IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER THE UNITED MEXICAN STATES – SINGAPORE AGREEMENT ON THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS AND THE UNCITRAL ARBITRATION RULES (2010)

PACC OFFSHORE SERVICES HOLDINGS LTD

Claimant

and

UNITED MEXICAN STATES

Respondent

(ICSID Case No. UNCT/18/5)

AWARD

Members of the Tribunal
Dr. Andrés Rigo Sureda, President
Prof. W. Michael Reisman, Arbitrator
Prof. Philippe Sands, Arbitrator

Secretary of the Tribunal
Ms. Mercedes Cordido-Freytes de Kurowski

Date of dispatch to the Parties: January 11, 2022

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Arbitration Rules or UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law adopted by the United Nations General Assembly on 15 December 1976
BIT	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, signed on November 12, 2009, which entered into force on April 3, 2011
C-[#]	Claimant's Exhibit
CER-001	Expert Report of Kiran Sequeira and Garrett Rush, Versant Partners, LLC dated March 20, 2019
CER-002	Second Expert Report of Kiran Sequeira and Garrett Rush, Versant Partners, LLC dated February 12, 2020
CER-003	Expert Report of Jean Richards, Quantum Shipping Services LTD dated March 20, 2019
CER-004	Supplementary Expert Report of Jean Richards, Quantum Shipping Services LTD dated February 12, 2020
CER-005	Report on Mexican Criminal Law prepared by Diego Ruíz Durán dated March 20, 2019
CER-006	Reply Expert Report on Mexican Criminal Law prepared by Diego Ruíz Durán dated February 12, 2020
CER-007	Report on Mexican Insolvency Law by Luis Manuel C. Méjan Carrer dated March 20, 2019
CER-008	Reply Expert Report on Mexican Insolvency Law by Luis Manuel C. Méjan Carrer dated February 12, 2020

CER-009	Expert Report on Foreign Investment Law by David Enríquez dated March 20, 2019
Cl. Cost Stmt.	Claimant's Statement of Costs dated July 23, 2021
Cl. SoC	Claimant's Statement of Claim dated March 20, 2019
CL-[#]	Claimant(s)'s Legal Authority
Hearing	Hearing on Jurisdiction and the Merits held by video conference on May 16-22, 2021
ICSID or the Centre	International Centre for Settlement of Investment Disputes
MCA	Master Collaboration Agreement, entered into between PACC Offshore Services Holdings Pte. Ltd., Carlos Ramón Espinosa Cerón, Amado Omar Yáñez Osuna, and Martín Díaz Álvarez dated 12 August 2011
MST	Minimum standard of treatment
OMS Industry	Offshore vessel industry, also known as offshore marine services industry
R-[#]	Respondent's Exhibit
Rejoinder	Respondent's Rejoinder on Jurisdiction and the Merits dated June 10, 2020
RER-001	Expert Report of José Alberro, Cornerstone Research, dated August 9, 2019
RER-002	Second Expert Report of José Alberro, Cornerstone Research, dated May 11, 2020
RER-003	Expert Report on Industry prepared by Miguel Peleteiro and Arturo del Castillo, Duff & Phelps, dated August 5, 2019
RER-004	Expert Report on Industry prepared by Miguel Peleteiro, Duff & Phelps, dated May 11, 2020

RER-005	Expert Report on Mexican Criminal Law issued by Francisco Javier Paz Rodríguez dated August 5, 2019
RER-006	Second Expert Report on Mexican Criminal Law issued by Francisco Javier Paz Rodríguez dated May 11, 2020
RER-007	Expert's Opinion on Mexican Insolvency Law by Darío Ulises Oscós Coria dated August 5, 2019
RER-008	Second Expert's Opinion on Mexican Insolvency Law by Darío Ulises Oscós Coria dated May 11, 2020
Resp. Cost Stmt.	Resp.'s Statement of Costs of July 24, 2021
Resp. SoD	Respondent's Statement of Defense dated August 21, 2019
RL-[#]	Respondent's Legal Authority
Reply	Claimant's Reply dated February 12, 2020
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on September 24, 2018 in accordance with the UNCITRAL Arbitration Rules (2010) and Article 13 of the Mexico-Singapore Agreement on the Promotion and Reciprocal Protection of Investments signed on November 12, 2009, and in force as of April 3, 2011. Its members are: Dr. Andrés Rigo Sureda (Spanish), President, appointed by his co-arbitrators; Prof. W. Michael Reisman (U.S.), appointed by the Claimant; and Prof. Philippe Sands (British/French), appointed by the Respondent.
W.S.	Witness Statement

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted under 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, which was signed on November 12, 2009 and entered into force on April 3, 2011 (the "**BIT**" or "**Treaty**") and under the Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL**"), as revised in 2010 (the "**UNCITRAL Rules"**). By agreement of the Parties, the International Centre for Settlement of Investment Disputes ("**ICSID" or the "Centre"**) serves as the administering authority for this proceeding.

2. The claimant is PACC Offshore Services Holding LTD ("**POSH**" or the "**Claimant**"), a company incorporated/organized under the laws of Singapore.

3. The Claimant brings the claims for itself, and, as provided for under Articles 11(2) and 11(3)(c) of the BIT, on behalf of the following Mexican enterprises: Servicios Marítimos GOSH, S.A.P.I de C.V. ("**GOSH**"), Servicios Marítimos POSH, S.A.P.I. de C.V. ("**SMP**"), POSH Honesto, S.A.P.I. de C.V. ("**HONESTO**"), POSH Hermosa, S.A.P.I. de C.V. ("**HERMOSA**"), Gosh Caballo Eclipse, S.A.P.I. de C.V. ("**ECLIPSE**") and POSH Fleet Services Mexico, S.A. de C.V. ("**PFSM**"), which the Claimant submits are its Mexican Subsidiaries ("**POSH's Subsidiaries**" or the "**Subsidiaries**").

4. The respondent is the United Mexican States ("**Mexico**" or the "**Respondent**").

5. The Claimant and the Respondent are collectively referred to as the "**Parties.**" The Parties' representatives and their addresses are listed above on page (i).

6. This dispute relates to the bareboat charter services that the Claimant provided to Oceanografía, S.A. de C.V ("**OSA**"), who in turn sub-chartered them to Petróleos Mexicanos ("**PEMEX**"), a Mexican state-owned oil and gas company. The dispute concerns a series of acts and omissions by the Mexican authorities (the "**Measures**") relating to the investment of the Claimant in Mexico (the "**Investment**") and addressing the Claimant or OSA.

II. PROCEDURAL HISTORY

7. On May 4, 2017, the Claimant delivered a Notice of Intent to Submit a Claim to Arbitration (the "**Notice of Intent**") to the Respondent pursuant to Article 10 of the BIT,[1] On January 19, 2018, Mexico confirmed in writing that it did not believe that the alleged claims had merit, and that if they wished to continue and submit a request for arbitration, Mexico would defend the claim.[2]

8. On March 7, 2018, the Claimant provided Consent and Waiver Forms under Articles 11(4) and 11(5) of the BIT.[3]

9. On May 8, 2018, the Claimant delivered the Claimant's Notice of Arbitration of the same date, to Mexico, together with factual exhibits C-1 to C-7, and the Claimant's Legal Authority CLA-1 ("**Notice of Arbitration**"), initiating arbitration proceedings against Mexico. In its Notice of Arbitration, the Claimant appointed Prof. W. Michael Reisman, a national of the United States, as arbitrator.

10. On June 4, 2018, Mexico submitted its Response to the Notice of Arbitration.

11. On August 16, 2018, the Claimant submitted to the Secretary-General of ICSID a Request for Appointment of the Presiding Arbitrator and of the Arbitrator not yet appointed, of the same date ("**Appointment Request**").

12. On August 20, 2018, Mexico appointed Prof. Philippe Sands, a dual British and French national as arbitrator, of which ICSID took note on August 21, 2018.

13. By communications of August 22, 2018 and August 29, 2018, the Claimant informed ICSID that it was conferring with the Respondent with respect to the appointment of the

[1] Notice of Arbitration, May 4, 2018.

[2] **C-5**, Email from Samantha Atayde Arellano (Mexico) to Tai-Heng Cheng (Quinn Emanuel), dated January 19, 2018.

[3] **C-6**, Consent and Waiver Forms of PACC Offshore Services Holdings Ltd, March 7, 2018; **C-7**, Consent and Waiver Forms of Servicios Marítimos GOSH, S.A.P.I de C.V., POSH Hermosa, S.A.P.I de C.V., POSH Honesto, S.A.P.I de C.V., and POSH Fleet Services Mexico, S.A. de C.V., March 7, 2018.

Presiding Arbitrator and would revert on September 4, 2018. In the interim, ICSID was to take no action.

14. On September 6, 2018, the Claimant informed ICSID that the Parties had agreed on a method for the appointment of the President of the Tribunal (i.e., by the co-arbitrators in consultation with the Parties, and absent an agreement, the ICSID Secretary-General would appoint the President of the Tribunal).

15. On September 21, 2018, the co-arbitrators, Prof. W. Michael Reisman and Prof. Philippe Sands, informed the Parties and ICSID that an agreement had been reached with respect to the appointment of Dr. Andrés Rigo Sureda, a Spanish national, as President of the Tribunal. On September 22, 2018, Dr. Rigo Sureda accepted his appointment, and attached a statement on his independence and availability.

16. On September 24, 2018, the Tribunal was constituted in accordance with the UNCITRAL Arbitration Rules (2010) and Article 13 of the BIT, and is composed of Dr. Andrés Rigo Sureda, a national of Spain, President, appointed by his co-arbitrators in consultation with the Parties; Prof. W. Michael Reisman, a national of the United States of America, appointed by the Claimant; and Prof. Philippe Sands, a national of Great Britain and France, appointed by the Respondent.

17. By communications of September 25 and 26, 2018, the Parties requested ICSID to act as Administering Authority for this proceeding, which the Secretary-General of ICSID accepted by letter of September 26, 2018.

18. On October 7, 2018, in preparation for the First Session, a draft Agenda and draft Procedural Order No. 1 was circulated to the Parties for their comments, which they submitted on November 7, 2018.

19. On November 21, 2018, the Tribunal held a First Session with the Parties by telephone conference. During the First Session, Ms. Mercedes Cordido-Freytes de Kurowski, Legal Counsel, ICSID, was appointed Secretary of the Tribunal.

20. On November 28, 2018, the Tribunal issued Procedural Order No. 1 ("**PO-1**"), reflecting the Parties' agreements, and the Tribunal's decisions on those outstanding issues where the Parties expressed different views.

21. On December 6, 2018, the Respondent submitted to the Tribunal's consideration a proposal on matters of confidentiality, in accordance with the Tribunal's directions under Section 26.1 of PO-1.

22. On December 9, 2018, the Tribunal noted to the Parties that "*the schedule of document production as it stands would render the production of documents of limited use for the preparation of the Reply. Indeed, in the case of non-objected documents, the deadline is 6 weeks from the due date of the Statement of Defense, and in the case of objected documents ordered to be produced by the Respondent, the deadline is 7 weeks from that date. In these circumstances the Tribunal considers it reasonable to start counting the deadline for filing the Reply as from the end of the production phase. The Tribunal would appreciate the parties' views on this matter by no later than December 14, 2018*." Subsequently, the Parties submitted their respective views, as scheduled.

23. On December 19, 2018, the Tribunal issued Procedural Order No. 2 ("**PO-2**") regarding the Procedural Calendar together with a revised Procedural Order No. 1, extending the deadlines for submission of the Claimant's Reply and the Respondent's Rejoinder.

24. On January 8, 2019, the Parties informed the Tribunal that they agreed on the Respondent's proposal on matters of confidentiality set forth in the Respondent's letter of December 6, 2018.

25. On January 10, 2019, the Tribunal issued Procedural Order No. 3 ("**PO-3**") concerning the confidentiality of documents.

26. On March 20, 2019, the Claimant filed its Statement of Claim ("**Cl. SoC**"), accompanied by: the Witness Statements of Lee Keng Lin, Gerald Kang Hoe Seow, and José Luis Montalvo Sánchez Mejorada; the Expert Reports by Jean Richards (Industry) (with annexes), David Enríquez (Mexican Foreign Investment Law) (with annexes), Diego Ruíz Durán (Mexican Criminal Law) (with annexes), Luis Manuel C. Méjan Carrer

(Mexican Insolvency Law) (with annexes), and Kiran Sequeira and Garrett Rush, Versant (Damages) (with annexes); the Claimant's Factual Exhibits C-1 to C-246; and the Claimant's Legal Authorities CL-1 to CL-161.

27. On May 31, 2019, the Claimant filed for the record new Powers of Attorney granted to Tai-Heng Cheng and Simón Navarro of Sidley Austin LLP by the Claimant and its Mexican subsidiaries on behalf of which the Claimant is acting in this arbitration. The Claimant and its subsidiaries had previously been represented by Tai-Heng Cheng and Duncan Watson of Quinn Emanuel Urquhart & Sullivan LLP.

28. On June 26, 2019, the Parties informed the Tribunal of their agreement to revise the procedural schedule.

29. On August 21, 2019, the Respondent filed its Statement of Defense ("**Resp. SoD**"), accompanied by: the Expert Reports by Miguel Peleteiro and Arturo del Castillo (Industry) (with annexes), Francisco Javier Paz Rodríguez (Mexican Criminal Law) (with annexes), Darío Oscós Coria (Mexican Insolvency Law) (with annexes), and José Alberro, Cornerstone (Damages) (with annexes); the Respondent's Factual Exhibits R-001 to R-092; and the Respondent's Legal Authorities RL-001 to RL-052. Subsequently, the Respondent filed an Errata of the Statement of Defense, dated September 5, 2019.

30. On October 16, 2019, following exchanges between the Parties, the Parties filed a request for the Tribunal to decide on production of documents.

31. On November 7, 2019, the Tribunal issued Procedural Order No. 4 ("**PO-4**") regarding production of documents.

32. On December 18, 2019, following a request from the Respondent of December 13, 2019, and after considering the Parties' positions on the matter, for the reasons indicated in its letter of December 18, 2019, the Tribunal extended the deadlines for the filing of the Claimant's Reply and the Respondent's Rejoinder. Subsequently, on December 24, 2019, the Tribunal granted a further extension of those deadlines, as agreed by the Parties.

33. On January 7, 2020, the Respondent updated its distribution list and representation, incorporating Stephen Becker of Pillsbury Winthrop Shaw Pittman LLP to its team of representatives.

34. On January 27, 2020, the Parties were informed that arbitrator Prof. Philippe Sands would not be available on the hearing dates as scheduled. The Tribunal informed the Parties that it could be available on July 20-24, 2020 for a hearing to be held in Washington, D.C., and invited the Parties to confirm their availability.

35. On February 12, 2020, the Claimant filed its Reply ("**Reply**"), accompanied by Second Witness Statement of José Luis Montalvo Sánchez Mejorada; Second Expert Reports by Jean Richards (Industry) (with annexes), Diego Ruíz Durán (Mexican Criminal Law) (with annexes), Luis Manuel C. Méjan Carrer (Mexican Insolvency Law) (with annexes), and Kiran Sequeira and Garrett Rush, Versant (Damages) (with annexes); the Claimant's Factual Exhibits C-247 to C-357; and the Claimant's Legal Authorities CL-0162 to CL-0216. Subsequently, on February 26, 2021, the Claimant submitted a revised Reply correcting minor clerical errors.

36. Following a consultation process with the Parties regarding the rescheduling of the hearing ("**Hearing**") in the present case, by letter of March 19, 2020, the Tribunal taking note that both Parties had confirmed their availability for a hearing during the week of May 17-21, 2021, confirmed that the Hearing would be held during that week in Washington, D.C.

37. On March 30, 2020, the Respondent informed the Tribunal of the Parties' agreement to request an extension of the deadline for the filing of the Respondent's Rejoinder until June 10, 2020. On the same date, the Tribunal confirmed the extension of the deadline, as agreed by the Parties.

38. On June 10, 2020, the Respondent filed a Rejoinder ("**Rejoinder**"), accompanied by Second Expert Reports by Miguel Peleteiro (Industry) (with annexes), Francisco Javier Paz Rodríguez (Mexican Criminal Law), Darío Oscós Coria (Mexican Insolvency Law) (with annexes), and José Alberro, Cornerstone (Damages) (with annexes); the

Respondent's Factual Exhibits R-093 to R-155; and the Respondent's Legal Authorities RL-053 to RL-127.

39. On January 15, 2021, the Tribunal wrote to the Parties with reference to the Hearing. Considering the extraordinary circumstances created by the coronavirus pandemic, the health risks, travel uncertainties, and the current and potential quarantine periods following travel, the Tribunal invited the Parties to express their views regarding the modality of this Hearing.

40. On January 26, 2021, the Tribunal acknowledged the Parties' subsequent communications on the modality of the Hearing (the Claimant's communications of January 19 and 26, 2021 and the Respondent's letter of January 20, 2021), noted that both Parties agreed to holding the Hearing virtually, but disagreed on its length and the starting time. As a result, the Tribunal invited the Parties to discuss the possibility of extending the length of the Hearing by two days, so as to have a 7-day hearing from Sunday, May 16, 2021 to Saturday, May 22, 2021.

41. On January 28, 2021, both Parties confirmed their availability for a virtual hearing on the proposed dates.

42. On February 5, 2021, the Tribunal confirmed that the Hearing in the present case would be held virtually from Sunday, May 16, 2021 to Saturday, May 22, 2021, as proposed by the Tribunal and agreed by the Parties.

43. On February 20, 2021, the Tribunal circulated a Draft Procedural Order No. 5 regarding the organization of the Hearing for the Parties' consideration and comments.

44. On March 16, 2021, the Parties submitted a joint statement with their comments on the Draft Procedural Order No. 5.

45. On March 25, 2021, pursuant to Section 22.1 of Procedural Order No. 1, a pre-hearing organizational meeting between the Parties and the President of the Tribunal was held by video conference (the "**Pre-Hearing Conference**"), to discuss any outstanding procedural, administrative, and logistical matters in preparation for the Hearing.

46. On March 31, 2021, the Tribunal informed the Parties of the Tribunal's decision regarding the points of disagreement on Draft Procedural Order No. 5 that remained outstanding (the "**Outstanding Matters**") after the Pre-Hearing Conference, and requested the Parties to provide certain information to enable the Tribunal to finalize Procedural Order No. 5.

47. On April 21, 2021, the Tribunal issued Procedural Order No. 5 ("**PO-5**") concerning the organization of the Hearing.

48. On May 6, 2021, a test was conducted in preparation for the Hearing to ensure connectivity of the Hearing participants.

49. A hearing was held via zoom from May 16, 2021 to May 22, 2021. The following persons were present at the Hearing:

Tribunal:

Andrés Rigo Sureda	President
W. Michael Reisman	Arbitrator
Philippe Sands	Arbitrator
Cina Santos	Prof. Reisman's Assistant

ICSID Secretariat:

Mercedes Kurowski	Secretary of the Tribunal
Anastasia Tsimberlidis	Paralegal
Irina Langenegger	Intern

For the Claimant:

Tai-Heng Cheng	Legal Representative
Marinn Carlson	Legal Representative
Simón Navarro	Legal Representative
Jennifer Lim	Legal Representative
Manuel Valderrama	Legal Representative
Meera Rajah	Legal Representative
Eugenia Seoane	Legal Representative
Tatiana Velasquez	Legal Representative
Daniel Ang	Legal Representative
Anthony Peña	Legal Representative
James Beall	Legal Representative
Whitley Tiller	Legal Representative
Lee Keng Lin	Party Representative
Andy Soh	Party Representative

Corey Whiting	Party Representative
Shawn Ang	Party Representative
Paul Shen	Party Representative
Raymond Ang	Party Representative

For the Respondent:

Orlando Pérez Gárate	Legal Representative
Cindy Rayo Zapata	Legal Representative
Alan Bonfiglio Rios	Legal Representative
Rosalinda Toxqui Tlaxcalteca	Legal Representative
Ellionehit Sabrina Alvarado Sánchez	Legal Representative
Rafael Alejandro Augusto Arteaga Farfán	Legal Representative
Karla Shantal Ayala Molina	Legal Representative
Miguel Ángel Galindo Vega	Legal Representative
Stephan E Becker	Legal Representative
David Stute	Legal Representative
Jacklyne Vargas	Legal Representative
Greg Tereposky	Legal Representative
Alejandro Barragan	Legal Representative
Ximena Iturriaga	Legal Representative

Court Reporter:

Dawn Larson	English Court Reporter
Dante Rinaldi	Spanish Court Reporter
Elizabeth Cicoria	Spanish Court Reporter
Virginia Masce	Spanish Court Reporter
Guadalupe García	Spanish Court Reporter

Interpreters:

Silvia Colla
Charles Roberts
Judith Letendre

50. During the Hearing, the following persons were examined:

On behalf of the Claimant:

Lee Keng Lin	Witness
José Luis Montalvo Sánchez Mejorada	Witness
Luis Manuel Camp Méjan	Expert
Diego Ruíz Durán	Expert
Jean Richards	Expert
Kiran Sequeira	Expert
Garrett Rush	Expert

On behalf of the Respondent:

Darío Ulises Oscós Coria	Expert
Francisco Javier Paz Rodríguez	Expert
Miguel Peleteiro	Expert
Marco Biersinger	Expert
Thomas Champy	Expert
José Alberro	Expert

51. On July 23, 2021, the Claimant filed a statement of costs, and so did the Respondent on July 24, 2021.

III. FACTUAL BACKGROUND

A. OVERWIEW

52. In 2011, according to the Claimant, PEMEX – the only oil and gas producer in Mexico and a Mexican state-owned oil and gas company[4] – was in need to expedite repair and maintenance works, restore its production levels, and about to engage in an expansion process. PEMEX would therefore require additional and more modern offshore support vessels, floating assets, and foreign capital to implement its expansion plans.[5]

53. The Claimant believed that as a world-leading offshore services provider it could meet PEMEX's demand of more modern offshore support vessels by acquiring and bareboat chartering vessels to operators that serviced PEMEX.[6] For this purpose, the Claimant would bareboat charter vessels through a Joint Venture to OSA, so that OSA could sub-charter them to PEMEX after bidding in PEMEX' public tenders.[7] The Respondent states

[4] Cl. SoC, para. 46.

[5] **C-29**, Memorandum from Gerald Seow to POSH Board of Directors, dated August 3, 2011, ("**Seow Memorandum**"), p. 1 .

[6] Cl. SoC, paras. 4, 47-52; Reply, paras. 57-62, citing **C-29**, Seow Memorandum, p. 1; **CER-003**, Richards' Expert Industry Report, paras. 2.6., 3.2; **C-30**, Email from L. Keng-Lin to D. Tay et al., dated March 8, 2011.

[7] Cl. SoC, paras. 5, 53-58, citing **C-30**, Email from L. Keng-Lin to D. Tay et al., dated March 8, 2011; W.S. of Gerald Seow ("**W.S. Seow**"), paras. 17, 20, 23; **C-29**, Seow Memorandum, p. 1; **C-32**, Resolution of the POSH Board of Directors, dated August 4, 2011; **C-33**, Master Collaboration Agreement, entered into between PACC Offshore Services Holdings Pte. Ltd., Carlos Ramón Espinosa Cerón, Amado Omar Yáñez Osuna, and Martín Díaz Álvarez, dated August 12, 2011; W.S. of José Luis Montalvo ("**W.S. Montalvo**"), para. 12. See also Resp. SoD, paras. 24-25; Tr. Day 1 [Cheng] 15:17-16:1.

that the Claimant's intention to invest rested on the expectations OSA generated for the Claimant.[8]

54. Offshore vessels are designed to support the offshore oil and gas industry, and are part of what is known as the offshore marine services industry ("**OMS Industry**").

55. The Claimant alleges that there were a series of acts and omissions by the Mexican authorities, referred to as the Measures, relating to the Claimant's investment in Mexico and addressing the Claimant or OSA, which gave rise to the present dispute.

56. The following factual summary provides an overview of the underlying facts in the present dispute. The Tribunal has considered the entirety of the Parties' submissions of fact in their written and oral submissions, whether expressly discussed in this section or not.

B. CLAIMANT'S INVESTMENT IN MEXICO

57. The Claimant asserts that to participate in PEMEX tenders, it needed to partner with a Mexican company, like OSA, that already had an established relationship with PEMEX.[9] The Respondent notes that POSH never had a shareholding or invested capital in OSA,[10] and that the need for POSH to partner with a Mexican company was due to the 49% limitation prescribed in Mexico's Foreign Investment Law ("**FIL**" or "**LIE**") for foreign investment in maritime companies dedicated to the commercial exploitation of vessels for inland navigation and cabotage in Mexico.[11]

58. According to the Claimant, its investment in Mexico would depend on three elements: the availability of the vessels, the contracts with OSA, and OSA's ability to contract with PEMEX.[12]

[8] Resp. SoD, para. 53; Rejoinder, paras. 83-111.
[9] Cl. SoC, paras. 52-54.
[10] Resp. SoD, para. 24.
[11] Resp. SoD, paras. 26-27, citing **CL-15**, Mexico Foreign Investment Law (1993), Art. 7 of FIL.
[12] Cl. SoC, para. 56.

59. The Claimant explains that its investment in Mexico took place in three phases: the *GOSH* phase, the *SEMCO* phase and the *SMP* phase.

(1) The GOSH Phase

60. On August 12, 2011, POSH, Mr. Carlos Espinosa, Mr. Amado Yáñez and Mr. Martín Díaz[13] entered into a Master Collaboration Agreement ("**MCA**"), for the establishment of a joint venture ("**JV**") company in Mexico between POSH and OSA ("**GOSH**").[14] POSH and Mr. Espinosa would hold 50% of the JV, Mr. Yáñez would hold 25%, and Mr. Díaz the remaining 25%.[15]

61. Mr. Espinosa eventually withdrew from the JV. POSH retained 14% of his equity, for a total of 49%, and allocated the remaining 1% to Inversiones Costa Afuera, S.A. de C.V. ("**ICA**"), a company owned by Mr. José Luis Montalvo, a strategic Mexican partner. POSH lent the capital for ICA to acquire the shares, through a Master Loan Agreement ("**MLA**")[16] and a Supplement to the MLA ("**Supplement**")[17]. Mr. Montalvo pledged ICA's shares as collateral for the repayment of the loan.[18] This way, POSH would retain full control over ICA's 1% stake[19] and over GOSH.[20]

62. According to the Claimant, at the time of GOSH's incorporation on August 26, 2011, "POSH owned 49% of the share capital, through its wholly owned subsidiary Mayan Investments Pte. Ltd. ("**MAYAN**"); [Mr. Montalvo] owned 1%, through ICA; Mr. Yáñez owned 25%, through Arrendadora Caballo de Mar III, S.A. de C.V. ("**Arrendadora**");

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[13] Mr. Espinosa was a Mexican partner of one of POSH's sister companies. Mr. Yáñez and Mr. Díaz, together with the Cargill family were OSA's shareholders. *See* Cl. SoC, paras. 53-54.

[14] **C-33**, Master Collaboration Agreement, entered into between PACC Offshore Services Holdings Pte. Ltd., Carlos Ramón Espinosa Cerón, Amado Omar Yáñez Osuna, and Martín Díaz Álvarez, dated August 12, 2011 ("**MCA**") .

[15] **C-33,** MCA, para. 4.2; W.S. Seow, para. 16.

[16] **C-34**, Master Loan Agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Inversiones Costa Afuera S.A. de C.V., dated November 23, 2011 ("**MLA**").

[17] **C-34**, MLA, also includes Supplement - Details of the Loan, dated February 2, 2012.

[18] **C-39**, Stock Pledge Agreement relating to Inversiones Costa Afuera, S.A. de C.V., entered into by and between José Luis Montalvo Sánchez Mejorada, PACC Offshore Services Holdings Pte. Ltd., and Juan Carlos Durand Hollis, dated December 10, 2012; W.S. Montalvo, para. 19; Cl. SoC, para. 62.

[19] W.S. Seow, para. 23.

[20] Cl. SoC, para. 61.

and Mr. Díaz owned the remaining 25%, through GGM Shipping, S.A. de C.V. ("**GGM**")."[21]

63. The Respondent asserts that GOSH's above-indicated ownership interest, was agreed during a shareholders' meeting on May 18, 2012, when the bylaws were modified.[22]

64. According to the Respondent, the last ownership structure that GOSH notified to the National Registry of Foreign Investment ("**RNIE**") was on October 20, 2011, when it was reported that GOSH's shareholding was 51% of Mr. Carlos Ramón Espinosa Cerón, and 49% of POSH.[23]

65. Under the JV, POSH would provide the vessels to serve PEMEX's offshore needs, OSA would procure contracts with PEMEX, the vessels would be bareboat chartered to OSA, which would sub-charter them to PEMEX.[24]

66. GOSH acquired six vessels (Caballo Argento ("**Argento**"), Caballo Babieca ("**Babieca**"), Don Casiano ("**Casiano**"), Caballo Copenhagen ("**Copenhagen**"), Caballo Monoceros ("**Monoceros**"), Caballo Scarto ("**Scarto"**), and collectively "**GOSH's Vessels**"[25] from the Claimant-related entities for USD 158.91 MM. Of that cost, POSH temporarily loaned USD 142.75 MM to GOSH (the "**Bridge Loan**")[26]. To secure the Bridge Loan, GOSH mortgaged the vessels and GOSH's shareholders pledged their shares.[27]

[21] W.S. Montalvo, para. 17. Cl. SoC, para. 59.

