific in its application.⁷⁹⁸ This does not mean that the fair and equitable treatment standard is “vague” or cannot “provide useful guidance,” as Mexico contends.⁷⁹⁹ Despite being fact-specific, it is well established that “the terms ‘fair and equitable’ ... mean “just”, “even-handed”, “unbiased”, and “legitimate”⁸⁰⁰ and that, according to Prof. Dolzer, the purpose of the standard is “to fill gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties.”⁸⁰¹ It is also well established that the FET standard comprises specific categories, including the duties to

⁷⁹⁷ Statement of Defense, para. 642 (emphasis added).

⁷⁹⁸ See, eg, *MTD Equity Sdn. Bhd. & Anor. v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, **CL-110**, para 109 (“the meaning of what is fair and equitable is defined when that standard is applied to a set of specific facts” quoting Judge Steven Schwebel); see also C Schreuer, “Fair and Equitable Treatment (FET): Interactions with Other Standards” in: C Ribeiro (ed), *Investment Protection and the Energy Charter Treaty* (2008), **CL-185**, p. 38 (concluding that fair and equitable treatment “is indeed an overarching principle that finds its expression in a number of ways in different standards and concepts of modern investment law”).

⁷⁹⁹ Statement of Defense, para. 642.

⁸⁰⁰ *Saluka v. Czech Republic*, Partial Award, **CL-83**, paras. 297-298. See *MTD v. Chile*, Award, **CL-110**, para. 113; *Azurix v. Argentina*, Award, **CL-81**, para. 360.

⁸⁰¹ Dolzer and C. Schreuer, *Principles of International Investment Law* (2012), **CL-42**, p. 132.

safeguard legitimate expectations, provide transparency and due process, act for a proper purpose, refrain from arbitrary or discriminatory measures, and act in good faith.⁸⁰²

507. In the SOC, Claimant explained, at length, the content and the well-known categories of protection required under the FET standard, and how these categories were applicable to the case at hand, whether vis-à-vis executive decisions, administrative resolutions, criminal investigations, insolvency proceedings, or otherwise. Mexico’s arguments in no way refute Claimant’s articulation of the standard. Therefore, Claimant will make a brief reference to Mexico’s arguments on the legitimate expectations strand of the FET standard. And, given that Mexico’s arguments regarding the other strands of FET lack any substance, Claimant will only provide here a brief summary of those other variations of the standard.

(i) Safeguarding legitimate expectations

508. Mexico contends that the “concept of legitimate expectations has been much criticized”⁸⁰³ –but, for that proposition (“much criticized”), cites only a single decision by an *ad hoc* annulment committee. Mexico does not go so far as to deny that “legitimate expectations” is a part of the FET standard, but it does attempt to cast a shadow over the concept. That attempt is misguided and futile.

509. It is well-established that a cornerstone of the fair and equitable treatment standard is the requirement that investors be accorded a stable and predictable investment environment. Specifically, fair and equitable treatment includes the “obligation to treat foreign investors so as to avoid the frustration of investors’ legitimate and reasonable expectations.”⁸⁰⁴ In *Bayindir v*

⁸⁰² Mexico contends that Claimant has not provided “any evidence of customary international law standards relevant to bankruptcy and criminal systems.” This statement is untrue. Claimant has provided a thorough analysis of the FET standard, its content, and its interpretation by international tribunals in cases similar to this one for the tribunal to decide whether a violation of the standard occurred here. It is well-established that the “precise scope of the standard is... left to the determination of the Tribunal which ‘will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable.’” (*Rumeli v. Kazakhstan*, Award, **CL-68**, para 610 (internal citations omitted); see also *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award, April 4, 2016, **CL-55**, para 544)

⁸⁰³ Statement of Defense, para. 640.

⁸⁰⁴ *Saluka v. Czech Republic*, Partial Award, **CL-83**, para. 302.

Pakistan, the tribunal expressed this idea succinctly,⁸⁰⁵ and the seminal award in *Tecmed v Mexico* offers a particularly clear articulation in this regard:

The Arbitral Tribunal considers that this provision of the Agreement [FET], in light of the good faith principle established by international law, *requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments [...] The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions [...] that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.* The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.⁸⁰⁶

510. An investor may legitimately expect that a State will “conduct itself vis-à-vis his investment in a manner that [is] reasonably justifiable and [does] not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination.”⁸⁰⁷ Likewise, in *Saluka v Czech Republic*, the tribunal held that a foreign investor “is entitled to expect that the [host State] will not act in a way that is manifestly inconsistent, non-transparent, and unreasonable.”⁸⁰⁸ At very least, therefore, an investor can have the legitimate expectation that the conduct of the host State will be fair and equitable in the sense that it will not fundamentally

⁸⁰⁵ *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, August 27, 2009, **CL-111**, para. 178 (emphasis added). (“The Tribunal agrees with Bayindir when it identifies the different factors which emerge from decisions of investment tribunals as forming part of the [fair and equitable treatment] standard. These comprise the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion or from frustrating the investor’s reasonable expectations.”). See *Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, January 14, 2010, **CL-112**, para 284; *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No UN 3467, Final Award, July 1, 2004, **CL-113**, paras. 183, 186.

⁸⁰⁶ *Tecmed v. Mexico*, Award, **CL-47**, para 154 (emphasis added).

⁸⁰⁷ *Ioannis Kardassopoulos v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, March 3, 2010, **CL-80**, para. 441.

⁸⁰⁸ *Saluka v. Czech Republic*, Partial Award, **CL-83**, para 309.

contradict basic principles of its own laws and regulations. This includes, as noted by the tribunal in *Alpha v Ukraine*, a legitimate expectation that a State will not act “beyond its authority.”⁸⁰⁹

511. Mexico does not expressly dispute this articulation of the standard, but mischaracterizes it by asserting that “[a]llegations of violation of national law, general complaints of injustice, and *self-defined* ‘expectations’ are not sufficient to argue a violation of the standard on fair and equitable treatment.” Mexico’s play on words does little to advance its case. The FET standard does not prohibit “*allegations* of violation of national law,” as Mexico contends, but rather actual violations of national law. It does not prohibit “*complaints* of injustice” but rather actual injustice in the form of lack of consistency, transparency, even-handedness and non-discrimination. Finally, the standard does not protect “*self-defined* expectations,” as Mexico contends, but rather legitimate expectations. And Claimant has established here actual violations of national law, injustice, and legitimate expectations.

512. In sum, the FET standard protects the investor’s legitimate expectations that the State will conduct itself in a consistent, transparent, even-handed and non-discriminatory manner, will not act beyond its authority, and will not contradict its own laws and regulations.

(ii) Other elements of the standard

513. Claimant incorporates by reference paragraphs 358 to 378 of the SOC, where Claimant explained, at length, the different elements of the FET standard. For ease of reference, below is a brief summary.

514. *Transparency and due process.* These are fundamental elements of the fair and equitable treatment obligation. While they merit separate consideration as a subset of this standard, they are inextricably linked with the investor’s legitimate expectation of a stable and predictable legal framework. The focus under this limb of the standard is, however, more on *how* the government implements its measures against the investor, rather than on the measures themselves. In the recent case of *Gold Reserve v Venezuela*, the tribunal found that Venezuela’s measures had breached the fair and equitable treatment guarantee by “failing to ensure a

⁸⁰⁹ *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No ARB/07/16, Award, November 8, 2010, **CL-114**, para. 422.

transparent and predictable framework for [the investor’s] business planning and investment.”⁸¹⁰ The tribunal noted its belief that the reasons for the cancellation were not limited to those officially stated by the Ministry, but, rather, were to be found in “*the change of political priorities of the Administration... taken regarding mining of mineral reserves starting in late 2007 by the highest levels of authority.*”⁸¹¹

515. *Unreasonable and discriminatory measures.* This is also a fundamental element of the FET standard and the minimum standard of treatment. The standard of reasonableness of State conduct is flexible and broad, to be determined in light of all the circumstances of the case.⁸¹²

516. Most tribunals agree that arbitrary or discriminatory conduct is *per se* a breach of the FET standard.⁸¹³ The essence of the protection from arbitrary or discriminatory measures is that the State’s impugned decision must find a rational basis. Tribunals have accepted the following as arbitrary: (i) measures that inflict damage on the investor without serving any apparent legitimate purpose; (ii) measures that are not based on legal standards but on discretion, prejudice, or personal preference; and (iii) measures taken for reasons that are different from those put forward by the decision maker.⁸¹⁴

⁸¹⁰ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award, September 22, 2014, **CL-13**, para 609.

⁸¹¹ *Gold Reserve v. Venezuela*, Award, **CL-13**, para 580. The official reason conveyed by the Ministry of Mining for the cancellation of the mining rights was that the investor had not complied with certain obligations under the concessions. However, the tribunal noted that the allegations of non-compliance had never before been raised by the State and indeed contradicted years of written certifications issued by the same Ministry, suggesting that the investor had complied sufficiently with those obligations.

⁸¹² *CME*, Partial Award, **CL-62**, para 158. [t]he determination of reasonableness is in its essence a matter for the arbitrator’s judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behavior in light of the goals of the Treaty.

⁸¹³ See, e.g., *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, **CL-116**, para. 290; UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11 (Vol. III) (1999), **CL-117**, p. 37.

⁸¹⁴ *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, **CL-105**, para. 303; *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, **CL-112**, para. 262; *CME*, Partial Award, **CL-62**, para. 158 (“the determination of reasonableness is in its essence a matter for the arbitrator’s judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behavior in light of the goals of the Treaty”).

517. The *Gold Reserve v. Venezuela* case is instructive in this regard. There, the tribunal found there was a lack of fair and equitable treatment because decisions regarding permits and licenses were made on the basis of political policies and not applicable legal rules.⁸¹⁵ That reflected a lack of transparency as to the real reasons behind the decisions, which were taken entirely as a matter of political preferences, and also displayed a lack of good faith.⁸¹⁶

518. *Acting for a proper purpose.* A State is required to exercise its powers and take decisions for a proper purpose. In *Tecmed*, Mexico’s regulatory body for environmental issues refused to renew the claimant’s permit to operate a landfill. It did so, not because of the landfill’s environmental impact, but because the site had “become a nuisance due to political reasons relating to the community’s opposition”. The tribunal held that such politically-motivated conduct amounted to a breach of the fair and equitable treatment standard.⁸¹⁷ Similarly, the tribunal in *Azurix*, found that Argentina had breached the fair and equitable treatment standard as a result of the arbitrary actions of provincial authorities who intervened “for political gain” during a tariff dispute with ABA, which provided potable water and sewerage services.⁸¹⁸

519. In *Vivendi v. Argentina II*, the tribunal found that the State, improperly and without justification, had mounted an illegitimate “campaign” against the investment, which constituted a breach of the fair and equitable treatment standard.⁸¹⁹ In *Pope & Talbot v. Canada*, the tribunal found that the relevant government organ had:

changed its previous relationship with the Investor and the Investment from one of cooperation ... to one of threats and misrepresentation. Figuring in this new attitude were assertions of non-existent policy reasons for forcing them to comply with very burdensome demands for documents, refusals to provide them with promised information, threats of reductions and even termination of the Investment’s export quotas, serious misrepresentations of fact in memoranda to the Minister concerning the Investor’s and the

⁸¹⁵ *Gold Reserve v. Venezuela*, Award, **CL-13**, para. 581.

⁸¹⁶ *Gold Reserve v. Venezuela*, Award, **CL-13**, para. 581.

⁸¹⁷ *Tecmed v. Mexico*, Award, **CL-47**, paras. 164, 166.

⁸¹⁸ *Azurix v. Argentina*, Award, **CL-81**, para. 144.

⁸¹⁹ *Compañía de Aguas v. Argentina*, Award, **CL-52**, paras. 7.4.19-7.4.41.

Investment's actions and even suggestions of criminal investigation of the investment's conduct.⁸²⁰

520. *Good faith*. Good faith is one of the foundations of international law in general and of foreign investment law in particular.⁸²¹ Arbitral tribunals have confirmed that good faith is inherent in the concept of FET and minimum standard of treatment.⁸²² Several tribunals have confirmed that State conduct that is carried out in demonstrable lack of good faith will, of itself, constitute a breach of the obligation to afford FET.⁸²³

521. In *Bayindir v. Pakistan*, the investor claimed that its expulsion was based on local favoritism and on bad faith, since the reasons given by the government did not correspond to its actual motivation.⁸²⁴ The tribunal found that “the allegedly unfair motives of expulsion, if proven, are capable of founding a fair and equitable treatment claim under the BIT”.⁸²⁵ The *Frontier Petroleum* tribunal held that the concept of “bad faith”:

[i]ncludes a conspiracy by state organs to inflict damage upon or to defeat the investment, the termination of the investment for reasons other than the one put forth by the government, and *expulsion of an investment based on local favoritism*.⁸²⁶

522. It follows that action in bad faith against the investor is a violation of the FET standard.⁸²⁷ However, arbitral practice clearly indicates that the FET standard may be violated even if no *mala fide* is involved.⁸²⁸ FET, like the prohibition on unreasonable and discriminatory

⁸²⁰ *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award in Respect of Damages, May 31, 2002, **CL-119**, para. 68.

⁸²¹ See Dolzer and C. Schreuer, *Principles of International Investment Law* (2012), **CL-42**, pp. 156-58.

⁸²² See Dolzer and C. Schreuer, *Principles of International Investment Law* (2012), **CL-42**, pp. 156-158; *Waguih Elie George Siag and Corinda Vecchi v. Egypt*, ICSID Case No ARB/05/15, Award, June 1, 2009, **CL-78**, para. 450 (describing the principle that States must act in good faith as the “general, if not cardinal principle of customary international law”).

⁸²³ See, e.g., *Rumeli v. Kazakhstan*, Award, **CL-68**, para. 609; *Biwater v. Tanzania*, Award, **CL-82**, para. 602.

⁸²⁴ *Bayindir v. Pakistan*, Decision on Jurisdiction, **CL-120**, paras. 232-243.

⁸²⁵ *Bayindir v. Pakistan*, Decision on Jurisdiction, **CL-120**, para. 250.

⁸²⁶ *Frontier Petroleum Services Ltd v. Czech Republic*, UNCITRAL, Final Award, November 12, 2010, **CL-121**, para. 300 (emphasis added).

⁸²⁷ Dolzer and C. Schreuer, *Principles of International Investment Law* (2012), **CL-42**, p. 157.

⁸²⁸ See, e.g., *Occidental v. Ecuador*, Final Award, **CL-113**, para. 186 (“this is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not”).

measures, is an objective standard, and can be breached even where the State has acted in good faith.⁸²⁹

2. Mexico breached the fair and equitable treatment standard

523. In the SOC and in this Reply, Claimant has detailed the litany of breaches of the generally recognized “strands” of the FET standard that were committed by Mexico. Against this, Mexico merely claims (i) that the Measures “were taken in the normal course of proceedings and were reasonable;”⁸³⁰ and (ii) that “Claimant did not have legitimate expectations” since it did not conduct adequate due diligence on OSA or its shareholders, which should have raised several red flags, and there were no grounds to expect that the contracts with PEMEX would be renewed. Mexico’s allegations are meritless, and contradicted by the facts on the record.

524. Mexico abused its powers and conducted a politically motivated campaign against OSA and its business partners, adopting unlawful, unreasonable and arbitrary measures that served no proper purpose and were aimed at straining OSA’s finances, taking control of OSA and diverting OSA’s resources to the government.

525. *First*, as noted by senators of the Senate Committee, Mexico initiated a politically motivated campaign against OSA as “a hunt against [OSA,] the company [that had been] spoiled by PEP during the Calderón [administration],” as an act of “revenge against the PAN”⁸³¹ [Political Party], “to obtain a... cooperative attitude from that party...”⁸³² This campaign included Mexico’s abduction of, and coercion and threats exerted upon, a witness for him to sign a false statement accusing OSA. As in *Gold Reserve v Venezuela*, the reasons for Mexico’s actions were not limited to those officially stated, but, rather, were to be found in “*the... political priorities of the*

⁸²⁹ See, e.g., *Occidental v. Ecuador*, Final Award, **CL-113**, para. 186 (“this is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not”), (finding that the fair and equitable treatment standard represents “an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not”).

⁸³⁰ Statement of Defense, para. 646.

⁸³¹ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**.

⁸³² PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 1.

*Administration.*⁸³³ Mexico abused its powers and acted with no proper purpose. As in the *Frontier Petroleum* case, State action was based, not on legal premises, but “*on local favoritism.*”⁸³⁴

526. *Second*, Mexico unlawfully banned OSA from entering into any public contract, including with PEMEX, impairing OSA’s ability to perform on its contracts with the Subsidiaries and leading to its demise. This measure was unlawful, as shown by its subsequent revocation by Mexico’s own courts. Mexico plays down the relevance of the Unlawful Sanction because it “was lifted only five months after it was issued,” and because OSA purportedly stated that “the main cause of its problems was the financial fraud allegedly caused by Citibank.”⁸³⁵

527. As explained in this Reply, any dispute between the Parties over the relevance of the Unlawful Sanction is more apparent than real. Mexico admits that “[i]t is undisputed that Oceanografia’s viability depended on the OSA-PEP Contracts”⁸³⁶ that “[t]he terms of the OSA-PEP Contracts were effectively ending,”⁸³⁷ and that OSA could not obtain new contracts for the same services (renewals). It is undisputed that the Unlawful Sanction prompted the suspension of the OSA’s factoring with Citibank, which strained OSA’s finances even more. It is undisputed that, even after the Unlawful Sanction was suspended five months after it was issued, OSA could not resume participating in PEMEX tenders, because it could no longer meet PEMEX’s financial solvency and stability requirements.⁸³⁸ And it is undisputed that, in the wake of the Unlawful Sanction, OSA was never again awarded a single contract by PEMEX. Moreover, OSA has never stated that the Unlawful Sanction did not strain its finances irreparably, which would not be true. Moreover, as explained in the SOC, Mexico itself has acknowledged that the Unlawful Sanction was the proximate cause of OSA’s insolvency. Both SAE and the Insolvency Court acknowledged

⁸³³ *Gold Reserve v. Venezuela*, Award, **CL-13**, para. 580, The official reason conveyed by the Ministry of Mining for the cancellation of the mining rights was that the investor had not complied with certain obligations under the concessions. However, the tribunal noted that the allegations of non-compliance had never before been raised by the State and indeed contradicted years of written certifications issued by the same Ministry, suggesting that the investor had complied sufficiently with those obligations.

⁸³⁴ *Frontier v. Czech Republic*, Final Award, **CL-121**, para. 300. (Emphasis added).

⁸³⁵ Statement of Defense, para. 382.

⁸³⁶ Statement of Defense, para. 382.

⁸³⁷ Statement of Defense, para. 381.

⁸³⁸ Email from J. Phang to G. Seow *et al.*, July 18, 2014, **C-130**.

that this measure had led to OSA’s insolvency and, if not immediately suspended, could lead to OSA’s bankruptcy.⁸³⁹ The unlawfulness, arbitrariness and unreasonableness of this measure, and its impact over OSA, is beyond doubt. It reveals the government’s firm intention to sever OSA’s ties with PEMEX at all costs.

528. *Third*, Mexico initiated an unsupported criminal investigation against OSA for alleged money laundering, and requested the seizure of the whole company and all its assets, without any reasonable signs of criminal activity or any explanation why that seizure was necessary. Mexico’s claim that “[t]here were clear signs of illegal activity, including fraudulent invoices and indications of money laundering”⁸⁴⁰ to justify the investigation are baseless. As explained in this Reply, the UIF Complaint does not cite, mention, or analyze the allegedly “fraudulent invoices” submitted to Banamex. In fact, when the UIF was filed, the UIF did not have access to the Banamex complaint or the information included in that investigation. To the contrary, the UIF Complaint was based on a “different purported illegal origin of the funds, that is unrelated to Banamex, and that was never mentioned again by the public authorities in their investigations.”⁸⁴¹ Moreover, as Mr. Ruiz explained “[t]here is a stark contrast between the lack of evidence contained the UIF Complaint and the seriousness and exceptional nature of the measures requested by the UIF and subsequently ordered by PGR.”⁸⁴² In this case, “[t]here is no legal explanation for this completely unfounded request of such a grievous nature.”⁸⁴³ Mexico abused its investigative powers, and acted with the clear intention of taking control of OSA. Mexico has never denied that it never pressed any charges for money laundering—the investigation upon which it requested the seizure of OSA. This further illustrates the political nature of the investigation.

529. *Fourth, the day after* Mexico initiated its investigation for money laundering, Mexico seized all of OSA’s assets and took control of the whole company, a measure never before taken in the history of Mexico. Mexico abused its authority and acted for an improper purpose.

⁸³⁹ Statement of Claim, para. 330.

⁸⁴⁰ Statement of Defense, para. 647.

⁸⁴¹ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 39.

⁸⁴² Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 41.

⁸⁴³ Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 41.

Mexico expressly admitted that it ordered the seizure of OSA for purposes other than those established by law. The Seizure Order [REDACTED]

[REDACTED] But Mexico’s Federal Code of Criminal Prosecution, and Mexico’s own expert, are clear that the only proper purpose of a seizure is to preserve “the instruments, objects or products of the crime... so that these are not altered, destroyed or made to disappear.”⁸⁵¹ In addition, the Seizure Order did not meet the legal standard, since it was not “appropriate, pertinent, sufficient and indispensable.” Quite the contrary. The PGR relied [REDACTED] none of which showed any indicia of any crime. In fact, the evidence shows that *the PGR fabricated at least one of them* by threatening and coercing a witness to give false testimony. Moreover, the Seizure Order was excessive and disproportionate. The PGR “limited the scope of the alleged crime to the use of bank accounts by OSA, not to the entire corporate structure of the company.”⁸⁵² Therefore, as confirmed in Mexican jurisprudence, even if evidence of potential crimes had existed—which was not the case—the adequate, reasonable, proportionate measure would have been the attachment OSA’s bank accounts.

530. *Fifth*, Mexico appointed a relative of President Peña Nieto, with no experience in the OMS industry, as OSA’s administrator and awarded him a salary of USD30,000 per month. This clear act of nepotism further demonstrates the political agenda behind the Measures.

531. *Sixth*, Mexico unlawfully seized the ten vessels owned by POSH’s Subsidiaries. The Extension of the Seizure and the Detention Order specifically targeted POSH’s Subsidiaries and were fatally flawed. Mexico abused its power and acted for an improper purpose. In fact, the

⁸⁴⁴ Statement of Defense, para. 252.

⁸⁴⁵ Statement of Defense, para. 252.

⁸⁴⁶ Statement of Defense, para. 252.

⁸⁴⁷ Statement of Defense, para. 252.

⁸⁴⁸ Statement of Defense, para. 252.

⁸⁴⁹ Statement of Defense, para. 252.

⁸⁵⁰ Statement of Defense, para. 252.

⁸⁵¹ Federal Code of Criminal Procedures, **CL-6**, Art. 181.

⁸⁵² Second Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 109.

Extension of the Seizure [REDACTED]

[REDACTED] Under Mexican law, the only valid and legally permitted purpose for any seizure is to preserve the instruments or objects of the crime during the investigation.

532. The Extension of the Seizure further was unlawful, unreasonable and arbitrary under international law since it did not even mention what the alleged relationship was between the vessels and the alleged crime. The most glaring evidence is that Mexico's expert himself admitted that Mexico returned the vessels when POSH produced the pertinent documentation proving that the Subsidiaries owned the vessels. Had there been any actual relationship between the vessels and the alleged crime, POSH's ownership of the vessels would not have been a valid reason for their release. The Extension of the Seizure was also excessive and disproportionate for the same reasons as the Seizure Order. The PGR [REDACTED]

[REDACTED] Therefore, even if evidence of potential crimes had existed—which was not the case—the adequate, reasonable and proportionate measure would have been the attachment OSA's bank accounts.

533. *Seventh*, Mexico drove OSA into insolvency, acknowledging that the Unlawful Sanction had been the proximate cause of the insolvency. Mexico further suspended all payments to creditors, including the Subsidiaries, which had been previously blocked by SAE, and unlawfully diverted the payments owed by PEMEX to POSH via the Irrevocable Trust, through the Diversion Order. Mexico's attempts to claim that the Diversion Order is legal do not withstand the most superficial scrutiny.

534. The Diversion Order was unlawful, unreasonable and arbitrary. It “violated the rightful ownership by the Irrevocable Trust and its beneficiaries of the collection rights derived from the contracts executed between OSA and Pemex...” it “created an exception to the *pacta sunt servanda* that is prohibited by law,” and “unlawfully exceeded the scope of precautionary measures under Mexican Law.”⁸⁵³ Mexico abused its authority and acted for an improper purpose since the Diversion Order unlawfully authorized the transfer of OSA's assets to the government's

⁸⁵³ Second Expert Legal Opinion on Mexican Insolvency Law by Luis Manuel C. Meján, para. 121.c.

bank account. Mexico admits that “SAE requested that any sum of money in favor of Oceanografía be deposited *in an account in the SAE itself...*” but does not even attempt to explain its legal basis. This constituted a step further in the government’s campaign against OSA. Not only did the government take full control of OSA, but also funneled OSA’s resources to the government.

535. The Diversion Order also violated POSH and the Subsidiaries’ due process rights. The Irrevocable Trust created an independent legal relationship between PEMEX as debtor, and the Trust and its beneficiaries (the Subsidiaries) as PEMEX’s creditors, separate and apart from OSA. Any interference with this legal relationship required that the Trust and its beneficiaries be afforded an opportunity to be heard and to defend their lawfully acquired rights. The Insolvency Court, however, issued the Diversion Order on a precautionary basis, without ever holding an adversarial proceeding that would have allowed the Trust, Invex (the Trustee), POSH (the primary beneficiary) or GOSH (the secondary beneficiary) to be heard. This is a clear violation of the Mexican Constitution and the Treaty. The Diversion Order completely destroyed POSH’s Investment. It meant that POSH would not receive payments for the services rendered by the Subsidiaries regardless of whether OSA remained operative.

536. *Eighth*, Mexico’s own courts fully acknowledged that the Diversion Order was unreasonable, arbitrary and contrary to Mexican Law and the Mexican constitution. The Amparo Decision held that the Diversion Order violated Mexican law and the Mexican Constitution based on each of the grounds just discussed.

537. *Ninth*, Mexico violated the POSH and the Subsidiaries’ due process rights, by depriving them of their standing to challenge the Diversion Order. After the Amparo Decision had confirmed the unlawfulness of the Diversion Order, Mexico successfully challenged the Amparo Decision. In the Revision Decision, Mexican courts revoked the Amparo Decision on grounds that POSH did not have standing to challenge the Diversion Order. The Revision Decision did not reach the merits to assess whether the Diversion Order was contrary to Mexican Law and the Mexican Constitution, as confirmed by the Amparo Decision. The Revision Decision thus deprived POSH and the Subsidiaries of any means to challenge the Diversion Order in Mexican courts, despite that Order’s clearly harmful, destructive impact on their rights to receive payments

from PEMEX under the Irrevocable Trust. That loss of access to justice is a further, serious deprivation of due process.

538. *Tenth*, one year and a half after the Diversion Order, the 3d Collegiate court issued the Isolated Decision, which constitutes an impermissible *ex-post* attempt to justify the prior unlawfulness, arbitrariness and disproportionateness of the Diversion Order. The Isolated Decision held, *inter alia*, that the Irrevocable Trust and assignment of rights became automatically ineffective upon the declaration of insolvency. This decision was unlawful, unreasonably and arbitrary. To begin with, the Isolated Decision is not a binding precedent, is not the applicable law in Mexico, and has been overruled by subsequent decisions. The Isolated Decision was also unfounded, because it improperly declared that certain contracts were automatically ineffective, without following the specific procedures provided under Mexican law for that purpose. The Insolvency Court never issued a declaration of ineffectiveness, but rather indirectly deprived them of effect by unlawfully extending the effects of a precautionary measure to the Irrevocable Trust and Assignments of Rights, without hearing any of the interested parties thereunder. The Isolated Decision created a self-serving judicial exception to the principle of *pacta sunt servanda*, which is expressly prohibited by Mexican Law. Finally, the Isolated Decision did not even attempt to explain the legal basis for diverting the payments owed to OSA to the government's bank account instead. Evidently, as explained by Mr. Meján, "there was no legitimate or lawful reason to deviate OSA's resources to the government's bank account."⁸⁵⁴

539. *Eleventh*, Mexico arbitrarily prevented PEMEX from rescinding the contracts with OSA and replacing them with new contracts with the Subsidiaries. SAE refused to cancel OSA's contracts and the Insolvency Court prohibited PEMEX from rescinding them, fatally condemning POSH's operations in Mexico. This measure was unreasonable and arbitrary for three reasons:

One: SAE was aware, or had an obligation to be, that OSA could not receive new contracts while it was undergoing insolvency proceedings since it did not meet the necessary economic requirements therefor. Two: SAE was aware of, and had acknowledged, that without new contracts, OSA could not meet its obligations under the current contracts with Pemex. Three: SAE was aware of, and had acknowledged, that the breach of the Pemex contracts

⁸⁵⁴ Second Expert Legal Opinion on Mexican Insolvency Law by Luis Manuel C. Meján, paras. 63, 65.

resulted in conventional penalties, which would constitute claims against the estate...

The reasonable decision by the judge would have been to permit the rescission of the contracts. The reasonable decision by the Conciliator would have been to cancel the contracts in the interest of the estate.⁸⁵⁵

540. *Twelfth*, SAE engaged in gross misconduct and acted in a non-transparent manner in its administration of OSA. SAE created an obvious conflict of interest by serving simultaneously as OSA's Administrator, Visitor, Conciliator, and also as the Trustee in the Insolvency Proceeding. SAE received payments belonging to OSA in its own bank account in excess of USD\$71 million without ever accounting for its use of those funds. SAE behaved in an opaque manner throughout the Insolvency Proceeding. And SAE then forced OSA to release and hold it harmless from any liability to OSA it may have incurred. Mexico baldly denies these accusations without providing any plausible alternative explanations for SAE's actions, much less any proof of its assertions. The Senate Committee acknowledged SAE's opacity and breach of fiduciary duties in a report:

[i]t is not known whether SAE has performed crucial tasks regarding Oceanografía because of the opacity exercised in the preparation of the diagnosis of goods, assets and liabilities of the shipping company. SAE has also failed to provide the investigative commission of this Senate with the details of the technical assessment it should have made of Oceanografía in order to fully understand the nature of the fraud... It can be concluded that *SAE did not meet its fiduciary responsibilities in the Oceanografía case in terms of transparency and sufficient disclosure of information.*⁸⁵⁶

541. In sum, Mexico acted for an improper purpose, launching a political campaign against OSA based on its belief that the company had been favored by its political rivals. Mexico violated POSH's legitimate expectations that the State would "conduct itself vis-à-vis his investment in a manner that [is] reasonably justifiable and [would] not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination."⁸⁵⁷ Mexico

⁸⁵⁵ Expert Legal Opinion on Mexican Insolvency Law by Luis Manuel C. Mejan, para. 89.

⁸⁵⁶ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 15.

⁸⁵⁷ *Ioannis v. Georgia*, Award, **CL-80**, para. 441.

fundamentally disregarded the rule of law, acted “beyond its authority,”⁸⁵⁸ violated the investor’s due process and adopted the three generally-recognized types of arbitrary measures: those (i) that inflict damage on the investor without serving any apparent legitimate purpose; (ii) that are not based on legal standards but on discretion, prejudice, or personal preference; and (iii) that are taken for reasons that are different from those put forward by the decision maker.⁸⁵⁹

542. These arbitrary and discriminatory acts and omissions both together and in isolation constitute a breach of Mexico’s obligation under Article 4(1) of the Treaty to provide fair and equitable treatment to Claimants’ Investment.

D. MEXICO FAILED TO PROVIDE FULL PROTECTION AND SECURITY TO POSH’S INVESTMENT

543. Pursuant to Article 4(1) of the Treaty, Mexico undertook to “accord to investments of investors of [Singapore] treatment in accordance with customary international law, including... full protection and security.”⁸⁶⁰ As explained in the SOC,⁸⁶¹ the Measures adopted by Mexico breached this obligation to provide Claimant’s Investment with full protection and security (**FPS**) by fundamentally undermining the Investment’s legal framework and legal protections under Mexican law.

544. In the SOD, Mexico contends that “under customary law, FPS is only about an investor’s *physical security*. Nothing more”⁸⁶² and that Claimant has “repeated the same accusations in support of its claim of denial of full protection and security as it did for its claim of denial of fair and equitable treatment.”⁸⁶³ Mexico’s arguments are unavailing. As explained in the SOC and further detailed below, it is well established that the obligation to afford FPS

⁸⁵⁸ *Alpha Projektholding v. Ukraine*, Award, **CL-114**, para. 422.

⁸⁵⁹ *EDF. Romania*, Award, **CL-105**, para. 303; *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, **CL-112**, para. 262; *CME*, Partial Award, **CL-62**, para. 158 (“the determination of reasonableness is in its essence a matter for the arbitrator’s judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behavior in light of the goals of the Treaty”).

⁸⁶⁰ Mexico-Singapore BIT, **CL-1**, Art. 4(1).

⁸⁶¹ Statement of Claim, paras. 407-408.

⁸⁶² Statement of Defense, para. 663.

⁸⁶³ Statement of Defense, para. 672.

encompasses the obligation to provide legal security to the investments of foreign persons. Moreover, although the obligations to provide FPS and FET are separate and distinct, it is entirely possible for some of the same conduct, such as the arbitrary application of national law, to independently breach both obligations. It is well established, and indeed common in practice, that the same set of facts may violate different treaty obligations.

1. Observations regarding the standard

545. As detailed in the SOC, there is extensive authority recognizing that the obligation to provide full protection and security (**FPS**) requires states to afford both physical *and* legal protection to investors and their investments.⁸⁶⁴ Mexico claims, however, that “the FPS obligation of the minimum standard of customary international law treatment refers only to the physical security of investors”⁸⁶⁵ while citing only one case, *Suez v. Argentina*, in support of the proposition. Mexico’s allegations are misplaced and numerous tribunals have adopted the opposite view to that espoused by the single legal authority cited by Mexico.

546. In the SOC, Claimant demonstrated with reference to the Treaty that while the customary international law standard includes police protection against physical harms, it also requires legal protection and security, and that arbitrary action that undermines the legal security of an investment will violate the standard.⁸⁶⁶ As demonstrated by George Foster in a detailed monograph analyzing the origins of the full protection and security obligation,⁸⁶⁷ the customary international law minimum standard of treatment includes an obligation to provide protection and security for foreigners’ persons and property not only in relation to physical harm, but more generally and specifically including legal protection against harm to persons and property. Foster explains:

Protection and security obliges the host state to act with due diligence as reasonably necessary to protect foreigners’ persons and property, as well as to possess and make available an adequate *legal system*, featuring such

⁸⁶⁴ See Statement of Claim, Section X.D.2.

⁸⁶⁵ Statement of Defense, para. 664.

⁸⁶⁶ Statement of Claim, paras. 395-406 (discussing G. Foster, *Recovering “Protection and Security”: The Treaty Standard’s Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 VANDERBILT J. TRANSNAT’L L. 1095 (2012), CL-125).