[22] Resp. SoD, para. 34.

[23] Resp. SoD, para. 33, referring to **R-001**, GOSH registrations with the RNIE.

[24] **C-33,** MCA, para. 2.5; W.S. Seow, para. 20. See also Resp. SoD, para. 29.

[25] W.S. Montalvo, para. 21.

[26] **C-49**, Credit Agreement between Servicios Marítimos GOSH, S.A.P.I. de C.V. and PACC Offshore Services Holdings Pte. Ltd., dated July 1, 2013 ("**Bridge Loan**"); W.S. Montalvo, para. 22.

[27] W.S. Montalvo, para. 22 (footnotes omitted).

67. Four of the GOSH Vessels had to undergo modifications to comply with PEMEX's specifications.[28] Such modifications represented additional USD 11,316,203.52, of which POSH paid USD 4,967,549.33, and GOSH paid USD 6,348,654.19.[29]

68. The Claimant states that due to problems with the Banco Nacional de México ("**Banamex**"), the Claimant converted the original Bridge Loan to a final loan to permanently finance GOSH's acquisition (the "**Loan**")[30] which was secured through an irrevocable trust dated August 9, 2013, with POSH as the primary beneficiary to receive all payments owed by PEMEX in connection with the OSA-PEMEX contracts (the "**Irrevocable Trust**")[31], managed by Banco Invex, S.A., Institución de Banca Múltiple, Invex Grupo Financiero ("**Invex**").[32] The purpose of the Irrevocable Trust was "to shield POSH from potential contingencies and eventualities affecting OSA."[33]

69. The Respondent states that the establishment of the Irrevocable Trust was due to a restructuring of OSA's debt.[34] OSA failed to pay charters supported by 73 unpaid invoices for a total of USD 49,148,757.16 and failed to make payment for payment notes for USD 224,057.84.[35] OSA's debt with PFSM was USD 14,579,677.23 by November 2013.[36] Further, OSA accrued various debts with HERMOSA and HONESTO due to chartering debts, repairs of the vessels due to OSA's bad maintenance, and wage payment

[28] W.S. Montalvo, para. 24.

[29] W.S. Montalvo, para. 25.

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

[31] **C-70**, Public Deed No. 1,015, recording the Trust Agreement, dated August 9, 2013.

[32] Cl. SoC, paras. 65-66, 72-73; W.S. Seow, paras. 26-27, 29; W.S. Montalvo, para. 22; **C-40**, Minutes of the 8th Board of Directors meeting of PACC Offshore Services Holdings Pte. Ltd., dated August 18, 2011, p. 5; **C-49**, Credit Agreement between Servicios Marítimos GOSH, S.A.P.I. de C.V. and PACC Offshore Services Holdings Pte. Ltd., dated July 1, 2013; **C-70**, Public Deed No. 1,015, recording the Trust Agreement, dated August 9, 2013; Tr. Day 1 [Cheng] 16:22-17:13.

[33] W.S. Seow, para. 29.

[34] Resp. SoD, paras. 90-108; Rejoinder, paras. 114-152; **C-154**, Credit Recognition Request filed by SEMCO Salvage (IV) Pte. Ltd., dated September 3, 2014, p. 5; **R-015**, Addendum modifying agreement to the charter of Caballo Argento, dated February 1, 2013 (*Addendum/convenio modificatorio al Fletamento de Caballo Argento*).

[35] Resp. SoD, para. 64, citing **C-198**, Credit Recognition Request filed by Servicios Marítimos GOSH, S.A.P.I. de C.V., dated September 3, 2014, pp. 3-9, 11.

[36] Resp. SoD, para. 70, citing **C-149**, Credit Recognition Request filed by POSH Fleet Services Mexico, S.A. de C.V., dated September 3, 2014, p. 4.

to the crew.[37] OSA also had difficulties in paying SEMCO IV for claims related to the Salvision and Salvirile vessels amounting to US$ 1,917,899.52, reason for which it submitted a notice of arbitration.[38] Through the Irrevocable Trust, the risk of nonpayment of OSA should be reduced.[39]

70. Further, the Respondent states that there was a second Fund established, the Autofin Fund ("**Autofin Fund**") for the rights of the Contracts OSA-POSH with relation to Caballo Grano de ORO and Rodrigo.[40]

71. By February 16, 2012, GOSH's Vessels were registered in the Mexican Public Maritime Registry and flying the Mexican flag.[41] By May 2012, GOSH's Vessels were servicing PEMEX's offshore oil projects through bareboat charters GOSH had entered into with OSA (the "**GOSH Charters**") as well as through service contracts, with the structure of GOSH chartering the vessels to OSA, which in turn placed them at the service of PEMEX.("**GOSH Service Contracts**")[42]

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[37] Resp. SoD, paras. 71-83, citing **C-152**, Credit Recognition Request filed by POSH Honesto, S.A.P.I. de C.V., dated September 3, 2014, pp. 3-4; **C-160**, Notice of Repossession and Notice of Default and Requirement of Payment in relation to the vessel Rodrigo DPJ, sent by GOSH Rodrigo DPJ, S.A.P.I. de C.V. to Oceanografía, S.A. de C.V., dated February 10, 2014, p. 4; **R-028**, Federal Civil Code, Articles 2108, 2109; **C-153**, Credit Recognition Request filed by POSH Hermosa, S.A.P.I. de C.V., September 3, 2014, pp. 3-4; **C-161**, Notice of Repossession of vessel Caballo Grano de Oro, sent by GOSH Caballo Grano de Oro S.A.P.I. de C.V. to Oceanografía, S.A. de C.V., February 10, 2014, p. 4; **C-151**, Act of Protest, recording the delivery of the vessel Caballo Grano de Oro, March 10, 2014 p. 2.

[38] Resp. SoD, paras. 84-108, citing **C-154**, Credit Recognition Request filed by SEMCO Salvage (IV) Pte. Ltd., September 3, 2014, pp. 3-5; **C-196**, Letter from Incisive Law LLC to Oceanografía S.A., de C.V., February 12, 2014, pp. 4-5; **R-014**, Notice of Arbitration from SEMCO Salvage (IV) PTE LTD against OSA, March 25, 2014, p. 5.

[39] Resp. SoD, paras. 84-108, citing **C-111**, Management Agreement by and between POSH Fleet Services Mexico, S.A. de C.V., and Oceanografía, S.A. de C.V., July 1, 2013, p. 3; **C-122**, Email and attachment from L. Peng Wu, October 22, 2013, p. 3; **C-146**, Writ filed by José Luis Montalvo Sánchez Mejorada, on behalf of GOSH, April 29, 2014, pp- 8-10; **R-003**, Pacc Offshore Services Holdings Ltd, Annual Report 2014, pp. 7-8.

[40] Resp. SoD, paras. 109-115, citing **R-016**, Autofin Trust, pp. 2-3.

[41] W.S. Montalvo, para. 26; Cl. SoC, para. 74, citing **C-77**, Flagging Act for "Caballo Argento", dated October 26, 2011; **C-78**, Flagging Act for "Caballo Babieca", dated December 23, 2011; **C-79**, Flagging Act for "Caballo Copenhagen", dated February 16, 2012; **C- 80**, Flagging Act for "Caballo Monoceros", dated January 16, 2012; **C-81**, Flagging Act for "Don Casiano", dated October 17, 2011; **C-82,** Flagging Act for "Caballo Scarto", dated January 10, 2012; **C-83**, Certificate of Registration for "Caballo Argento" dated October 26, 2011; **C-84**, Certificate of Registration for "Caballo Babieca", dated December 23, 2011; **C-85**, Certificate of Registration for "Don Casiano", dated October 17, 2011; **C-86**, Certificate of Registration for "Caballo Copenhagen", dated February 10, 2012; **C-87**, Certificate of Registration for "Caballo Monoceros", dated January 16, 2012; **C-88**, Certificate of Registration for "Caballo Scarto", dated January 10, 2012.

[42] W.S. Seow, para. 31 (footnote omitted); W.S. Montalvo, para. 26 (footnote omitted); Cl. SoC, paras. 75-77; Resp. SoD, para. 51, citing **C-89**, Bareboat Charter for Caballo Copenhagen between Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated February 1, 2012; **C-90**, Bareboat Charter for Caballo Scarto between

(2) The SEMCO Phase

72. On December 27, 2011, Semco Salvage (I) Pte. Ltd. ("**SEMCO I**") and Semco Salvage (IV) Pte. Ltd. ("**SEMCO IV**"), two wholly-owned Singaporean subsidiaries of the Claimant, entered into contracts with OSA to charter two additional vessels ("the **SEMCO Vessels**") to use in OSA's offshore operations in Mexico with no direct contract with PEMEX.[43] POSH could use Singaporean-flagged vessels under renewable two-year permits to navigate in Mexico.[44] The SEMCO Vessels, "Salvirile" owned by SEMCO I, and "Salvision" owned by SEMCO IV, were in full operation in Mexico by February 2012.[45]

(3) The SMP Phase

73. By May 12, 2012, OSA requested two additional vessels from POSH, to be used for a PEMEX tender. These two additional vessels were acquired through Servicios Marítimos POSH, S.A.P.I ("**SMP**") – previously Sermargosh2, S.A. de C.V. – incorporated on March 22, 2012 as a second JV vehicle, and owned by the Claimant (49%) and ICA (51%), where the Claimant loaned the purchase price of the shares to ICA.[46] For this,

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Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated January 3, 2012; **C-91**, Bareboat Charter for Don Casiano between Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated September 18, 2011; **C-92**, Bareboat Charter for Caballo Babieca between Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated December 20, 2011; **C-93**, Bareboat Charter for Caballo Monoceros between Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated January 27, 2012; **C-94**, Bareboat Charter for Caballo Argento between Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated October 29, 2011; **C-95**, 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., dated April 30, 2013; **C-96**, 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., dated June 22, 2012; **C-146**, Writ filed by José Luis Montalvo Sánchez Mejorada, on behalf of GOSH, April 29, 2014, p. 8; **R-005**, Explanatory Table on modifications to Charters and to the OSA-PEP Contracts.

[43] W.S. Seow, paras. 32-33; W.S. Montalvo, para. 28; Cl. SoC, paras. 78-81; Resp. SoD, paras. 39, 47; **C-20**, Bareboat Charter for Salvirile between Semco Salvage (IV) Pte. Ltd. and Oceanografía, S.A. de. C.V., dated December 27, 2011; **C-21**, Bareboat Charter for Salvision between Semco Salvage (IV) Pte. Ltd. and Oceanografía, S.A. de C.V., dated December 27, 2011.

[44] W.S. Seow, paras. 32-33 (footnotes omitted); W.S. Montalvo, paras. 27-28 (footnotes omitted).

[45] Cl. SoC, para. 80; Resp. SoD, para. 39.

[46] W.S. Seow, paras. 35-36; W.S. Montalvo, paras. 29-30; Cl. SoC, paras. 82-85; Resp. SoD, para. 40; **C-42**, Memorandum from Gerald Seow to POSH Board of Directors, dated May 8, 2012; **C-10**, Public Deed No. 63,246, recording the Extraordinary Shareholders Meeting of Servicios Marítimos POSH, S.A.P.I. de C.V., from May 5, 2014, dated May 6, 2014; **C-34**, Master Loan Agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Inversiones Costa Afuera S.A. de C.V., dated November 23, 2011, p. 10, Supplement – Details of the Loan dated April 12, 2012, paras. 4.1, 4.5, 6.2, 8.1; **C-101**, Stock Pledge Agreement relating to Sermargosh2 entered into by and

SMP incorporated two fully-owned subsidiaries, HONESTO and HERMOSA, where HONESTO acquired the vessel Rodrigo DPJ ("**Rodrigo**") for USD 21 MM, and HERMOSA acquired the vessel Caballo Grano de ORO ("**Grano de Oro**") for USD 24.5 MM with a loan granted by the Claimant with the collateral of the vessels.[47] Both vessels were modified per PEMEX's specifications.[48] By April 2013, these were chartered to OSA, which in turn chartered them to PEMEX according to the service contracts PEMEX awarded OSA on June 24, 2013.[49]

74. The Respondent notes that, as with GOSH, the Claimant openly acknowledges that POSH maintained control over the corporate and economic rights of SMP shares.[50]

(4) The Incorporation of Other Supporting Companies

75. The Claimant further provided supporting services to OSA, such as through its subsidiary PFSM for technical and crew management assistance of GOSH's vessels, and through its subsidiary Operadora de Servicios Costa Afuera, S.A. de C.V. ("**OSCA**") for

between Inversiones Costa Afuera, S.A. de C.V., PACC Offshore Services Holdings Pte. Ltd., and Juan Carlos Durand Hollis, dated December 10, 2012.

[47] Cl. SoC, paras. 86-87, citing **C-102**, Bill of Sale for POSH Plover (Rodrigo DPJ), dated May 14, 2012; **C-103**, Bill of Sale for POSH Vantage (Caballo Grano de Oro), dated July 25, 2012; **C-104**, Public Deed No. 29,100, recording the ship mortgage agreement for Caballo Grano de Oro and loan agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Gosh Caballo Grano de Oro S.A.P.I. de C.V., dated February 5, 2013; **C-105**, Public Deed No. 28,050, recording the ship mortgage agreement for Rodrigo DPJ and the loan agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Gosh Rodrigo DPJ, S.A.P.I., dated August 8, 2012. See also Resp. SoD, paras. 40-41, 46.

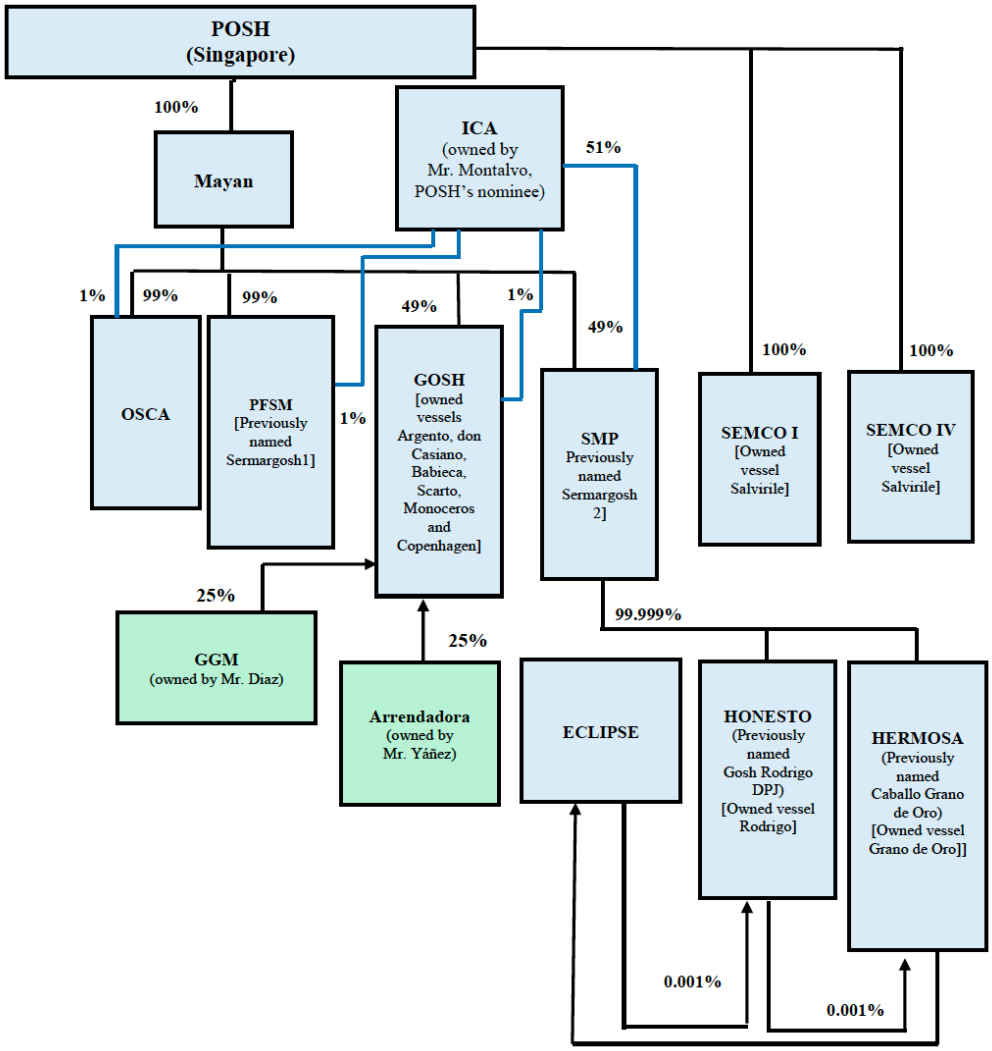
[48] Cl. SoC, para. 88, citing **C-106**, Email from J. Phang to H. Escobedo et al., dated June 19, 2013; W.S. Montalvo, paras. 24, 31; **C-63**, Email from K. Hwee Sen to L. Keng-Lin et al., dated October 19, 2014.

[49] Cl. SoC, paras. 84, 89, citing **C-95**, 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., dated April 30, 2013; **C-96**, 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., dated June 22, 2012; **CER-003**, Richards' Expert Industry Report, paras. 5.5-5.7; **C-107**, Ruling Notification Record for National Public Bid No. 18575088-522-13, dated June 24, 2013; **C-108**, Contract No. 421003849 entered into between Pemex Exploración y Producción and Oceanografía, S.A. de C.V., for Caballo Grano de Oro, dated July 5, 2013; **C-109**, Contract No. 421003848 entered into Pemex Exploración y Producción and Oceanografía, S.A. de C.V., for Rodrigo DPJ, dated July 5, 2013.

[50] Resp. SoD, para. 41, referring to Cl. SoC, para. 85.

administrative personnel related to OSA's operations.[51] Further, SMP incorporated ECLIPSE as a holding company to facilitate transactions within the POSH group.[52]

76. The Claimant provides the following chart to illustrate its corporate structure:[53]



[51] Cl. SoC, paras. 90-92, citing W.S. Seow, paras. 39-40; **C-14**, Public Deed No. 59,370, recording of the Extraordinary and Ordinary Shareholders Meeting of POSH Fleet Services Mexico, S.A. de C.V. from June 5, 2013, dated June 13, 2013, p. 6; **C-18**, Semco Salvage (IV) Pte. Ltd. Register of Members; C-19, Semco Salvage (I) Pte. Ltd. Register of Members; W.S. Montalvo, para. 34; **C-111**, Memorandum, from Dawn Tay to POSH Board of Directors, dated November 18, 2013, **C-110**; Management Agreement by and between POSH Fleet Services Mexico, S.A. de C.V., and Oceanografía, S.A. de C.V., dated July 1, 2013; **C-41**, Memorandum from Gerald Seow to POSH Board of Directors, dated February 14, 2012. See also Resp. SoD, para. 48.

[52] Cl. SoC, para. 93, citing **C-13**, Public deed No. 55,144, recording the incorporation of Gosh Caballo Eclipse, S.A.P.I. de C.V., by SERMARGOSH2, S.A.P.I. de C.V., and GOSH Caballo Grano de Oro, S.A.P.I. de C.V., dated May 9, 2012, pp. 16-17.

[53] Cl. SoC, para. 95.

(5) Other Activities of the Claimant in Mexico

77. On October 23, 2013, the Claimant also incorporated POSH GANNET, which acquired the vessel Gannet.[54] In a partnership with Huasteca Oil Energy, S.A. de C.V. ("**Huasteca**") to bid for a contract directly with PEMEX. Huasteca was a minority-owned subsidiary of the Claimant and was awarded the contract. The vessel Gannett was chartered to PACC Offshore México, S.A. de C.V. ("**POM**").[55] PEMEX renewed the contract on several occasions and, according to the Claimant, at the time of writing of the Memorial, it was still fully operational in Mexico, profitably in contract with PEMEX.[56]

(6) POSH's Operations and Alleged Contributions to Mexico

78. According to the Claimant, by the end of 2013, POSH had a fully established investment, and solid and stable operations in Mexico.

79. The Claimant submits that its investments in Mexico "*exceeded $190 million and supported the growth of Mexico's oil industry*."[57] The Claimant's investments included two offices, Mexican and Singaporean companies including: "*two holding companies (SMP and ECLIPSE), five vessel-owning companies (GOSH, HONESTO, HERMOSA, SEMCO I and SEMCO II), and two supporting companies (PFSM and OSCA)*."[58]

80. As to the vessels, POSH's subsidiaries had 10 vessels operating in the Gulf of Mexico, within territorial waters, which the Claimant submits had a combined value of USD 215 MM.[59] Eight of them flew under the Mexican flag, they "*were bareboat chartered to*

[54] Cl. SoC, paras. 96-97, citing **C-110**, Memorandum, from Dawn Tay to POSH Board of Directors dated November 18, 2013; **C-22**, Public deed No. 18,286, recording the incorporation of POSH Gannet, S.A. de C.V., by Mayan Investments, Pte. Ltd. and PACC Offshore Services Holdings, Pte. Ltd., dated October 23, 2013. See also Resp. SoD, para. 49.

[55] Cl. SoC, para. 97, citing **C-112**, Contract No. 421004858 between Pemex Exploración y Producción, and POSH and Huasteca Oil Energy, S.A. de C.V., dated June 30, 2014, p. 1.

[56] Cl. SoC, para. 98, citing **C-113**, Addendum No. 1 to Contract No. 421004858 (*Convenio Modificatorio Número Uno*) between PEP and PACC Offshore Mexico, S.A. de C.V. and Huasteca Oil Energy, S.A. de C.V., dated December 28, 2015, pp. 3-4; **C-114**, Addendum No. 5 to Contract No. 421004858 (*Convenio Modificatorio Número Cinco*) between PEP and, PACC Offshore Mexico, S.A. de C.V. and Huasteca Oil Energy, S.A. de C.V., dated April 23, 2018, pp. 4-5; W.S. Montalvo, para. 37.

[57] Cl. SoC, paras. 99-100.

[58] Cl. SoC, para. 100.

[59] Cl. SoC, para. 101, citing **C-43**, Bill of Sale for Caballo Argento, dated September 21, 2011; **C-44**, Bill of Sale for Caballo Babieca, dated September 13, 2011; **C-45**, Bill of Sale for Don Casiano, dated September 9, 2011; **C-46**, Bill

OSA and then assigned to long-term contracts that OSA had with PEMEX." The other two, flew the Singaporean flag, and "were bareboat chartered to OSA and performing operations in support of PEMEX, but not directly employed by PEMEX".[60]

81. The Claimant further asserts that it also provided other services, such as technical support, crew management to the GOSH's vessel, and supported several Mexican companies, contributing to the development of the oil and gas industry in Mexico.[61]

C. THE SANCTIONS, CRIMINAL INVESTIGATION, AND INSOLVENCY PROCEEDINGS

82. The Claimant submits that due to its connections with Mexico's prior administrations under a different political party, the Mexican administration led a politically motivated campaign to bring down OSA, its contractors and business partners, including POSH's Subsidiaries. These measures, claims the Claimant, targeted its Subsidiaries, and resulted in the destruction of POSH's investment.[62]

83. The Respondent, on the other hand, explains, by way of background, that between 2005 and 2009, the Auditoría Superior de la Federación ("**ASF**") discovered various irregularities concerning OSA, with the effect of creating a Surveillance Commission in the Chamber of Deputies.[63] Further, there were legal proceedings against OSA in Mexico and abroad.[64]

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of Sale for Caballo Copenhagen, dated August 31, 2011; **C-47**, Bill of Sale for Caballo Monoceros, dated December 15, 2011; **C-48**, Bill of Sale for Caballo Scarto, dated August 31, 2011; **C-115**, Bill of Sale for Rodrigo DPJ, dated March 2, 2015; **C-116**, Bill of sale for Caballo Grano de Oro, dated February 25, 2015; **C-119**, Certificate of Valuation of Salvirile, dated July 23, 2007; **C-120**, Certificate of Valuation of Salvision, dated July 23, 2007.

[60] Cl. SoC, para. 101.

[61] Cl. SoC, para. 102.

[62] Cl. SoC, para. 110.

[63] Resp. SoD, paras. 144-145.

[64] Resp. SoD, paras. 169-193, citing **C-166**, Statement of Claim for the Declaration of Insolvency, filed by the PGR, April 9, 2014, pp. 23, 24, 26; **C-181**, Writ filed by Servicio de Administración y Enajenación de Bienes (answering the insolvency claim on behalf of OSA), May 6, 2014, pp. 26-28; **R-029**, Judgment of the Fifth District Court, pp. 17-20; **C-242**, Email from C. Espinosa to J. Teo et al., June 21, 2011, pp. 1-3; **R-023**, Letter dated April 4, 2014, sent to the PGR by SAE, p. 3; **R-030**, Letter dated September 24, 2014, sent to the Senate Committee by SAE, p. 6; **C-126**, Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.'s case, 2015 Activities Report, p. 53; **R-031**, Letter dated July 22, 2015 sent to the Senate Committee by SAE, p. 4; **C-195**, Report of Pemex Internal Control Body, October 29, 2014, p. 5; **R-032**, Letter dated October 13, 2014 sent to the Senate Committee by PFF, p. 2; **R-033**, Letter dated March 30, 2015 sent to the Senate Committee by PGR, p. 3; **R-034**, List of cases in United States courts; **R-035,** *Oceanografía, S.A. de C.V. and Amado Yáñez Osuna v. Citigroup, Inc., Citibank, N.A.,*

84. The Claimant states that on February 10, 2014 (and the Respondent that on February 11, 2014), the Secretaría de la Función Pública ("**SFP**") issued a resolution accusing OSA of failing to obtain insurance policies covering 10% of the value of nine of its contracts with PEMEX as required by Mexican Law.[65] Based on this resolution, the SFP banned OSA from entering into new contracts with any public entity for one year, nine months, and 12 days, and to pay MEX 22 MM (the "**Sanction**").[66] The effects of the sanction were first suspended in July 2014, revoked in November 2014, and the revocation was confirmed in June 2015.[67]

85. The disqualification to enter into new contracts with public entities prompted Banamex to launch an internal review of the cash advance facility it had established with OSA and reported to the Mexican authorities that it believed a portion of the account receivables were fraudulent.[68]

86. On February 26, 2014, Banamex filed a criminal complaint against OSA before the Procuraduría General de la República ("**PGR**") claiming that OSA had forged work estimates and approvals from PEMEX to obtain over USD 400 MM. in cash advances from Banamex (the "**Banamex Complaint**").[69]

87. On February 27, 2014, the Financial Intelligence Unit of the Ministry of Treasury ("**UIF**") filed a separate criminal complaint before the PGR stating that OSA and its shareholders had engaged in money laundering and requesting the seizure of OSA and

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Citigroup Global Markets, Inc. Banco Nacional de México, S.A., No. 17-cv-1434, United States District Court, Southern District of New York, November 30, 2017. .

[65] Cl. SoC, para. 113, citing **C-127**, Letter from D. Ramírez Ruiz to Senator L. Hernández Lecona, dated May 2, 2014 (attachment containing the administrative procedure adopted against Oceanografía, S.A. de C.V.); Reply, paras. 147-155; Resp. SoD, paras. 194-200.

[66] Cl. SoC, para. 113, citing **C-127**, Letter from D. Ramírez Ruiz to Senator L. Hernández Lecona, dated May 2, 2014 (attachment containing the administrative procedure adopted against Oceanografía, S.A. de C.V.); Resp. SoD, paras. 194-195.

[67] Cl. SoC, para. 114, citing **C-128**, Judgement of the Court of Appeals for the 10th Circuit, dated June 4, 2015; Resp. SoD, paras. 206-211

[68] Cl. SoC, para. 118, citing **C-131**, Email from A. Orvañanos to G. Seow et al., dated February 28, 2014; **C-126**, Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.'s case, 2015 Activities Report, p. 65. Resp. SoD, paras. 161-162, 215-225.

[69] Cl. SoC, para. 121, citing **C-126**, Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.'s case, 2015 Activities Report, p. 11; Resp. SoD, paras. 231-233.

all its assets (the "**UIF Complaint**").[70] The case was assigned to the Organized Crime Unit ("**OCU**"), which initiated the criminal investigation "*Averiguación Previa UEIORPIFAM/AP/065/2014.*"[71] The Claimant states that the investigation was suspended on October 10, 2018, and referred to a different governmental unit. The Respondent states that it only did the latter.[72]

88. One day later, the PGR ordered the temporary seizure of OSA, all its assets, and those of its shareholders (the "**Seizure Order**"). As a result, on March 1, 2014, the PGR ordered Servicio de Administración y Enajenación de Bienes ("**SAE**") to take control of OSA.[73] SAE blocked all payments owed by OSA to the Subsidiaries and owed by PEMEX to the Claimant via the Irrevocable Trust.[74]

89. On March 11, 2014, the Claimant terminated the loan granted to GOSH due to the Subsidiaries' default on the loans.[75] On March 13, 2014, the Claimant sent notice to Arrendadora and GGM commencing enforcement of the share pledges and requested approval from Mexican courts to sell the shares, which the courts authorized on July 31 and August 7, 2014.[76]

90. On March 19, 2014, PGR seized and detained 10 vessels of the Claimant's Subsidiaries and placed them under SAE's control (the "**Detention Order**").[77] The Claimant states that it learned unofficially about the Detention Order on March 25, 2014.[78] On March

[70] Cl. SoC, para. 122, citing **C-140**, Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury, dated February 27, 2014, p. 24; Reply, paras. 164-178; Resp. SoD, paras. 234-239; Rejoinder, paras. 198-201.

[71] Cl. SoC, para. 122, citing **C-140**, Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury, dated February 27, 2014, p. 24.

[72] Cl. SoC, para. 127; Resp. SoD, paras. 244-248.

[73] Cl. SoC, para.129; Reply, paras. 179-209, citing **C-141**, Seizure Order (*Acuerdo de Aseguramiento),* issued by the Special Unit for the Investigation of Illicit Funds Operations and Forgery or Alteration of Money, dated February 27, 2014; **C-126**, Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.'s case, 2015 Activities Report.

[74] Cl. SoC, para. 129, citing W.S. Montalvo, para. 48.

[75] Cl. SoC, para. 224, citing **C-150**, Act of Protest, recording the delivery of the vessel Rodrigo DPJ, dated March 7, 2014; **C-151**, Act of Protest, recording the delivery of the vessel Caballo Grano de Oro, dated March 10, 2014.

[76] Cl. SoC, paras. 224-225, citing **C-216**, Writ filed by POSH, dated April 3, 2014; **C-217**, Writ filed by POSH, dated March 28, 2014.

[77] Cl. SoC, para. 139; Reply, paras. 225-243, citing **C-143**, Record of Service of the decision that orders the seizure of GOSH's vessels from March 19, 2014, dated March 28, 2014.

[78] Cl. SoC, para. 139.

28, 2014, the Claimant submitted to the PGR the documentation that the ten vessels belonged to the Claimant and its Subsidiaries and subsequently filed two further briefs requesting the release of the vessels.[79]

91. During part of the Detention Order, GOSH's Vessels remained operative servicing PEMEX, with PFSM having to assume the payment obligations OSA failed to meet.[80] On May 16, 2014, GOSH withdrew the vessels from the GOSH Charters but did not recover the use of the vessels. The vessels remained inoperative during the rest of the Detention Order.[81]

92. The SMP Vessels remained inoperative and OSA failed to pay the crew. SMP covered OSA's costs of maintenance and crew.[82] SMP regained possession of the vessels on March 7 and 10, but the vessels remained inoperative during the detention period.[83]

93. The SEMCO Vessels also remained inoperative during the detention period.[84] While OSA paid the crew, SEMCO could not regain possession nor deploy them elsewhere. According to the Claimant, the vessels depreciated due to OSA's improper maintenance and repair. SEMCO assumed the consequent costs.[85]

94. The SEMCO Vessels were released on June 26, 2014. GOSH's Vessels and the SMP Vessels were released on July 16, 2014.[86]

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[79] Cl. SoC, para. 139, citing **C-144**, Email from J. Phang to G. Seow et al., dated February 28, 2014; **C-145**, Writ filed by José Luis Montalvo Sánchez Mejorada, on behalf of GOSH, dated March 28, 2014.

[80] Cl. SoC, para. 141, citing W.S. Montalvo, para. 50; W.S. Seow, para. 40.

[81] Cl. SoC, para. 141, citing W.S. Montalvo, para. 50; **C-149**, Credit Recognition Request filed by POSH Fleet Services Mexico, S.A. de C.V., dated September 3, 2014; W.S. Montalvo, para. 52; **CER-001,** Versant Report, para. 118.

[82] Cl. SoC, para. 142.

[83] Cl. SoC, para. 142, citing **C-150**, Act of Protest, recording the delivery of the vessel Rodrigo DPJ, dated March 7, 2014; **C-151**, Act of Protest, recording the delivery of the vessel Caballo Grano de Oro, dated March 10, 2014; **C-152**, Credit Recognition Request filed by POSH Honesto, S.A.P.I. de C.V., dated September 3, 2014; **C-153**, Credit Recognition Request filed by POSH Hermosa, S.A.P.I. de C.V., dated September 3, 2014; W.S. Montalvo, para. 51; **CER-001,** Versant Report, para. 53.

[84] Cl. SoC, para. 143.

[85] Cl. SoC, para. 143, citing W.S. Montalvo, paras. 52-53; **C-154**, Credit Recognition Request filed by SEMCO Salvage (IV) Pte. Ltd., dated September 3, 2014; **CER-001,** Versant Report, para. 118.

[86] Cl. SoC, para. 144, citing **C-155**, Record of Service of the decision that orders the lifting of the interim measures and the release of the vessels Salvision and Salvirile from June 25, 2014, dated June 26, 2014; **C-156**, Record of Service of the decision that orders the lifting of the interim measures and the release of the vessel Rodrigo DPJ from

95. On May 5, 2014, the PGR launched an investigation against Mr. Yáñez, who was arrested. According to the Claimant, upon challenging the arrest, Mr. Yáñez was released.[87] On May 28, 2014, the PMF launched an investigation against Mr. Díaz.[88] On October 17, 2017, Mexico launched another investigation against Mr. Yáñez. He was arrested and imprisoned. He challenged his detention and was released.[89] The Respondent states that Mr. Yáñez is still subject to a criminal proceeding and was only released on bail.[90]

96. On April 9, 2014, the PGR filed for insolvency proceedings against OSA (the "**Insolvency Claim**") before a Federal Court in Mexico (the "**Insolvency Court**").[91] On April 14, 2014, the Insolvency Court admitted the Insolvency Claim (the "**Writ of Admission**"), initiated insolvency proceedings against OSA (the "**Insolvency Proceeding**") and ordered the Federal Institute of Insolvency Specialists ("**IFECOM**") to appoint SAE as Visitor, who assigned this function to Mr. José Antonio de Anda Turati.[92] Further, the Writ of Admission ordered to suspend all execution proceedings against OSA and all payments in favor of OSA's creditors, to make all payments owed to OSA to SAE, and to only make payments that were indispensable to continue operations.[93]

July 16, 2014, dated July 16, 2014; **C-157**, Record of Service of the 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 Argento from July 16, 2014, dated July 16, 2014; **C-158**, Record of Service of the decision that orders the lifting of the interim measures and the release of the vessel Caballo Grano de Oro from July 16, 2014, dated July 16, 2014.

[87] Cl. SoC, paras. 152-153, citing **CER-005**, Ruiz Durán Criminal Law Expert Legal Opinion, para. 81.

[88] Cl. SoC, para. 154; Resp. SoD, paras. 277-278, **CER-005**, Ruiz Durán Criminal Law Expert Legal Opinion, para. 82; **C-162**, Reforma, *Reponen amparo a socio de Oceanografía*, dated May 29, 2015, retrieved from https://perma.cc/G5ZB-4QP2 (last accessed March 20, 2019).

[89] Cl. SoC, para. 155, citing **CER-005**, Ruiz Durán Criminal Law Expert Legal Opinion, para. 84; **C-163**, El Financiero, *Dictan formal prisión a Amado Yáñez*, dated October 28, 2014, retrieved from https://perma.cc/CNH5-3K4C (last accessed March 20, 2019); **C-164**, Excelsior, *Liberan a Amado Yáñez con brazalete*, dated April 14, 2017, retrieved from https://www.excelsior.com.mx/nacional/2017/04/14/1157635 (last accessed March 20, 2019). Resp. SoD, paras. 272-276.

[90] Resp. SoD, paras. 131-136.

[91] Cl. SoC, para. 160; Reply, paras. 251-252; Resp. SoD, paras. 285-289.

[92] Cl. SoC, paras. 163-164, citing **C-169**, Insolvency Court decision, dated April 14, 2014; **C-170**, Writ filed by Servicio de Administración y Enajenación de Bienes, dated April 25, 2014.

[93] Cl. SoC, para. 165, citing **C-173**, Insolvency Court decision, dated May 6, 2014.

97. On May 2, 2014, SAE filed a writ with the Insolvency Court requesting to order PEMEX to make payments to SAE instead of the trusts. On May 6, 2014, the Insolvency Court ordered PEMEX to do so (the "**Diversion Order**") and, on May 9, 2014, the Insolvency Court further clarified that the Diversion Order also applied to the Irrevocable Trust. The Order was confirmed on May 16, 2014, after the Claimant's and GOSH's challenge.[94]

98. On May 6, 2014, SAE answered the Insolvency Claim on behalf of OSA and confirmed OSA's insolvency.[95] On May 15, 2014, the Insolvency Court ordered SAE to assess OSA's financial condition. On June 5, 2014, SAE filed a report on the financial condition of OSA, and, on the same date, SAE sought interim relief to suspend the effects of the Sanction and allow OSA to enter into new contracts with PEMEX.[96]

99. On July 8, 2014, the Insolvency Court decided that OSA was insolvent and ordered IFECOM to appoint SAE as Conciliator.[97] Further, it adopted interim measures requested by SAE, such as the suspension of the effects of the Sanction, the suspension of Contractual Penalties by the State-owned company, and the return of the Contractual Penalties of February 28, 2014.[98] The Claimant states that at this point, OSA could no longer qualify for PEMEX's contracts due to its failure to meet the requirements.[99]

100. On August 15, 2014, the Insolvency Court decided that PEMEX could not rescind its contracts with OSA, including the GOSH and SMP Service Contracts.[100] The Claimant had previously been in contact with PEMEX to assign the GOSH contracts from OSA to

[94] Cl. SoC, paras. 168-170, citing **C-175**, Insolvency Court decision, dated May 6, 2014; **C-176**, Writ by Pemex, dated May 8, 2014; **C-177**, Insolvency Court decision, dated May 9, 2014, pp. 3-4; **C-178**, Writ filed by Invex, dated May 15, 2014; W.S. Seow, para. 29; **C-179**, Insolvency Court decision, dated May 16, 2014; **C-180**, 14th Court in Civil Matters for the 10th Circuit decision, dated June 3, 2015.

[95] Cl. SoC, para. 180, citing **C-181**, Writ filed by Servicio de Administración y Enajenación de Bienes, dated May 6, 2014; **C-182**, Insolvency Court decision, dated July 8, 2014, p. 24.

[96] Cl. SoC, para. 181, citing **C-183**, Report subscribed by José Antonio de Anda Turati on Oceanografía, S.A. de C.V.'s financial situation, dated June 5, 2014; **C-184**, Writ filed by Servicio de Administración y Enajenación de Bienes, dated June 26, 2014, p. 2.

[97] Cl. SoC, para. 183, citing **C-182**, Insolvency Court decision, dated July 8, 2014. Resp. SoD, paras. 312-313.

[98] Cl. SoC, paras. 181, 186, citing **C-182**, Insolvency Court decision, dated July 8, 2014, pp. 33-35.

[99] Cl. SoC, para. 187, citing **C-130**, Email from J. Phang to G. Seow et al., dated July 18, 2014.

[100] Cl. SoC, para. 194, citing **C-191**, Writ filed by Servicio de Administración y Enajenación de Bienes, dated June 27, 2014; **C-192**, Insolvency Court decision, dated August 15, 2014.

GOSH, and SAE had conveyed that it would cancel the contracts in exchange for a haircut to the debt of POSH Group and a higher commission for OSA.[101]

101. On October 23, 2014, the Insolvency Court decided the degree of priority and order of payment of OSA's creditors. The Claimant's Subsidiaries were classified as ordinary creditors, which the Subsidiaries appealed unsuccessfully.[102]

102. From February 25, 2015, to August 7, 2017, the Subsidiaries sold the GOSH's Vessels and the SMP Vessels. Thus the loans granted by the Claimant to GOSH, HONESTO, and HERMOSA were terminated.[103]

103. On August 8, 2016, the Insolvency Court declared OSA's bankruptcy.[104] From May 18, 2015 to January 12, 2018, the Insolvency Court approved three restructuring agreements, which were all appealed with the last one pending resolution.[105] The Claimant's Subsidiaries withdrew their claims, according to the Claimant due to the missing expectations to recover anything in the Insolvency Proceeding.[106]

104. On June 20, 2017, the Insolvency Court issued a decree informing that PGR had lifted OSA's seizure on June 15, 2017.[107]

IV. REQUEST FOR RELIEF

105. The Claimant has requested that the Tribunal:

[101] Cl. SoC, paras. 190-192, citing **C-186**, Email from G. Seow to G. Yeoh, dated March 19, 2014; **C-188**, Email from J. Phang to G. Seow et al., dated August 20, 2014.

[102] Cl. SoC, para. 204, citing **C-165**, Judgment on Recognition of Credits, dated October 23, 2014, pp. 32-39. Resp. SoD, paras. 319-321.

[103] Cl. SoC, paras. 227-231.

[104] Cl. SoC, para. 209, citing **C-204**, Insolvency Court Decision, dated August 8, 2016. Resp. SoD, para. 332.

[105] Cl. SoC, paras. 207-210; Resp. SoD, paras. 324-331, citing **C-200**, Insolvency Court Decision, dated May 18, 2015; **C-202**, Insolvency Court Decision, dated January 26, 2016; **C-207**, Insolvency Court decision, dated January 12, 2018.

[106] Cl. SoC, para. 211.

[107] Cl. SoC, para. 209, citing **C-205**, Writ filed by PGR informing lifting seizure of OSA, dated June 16, 2017. Resp. SoD, para. 266.

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."[108]

[108] Reply, para. 646.

106. The Respondent has requested that the Tribunal:

> *(i)* "*Dismiss entirely Claimant's claims, because the Tribunal does not have jurisdiction to rule POSH's claims or because the Tribunal does not have jurisdiction over one or more claims as they lack merits;*
>
> *(ii) Order Claimant that pays Respondent for the costs that it has expended in this arbitration, including legal fees, travel fees that the legal team and experts had to make, and the fees paid by Mexico to the Tribunal;*
>
> *(iii) Any other costs that Respondent may ask for during this arbitration and that the Tribunal considers appropriate.*"[109]

V. OBJECTIONS TO THE TRIBUNAL'S JURISDICTION

A. SUMMARY OF THE PARTIES' ARGUMENTS

107. According to the Claimant, Mexico engaged in an arbitrary campaign against OSA which ultimately resulted in the destruction of its investment in Mexico. It is also the Claimant's view that by and large Mexico has not refuted that Mexico: (i) launched and vigorously pursued a multi-front, politically motivated campaign against OSA, (ii) unlawfully destroyed OSA's liquidity and viability ("**the Unlawful Sanction**"), (iii) launched an unsupported criminal investigation against OSA for alleged money laundering ("**the UIF Complaint**"), (iv) unlawfully seized all of OSA's assets and took control over OSA ("**the Seizure Order**'), and (v) unlawfully seized the ten vessels owned by POSH's Subsidiaries ("**the Detention Order**"). The Claimant further asserts that (vi) the Unlawful Sanction drove OSA into insolvency ("**the Insolvency Proceeding**"), (vii) the Isolated Decision was an arbitrary ex-post attempt to justify the Diversion Order ("**the Isolated Decision**"), (viii) that the actions unreasonably and arbitrarily prevented POSH's Subsidiaries from contracting directly with PEMEX, and (ix) 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.

[109] Rejoinder, para. 557.

108. In its SoD the Respondent has argued that: "*i) the Tribunal lacks jurisdiction* ratione personae *and* ratione materiae *because the Claimant has failed to establish a proximate legal causal link between the investor/alleged investments and the alleged measures under the APPRI and the general principles of international law; ii) the Tribunal lacks jurisdiction* ratione materiae *because there were no investments and, to the extent that there were, the investments were made in contravention of the provisions of Mexican law; and (iii) the Tribunal lacks jurisdiction* ratione temporis*, as certain alleged measures are time-barred*."[110]

109. The Respondent explains that the Tribunal has no jurisdiction *ratione personae* and *ratione materiae* because the Claimant cannot speak for OSA and the governmental measures were not directed at it. The Claimant was affected only indirectly and incidentally because of its decision to conduct business with OSA. The Claimant was "*on [the] distant periphery of OSA's economic activities and, therefore, on the distant periphery of the alleged measures, acts and omissions.*"[111]

110. The Respondent argues that POSH confuses its claims with claims that OSA might make, but "*[n]either POSH nor its Subsidiaries can bring a claim based on allegations of how OSA was treated by Pemex or the Mexican government.*"[112] The Respondent argues that this confusion extends to the expropriation claim: "*[t]he 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 and, therefore, it cannot have been 'taken' or 'expropriated' from POSH.*"[113]

111. Similarly, the Respondent argues in respect of the claim of unfair and inequitable treatment: "*[r]ather than identifying the treatment of its investments (the Subsidiaries) by the Respondent, the Claimant bases its claim of a denial of fair and equitable treatment on actions involving OSA, a Mexican company which is not a POSH*

[110] Resp. SoD, para. 12.
[111] Id., para. 507.
[112] Id., para. 517.
[113] Id., para. 523.

investment."[114] The argument of lack of a causal link is repeated in the context of the Claimant's allegations of denial of full protection and security to OSA. They all refer to the treatment of OSA not to the Respondent's treatment of the Claimant's investment.

112. It is the Respondent's contention that the Claimant does not have investments covered by the APPRI because it lacks ownership of the Subsidiaries, and the alleged *de facto* control violated Mexican law. According to the Respondent, "*[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.*"[115]

113. The Respondent affirms that the Claimant has failed to prove that "*the availability of vessels, the contracts with OSA and OSA's ability to contract with PEMEX*" are covered investments under the APPRI; it is the Claimant's burden to prove that its alleged investments are covered under the protection of the APPRI.

114. As regards the objection *ratione temporis* the Respondent maintains that the three-year limit in Article 11(8) is a jurisdictional matter. The Respondent relies on the two-step test analysis of the *Rusoro* tribunal: "*[f]irst, it assessed whether the claimant (i.e., Rusoro) was aware of the existence of the alleged measures and their consequences for the alleged investments before the 'cut-off date' (3 years prior to Rusoro's Request for Arbitration). Second, it determined the impact of such knowledge for the 'investor-State' claims of the claimant.*"[116]

115. The Respondent applies the *Rusoro* test to the instant case. It lists first the measures identified by the Claimant that were adopted before the deadline of May 4, 2014 and then affirms that the measures so listed and any others taken before the said deadline are outside the jurisdiction of the Tribunal.

[114] Id., para. 527.

[115] Id., para. 542.

[116] Id., para. 557, emphasis omitted.

116. In its Reply, the Claimant questions whether the Respondent has discharged its burden "*to prove the factual and legal assertions on which its admissibility and jurisdictional objections are based*."[117] First, the Claimant asserts that there is no rule that only majority owned assets constitute covered investments. According to the Claimant, it is entitled to submit a claim on its own behalf irrespective of the proportion of ownership in the Subsidiaries. The Claimant also asserts that, under Article 11(2) of the Treaty, it is entitled to file a claim on behalf of local subsidiaries that it directly or indirectly owns or controls. The Claimant re-affirms that, under international law, *"the word 'control' includes both legal and de facto control.*"[118]

117. The Claimant refutes that its *de facto* control over the Subsidiaries violated Mexican law. Based on expert advice, the Claimant argues that "*[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*".[119] The Claimant notes that the Respondent has failed to produce any evidence to rebut the Claimant's expert report.

118. According to the Claimant, the Respondent has taken out of context its explanation in the SoC that "*the investment made by POSH and its Subsidiaries relied on three essential pillars: the availability of vessels, the contracts with OSA and OSA's ability to contract with PEMEX.*"[120] These pillars are not characterized in the SoC as investments but as premises for the investment to succeed. The Claimant affirms that "*at a minimum, Claimant's equity and debt investments in the Subsidiaries are covered investments under the Treaty*."[121]

119. The Claimant argues that the attempts to import a proximate cause requirement for jurisdiction is misplaced and incorrect. According to the Claimant, "*the general principle of causation requires a causal link between the State's* wrongful act *and the* damages

[117] Reply, para. 360.
[118] Id., para. 370.
[119] Id., para. 375.
[120] Id., para. 379, emphasis in the original.
[121] Id., para. 378.

incurred by the investor. This is a merits issue unrelated to the Treaty jurisdictional boundaries…"[122] The Claimant criticizes the Respondent's reliance on NAFTA cases and the requirement of "*relating to*" in Article 1101(1). The Claimant affirms that "*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.*"[123]

120. In any case, the Claimant states that, even if the jurisdiction of the Tribunal were subject to a proximate cause requirement, such requirement would be satisfied here. The Claimant points out that the measures were not measures of general application, as they were in the case of *Methanex*, but "*specifically targeted OSA and its commercial partners, including POSH and the Subsidiaries, and they directly and irreparably impacted POSH and the Investment*."[124]

121. As regards the *ratione temporis* objection based on Article 11(8) of the Treaty, the Claimant asserts that compliance with a statute of limitations is a requirement pertaining to admissibility rather than jurisdiction. Whether it is considered one or the other Article 11(8) is not a barrier to any of the POSH's claims because Mexico's measures constituted a composite act.

122. The Claimant asserts that the Respondent misrepresented the approach suggested in *Rusoro* and, "*[u]nlike 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*." [125]

123. The Respondent in the Rejoinder insists that the "*Claimant, in selectively quoting scholarship on jurisdiction and admissibility, conveniently ignores that investment treaty*

[122] Id., para. 388, emphasis in the original.
[123] Id., para. 391.
[124] Id., para. 398.
[125] Id., para. 425.

tribunals routinely consider the time bar as a preliminary jurisdictional issue that precedes any decision on the merits."[126] Based on Article 11(8) of the Treaty, the Respondent reasserts that "*any alleged measures taken before May 4, 2014, must be time barred, and this is a question of jurisdiction, not of arbitrability.*"[127]

124. The Respondent insists in its argument that the Tribunal lacks jurisdiction *ratione materiae* because the Investment must be compliant with domestic law. The Respondent contends that "*the record here provides substantial evidence that the Claimant structured its investment to give the false appearance that the Subsidiaries were in compliance with the 49% foreign ownership cap established by the FIL*."[128]

125. The Respondent re-asserts the lack of jurisdiction of the Tribunal *ratione personae*. According to the Respondent, "*the Claimant can allege no material actions taken by a governmental authority specifically in relation to GOSH or its Subsidiaries. Rather, the foundation of its claim is to pretend that it can complain about the treatment of OSA – a Mexican company wholly unrelated to the Claimant and that itself does not share the Claimant's view of its treatment.*"[129] The Claimant lacks standing to bring claims for alleged injuries to the purported pillars of the Investment.

126. The Respondent affirms that "*the Claimant had no property interest whatsoever in OSA or OSA's 'ability to contract with Pemex*.'" The Tribunal lacks jurisdiction over claims based on the treatment of OSA as well as OSA's contracts with Pemex and OSA's ability to contract with Pemex in the future, as those are not investments of the Claimant for which it could have standing. Further, the Claimant has not shown how "'*availability of vessels*" or its subsidiaries' services contracts with OSA are covered investments under the APPRI"[130].

[126] Rejoinder, para. 291.
[127] Id., para. 294.
[128] Id., para. 326.
[129] Id., para. 328.
[130] Id., para. 330.

127. The Respondent addresses the Claimant's criticism that it has tried to invent a jurisdictional requirement of immediate or proximate causation. The Respondent recalls that investor-state arbitration tribunals are not courts of general jurisdiction and their powers are limited to the consent given by the State. The Respondent finds relevant the reasoning of the *Methanex* tribunal rejecting the argument that "*relating to*" meant "*affecting*" because, "First, like NAFTA Article 1101(1), which the *Methanex* tribunal acknowledged to be a provision relevant to its jurisdiction, Article 11(1) and (2) of the APPRI prescribe thresholds to arbitration that similarly relate to this Tribunal's jurisdiction. Second, like NAFTA Article 1101(1), the thresholds for arbitration in Article 11(1) and (2) of the APPRI must be interpreted in a manner that confers upon them "*significance*". Third, the phrase "*by reason of, or arising out of*" in Article 11(1) and (2) of the APPRI is at least as strict as the term "*relating to*" in NAFTA Article 1101(1), if not stricter. Thus, as in *Methanex*, it is not enough to interpret this phrase to mean "*affecting*", which is exactly what the Claimant in this arbitration is attempting. The term "*relating to*" has been interpreted to mean "*a close and genuine relationship of ends and means*" and not something that is merely incidental or inadvertent. At the very least, the phrase "*by reason of, or arising out of" imposes a similar threshold. At most, the measures alleged by the Claimant in this arbitration have only an 'incidental' effect on the alleged investments and, therefore, clearly do not meet the threshold*."[131]

B. ASSESSMENT BY THE TRIBUNAL

(1) Preliminary Observations

128. It bears repeating that OSA is not an investment or investor as defined in the Treaty and the Claimant has no stake of ownership of OSA. The connection with OSA is purely contractual. The task of the Tribunal is to separate those actions of Mexico that are attributable to the Claimant's connection with OSA from acts allegedly taken against the Claimant and the Subsidiaries irrespective of such connection.

[131] Id., para. 340.

129. It is notable that the Claimant has failed to address the effect that its connection with OSA might have had on its investment. The Claimant has depicted OSA as a victim of state-sponsored political revenge without addressing a number of OSA's business practices which, as described below, brought them into the sphere of investigations for violations of the laws of Mexico.

130. When SFP sanctioned OSA in February 2013, it prompted Banamex to review in house and with PEMEX the factoring facility granted by Banamex to OSA. The United States SEC order to Cease and Desist summarized the findings of this review as follows:

> "*Over the period between 2008 and February of 2014, Banamex loaned billions of dollars on the basis of invoices and work estimates – also known as "accounts receivable factoring" in the banking industry – reflecting work performed for Petróleos Mexicanos, S.A. de C.V. ('Pemex') by Oceanografia, S.A. ('OSA'), a Mexican marine services provider for the oil industry in the Gulf of Mexico. However, some of the factored documents received from OSA, amounting to about $400 million, were fraudulent and included forged signatures. Banamex had deficient internal accounting controls over its accounts receivable factoring program used by OSA, including lacking internal accounting controls necessary to test the authenticity of the factored documents prior to advancing funds to OSA and recording them as accounts receivable. Banamex also lacked internal accounting controls sufficient to identify and respond to red flags that arose during the relationship between Banamex and OSA potentially warning Banamex of the ongoing fraud. Instead, it was not until the Government of Mexico itself accused OSA of failing to post a satisfactory insurance bond and decided to temporarily cease doing new business with OSA in February of 2014, at a time when Banamex had approved funding of over $600 million dollars to OSA and was still advancing monies to OSA, that Citigroup discovered many of the work estimates were falsified. Banamex's internal accounting controls surrounding the factoring program were not sufficient to allow the earlier detection of OSA's fraud. As a result, Citigroup recorded nearly $475 million in expenses in its financial statements. In particular, Citigroup adjusted its fourth quarter and full year 2013 financial results downward by the then estimated $360 million loss and recognized an additional loss of $113 million in 2014, when Citigroup had determined the full magnitude of the fraud.*"[132]

[132] **R-024**, SEC Order Cease and Desist Proceedings dated 16 August 2018, Summary, p. 2.

131. It is instructive to refer to what a Florida court was told about the same scheme by the same law firm that at the time was also representing the Claimant before the Tribunal[133]: "*[o]n February 20, 2014, Pemex confirmed what Citigroup already knew, that Pemex had not signed many of the Pemex work estimates and work estimate authorizations provided by Oceanografía to Citigroup. On approximately February 22, 2014, the CNBV launched a probe into the fraudulent scheme*."[134] The plaintiffs in the Florida case blame Citigroup for the fraudulent scheme and affirm that Citigroup admitted criminal behavior and report that the Mexican Banking Regulator and the Mexican Criminal Authority confirmed that Citigroup was responsible for the fraudulent scheme. The lawsuit mentions that Mr. Yáñez had violated criminal law by submitting forged documents to obtain cash advances from Citigroup. On February 28, 2014, a warrant was issued for his arrest for misappropriating Citigroup's cash advances, which he was supposed to use for paying Oceanografía's vendors, creditors and bondholders. A further arrest warrant was issued on October 28, 2014 for his role in fraudulent cash advances.[135]

132. It is also relevant that a similar scheme had been run before by OSA and described in the SEC settlement to show Banamex's inadequate response: "*[t]he response [of Banamex] to publicly available information regarding OSA and its principals was insufficient. Media reports alleged that OSA had defrauded another Mexican bank of more than $30 million dollars in 2006 under a credit product almost identical to the Program, by submitting fraudulent invoices to obtain financing from that bank, i.e. in the exact manner in which OSA defrauded Banamex. This information was publicized in the media and available to Banamex.*"[136]

[133] The Florida lawsuit was filed on August 23, 2016; the Notice of intent was filed on May 4, 2017; the Statement of Claim was filed on March 20, 2019. Resigned as counsel of the Claimant April 17, 2019 more than two years after filing the Florida lawsuit and a few weeks after filing the Statement of Claim.
[134] **R-022**, Florida case, para. 91.