⁸⁶⁷ G. Foster, “*Protection and Security*”, CL-125.

protections as appropriate remedial mechanisms, due process, and a right to compensation for expropriation.⁸⁶⁸

547. As such, the FPS standard is distinct, but overlaps with the customary obligation to provide fair and equitable treatment, which by contrast “concerns the manner in which the state treats the investment when interacting with it, requiring that the state act reasonably and in good faith.”⁸⁶⁹ Conduct that can violate both standards thus includes, *inter alia*, a denial of justice or an *arbitrary application of the law*.⁸⁷⁰ Mexico ignores this reasoning in its complaints that Claimant repeats “the same accusations” for both FET and FPS claims.

548. By tracing commentary, state practice, and *opinio juris*, Foster also demonstrates that the customary obligation to exercise reasonable diligence to provide protection and security was never limited exclusively to police protection in relation to physical harms, but also included the exercise of reasonable due diligence to ensure that legal protection and security was provided against economic losses⁸⁷¹ An additional recent extensive study of the historical origins and development of the full protection and security standard in international law by Professor Nartnirun Junngam further confirms this point.⁸⁷² Professor Junngam demonstrates that the standard has not been so limited historically, but has included protection from legal harms.⁸⁷³

549. Several tribunals confirm this position. In *Azurix v Argentina* the tribunal held that “when the terms ‘protection and security’ are qualified by ‘full’ and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.”⁸⁷⁴ The *Biwater Gauff v Tanzania* tribunal elaborated that “when the terms ‘protection’ and ‘security’ are qualified by ‘full’, the content of the standard may extend to matters other than physical security. It implies a State’s guarantee of stability in a secure environment both physical, commercial and legal. It would in the Arbitral Tribunal’s view be unduly artificial to confine the

⁸⁶⁸ G. Foster, “*Protection and Security*”, **CL-125**, p. 1103. (Emphasis added).

⁸⁶⁹ G. Foster, “*Protection and Security*”, **CL-125**, p. 1103.

⁸⁷⁰ G. Foster, “*Protection and Security*”, **CL-125**, p. 1103 (emphasis added).

⁸⁷¹ G. Foster, “*Protection and Security*”, **CL-125**, pp. 1116-1149.

⁸⁷² Nartnirun Junngam, *The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully Protected and Secured From?*, 7 AM. U. BUS. L. REV. 1 (2018), **CL-199**, p. 1.

⁸⁷³ N. Junngam, *The Full Protection and Security Standard*, **CL-199**, p. 91.

⁸⁷⁴ *Azurix v. Argentina*, Award, **CL-81**, para. 408.

notion of ‘full security’ only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments.”⁸⁷⁵ Moreover, in *National Grid P.L.C. v. Argentine Republic*, the tribunal reasoned that:

[I]n the context of the protection of investments broadly defined to include intangible assets, the Tribunal finds no rationale for limiting the application of a substantive protection of the Treaty to a category of assets—physical assets—when it was not restricted in that fashion by the Contracting Parties.⁸⁷⁶

550. These authorities demonstrate that it is not correct to conclude that the customary international law obligation to provide full protection and security is limited to the obligation to provide reasonable police protection against physical harm caused by third parties. As the Treaty incorporates the obligation as reflected in customary international law, it is not reasonable to interpret the Treaty’s protections in the limited manner that Mexico suggests.⁸⁷⁷

2. Mexico violated the obligation to provide full protection and security

551. As shown in the SOC, Mexico’s course of unlawful, arbitrary and disproportionate conduct in respect of POSH and the Subsidiaries deprived POSH’s investments of full protection and security in violation of the Treaty.⁸⁷⁸

552. Indeed, the same course of conduct described above in relation to Mexico’s failure to accord fair and equitable treatment to POSH’s Investment, as a composite act, also constituted an abject disregard of POSH’s legal, contractual, and other acquired rights and as such constituted a failure to provide full protection and security to POSH’s investments. Individual components of that course of conduct can also make out FPS violations on their own account.

⁸⁷⁵ *Biwater v. Tanzania*, Award, **CL-82**, paras. 729, 730 (the full protection and security standard is not “limited to a State’s failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself”).

⁸⁷⁶ *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, November 3, 2008, **CL-106**, para. 187.

⁸⁷⁷ Mexico’s reliance on the “customary international law” language in Article 4(1) of the Treaty is unavailing because of the MFN treatment provision set forth in Article 3(1) of the Treaty. In the event that the reference to “customary international law” in Article 4(1) operated to limit the obligation to provide FPS to physical security alone, Claimant invokes, for instance, the FPS standard set forth in Article 2 of the Mexico-Germany BIT,⁸⁷⁷ which does not contain the reference to “customary international law.”

⁸⁷⁸ Statement of Claim, p. 148.

553. This conduct primarily included, but was not limited to, the following:

- Mexico failed to honor the rule of law in the administrative proceeding resulting in the Unlawful Sanction, which led to OSA’s demise, and deprived POSH and its Subsidiaries of a stable and predictable environment. The Unlawful Sanction was contrary to Mexican law and minimal diligence on the part of the State would have sufficed to observe this. OSA was sanctioned based on a law governing anti-corrupt practices for a mere breach of contract.
- Mexico failed to honor the rule of law in the criminal investigations against OSA, adopting investigative measures without any indicia, even circumstantial, of a crime. Despite the lack of evidence, Mexico requested the seizure of OSA and all its assets.
- Mexico failed to respect the legal framework and to protect POSH’s Investment by unlawfully seizing all OSA’s assets and taking control over OSA. The seizure [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- Mexico failed to honor the rule of law by unlawfully detaining the ten vessels owned by POSH’s Subsidiaries. Not only Mexico failed to protect, but it actively attacked POSH’s Investment with the detention of the vessels. The Extension of the Seizure [REDACTED]
[REDACTED]
[REDACTED]
- Mexico failed to protect the investment made by POSH and its Subsidiaries during the insolvency proceeding against OSA. Mexico suspended payments to creditors and unlawfully deprived POSH, as beneficiary, of the payment owed by PEMEX to the Irrevocable Trust. Mexico’s own courts acknowledged that the Diversion Order was Unlawful.
- Mexico did not honor the rule of law and failed to provide legal security to POSH’s Investment, since it deprived POSH and the Subsidiaries of the standing to challenge the unlawful Diversion Order.
- Mexico did not honor the rule of law, nor did it respect the legal framework by issuing the Isolated Decision, which represents an unlawful ex-post attempt to justify the unlawfulness of the Diversion Order.
- Mexico failed to provide an objective, impartial and independent supervision of the Insolvency Proceeding, since “SAE... perform[ed] contradictory functions defending conflicting interests. It is not possible to defend the interests of the insolvent company and, at the same time, assess its financial situation with independence and objectivity, negotiate with the creditors or proceed with its sale.

Especially, when other state agencies (such as Pemex, the Mexican Institute of Social Security [IMSS], the National Workers' Housing Fund Institute [INFONAVIT], the Tax Administration Service [SAT]) are recognized creditors in the insolvency proceeding.”⁸⁷⁹

- Mexico failed to protect POSH's Investment by diverting funds from the Subsidiaries' only client—OSA—to the government's bank account. As a result, SAE received in excess of USD\$71 that are unaccounted for to date.⁸⁸⁰

554. In sum, the State's actions, including through its administrative, criminal and judicial bodies, withdrew and withheld legal protections from the investment made by POSH and its Subsidiaries in violation of its obligation to provide full protection and security under the Treaty. These wrongful failures of protection have cumulatively caused the complete deprivation of the use, value, and enjoyment of the investment. Mexico breached its “obligation of vigilance” and failed “to take all measures necessary to ensure the full enjoyment of protection and security of [the] investment ...”⁸⁸¹

XIII. CLAIMANT HAS PROVEN MEXICO'S BREACHES DESTROYED THE INVESTMENT

555. In the SOC, Claimant established that Mexico's breaches of the Treaty caused the destruction of the Investment (causation in fact), and that these damages were the natural and foreseeable consequences of Mexico's actions (legal causation). Mexico, however, claims that Claimant's losses were not caused by the Measures, but by “by OSA's own actions, third parties, and general market forces.”⁸⁸² Mexico's arguments are discussed and rebutted in the sections that follow.

⁸⁷⁹ Expert Legal Opinion on Mexican Insolvency Law by Luis Manuel C. Meján, para. 105.

⁸⁸⁰ Status of Account No. 0195530431 (produced by Respondent as Document 31.1 on December 5, 2019), **C-323**; Status of Account No. 0195530431 (produced by Respondent as Document 31.2 on December 5, 2019), **C-324**; Status of Account No. 0195530431 (produced by Respondent as Document 31.3 on December 5, 2019), **C-325**; Status of Account No. 0195530431 (produced by Respondent as Document 31.4 on December 5, 2019), **C-326**; Status of Account No. 0157851499 (produced by Respondent as Document 31.5 on December 5, 2019), **C-327**; Status of Account No. 0157851499 (produced by Respondent as Document 31.6 on December 5, 2019), **C-328**; Status of Account No. 0157851499 (produced by Respondent as Document 31.7 on December 5, 2019), **C-329**.

⁸⁸¹ *American Manufacturing and Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, February 21, 1997, **CL-124**, para. 6.05.

⁸⁸² Statement of Defense, para. 594.

A. THE CAUSATION STANDARD

556. As Mexico acknowledges, causation comprises two elements: factual causation and legal causation. Factual causation requires evidence of a “causal link” between the alleged *cause* of the damages (the breach of the Treaty) and the deleterious *effect* of the breach on the investment.⁸⁸³ As explained by the tribunal in *Lemire v. Ukraine*:

The causal link can be viewed from two angles: the positive aspect requires that the aggrieved party prove that an uninterrupted and proximate logical chain leads from the initial cause (in our case the wrongful acts of Ukraine) to the final effect (the loss in value of Gala); while the negative aspect permits the offender to break the chain by showing that the effect was caused – either partially or totally – not by the wrongful acts, but rather by intervening causes, such as factors attributable to the victim, to a third party or for which no one can be made responsible (like force majeure).⁸⁸⁴

557. A claimant may establish factual causation by proving either a “pure causal link[.]...”—that “the damage derives directly from the wrongful act without intermediary element”⁸⁸⁵—or a “transitive causal link[.]”—a causal link between the occurrence (e.g., a bankruptcy or insolvency) resulting in the loss and the wrongful act complained of.⁸⁸⁶ For example, where:

[A] State wrongfully arrests a vessel, thereafter the shipping company is forced into bankruptcy, and if its shareholders finally suffer a loss, the causal link between wrongful act and loss is transitive: the loss has not been caused directly by the arrest, but rather by the bankruptcy, which in its turn was caused by the wrongful action.

In the shipping example given above, the victim, in order to be entitled to compensation, would have to prove each element of the chain of events: that the arrest of the ship led to losses for the shipping company, that the losses led to its bankruptcy and that, as a consequence of the bankruptcy, the shareholders lost their investment. And vice versa: the State could

⁸⁸³ *Lemire v. Ukraine*, Award, **CL-132**, para. 163.

⁸⁸⁴ *Lemire v. Ukraine*, Award, **CL-132**, para. 163.

⁸⁸⁵ *Lemire v. Ukraine*, Award, **CL-132**, para. 164.

⁸⁸⁶ *Lemire v. Ukraine*, Award, **CL-132**, paras. 164-165.

escape responsibility if it could prove that some other cause (e.g. mismanagement) provoked the bankruptcy and the shareholders' loss.⁸⁸⁷

558. Legal causation, in turn, requires a showing that the consequences of the damaging actions were natural or foreseeable. As the tribunal in *Lemire v. Ukraine* explained:

If it can be proven that in the normal cause of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other.

[O]ffenders must be deemed to have foreseen the natural consequences of their wrongful acts, and to stand responsible for the damage caused. Proximity and foreseeability are related concepts: a chain of causality must be deemed proximate, if the wrongdoer could have foreseen that through successive links the irregular acts finally would lead to the damage.⁸⁸⁸

559. Accordingly, so long as the outcome is a natural or foreseeable consequence of the act, legal causation is satisfied. Both the factual causation and legal causation tests were met here.

B. MEXICO CAUSED CLAIMANT'S INJURIES

560. Claimant has established that its injuries were both caused by, and were the foreseeable consequence of, Mexico's Measures. Mexico claims, to the contrary, that the Measures were lawful and addressed to OSA, and that the damages were the result of OSA's own actions, the actions of third parties, Claimant's actions,⁸⁸⁹ or "market forces." According to Mexico, it seems that any and every conceivable event contributed to OSA's demise and the destruction of POSH's Investment—*except for* Mexico's targeted political "hunt"⁸⁹⁰ to bring down OSA (as the Measures were characterized by several Senators from the Senate Committee). That

⁸⁸⁷ *Lemire v. Ukraine*, Award, **CL-132**, paras. 165, 167. See also *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, October 21, 2002, **CL-214**, para. 160 ("[A] debate as to whether damages are direct or indirect is not appropriate. If they were caused by an event, engage [NAFTA] Chapter 11 and are not too remote, there is nothing... that limits their recoverability.").

⁸⁸⁸ *Lemire v. Ukraine*, Award, **CL-132**, paras. 169-170.

⁸⁸⁹ Mexico contends that Claimant would have assumed the risk of doing business with OSA. This argument overlaps with Mexico's request that damages be reduced due to the assumption of risk or contributory negligence. Therefore, Claimant will address the lack of merit of this argument below.

⁸⁹⁰ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, April 30, 2015, **C-135**, p. 4.

proposition is unsustainable, to put it generously. In prior sections, Claimant has already addressed the unlawfulness of the Measures. Here, Claimant will address how each measure affected POSH and the Subsidiaries, and ultimately destroyed their Investment.

1. The Measures caused the destruction of POSH's Investment

561. As already explained, the Measures both directly destroyed the viability of OSA, which was POSH's joint venture partner and the Subsidiaries' only client, and directly prevented Claimant and the Subsidiaries from collecting or generating any revenue from the vessels. These Measures naturally and foreseeably resulted in the destruction of the Investment. Mexico has not disputed the specific impact of any of the Measures on POSH, the Subsidiaries or the Investment.

562. *First*, Mexico candidly admits that “[i]t is undisputed that Oceanografía's viability depended on the OSA-PEP Contracts.”⁸⁹¹ Claimant agrees. OSA was PEMEX's largest contractor: since 2003, it had entered into over 150 contracts with PEMEX, with 45 awarded in the 2011-2013 period.⁸⁹² OSA's contracts with PEMEX represented 97% of its income.⁸⁹³ OSA relied on those contracts to obtain cash flow to operate the vessels and pay its debts, including debts to POSH's Subsidiaries. Without the contracts, OSA would be forced to shut down.

563. *Second*, Mexico also maintains that “there are no automatic renewals or extensions of [PEMEX's] contracts...”⁸⁹⁴ PEMEX's contracts are awarded through public procurement procedures.”⁸⁹⁵ Claimant again agrees. As explained in the Fact Section of this Reply, this means that, for companies such as OSA that are entirely reliant on PEMEX contracts, a sanction banning them from entering into any public contracts has two devastating effects: (i) the company cannot obtain new contracts for any *new services*, so it cannot grow its business; and most importantly, (ii) when its current contracts start expiring, the company cannot secure renewals (*i.e.*, contracts for the *same services* it was already rendering) and so it cannot even maintain its business. In practice, the award of PEMEX contracts for the same services typically operate like renewals, in

⁸⁹¹ Statement of Defense, para. 382.

⁸⁹² Letter from J. Márquez Serralde to Senator L. Hernández Lecona, October 23, 2014, **C-124**.

⁸⁹³ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.'s case, Report of the period between September 2017 and April 2018, **C-125**, p. 5.

⁸⁹⁴ Statement of Defense, para. 487.

⁸⁹⁵ Statement of Defense, para. 208.

which the company that was previously rendering the services is awarded the contract again, and again.⁸⁹⁶ That was OSA's consistent experience with PEMEX. Indeed, "OSA's fleet ha[d] been operating at nearly 100% capacity over the last 10 years."⁸⁹⁷

564. *Third*, the Unlawful Sanction banned OSA from entering into any public contract, including with PEMEX, cutting off OSA's lifeblood and irreparably damaging its finances. During the time that the Unlawful Sanction was in force, OSA's contracts with PEMEX were expiring, as Mexico admits: "[t]he terms of the OSA-PEP Contracts were effectively ending."⁸⁹⁸ OSA needed to obtain new contracts for the same services (renewals) in order to keep its fleet active at the vessels' existing locations and generating revenues, but it was barred from bidding for those contracts (or any others). As a result, OSA's financial situation rapidly deteriorated, and so did its ability to perform on the contracts with POSH's Subsidiaries. It is undisputed that, by the time the Unlawful Sanction was suspended in July 2014, OSA was insolvent, had stopped performing on its contracts with the Subsidiaries, and could no longer meet PEMEX's financial requirements to bid for any new public tenders in the future.⁸⁹⁹ That is, OSA could no longer contract with PEMEX, which was effectively its only client.

565. As explained in the Fact Section of this Reply, any dispute as to the relevance and effect of the Unlawful Sanction is more apparent than real.⁹⁰⁰ The record shows that the Unlawful Sanction was a death sentence for OSA and for POSH's Investment. It damaged OSA's finances irreparably and destroyed the main reason and premise for POSH's Investment. As explained by the tribunal in *UP and C.D. Holding Internationale v. Hungary*, Hungary's eviction of "Claimants' Hungarian subsidiary from a market "represent[ing] 97% of its business" placed the subsidiary "in a desperate position *within months*" and that the measure rendered the subsidiary's collapse "inevitable."⁹⁰¹ The same was true here.

⁸⁹⁶ OECD, *Fighting Bid Rigging in Public Procurement: A review of the procurement rules and practices of PEMEX in Mexico*, 2016, **C-289**.

⁸⁹⁷ Citigroup Management Presentation "Oceanografia", January 2014, **C-248**, p. 29.

⁸⁹⁸ Statement of Defense, para. 381.