[135] The Respondent has commented: "The plaintiffs in that lawsuit are represented by the law firm Quinn Emmanuel, the same firm that initially represented the Plaintiff in this arbitration. In Respondent's view, the Florida Case lawsuit contradicts the facts argued by the Claimant in this arbitration. For example, in the Florida Case, Plaintiffs claimed that Citigroup conspired with OSA to fraudulently falsify OSA's financial position vis-à-vis the plaintiffs. In this arbitration, the Claimant cites to Citigroup's financial analysis of OSA, which it has characterized as "conclusive evidence of the positive financial condition of OSA." Rejoinder, paras. 38-39.
[136] **R-024**, SEC Order Cease and Desist Proceedings dated 16 August 2018, para. 16.

133. What appears not to be in issue before this Tribunal is that fraudulent actions occurred, although the question of who may have been responsible for them remains unresolved. The fact that fraudulent behavior occurred is significant, as it makes clear that the Mexican state was entitled – indeed required – to take certain investigatory and other measures to protect the rule of law.

(2) The Respondent's Objections

134. The Tribunal will consider the following questions raised by the arguments of the Parties on the objections of the Respondent to the Tribunal's jurisdiction: i) was there an investment?; was the investment legal?; were Mexico's Measures related to the investment?; if the measures were related to the investment, are the claims time-barred? and the question raised by the Claimant of whether the time limitation should be considered as part of the jurisdiction or the merits.

135. It will be convenient to recall here when an investor may, according to the Treaty, submit a claim to arbitration under Article 11. In relevant part this 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."[…]*
>
> *8. A dispute may be submitted to arbitration provided that the investor has delivered to the disputing Contracting Party its notice of intent referred to in Article 10 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."*[137]

[137] **CL-1**, Treaty, Article 11.

Was there an investment?

136. The Treaty defines an investment as:

> *"[A]n asset owned or controlled, directly or indirectly by investors of one Contracting Party and established or acquired in accordance with the laws and regulations of the other Contracting Party in whose Area the investment is made, and in particular includes:*
>
> *(a) an enterprise;*
>
> *(b) shares, stocks, and other forms of equity participation in an enterprise, or futures, options, and other derivatives;*
>
> *(c) bonds, debentures, and other debt securities of an enterprise:*
>
> *(i) where the enterprise is an affiliate of the investor; or*
>
> *(ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a Contracting Party or an entity directly owned and controlled by a Contracting Party;*
>
> *(d) loans to an enterprise:*
>
> *(i) where the enterprise is an affiliate of the investor; or*
>
> *(ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a Contracting Party or an entity directly owned and controlled by a Contracting Party;*
>
> *(e) 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 under:*
>
> *(i) contracts involving the presence of an investor's property in the Area of the other Contracting Party, including turnkey or construction contracts, or concessions;*
>
> *(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; or*
>
> *(iii) licenses, authorizations, permits, and similar instruments;*

(f) 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;

(g) intellectual property rights; and

(h) claims to money involving the kind of interests set out in sub-paragraphs (a) to (g) above, but not claims to money that arise solely from:

(i) commercial contracts for the sale of goods or services by a national or enterprise in the Area of a Contracting Party to an enterprise in the Area of the other Contracting Party; or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by sub-paragraph (d) above;"[138]

137. The description of the investment in the Statement of Claim and substantively reproduced above includes ownership or control, including <u>*de facto*</u> control, of several enterprises directly or indirectly and loans. The Respondent's arguments assume that, for an enterprise to be a protected investment under the Treaty, an investor needs to own at least 51% of the enterprise: "*[t]he Claimant's positions are erroneous in the light of Article 1(2)'s explicit language. Article 1(2) requires the Claimant to have ownership, i.e., more than 51% of shares over the Subsidiaries to claim them as covered investments under the APPRI.*"[139]

138. Article 1(2) of the Treaty does not mandate any particular percentage of ownership of the enterprise for an investment to be protected. In fact, if the understanding of the Respondent would be correct, it would exclude the protection of the minority foreign investors which by law may not own more than 49% of the shares of a company. This takes the Tribunal to the question of whether the investment was made in accordance with the laws and regulations of Mexico.

139. The Respondent has argued that the investment is illegal because the Claimant evaded the FIL's requirements. The question for the Tribunal is whether the restriction in Article

[138] **CL-1**, Treaty, Article 1(7).

[139] Resp. SoD, para. 539.

7 of the FIL applies to POSH's Subsidiaries. The Claimant relies on the expert opinion of David Enríquez: "*[t]he restriction included in Article 7 the FIL only applies to Shipping companies that engage in commercial exploitation of vessels. The FIL does not provide a definition of "*commercial exploitation*" or "*commercial exploitation of vessels*." Article 2 of the Navigation Law, however, defines "Maritime Commerce" as "...the activities that are carried out through commercial and maritime exploitation of vessels and naval artefacts* in order to transport people, goods or things*, or to perform an activity of exploration or capture of natural resources, construction or recreation… This means that, the simple activity of making available a vessel to a third party in exchange for a rate, by means of a lease or a bareboat charter, or providing technical or crew management services, although being lucrative activities, do not constitute 'commercial exploitation of a vessel' for the purposes of the FIL.*"[140] Expert Enríquez noted that the Mexican administrative authorities have confirmed this understanding in DAJCNIE.315.14.92 of the Ministry of Economy.[141]

140. The Tribunal observes that this confirmation has not been rebutted by an expert opinion of the Respondent and that the Claimant's expert was not called to be cross-examined by the Respondent. The Tribunal concludes on the basis of the evidence before it, including in particular the expert evidence, that the investment of POSH was made in accordance with the FIL.

141. Therefore, the Tribunal turns to the issue of lack of "*proximate causation*" raised by the Respondent. The question for the Tribunal is whether Article 11 of the Treaty includes a "*proximate causation*" requirement and, if so, whether this requirement is satisfied in the present case.

142. The obvious starting point in determining whether such a requirement exists is the language of the provision, but this does not provide a clear answer. The language of "*by*

[140] **CER-009**, paras. 22-25. Emphasis in the original.
[141] **CER-009**, para. 26.

reason of, or arising out of [...]" does suggest the need for a link between the alleged breach and the loss, but the nature and extent of this link is unclear.

143. In light of this, the UNCITRAL Arbitration Rules applicable to this proceeding and existing investment case law may provide some guidance. The UNCITRAL Arbitration Rules state in the opening paragraph that "*[w]here parties have agreed that disputes between them* in respect of a defined legal relationship, whether contractual or not,[142] *shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree*." The Tribunal is not aware of any relevant modification to the Rules.

144. Almost all the cases which address this issue are related to NAFTA disputes, and none have facts similar to the present case. The leading case is *Methanex v. U.S.A.,* where the tribunal found that the language of "*relating to*" in Art 1101(1) NAFTA imported a requirement that there must be a "*legally significant connection between the measure and the investor or the investment*"[143] This, the tribunal said, was necessary if it was to impose some limit on the claims which could be brought under Art 1101(1), otherwise the infinite chain of consequences which flow from government actions and measures could give rise to an unlimited stream of investment claims. This line of reasoning in *Methanex* has been followed or cited on a number of occasions since.[144]

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[142] **CL-164**, Article 1(1), Emphasis added by the Tribunal.

[143] **CL-170**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, August 7, 2002, (Arbs. William Rowley, V.V. Veeder and Warren Christopher) ("***Methanex v. U.S.A."***), paras. 138-139.

[144] **RL-004**, *Bayview Irrigation District v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, June 19, 2007, (Arbs. Vaughan Lowe, Ignacio Gómez-Palacio and Edwin Meese III) ("***Bayview v. Mexico***"), para. 101; **CL-094/RL-021**, *Cargill v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, (Arbs. Michael C. Pryles, David R. Caron and Donald M. McRae) ("***Cargill v. Mexico***"), para. 174; **CL-206**, *Apotex Holdings Inc. and Apotex Inc v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, (Arbs. V.V. Veeder, J. William Rowley and John R. Crook) ("***Apotex v. U.S.A.***"), para 6.13*;* **RL-066**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada*, UNCITRAL, Award on Jurisdiction and Liability, March 17, 2015, (Arbs. Bruno Simma, Donald McRae and Bryan Schwartz) ("***William Ralph Clayton et al. v. Canada***"), para. 240; **RL-026**, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award, March 24, 2016, (Arbs. Gabrielle Kaufmann-Kohler, Charles N. Brower and Toby Landau) ("***Mesa Power v. Canada***"), para. 259.

145. The Claimant has directed the Tribunal to two authorities which it suggests depart from the approach in *Methanex*. On a close read, however, these cases do not support the Claimant's argument. Firstly, the Claimant relied on the decision in *Pope & Talbot v. Canada.* However, the tribunal in that case was addressing the issue of whether a measure which related to trade in goods under Chapter 3 of the NAFTA could also relate to investment under Chapter 11, not whether there is a "*proximate causation*" or "*legally significant connection*" requirement under Art. 1101(1).[145] It therefore has little or no relevance here. Secondly, the Claimant relies on the separate opinion of Dr. Bryan Schwartz in *S.D. Myers*. However, from a broader reading of this opinion it is clear that Dr. Schwartz's analysis related primarily to regulatory measures which affect investment but principally have another aim, such as protecting the environment, and he did not turn his mind to a situation similar to the one in the present case.[146] Dr. Schwartz's approach consequently has little relevance here. In any case, his view appears to have evolved as he did not dissent on this issue in the more recent case of *Bilcon v. Canada*.[147]

146. The Tribunal shares the concern expressed by the tribunal in *Methanex*. A potentially endless chain of consequences may flow from any government decision or action, and it is necessary and reasonable to find some limit to the claims which can be brought under the Treaty.[148] It is unrealistic to suppose that the Treaty parties intended that Article 11 should permit an infinite number of investment claims in relation to any one measure, including in respect of consequences that could not have been foreseen or intended by the decision-maker, or which are so indirect that they were not known (or could not have been known) to the respondent. The Claimant is right to point out that the Tribunal should not impose jurisdictional requirements which do not have a textual basis in the Treaty, but the Tribunal does not run such risk due to the presence of the phrase "*by reason of, or arising out of [...]*" in Article 11 of the Treaty. Although the Treaty does not use

[145] **CL-168**, *Pope & Talbot v. Government of Canada*, UNCITRAL, Preliminary Award, January 26, 2000, (Arbs. Lord Dervaird, Bejamin J. Greenberg and Murray J. Belman) ("***Pope & Talbot v. Canada***"), paras. 33-34.
[146] **CL-169**, *S.D. Myers v. Government of Canada*, UNCITRAL, Separate Opinion by Dr Bryan Schwartz (on the partial award), November 12, 2000, paras. 54-56 (particularly para. 56).
[147] **RL-066**, *William Ralph Clayton v. Canada*, para. 240.
[148] "If the threshold provided by Article 1101(1) were merely one of 'affecting', as Methanex contends, it would be satisfied wherever any economic impact was felt by an investor or an investment. For example, in this case, the test could be met by suppliers to Methanex who suffered as a result of Methanex's alleged losses, suppliers to those suppliers and so on…"**RL-079**, *Methanex v. U.S.A.*, para. 137.

exactly the same formulation of "*relating to*" as in NAFTA Art. 1101(1), both phrases convey the need for some degree of direct connection between the contested measure and the loss claimed. To hold that this difference is somehow significant risks drawing artificial distinctions between phrases which have the same substantive meaning. Similarly, the Tribunal has a preference for "*legally significant connection*" used in *Methanex* instead of "*proximate causation*" suggested by the Respondent. The Tribunal is concerned that the latter may indicate a need to investigate the merits before a decision on jurisdiction is reached, although it does not believe that there is necessarily any material difference between the two phrases.

147. The Tribunal addresses next whether the Claimant satisfies the "*legally significant connection*" test. The Tribunal observes that the relationship between the Claimant and its investment and the other measures are entirely the consequence of the Claimant's contractual relationship with OSA. This is not in dispute. The Claimant is affected by most measures only secondarily and indirectly, through OSA, and not primarily. To put it another way, if the Claimant had not contracted with OSA, it would be unaffected by the measures.

148. In its Reply and in its oral submissions, the Claimant also relied on the cases of *Corn Products International v. Mexico,*[149] *Archer Daniels et al v. Mexico*[150] and *Cargill v. Mexico*[151] in support of the proposition that an investor which is affected by a measure taken against its contracting party is able to bring a claim. On a close reading, however, these cases are distinguishable. All three disputes concerned a tax imposed on drinks containing High Fructose Corn Syrup ('HFCS'), a product supplied by each claimant (or its subsidiaries) to its contractual counterparties. Although the tax was not directed at HFCS itself, it amounted to a tax on some uses of HFCS. Contracting with a different

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[149] **CL-212**, *Corn Products International v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, January 15, 2008, (Arbs. Christopher Greenwood, Andreas F. Lowenfeld and Licenciado Jesh Alfonso Serrano de la Vega) ("***Corn v. Mexico***").
[150] **CL-130**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, November 21, 2007 (Arbs. Bernardo M. Cremades, Arthur W. Rovine and Eduardo Siqueiros T) ("***Archer Daniels v. Mexico***").
[151] **CL-94**, *Cargill v. Mexico*. Notably at paras. 174-175 the tribunal in *Cargill* appears to adopt the test in *Methanex*.

drinks manufacturer would not have helped the claimant escape its losses. There was consequently a direct relationship between the core business of the investor and the imposition of the tax, which distinguished the claimants in those cases from other entities which contracted with the downstream manufacturers. That is not the case here.

149. To recall, the Claimant has set forth a string of measures that allegedly are linked and which are said to have ultimately caused the demise of the investment. As summarized by the Claimant in the opening argument at the hearing these measures consist of the Disqualification Order, the attachment of OSA, which in turn caused Banamex to close the factoring facility, the extension of the attachment to GOSH vessels, the Diversion Order in respect of the funds owed PEMEX to OSA to be paid into the Invex Trust and the Blocking Order. Except for the Invex Trust Fund and the Extension and Blocking Orders, the alleged losses are entirely dependent on the fact that the Claimant happened to contract with OSA. There is nothing to distinguish the Claimant from other entities which may have contracted with OSA, and in the view of the Tribunal the Claimant is insufficiently proximate or indirectly affected by the measures objected to amount to a significant legal relationship.[152]

150. For these reasons, the Tribunal concludes that only in the case of the Invex Trust, the vessels' detention and the Blocking Order may there be said to be a significant legal relationship and hence its jurisdiction is limited to these measures alone, provided of course that they meet the time bar requirement in Article 11(8) of the Treaty.

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[152] As described by the Claimant most of the measures are articulated as measures against OSA:
"Mexico initiated an unsupported criminal investigations [*sic*] against OSA for alleged money laundering and fraud."
"Mexico unlawfully banned OSA from entering into any public contract. Based on the unlawful investigation, Mexico unlawfully seized all OSA's assets and took control of OSA…
Mexico unlawfully seized the ten vessels owned by POSH's Subsidiaries…
Mexico suspended all payments to creditors, including to POSH's Subsidiaries, which had effectively been blocked by SAE upon taking control of OSA…
Mexico unlawfully diverted the payments owed by PEMEX to POSH via the Irrevocable Trust. This measure was, in fact, a direct expropriation of POSH's lawful rights under the Irrevocable Trust…
Mexico acknowledged that the Unlawful Sanction was the proximate cause of OSA's insolvency. Both SAE and the Insolvency Court acknowledged that this measure had led to OSA's insolvency…
Mexico blocked POSH's Subsidiaries from contracting directly with PEMEX. SAE refused to cancel OSA's contracts and the Insolvency Court prohibited PEMEX from rescinding them, fatally condemning the Subsidiaries' operations in Mexico." Cl. SoC, para. 330.

151. The Parties disagree on whether a time bar is a jurisdictional or admissibility matter. In the procedural circumstances of the instant case the question lacks significance: the Tribunal has the benefit of the Parties' written and oral submissions on jurisdiction and the merits. Besides, as the *Methanex* tribunal noted, "*Article 21(1) of the UNCITRAL Arbitration Rules does not accord to the Tribunal any power to rule on objections relating to admissibility.*"[153]

152. The next issue to be addressed by the Tribunal is whether the time bar can be extended to more than three years by reason of the measures being part of a composite act and, therefore, the three-year period may reach to the date of the first of the actions part of the composite act.

153. The Claimant has submitted that the cut-off date of the three-year period is May 4, 2014. The Respondent has not questioned that date except for its extension on the basis of a composite act. Some of the actions alleged by the Claimant to constitute a composite act in breach of the Treaty are dated before that critical date and would only be within the jurisdiction of the Tribunal by extension of the three-year period on grounds that they are part of a composite act. The Tribunal has already dismissed the Disqualification Order and the Attachment Order on the basis of the lack of their significant legal connection to POSH. The Diversion Order and the Blocking Order are dated after May 4, 2014. This leaves the Detention Order as the only measure legally and significantly connected to POSH and dated before May 4, 2014. In the Tribunal's view the Detention Order may extend the qualifying period to its date of March 19, 2014 since it qualifies as an act having a continuing character, as provided in Article 14(2) of the Articles on State Responsibility: "[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation."[154]

[153] **RL-079**, *Methanex v. U.S.A.*, para. 123.

[154] See **CL-136**, J. Crawford, The International Law Commission's Articles on State Responsibility ("**ILC Articles**"). See commentary on Article 14, paras. 9 and ff.

154. Thus the Tribunal does not need to consider further the composite act argument since the components of this act dated before May 4, 2014, have been dismissed on grounds of lack of a significant legal relationship to POSH or determined by the Tribunal to have a continuing character. But even if the components predating May 4 -the Disqualification Order and the Attachment Order- had been ruled to have a significant legal relationship to POSH, the Tribunal does not consider that the three- year limit could be extended on the basis of earlier dated measures that resulted from questionable practices of OSA described elsewhere in this Award.

155. To conclude on the objections of the Respondent to the jurisdiction of the Tribunal, the Tribunal has jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis* in respect of the Detention Order and the acts dated after May 4, 2014.

VI. MERITS

A. SUMMARY OF THE PARTIES' ARGUMENTS

(1) Statement of Claim

156. The Claimant argues that Mexico is responsible for the acts and omissions of its agencies and instrumentalities. The acts and omissions of UIF,PGR, SAE, PEMEX and the Insolvency Court are all attributable to Mexico under international law. According to the Claimant, the acts and omissions of Mexico's agencies and instrumentalities breached the protections of the Investor under Chapter II of the Treaty.

157. The Claimant asserts that through a series of measures the investment made by it and its Subsidiaries was expropriated. As summarized by the Claimant the following acts and omissions had the effect of depriving POSH and the Subsidiaries from the use, value and benefit of the investment:

- *"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. Even the Mexican Senate admitted that there was 'a hunt to bring down the company [that had been] spoiled by the Calderon administration', as an act of 'vengeance against*

the PAN' [Political Party], 'to obtain a... cooperative attitude from that party'...

- *Mexico unlawfully banned OSA from entering into any public contract, including with PEMEX, harming OSIA's financial situation irreparably, impairing its ability to perform on the contracts with the Subsidiaries and leading to its demise. This measure was declared unlawful and later revoked by Mexican Courts but it was too little too late. OSA was already undergoing insolvency proceedings and did not meet PEMEX's financial requirements for new contracts. This measure destroyed one of the main pillars of the investment—OSA's ability to contract with PEMEX.*
- *Mexico initiated an unsupported criminal investigations [sic] against OSA for alleged money laundering and fraud to obtain over $400 MM. from Banamex. Mexico did not show any sign of illegal activity, since none was present. Mexico never pressed any charges, which clearly illustrates the political nature of the investigation.*
- *Based on the unlawful 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. There were no signs of criminal activity and the Seizure Order had no factual or legal basis. Thereafter, SAE effectively 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 over 3 years and the seizure was finally lifted due to the lack of evidence of any crime. As noted above, no charges were ever pressed as a result of the investigation.*
- *Mexico unlawfully seized the ten vessels owned by POSH's Subsidiaries. The Detention Order was fatally flawed, since it stemmed from an unlawful criminal investigation and seizure of OSA. There was no factual or legal basis to detain the vessels owned by POSH's Subsidiaries. For several months, POSH's Subsidiaries were deprived of another pillar of the investment—the availability of vessels.*
- *Mexico drove OSA into insolvency. As a result of the Unlawful Sanction, 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 had effectively been blocked by SAE upon taking control of OSA. Moreover, Mexico unlawfully diverted the payments owed by PEMEX to POSH via the Irrevocable Trust. This measure was, in fact, a direct expropriation of POSH's lawful rights under the Irrevocable Trust. It further deprived POSH's Subsidiaries from any income, value or use of the contracts with OSA. As noted in the Norwegian Ship owners' Claims case 'whatever the intentions may have been the [State] took, both in fact*

and in law, the contracts under which the ships in question were being' operated.

- *Mexico acknowledged that the Unlawful Sanction was the proximate cause of OSA's insolvency. Both SAE and the Insolvency Court acknowledged that this measure had led to OSA's insolvency and, if not immediately suspended, could lead to OSA's bankruptcy.*
- *Finally, Mexico blocked POSH's Subsidiaries from contracting directly with PEMEX. SAE refused to cancel OSA's contracts and the Insolvency Court prohibited PEMEX from rescinding them, fatally condemning the Subsidiaries' operations in Mexico."*[155]

158. According to the Claimant the expropriation was unlawful because it lacked a public purpose: "*[t]he fact [that] there were (unproven) fraud accusations against OSA does not satisfy the public purpose requirement. The PRI's Administration desire to punish OSA and its business partners for OSA's ties with the previous administrations is not a legitimate public purpose either.*"[156]

159. The Claimant points out the lack of substantive and procedural due process: "t*he measures adopted by Mexico in the administrative proceeding that ended with the Unlawful Sanction, in the unsupported criminal investigation that resulted in no charges, and in the state-driven insolvency proceedings that resulted in OSA's demise, were contrary to Mexican law and violated the Claimant's due process. These measures had a direct impact on, or specifically targeted the Subsidiaries, and resulted in the destruction of the Investment, yet no POSH entity was notified in advance of any of them, nor did they have an opportunity to be heard.*"[157]

160. The Claimant explains that the expropriation was unlawful because Mexico has not paid the compensation required by the Treaty and because the measures specifically targeted to the Claimant and the Subsidiaries are by definition discriminatory.

161. The Claimant argues that the Respondent breached Article 4(1) of the Treaty by failing to accord the investors and the investment treatment in accordance with customary

[155] Cl. SoC, para. 330.

[156] Id., para. 339.

[157] Id., para. 344.

international law, including fair and equitable treatment. Based on a review of recent cases the Claimant concludes that "*the minimum standard of treatment under customary international law has evolved and, in the context of foreign investment, has converged in substance with the standard of fair and equitable treatment*"[158], and that "*it now is axiomatic that a host State has legal obligations under the minimum standard of treatment -and thus under Article 4(1) of the Treaty- to act in good faith, to refrain from exercising its powers arbitrarily, to provide a stable and secure legal and business environment, and to honor legitimate expectations that arose from conditions that it offered to induce the investor's investment*."[159]

162. The Claimant bases its argument that the Respondent breached Article 4(1) on the following acts of the Respondent: (i) the politically motivated campaign against OSA to sever the ties it had established with PEMEX during the previous administrations, (ii) the unlawful ban of OSA to enter into any public contract, (iii) the unsupported criminal investigations against OSA; (iv) the seizure of all of OSA's assets and control of OSA, blocking all payments to POSH's Subsidiaries, and the failure of the public authorities' duty to explain its resolutions; (v) the unlawful seizure of the ten vessels owned by POSH's Subsidiaries; (vi) the Unlawful Sanction was the proximate cause of OSA's insolvency and the Diversion Order diverted the payments owed by PEMEX to POSH via the Irrevocable Trust; (vii) the blocking of POSH's Subsidiaries from directly contracting with PEMEX; (viii) lack of transparency and due process, all measures within the criminal investigation were adopted in secrecy, without notice to the Subsidiaries or an opportunity to be heard; and (ix) Mexico abused its power and violated due process by adopting all possible roles in OSA's insolvency proceeding incurring in conflict of interest.

163. The Claimant also argues that the Respondent breached the Treaty by failing to provide full protection and security. According to the Claimant, the Respondent's obligation extends beyond the physical security of the investments to their legal protection and security. Specifically, the Claimant asserts that the Respondent failed to honor the rule

[158] Id., para. 357.

[159] Id., para. 357.

of law in the administrative proceeding resulting in the Unlawful Sanction , in the criminal investigations against OSA, in the seizure of OSA's assets and the taking of control of OSA, and in the seizure of the vessels owned by the Subsidiaries. In respect to the seizure of the vessels, the Claimant asserts that "*Mexico did not employ the legal diligence required by international law to protect the investment nor did it allow the investor reasonable procedural recourse to contest it. It was undisputed that the vessels did not belong to OSA, nor were they associated with any of the alleged crimes. POSH's representative filed three briefs with the PGR showing this and requesting the release of the vessels. All three briefs went unanswered. A testament to the lack of evidence of any crime is the fact that the vessels were released several months later without any further explanation*."[160]

164. The Claimant additionally argues that the Respondent failed to provide an objective, impartial and independent supervision of the insolvency proceeding, and "*coerced POSH and its Subsidiaries to accept a 'hair cut to the debt' and a 'higher commission' in exchange for the cancellation of OSA's contracts, which was the sound and reasonable commercial decision.*"[161]

165. The Claimant concludes: "*[i]n 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 ...*'"[162]

[160] Cl. SoC, para. 407.
[161] Cl. SoC, para. 407.
[162] Cl. SoC, para. 408.

(2) Statement of Defense

166. The Respondent denies that it breached any obligation under the Treaty and makes several observations before addressing the Claimant's claims. The Respondent notes that "*In presenting its arguments, the Claimant fails to distinguish how the obligations it invokes apply differently to these entities, which comprise the executive, administrative and judicial branches of the Mexican government. Further, it simply repeats the same allegations in support of each of its claims of expropriation, denial of fair and equitable treatment, and denial of full protection and security, as though the content of each obligation were identical.*"[163]

167. The Respondent clarifies that, when the Court of Appeals invalidated the Disqualification of OSA, it made no separate conclusions with respect to whether OSA had negligently breached its obligation to submit bonds with respect to the nine OSA-PEP Contracts.

168. The Respondent explains that the UIF Complaint was based on the analysis of transactions with irregular characteristics that exceeded risk models.

169. The Respondent further explains that (i) Investigation 115/2014 investigates whether Mr. Yáñez used Oceanografía's resources for different purposes than for which they were obtained; (ii) Investigation 239/2014 investigates the possible crime of providing false information to credit institutions, and (iii) these inquiries are in the stage of criminal proceedings and have not yet concluded.

170. The Respondent recalls that Mexican law permits a "*legal moratorium*" for a company submitted to insolvency and thus to suspend payments to creditors while the bankruptcy proceedings are resolved.

171. The Respondent concludes its observations by stating that the Claimant has not established nor can it establish that the claimed measures were issued outside the normal course of action of the Mexican authorities

[163] Resp. SoD, para. 571.

172. The Respondent disputes that there is such a thing as "*judicial expropriation*", "*[w]hen a tribunal acts as a neutral arbiter of disputes between private parties, its decision against the interests of one party that happens to be a foreign investor will not lead to expropriation. If that were so, every decision by a domestic court against a foreign investor involving property rights could be viewed as an expropriation and there would be a very large body of jurisprudence on the subject in investment treaty law… [E]ven if the concept of judicial expropriation were accepted, it would be necessary to comply with the rule of firmness or finality. In the case at hand, the Precautionary Measure (erroneously called the Deviation Order) derived from a decision issued by a trial court: the Insolvency Court*."[164]

173. The Respondent notes that "*the Subsidiaries and Invex challenged the Precautionary Measure, and other decisions of the Insolvency Judge through appeals and amparos. This means that the Mexican judicial system was put to the test by the Claimant*."[165] The Respondent adds, "*[i]n fact, the Petition for Review 96/2015 filed by Invex resulted in an interpretation precedent issued by the Third Collegiate Court that concluded, among other things, that: the trust and the transfer of rights were concluded during a dubious period (i.e., the Retroactive Period); the Precautionary Measure was not illegal or unconstitutional, and the Precautionary Measure was intended to protect the assets of OSA ('bankruptcy estate'), allowed the commercial operations of Oceanografía, protected thousands of employees and maintained equal treatment for hundreds of suppliers (creditors)*."[166] The Respondent affirms that the Claimant has tried to argue a claim of denial of justice "*disguised*"[167] as judicial expropriation.

174. The Respondent asserts that nothing was taken from the Claimant, that the POSH's vessels were not expropriated. In this respect, the Respondent provides a calendar of events reproduced below:

[164] Resp. SoD, paras. 597-599.
[165] Resp. SoD, para. 602.
[166] Resp. SoD, para. 603.
[167] Resp. SoD, para. 600.

- On March 7, 2014, Oceanografía returned the Rodrigo DPJ vessel to POSH Honesto. Prior to that, the vessel was taken out of service due to lack of payment to the crew.
- On March 10, 2014, Oceanografía returned the Caballo Grano de Oro vessel to POSH Hermosa. However, since December 26, 2013, the vessel had been out of service due to technical problems
- On March 19, 2014, the SAE requested the provisional attachment of some vessels in possession of Oceanografía, including Caballo Argento, Caballo Babieca, Caballo Copenhagen, Don Casiano, Caballo Grano de Oro, Caballo Monoceros, Rodrigo DPJ and Caballo Scarto.
- On March 28, 2014, the PGR notified the Subsidiaries that their vessels were part of the Provisional Attachment. On the same date, GOSH and POSH Hermosa filed communications with the PGR to demonstrate that the Subsidiaries were the owners of the vessels and thus not covered by the attachment .
- Further documentation was submitted on April 29 and May 7, 2014.
- On May 19, 2014, the SAE, at the request of the PGR, delivered Salvirile and Salvision to SEMCO IV pending resolution of their legal status.
- On June 26, 2014, the PGR lifted the provisional attachment Salvision, Salvirile, POSH Honesto, POSH Hermosa, Caballo Argento, Caballo Babieca, Caballo Don Casiano, Caballo Copenhagen, Caballo Scarto, and Caballo Monoceros.

175. Therefore, the Respondent concludes that the Subsidiaries only had to prove that they were the owners of the vessels so that their provisional attachment would be lifted.

176. According to the Respondent, the supply contracts of the Subsidiaries with OSA are not an "*investment*" within the meaning of the Treaty and, therefore, cannot be expropriated. Furthermore, GOSH itself withdrew its vessels from operation under its contracts with OSA: "*since December 26, 2013, Caballo Grano de Oro was out of service due to technical problems. Caballo Argento was retired by GOSH as of May 11, 2014. Rodrigo DPJ was taken out of service due to lack of payment to crew personnel since February 28, 2014. Caballo Babieca was withdrawn from operation on May 11, 2014 by GOSH. Don Casiano was retired on May 10, 2014. Caballo Copenhagen suffered an impact on*

the breakwaters due to a crash at the Dos Bocas Maritime Terminal on April 15, 2014 and was subsequently withdrawn. Caballo Scarto was removed due to administrative problems with Oceanografía on May 11, 2014. Caballo Monoceros was removed due to administrative problems on May 12, 2014."[168]

177. According to the Respondent, the Claimant decided to withdraw all the vessels which caused the OSA-PEP Contracts related to the Subsidiaries' vessels to be rescinded.

178. The Respondent recalls that on August 15, 2014, the Insolvency Judge granted a precautionary measure at the request of Oceanografía to extend the validity of only 9 OSA-PEP Contracts (out of a total of 25) since they were the only ones financially and operationally viable. The Respondent notes that the Subsidiaries could have challenged this precautionary measure and they did not.

179. The Respondent denies that the ability of OSA to contract with PEMEX was an investment and, in any case, it was not expropriated. The disqualification was in force for only 5 months and was not applicable to existing contracts.

180. The Respondent disputes that the series of acts or omissions had the aggregate effect of destroying the value of the Claimant's investment. The Respondent also denies that the alleged acts and omissions constituted a "*creeping expropriation*". According to the Respondent, the measures identified by the Claimant are too remote from each other and too remote from POSH and the Subsidiaries; they had no expropriation effect either individually or jointly.

181. The Respondent insists on the vagueness of the alleged breach of the fair and equitable treatment obligation, "[*t]he most important and fundamental thing is that the Claimant actually complains about the application of Mexican insolvency and/or bankruptcy laws and its system for criminal investigation and prosecution, but without presenting any evidence of customary international law standards relevant to bankruptcy and criminal*

[168] Resp. SoD, para. 617.

systems. This alone is reason to dismiss the claim of a denial of fair and equitable treatment."[169]

182. According to the Respondent, the standard for finding a violation of the minimum treatment standard is high and, after reviewing the caselaw, concludes that "*the minimum standard of customary international law prohibits an action that 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*.' Allegations 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*."[170]

183. The Respondent dismisses the Claimant's argument as inappropriate because i) all the measures under discussion were taken in the normal course of proceedings and were reasonable, and ii) the Claimant had no "*legitimate expectations*." In respect of the latter, the Respondent argues that POSH did not make its investment with adequate knowledge of the risk involved. According to the Respondent, there were many red flags that showed that OSA was not a reliable partner. The Respondent lists the following:

- "*In 2011, the Claimant already knew that Oceanografía and Mr. Yáñez were almost bankrupt;*
- *OSA had violated the terms of the bareboat charter since 2012 and, nevertheless, the Claimant decided to continue its commercial relationship;*
- *In 2007, a Surveillance Commission was created in the Chamber of Deputies to review the contractual irregularities of Oceanografía;*
- *Oceanografía and its directors (Mr. Yáñez and Mr. Díaz) had dubious backgrounds;*
- *Oceanografía's 2013 Financial Statements revealed that the company faced investigation requests by the SAT, 29 commercial lawsuits, 7 civil lawsuits, 19 procedures related to the imposition of penalties by PEP, 7 lawsuits with PEP, and 7 nullity cases*."[171]

[169] Resp. SoD, para. 636.

[170] Resp. SoD, para. 643.

[171] Resp. SoD, para. 653.

184. The Respondent adds that POSH could not have had "*legitimate expectations*" that contracts with OSA would be renewed or renewed on the same terms. The Respondent recalls that the contracts awarded by Pemex have to go through a public procurement procedure. Furthermore, the need for offshore services and the rates of such services depend on industry factors and especially the price of oil. It could not be guaranteed that Mexican and global oil markets would not change.

185. The Respondent notes that "*in February 2014 (that is, before the Disqualification, criminal investigations and insolvency proceedings), POSH "look[ed] into requesting for the assignment of the 6 GOSH contracts and the 2 [SMP] contracts to the POSH group." "Also, in early February 2014, POSH claimed the restitution of some of the vessels and even began a commercial arbitration against Oceanografía*."[172] The Respondent concludes that the argument of the Claimant that the Respondent breached the legitimate expectations of the Claimant is without foundation.

186. As to the breach of the full protection and security obligation, the Respondent affirms that, under customary international law, this obligation is limited to the investor's physical security. The Respondent notes that the Claimant simply repeated under the full protection and security the same accusations than it did for denial of fair and equitable treatment and concludes that "*[t]he Tribunal should reject the Claimant's attempt to extend the full protection and security obligation of Article 4.1 of the APPRI.*"[173]

(3) Reply

187. As regards the claim of expropriation the Claimant concludes that "*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*

[172] Resp. SoD, para. 659. See Cl. SoC, para. 190, **C-160**, Notice of Repossession and Notice of Default and Requirement of Payment in relation to the vessel Rodrigo DPJ, sent by GOSH Rodrigo DPJ, S.A.P.I. de C.V. to Oceanografía, S.A. de C.V., February 10, 2014; **C-161**, Notice of Repossession of vessel Caballo Grano de Oro, sent by GOSH Caballo Grano de Oro S.A.P.I. de C.V. to Oceanografía, S.A. de C.V., February 10, 2014; **C-196**, Letter from Incisive Law LLC to Oceanografía S.A., de C.V., February 12, 2014; and **R-014**, Notice of arbitration submitted by SEMCO IV against OSA under the Arbitration Rules of SCMA of 2009, March 25, 2014.

[173] Resp. SoD, para. 673.

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."[174]

188. The Claimant insists that the Diversion Order and the Isolated Decision directly expropriated the receivables owed to POSH pursuant to the Irrevocable Trust by diverting those funds to SAE's bank account. As explained by Mr. Méjan, *"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.*"[175] In this case, OSA had assigned the rights arising from the OSA-PEMEX Contracts to the Irrevocable Trust, of 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.[176]

189. Based on the Claimant's review of caselaw, the Claimant argues that "*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.*"[177]

190. The Claimant argues that the relationship between the politically motivated measures and their expropriatory nature vis-à-vis POSH's Investment is clear: "*[a]ll of the measures were intended to strain OSA's finances, take control of OSA, or divert OSA's resources*

[174] Reply, para. 468.
[175] Id., para. 476 (emphasis in original).
[176] Id., para, 476.
[177] Id., para. 484.

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."[178]

191. According to the Claimant, by "*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*."[179]

192. The Claimant insists that "*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*."[180]

193. The Claimant points out that "*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.*'"[181]

194. The Claimant points out that Mexico has no answer to the fact that the expropriation, lacked compensation, due process and public purpose, and was discriminatory.

195. The Claimant argues that the "*FET standard protects the investor's legitimate expectations that the State will conduct itself in a consistent, transparent, even-handed*

[178] Id., para. 486.
[179] Id., para. 487.
[180] Id., para. 488.
[181] Id., para. 490.

and non-discriminatory manner, will not act beyond its authority, and will not contradict its own laws and regulations… Mexico violated POSH's 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*."[182]

196. The Claimant argues that the Isolated Decision held, *inter alia*, that the Irrevocable Trust and assignment of rights became automatically ineffective upon the declaration of insolvency. However, "*[t]he 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.*"[183]

197. The Claimant insists that Mexico arbitrarily prevented PEMEX from rescinding the contracts with OSA and replacing them with new contracts with the Subsidiaries. The Claimant also insists that the conduct of Mexico in respect of the Investment or the Investor considered together as a composite act breached the FET. The conduct 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*

[182] Id., paras. 512, 537.

[183] Id., para. 538.

investments. Individual components of that course of conduct can also make out FPS violations on their own account."[184]

(4) Rejoinder

198. Respondent draws the Tribunal's attention to the New York case of OSA and Mr. Yáñez against Citibank in which OSA and Mr. Yáñez claim that Citibank was responsible for orchestrating a fraud that led to OSA's bankruptcy and caused Mr. Yáñez to face criminal proceedings. For the Respondent, this case demonstrates that OSA itself : "*i) holds Citibank exclusively responsible for the loss of its business, and ii) OSA did not consider that the temporary suspension to contract with Pemex had affected its business.*"[185] The Respondent adds that the Claimant has failed to point out that OSA and Mr. Yáñez subsequently filed a commercial claim against Banamex before the courts of Mexico City,[186] which "*shows that OSA, to this day, continues to blame private entities (e.g., Banamex) for its legal and financial problems, and not Pemex or the Respondent. Furthermore, it is shown that Pemex fulfilled its payment obligations under the OSA-PEP Contracts.*"[187] In the Respondent's view, the New York lawsuit shows that OSA blames Citibank, and not the Mexican government, for its problems. The New York lawsuit says nothing about a conspiracy between the government and Citibank, or that OSA was the target of a "*politically motivated hunt*" as the Claimant seeks to lead the Arbitration Tribunal to believe in this arbitration. OSA states in the New York lawsuit that it did not commit fraud; it argues that Citigroup was the one who committed the fraud. Whatever the outcome of this litigation, the reality is that the claim in the New York Case constitutes complete evidence that the Claimant does not and cannot speak for OSA. The Claimant decided to systematically and without reason dismiss any argument or evidence presented by the Respondent, clearly because it contradicted its alleged theory of the political plot against OSA.[188]

[184] Id., para. 552.
[185] Rejoinder, para. 30.
[186] Id., para. 34.
[187] Id., para. 36.
[188] Id., para. 37.

199. The Respondent recalls that former counsel to the Claimant filed the Florida Case complaint shortly before the Statement of Defense: "*[t]his judicial procedure was initiated by a large group of service providers, bondholders and OSA creditors against Citigroup. The plaintiffs in that lawsuit are represented by the law firm Quinn Emmanuel, the same firm that initially represented the Plaintiff in this arbitration. In the Respondent's view, the Florida Case lawsuit contradicts the facts argued by the Claimant in this arbitration.*"[189]

200. The Respondent clarifies that both cases were dismissed without prejudice on the basis of forum *non conveniens*. The Respondent explains that the Florida Case lawsuit was presented as evidence in this arbitration to demonstrate that a substantial group of OSA creditors also blame Citigroup for the problems faced by OSA, and do not blame the Mexican government. According to the Respondent, the two cases before US Courts "*demonstrate that the Claimant cannot speak on behalf of or represent OSA in this arbitration. Furthermore, these cases take away any credibility from their theories about the supposed political campaign against OSA*" by the Mexican government.[190]

201. The Respondent asserts that the Claimant's purported reliance on Pemex's due diligence is misplaced and had "*POSH conducted legal due diligence with respect to OSA, that due diligence would have surely revealed significant 'red flags', including numerous investigation requests by SAT; civil lawsuits; procedures related to the imposition of penalties by PEP; lawsuits with PEP; and nullity cases. These 'red flags' would have indicated with certainty that OSA was not a reliable customer or partner. As such, the Claimant must assume its responsibility for the risk of not having done so.*"[191]

202. The Respondent notes that the Claimant is the only creditor to OSA that claims that the valuations prepared by Citigroup, Advent and Blackstone were correct. The Respondent adds that "*[i]n fact, the evidence shows that the Claimant had information indicating that it was risky to do business with Oceanography. In June 2011, after a first meeting with*

[189] Id., para. 38.
[190] Id., para. 43.
[191] Id., para. 50.

Mr. Martín Díaz, POSH learned that OSA was facing at least USD $ 1.1 billion in debt and financial commitments, and that it could not be clearly determined the reasons why OSA was valued at USD $ 400 million."[192]

203. The Respondent further observes that the Claimant also ignored the risk of the OSA administration. The Respondent recalls that, in the document production phase, "*the Claimant produced an internal report on July 18, 2011, in which it analyzed the operation and management of the OSA vessels. According to the report itself, the structure of the Oceanografía organization was disorganized, despite the fact that at the time attempts were being made to restructure it. In fact, OSA administrators themselves were unable to clearly identify the responsibilities of each area and the process manager. Despite this, POSH decided to ignore its own observations and chose to bet on a business relationship with OSA despite any risk.*"[193]

204. The Respondent insists on the illegality of the investment and maintains that, "*[a]s long as the company establishes the possibility of cabotage (even if it does not do so), the restriction on the percentage of foreign participation must be met.*"[194]

205. The Respondent clarifies that "*OSA was in charge of obtaining Pemex contracts for the provision of services and not charter contracts. This is an important difference and based on it, it cannot be affirmed that Pemex made any promise that it would 'charter' the POSH vessels*."[195] The Respondent further clarifies that "*POSH's alleged expectations based on the age of the Vessels are unfounded. The Vessels were a work tool subcontracted by OSA to be able to provide the services that Pemex required. The contractual relationship between Pemex and OSA was not binding on POSH. In other words, under the OSA-PEP Contracts, OSA had the discretion to decide which vessel it would use to fulfill its contractual obligations to Pemex*."[196]

[192] Id., para. 63.
[193] Id., para. 64.
[194] Id., para. 80.
[195] Id., para. 83 (emphasis omitted).
[196] Id., para. 85.

206. On the issue of the Blocking Order, the Respondent explains that, "*[l]egally, the same boat could not—and cannot—provide services under two contracts at the same time. Claimant also minimizes the competition that exists among other suppliers, more economic offers and changes in the offshore market, such as the fact that Pemex no longer required that the vessels have the Mexican flag*."[197]

207. On the termination of the OSA-PEP Contracts, the Respondent clarifies that "*[i]n principle, the OSA-PEP Contracts did not have to be terminated since Pemex required these services. Ultimately, controversial issues arose within the bankruptcy proceedings regarding conventional penalties for breaches made by OSA under the OSA-PEP Contracts, which delayed the formalization of the contractual settlements… It is important to remember that the Subsidiaries withdrew the Vessels, which largely caused the OSA-PEP Contracts to be terminated and conventional penalties were generated against OSA*."[198]

208. The Respondent details OSA's breaches of the contracts: On February 1, 2013, all GOSH Vessel charters increased charter rates, from USD 9,700 per month to USD 14,500 per day, approximately. On April 25, 2013, GOSH required OSA to pay overdue charters since September 2012 (Notice of Default).

209. The Respondent recalls that, on July 1, 2013, three agreements were executed: i) a credit agreement between POSH and GOSH; ii) the management contract between PFSM and OSA, and iii) an agreement between POSH, GOSH, Mayan, ICA, GGM and Arrendadora Caballo de Mar (2013 Agreement). According to the Respondent, these agreements, "*show that POSH sought to ensure the payment of its debts, have greater control over the vessels and ensure that OSA would not [keep] the payments made by PEP*."[199]

210. The Respondent disputes the Claimant's assertion that, as a result of the 2013 Agreement, OSA paid its debts in mid-2013. According to the Respondent, this document does not

[197] Id., para. 108.
[198] Id., paras. 109-110.
[199] Id., para. 127.

show that OSA had settled its debts but notes that in June 2013 OSA made only a few payments and defaults continued.

211. Based on March-May 2013 communications between OSA and POSH, the Respondent affirms that "*it is evident that POSH was looking for ways to dispense with the commercial alliance with OSA. In addition, at that time, POSH knew that OSA simply did not make the payments under the Charters, despite having the money*."[200]

212. On February 10, 2014, POSH Honesto and POSH Hermosa demanded that Oceanografía return the ships.

213. On May 8, 2014, GOSH sent a new notification of non-compliance for non-payment since September 2012.

214. According to the Respondent, "*POSH sought to give the impression that it had granted the loan to GOSH for the acquisition of the Vessels since 2011*."[201] The Respondent disputes that the only reason to establish the Invex Trust was to guarantee POSH's loan to GOSH, "*the facts and evidence demonstrate the following: i) that POSH had to finance the vessels because it saw no other viable option due to the limited options from national banks; ii) GOSH's debts to POSH were increasing with the non-payment from OSA, iii) POSH and GOSH looked for ways to corroborate if OSA actually received the payments from Pemex, iv) OSA reluctantly acknowledged that it did receive payments from Pemex, but OSA continued to default on its payment obligations to GOSH—and in turn GOSH with POSH, and v) the instrument to prevent OSA from continuing to default on payments and stop disposing of resources was through the Invex Trust*."[202]

215. The Respondent also disputes that "*GOSH, POSH Honesto and POSH Hermosa were 'stripped' from obtaining profits from their investment, since they had to sell the boats to pay the loans.*"[203] The Respondent recalls that POSH-related companies (Adara

[200] Id., para. 135.
[201] Id., para. 138.
[202] Id., para. 147.
[203] Id., para. 148.

Limited or Maritime Charlie) acquired the GOSH, POSH Honesto and POSH Hermosa Vessels. The same companies that sold the eight ships to the Subsidiaries. The Respondent further recalls that "*[p]rior to Adara and Maritime Charlie 'repurchasing' the Vessels, POSH canceled the mortgages on the Vessels that secured the loans in favor of the Subsidiaries. This does not result in a minor event. The Claimant not only maintained control of the eight vessels, but the loans and guarantees were made in favor of practically the same companies dependent on POSH, which initially sold the vessels to the Subsidiaries.*"[204]

216. The Respondent points out that Mr. José Luis Montalvo acknowledges that Caballo Copenhagen and POSH Honesto are the subject of charter contracts, POM has such vessels, and they are operating in Mexico. In sum, the Respondent concludes: "*[t]he above coupled with the fact that the shares of GGM and Arrendadora Caballo de Mar in GOSH were acquired by GOSH Caballo Eclipse S.A.P.I. de C.V., another company related to POSH, reveal that POSH had no damages on the 'capital and debt' in GOSH.*"[205]

217. The Respondent rectifies certain facts narrated in the Reply. First, the Disqualification did not cause the insolvency of OSA because i) the OSA-PEP Contracts were still in force, that is, OSA's source of income did not cease, ii) the Disqualification had a maximum duration of five months, as the Insolvency Judge suspended its effects through a precautionary measure, and iii) OSA began to display financial problems, at least, since 2013. Second, Citibank suspended OSA factoring, not the Respondent. Third, the Claimant did not mention the settlement of the SEC which reached conclusions similar to those of the CNBV. Fourth, the Respondent questions the reliability of the testimony of Mr. [redacted] Fifth, the Respondent or the Subsidiaries did not object to Mr. Maza as administrator of OSA. Sixth, the Banamex complaint was conclusive for the PGR to investigate the ORPI crime. Seventh, OSA's assignment of rights established as an exception the insolvency proceedings. Eighth, the object of the Invex Trust was to pay POSH and GOSH but the income depended on future commitments, i.e. the compliance

[204] Id., para. 150.

[205] Id., para. 152.

with OSA-PEP Contracts. Ninth, POSH, GOSH and Invex did not exercise the ordinary remedies provided in the Insolvency Law ("**IL**"). POSH and GOSH lacked legal standing to resort to an *amparo* trial as an extraordinary means of defense. Invex, who had legal standing to initiate an *amparo*, exercised those rights. The Respondent asserts that "*[i]n no moment POSH and the Subsidiaries were restricted in their access to justice since Invex was in charge to defend its interests as trustee.*"[206]

218. The Respondent refers to expert Oscós's explanation that "*the judgment of the Review Appeal 96/2015 is the expression of the access to justice and the answer to the amparo trial promoted by Invex … The isolated precedent issued by the Third Collegiate Court has not been superseded by a later criterion, much less by the isolated precedent of the Review Appeal 70/2018, which is irrelevant and inapplicable to OSA's case since it is an insolvency case different from OSA's, and it arose under different circumstances than those that led Invex to promote the Amparo 844/2014 and resulted in the judgment of the Review Appeal 96/2015*."[207]

219. The Respondent expresses concern for the lack of acknowledgment by Mr. Yáñez that, on July 1, 2013, he agreed to restructure OSA's debt to POSH and GOSH. The Respondent recalls that Mr. Yáñez participated as president of the Board of Directors of OSA and GOSH, a situation that had the effect of triggering one of the requirements to consider an event as fraudulent indicated in the IL called "*related person*".[208]

220. The Respondent clarifies that the bank statements that the Respondent produced in the document production phase correspond to the bank accounts described in the Insolvency Proceedings: "*[t]he amount of USD $24.8 million (calculated based on the seven bank accounts that encompass the period of May 2014 to December 2017) do not correspond to OSA's debt to POSH, that it had to pay to the Invex Trust. The GOSH Vessels stopped*

[206] Id., para. 257.

[207] Id., paras. 262 and 264.

[208] Id., para. 268.

their services since May 2014, consequently it was impossible that they generated any income in favor of OSA until 2017."[209]

B. ASSESSMENT BY THE TRIBUNAL

(1) The Claim of Expropriation

221. Article 6 of the Treay on "*Expropriation and Compensation*" sets forth the conditions to be met for an expropriation to be in compliance with the requirements of the Treaty:

> *"1. Neither Contracting Party may expropriate or nationalize an investment either directly or indirectly through measures tantamount to expropriation or nationalization (hereinafter referred to as "expropriation"), except:*
>
> *(a) for a public purpose;*
>
> *(b) on a non-discriminatory basis;*
>
> *(c) in accordance with due process of law; and*
>
> *(d) on payment of compensation in accordance with paragraph 2 below."*

222. Article 17.1 of the Treaty on Applicable Law is also relevant. It reads:

> *A tribunal established under this Section [Section One under Chapter III on Dispute Settlement] shall decide the issues in dispute in accordance with this Agreement and the applicable rules and principles of international law.*

The Tribunal notes that this article is applicable to any issues in dispute and needs to decide them in accordance the rules and principles of international law.

223. The Parties dispute whether there is such a matter as judicial expropriation. The Claimant has argued that conduct of the judiciary of the Respondent is not beyond the reach of the Treaty's obligations of the Respondent. On the other hand, the Respondent contends that there is no possibility of judicial expropriation under the Treaty.

224. The Tribunal observes that Article 6 does not on its face exclude any measures taken by any organ of a Contracting Party. The defining feature of the measures is their effect, not

[209] Id., para. 274.

the identity of the organ of the Contracting Party which takes them. It could be an organ related to the executive, legislative or judicial branch of a Contracting Party.

225. For purposes of attribution to a State, Article 4 of the International Law Commission's Articles on Responsibility of States for Intentionally Wrongful Acts ("**ILC Articles**") include organs that exercise judicial functions. It reads 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."*[210]

226. The Commentary to Article 4 of the ILC Articles explains:

> *"[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."*[211]

227. Therefore, acts of the judiciary are not *per se* to be excluded from being treated as expropriatory in character. The issue is what should be the standard to be applied in order to differentiate the role of an international arbitral tribunal in an investment arbitration from an appellate court of domestic courts' decisions. The Parties have raised and addressed this question.

228. The Claimant refers in particular to the *Eli Lilly* tribunal's dictum that "*it will accordingly only be in very exceptional circumstances in which there is clear evidence of egregious and shocking conduct, that it will be appropriate for a NAFTA tribunal … to assess such conduct."*[212] As already noted, the Respondent has questioned whether judicial

[210] **CL-14**, ILC Articles, Art. 4.

[211] Id., p. 40.

[212] **RL-099**, *Eli Lilly & Co. v. Canada*, ICSID Case No. UNCT/14/2, Final Award, Mar. 16, 2017,("***Eli Lilly v. Canada***"), paras. 223-225.

expropriation is possible, but in any case, the Respondent asserts that the customary international law standard applies: "*a 'notoriously unjust' or 'egregious' administration of justice 'which offends a sense of judicial propriety*.'"[213] The Respondent adds that, "*unlike actions of the executive or the legislature, judicial acts can violate customary international law obligations in only the most extreme and unusual of circumstances*."[214]

229. The standard described by the Claimant and Mexico in their references to the *dictum* of the *Eli Lilly* tribunal and to customary international law, respectively, converges around the necessity for the presence of unusual circumstances, situations of "*clear evidence of egregious and shocking conduct*" by the courts. The Tribunal agrees with this standard, not as an added condition to expropriation under Article 6 but by placing this article in the context of the Treaty and in particular Article 17.1 of the Treaty.

230. Before applying this standard the Tribunal observes that the Claimant has not been consistent in framing the claim as a direct or indirect expropriation, or both. In the SoC the Claimant argued that the expropriation of the investment was "*creeping and indirect*" and the measures taken by Mexico constituted measures having an effect equivalent to expropriation.[215] In the Reply, the Claimant alleged the direct expropriation of payments owed by OSA to POSH via the Invex Trust and the indirect expropriation of "*the rest of the investment*." The Tribunal will address first the claim of direct expropriation and later the Detention Order and the Blocking Order as measures allegedly having an effect equivalent to expropriation.

a. ***Direct Expropriation of Trust Assets***

231. The claim of direct expropriation of Trust assets is based on the Diversion Order, the Revision Order and the Isolated Decision preventing POSH from receiving payment through the Trust thereby depriving POSH of its rights and diverting the funds for the benefit of Mexico. The question for the Tribunal is whether egregious and shocking

[213] Rejoinder, para. 387.

[214] Rejoinder, para. 387, referring to **RL-102**, *Loewen Group, Inv. and Raymond Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Response of the United States of America to the Submissions of Claimants Concerning Matters of Jurisdiction and Competence, July 7, 2000, ("***Loewen v. U.S.A.***") p. 8.

[215] Cl. SoC, para. 329.

conduct of the Mexican courts has been shown taking into account the circumstances described below related to [the terms of the Assignment Agreements], the purpose of the Trust, the timing of the Trust, and the financial situation of OSA when the Trust was established. The Tribunal will also address the question of access to the Mexican courts.

(i) The Purpose of the Trust

232. The Parties disagree on whether the Invex Trust was to secure payment of the loans made to OSA as originally intended when first conceived in 2011 or had a wider purpose to include other payments due to POSH. The Claimant explains that "*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.*"[216] On the other hand, Mexico has been "*emphatic in pointing out that the structure and purpose of the Invex Trust was to create a guarantee to OSA's non-payment of charters*."[217]

233. The Claimant explains the importance of the differing views of the Parties, "*Mexico infers that OSA was in poor financial health, that that condition was known to the 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*."[218] The Claimant asserts that Mexico is wrong because, inter alia, the trust was conceived years earlier, in 2011, for the particular purpose of satisfying the lenders' need for security for their loan, and "*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.*"[219]

234. The 2013 Agreement sets the framework for the obligations to be undertaken by OSA in respect of the assignment of rights to the Trust ,"*[c]omo garantía del cumplimiento cabal*

[216] Reply, para. 75.
[217] Rejoinder, para. 115.
[218] Reply, para. 74.
[219] Reply, para. 74.

de las obligaciones de OSA en virtud de los Contratos de Arrendamiento a Casco Desnudo y en relación con el acuerdo técnico y de tripulación mencionado en la Cláusula 1.2, y también para asegurar la obligación de GOSH de pagar la Deuda […]."[220] The objective of the assignment was to guarantee payment of the debt and the obligations of OSA related to the Bareboat Contracts. Although this might not have been the intention in 2011, it is obvious from the quoted text that it was the intention in 2013. Evidently, POSH would have been free to limit the Trust guarantee to the loan.