⁸⁹⁹ Email from J. Phang to G. Seow *et al.*, July 18, 2014, **C-130**

⁹⁰⁰ *See* paras. 140-141, *supra*.

⁹⁰¹ *UP and C.D. v. Hungary*, Award, **CL-197**, paras. 352-353.

566. *Fourth*, Mexico acknowledges that the Unlawful Sanction was the direct cause of subsequent joint investigations launched by Mexico and Banamex to examine OSA’s factoring facility: “[the Unlawful Sanction] caught the attention of Citibank and generated an investigation regarding the financial factoring between Banamex and Oceanografía...⁹⁰² [and] Citibank and Pemex jointly performed a review of the documentation of the financial factoring system”⁹⁰³ As a result, Banamex suspended OSA’s factoring facility. It was entirely foreseeable that severing OSA’s access to credit would cripple its ability to operate. The Unlawful Sanction and the Factoring Investigation drove OSA—the Subsidiaries’ only client—into insolvency. Mexico rendering OSA insolvent naturally resulted in OSA’s inability to pay its suppliers, including the Subsidiaries.

567. *Fifth*, Mexico directly took control of OSA through the Seizure Order and appointed a relative of President Peña Nieto as OSA’s administrator. This measure directly impacted POSH since, upon taking control of OSA, the State effectively blocked the payments of OSA’s debts to the Subsidiaries. There is no question that the State’s decision to suspend payment of charter hire to the Subsidiaries is the direct and proximate cause of the damage to the Subsidiaries.

568. *Sixth*, in addition to seizing OSA’s assets, Mexico also unlawfully seized the ten vessels owned by POSH’s subsidiaries which had been chartered to OSA. For several months, the Subsidiaries were deprived of their main income-generating asset. Evidently, this measure directly caused damages to the Subsidiaries since they could not re-deploy the vessels elsewhere nor could they obtain charter hire from third parties.

569. *Seventh*, Mexico had effectively blocked payments owed by OSA to POSH’s subsidiaries upon taking control of OSA, and officially suspended all payments to creditors within the insolvency proceeding. Moreover, Mexico specifically targeted POSH and unlawfully diverted the payments owed by PEMEX to POSH under the Irrevocable Trust, to the government’s bank

⁹⁰² Statement of Defense, para. 215.

⁹⁰³ Statement of Defense, para. 216.

account. This measure further deprived POSH's subsidiaries from any income, value or use of the contracts with OSA.

570. *Eighth*, Mexico blocked the Subsidiaries from contracting directly with PEMEX. PEMEX feared that OSA's insolvency would hinder its operations and was willing to rescind its contracts with OSA and assign new contracts directly to POSH's subsidiaries. However, SAE and the insolvency Court prevented PEMEX from rescinding these contracts. These actions directly impacted POSH's subsidiaries, preventing them from earning a return on POSH's vessels through PEMEX, which was POSH's ultimate client in Mexico.

571. *Ninth*, the State diverted payments owed to POSH, via the Irrevocable Trust, to SAE's bank account. This way, SAE obtained in excess USD\$71million that were never accounted for. This measure further debilitated OSA's finances and viability within the insolvency proceeding.

572. In sum, Mexico's acts and omissions deprived POSH and its Subsidiaries of the value, use and benefit of their investment. Mexico was the direct cause of the destruction of the Investment. Mexico drove OSA into insolvency through the Unlawful Sanction and the Factoring Investigation. Mexico detained the vessels for several months. Mexico stopped payments to the Subsidiaries and diverted payments owed to POSH, via the Irrevocable Trust, to the government's bank account instead. Mexico prevented the Subsidiaries from contracting directly with PEMEX. As a result of Mexico's acts and omissions, the Subsidiaries did not receive any payments from the contracts with OSA and POSH could not contract directly with PEMEX either. There was no cash flow, no activity and, for several months, no vessels. This led to POSH's subsidiaries' default on the loans granted to finance the acquisition of the vessels, which were then enforced and the vessels sold to use the proceeds as re-payment for the loans. As of February 2015, one year after Mexico initiated its political campaign against OSA, POSH's subsidiaries had no vessels, no contracts with OSA, and no possibility to contract with PEMEX. The impact on Claimant's Investment was the direct and foreseeable consequence of Mexico's Measures.

573. In a similar case, the tribunal in *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine* explained that:

As stated in Article 31(1) of the ILC Articles on State Responsibility, “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.” Respondent has presented arguments that its acts did not cause the harm in question under a standard that considers either whether the acts were a “proximate” cause of the harm or whether the harm was a “foreseeable” result of the acts. The Tribunal finds that the action taken by Respondent in ordering that the ship not leave the territorial waters of Ukraine caused the harm to Claimants under either standard discussed by Respondent. As a direct result of that instruction, Claimants had to cancel the 2006 sailing season. *It is irrelevant that there was some uncertainty about the duration of the travel ban in the first few days after the ban was issued, or that Claimants continued to try to do business for some time in the hope that the ban would be lifted. The ban was wrongful and should never have been imposed. As it remained in place beyond the start of the 2006 season, Claimants did what was necessary to cancel the bookings. The ban remained in force for a year, and, at that point, the damage to Claimants became irreversible.*⁹⁰⁴

2. Prior to this arbitration, Mexico acknowledged that the Unlawful Sanction was the proximate cause of OSA’s insolvency

574. As explained in Section VII.B above, any dispute about the impact or relevance of the Unlawful Sanction on OSA’s viability is more apparent than real.⁹⁰⁵ Mexico has acknowledged in this arbitration that OSA’s viability depended entirely on the contracts with PEMEX and that the Unlawful Sanction severed OSA’s income stream, because the PEMEX contracts started to expire and OSA was banned from entering into new ones. Mexico has already acknowledged this. Prior to the commencement of this arbitration—when Mexico did not need to adopt a litigation strategy—both SAE and the Insolvency Court acknowledged that the Unlawful Sanction had rendered OSA insolvent and, if not immediately suspended, would lead to OSA’s liquidation.

575. As explained in the SOC, on May 6, 2014, SAE—the State entity—filed the Answer to the Insolvency Claim on behalf of OSA, underscoring that the Unlawful Sanction was seriously undermining OSA’s viability, as some contracts with PEMEX had expired and OSA was not eligible to enter into new ones:⁹⁰⁶

⁹⁰⁴ *Inmaris v. Ukraine*, Award, **CL-198**, para. 381.

⁹⁰⁵ *See* paras. 140-41, *supra*.

⁹⁰⁶ Insolvency Court decision (declaring the insolvency of Oceanografía S.A. de C.V.), July 8, 2014, **C-182**, p. 24.

In addition to the foregoing, it is important to highlight that the main client of the alleged insolvent is Pemex Exploration and Production; as the services contracts that were entered into have started to become due and considering that according to the circular published in the Federation's Official Gazette on February 11, 2014, the company is currently disqualified by the Public Function Secretariat through Pemex Exploration and Production's Internal Control Organ, thus it cannot take part in new tenders and/or celebrate additional contracts.⁹⁰⁷

576. The effects of the Unlawful Sanction were so devastating to OSA's finances that, on June 5, 2014, SAE sought interim relief from the Insolvency Court suspending its effects. SAE explained, with a great level of detail, the Unlawful Sanction's fatal consequences on OSA's long-term viability:

- (i) SAE explained that the Unlawful Sanction prevented OSA from contracting with its main client, PEMEX:

The disqualification referred to herein, decided by Pemex Exploration and Production's Internal Control Organ, means that Oceanografía, S.A. de C.V. is unable to take part in new tenders and to enter into new contracts which constitute the company's main source of income...⁹⁰⁸

- (ii) SAE noted that, following the issuance of the Unlawful Sanction, *40% of the contracts with PEMEX had expired or been terminated*, and that the income of the company was severely limited as a result:

[i]t needs to be considered that nearly *40% of the contracts that Oceanografía had entered into and from which received an income, have expired (10 contracts) or have been terminated (5 contracts)*,

⁹⁰⁷ Insolvency Court decision (declaring the insolvency of Oceanografía S.A. de C.V.), July 8, 2014, **C-182**, p. 24. Translated by counsel from the original in Spanish. ("Adicional a lo anterior, es importante destacar que el principal cliente de la presunta concursada es Pemex Exploración y Producción; siendo que los contratos de prestación de servicios que en su momento fueron celebrados han empezado a vencer y considerando que conforme a la circular publicada en el Diario Oficial de la Federación el día 11 de febrero de 2014, el comerciante se encuentra inhabilitado por parte de la Secretaría de la Función Pública a través del Órgano Interno de Control de Pemex Exploración y Producción, por lo que no puede participar en nuevas licitaciones y/o celebrar contratos adicionales.")

⁹⁰⁸ Writ filed by Servicio de Administración y Enajenación de Bienes, June 26, 2014, **C-184**, p. 2. Translated by counsel from the original in Spanish. ("La inhabilitación de referencia, que resolvió el Órgano Interno de Control en Pemex Exploración y Producción, trae como consecuencia que Oceanografía, S.A. de C.V. esté imposibilitada para participar en nuevos procedimientos de contratación, así como para celebrar nuevos contratos con quien representa su principal fuente de ingresos [...]").

so the number of contracts that can provide income to the alleged insolvent has been sensibly reduced in the last months.⁹⁰⁹

- (iii) SAE indicated that the Unlawful Sanction also limited the cash flow on which the company relied to operate the vessels and pay salaries:

These conditions substantially restrict the cash flow needed to operate and pay the salaries of the employees required to continue rendering services.⁹¹⁰

- (iv) SAE warned that the Unlawful Sanction would paralyze the company, preventing it from generating any income, ultimately resulting in the cancelation of operations and contracts:

In the event that Oceanografía, S.A. de C.V. is prevented from participating in tenders for new contracts, this would cause the stagnation of the insolvent company, limiting the exercise of the company's purpose for which it was created, preventing new income and displacing it from the market, which in turn would lead to the cancellation of its operations and contracts with subcontractors, providers, workers, etc., with the fatal consequences that this would entail, in particular for the employees of the alleged insolvent.⁹¹¹

- (v) Although SAE noted that there were PEMEX tenders in which OSA could participate in order to obtain contracts and generate cash flow,⁹¹² that statement was not true. OSA was not able to bid for those contracts.

⁹⁰⁹ Writ filed by Servicio de Administración y Enajenación de Bienes, June 26, 2014, **C-184**, pp. 2-3.. Translated by counsel from the original in Spanish. (“[e]s de considerar que cerca del 40% de los contratos que Oceanografía S.A. de C.V. tenía en operación y de los cuales recibía algún recurso, han concluido su vigencia (10 contratos) o bien han sido rescindidos (5 contratos), por lo que el número de contratos que pueden proveer de recursos a la presunta concursada se ha visto sensiblemente reducido en los últimos meses.”)

⁹¹⁰ Writ filed by Servicio de Administración y Enajenación de Bienes, June 26, 2014, **C-184**, p. 3. Translated by counsel from the original in Spanish. (“Estas condiciones restringen de manera sustancial el flujo necesario para operar y pagar la nómina de los empleados requeridos para continuar la prestación de los servicios.”)

⁹¹¹ Writ filed by Servicio de Administración y Enajenación de Bienes, June 26, 2014, **C-184**, p. 4. Translated by counsel from the original in Spanish. (“En el evento de que se impida a Oceanografía, S.A. de C.V. participar en licitaciones de nuevos contratos, provocaría el estancamiento de la concursada, limitando el ejercicio del objeto para el que fue constituida, impidiendo el ingreso de nuevos recursos y permitiendo que sea desfasada del mercado, lo que a la postre conduciría a la cancelación de sus operaciones y contratos con los subcontratistas, proveedores, trabajadores, etc., con las funestas consecuencias que ello acarrearía, de manera particular para los trabajadores de la presunta concursada.”)

⁹¹² Writ filed by Servicio de Administración y Enajenación de Bienes, June 26, 2014, **C-184**, p. 5. Translated by counsel from the original in Spanish. (“De acuerdo a la información publicada en el “Programa Anual de Adquisiciones, Arrendamientos, Obras y Servicios Actualización 2014” por PEMEX Exploración y Producción.... la presunta concursada podría participar en diversas licitaciones, considerando que cuenta con la experiencia y capacidad operativa. En caso de que la concursada fuese favorecida con los fallos correspondientes, y contara con recursos suficientes para proporcionar los servicios ofertados, generaría un

- (vi) Finally, SAE warned that the Unlawful Sanction would only aggravate the company's finances, placing it under an imminent risk of complete collapse:

The requested interim measure will prevent the aggravation of the company's financial situation and, indeed, addresses the imminent risk that Oceanografía, S.A. de C.V., would completely shut down its operations putting at risk, not only the employment sources, but also, in some way, the oil exploitation by the Mexican State through Pemex Exploration and Production.⁹¹³

577. SAE's words were categorical. The State entity acknowledged that OSA relied on public contracts to operate and that the Unlawful Sanction would irreparably limit OSA's cash flow and result in a complete shutdown of OSA's operations. SAE was correct.

578. The Insolvency Court—another State organ—concurred with SAE's analysis. On July 8, 2014, the Insolvency Court issued its judgment on the Insolvency Claim (the Judgment),⁹¹⁴ acknowledging that OSA's contracts with PEMEX were expiring or being terminated, and that OSA was not eligible to renew them or enter into new ones. The Insolvency Court reiterated that the Unlawful Sanction undercut OSA's ability to operate and pay its obligations, since 40% of its regular income (the contracts with PEMEX) had already vanished:

[F]ederal instrumentalities, must abstain from accepting proposals or entering into contracts with Oceanografía, S.A. de C.V., as it is disqualified for the term of a year, nine months, and twelve days, so it cannot take part in new contracting proceedings with Pemex Exploration and Production. Under this scenario, in the words of Petitioner, *close to forty per cent of the contracts with Oceanografía, S.A. de C.V., have expired (ten contracts) or have been terminated (five contracts), which substantially limits the flow needed to operate and pay its employees' payroll needed to continue with the rendering of services, in this sense and concerning the legislation that*

número considerable de fuentes de empleo, así como un impacto positivo en la economía de la sonda de Campeche.”)

⁹¹³ Writ filed by Servicio de Administración y Enajenación de Bienes, June 26, 2014, **C-184**, p. 4. Translated by counsel from the original in Spanish. (“La medida cautelar que se solicita evitará que se agrave la situación financiera de la empresa y desde luego acota el riesgo inminente de que Oceanografía, S.A. de C.V., suspenda por completo sus operaciones poniendo en riesgo no sólo las fuentes de empleo, sino de alguna manera la explotación petrolera que lleva a cabo el Estado Mexicano a través de Pemex Exploración y Producción.”)

⁹¹⁴ Insolvency Court decision (declaring the insolvency of Oceanografía S.A. de C.V.), July 8, 2014, **C-182**.

regulates Pemex Exploration and Production, it is prevented from contracting with the insolvent.⁹¹⁵

579. To address its fatal consequences for OSA, the Insolvency Court ordered the suspension of the Unlawful Sanction.⁹¹⁶ The court's own words (transcribed above) clearly indicate the rationale for the suspension—*the court believed that these measures had led to OSA's insolvency and, if not immediately suspended, could bankrupt OSA*. The interim measures came too late, however, because, by that point, OSA could no longer qualify for PEMEX's contracts.

580. It is therefore undisputed that Mexico has itself acknowledged, prior to the commencement of this arbitration—when Mexico did not need a litigation strategy—that the Unlawful Sanction was the proximate cause of OSA's insolvency, which in turn led to OSA's demise and its inability to perform on the Charters entered into with the Subsidiaries. Mexico is bound by, and cannot contest, its own actions (*venire contra factum proprium*).

3. OSA was a viable company and had solid prospects for the future

581. In order to deflect its own responsibility, Mexico claims that the cause of OSA's demise was “the substantial financial and operating problems that OSA was undergoing, including its contractual problems with the Claimant,”⁹¹⁷ while also vaguely referring to unspecified “general market forces”⁹¹⁸ and unidentified “third parties.”⁹¹⁹ As explained in the Facts Section of this Reply, these allegations are both unsupported and untrue. Mexico does not produce a single contemporaneous, third party document providing a fair and truthful assessment of OSA's finances

⁹¹⁵ Insolvency Court decision (declaring the insolvency of Oceanografía S.A. de C.V.), July 8, 2014, **C-182**, p. 37. Translated by counsel from the original in Spanish: “[f]ederativas, que deberán abstenerse de aceptar propuestas o celebrar contratos con Oceanografía, sociedad anónima de capital variable, por encontrarse inhabilitada por el plazo de un año, nueve meses y doce días, por lo que no puede participar en nuevos procedimientos de contratación con Pemex Exploración y Producción. Situación por la cual, a decir de la promovente, cerca del cuarenta por ciento de los contratos de Oceanografía, sociedad anónima de capital variable, han concluido su vigencia (diez contratos) o bien han sido rescindidos (cinco contratos), lo que limita de manera sustancial el flujo necesario para operar y pagar la nómina de los empleados que se requieren para continuar con la operación de servicios, de esta manera y atendiendo a la legislación que rige a Pemex Exploración y Producción, el impide contratar con la concursada.”

⁹¹⁶ Insolvency Court decision (declaring the insolvency of Oceanografía S.A. de C.V.), July 8, 2014, **C-182**, pp. 33-34.

⁹¹⁷ Statement of Defense, para. 697.

⁹¹⁸ Statement of Defense, para. 694.

⁹¹⁹ Statement of Defense, para. 694.

or value as of the end of 2013. Even if OSA were under any short-term financial strains at the time, as explained in this Reply, the documents on the record demonstrate that they did not affect OSA's long-term viability.