235. This is confirmed by the Representations and the Covenants in the Trust Agreement. In Representation II (g) it is stated "*[f]or the duration of this Trust Agreement, as* a guarantee and source of payment of any amount due from OSA under the Charter Agreements, OSA shall assign in favor of the Trustee *all of the receivables in its favor under the PEP Contracts, the Additional Contracts (if any) and the Third Party Contracts (if any), as well as any amount due under said contracts consequence of invoices, estimations of works to PEP's satisfaction or any other concept (including but not limited to recourses derived from the indemnities or payments for early termination of the PEP Contracts, the Additional Contracts and the Third Party Contracts, as the case may be).*"[221]

236. In addition, Clause 5 of the Trust Agreement lists among the purposes of the trust to use the Trust assets to pay at all times the secured obligations, which are defined as "*all of GOSH's obligations under (i) the Maritime Mortgages, including without limitation the full payment of the amounts due referred to in the Maritime Mortgages, including any principal amount plus interests, (ii) the mobilization charges of the Vessels and (iii) the modification charges resulting in a total aggregate amount of USD 1,478,413.91 as at 30 June 2013, as well as all of OSA's obligations under the Charter Agreements*

[220] **C-274**, Settlement Agreement between PACC Offshore Services Holdings PTE LTD, Servicios Marítimos 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 and Oceanografia, S.A. de C.V.,Clause 1.3.

[221] **C-070**, Public Deed No. 1,015, recording the Trust Agreement, August 9, 2013. Emphasis added by the Tribunal.

including without limitation the full payment of charter hire under the Charter Agreements." [222]

(ii) The Financial Situation of OSA when the Trust was established

237. The Invex Trust was established in August 2013. From September 2012, OSA was in arrears to GOSH. On April 25, 2013, GOSH sent OSA a default notice requiring OSA to pay USD 16,632,838.35.[223] On July 1, 2013, three relevant legal agreements were executed: i) a credit agreement between POSH and GOSH; ii) the management contract between PFSM and OSA, and iii) an agreement between POSH, GOSH, Mayan, ICA, GGM and Arrendadora Caballo de Mar (the "**2013 Agreement**").

238. The Claimant asserts that, as a result of the 2013 Agreement, OSA paid its debts in mid-2013. The Respondent disputes this affirmation. According to the Respondent, this Agreement describes that in June 2013 OSA made only a few payments and that defaults continued.[224] Further, POSH saw "*the need to grant the loan because OSA did not meet its payment obligations and considered a possible Banamex loan to be inconvenient. The same day that POSH, GOSH, and officers of OSA entered into the 2013 Agreement, POSH arranged a loan to GOSH for approximately USD $142 million*."[225]

239. In an email dated October 23, 2013 on the possible impact of the GOSH joint venture on POSH's balance sheet, after setting forth the debt of GOSH to the POSH Group, Mr. Ma comments, "*[i]n end-April this year, we forced them to settle accounts, albeit up to January 2013. Following that experience, we insisted that the irrevocable assignment of the PEMEX collectibles to the Trust Structure be accelerated and in addition we demand to take over the operational management of the 6 vessels.*"[226]

[222] **C-070**, Public Deed No. 1,015, recording the Trust Agreement, August 9, 2013.
[223] Rejoinder, para. 121.
[224] Id., para. 128.
[225] Id., paras. 138-139.
[226] **C-330**, Email from W. Long Peng to P. Ma et al., October 23, 2013, p. 1.

240. In sum, the evidence before the Tribunal makes it clear that when the Trust was established the financial situation of OSA was already precarious, and the infusion of funds by the Claimant was intended to finance the debt of OSA to the Claimant.

(iii) Access to the Mexican Courts

241. It has been argued by the Claimant that POSH and the Subsidiaries were denied due process. This claim is grounded in the determination of lack of standing of POSH and GOSH to file *amparo* lawsuits. The Respondent has explained that the *amparo* remedy is an extraordinary remedy only available to parties with legal interest. In the instant case, Invex had standing to initiate an *amparo* remedy to defend its legal interest as trustee and it did.[227] POSH and GOSH could have availed themselves of ordinary remedies provided in the Insolvency Law, such as the *acción separatoria*, but they did not do so. This may not be construed as a denial of due process or lack of access to the courts. Rather, it shows differences in legal standing depending on the exact remedy to be pursued, a difference that is recognized in many legal systems around the world.

242. OSA was in substantial arrears in paying the bills owed to the Claimant. The Claimant also needed to refinance the debt owed by OSA to the Claimant. This is the moment in April 2013 chosen to establish the Trust after having considered setting it up for several years. The timing is suspect. The Claimant was aware that the trust arrangement may be disputed and so informed potential investors in the prospectus of April 2014: "*[...] there can be no assurance that there will be no attempts by the creditors of OSA and the Mexican government to dispute the trust arrangement and claim against charter hires paid or payable to the trust.*"[228] It is not surprising that the Third Collegiate Court concluded that the Trust and the assignment of rights were done during a dubious period.

243. The circumstances described above lead the Tribunal to conclude that the Claimant has failed to show, on the basis of the evidence before the Tribunal, that the courts acted in an egregious or shocking manner such that the actions could be considered to be an

[227] Resp. SoD, paras. 414-422.

[228] **C-121**, POSH Initial Public Offering Prospectus, April 17, 2014, p. 52, Mexico's Closing Presentation, slide 26.

expropriation. The Claimant has also failed to establish that the courts were not available to the Claimant.

b. ***The Detention Order***

244. The issue for the Tribunal is whether from an expropriation point of view a temporary (or temporally limited) attachment can amount to an expropriation. The jurisprudence on whether temporary deprivations can amount to an expropriation is mixed. Early tribunals used the language of "*permanent deprivations*", suggesting that deprivations which are temporary will not be enough to give rise to an expropriation claims.[229] The weight of case law, however, favors being open to the possibility under certain conditions of an expropriation in a case involving something other than a permanent deprivation, but only in very limited circumstances. Tribunals have considered a number of factors, including the temporal duration of the deprivation,[230] and whether the deprivation was always intended to be temporary.

245. Tribunals have been reluctant to find that a measure is expropriatory in circumstances where the deprivation has not had long-term effect on the value of the investment. As the tribunal in *LG&E v Argentina* expressed it, "[*g]enerally, the expropriation must be permanent, that is to say, it cannot have a temporary nature, unless the investment's successful development depends on the realization of certain activities at specific moments that may not endure variations*".[231]

246. The Claimant was deprived of some of the vessels for a short period of 4-5 months, and there is no evidence that the deprivation was ever intended to be permanent. Further, the Claimant recovered the vessels. In these circumstances the Tribunal dismisses the claim

[229] **CL-47**, *Tecnicas Medioambientales Tecmed S.A. v. The United States of Mexico*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, (Arbs. Horacio A. Grigera Naon, Jose Carlos Fernandez Rozas, Carlos Bernal Verea) ("***Tecmed v. Mexico***"), paras 115-116.
[230] **CL-100**, *LG&E Corp et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, (Arbs Tatiana B. de Maekelt, Francisco Rezek, Albert Jan van den Berg) ("***LG&E v. Argentina***"), para. 193; **CL-71**, *Valeri Belokon v. The Kyrgyz Republic*, UNCITRAL, Award, October 24, 2014, (Arbs Kaj Hober, Niels Schiersing, Jan Paulsson) ("***Valeri Belokon v. Kyrgyz Republic***"), para 206.
[231] **CL-100**, *LG&E v. Argentina,* para 193.

of expropriation grounded on the Detention Order and will re-visit the claim from the point of view of fair and equal treatment.

c. ***The Blocking Order***

247. Under the claim of indirect expropriation the Claimant includes the Blocking Order: "*Mexico blocked POSH's Subsidiaries from contracting directly with PEMEX as an alternative [rather than through OSA]. SAE refused to cancel OSA's contracts and the Insolvency Court prohibited PEMEX from rescinding them, fatally condemning the Subsidiaries' operations in Mexico*."[232]

248. This order was issued at the request of SAE. It prohibited PEMEX from contracting with GOSH's ships previously chartered to OSA. The Claimant affirms that PEMEX wanted to cancel the OSA contracts and award them directly to POSH's Subsidiaries in order to avoid interruption of service. The Claimant further affirms that the Subsidiaries' vessels had a clear competitive advantage against other vessels, because they had already incurred mobilization and modification costs 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*",[233] and preventing GOSH from mitigating its loss through direct charters with PEMEX.

249. The Respondent points out that Oceanografía defended its rights and interests during the Insolvency Proceeding by requesting precautionary measures including the suspension of the administrative procedures of termination of the OSA-PEP Contracts and the extension of the Contracts' validity.[234] This notwithstanding, the Claimant blames SAE and PEMEX for not taking action to make fast-track administrative termination procedures for the OSA-PEP Contracts, so that such contracts would be assigned to POSH. According to the Respondent, "*[t]his theory does not stand up*."[235] The evidence

[232] Reply, para. 485.
[233] Reply, para. 356.
[234] Rejoinder, para. 284.
[235] Id., para. 285.

provided by the Claimant demonstrates that "POSH wanted to end its business relationship with OSA as soon as possible."[236]

250. The key issue for the Tribunal is whether the Claimant or the Subsidiaries were given promises to be able to enter into new and future contracts with PEMEX once the OSA contracts with PEP were terminated. If they were not, whether the intention of the Claimant was to terminate the relationship with OSA or to mitigate damages becomes irrelevant. There is no written evidence of the Claimant or the Subsidiaries having made any such promise. New contracts would have had to be subjected to public bidding with the consequent uncertainty whether a bid for them would be successful. The Claimant believed that its vessels had a competitive advantage, but this by itself is no more than its appreciation of possible future business. On the basis of the evidence before the Tribunal, the Claimant has not shown that it had a right to new contracts, or that the benefit of such promise may be said to have been expropriated. Accordingly, the expropriation claim must fail.

(2) Breach of Fair and Equitable Treatment

251. Article 4 of the Treaty on the minimum standard of treatment ("**MST**") provides:

> *"1. Each Contracting Party shall accord to investments of investors of the other Contracting Party treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*
>
> *2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other Contracting Party. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard and do not create additional substantive rights.*
> *3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article."*

252. Footnote 1 to the expression "*the customary international law minimum standard of treatment of aliens*" in Article 4.2 explains that "*[w]ith regards to this article, the*

[236] Id., para. 286.

customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens."

253. The text of Article 4 shows the intention to ensure that fair and equitable treatment and full protection and security are applicable as part of the MST and that are also applicable "*all customary international law principles that protect the economic rights and interests of aliens*." At the same time, "*for greater certainty*", it is affirmed that the concepts of fair and equitable treatment and full protection and security do not require treatment additional to that required by the MST.

254. There is an ambivalence in the text of Article 4 between the recognition of what is included in the references to the MST and, at the same time, a concern for limiting in paragraph 2 the consequence of such recognition. This ambivalence leads the parties to the Treaty to explain that such concepts "*do not require treatment in addition to or beyond that which is required by that standard and do not create additional substantive rights*." Article 4.3 extends this limitation to ensure that breaches of other provisions of the Treaty or of other international agreements do not establish a breach of Article 4.

255. In sum, the Treaty parties affirm their obligation to accord investments of investors fair and equitable treatment but without extending the treatment beyond the MST. This conclusion begs the question of what does it mean fair and equitable treatment when the Treaty links it to the minimum standard of treatment. After a review of case law, the *Waste Management* tribunal provides an answer on which both Parties rely in their pleadings:

> *"Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the 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."[237]

256. In the case of the Detention Order, the actual reason for the attachment was not uncertainty as to title to the vessels, but to ensure service of OSA to PEMEX. Mexico has not denied that the reason for sequestering the vessels was to ensure that OSA continued to provide services to PEMEX. The Detention Order, quoted by Mexico's expert, Javier Paz, in the second report, states that the vessels were seized [redacted] The Order also states that [redacted][238] Thus it was known that OSA did not own the vessels but it had only their use.

257. The Respondent argues that, while it sequestered the vessels for the purpose of servicing PEMEX, all POSH had to do to get them back was to prove "*ownership*". If Mexico sequestered the vessels until it verified that the insolvent party wasn't the owner and who the owner was would be a reasonable course of action in an insolvency, but it doesn't explain why it took Mexico several months to verify the ownership of ships registered under its flag. Indeed, Mexico already had, or should have had, information regarding the ownership of eight out of the attached 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 required the Subsidiaries to file three different pleadings to establish their ownership with the PGR before they finally obtained the release of their vessels from the Detention Order.[239]

[237] **CL-87**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, (Arbs. Judge Crawford, Benjamin Civiletti, Eduardo Magallón Gómez), para. 98.

[238] **RER-006**, Paz, 2nd Report, page 32.

[239] Reply, para. 242.

258. As the Detention Order itself states, the vessels were sequestered to ensure they continued to service PEMEX. If this was the objective, why was proof of ownership necessary or sufficient to release them?

259. To conclude, the Subsidiaries retained ownership of the vessels but not their use or benefit. It is not disputed that the effect of the measure was to deprive the owners of the income generated by the vessels during the detention periods. The owners were never compensated by the Respondent and the actual reason for the attachment was not uncertainty as to title to the vessels, but to ensure service to PEMEX as stated in the Detention Order. The Tribunal finds that the Detention Order was arbitrary, grossly unfair and unjust, and for this reason breached the applicable standard requiring the Respondent to grant the Claimant fair and equitable treatment.

(3) Full Protection and Security

260. The Tribunal observes that the Parties differ on the content of the State's obligation to provide the Claimant full protection and security. In particular, they differ on whether the obligation includes legal protection against harm to persons and property. The Claimant argues that "*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.*"[240] The Tribunal has rejected the composite act argument. The individual components in respect of which the Tribunal has determined that it has jurisdiction have already been considered under the claim of expropriation or of fair and equitable treatment. Therefore, for reasons of judicial economy the Tribunal does not need to determine the content of "*full protection and security*" or consider the composite act or its individual components.

[240] Reply, para. 552.

VII. DAMAGES

A. SUMMARY OF THE PARTIES' ARGUMENTS

261. This summary is limited to arguments related to losses for which the Tribunal has determined the Respondent is responsible, namely: (i) lost charter hire for the period vessels were detained by the Mexican authorities, and (ii) demobilization fees and repair costs of the vessels.

262. In the SoC these two items are included in the chapter of historical losses, which the Claimant defines as losses pre-dating the Valuation Date of May 16, 2014. The Claimant explains that during this period and since March 19, 2014, POSH and the Subsidiaries did not receive any payment from OSA, and they were not able to re-charter their ten vessels elsewhere. After deducting the operating costs incurred by GOSH, HONESTO and HERMOSA, the Claimant estimates losses due to lost charter hire in the amount of USD 11,289,516.[241]

263. As regards demobilization fees and repair costs, the Claimant affirms that: (i) SEMCO was not paid a demobilization fee of USD 1,800,000 for the SEMCO vessels[242] as required by clause 16 of the SEMCO Charters, and (ii) due to poor maintenance, HONESTO, HERMOSA and SEMCO paid for repairs in the amount of USD 1,355,806.[243]

264. In the SoD, the Respondent argues that because the bareboat charters of Caballo Grano de Oro and Rodrigo DPJ expired in January 2014 and Salvirile and Salvision expired in February 2014 there was no basis to assume that these vessels would have been chartered by PEMEX but-for the impugned measures and should not be included in the damages' calculation.[244]

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[241] Cl. SoC, para. 445. **CER-001,** Versant Report, Table 23, p. 71.

[242] Id., para. 446. **CER-001,** Versant Report, p. 71.

[243] Ibidem. **CER-001,** Versant Report, Table 24, p. 72.

[244] Resp. SoD, para. 725. **RER-001**, Alberro-Cornerstone Report, para. 22.

265. The Respondent also observes that (i) the Claimant has not deducted the operating costs of the estimated lost charter hire, and (ii) there is double counting because the amount of PSFM's invoices was included in another head of damages. After taking into account these criticisms, the Respondent estimates the lost charter hire at USD 5,268,756.[245]

266. The Respondent argues that there was no evidence that PEMEX was obligated to pay demobilization fees to OSA or pay for damage allegedly caused to POSH's vessels. For these reasons the Respondent disputes the inclusion of this head of damages.[246]

267. In the Reply, the Claimant accepts in part the Respondent objection related to PFSM's invoices, but argues that the Respondent's objections to damages arising from the detention of the SMP and SEMCO vessels is baseless. The Claimant explains, "*[t]he 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, the Claimant has established that, even though the SMP and SEMCO charters with OSA had expired, Mexico deprived the Claimant of its ability to re-charter those vessels and re-deploy them elsewhere*."[247] The Claimant adds that it would be "*illogical that the vessels could be detained with* no economic consequence *for both the period of detainment and uncertainty surrounding the release date.*"[248] Based on Versant's Second Expert Report, the Claimant argues that the most appropriate benchmark is the charter rate applicable to the most recent contracts.

268. As regards PSFM's invoices, the Claimant agrees to deduct the amount of these invoices already included in its calculation of damages for work performed and invoiced payable through the Irrevocable Trust, but the Claimant disagrees with the estimated operating costs per day per vessel. Accordingly, Versant deducts from their estimated operating costs per day for the GOSH's vessels (but not the SMP or SEMCO vessels since PFSM's invoices did not include the costs for these vessels during the detention period) and

[245] Id., para. 727. **RER-001**, Alberro-Cornerstone Report, paras. 21-26.

[246] Id., para. 728. **RER-001**, Alberro-Cornerstone Report, paras. 27-28.

[247] Reply, para. 622(i) (Emphasis omitted).

[248] Ibidem, quoting **CER-002**, Versant's 2nd. Report, para. 47 (emphasis added by the Claimant).

reduces the calculation of "*lost charter hire from US$ 11.29 million to US$ 9.48 million (reduction of US$ 1.81 million)*."[249]

269. In the Rejoinder, the Respondent states that, "*[i]f this Tribunal determines that the temporary detention of those vessels constitutes a breach of the APPRI, the Respondent acknowledges that it would be responsible for any damages flowing from that detention –i.e., there is no causation issue regarding these damages*."[250] But the Respondent insists that the Claimant makes unreasonable assumptions to assess those damages. As contended in the SoD, the Respondent claims that there is no factual basis to assume automatic renewal of service contracts and to equate "*the damages to the full value of the lost profits under a hypothetical renewal, rather than assessing them as the loss of an opportunity that could* potentially *have value*."[251] The Respondent argues that, "*[s]ome allowance has to be made to account for the needed to obtain a new contract, as well as the possibility of not obtaining it.*"[252] For this reason, the Respondent assumes that the four vessels with expired contacts would be under a new contract for 80% of the detention period. The Respondent further objects to the Claimant's estimate of damages because it does not deduct the operating costs from lost income for certain vessels. Based on these adjustments, the Respondent estimates that losses for the detention period amount to $6.7 million.

270. On the matter of demobilization fees and repair costs, the Respondent notes that the Claimant's experts did not produce invoices to PEMEX for payments made on account of demobilization fees or repair costs. Based on expert Richards' report[253] and the

[249] Reply. para. 622(ii), quoting **CER-002**, Versant's 2nd. Report, para. 53.

[250] Rejoinder, para. 509.

[251] Id., para. 514 (emphasis added by the Respondent).

[252] Id., para. 515.

[253] "[A]ny bareboat contracts in place between GOSH and OSA would be at bareboat rates equivalent to the time-charter rate received from PEMEX and it should also be assumed that POSH would pay the OPEX, dry-docking and management fees to PFSM on behalf of the disponent owner OSA out of the gross hire revenues received". **CER-003**, Richards' Report, para. 2.7, cited in **RER-002**, Alberro-Cornerstone 2nd. Report at para. 29. Emphasis added by Dr. Alberro.

Barecon 2001 Standard Bareboat Charter Agreement[254], the Respondent submits that the Claimant would be responsible for paying for these fees and costs.

B. ASSESSMENT BY THE TRIBUNAL

271. The Tribunal has determined that the liability of the Respondent is limited to certain damages resulting from the Detention Order. There is no dispute on the causality of these damages, either on factual or legal aspects. Rather, the disagreement between the Parties is limited to the fact that some contracts for the vessels had expired and the Claimant assumed in calculating damages that they would have earned income during the entire period of detention, and certain operating and repair costs that had not been deducted in the Claimant's counter-factual scenario.

272. Since there was no automatic renewal of contracts, the possibility of their renewal should be assessed as "*the loss of an opportunity that could* potentially *have value*."[255] The Second Report of the Respondent's expert Alberro has assumed that "*the four vessels with expired contracts would be under a new contract for 80% of the detention period, which is in line with market information for the first quarter of 2014.*"[256] The Tribunal finds this assumption reasonable in the circumstances.

273. The second objection of the Respondent to Versant's calculation of damages is related to the failure of Versant to include demobilization fees and repair costs. The Respondent affirms that there is no evidence that Pemex was contractually obligated to pay such fees and costs.[257]

274. The question is not whether OSA or POSH were responsible for those fees and costs, but whether Pemex or PEP were responsible. No evidence has been produced to show that

[254] Rejoinder, para. 520, citing **RER-002**, Alberro-Cornerstone 2nd. Report, para. 31: "[T]he Charterers shall bear all survey expenses and all other costs, if any, including the cost of docking and undocking, if required, as well as all repair costs incurred.", in turn, citing Versant Damages Report, Annexes VP-9, VP-22, VP-37. Emphasis added by the Respondent.

[255] Rejoinder, para. 514, emphasis in the original.

[256] Id., para. 515 and **RER-002**, Alberro-Cornerstone 2nd. Report, paras. 22-23.

[257] Id., para. 518.

they were contractually responsible. The evidence referred to above[258] rather confirms the opposite. For these reasons, adopting the approach and reasoning proposed by the Respondent (see para. [269] above, the Tribunal determines that the damage for the vessels' detention amounts to USD 6,712,226.

VIII. INTEREST

275. According to Article 6.2(c) of the Treaty on compensation, interest is to be paid "*at a commercially reasonable rate for that currency, from the date of expropriation until the date of actual payment.*" The Tribunal has not found that the Claimant was expropriated but unfairly treated. Article 6 refers to compensation for expropriation, as it is customary in this type of treaty. Arbitral tribunals have nonetheless granted compensation on the basis of provisions equivalent to Article 6 for breaches of other obligations under the applicable investment treaty. The Parties in their arguments have not raised this as an issue and have argued for and against an award of damages assuming that compensation under Article 6 would apply to a breach of Article 4. The Tribunal will proceed accordingly.

276. The Parties don't differ on the Claimant's request that pre- and post-award interest is applicable to the amount awarded by the Tribunal. It is also not in dispute that interest be compounded. The Parties differ on the applicable interest rate. The Claimant has requested 12% or LIBOR plus 4 points.[259] Mexico argues that LIBOR without added percentage points would be a commercially reasonable rate as required by the Treaty.[260]

277. The Tribunal finds that the Claimant has not justified the reasonableness of 12% or LIBOR plus 4 percentage points and it is persuaded by Mexico's argument that LIBOR is a commercial rate, fixed by a third party which has excluded extreme values in its calculation.[261]

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[258] See paras. 258-259 *supra*.

[259] Reply, para. 643. **CER-001,** Versant Report, paras. 264-265.

[260] Rejoinder, para. 554.

[261] Id., para. 553. **RER-002**, Alberro-Cornerstone 2nd. Report, para. 121.

278. For these reasons, the Tribunal determines that interest shall be at an annual compounded LIBOR without any additional percentage point. Interest shall accrue from May 16, 2014 to the date of payment.

IX. COSTS

279. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Andrés Rigo Sureda	USD 184,125.00
W. Michael Reisman	USD 150,375.00
Philippe Sands	USD 75,000.00
ICSID's administrative fees	USD 148,000.00
Direct expenses (estimated)	USD 126,789.19
Total	USD 684,289.19

280. Each Party has pleaded that the Tribunal order the other to pay all the costs of this arbitration including its costs of legal representation and assistance. Under Article 42 of the UNCITRAL Rules, the costs of arbitration shall in principle be borne by the unsuccessful party, but "*the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*"

281. In the circumstances of this proceeding in which the Claimant is only being awarded a minimal part of its claim, the Tribunal considers that it is reasonable that each party bears its own costs and 50% of the costs of the Tribunal and the ICSID Secretariat.

282. The Tribunal notes that the Parties have equally contributed to the costs of the Tribunal and the ICSID Secretariat and, therefore, there is no need for the Tribunal to order the payment on that account of any sum by one party to the other.

X. DECISION

283. For the above reasons, the Tribunal decides by majority[262]:

1) That the Tribunal has jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis* in respect of the Detention Order and the acts dated after May 4, 2014.

2) That the Respondent breached its obligation to grant the Claimant fair and equitable treatment in breach of Article 4 of the Treaty on account of the detention of the Claimant's vessels.

3) To award the Claimant USD 6,712,226, such amount to be free of taxes, carry interest at LIBOR without any additional percentage points, compounded annually and accruing since May 16, 2014 until payment.

4) Each party shall bear its own costs and 50% of the costs of the Tribunal and the ICSID Secretariat.

5) All other claims and requests are dismissed.

[262] See the attached Concurrent and Dissenting Opinion of Professor W. Michael Reisman.

[Signed]

Prof. W. Michael Reisman
Arbitrator
Subject to the attached Concurring and Dissenting Opinion

Date : January 7, 2022

[Signed]

Prof. Philippe Sands Q.C.
Arbitrator

Date : January 6, 2022

[Signed]

Dr. Andrés Rigo Sureda
President of the Tribunal

Date : January 11, 2022

IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER THE UNITED MEXICAN STATES – SINGAPORE AGREEMENT ON THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS AND THE UNCITRAL ARBITRATION RULES (2010)

PACC OFFSHORE SERVICES HOLDINGS LTD

Claimant

and

UNITED MEXICAN STATES

Respondent

(ICSID Case No. UNCT/18/5)

Concurring and Dissenting Opinion of Professor W. Michael Reisman

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Members of the Tribunal
Dr. Andrés Rigo Sureda, President
Prof. W. Michael Reisman, Arbitrator
Prof. Philippe Sands, Arbitrator

Secretary of the Tribunal
Ms. Mercedes Cordido-Freytes de Kurowski

A. Introduction

1. This case concerns a dispute between a Singaporean investor, PACC Offshore Services Holding LTD ("POSH") and the United Mexican States ("Mexico") under 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, dated November 12, 2009 (the "BIT"). A tribunal instituted under the dispute resolution mechanism in Article 11 of the BIT must apply the BIT, not redraft it. I cannot concur with those parts of the Award which pick, choose, and, in effect, redraft provisions of the BIT.

2. Irrespective of the evidence produced by the Parties, which I believe supports key parts of the Claimant's case, the Award employs, in my view, an impermissible methodology for treaty interpretation and application. The Award redrafts the BIT provisions, cherry-picking its language, and importing conditions from other treaties under cover of "concerns" couched in grand questions of arbitral policy, which go beyond the BIT and the dispute.

3. I will explain my position in three parts. First, the Award's reasoning for excluding the treatment of OSA from the jurisdiction of the tribunal is mistaken and, in addition, creates a problematic precedent. Second, the Award redrafts the BIT's provision on expropriation, transforming the objective standard of expropriation into a subjective analysis akin to denial of justice. Third, the Award's damages calculation disregards the long-term effects of the Detention Order and its expropriative character.

B. The Treatment of OSA

4. It seems to me that if a State demands in its domestic law that a foreign investor must enter into a Joint Venture (JV) with a domestic party in order to conduct its business there, the State

may not shield itself from responsibility under the BIT for an injury to the investor, by claiming that it only acted against the domestic JV partner. If its treatment of the domestic JV partner under domestic law causes injury to the foreign investor, it must account to the investor for its actions in terms of fair and equitable treatment (FET) or full protection and security (FPS). That would not be the case when there was no requirement to joint venture with a national business and the investor decided to do so for its own strategic reasons, unless, however, the real target of the measure was the investor.

5. I have no quarrel with the Award's announcement that it "shares the concern expressed by the tribunal in *Methanex*", *i.e.*, that "A potentially endless chain of consequences may flow from any government decision or action, and it is necessary and reasonable to find some limit to the claims which can be brought under the Treaty".[1] Yet that is not the situation before the Tribunal. If, in this case where a JV was required under domestic law, the source of part of the foreign investor's injury derives from a violation of OSA's, the Mexican JV partner's, civil rights under Mexican law, then the derivative injury suffered by the foreign investor is proximate and should sound in the BIT.[2] I am persuaded that this is required by the BIT but the Award finds it, as a matter of law, too remote. Yet to reach this conclusion, the Award takes a term of the BIT out of its context and uses the interpretation of a similar term in NAFTA in a different context, to limit the term's application in the BIT. That is wrong.

[1] Award, ¶ 146.

[2] The OSA's consent decree for money laundering under U.S. law played a mischievous role in the arbitration. From time to time, it was raised with the clear implication that OSA was not entitled to due process in the Mexican proceedings, in which Mexican misfeasances ultimately led to the bankruptcy of OSA. To the extent that it made OSA's consent decree in another State's process the issue, as if a defendant in an unrelated criminal process which led to its bankruptcy is not entitled to due process, I think it impaired POSH's rights to due process.

6. The Award reaches its conclusion by selectively quoting from the BIT and from NAFTA (the latter as if it were part of the governing law). The Award compares NAFTA's "relating to" and the BIT's "by reason of, or arising out of" to contend that "both phrases convey the need for some direct connection between the contested measure and the loss claimed". Concluding artfully that "[t]o hold that this difference is somehow significant risks drawing artificial distinctions between phrases which have the same substantive meaning".[3] That conclusion holds only if one ignores the rules of treaty interpretation and disregards the "context", the respective instruments in which the terms appear: NAFTA and the BIT.