582. As a threshold point, as explained in the Fact Section, OSA's financial strains were partially caused, and certainly aggravated, by the PEMEX's recurrent delays in payment, OSA's only client and the source of 97% of OSA's income. Thus Mexico—through PEMEX—is largely at fault for any cash flow strains that may have affected OSA. In fact, PEMEX regularly incurred two types of delays in its payments to OSA, both of which, as explained by Mr. Montalvo, “are consistent with PEMEX's normal business practices.”⁹²⁰ First, at times of tight liquidity, “PEMEX would delay the issuance of the COPADE document with respect to work that was completed by OSA, which prevented OSA from issuing the relevant invoice(s). Second, “even after OSA did issue the relevant invoice(s) for services performed, PEMEX would further delay actually paying the invoices.”⁹²¹ OSA maintained numerous contracts with PEMEX, however, which generated recurrent cash flows and secured its long-term financial position. The most noteworthy evidence is that, by 2013, an independent third party valued OSA's existing contracts with PEMEX at USD\$2.73 billion.⁹²²

583. *Second*, Mexico has not produced a single contemporaneous, independent document showing any different view of OSA's financial situation at the end of 2013.⁹²³ As explained above, OSA did face occasional financial strains, which affected OSA's short-term

⁹²⁰ Second Witness Statement by José Luis Montalvo, para. 8.

⁹²¹ Second Witness Statement by José Luis Montalvo, para. 8.

⁹²² Citigroup Management Presentation “Oceanografía”, January 2014, **C-248**, p. 25.

⁹²³ Mexico only produced a document containing OSA's financial statements for the year 2013 (Oficio DCEAF/DEAECM/047/2014 del SAE dirigido a la PGR del 4 de abril de 2014, **R-023**) which was prepared by SAE, as OSA's administrator, in *January 2015*. As a result of all the Measures adopted by Mexico against OSA, the lack of documentary evidence given by SAE to the auditor, and the fact that the statements do not include the information pertaining to four of OSA's most profitable subsidiaries (Caballo Frión Arrendadora, S.A. de C.V., Arrendadora Caballo del Mar II, S.A. de C.V., Arrendadora OSA Goliath, S.A. de C.V., and Ultramar Unipessoal, LDA) the auditor refused to issue an opinion confirming that the financial statements presented a true and accurate view of OSA's financial situation. This self-serving document was prepared by SAE in January 2015 and, according to the auditor, does not reflect an accurate view of OSA's finances. This document is not apt to prove OSA's financial condition by the end of 2013.

liquidity but did not impair OSA's long-term viability, as demonstrated by the independent third party valuations of OSA produced by Claimant.

584. As of the end of 2013, prior to the Measures, Citigroup's Latin America Investment Banking Group prepared an investor presentation describing OSA's business and finances, including the cash flow from its contracts with PEMEX. In the Citigroup Valuation, major financial institutions (Citigroup, BBVA, and Bancomer) valued OSA at around USD\$3.5 billion.⁹²⁴ This figure was in line with, and more bullish than other, earlier, independent, third-party valuations of OSA. In September 2013, for example, Blackstone Energy Partners valued OSA at USD\$2.8 billion.⁹²⁵ And the prior year Advent International, another private equity firm, had valued OSA at USD\$2.6 billion.⁹²⁶ As explained in the Fact Section of this Reply, a closer look at the Citigroup Valuation reveals not only OSA's viability at the time, but also its solid prospects for the future.⁹²⁷

585. *Third*, Mexico does not specify, nor does it attempt to support, its assertion that "general market forces" or "third parties" contributed to OSA's demise.⁹²⁸ In the event that Mexico is referring to the downturn in the offshore market that started at the end of 2014, the suggestion is obviously inapposite. POSH's Investment was entirely destroyed by that time. Even if the Investment had not already been destroyed by that time, Ms. Richards has explained that the decline in the Mexican offshore market beginning in late 2014 was cyclical and of limited duration.⁹²⁹ Further, the decrease in oil prices did not substantively impact PEMEX's capital investments or the growth prospects of the Mexican OSV market over the forecast period.⁹³⁰

⁹²⁴ Citigroup Management Presentation "Oceanografia", January 2014, **C-248**, p. 28. The Citigroup Valuation was later echoed by the press: "Oceanografia... Latin America's largest oil and gas company, was reportedly valued at about \$3.5 billion." Lorraine Bailey, *Oil Firm Accused of Fraud Points Finger at Citibank*, March 1, 2017, **C-247**.

⁹²⁵ Summary of Terms between Oceanografia S.A. de C.V., and Blackstone Energy Partners L.P., September 1, 2013, **C-249**.

⁹²⁶ Letter from Advent International to Oceanografia S.A. de C.V., November 21, 2012, **C-250**.

⁹²⁷ *See* paras. 99-107, *supra*.

⁹²⁸ Statement of Defense, para. 694.

⁹²⁹ Second Expert Industry Report by Jean Richards, para. 4.26.

⁹³⁰ Second Expert Industry Report by Jean Richards, para. 2.4.

C. MEXICO’S THEORIES FOR THE REDUCTION OF DAMAGES ARE INAPPOSITE

586. Mexico invokes three theories for reducing the amount of damages sustained by POSH and the Subsidiaries. According to Mexico, Claimant’s damages resulted from investment risks that Claimant assumed; Claimant’s negligence contributed to its losses; and Claimant did not appropriately mitigate its own damages. Mexico does not even attempt to explain the third theory (mitigation of damages) and reserves its right to do so in the future—a transparent, tactical move to improperly try to prevent Claimant from addressing and rebutting Mexico’s position.⁹³¹ In addition, Mexico’s arguments under the first and second theories are entirely without merit. Claimant adequately assessed the risks associated with the investment, and Claimant’s losses are attributable to the Measures, not to any lack of diligence on Claimant’s part.

1. Assumption of risk and contributory negligence

587. Mexico claims that Claimant did not adequately assess the *investment risks* associated with “enter[ing] into a supply contract with OSA,”⁹³² “chos[ing] to include Mr. Yáñez and Mr. Díaz as shareholders in GOSH,”⁹³³ “comply[ing] with cabotage legislation,” or “the unpredictable forces of the market.”⁹³⁴ Mexico further claims that Claimant *contributed to its own losses* by “doing business with... OSA,” failing to conduct “necessary due diligence” on OSA and its shareholders,” and failing to adopt effective remedial measures in its “commercial relationship with OSA.”⁹³⁵

588. Mexico’s repeats the same factual allegations regarding POSH’s alleged lack of due diligence on OSA in support of two overlapping theories—investment risks and contributory negligence—as Mexico itself is forced to acknowledge: “If the loss of an investment is partly due to the fact that *risks borne by the investor* have materialized and *contributed to the loss as a*

⁹³¹ As explained in Section XII.C.2, *infra*, Claimant has provided abundant examples of its efforts to mitigate damages that Mexico does not even attempt to address. Accordingly, should Mexico elaborate on its allegations regarding mitigation of damages in the Rejoinder, Claimant reserves its right to file an additional brief addressing them.

⁹³² Statement of Defense, para. 702.

⁹³³ Statement of Defense, para. 702.

⁹³⁴ Statement of Defense, para. 702.

⁹³⁵ Statement of Defense, para. 709.

concurrent cause, it would be wrong to attribute the whole of the loss to governmental action.”⁹³⁶ In any case, Mexico’s assertions lack evidentiary support, and are demonstrably false. The record shows that POSH conducted appropriate due diligence on the Mexican market, on OSA, and on several other Mexican operators with which it explored potential collaborations.

(a) The legal standards

589. The principle of assumption of risk rests on the proposition that “[b]ilateral Investment Treaties are not insurance policies against bad business judgments” such that “they cannot be deemed to relieve investors of the business risks *inherent* in *any* investment.”⁹³⁷ For example, where “[n]ormal market conditions could move... in a manner favorable or unfavorable to the [investor]... this [is] to be considered a normal business risk that... [the investor] was to have considered at the time of” making its investment.⁹³⁸

590. Accordingly, investors cannot recover for losses resulting from the inherent risks of an investment. But they *are* entitled to the gains they would have obtained if there had been no interference by the State in breach of its BIT obligations.⁹³⁹ As such, the principle of assumption of risk is simply the corollary to the norm that full reparation must wipe out the consequences of the *State’s wrongful acts*, rather than the consequences of the inherent “risk[s] of unsatisfactory results as to investments...”⁹⁴⁰

591. With regards to contributory fault, the ILC Commentary explains that:

Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights... It follows that something

⁹³⁶ Statement of Defense, para. 701.

⁹³⁷ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, November 13, 2000, **CL-200**, para. 64 (emphases added).

⁹³⁸ *CMS v. Argentina*, Award, **CL-116**, para. 241.

⁹³⁹ *See Impregilo SpA v. Argentine Republic*, ICSID Case No ARB/07/17, Award, June 21, 2011, **CL-157**, para. 381.

⁹⁴⁰ *Impregilo v. Argentina*, Award, **CL-157**, para. 374.

which is not wilful, negligent or otherwise culpable falls outwith the principle expressed in Article 39.⁹⁴¹

592. Accordingly, in order to establish its claim of contributory fault, Mexico bears the burden of proving “willful or negligent, reproachable behavior by [the claimant], [that] *materially* contribut[es] to its damage.”⁹⁴² “[A] mere contribution to causation is not enough...”⁹⁴³ Mexico has not alleged, much less proven, acts or omissions attributable to Claimant that were willful or negligent and that materially contributed to its injuries.

(b) Claimant adequately assessed the risks of its Investment and Claimant’s losses are attributable to the Measures, not to an alleged lack of due diligence on OSA.

593. Mexico’s claim that POSH did not conduct due diligence on OSA prior to its Investment lacks any evidentiary support and is demonstrably false. Mexico engaged in a political hunt to sever OSA’s ties with PEMEX, which constitutes an internationally wrongful act, not an investment risk associated with OSA, nor evidence of Claimant’s contributory fault.

594. *First*, as explained above in the Statement of Facts, in early 2011, POSH prepared a thorough study on the Mexican offshore market assessing viable alternative means of establishing operations supporting PEMEX (the Market Analysis).⁹⁴⁴ The Market Analysis confirmed PEMEX’s “plans to increase production in the [following] two years” and the “increasing demand in the [jack up] and floaters market.”⁹⁴⁵ The Market Analysis also made clear that, to successfully participate in PEMEX tenders and make a long-term investment in the Mexican offshore industry, POSH needed to partner with a Mexican company that already had an established relationship with the State-owned company. The driver behind this partnership was doing business with PEMEX, which was—and still is—the only oil and gas producer, and the ultimate client of all marine offshore operations, in Mexico.

⁹⁴¹ ILC Articles, **CL-14**, Art. 39(5) (emphasis added).

⁹⁴² *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, September 27, 2017, **CL-201**, para. 1192.

⁹⁴³ *Caratube v. Kazakhstan*, Award, **CL-201**, para. 1192.

⁹⁴⁴ Presentation “POSH – Overview of the Market – Opportunity for POSH”, **C-208**.

⁹⁴⁵ Presentation “POSH – Overview of the Market – Opportunity for POSH”, **C-208**.

services,⁹⁵³ and OSA's fleet made up 12% of the entire fleet servicing PEMEX in the Bay of Campeche.⁹⁵⁴

597. As Mexico also acknowledges, “[f]rom 2003 to 2012, [OSA] had 106 contracts with Pemex, *all of them awarded by public tender.*”⁹⁵⁵ Significantly, in order to participate in PEMEX's tenders, OSA had to produce voluminous information proving its experience, technical expertise, and financial solvency, and PEMEX had to review that extensive documentation for each of those tenders. At the end of that process, PEMEX concluded that, among the participating companies, OSA was the most suitable candidate to receive those 106 contracts.

598. *Fourth*, OSA presented significant competitive advantages over its Mexican competitors. Prior to making its investment, POSH also had the benefit of a report on OSA's operations, financial condition and future prospects prepared by independent consulting firm, Akya Shipping Agency & Trading (the Akya Report). The Akya Report identified that OSA presented clear competitive advantages vis-à-vis other Mexican operators: (i) OSA had the largest Mexican-flagged fleet, which afforded OSA preferential treatment by PEMEX as a result of local law regulations; (ii) OSA's fleet was technically advanced; (iii) OSA had a modern fleet, which allowed for better operating margins; (iv) OSA had an excellent, long-standing and unrivalled relationship with PEMEX; and (v) OSA had an advantageous geographical position, which reduced transportation costs vis-à-vis foreign investors.⁹⁵⁶ On that basis, the Akya Report concluded that “none of the relevant competitors by business line holds a significant advantage

⁹⁵³ Presentation “Analysis of the Gulf of Mexico offshore market environment for maritime personnel transport, suppliers, specialized services and support vessels for rendering maintenance services”, January 17, 2012, **C-263**, p. 57.

⁹⁵⁴ Presentation “Analysis of the Gulf of Mexico offshore market environment for maritime personnel transport, suppliers, specialized services and support vessels for rendering maintenance services”, January 17, 2012, **C-263**, p. 22.

⁹⁵⁵ Statement of Defense, para. 123.

⁹⁵⁶ Presentation “Analysis of the Gulf of Mexico offshore market environment for maritime personnel transport, suppliers, specialized services and support vessels for rendering maintenance services”, January 17, 2012, **C-263**, p. 17.

against [OSA].”⁹⁵⁷ The Akya Report also assessed OSA’s promising financial prospects for the future.⁹⁵⁸

599. *Fifth*, Mexico’s suggestion that Claimant assumed “all risks associated with... Mr. Yáñez and Mr. Díaz”⁹⁵⁹ is entirely unsubstantiated and does nothing to prove that POSH did not conduct appropriate due diligence prior to its investment. Mexico does not produce a single piece of evidence actually showing any “irregularity” involving OSA or its shareholders prior to the Investment or any misconduct on the part of Mr. Yáñez and Mr. Díaz, much less of Claimant’s supposed poor judgment in partnering with them. In contrast, the record illustrates an unlawful campaign against OSA, Mr. Yáñez and Mr. Díaz that was rife with regulatory and prosecutorial malfeasance, the seizure and misappropriation of private property, coercion and the subornation of perjury.⁹⁶⁰

600. *Sixth*, Mexico’s suggestion that Claimant’s injuries resulted from unspecified “market forces” fails for two reasons: (i) Mexico’s Measures had already destroyed the Investment prior to the onset of the cyclical downturn in the Mexican offshore market in late 2014,⁹⁶¹ and (ii) the cyclical downturn was short-lived and did not seriously impair the prospects of the Investment over the lifetime of the Vessels.⁹⁶²

601. *Seventh*, Mexico’s assertions that POSH assumed the risks of complying with cabotage laws is misplaced. As explained in the Fact Section, POSH and the Subsidiaries did comply with Mexican law.⁹⁶³ As explained by Mr. Enriquez, expert on FIL, the FIL restrictions “do not apply to POSH’s Subsidiaries, which have complied therewith,”⁹⁶⁴ because POSH’s

⁹⁵⁷ Presentation “Analysis of the Gulf of Mexico offshore market environment for maritime personnel transport, suppliers, specialized services and support vessels for rendering maintenance services”, January 17, 2012, **C-263**, pp. 20-21.

⁹⁵⁸ Presentation “Analysis of the Gulf of Mexico offshore market environment for maritime personnel transport, suppliers, specialized services and support vessels for rendering maintenance services”, January 17, 2012, **C-263**, p. 17.

⁹⁵⁹ Statement of Defense, para. 709.

⁹⁶⁰ See Section VII, *supra*.

⁹⁶¹ Expert Industry Report by Jean Richards, para. 3.35.

⁹⁶² Expert Industry Report by Jean Richards, para. 3.15.

⁹⁶³ See Section IV.B, *supra*.

⁹⁶⁴ Expert Legal Opinion on FIL by David Enríquez, para. 34.

Subsidiaries are ship-owning companies that bareboat charter, but do not operate, the vessels. Mexico has not demonstrated otherwise, nor has it produced an expert report attempting to rebut Mr. Enriquez’s conclusions.

602. In sum, the record demonstrates that POSH conducted appropriate due diligence on the Mexican market, other Mexican operators and OSA. This due diligence showed that no other Mexican operator presented advantages over OSA. This conclusion was consistent with Mexico’s own due diligence on OSA since, at the time, OSA was PEMEX’s largest contractor and the largest offshore marine services company in Latin America. Mexico assessed and validated OSA’s technical and financial *bona fides* for some 15 years, and more than 100 contracts, by the time of Claimant’s investment. Mexico’s tactic of criticizing POSH for reaching the very same conclusion about OSA that PEMEX itself reached more than 100 times is a transparent litigation strategy. There was no reason for POSH to question OSA’s financial condition or its shareholders’ actions.

2. Mitigation of damages

603. Mexico does not specify how it believes Claimant did not mitigate its damages, nor does it explain the specific measures that Claimant should have adopted in order to do so. Instead, Mexico “reserves its right to address mitigation in its Rejoinder to the extent that relevant information is identified in the request for documents procedure...”⁹⁶⁵ This is a tactical ploy by Mexico to try to prevent Claimant from addressing and rebutting Mexico’s unfounded allegations. Should Mexico set out for the first time in the Rejoinder allegations regarding mitigation of damages, Claimant reserves its right to file an additional brief addressing them. In any case, the record shows that Claimant took all reasonable steps to mitigate its damages.

(a) The legal standard

604. The *onus probandi* on the issue of mitigation, as explained by the tribunal in *AIG Capital Partners v. Republic of Kazakhstan* “is always on the person pleading it—if he fails to show that the Claimant or Plaintiff ought reasonably to have taken certain mitigating steps, then the normal measure of damages will apply.”⁹⁶⁶ Likewise, the tribunal in *Middle East Cement*

⁹⁶⁵ Statement of Defense, para. 712.

⁹⁶⁶ *AIG Capital Partners v. Republic of Kazakhstan*, ICISD Case No. ARB/01/6, Award, October 7, 2003, **CL-202**, para. 10.6.4(4).