NAFTA Article 1101(1):

> "1. This Chapter 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."

BIT Article 11(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.**"

7. While NAFTA uses the term "relating to" to connect "measures" and "investors" or "investments", the BIT uses the term "by reason of, or arising out of" to connect "loss" and

[3] Award, ¶ 146.

"breach". That is 'substantively' different. There is nothing in the BIT to suggest that any "direct connection" or a "legally significant connection", whatever either formulation is taken to mean, must exist between the "measure" and the "loss", or the "measure" and the "investor", as the Award states.[4] By selectively quoting the provisions, the Award applies an interpretation of a term adopted in one context, *i.e.*, between a measure and an investor, to interpret a link between entirely different elements, the breach and the loss. But the Award circles back and concludes that the interpretation of a link between "loss" and "breach" is actually a link between "loss", "investor", and "measure"; examining the "relationship between the Claimant and its investment and the other measures", excluding them because the Claimant was affected "only secondarily and indirectly, [] and not primarily".[5]

8. BIT Article 11(2) is neither unusual, problematic, nor does it impose any special conditions. The fact that a claim by an investor must concern a loss which arises out of a breach of a treaty obligation by the host-State is the *raison d'être* of investment protection. Absent some special language to the contrary, it would be absurd to suggest that an investor may claim a loss *not* arising out of a treaty breach. But that does not justify somehow imposing a limitation on the link between the measure and the loss or the measure and the investor, as the Award does. Recall that the Vienna Convention requires terms to be interpreted in their "context".

9. Moreover, the Award's method undermines the principle of *effet utile*. The Award's approach would drain the word "breach" of any meaning, equating it with the word "measure" used in NAFTA. But not every measure is a breach, and whether a measure, or to be precise, an

[4] Award, ¶¶ 146-147.

[5] Award, ¶ 147.

act attributable to the State under international law, is a breach of the treaty, depends on the substantive provisions of the BIT, such as Articles 4 and 6. Yet the Award fails to explain how *those* provisions require any degree of connection, primary or secondary, between the investor and the attributable act. Article 6 even uses the broad stipulation that expropriation may be effected "directly **or indirectly** through measures tantamount to expropriation".[6] Expropriation may thus *per se* be a secondary effect of an attributable act.

10. The Award thus mixes and matches between the terms of the BIT (which is binding on it) and of NAFTA (which is not binding on it). And it then goes even further afield by invoking the *Methanex* award, under NAFTA, as if it were authority for this case, under the BIT. The fact that the BIT provides that any claim must be based on a loss arising out of a treaty breach, cannot, as the Award decides, require a "legally significant connection" between the Claimant and the measures, not to mention any purported exclusion of measures which affect investors "only secondarily and indirectly".[7]

11. According to the BIT there are thus two questions: (1) whether an act attributed to the State (*i.e.*, "measure") breaches an obligation owed to an investor – which turns on the substantive provisions. If that is true, then the procedural question (2) is whether the loss claimed arose from that breach. The Award should not rewrite the BIT to alleviate its concerns, replace the word "breach" with "measure", and somehow intertwine the term "investor" into what becomes an interpretational jigsaw puzzle. All that without explaining why the effect in question is not "legally significant".

[6] Mexico-Singapore BIT, Art. 6 [**Exhibit CL-1**] [emphasis added].

[7] Award, ¶ 147.

12. To address the first question, the Award should have considered whether, if true, the alleged political persecution of OSA would have been a breach of Article 4 of the BIT. In other words, if proven, does a political persecution of the JV partner fulfil a host State's duty to provide a safe investment environment under FET or FPS? I believe it would not.

13. Yet even were one to follow the Award's concerns and rewrite the BIT, the Award's reasoning is detached from its own review of the facts. The Award makes several arguments to support its position that there is no connection between the measures against OSA and the Claimant. First that "if the Claimant had not contracted with OSA, it would be unaffected by the measures".[8] Second, "the alleged losses [*i.e.*, those relating to the treatment of OSA] are entirely dependent on the fact that the Claimant happened to contract with OSA".[9] And third, that "[t]here is nothing to distinguish the Claimant from other entities which may have contracted with OSA".[10] But in its paragraph 57, the Award recognizes that:

> "**Respondent notes** that POSH never had a shareholding or invested capital in OSA, and **that the need for POSH to partner with a Mexican company was due to the 49% limitation prescribed in Mexico's Foreign Investment Law ("FIL" or "LIE") for foreign investment in maritime companies dedicated to the commercial exploitation of vessels for inland navigation and cabotage in Mexico**."[11]

14. The Award thus fails to appreciate that by forcing POSH to conduct its business through a JV with a domestic partner, Mexico exposed it to risks stemming from its actions against such domestic partners in comparison with other foreign investors allowed to engage in their business

[8] Award, ¶ 147.

[9] Award, ¶ 149.

[10] Award, ¶ 149.

[11] Award, ¶ 57.

without domestic partners. By requiring investors to structure their investment in such a way as to become dependent upon domestic partners, Mexico's obligations under FET and FPS extend to cover the additional risks such dependance exposed the investor to. After requiring such investment structures, the Respondent cannot simply excuse itself from harm caused to the investor by claiming that the measure was directed against the Mexican partner; absent the FIL, there might not have been any Mexican partner whose, allegedly unlawful, persecution would have destroyed the investment.

15. In fact, the evidence shows that after the measures POSH tried to contract with PEMEX directly.[12] Whether, or how, such business relationship would have had to be structured under Mexican law is beside the point. It never happened because the investment was destroyed, but what is clear is that POSH engaged a Mexican JV partner, OSA, because of the requirements of domestic law. That is a fact the Respondent recognized and the Award itself recalls.

16. Whether it is called a "legally significant connection" or any other formulation, by first requiring JVs and then allegedly mistreating the domestic partner, Mexico had breached an obligation towards the investor (FET or FPS). The loss suffered by the investor is therefore "by reason of, or arising out of" Mexico's failure to properly apply its law towards the JV partner. The distinction between investors allowed to engage in business by themselves and those mandated to enter into JVs with local partners is normatively significant when it comes to the State's obligations with respect to investors and particularly the treatment of their JV partners. By demanding that investors expose themselves to its treatment of their domestic partners, a State may not claim that

[12] *See, e.g.*, Email from J. Phang to G. Seow et al., April 11, 2014 [**Exhibit C-299**]; Email from J. Phang to G. Seow et al., July 18, 2014 [**Exhibit C-130**]; Email from J. Phang to G. Seow et al., August 20, 2014 [**Exhibit C-188**]; Email from J. Phang to G. Seow et al., April 1, 2014 [**Exhibit C-187**].

unlawful measures against the domestic partner are too remote from the investor to be considered a violation of an obligation owed to the investor. Mexico mandated the dependence of foreign investors in the maritime service industry upon a domestic partner and should have taken that into account when it went after OSA, a major such intermediary in the industry.

17. In contrast to the Award's conclusion there is thus much to "distinguish the Claimant from other entities which may have contracted with OSA".[13] The Claimant contracted with OSA in compliance with a legal requirement which Mexican law imposed on it as a putative foreign investor in a particular industrial sector. The fact that when required by Mexico to choose a domestic JV partner, POSH "happened to" choose OSA, a major player at the time, does not excuse Mexico from responsibility to POSH for its injuries deriving from mistreatment of OSA. The Respondent, as is evident from this case, is well aware that it imposes such restrictions on foreign investors under its law and, thus, assumed a duty to have been aware of this when it decided to pursue a major such intermediary. Was Mexico unaware that by pursuing OSA, foreign investors would be affected? Its law mandated their exposure. Even if it was not intentional, at most Mexico did not concern itself with such effects.

18. Whether Mexico pursued OSA lawfully is beside the point for jurisdiction. The Award would allow a State to require JVs with domestic partners and then excuse it from destroying the investment by targeting "only" the JV partner. Thus, not only does the Award rewrite the BIT to impose conditions absent from it, but it then misapplies its own conditions.

19. Finally, the Award seems to consider that in order for the attributed acts which concern the treatment of OSA, *i.e.*, the Disqualification Order and the Attachment Order, to fall under the

[13] Award, ¶ 149.

Tribunal's *ratione temporis* jurisdiction, the "three year limit" needs to be "extended".[14] Yet that again is a misapplication of the BIT. The Award confuses the "measure", "breach", and "loss". Per the Award, the May 4, 2014 cut-off date concerns the date of the measure. In other words, for acts and events which occurred before that date, an extension is needed, either as a continuing or composite act.[15] This rewrites the BIT.

20. Article 11(8) of the BIT, which prescribed the Tribunal's jurisdiction *ratione temporis,* provides a two-element test neither of which concerns the date of the measure:

> "A dispute may be submitted to arbitration provided that the investor has delivered to the disputing Contracting Party its notice of intent referred to in Article 10 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**."

21. Thus, when it comes to the treatment of OSA, jurisdiction *ratione temporis* does not turn on the act itself but on (1) when the investor became aware that the treatment of OSA was unlawful and therefore a breach that sounded in the BIT, **and** (2) when it became aware that the breach caused it damage.

22. The Award seems to substitute the word "breach" with "measure" while completely disregarding the second condition, *i.e.*, knowledge of loss. The Award seems to assume that at the moment of the measure's adoption, POSH immediately knew that the measure was a breach of the treaty *and* that it immediately knew it had suffered loss or damage from the breach. Not only does

[14] Award, ¶ 154.

[15] Award, ¶¶ 153-154.

the Award fail to explain such an interpretation or assumption, but its assumption disregards the facts which the Award itself reviews.

23. On March 19, 2014, weeks after the measures were adopted, in an internal POSH email from Gerald Seow to Geoffrey Yeoh, it was stated that "In general, the management and staff of Pemex, and PEP recognise Posh's good reputation, and that Posh is one of many victims of OSA's mismanagement and criminal activities" and that "They are appreciative that POSH continues to keep the vessels operating and supporting Pemex production activities offshore, and requested that we continue to keep the vessels operating".[16] This email exchange indicates that POSH was not aware of any alleged wrongdoing by the Mexican Authorities with respect to the criminal prosecution of OSA. On the contrary, POSH continued in its operation and wanted to distance itself from what it *then* perceived as "OSA's mismanagement and criminal activities". This exchange alone indicates that the Award's assumption that POSH considered the mere passing of the measures as creating "knowledge of the alleged breach" is incorrect. A review of POSH's initial public offering dated April 17, 2014, also indicates that POSH did not consider that there was wrongdoing on part of the Mexican government in the investigation of OSA.[17]

24. It is unclear when POSH first became aware that the measures against OSA were, allegedly, politically motivated. The Senate Committee reports which made accusations of political persecution were only issued in 2015,[18] and only in August 2014 did POSH's internal

[16] Email from G. Seow to G. Yeoh, March 19, 2014 [**Exhibit C-186**].

[17] POSH Initial Public Offering Prospectus, April 17, 2014, pages 33-34 [**Exhibit C-121**] (*e.g.,* "To the best of our knowledge, none of the vessels of our Group and GOSH are involved in the fraud allegations. None of our Directors and Executive Officers are involved in the fraud allegations.").

[18] Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.'s case, 2015 Activities Report [**Exhibit C-126**]; PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, dated 30 April 2015, [**Exhibit C-135**].

communication seem to reflect disenchantment with the decisions of the Mexican authorities.[19] The Respondent provided no evidence that POSH became aware that the treatment of OSA was politically motivated before the Senate reports. But even assuming, *arguendo*, that POSH was aware of and believed contemporary media reports from March 4, 2014, about the persecution of OSA,[20] a supposition belied by its internal communication quoted above that came two weeks later, it would not suffice to deny jurisdiction, because Article 11(8) of the BIT provides for a second, cumulative requirement of "knowledge that the investor or the enterprise has incurred loss or damage". Was the loss or damage suffered by POSH due to the alleged fact that OSA's persecution was politically motivated known immediately? The record is clear that it was not.

25. POSH's actions through March, April and May indicate that POSH only became aware of *any* damage or loss on May 16, 2014 or May 9, 2014 at the earliest.[21] The Award fails to see the clear link between two of the facts it reviews. First, the Award recognizes that:

> "During part of the Detention Order, GOSH's Vessels remained operative servicing PEMEX, with PFSM having to assume the payment obligations OSA failed to meet. On May 16, 2014, GOSH withdrew the vessels from the GOSH Charters but did not recover the use of the vessels. The vessels remained inoperative during the rest of the Detention Order."[22]

And that:

> "On May 2, 2014, SAE filed a writ with the Insolvency Court requesting to order PEMEX to make payments to SAE instead of the trusts. On May 6, 2014, the

[19] Email from J. Phang to G. Seow et al., August 20, 2014 [**Exhibit C-188**] ("Marcia Fuentes is basically blackmailing us."; "Especially since Marcia seems to be able to get the Bankruptcy Judge to approve all sorts of ridiculous Court Orders in the name of saving OSA"]. A mistreatment could also be inferred from a May 12, 2014 email, but even that is after the critical date. *See* Email from G. Seow to R. Granguillhome Morfin, May 12, 2014 [**Exhibit C-148**].

[20] Claim, ¶ 119.

[21] A May 12, 2014 email seems to be the first indication of POSH's awareness of losses. *See* Email from G. Seow to R. Granguillhome Morfin, May 12, 2014 [**Exhibit C-148**].

[22] Award, ¶ 91.

> Insolvency Court ordered PEMEX to do so (the "**Diversion Order**") and, on May 9, 2014, the Insolvency Court further clarified that the Diversion Order also applied to the Irrevocable Trust. The Order was confirmed on May 16, 2014, after Claimant's and GOSH's challenge."

26. Until the confirmation of the Diversion Order's application to POSH on May 16, 2014, POSH's vessels continued to service PEMEX under the OSA contracts, assuming, based on SAE's assurances,[23] that any payments were to be made to the Irrevocable Trust and to POSH as holder of the beneficial interest. POSH's actions speak clearly. Once the payments were diverted, POSH became aware that it suffered damage and acted to minimize that damage by withdrawing the vessels. Yet even if POSH became aware of that damage when the May 9, 2014, order was issued, that date is still later than the May 4, 2014, cut-off date.

27. Contemporary documents support the Diversion Order as being the moment POSH became aware of damages as the Claimant explained.[24] In its prospectus to potential investors dated April 17, 2014, POSH lists potential risks to investment in its shares, including potential risks from its investment in Mexico. Yet risk is not knowledge of damage or loss. Obligated to be transparent with potential investors, POSH revealed risks and lack of assurances, but it is telling that POSH did not say it had suffered or expected, loss or damage, from these events in Mexico.[25] POSH listed the OSA related events as risks which "*could* adversely affect our financial condition and results of operations". It is more likely that POSH was unaware of damage, rather than deceptive in its public offering. The moment POSH became aware of damages is clear from a May 12, 2014

[23] Email from G. Seow to R. Granguillhome Morfin, May 12, 2014 [**Exhibit C-148**].

[24] Reply, ¶¶ 414-420.

[25] POSH Initial Public Offering Prospectus, April 17, 2014, pages 33-34 [**Exhibit C-121**]; This can be contrasted with POSH's subsequent listing of two incidents of contract termination "where revenue was affected by such termination", for which it commenced arbitration. *Id.*, at pages 36-7.

correspondence. On that day, Gerald Seow wrote to Rogelio Granguillhome Morfin, concerning the Diversion Order, stating that "Under the SGX rules we are obliged to publish this news as it may have significant impact on our financial performance".[26] Captain Seow explained the historical context and stated that:

> "The payment rights of the 6 vessels had been assigned to an irrevocable Trust Account in 2013, and as such our revenue for these vessels should have been assured.
>
> Unfortunately, unbeknownst to us, SAE requested the Third District Court hearing the bankruptcy proceedings to order Pemex Exploracion y Produccion ('PEP') to stop payment to the trusts of the collection rights over the PEP Contracts assigned by OSA to the Trust, and instead to pay directly to SAE/OSA under the grounds that the funds are required to effect payments to OSA's workers and to maintain the company in operation."

28. Even though the Claimant raised this point in the Reply,[27] the Respondent provided no evidence that before May 4, 2014, POSH knew that the treatment of OSA was unlawful and thus a breach or that it suffered damage. Rather, in its Rejoinder, the Respondent insisted on treating the *ratione temporis* limitation as concerning the date of the measure.[28] The Award adopts the Respondent's reading of Article 11(8), absent any support in the text of the BIT. In my opinion, the existence of evidence supporting POSH's lack of knowledge and its contemporary actions indicate that the burden of proof in this case shifted to the Respondent, which failed to sustain it.

[26] Email from G. Seow to R. Granguillhome Morfin, May 12, 2014 [**Exhibit C-148**].

[27] Reply, ¶¶ 414-420.

[28] Rejoinder, ¶ 312.

29. I therefore dissent on the matter of jurisdiction and conclude that the tribunal had jurisdiction to consider the Respondent's treatment of OSA, and whether that treatment breached the obligation to provide FET to an investor in the bareboat charter industry.

C. The Irrevocable Trust

30. As with the question of jurisdiction, the Award grounds its decision concerning the Diversion Order not in the language of the BIT but in how it would have written the BIT given its concerns for the implications of its decision. Rather than applying Article 6 of the BIT on expropriation, the Award redrafts the provision, disguising the change as an interpretation of it. I cannot agree with the Award on this point.

31. The Award reviews the provisions of the BIT and the Articles on State Responsibility to suggest that "acts of the judiciary are not *per se* to be excluded from being treated as expropriatory in character".[29] The interpolated words "*per se*" open the door to a modification of the applicable standard of expropriation. The Award continues that "The issue is what should be the standard to be applied in order to differentiate the role of an international arbitral tribunal in an investment arbitration from an appellate court of domestic courts' decisions."[30] The Award's concern is that deciding whether a decision of a domestic court violated an international obligation of the State would place an international tribunal in the position of an "appellate court". This concern leads the Award to redraft the provision on expropriation by artfully interpreting the provision by reference to Article 17.1 of the BIT. The Award reasoned that:

[29] Award, ¶ 227.

[30] *Id.*

> "The standard described by the Claimant and Mexico in their references to the *dictum* of the *Eli Lilly* tribunal and to customary international law, respectively, converges around the necessity for the presence of unusual circumstances, situations of "*clear evidence of egregious and shocking conduct*" by the courts. The **Tribunal agrees with this standard, not as an added condition to expropriation under Article 6 but by placing this article in the context of the Treaty and in particular Article 17.1 of the Treaty**."[31]

The aforementioned provision of the BIT provides that:

> "A tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and *the applicable rules and principles of international law*."

32. The reader discovers that, for the Award, the italicized words mean a selection of IIL awards, some antedating the BIT, which confine claims of expropriation by judicial organs to a narrower "denial of justice" standard.[32] The Award's reference to the decision and standard in *Eli Lilly* takes that award as revealed truth; like revealed truth, it is ambiguous. Consider the original passage from the decision in *Eli Lilly* from which the Award takes this standard:

> "It will accordingly only be in very exceptional circumstances, in which there is clear evidence of egregious and shocking conduct, that it will be appropriate for a NAFTA Chapter Eleven tribunal to assess such conduct against the obligations of the respondent State under **NAFTA Article 1105(1)**."[33]

33. The standard taken from *Eli Lilly* was formulated to assess "conduct against the obligations of the respondent State under **NAFTA** Article 1105(1)". But NAFTA Article 1105 is entitled "Minimum Standard of Treatment", and Article 1105(1) relates to FET and FPS: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law,

[31] Award, ¶ 229.

[32] Award, ¶¶ 228-229.

[33] *Eli Lilly & Co. v. Canada*, ICSID Case No. UNCT/14/2, Final Award, ¶ 224 (Mar. 16, 2017).

including fair and equitable treatment and full protection and security." Expropriation is in NAFTA Article 1110. The tribunal in *Eli Lilly* made a general comment that "NAFTA Article 1110(1)(c) includes the requirement that [] the nationalization or expropriation of an investment must be 'in accordance with due process of law and Article 1105(1)'."[34] And it added the obscure comment that "As regards decisions of the national judiciary, the interplay between obligations under NAFTA Articles 1105(1) and 1110 will be a matter for careful assessment in any given case, subject to the controlling appreciation that a NAFTA Chapter Eleven tribunal is not an appellate tier with a mandate to review the decisions of the national judiciary."[35] The *Eli Lilly* tribunal declined to decide upon the various arguments of the parties on judicial expropriation,[36] limiting itself to these statements, and rejecting the case on the facts.[37] There is nothing here to indicate that the NAFTA tribunal considered that its standard for FET or FPS violations applies to a claim of expropriation.

34. Thus, per the Award, a standard set by a NAFTA tribunal to evaluate whether a State breached its obligation to provide investors with FET and FPS under NAFTA, is part of "the applicable rules and principles of international law" for assessing a claim of *expropriation* under the Mexico-Singapore BIT. In supporting its view, the Award only further muddles FET and expropriation, employing an interpretation method which literally detaches statements from their

[34] *Id.* at ¶ 225.

[35] *Id.* at ¶ 225. This seems to refer to a comment made in paragraph 221: "First, the 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. This said, the Tribunal emphasizes the point made below in respect of NAFTA Article 1105(1) that a NAFTA Chapter Eleven tribunal is not an appellate tier in respect of the decisions of national judiciaries." If *Eli Lilly* intended to be obscure, it more than achieved its intention.

[36] *Id*. at ¶ 220.

[37] *Id.* at ¶ 226.

context, and claims them to be "rules" or "principles" applicable in an entirely different context. In contrast to the Award's apparent disclaimer, the Award not only adds, but in fact redrafts Article 6 of the BIT.

35. Moreover, in redrafting the provision and confining claims of expropriation by judicial organs to a standard akin to denial of justice, the Award does exactly what it professed to be concerned about. By transforming the objective standard of expropriation to the subjective standard of denial of justice, the Award was required, and it in fact performed, an in depth reconsideration of the decisions by the Mexican courts.[38] The Award evaluated the "purpose" of the Irrevocable Trust, concluding, in a sentence which I cannot follow, that "the evidence before the Tribunal makes it clear that when the Trust was established the financial situation of OSA was already precarious and the infusion of funds by the Claimant was intended to finance the debt of OSA to the Claimant."[39] The Award then goes on to decide that the timing of the establishment of the Irrevocable Trust was "suspect", in what seems to be a reference to the standard applicable under Mexican domestic law on insolvency,[40] concluding that "It is not surprising that the Third Collegiate Court concluded that the Trust and the assignment of rights were done during a dubious period."[41] Thus the Award's redraft leads it to engage in precisely the role it wanted to avoid – "an appellate court of domestic courts' decisions".

36. The proper way to analyze the question of expropriation with respect to the Invex Trust was through the standard of expropriation applicable under the BIT's Article 6. Judicial organs are

[38] Award, ¶¶ 231-243.

[39] Award, ¶ 240.

[40] Award, ¶ 242.

[41] Award, ¶ 242.

organs of the State, and unless specifically excluded, their conduct may engage the State's responsibility for expropriation.[42] That is so whether or not their decision applied domestic law correctly.[43] Were the Award to evaluate the diversion of the Irrevocable Trust payments under the standard of expropriation rather than denial of justice, there would have been no need to act as "an appellate court" and examine the validity of the Mexican courts' decisions under Mexican law. That is precisely the difference between the standards of expropriation and denial of justice, which the Award muddles.

i. The Standard of Expropriation Under the BIT

37. The Mexico-Singapore BIT prescribes a very broad asset-based definition of a protected "investment" and a broad, yet explicit, protection against what it defines as an unlawful "expropriation". With respect to expropriation, Article 6 of the BIT provides that:

> "Neither Contracting Party may expropriate or nationalize **an investment** either **directly or indirectly** through **measures** tantamount to expropriation or nationalization (hereinafter referred to as "expropriation"), except:
> (a) for a public purpose;
> (b) on a non-discriminatory basis;
> (c) in accordance with due process of law; and
> (d) **on payment of compensation** in accordance with paragraph 2 below".

38. Article 6 does not exclude judicial measures, or subject them to a standard different than that of executive or legislative measures. A tribunal may not subject judicial measures to a standard

[42] *See, e.g, Sistem Mühendislik In aat Sanayi ve Ticaret A. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, ¶ 118 (Sep. 9, 2009) ("That abrogation was effected by an organ of the Kyrgyz State, for which the Kyrgyz Republic is responsible. It is well established that the abrogation of contractual rights by a State, in the circumstances which obtained in this case, is tantamount to an expropriation of property by that State. The Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree. If the Claimant has been deprived of its property rights by an act of the State, it is irrelevant whether the State itself took possession of those rights or otherwise benefited from the taking"). *See further id.* at ¶¶ 117 – 122.

[43] *See further infra.*

narrower than that in Article 6 or excuse expropriatory measures from the obligation to pay compensation because these were done in accordance with domestic law or with due process. In other words, under the BIT, the fulfilment of condition (c) (due process) cannot excuse a Party from fulfilling condition (d) (payment of compensation). Such an exercise would not only be inconsistent with the BIT but with general international law on State responsibility. The Award's reasoning allows the State to evade the strict standard of expropriation by modifying its domestic law to enable the executive to expropriate property through the courts, thus subjecting itself to a more lenient denial of justice standard.

39. This is part of a disquieting trend. Hamid Gharavi recently pointed out that the line of tribunals which infused standards from denial of justice as preconditions to judicial expropriation, on which the Award relies, exceeded their authority by rewriting their investment treaties and, moreover, created absurdities.[44] States write BITs and may agree on a rule which imposes stricter conditions on judicial expropriations or excludes them entirely; but that is not the rule applicable under this BIT. If the State-Parties to the BIT believe that judicial expropriations should be subjected to a higher standard, they should rewrite the BIT or provide for an authoritative joint interpretation per Article 17(2) of the BIT. Absent such amendment or interpretation, a tribunal is required to apply the standard in the BIT, not to impose a different standard, simply asserting it to be an "applicable rule or principle of international law".

40. Based on SAE's request, in its May 9, 2014 decision, the Insolvency Court ordered that PEMEX divert the payments due to the Irrevocable Trust to the State's own accounts held by

[44] Hamid G. Gharavi, *Discord Over Judicial Expropriation*, 33 ICSID REV. 349 (2018).

SAE.[45] The Award subjects the legality and implication of this measure under international law to domestic law in contradiction to the rules governing State responsibility under international law.

41. Article 4 of the ILC's Articles on State Responsibility ("ASR"), which the Award quotes, explicitly provides that the conduct of judicial organs is attributable to the State:

> "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".

There is no exclusion or specific standard for attribution of judicial acts.

42. Even if, *arguendo*, the disputed decision of the Insolvency Court correctly applied domestic law, and that under domestic law, the court could lawfully take the investor's property and transfer it to the State, that is not a defense to an expropriation claim. As Article 3 of the Articles on State Responsibility provides: "The characterization of an act of a State as internationally wrongful is governed by international law. Such *characterization is not affected by the characterization of the same act as lawful by internal law*."[46] The ILC Commentary made clear: "That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled." The ILC quoted a pertinent passage from *ELSI*:

> "The question still remains, therefore, whether the requisition was or was not a violation of Article III, paragraph 2. This question arises irrespective of the position in municipal law. Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be

[45] Award, ¶ 97.

[46] UN Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001 Y.B. Int'l L. Commission, vol. II, Art. 3 [hereinafter ASR with Commentary].

> lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty."[47]

43. In an ITLOS case, Judge Rao pointed out that "it is well established that a State cannot take shelter behind a decision of any of its organs as an excuse for not implementing its international legal obligations",[48] quoting the Permanent Court of International Justice in *Certain German Interests in Polish Upper Silesia*, where it explained that:

> "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention."[49]

The ASR rules make clear that, first, measures adopted by judicial organs are attributed to the State in the same way as those adopted by executive or legislative organs. Second, the rules of domestic law according to which a judicial organ may prescribe a measure cannot be raised to excuse the State from international responsibility over the effects of the measure on its international obligations. This has been pointed out by the Iran-US Claims Tribunal in *Oil Field* v. *Iran*:

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[47] Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment, 1989 I.C.J. Rep. 15, ¶ 73 (Jul. 20).

[48] The "ARA Libertad" Case (Argentina v. Ghana), Provisional Measures, ITLOS, Order of 15 Dec. 2012, Separate Opinion of Judge Rao, ¶ 6, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/published/C20_Rao_151212.pdf.

[49] Certain German Interests in Polish Upper Silesia, PCIJ, Merits, Judgment, 19 (May 25, 1926), https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_07/17_Interets_allemands_en_Haute_Silesie_polonaise_Fond_Arret.pdf.