Shipping and Handling Co v. Egypt observed that “Respondent has the burden of proof for the facts establishing... a duty [to mitigate] and the failure of Claimant to carry it out.”⁹⁶⁷

605. Moreover, “[t]he question of mitigation of damages is always a question of fact: as to whether the loss was avoidable by reasonable action that could have been taken by a Claimant is also a question of fact, not of law.”⁹⁶⁸ And finally, in order to establish Claimant’s alleged failure to mitigate, Mexico must establish the specific measures that “Claimant... ought reasonably to have taken...” under the circumstances.⁹⁶⁹ Mexico has not come close to meeting this standard.

(b) Claimant took reasonable steps to mitigate its damages

606. Mexico does not even attempt to meet its burden to prove Claimant’s alleged failure to mitigate damages, nor does it explain what specific additional measures Claimant should have taken. This alone is sufficient to dismiss Mexico’s allegations. The record demonstrates, however, Claimant’s constant and continued efforts to mitigate damages.

- As early as March 2014, after the Unlawful Sanction and the government’s seizure of OSA, “POSH ‘looked into requesting [PEMEX] the [direct] assignment of the 6 GOSH contracts and the 2 [SMP] contracts...”⁹⁷⁰ The insolvency Court, however, blocked this possibility. Seeking to contract with PEMEX directly was the logical first step as “GOSH Vessels and SMP Vessels were Mexican flagged and based in Mexico and most had been specially configured as mud processing vessels for PEMEX.”⁹⁷¹

⁹⁶⁷ *Middle East Cement v. Egypt*, Final Award, **CL-11**, para. 170.

⁹⁶⁸ *AIG Capital v. Kazakhstan*, Award, **CL-202**, para. 10.6.4(1).

⁹⁶⁹ *AIG Capital v. Kazakhstan*, Award, **CL-202**, para. 10.6.4(4).

⁹⁷⁰ Statement of Claim, para. 190.

⁹⁷¹ Statement of Claim, para. 219. Mexico does not explain why Claimant’s near immediate attempt to reduce its exposure to the Unlawful Sanction by contracting directly with PEMEX would be unreasonable given the impediments and costs associated with reconfiguration and redeployment. At the very minimum, Claimant’s course of action was clearly plausible, which is sufficient to dismiss Mexico’s implications, as explained by the tribunal in *Middle East Cement Shipping and Handling Co v. Egypt*:

Regarding the question whether the Claimant could have obtained the permission to take the ship Poseidon out of the Free Zone by fulfilling the requirements set by GAFI and by paying the alleged debts leading to the attachment and auction of the ship, the Tribunal finds the explanations given by Claimant at least plausible. That is sufficient to deny a duty to mitigate, as the Respondent has the burden of proof for the facts establishing such a duty and the failure of Claimant to carry it out.

Middle East Cement v. Egypt, Final Award, **CL-11**, para. 170.

- In March 19, 2014, Mexico unlawfully detained the Subsidiaries’ vessels, thereby foreclosing any possibility of Claimant’s promptly redeploying the Vessels’ in order to escape the fallout of Mexico’s increasingly draconian Measures.⁹⁷²
- In June and July 2014, upon return of the vessels, POSH spent substantial amounts repairing and reconfiguring the vessels and sought new charters.⁹⁷³
- POSH’s Subsidiaries did in fact try to re-charter the vessels outside of Mexico and engaged in discussions with several operators to that effect.⁹⁷⁴
- On April 4, 2014, POSH received an invitation from PEMEX to submit two vessels for potential work with PEMEX.⁹⁷⁵ POSH submitted the Rodrigo (to be renamed POSH Honesto) and the Caballo de Oro (to be renamed POSH Hermosa) for PEMEX’s consideration.⁹⁷⁶ PEMEX did not award contracts to these vessels because, as expressed informally by the State-owned company, the vessels still appeared in their systems as under contract with PEMEX.⁹⁷⁷
- POSH complied and submitted the renamed vessel Honesto for a further PEMEX tender.⁹⁷⁸ Despite the Honesto offering the lowest price, PEMEX did not award the contract to the Honesto.⁹⁷⁹ As memorialized in contemporaneous emails, PEMEX “claimed that the vessel was technically still on charter through OSA. This contradict[ed] the earlier advice that the vessel w[ould] be eligible for Pemex charters once the name is changed.”⁹⁸⁰
- POSH also attempted to secure spot charters, including outside of Mexico, and engaged in discussions with several operators for that purpose. POSH sent a proposal to Blake Rigs International for the

⁹⁷² See Section VIII.D, *supra*.

⁹⁷³ See Section IX.I, *supra*.

⁹⁷⁴ See Section IX.I, *supra*.

⁹⁷⁵ Email from J. Phang to G. Seow *et al.*, April 11, 2014, **C-299**.

⁹⁷⁶ Letter from Jose Luis Montalvo Mejorada to [REDACTED], April 4, 2014, regarding “Caballo Grano de Oro”, **C-300**; Letter from Jose Luis Montalvo Mejorada to [REDACTED], April 4, 2014 regarding “Rodrigo DPJ”, **C-301**; Email from Jose Luis Montalvo to [REDACTED], April 9, 2014, **C-302**.

⁹⁷⁷ Email from J. Phang to G. Seow *et al.*, April 11, 2014, **C-299**.

⁹⁷⁸ Email from G. Seow to Ean Kuok, August 26, 2014, **C-303**.

⁹⁷⁹ Email from L. Keng Lin to Ean Kuok, September 26, 2014, **C-304**; Chart containing information on vessels and prospective charters, **C-305**.

⁹⁸⁰ Email from L. Keng Lin to Ean Kuok, September 26, 2014, **C-304**.

Monoceros, but received no answer.⁹⁸¹ POSH further attempted to secure two spot charters for the Babieca and the Argento in West Africa, but the vessels could not be redeployed from the Gulf of Mexico to Africa by the required commencement dates.⁹⁸² Ultimately, POSH managed to secure spot charters for these two vessels (notably, the only vessels that had not been reconfigured to serve PEMEX). The Argento worked for AMAPET in Mexico from August 9, 2014 until September 14, 2014.⁹⁸³ The Babieca worked in Congo in October 2014.⁹⁸⁴ Despite numerous attempts, the Subsidiaries could not secure any charters for the other eight vessels prior to their sale in satisfaction of the loans with POSH.

607. In sum, the record clearly shows that POSH employed its best efforts to re-charter the vessels to PEMEX and to other operators, including outside of Mexico. Neither PEMEX nor other Mexican operators, however, wanted to do business with the Subsidiaries as a result of their previous relationship with OSA.

XIV. CLAIMANT HAS PROVEN THE DAMAGES ATTRIBUTABLE TO MEXICO'S BREACHES OF THE TREATY

608. Mexico does not dispute that a State responsible for violations of an investment treaty “is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”⁹⁸⁵ The “full reparation” standard applies in the context of all types of investments and to all manner of treaty breaches, as explained by the *Vivendi II* Tribunal:

[R]egardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the

⁹⁸¹ Status chart, September 23, 2014, **C-307**; Email from Gerardo Silva to J. Phang *et al.*, August 28, 2014, **C-314**.

⁹⁸² Email from K. Teo to C. Tay *et al.*, September 21, 2014, **C-315**.

⁹⁸³ Time Charter Party for Offshore Service Vessels for Caballo Argento between Servicios Marítimos Gosh, S.A.P.I. de C.V., and Aprovisionamientos Marítimos y Petroleros, S.A. de C.V., August 9, 2014, **C-211**; Time Charter Party for Offshore Services Vessels for Caballo Argento between Servicios Marítimos Gosh, S.A.P.I. de C.V., and Aprovisionamientos Marítimos y Petroleros, S.A. de C.V., August 16, 2014, **C-212**.

⁹⁸⁴ Agreement for the hire of PSV POSH Kittiwake between Petro S. Management Consulting FZE and Posh Semco Pte. Ltd., October 1, 2015, **C-213**; Time Charter Party for Offshore Services Vessels between Petro Services Congo SARL and Posh Semco Pte. Ltd., November 6, 2014, **C-214**; Agreement for the hire of PSV “Caballo Babieca” between Petro S. Management Consulting FZE and Posh Semco Pte. Ltd., November 15, 2014, **C-215**; Email from K. Teo to J. Phang *et al.*, November 11, 2014, **C-316**.

⁹⁸⁵ ILC Articles, **CL-14**, Article 31. *See also* Statement of Defense, para. 706.

affected party fully and to eliminate the consequences of the state's action.⁹⁸⁶

609. The purpose of the compensation, as explained by the tribunal in *Lemire v. Ukraine*, “must be to place the investor in the same pecuniary position in which it would have been if respondent had not violated the BIT.”⁹⁸⁷

610. Claimant has adhered to the principle of full compensation in computing its calculation of damages. Claimant has satisfied its burden to prove that it suffered damages caused by Mexico's actions and the amount of those damages. As detailed below, Mexico's objections to Claimant's calculation of the quantum of damages attributable to Mexico's treaty breaches are flawed and should be rejected.

A. THE BURDEN AND STANDARD OF PROOF FOR DAMAGES

1. The burden of proof for damages

611. Under international law, the claimant bears the initial burden of making a *prima facie* showing of its damages. If the claimant succeeds in establishing its *prima facie* entitlement to damages, the evidentiary burden shifts to the respondent,⁹⁸⁸ as explained in *Asian Agricultural Products v. Sri Lanka*:

In exercising the “free evaluation of evidence” provided for under the previous Rule, the international tribunals “decided the case on the strength of the evidence produced by both parties”, and in case a party “adduces

⁹⁸⁶ *Compañía de Aguas v. Argentina*, Award, **CL-52**, para 8.2.7; *S.D. Myers*, First Partial Award, *S.D. Myers v. Canada*, Partial Award, **CL-27**, paras. 311-15; *Metalclad v. Mexico*, Award, **CL-43**, para. 122; *MTD v. Chile*, Award, **CL-110**, para. 238; *Enron Corporation and Ponderosa Assets LP v. Argentine Republic*, ICSID Case No ARB/01/3, Award, May 22, 2007, **CL-140**, paras. 359-61; *Ioannis v. Georgia*, Award, **CL-80**, para. 533; *Gemplus SA and others v. United Mexican States*, and *Talsud SA v. United Mexican States*, ICSID Case Nos ARB(AF)/04/3 and ARB(AF)/04/4, Award, June 16, 2010, **CL-131**, para. 12-52. See also *Biwater v. Tanzania*, Award, **CL-82**, para. 776; *American Manufacturing and Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, February 21, 1997, **CL-124**, para. 6.21.

⁹⁸⁷ *Lemire v. Ukraine*, Award, **CL-132**, para. 149 (citing I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (2009), **CL-134**, para. 3.288). See also *LG&E Energy Corp., et al. v. Argentine Republic*, ICSID Case No ARB/02/1, Award, July 25, 2007, **CL-203**, para. 39.

⁹⁸⁸ *William A. Parker (U.S.A.) v. United Mexican States*, Mexico/USA General Claims Commission, UN Reports, Vol. IV, March 31, 1926, **CL-204**, para. 6; see also Durward V. Sandifer, *Evidence before International Tribunals* (revised version, 1975), **CL-205**, pp. 125, 129-30, 170-73).

some evidence which prima facie supports his allegation, the burden of proof shifts to his opponent.”⁹⁸⁹

612. The tribunal in *Apotex v. United States* agreed, stating that the burden of proof shifts from one party to the other:

The Tribunal considers such a distinction exists between the legal burden of proof (which never shifts) and the evidential burden of proof (which can shift from one party to another, depending upon the state of the evidence).”⁹⁹⁰

2. The standard of proof for damages

613. A claimant must prove the damages suffered under a “balance of probabilities” standard⁹⁹¹ In this regard, the tribunal in *Kardassopoulos v. Georgia* explained that:

The Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties any burden of proof beyond a balance of probabilities. With respect to proof of damages in particular, the Tribunal finds the following passage quoted by the Claimants in their written submissions from the award in *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.* to be apposite: “It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage.”⁹⁹²

614. Similarly, in *Khan Resources et. al. v. Mongolia*, the tribunal explained that:

⁹⁸⁹ *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award, June 27, 1990, **CL-10**, para. 56 (citing D. V. Sandifer, *Evidence before International Tribunals*, **CL-205**, pp. 125, 129-30, 170-173 and relying upon the 1962 Parker case adjudicated by the Mexico/U.S.A. General Claims Commission, *W. Parker v. Mexico*, Mexico/USA General Claims, **CL-204**).

⁹⁹⁰ *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, **CL-206**, para. 8.8.

⁹⁹¹ *Ioannis v. Georgia*, Award, **CL-80**, para. 229; *Impregilo v. Argentina*, Award, **CL-157**, para. 371; *Khan Resources Inc., et al. v. Mongolia*, PCA Case. No. 2011-09 (UNCITRAL), Award on the Merits, March 2, 2015, **CL-207**, para. 375; *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, December 17, 2015, **CL-208**, para. 175; *Gold Reserve v. Venezuela*, Award, **CL-13**, para. 685.

⁹⁹² *Ioannis v. Georgia*, Award, **CL-80**, para. 229 (emphasis added), (citing *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.*, Arbitral Award, March 15, 1963, reprinted in 35 I.L.R. 136, **CL-209**).

The standard of proof required is the balance of probabilities. This, of course, means that damages cannot be speculative or uncertain. However, scientific certainty is not required and it is widely acknowledged by investment treaty tribunals and publicists that the assessment of damages is often a difficult exercise and will usually involve some degree of estimation and the weighing of competing (but equally legitimate) facts, valuation methods and opinions, which does not of itself mean that the burden of proof has not been satisfied.⁹⁹³

615. Finally, the tribunal in *Gold Reserve v. Venezuela* specifically rejected the claim that any other standard of proof governs the assessment of damages in investor-State arbitrations:

The Tribunal agrees with the Parties that Claimant bears the burden of proving its claimed damages. The Tribunal finds no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore is satisfied that the appropriate standard of proof is the balance of probabilities.⁹⁹⁴

616. As detailed below, Claimant has met its burden to prove the existence and extent of the damages.

B. CLAIMANT'S UPDATED CALCULATION OF DAMAGES

617. The Second Versant Report provides an update to Claimant's damages to calculation to account for additional accrued pre-award interest and to incorporate certain adjustments to Claimant's historical losses noted in the Cornerstone Report.⁹⁹⁵ Claimant's updated damages calculation is set forth in the table below.

⁹⁹³ *Khan Resources v. Mongolia*, Award, **CL-207**, para. 375 (emphasis added).

⁹⁹⁴ *Gold Reserve v. Venezuela*, Award, **CL-13**, para. 685.

⁹⁹⁵ Second Expert Damages Report by Versant, para. 161.

Table 1 – Updated Damages with Interest⁹⁹⁶

Calc. Logic	Components of Loss	Amount (US\$)
[A]	Historical Losses	46,215,788
[B]	GOSH Enterprise Value	205,755,096
[C]	PFSM Enterprise Value	591,475
[D]	Less Residual Value of GOSH Vessels	(126,000,000)
[E] = B+C+D	Lost Value	80,346,571
[F]	Less Withholding Tax on Dividends	(10,447,251)
[G] = A+E+F	Nominal Damages	116,115,108
[H]	Interest on Unpaid Charter Hire @ 12% through 16 May 2014	2,303,577
[I] = G+H	Damages as of 16 May 2014	118,418,686
[J]	Pre-award Interest @ LIBOR+4% through 31 Jan 2020	42,811,259
[K] = I+J	Damages including Interest through 20 Jan 2020	161,229,944
[L]	Pre-award Interest @ 12% through 31 Jan 2020	107,891,764
[M] = I+L	Damages including Interest through 20 Mar 2019	226,310,449

C. MEXICO’S OBJECTIONS TO CLAIMANT’S DAMAGES ARE GROUNDESS

618. In the SOD, Mexico does not contest the Valuation Date invoked by Claimant (May 16, 2014).⁹⁹⁷ Mexico does dispute certain aspects of Claimant’s calculation of (i) historical damages; (ii) the lost value of Claimant’s Investment; and (iii) the appropriate pre-award interest rate. As mentioned above, Claimant has accepted certain arguments made by Mexico with respect to historical losses, and accordingly has made certain adjustments to Claimant’s calculation (reflected in the table above). The bulk of Mexico’s objections, however, are either legally baseless or based upon factual, methodological, or computational errors. These allegations should be rejected for the reasons set forth below.

⁹⁹⁶ Second Expert Damages Report by Versant, Appendix L.

⁹⁹⁷ Mexico reserves its right to dispute the valuation date in the future. Mexico had enough information to assess the appropriateness adequacy of the valuation date in its Statement of Defense. This is nothing but a tactical move to prevent Claimant from demonstrating the lack of merit of Mexico’s allegations. Should Mexico dispute the valuation date in its Re-Joinder, Claimant reserves its right to file an additional brief addressing those allegations.

1. Historical losses

619. In the SOC, Versant calculated that Claimant suffered historical losses totaling USD\$50.96 million. Mexico has objected to the inclusion and/or calculation of certain categories of Claimant’s historical losses, including the amounts owed for work performed and invoiced, damages incurred as a result of the detention period, and demobilization fees and costs. As a result, Mexico purports to reduce Claimant’s historical losses from US\$50.96 million to US\$13.16 million. Mexico’s allegations are partially incorrect.

(a) Amounts owed for work performed and invoiced

620. *Amounts not payable through the Irrevocable Trust.* Versant calculated that Claimant suffered US\$8.71 million in damages attributable to work performed and invoices that were payable directly to the Subsidiaries (not through the Irrevocable Trust).⁹⁹⁸ Mexico claims that all these amounts should be excluded from the calculation of historical losses because “Claimant has failed to establish the *causal link* between the lack of payment of the so-called Non-Invex Trust receivables.”⁹⁹⁹ This is without merit. Mexico’s allegations relate to causation, not the calculation of damages (Mexico does not dispute Versant’s calculation). And Claimant already established factual and legal causation in Section XIII above.¹⁰⁰⁰ This alone suffices to dismiss Mexico’s allegations.

621. *Amounts payable through the Irrevocable Trust.* Versant calculated that Claimant suffered US\$27.8 million in damages attributable to work performed and invoiced owed to the Irrevocable Trust.¹⁰⁰¹ With respect to this item, Mr. Alberro, objects to Versant’s 16% deduction from the total transfers from the Invex Trust based on the belief that those transfers excluded

⁹⁹⁸ Expert Damages Report by Versant, para. 162.

⁹⁹⁹ Statement of Defense, para. 722. (Emphasis added).

¹⁰⁰⁰ As stated in Section XIII.B.2, Mexico acknowledged prior to this arbitration—when Mexico did not need a litigation strategy—that OSA’s viability depended on the OSA-PEMEX contracts and that the Unlawful Sanction cut off OSA’s lifeblood and led to its insolvency. In addition, upon taking control of OSA, SAE effectively blocked all payments to the Subsidiaries. And upon the declaration of insolvency, the Insolvency Court suspended all payments to creditors including the Subsidiaries. But for the Unlawful Sanction and subsequent measures, OSA’s operations would have continued, OSA would have received payments from PEMEX (its contracts were valued at USD\$2.73 billion) and it would have had resources to make these payments to the Subsidiaries. Mexico’s Measures prevented all that from happening.

¹⁰⁰¹ Expert Damages Report by Versant, para. 171.

VAT.¹⁰⁰² Versant has reviewed additional documents from POSH indicating that certain VAT amounts were paid separately.¹⁰⁰³ As a result, Versant has adjusted its calculation of total transfers from the Invex Trust (net of VAT and interest), and reduced outstanding amounts owed to the Irrevocable Trust from USD\$36.52 million to US\$33.58 (a reduction of USD\$2.93 million).¹⁰⁰⁴

(b) Charter hire for the detention period

622. Versant calculated that Claimant suffered US\$11.29 million in damages attributable to Charter hire that was not paid to the Subsidiaries during Mexico’s detention of the vessels.¹⁰⁰⁵ Mexico raises two objections to this calculation: one involving damages arising from the detention of the SMP and the SEMCO vessels; the other one involving PFSM invoices. Claimant rejects the first objection and accepts with the second one, as set forth below.

- (i) Based on the Cornerstone Report, Mexico claims that, since the SMP and SEMCO Charters had expired on the Valuation Date, “there is no basis to assume that these vessels would have been chartered *by Pemex* but-for the impugned measures and therefore there is no good reason to include them in the damage’s calculation.¹⁰⁰⁶ This is baseless. The SMP and SEMCO vessels were under contract with OSA, but were not assigned to a specific contract with PEMEX (as opposed to GOSH’s Charters which were assigned to a specific contract with PEMEX). In addition, Claimant has established that, even though the SMP and SEMCO charters with OSA had expired, Mexico deprived Claimant of its ability to re-charter those vessels and re-deploy them elsewhere. On that basis, Versant explains that “[i]t is illogical that the vessels could be detained *with no economic consequence* for both the period of detainment and uncertainty surrounding the release date.”¹⁰⁰⁷ Rather, in “estimat[ing] what those vessels could have potentially earned if the vessels were not detained, the most appropriate benchmark is the charter rate contained in the

¹⁰⁰² Cornerstone Report, para. 36.

¹⁰⁰³ Second Expert Damages Report by Versant, para. 56.

¹⁰⁰⁴ Second Expert Damages Report by Versant, para. 57.

¹⁰⁰⁵ Expert Damages Report by Versant, para. 176.

¹⁰⁰⁶ Statement of Defense, para. 725. (Emphasis added).

¹⁰⁰⁷ Second Expert Damages Report by Versant, para. 47. (Emphasis added).

most recent contract those vessels were able to obtain (i.e. the expired contract rate).”¹⁰⁰⁸

- (ii) Mexico deducts PSFM’s invoices from the quantum of damages attributable to the detention period because Claimant already included the amount of these invoices in its calculation of damages for work performed and invoiced payable through the Irrevocable Trust.¹⁰⁰⁹ Versant agrees with this adjustment but disagrees “with the estimate used by Dr. Alberro of operating costs per day for each vessel.”¹⁰¹⁰ Accordingly, Versant deducts from their estimate operating costs per day for the GOSH’s Vessels (but not the SMP or SEMCO vessels as PFSM’s invoices did not include the costs for these vessels during the detention period) and reduces the calculation of “lost charter hire from US\$ 11.29 million to US\$ 9.48 million (reduction of US\$ 1.81 million).”¹⁰¹¹

(c) Demobilization fees and repair costs

623. The First Versant Report calculated that Claimant suffered US\$1.8 million in damages attributable to demobilization fees that OSA failed to pay, as well as US\$1,335,806 in repair costs for the vessels that the Subsidiaries were required to assume owing to OSA’s nonpayment.¹⁰¹²

624. Mexico’s sole objection to these demobilization and repair costs is that “[t]he Cornerstone Report explains that there is no evidence supporting that Pemex was *contractually obligated* to pay these demobilization fees to the Subsidiaries.”¹⁰¹³ Mr. Alberro thus seems to imply that, should this be a contractual obligation of OSA instead of PEMEX, its breach would never be attributable to Mexico. Clearly, Mr. Alberro’s allegations relate to causation, not the calculation of damages, despite the fact that the expert was expressly “instructed to assume that

¹⁰⁰⁸ Second Expert Damages Report by Versant, para. 47.

¹⁰⁰⁹ Statement of Defense, para. 726.

¹⁰¹⁰ Second Expert Damages Report by Versant, para. 52.

¹⁰¹¹ Second Expert Damages Report by Versant, para. 53.

¹⁰¹² Expert Damages Report by Versant, paras. 177-78.

¹⁰¹³ Statement of Defense, para. 728. (Emphasis added).

Mexico did violate the BIT”¹⁰¹⁴ and states that he was “not offering any opinions regarding the liability nor POSH’s entitlement to damages in this matter.”¹⁰¹⁵ This alone suffices to dismiss Mexico’s allegations. In any case, Claimant has established factual and legal causation in Section XIII.

(d) Updated historical losses

625. Applying both adjustments discussed above (VAT and PFSM invoices in connection with amounts payable to the Irrevocable Trust) Versant reduces Claimant’s Historical Loss from USD\$50.96 million to USD\$ 46.22 million, as shown in Table 6 below:

Component	Amount (US\$)
Amounts Outstanding for Work Performed	33,583,963
Lost Charter Hire for Vessels detained by Mexican Authorities	9,476,019
Demobilization Fee	1,800,000
Repair Costs	1,355,806
Claimant’s Historical Loss	46,215,788

2. The lost value of Claimant’s Investment

626. Mr. Alberro agrees with Versant’s use of a Discounted Cash Flow methodology to calculate GOSH’s and PFSM’s damages from May 16, 2014.¹⁰¹⁶ Mr. Alberro, however, makes certain adjustments to Versant’s projections based on disagreements as to certain assumptions. Mr. Alberro’s adjustments arise from methodological inconsistencies, unreliable source data, and/or simple misinterpretations of the calculations set forth in the First Versant Report. Therefore, Mr. Alberro’s adjustments should be rejected.

(a) The Cornerstone Report reflects methodological errors that invalidate its conclusions

627. Versant assessed the lost value of Claimant’s Investment using an *ex-ante* approach to the calculation of the fair market value of the Investment as of May 16, 2014.¹⁰¹⁷ Mr. Alberro

¹⁰¹⁴ Cornerstone Report, para. 4.

¹⁰¹⁵ Cornerstone Report, para. 4.

¹⁰¹⁶ Second Expert Damages Report by Versant, para. 76.

¹⁰¹⁷ Second Expert Damages Report by Versant, para. 59 (“[T]he decision to employ an *ex-ante* or *ex-post* analysis turns on the facts of each case. In this case, we understand that Claimant was forced to cancel its

criticizes Versant’s *ex-ante* approach, but makes grave methodological errors that invalidate his conclusions, as set forth below.

- (i) Mr. Alberro “adopts an *ex-ante* approach (with an *ex-ante* valuation date) but selectively cherry-picks *ex-post* information. This is methodologically inconsistent.”¹⁰¹⁸ Mr. Alberro adopts the same Valuation Date as Versant, but “ignores the fundamental purpose of adopting a specific Valuation Date,”¹⁰¹⁹ which is to consider only information that is known or knowable on the Valuation Date.¹⁰²⁰
- (ii) Mr. Alberro “maintains an *ex-ante* approach and discounts future cash flows to the valuation date, but nevertheless uses information available after the valuation date, which is methodologically incorrect.”¹⁰²¹
- (iii) Mr. Alberro criticizes Versant’s *ex-ante* approach, but he does not adopt an *ex-post* approach himself. As explained by Versant, an “*ex-post* approach would require Dr. Alberro to consider all market factors between the Valuation Date and the date

contracts on 16 May 2014. As of this date, it is possible to isolate and reliably quantify the loss arising from the alleged Measures. From an economic perspective, even though the Measures did impact Claimant’s investments prior to May 2014 (and stretching back to 2013 in some cases), the value of Claimant’s investments in GOSH and PFSM was permanently lost as of this date.”)

¹⁰¹⁸ Second Expert Damages Report by Versant, para 64 (“In an *ex-ante* analysis, the valuer necessarily places himself or herself at the valuation date (the date of the breach) and *considers only information known or knowable on that date*. The purpose of this perspective is to prepare a cash flow projection that only considers what is foreseeable on the date of the breach (or culmination of breaches in this case). This approach ensures that the risks and uncertainties that the claimant faced prior to the breach are consistent with the expectations but for the breach’s effect.”) (Emphasis added).

¹⁰¹⁹ Second Expert Damages Report by Versant, para. 66.

¹⁰²⁰ Should Cornerstone adopt a different approach in its second report, in a tactical move to prevent Versant from assessing and, if applicable, rebutting its conclusions, Claimant reserves its right to file a subsequent expert report to that effect.

¹⁰²¹ Second Expert Damages Report by Versant, para 67 (“A central difference between the *ex-ante* and *ex-post* analyses lies in the treatment of the cash flows between the Valuation Date to the date of the award. Under the *ex-ante* approach, the future cash flows are discounted back to the date of breach. In contrast, the *ex-post* approach does not discount the cash flows between the date of breach and award. The reason is because the *ex-post* approach uses information subsequent to the breach, and minimizes the uncertainties related to projecting certain inputs that are readily observable with the passage of time...”).

of the award. Mr. Alberro has failed to do so, for example, with respect to the Actual Value of the Investment.”¹⁰²²

- (iv) Had Mr. Alberro adopted an *ex-post* approach, he “would have... needed to use actual information *relevant* to Claimant’s circumstances but-for the alleged breaches.”¹⁰²³ Mr. Alberro failed to do so. He “inappropriately employs global utilization rates provided by Duff & Phelps for charters on- and off-hire rather than Mexican market on-hire utilization rates. Likewise, Dr. Alberro uses global day rates for AHTS and PSVs rather than the actual rates from PEMEX contracts.”¹⁰²⁴ Mr. Alberro thus cherry-picked the post-2014 information that reduced the calculation of damages.

628. In sum, as explained by Versant, “by cherry-picking post-2014 information, Dr. Alberro’s report is methodologically incorrect and further suffers from gaps in information, which he fills inappropriately.”¹⁰²⁵

(b) Contract Renewal

629. Based on the Industry Report prepared by Jean Richards, Versant concluded that the PEMEX contracts for GOSH’s vessels would have been renewed but-for the Measures.¹⁰²⁶ Mr. Alberro objects to this conclusion and asserts, upon instruction from Mexico’s counsel, that it is unreasonable to assume a high probability of contract renewal.¹⁰²⁷ Mr. Alberro also asserts that, even if the contracts were renewed, there would be gaps between contractual periods,¹⁰²⁸ since PEMEX contracts are awarded through tender procedures that have uncertain outcomes and take

¹⁰²² Versant calculated the Actual Value of the Investment in May 2014, based on a third party valuation of the charter-free vessels (USD\$126 million). The Cornerstone Report agrees with this Actual Value, which is tied to May 2014, but it should have considered information available thereafter. *See* Second Expert Damages Report by Versant, paras. 24-25.

¹⁰²³ Second Expert Damages Report by Versant, para. 26.

¹⁰²⁴ Second Expert Damages Report by Versant, para. 73.

¹⁰²⁵ Second Expert Damages Report by Versant, para. 74.

¹⁰²⁶ Second Expert Industry Report by Jean Richards, para. 2.5.

¹⁰²⁷ Cornerstone Report, para. 42: “Counsel for the Respondent has instructed me to assume that in the “but-for” world the contracts would not have been renewed automatically and that OSA would not have been prohibited from participating in new PEP tenders at market conditions.”

¹⁰²⁸ Cornerstone Report, para. 46.

time.¹⁰²⁹ As alleged evidence, Dr. Alberro cites the SMP and SEMCO Charters with OSA, which expired in January and February 2014 without a renewal.¹⁰³⁰ Mr. Alberro’s assessment is unreasonable and incorrect for at least five reasons:

- (i) Mr. Alberro uses information known after the Valuation Date, which is methodologically inconsistent. As of the Valuation Date—Versant and Ms. Richards explain¹⁰³¹—“there was no expectation that the contracts would not be renewed until the vessels reach the end of their useful life.”¹⁰³²
- (ii) Even if it was methodologically sound to consider information known after the Valuation Date (it is not), Mr. Alberro’s assessment would be incorrect. As explained by Versant, “[d]emand for PEMEX’s fleet of chartered OSVs expanded through the relevant period, related to discoveries and development of new offshore fields both in 2013/14 and in 2018.”¹⁰³³
- (iii) Versant explains that it is “commercially impractical to assume a gap between contract renewals.”¹⁰³⁴ Versant further notes that “it is common that a vessel will stay on charter, after contracting for a short extension, until a new contract is agreed.”¹⁰³⁵ Jean Richards concurs with this statement.¹⁰³⁶
- (iv) There is no basis to assume that a tender process would result in a gap in charter periods. Typically, as explained by Ms. Richards, larger charters perform their tenders so as to avoid a transition gap.¹⁰³⁷

¹⁰²⁹ Cornerstone Report, para. 48.

¹⁰³⁰ Cornerstone Report, para. 48.

¹⁰³¹ Second Expert Industry Report by Jean Richards, para. 8.1.

¹⁰³² Second Expert Damages Report by Versant, para. 81.

¹⁰³³ Second Expert Industry Report by Jean Richards, para. 2.5 and Section 4.

¹⁰³⁴ Second Expert Damages Report by Versant, para 82.

¹⁰³⁵ Second Expert Damages Report by Versant, para 82.

¹⁰³⁶ Second Expert Industry Report by Jean Richards, para. 8.5.

¹⁰³⁷ Second Expert Industry Report by Jean Richards, para. 8.5.

- (v) SMP and SEMCO, whose contracts ended in January and February 2014, are not reasonable benchmarks to assess the likelihood of the renewal of the OSA contracts with PEMEX. As explained in the fact section, neither the SMP nor the SEMCO Vessels were expressly assigned to a service contract between OSA and PEMEX.¹⁰³⁸ Versant notes that these differences are precisely why they did not calculate future damages for SMP and SEMCO beyond the Valuation Date.¹⁰³⁹ Moreover, the SMP and SEMCO Charters were not renewed because of the Measures.¹⁰⁴⁰ Finally, as noted by Versant, an “example that better illustrates the possibility of renewals with PEMEX is the Gannet, a vessel owned by POSH GANNET, a different subsidiary of POSH in Mexico. The PEMEX contract for this vessel has been subject to successive renewals over the years.”¹⁰⁴¹

(c) Utilization rates

630. The First Versant Report discussed two different types of utilization rates: market-wide utilization rates, and utilization rates for vessels under contract.¹⁰⁴² This second type, more relevant to the projection of Claimant’s vessels’ performance, reflects the use of vessels that are working *under a charter contract*. In this scenario, utilization is determined “by the days a vessel is available under the charter contract, or ‘on-hire days.’”¹⁰⁴³ Unavailable days, or “off-hire days”, “are days where a vessel is not used due to scheduled and unscheduled repairs and/or maintenance.”¹⁰⁴⁴ Based on these premises and Ms. Richards’ report, Versant implemented the following schedule of off-hire days, which is a function of a vessel’s age:

¹⁰³⁸ See para. 106, *supra*.

¹⁰³⁹ Second Expert Damages Report by Versant, para. 85.

¹⁰⁴⁰ See para. 107, *supra*.

¹⁰⁴¹ Second Expert Damages Report by Versant, para. 84.

¹⁰⁴² Expert Damages Report by Versant, para. 70.

¹⁰⁴³ Second Expert Damages Report by Versant, para. 88.

¹⁰⁴⁴ Second Expert Damages Report by Versant, para. 88.

Off-Hire Days	Vessel Age		
	1-5 Years	6-10 Years	11 + Years
Unscheduled Down-Time (days/yr)	3	5	7
Special Surveys (days/5 yrs)	12	15	18
Intermediary Dockings (days/5 yrs)	8	10	12

631. Mr. Alberro does not rely on utilization rates for “vessels under contract” but on broad market-wide utilization rates. On this basis, Mr. Alberro concludes that the vessels’ utilization would have been much lower than that calculated by Versant (44% for Mudboats and 45% for PSVs).¹⁰⁴⁵ Mr. Alberro’s calculations are incorrect and unreasonable for the reasons set forth below.

- (i) Mr. Alberro’s methodology is incorrect. He “relies on industry utilization rates to estimate contract specific utilization rates” (GOSH’s vessels were in contract).¹⁰⁴⁶ The most glaring evidence of the difference between those rates is that “[GOSH’s] vessels achieved an average utilization rate around 90% in 2013 (and achieved 96-97% during most quarters), while industry rates for this period were between 69% and 73%.”¹⁰⁴⁷
- (ii) Even if Mr. Alberro’s methodology was correct, the information used is both inappropriate and unresponsive of his arguments. Mr. Alberro uses *ex-post* information, which, in any case, is based on different types of contracts with different terms, locations, and vessel specifications. As Versant explains, “it is not appropriate to assume that the GOSH vessels would have similar utilization rates as the global industry average.”¹⁰⁴⁸
- (iii) Mr. Alberro’s utilization rates are not consistent with GOSH’s EBITDA. As explained by Versant, Mr. Alberro’s “utilization rate assumptions result in an estimated annual EBITDA of US\$ 11-15 million starting in 2016, a significant

¹⁰⁴⁵ Cornerstone Report, Table 5.

¹⁰⁴⁶ Second Expert Damages Report by Versant, para. 96.

¹⁰⁴⁷ Second Expert Damages Report by Versant, para. 97.

¹⁰⁴⁸ Second Expert Damages Report by Versant, para. 98.

decrease from GOSH's historical EBITDA of US\$ 26-32 million in 2012 and 2013.”¹⁰⁴⁹

- (iv) As already discussed, Mr. Alberro applies an *ex-ante* approach with substantial methodological errors. A proper *ex-ante* analysis, unlike that of Mr. Alberro, would have taken into account market expectations of continued growth in demand for OSVs as of May 2014.
- (v) Mr. Alberro's *ex-ante* approach is flawed in that it discounts cash flows for the post-Valuation date historical period, but also employs historical utilization rates for that period. Using actual data from the period following the Valuation Date renders it inappropriate to also discount cash flows because there is no uncertainty or risk arising from the need to *project* utilization rates.¹⁰⁵⁰ The impact of this discount alone reduces the estimated free cash flows to the firm (**FCFF**) for the period from 2014 to 2010 by US\$22 million (23%).¹⁰⁵¹

(d) Day rates

632. The First Versant Report based its calculation of day rates on Ms. Richards projected renewal rates for the GOSH vessels, which were 15% to 17% lower than the existing contract rates in place at the Valuation Date. As explained by Versant, “[i]t is important that the rates employed in this case are relevant for the near term, but also capture the long-term cyclicality of the industry as the final contract renewals for the vessels are as late as 2028, 2030, and 2031...”¹⁰⁵²

633. In contrast, Mr. Alberro's day rate forecast assumes a steady decline in day rates over the life of the vessels. This assumption is unreasonable and incorrect for the following reasons.

¹⁰⁴⁹ Second Expert Damages Report by Versant, para. 101.

¹⁰⁵⁰ Second Expert Damages Report by Versant, para. 106.

¹⁰⁵¹ Second Expert Damages Report by Versant, para. 106.

¹⁰⁵² Second Expert Damages Report by Versant, para. 112.

- (i) Evidence available as of the Valuation Date suggested that an increasing supply of vessels would place *short term* downward pressures on day rates,¹⁰⁵³ but it also showed long-term prospects for future growth in the Mexican offshore industry over the life of the vessels.¹⁰⁵⁴
- (ii) Even taking into account information known after the Valuation Date, which is methodologically incorrect, Mr. Alberro’s projected decline in day rates “do not reflect recent pricing or the long-term outlook.”¹⁰⁵⁵ For example, PEMEX’s drilling activity for 2019 is forecasted to have dramatically exceeded its pace during 2017 and 2018.¹⁰⁵⁶ And PEMEX itself has set bold production targets for 2020.¹⁰⁵⁷

(e) Operating costs

634. In their First Report, Versant used an operating cost estimate of USD\$5,250 per vessel.¹⁰⁵⁸ Mr. Alberro disagrees, bases his projected operating costs on the data reflected on the PFSM invoices for the period from August 2013 to May 2014 and concludes that Versant underestimated the operating costs by 30%. Mr. Alberro’s reliance on these PFSM invoices, however, is unreasonable for three reasons.

- (i) Mr. Alberro’s approach results in double counting PFSMs management fees and dry-docking expenses.¹⁰⁵⁹

¹⁰⁵³ Expert Damages Report by Versant, para. 197.

¹⁰⁵⁴ Second Expert Damages Report by Versant, para. 113.

¹⁰⁵⁵ Second Expert Damages Report by Versant, para. 117.

¹⁰⁵⁶ Second Expert Damages Report by Versant, para. 122.

¹⁰⁵⁷ Second Expert Damages Report by Versant, para. 123.

¹⁰⁵⁸ Second Expert Damages Report by Versant, para. 125.

¹⁰⁵⁹ As explained in the Expert Damages Report by Versant, PFSM invoices include all maintenance, management, insurance, and repair expenses, including operating and dry-docking expenses. However, based on Ms. Richards estimates, the Expert Damages Report by Versant had already accounted for PFSM management fees and dry-docking fees separately from other general operating expenses. *See* Expert Damages Report by Versant, paras. 197-99. Therefore, Cornerstone’s calculation of operating fees based on PFSM’s invoices, which include management fees and dry-docking expenses, result in double counting of these expenses.

- (ii) Mr. Alberro includes PFSM’s invoices for the period in which the GOSH’s vessels were detained, which “[is] not is not representative of operating costs during deployment and should therefore have been excluded.”¹⁰⁶⁰
- (iii) Mr. Alberro bases its operating cost projections on the PFSM invoices for Caballo Scarto issued in November and December 2013, which do not reflect ordinary operating costs, but rather costs associated with a failure of the vessel’s engine and further dry-docking expenses.¹⁰⁶¹

635. Adjusting Mr. Alberro’s calculation to account for the inaccuracies noted above, Mr. Alberro’s operating costs would total US\$4,925 per day, per vessel, which is *less* than Versant’s US\$5,250 estimate.¹⁰⁶²

(f) Depreciation

636. Versant estimated a depreciation for GOSH of approximately USD\$8.6 million per year. Mr. Alberro claims that Versant overestimated gross Property, Plant, and Equipment (**PP&E**), which resulted in an underestimation of taxes and an overestimation of damages by US\$2 million.¹⁰⁶³ This is incorrect. Mr. Alberro has misread Table 18 of the First Versant Report which reflects PP&E *net* of depreciation rather than gross PP&E.¹⁰⁶⁴ Accordingly, the Mr. Alberro’s downward adjustment of US\$2 million is unwarranted.

(g) GOSH’s Discount Rate

637. Versant estimated GOSH’s weighted average cost of capital (**WACC**) at 8.33% and used this figure as a discount rate. Mr. Alberro does not dispute Versant’s use of the WACC as a discount rate or Versant’s estimates with respect to cost of debt or debt-equity weighting.¹⁰⁶⁵ Mr. Alberro does dispute the cost of equity (10.26%), based on his disagreement with two of Versant’s assumptions—the risk-free rate and the beta—and on the lack of a company-specific

¹⁰⁶⁰ Second Expert Damages Report by Versant, para. 128.

¹⁰⁶¹ Second Expert Damages Report by Versant, para. 129.

¹⁰⁶² Second Expert Damages Report by Versant, paras. 130-31.

¹⁰⁶³ Cornerstone Report, para. 74.

¹⁰⁶⁴ Second Expert Damages Report by Versant, para. 133.

¹⁰⁶⁵ Second Expert Damages Report by Versant, para. 136, Table 13.

risk premium, which he believes should be added to the calculation. These adjustments are unwarranted.¹⁰⁶⁶

638. *Risk-Free Rate.* Mr. Alberro uses a 5% equity risk premium (**ERP**) and, based on the DP Report, claims that the ERP must be paired with a 4% “normalized” risk-free rate.¹⁰⁶⁷ Versant notes, however, that it considered the 4% rate, but rejected in calculating its ERP.¹⁰⁶⁸ Versant further explains that the other sources surveyed “recommend using a risk-free rate based on current market risk-free yields...”¹⁰⁶⁹ On this basis, as explained by Versant, the use of a market-based, rather than “normalized”, risk-free rate is appropriate.¹⁰⁷⁰

639. *Beta.* Versant used an unadjusted 1.09 beta for the Oilfield Services Industry.¹⁰⁷¹ Mr. Alberro uses a 1.16 beta adjusted to account for cash holdings.¹⁰⁷² Such an adjustment is inappropriate, however, in the absence of evidence that the Oilfield Services Industry is characterized by excess cash holdings.¹⁰⁷³ Versant explains that “[t]here is no evidence that the Oilfield Services Industry holds excess cash, nor does Prof. Damodaran provide evidence of this. Therefore, we do not agree [with] Dr. Alberro’s use of a cash adjusted beta.”¹⁰⁷⁴

640. *Size Premium.* Dr. Alberro contends that a size premium of 3.87% must be added to GOSH’s cost of equity, because smaller firms present greater risks to investors. This is inaccurate. Versant explains why size premiums have now been generally rejected by the scientific community on the following grounds: (i) the premise of the small company risk premium is flawed; (ii) historical stock return data for recent decades do not support the existence of a size-premium; (iii) modern research indicates that any size premium would only be applicable to very small companies (those with capitalization of less than US\$5 million) rather than companies such

¹⁰⁶⁶ Second Expert Damages Report by Versant, para. 136, Table 13.

¹⁰⁶⁷ Cornerstone Report, para. 80.

¹⁰⁶⁸ Second Expert Damages Report by Versant, para. 139.

¹⁰⁶⁹ Second Expert Damages Report by Versant, para. 139.

¹⁰⁷⁰ Second Expert Damages Report by Versant, para. 139.

¹⁰⁷¹ Second Expert Damages Report by Versant, para. 141.

¹⁰⁷² Cornerstone Report, para. 82.

¹⁰⁷³ Second Expert Damages Report by Versant, para. 142.

¹⁰⁷⁴ Second Expert Damages Report by Versant, para. 142.

as GOSH with a going concern value of over US\$200 million; (iv) there are significant doubts as to whether size premiums exist in non-US markets; and (v) surveys indicate that additional risk premiums are typically excluded from cost of equity by valuation practitioners and investors in practice.¹⁰⁷⁵

641. *Company Specific Risk Premium.* Dr. Alberro adds a company specific risk premium of 3% to his cost of equity based on “the judgment of a valuer”.¹⁰⁷⁶ Versant rejects the inclusion of a company specific risk premium for three reasons: (i) practitioners have expressed skepticism of company-specific risk premiums due to their subjectivity and tendency “to reduc[e] damages without an observable rationale;”¹⁰⁷⁷ (ii) the only specific risk cited by Mr. Alberro in support of a company specific risk premium is GOSH’s association with OSA—even as it notes that GOSH insulated itself from any risks relating to OSA through the Irrevocable Trust; and (iii) most of the typical bases for assigning company specific premiums are already accounted for in Mr. Alberro’s WACC calculation.¹⁰⁷⁸

3. Pre-award interest

642. In the SOC, Claimant explained that “interest is an integral component of full compensation under customary international law”¹⁰⁷⁹ and that Article 6(2)(c) of the Treaty authorizes awards of “interest at a commercially reasonable rate for that currency...”¹⁰⁸⁰ Claimant also noted that “the International Law Commission’s Articles on State Responsibility make clear, [that] interest... should run ‘from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled’”,¹⁰⁸¹ such that full compensation “encompasses both pre- and post-award interest.” Mexico does not dispute this proposition.

¹⁰⁷⁵ Second Expert Damages Report by Versant, paras. 144-51.

¹⁰⁷⁶ Cornerstone Report, para. 87.

¹⁰⁷⁷ Second Expert Damages Report by Versant, para. 153.

¹⁰⁷⁸ Second Expert Damages Report by Versant, para. 154.

¹⁰⁷⁹ Statement of Claim, para. 468.

¹⁰⁸⁰ Statement of Claim, para. 468.

¹⁰⁸¹ Statement of Claim, para. 468 (quoting ILC Articles, **CL-14**, Art. 38(2)).

643. Versant provided two commercially reasonable pre-award interest rates: LIBOR plus 4%, and the 12% interest rate applicable to late payments under the Charters.¹⁰⁸² Mr. Alberro objects to the reasonableness of both proposed interest rates. Mr. Alberro’s conclusions are baseless for the following reasons:

- (i) Mr. Alberro asserts that a LIBOR plus 4% “rate is excessive and certainly not reasonable” and that “LIBOR is a ‘reasonable commercial rate’” within the meaning of the Treaty because “is a benchmark interest rate at which major global banks lend to/borrow from one another.”¹⁰⁸³ This is without merit. Dr. Alberro does not address or rebut Versant’s explanation for the inclusion of a premium above LIBOR, namely that a LIBOR plus 4% rate better approximates the interest rates widely available in the market than the flat LIBOR inter-bank rate:

Historically, LIBOR plus 2% has closely tracked the U.S. Prime rate of interest, which is the rate banks charge their most creditworthy customers. Thus, this rate is not widely available in the market. An additional 2% premium (i.e., LIBOR plus 4%) would reflect a rate that is more broadly available to the market. Indeed, the terms of the Credit Agreement established as part of the 1 July 2013 Settlement Agreement, established an interest rate of LIBOR rate plus 4%. We therefore believe that the rate of LIBOR plus 4% represents a “normal” commercial rate of interest and one that has a direct relationship to Claimant’s cost of debt in this case.”¹⁰⁸⁴

- (ii) Mr. Alberro rejects the 12% contract rate on the basis that it “was not part of the relationship between PEP and OSA.”¹⁰⁸⁵ This is groundless. The lack of contractual privity between the Subsidiaries and PEP in no way diminishes Mexico’s responsibility for its actions to prevent payment under the OSA Charters, or the appropriateness of an industry-specific interest rate. The 12% rate is

¹⁰⁸² Expert Damages Report by Versant, paras. 264-65.

¹⁰⁸³ Cornerstone Report, para. 97.

¹⁰⁸⁴ Expert Damages Report by Versant, para. 264.

¹⁰⁸⁵ Cornerstone Report, para. 101.

“normal’ commercial rate” within the offshore industry, since it was the rate freely agreed upon by the charter parties in that industry.¹⁰⁸⁶

4. Conclusion

644. After the two adjustments to the historical damages component discussed above, POSH’s and the Subsidiaries damages through January 31, 2020, with pre-award interest at a rate of 12% total US\$ 226,310,449, per the table below.

Table 2 – Updated Damages with Interest¹⁰⁸⁷

Calc. Logic	Components of Loss	Amount (US\$)
[A]	Historical Losses	46,215,788
[B]	GOSH Enterprise Value	205,755,096
[C]	PFSM Enterprise Value	591,475
[D]	Less Residual Value of GOSH Vessels	(126,000,000)
[E] = B+C+D	Lost Value	80,346,571
[F]	Less Withholding Tax on Dividends	(10,447,251)
[G] = A+E+F	Nominal Damages	116,115,108
[H]	Interest on Unpaid Charter Hire @ 12% through 16 May 2014	2,303,577
[I] = G+H	Damages as of 16 May 2014	118,418,686
[J]	Pre-award Interest @ LIBOR+4% through 31 Jan 2020	42,811,259
[K] = I+J	Damages including Interest through 20 Jan 2020	161,229,944
[L]	Pre-award Interest @ 12% through 31 Jan 2020	107,891,764
[M] = I+L	Damages including Interest through 20 Mar 2019	226,310,449

645. The total damages sustained by each entity, including pre-award interest until February 12, 2020 is included in Versant’s table below.

¹⁰⁸⁶ Expert Damages Report by Versant, para. 41.

¹⁰⁸⁷ Second Expert Damages Report by Versant, Appendix L.

Entity	Nominal Damages (USD)	LIBOR + 4%		12% Penalty Interest	
		Interest	Total Damages	Interest	Total Damages
POSH	83,031,346	30,256,798	113,288,144	76,242,540	159,273,886
GOSH	35,372,118	12,889,675	48,261,793	32,480,024	67,852,142
PFSM	5,323	1,940	7,263	4,888	10,211
Total	118,408,787	43,148,413	161,557,200	108,727,452	227,136,239

XV. REQUEST FOR RELIEF

646. On the basis of the foregoing, without limitation and reserving POSH and its Subsidiaries' right to supplement these prayers for relief, including without limitation in the light of further action which may be taken by Mexico, Claimant respectfully requests that the Tribunal:

- (a) DECLARE that Mexico has breached the Treaty and international law, and in particular that:
 - (i) Mexico unlawfully expropriated POSH's and the Subsidiaries' Investment in violation of Article 6 of the Treaty.
 - (ii) Mexico failed to accord fair and equitable treatment to POSH and the Subsidiaries in violation of Article 4 of the Treaty.
 - (iii) Mexico failed to provide full protection and security to POSH's and the Subsidiaries' Investment.
- (b) In due course and on the basis of the arguments and evidence to be submitted in the valuation phase of this arbitration:
 - (i) ORDER Mexico to compensate POSH for its losses resulting from Mexico's breaches of the Treaty and international law for an amount of USD\$ 159,273,886 as of May 16, 2014 plus interest until payment at a commercially reasonable rate, compounded annually;
 - (ii) ORDER Mexico to compensate GOSH for its losses resulting from Mexico's breaches of the Treaty and international law for an amount of

USD\$ 67,852,142 as of May 16, 2014 plus interest until payment at a commercially reasonable rate, compounded annually;

- (iii) ORDER Mexico to compensate PFSM for its losses resulting from Mexico's breaches of the Treaty and international law for an amount of USD\$ 10,211 as of May 16, 2014 plus interest until payment at a commercially reasonable rate, compounded annually;
- (iv) DECLARE that: (a) the award of damages and interest be made net of all Mexican taxes; and (b) Mexico may not deduct taxes in respect of the payment of the award of damages and interest;
- (v) AWARD such other relief as the Tribunal considers appropriate; and
- (vi) ORDER Mexico to pay all of the costs and expenses of these arbitration proceedings.

Respectfully submitted,



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