> "It is well established in international law that the decision of a court in fact depriving an owner of the use and benefit of his property may amount to an expropriation of such property that is attributable to the state of that court."[50]

And the Ninth Edition of Oppenheim explains that there is no need for the attributable court's decision to be irregular or wrong to find a violation of an international obligation:

> "Even where there is no irregularity or error of procedure or law a decision by a court may still engage the international responsibility of the state: this would occur, for example, **where a judicial decision produces a result which is contrary to the state's treaty obligation**."[51]

44. The Respondent seems to have misunderstood the analysis of the tribunal in *Rumeli* v. *Kazakhstan*,[52] which was properly grounded in the expropriation provision of the relevant BIT and not in standards foreign to it.[53] In *Rumeli,* although the decision of the domestic court was in due process and for a public purpose, the tribunal decided it was an unlawful expropriation due to the absence of adequate compensation (even though some compensation was given).[54]

45. The Respondent selectively quoted from paragraph 704 of the award,[55] yet the tribunal only considered the instigation of the proceeding by the State to be relevant when the asset was transferred to a private party: "transfer to a third party may amount to an expropriation attributable

[50] Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran and National Iranian Oil Company, IUSCT Case No. 43, Award, ¶ 42 (Oct. 8, 1986), reproduced in https://jusmundi.com/en/document/decision/en-oil-field-of-texas-inc-v-the-government-of-the-islamic-republic-of-iran-and-national-iranian-oil-company-award-award-no-258-43-1-sunday-10th-august-1986#decision_3911.

[51] OPPENHEIM'S INTERNATIONAL LAW 545 (9th eds., 1992) [emphasis added].

[52] Rejoinder, ¶ 389.

[53] Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, ¶¶ 698-706 (Jul. 29, 2008).

[54] *Id.* at ¶¶ 705-706.

[55] Rejoinder, ¶ 389 ("First, *Rumeli v. Kazakhstan* added the requirement that 'the judicial process was instigated by the State'").

to the State if the judicial process was instigated by the State."[56] In the present case, the property of the investor was transferred to the State (SAE's accounts), at the State's (SAE's) request. In any event, the *Rumeli* tribunal stated that the identity of the party was "no doubt a relevant consideration, although not in itself decisive, as has already been observed".[57] Although in paragraph 707 of the *Rumeli* award the tribunal found the fact that the proceeding was initiated by the State to be important, it was not dispositive of the expropriation itself, which it had already concluded to have occurred, in paragraph 706, based solely on the expropriation provision.[58] This distinction is accurate because there is no requirement of illegality for a measure to be deemed expropriatory. Criticizing the *Saipem v. Bangladesh* tribunal's reference to the illegality of the judicial conduct, Berk Demirkol commented that

> "This reasoning does not seem fit. Conceptually, expropriation does not occur due to the illegal nature of any state measure, in this case, a court decision. It occurs because of the effects of the measure that substantially deprive the investor of the right, or the benefit attached to the right, that it legitimately holds. Conduct that has expropriatory effects need not bear an unlawful character".[59]

46. In the present case, I see no justification under the BIT to treat domestic courts differently when evaluating an expropriation claim. The Award's approach is not only mistaken but creates an absurd situation. If, under Mexican law, SAE had the power to administratively instruct PEMEX to transfer payments for services from the Irrevocable Trust to itself, there would be no

[56] Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, ¶ 704 (Jul. 29, 2008).

[57] *Id.*

[58] *Id.* at ¶ 707 ("The Tribunal further holds that the fact that the expropriation was not directly for the benefit of the State but for the benefit of Telecom Invest does not affect this conclusion, since, as the parties agree, expropriation can exist despite there being no obvious benefit to the State concerned. In this connection the Tribunal does however consider that it is relevant that the court process which culminated in the expropriation was instigated by the decision of the State, acting through the Investment Committee, to terminate the Investment Contract.[]").

[59] BERK DEMIRKOL, JUDICIAL ACTS AND INVESTMENT TREATY ARBITRATION 54 (2018).

special standard of misconduct and Mexican law would not be relevant or excuse the expropriatory act. But since SAE went through the Insolvency Court to achieve the same result, *presto* the State is protected as long as the deprivation was purportedly lawful under domestic law. This is reminiscent of the comment by the *Sistem v. Kyrgyzstan* tribunal that "The Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree."[60]

47. Under the Award's construction, all the State need do to evade the obligation to pay compensation for expropriation is to deprive a protected asset through a judicial procedure which "correctly" applies domestic law, itself a prerogative of the State. That contradicts the objective of the prohibition on expropriation and the rules on State responsibility. Moreover, such a construction places the investment tribunal in the place of an appellate authority considering whether the domestic law was accurately applied by the Court -- which the Award is ostensibly trying to avoid.

48. It is true that when "the rule of international law makes it relevant",[61] domestic law may become relevant to the application of the treaty rule. For instance, under the standard of the BIT, a qualifying "investment" must have been "established or acquired in accordance with the laws and regulations of the other Contracting Party". Domestic law is thus pertinent to the question of whether an "asset" is a qualifying "investment" to the extent it was *acquired or established* in accordance with such domestic law, but not deprived in accordance with domestic law. There is nothing in Article 1 or Article 6 of the Mexico-Singapore BIT to indicate that the validity of an

[60] Sistem Mühendislik In aat Sanayi ve Ticaret A. v. Kyrgyz Republic, ICSID Case No. ARB(AF)/06/1, Award, ¶ 118 (Sep. 9, 2009).

[61] ASR with Commentary, *supra* note 46, at 38.

asset as a qualifying "investment" is conditioned upon the application of domestic law by a court, or that a court can deprive the asset and transfer it to the State without breaching the treaty's standard for lawful expropriation as long as domestic law allows for such a transfer.

49. The pertinent question before the Tribunal, and one which does not require the Tribunal to act as an appellate court, is whether the decision was consistent with the State's obligation under the BIT to compensate for expropriation, irrespective of its legality under domestic law or due process. The choice through which organ a measure against an investor is to be implemented cannot be dispositive of whether an expropriation has occurred nor can it alter the conditions for a lawful expropriation as prescribed by the BIT.

50. It may be true that in certain circumstances, a judicial decision which may be framed as an expropriation, should not be treated as such. For example, in *Saipem* although the tribunal recognized that the "most significant criterion to determine whether the disputed actions amount to indirect expropriation or are tantamount to expropriation is the impact of the measure" it cautioned that:

> "[] given the very peculiar circumstances of the present interference, the Tribunal agrees with the parties that the substantial deprivation of Saipem's ability to enjoy the benefits of the ICC Award is not sufficient to conclude that the Bangladeshi courts' intervention is tantamount to an expropriation. If this were true, **any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds**".[62]

But that is not the case here, where a decision by a court transferred a protected asset of the investor, an eligible "investment", to the State's accounts.

[62] Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award, ¶ 133 (Jun. 30, 2009).

51. Under Article 6 of the BIT, there are thus three essential elements to the expropriation claim: (i) a qualifying "investment"; (ii) an attributable measure; and (iii) a payment of compensation. Whether the measure taken by the Mexican organ in question was done in accordance with domestic law or in due process is not dispositive when it comes to expropriation. In fact, as I explained, the legality of the measure under domestic law is immaterial and may not be raised as a defense to an internationally wrongful act. Because no compensation was paid, the Tribunal's decision turns on whether POSH's beneficial interest in the Trust was a qualifying investment and whether it was lost due to a measure attributable to Mexico. I believe the answers to both questions are affirmative.

ii. The Beneficial Interest is a Qualifying "Investment"

52. As I mentioned, the BIT provides for a broad asset-based definition of "investment":

> "investment" means an asset owned or controlled, directly or indirectly by investors of one Contracting Party and established or acquired in accordance with the laws and regulations of the other Contracting Party in whose Area the investment is made, and in particular includes:
>
> (a) an enterprise;
> (b) shares, stocks, and other forms of equity participation in an enterprise, or futures, options, and other derivatives;
> (c) bonds, debentures, and other debt securities of an enterprise:
> (i) where the enterprise is an affiliate of the investor; or
> (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a Contracting Party or an entity directly owned and controlled by a Contracting Party;
> **(d) loans to an enterprise:**
> **(i) where the enterprise is an affiliate of the investor**; or
> (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a Contracting Party or an entity directly owned and controlled by a Contracting Party;
>
> []

> (h) **claims to money involving the kind of interests set out in sub-paragraphs (a) to (g) above**, but not claims to money that arise solely from:
> (i) commercial contracts for the sale of goods or services by a national or enterprise in the Area of a Contracting Party to an enterprise in the Area of the other Contracting Party; or
> (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than **a loan covered by sub-paragraph (d) above**;

53. The broad asset-based definition is "designed to protect as wide a range of investment forms as possible".[63] UNCTAD explains that:

> "[] the broad asset-based definition is dominant in the vast majority of IIAs and BITs and has been the subject of significant arbitral interpretation. It states, initially, that investment includes "every kind of asset", suggesting that the term **embraces everything of economic value, virtually without limitation.**"[64]

54. Jeswald Salacuse has pointed out that "even if an alleged investment does not fall within any of the specified categories, it may still enjoy protection under the treaty if it qualifies as 'an asset'";[65] conversely, if a transaction does fall under the categories, its qualification as a protected investment is certain:

> "The interpretational methodology followed by the tribunals in the cases indicated above seems straightforward: the tribunal first determines whether the transaction in question falls into one of the transactional categories specified in treaty provisions. If it does, then the tribunal concludes the challenged transaction is an 'investment' within the meaning of the treaty and is therefore entitled to treaty protection."[66]

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[63] JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 212 (3rd ed., 2021).

[64] UNCTAD, SCOPE AND DEFINITION 24 (2011), https://unctad.org/en/Docs/diaeia20 l 02 en.pdf [emphasis added].

[65] SALACUSE, *supra* note 63, at 212.

[66] *Id.* at 213. The second approach discussed by Salacuse concerns the *Salini* test, which does not apply in this case. In addition, as he explains, the broad category of "claims to money", was intended to "broaden the scope of what one would traditionally consider to be an 'asset'". *Id*. at 212.

55. It is a long-standing principle of international law that when interests are separated between beneficial interest holders and holders of formal, legal title, the protected interest under international law is the beneficial interest, rather than that of the nominal titleholder. For example, the decision of the US Foreign Claims Settlement Commission in *American Security and Trust Company* explained:

> "It is clear that the national character of a claim must be tested by the nationality of the individual holding a **beneficial interest** therein rather than by the nationality of the nominal or record holder of the claim. Precedents for the foregoing well established proposition are so numerous that it is not deemed necessary to document it with a long list of authorities . . ."[67]

56. Similarly, *In the Matter of the Claim of Richard O. Graw,* the claims commission again emphasized that it was the person holding the "beneficial interest" that was protected under international law:

> "[I]t has been held by this Commission, in other claims programs, that the national character of a claim must be tested by the nationality of the individuals **holding a beneficial interest** therein rather than by the nationality of the nominal or record holder of the claim."[68]

57. In his work on the diplomatic protection of citizens abroad in 1919, Professor Borchard explained that "the Department of State in its diplomatic support of claims looks to the citizenship of the real or equitable owner of the claim as distinguished from the nominal or ostensible owner appears from the sections on corporations, administrators and assignees". As Borchard went on

[67] 26 ILR (1957), 322, 322.

[68] *In the Matter of the Claim of Richard O. Graw, Executor of the Estate of Oscar Meyer, Deceased*, Proposed Decision, U.S. Foreign Claims Settlement Commission, Decision No. PO-8583, Aug. 25, 1965, at 1-2, *upheld by* Final Decision, Sept. 20, 1965.

to explain, the State Department protects persons with "special or derivative rights [] although the record title may have been vested in an alien".[69]

58. *Blue Bank v. Venezuela* is a recent decision emphasizing the proposition that international law prefers the party with the beneficial interest rather than the nominal titleholder. Although in that case the beneficiary was also the protector, the tribunal's decision seems to have been guided by the enjoyment of the proceeds of the trust rather than any control over it:

> "The party that would come closest to satisfying the requirements of 'ownership' with regard to the assets of the Qatar Trust is what the trust deeds refer to as the 'Eligible Person' (which is not a term of art but one that the Tribunal - for reasons given in paragraphs 190 to 194 below - considers to be a beneficiary). It is the 'Eligible Person', in this case Hampton, that enjoys ultimate control over the trust asset and that will ultimately enjoy or suffer, as the case may be, the fortunes of the trust assets."[70]

59. Similarly, in *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, the tribunal explained that under international law the fundamental realities are preferred to legal formalities, thus protecting the party holding the "beneficial interest" rather than the legal interest:

> "[I]nternational law does not tend to permit formalities to triumph over fundamental realities. By way of example, in the field of diplomatic protection (which may, depending upon the issue, be relevant to the interpretation of a BIT), when claims commissions and arbitral tribunals have determined whether it is a person who holds the legal interest as opposed to **a person who holds the beneficial interest** in shares that is entitled to seek diplomatic protection, they have consistently found that it is the beneficial interest which is deserving of protection."[71]

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[69] EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 643 (1919).

[70] Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, *Award*, ¶ 170 (Apr. 22, 2017).

[71] Perenco Ecuador Ltd. v. The Republic of Ecuador, ICSID Case No. ARB/08/6, *Decision on Remaining Issues of Jurisdiction and Liability*, ¶ 522 (Sep. 12, 2014) [emphasis added].

60. Under the terms of the BIT, POSH's beneficial interests under the Invex Trust were a qualifying investment. There is no indication that the Invex Trust was not "established or acquired in accordance with the laws and regulations of the other Contracting Party". All the necessary procedures, including with the State-owned PEMEX, were fulfilled, and POSH's beneficial interest in an irrevocable trust was solidified. The fact that such structure was a prominent feature with other entities engaged with OSA indicates its legality under domestic law. A trust structure was considered as part of the original Banamex financing[72] and it has not been proven that it was established to defraud anyone.

61. POSH's beneficial interest was clearly a "claim[] to money involving the kind of interests set out" in paragraph (d) "loans to an enterprise", which is an affiliate of the investor. POSH secured the beneficial interest in an irrevocable trust to which the collection rights were assigned to protect POSH's loan to the JVs for the purchase of the vessels. Under the BIT, such beneficial interest is a protected "investment", whose deprivation would constitute an expropriation. As the beneficial interest in the trust fits neatly into one of the BIT's examples, it must be treated as a protected investment.

62. Yet even if, *arguendo*, one were to apply the *Salini* test, the beneficial interest fulfils the conditions of contribution, duration, and risk. The loan made by POSH, which was to be protected by the trust, was a significant contribution. The beneficial interest was intended to remain a claim to money for the duration of the loan repayment. And finally, as the claim to money was attached to the actual provision of services to PEMEX, it entailed risk.

[72] Minutes of the 8th Board of Directors meeting of PACC Offshore Services Holdings Pte. Ltd., August 18, 2011 [**Exhibit C-40**].

63. Following the terms of the BIT and not domestic law, as the Award should have, leads to the conclusion that POSH's beneficial interest in the Invex Trust is an independent, protected, "investment" under the terms of the BIT. POSH was the lawful, beneficial owner, of any receivables from the PEMEX contracts, less any mandatory distributions as part of the Invex Trust, *e.g.,* OSA's commission.[73]

64. The Award recognizes that the Respondent, through its organ SAE, requested that another one of its organs, the insolvency court, instruct the Respondent's State-owned entity PEMEX, to divert payments from the Irrevocable Trust, to the Respondent's accounts held under its organ, SAE:

> "On May 2, 2014, SAE filed a writ with the Insolvency Court requesting to order PEMEX to make payments to SAE instead of the trusts. On May 6, 2014, the Insolvency Court ordered PEMEX to do so (the "Diversion Order") and, on May 9, 2014, the Insolvency Court further clarified that the Diversion Order also applied to the Irrevocable Trust. The Order was confirmed on May 16, 2014, after Claimant's and GOSH's challenge".[74]

65. In this decision, an organ of the Respondent effectively deprived POSH of its claim to money under the Irrevocable Trust and transferred the economic value of the protected investment to another organ of the Respondent. Whether this decision was lawful under domestic law, or, as Claimant argued, misapplied the law in effect,[75] is not dispositive. The only pertinent question under Article 6 of the BIT, is whether a measure attributable to the Respondent, directly or indirectly, expropriated a protected investment. Having explained why, in contrast to the reasoning

[73] Moreover, taking account of the realities of the investment leads to the conclusion that the receivables from the PEMEX contracts were never intended to be OSA's property. OSA, as the intermediary, was only entitled to its commission which was secured through the Invex Trust. Treating the entire receivables from PEMEX as OSA's property thus disregards the rationale and structure of the investment and the business relationship.

[74] Award, ¶ 97.

[75] Reply, ¶¶ 251 – 300.

of the Award, the standard of denial of justice is inapplicable to expropriation, I believe the conditions of Article 6 of the BIT are fulfilled.

66. As against the suggestion in the Award, this conclusion is the opposite of an investment tribunal acting as an appellate court. The BIT in this case is clear. Where it comes to expropriation, an investment tribunal must conduct an objective analysis evaluating the facts of the case and whether an attributable act fulfilled the requisites of an expropriation. Such an objective standard, in contrast to denial of justice, refrains from conducting, in effect, appellate review and scrutinizing the substance of decisions by domestic courts. Redrafting the provision by importing purported "rules" or "principles" of international law to alter the applicable standard, the Award infuses foreign considerations into the analysis, transforming itself into an appellate court.

67. As I explained, the proper analysis disregards questions of legality under domestic law, focusing rather on whether the attributable act constitutes a breach of an obligation assumed by the Respondent State. By proactively attracting foreign investors by means of a BIT, States assume certain obligations with respect to the treatment of investors and their property. It is therefore understandable why, unless specified differently in the treaty, a host-State may not shield itself from responsibility for harm to investors by hiding behind the provisions of domestic law as applied by its organs. The Award, in effect, transforms a standard provision on the prohibition of expropriation without compensation into a hyper-charged Calvo clause. Per the Award, if a domestic court takes an asset and transfers it to the State in accordance with its interpretation and application of domestic law, (which can extend to changing the applicable law,) the case is closed for the investor unless there was a denial of justice. Manifestly, this is not the standard of expropriation under the BIT in this case and it muddles the different applicable standards. I

therefore dissent on this point, and would have concluded that the Respondent expropriated the Claimant's beneficial interest in the Irrevocable Trust.

D. The Detention Order was an Expropriation which Led to the Destruction of the Investment

68. I concur with Award's reasoning that the sequestration of the vessels was a breach of FET. Yet, as I will explain, I find the Award's reasoning flawed with respect to two interconnected points: (i) the Detention Order was in fact an expropriation, even though certain acts were temporary; and, that notwithstanding, (ii) the compensation provided under the Award for this breach fails to account for the circumstances of this case. Obviously, FET could still achieve its equitable result, if the damages awarded were to cover the full extent of the Claimant's injury, the remedy for expropriation.

69. The Award mentions two decisions on which its analysis of the Detention Order as a temporary expropriation is based: *LG&E v. Argentina,* and *Belokon v. Kyrgyz*.[76] The Award, referring to these two decisions, states that "Tribunals have considered a number of factors, including the temporal duration of the deprivation, and whether the deprivation was always intended to be temporary".[77] The Award then reasons that:

> "Tribunals have been reluctant to find that a measure is expropriatory in circumstances where the **deprivation has not had long-term effect on the value of the investment**. As the tribunal in *LG&E v Argentina* expressed it, "[g]enerally, the expropriation must be permanent, that is to say, it cannot have a temporary nature, unless the investment's successful development depends on the realization of certain activities at specific moments that may not endure variations".

[76] Award, ¶¶ 244-245.

[77] Award, ¶ 245.

70. The Award concludes that: "The Claimant was deprived of some of the vessels for a short period of 4-5 months, and there is no evidence that the deprivation **was ever intended** to be permanent. Further, the Claimant recovered the vessels."[78]

71. The Award's reliance upon the intention that an expropriation be intended to be permanent is unsupported by the authorities on which it relies,[79] while numerous decisions have recognized that under international law the intent to expropriate is not a precondition or even a decisive factor.[80] The focus is the effects of the measure, not the intent of the State.

72. As I will explain, the record shows that the impact of the measure on the investment was devastating. But even if one accepts that the cause and context may be taken into account, per the tribunal in *LG&E v. Argentina*, then in this case, as the Award explains, the State sequestered the property to ensure the operation of the State-owned PEMEX, stringing the investor along with made-up requests that it prove ownership.[81]

73. Even if some tribunals, as the Award claims, have "considered a number of factors, including the temporal duration of the deprivation, and whether the deprivation was always

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[78] Award, ¶ 246.

[79] The only decision which may remotely relate to considering whether "the deprivation was always intended to be temporary" is *Belokon v. Kyrgyz*. But there the issue was the continuing administrative sequestration of the bank, with "no assurances by the Respondent that this temporary administration will soon be at an end." (Belokon v. Kyrgyz, Award, ¶ 207 (Oct. 24, 2014). *LG&E v. Argentina* mentioned its opinion that it should consider the context and purpose of a measure to balance "both of the causes and the effects of a measure" (LG&E v. Argentina, ICDIS Case No. ARB/02/1, Decision on Liability, ¶ 194 (Oct. 3, 2006).

[80] *See, e.g.,* Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 111 (Aug. 30, 2000); Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶ 270 (Feb. 6, 2007); Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine, ICSID Case No. ARB/08/8, Excerpts of Award, ¶ 304 (Mar. 1, 2012); National Grid P.L.C. v. Argentina Republic, UNCITRAL, Award, ¶ 147 (Nov. 3, 2008); Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, ¶ 7.5.20 (Aug. 20, 2007).

[81] Award, ¶¶ 259-260.

intended to be temporary",[82] the Award seems to treat these factors as dispositive, disregarding the decision whose dictum it quoted. For example, the quote from *LG&E v. Argentina*, conditions temporary expropriation on "unless the investment's successful development depends on the realization of certain activities at specific moments that may not endure variations". Given the consequential nature of expropriation, its "intended" effect cannot be decisive.

74. In fact, the timeline strongly suggests that the investment was lost, in large part, due to the sequestration of the vessels. For one thing, duration has to be treated realistically; it was not simply a matter of receiving the vessels on the day of their release, wiping down the wheelhouses and returning them immediately to service. The tolerable duration of expropriatory measures which produce significant injury for complex investments which coordinate equipment and assembly of crew, schedules with other operators, etc. may be much shorter.

75. In point of fact, this was an expropriation: there was a clear intent by the State to deprive the investor of the property for the State's benefit; the deprived property was a substantial part of the investment; and while the retention of the vessels by the State might have been temporary, its deprivatory effect, a direct consequence of the sequestration, proved to be permanent: the investment did not continue to operate during this period of time nor was POSH able to restart its operations in Mexico afterwards.

76. The Award explains that: "The SEMCO Vessels were released on June 16, 2014. GOSH's Vessels and the SMP Vessels were released on July 16, 2014."[83] What happened after that is an important part of the story. Less than 10 days after the release of the GOSH Vessels, in an internal

[82] Award, ¶ 246.

[83] Award, ¶ 94.

POSH correspondence, Geoffrey Yeoh wrote to Gerald Seow that "We are bleeding in Mexico and any work for our vessels, even short term in nature will help stem our losses", to which Gerald Seow responded that:

> "Geoff,
> **The reality is that GOSH has no more equity left.**
> Therefore the value of GOSH will be the market value of the vessels over the debt to Posh.
> There is no goodwill left, since the contracts are no longer there.
> Assuming the market value is $20 million each, then the value of Gosh will be about $$120m less debt of $110 million, which works out to $10 million.
> **This $10 million will become zero in the next few months,** which means Gosh has zero value??
> Brgds"[84]

77. This communication, dated July 25, 2014, is clear. After the Detention Order, GOSH had "no more equity left". As the contracts were terminated, pursuant to the Diversion Order as I explained above, it seems that POSH expected that the value of its investment in GOSH above debt would become zero. The investor was denied the use of the property through which its investment generated revenue for a prolonged period of time and the existing contracts were terminated because an organ of the Respondent diverted any receivables to the State's accounts. It is therefore not surprising that the Detention Order left GOSH with no equity.

78. To recall, the decision in *LG&E v. Argentina,* on which the Award relies, opined that an expropriation must be permanent "unless the investment's successful development depends on the realization of certain activities at specific moments that may not endure violations". Whether or not such limitation is correct, it is clear that in this case depriving the investor of the ability of using its revenue-generating property for this period, had a devastating effect on the entire

[84] Email from G. Seow to G. Yeoh et al., July 25, 2014 [**Exhibit C-189**] [emphasis added].

investment. The Award says that "the Claimant recovered the vessels" and that "there is no evidence that the deprivation was ever intended to be permanent".[85] Yet consequence, not intention, defines the scope of expropriation: The pertinent question is not whether the deprivation was intended to be permanent but rather whether it had a permanent effect. The events of this case indicate that it did.

79. As mentioned above, at the end of the detention period, the investor's prime investment had no more equity left. This was the result of two actions taken by the Respondent. First, the Respondent sequestered the prime revenue generating property of the investor for the purpose of protecting the operations of the State-owned PEMEX.[86] Second, the Respondent diverted any payments from work performed by the sequestered property to the State's accounts rather than the Irrevocable Trust. The second act of the Respondent immediately led to the investor's decision to withdraw the vessels from the existing contracts; the investor could not have been expected to do otherwise. Deprived of its only means to generate profit and sustaining the costs of the vessels during the Detention Period, is it surprising that the investment had no more equity left? Is it surprising that without equity the investor was unable to restart the venture?

80. In fact, POSH attempted, in an effort to mitigate its injury, to restart the investment in negotiations with PEMEX and SAE in the several weeks following the release of the vessels on

[85] Award, ¶ 248.

[86] Award, ¶¶ 258-261.

July 16, 2014,[87] only to have its efforts blocked by another decision by an organ of the Respondent on August 15, 2014.[88]

81. Without explanation, the Award treats the investor's only losses from the Detention Order as those limited to the detention period itself. That is a mistake. The Mexico-Singapore BIT is silent on the specific measure of compensation to be paid. Yet that fact does not mean that there is a vacuum. As I will further elaborate below, were the Detention Order deemed an expropriation, as I believe it should have been, the BIT provides a standard of compensation of a lawful expropriation.[89] Professor Salacuse provides a succinct formulation of which there are many, many more: "Customary law therefore requires a tribunal to award 'full compensation' to a claimant for the injuries to an investment caused by a state's treaty violations, to seek 'to wipe out all the consequences' of that state's illegal acts, and to place the claimants 'in the situation which would, in all probability, have existed' if that state had not committed its illegal acts."[90]

82. The Award seems to believe that by awarding POSH the loss associated with only the detention period, it would "wipe out all the consequences" of the illegal Detention Order. As I have explained, that is simply wrong. According to the Award, during this period of time the investment lost US$ 6.7M (I will return to this number below).[91] By depriving the investor of this revenue, leaving its main subsidiary, GOSH, without any equity at the end of the Detention Period,

[87] *See, e.g.,* Email from G. Seow to G. Yeoh et al., July 25, 2014 [**Exhibit C-189**]; Email from J. Phang to G. Seow et al., July 18, 2014 [**Exhibit C-130**]; Email from J. Phang to G. Seow et al., August 20, 2014 [**Exhibit C-188**].

[88] Reply, ¶ 310; Insolvency Court decision (granting the injunction requested by SAE), August 15, 2014 [**Exhibit C-192**].

[89] Mexico-Singapore BIT, Art. 6(2) [**Exhibit CL-1**].

[90] SALACUSE, *supra* note 63, at 554. Quoting from the *Factory at Chorzow* judgment of the Permanent Court of International Justice.

[91] Award, ¶ 268.

the Respondent created a situation from which the investment did not recover. Thus, by compensating the investor solely for the "income generated by the vessels during the detention periods",[92] (or in fact for only parts thereof), the Award does not "wipe out all the consequences" of the illegal Detention Order. Even as a violation of FET, if that focus were deployed, the compensation must include losses associated with the loss of investment itself. The necessary compensation is even clearer when the Detention Order is treated as an expropriation.

83. The Award recognizes that the investor's property, *i.e.*, the vessels, were taken by the Respondent to protect the operations of the State-owned PEMEX. Article 6 of the BIT defines an expropriation broadly, including direct and indirect measures tantamount to expropriation:

> "Neither Contracting Party may expropriate or nationalize **an investment** either **directly or indirectly** through **measures** tantamount to expropriation or nationalization".

An "investment" is defined very broadly in the BIT, and includes, besides the examples quoted above, also:

> "(e) 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 under:
>
> > (i) contracts involving the presence of an investor's property in the Area of the other Contracting Party, including turnkey or construction contracts, or concessions;
> > (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; or
> > (iii) licenses, authorizations, permits, and similar instruments;
>
> (f) 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;"

[92] Award, ¶ 261.

84. The broad language of the BIT provides for various ways in which the Detention Order can be viewed as an expropriation. First, the lost revenue from the existing contracts was an "interest[] arising from the commitment of capital or other resources", from "contracts involving the presence of an investor's property in the Area of the other Contracting Party". Second, the vessels themselves were movable property "used for the purpose of economic benefit or other business purposes". As explained above, the Detention Order also produced indirect effects on other assets of POSH which sustain the definition of a protected investment. These include enterprises owned by the investor (BIT Article 1(7)(a)), and rights related to the movable property such as, for instance, mortgages (BIT Article 1(7)(f)). But the Detention Order also denied the subsidiaries the property required to conduct business and repay their loans from POSH (BIT Article 1(7)(d)).

85. It may be true that from an *ex-post* perspective, it is challenging to ascertain whether the additional US$ 6.7M (assuming that the Award's reliance upon Dr. Alberro is justified)[93] would have allowed POSH to restart the investment successfully. For one, the Diversion Order, itself an expropriation as I explained above, would have probably led to the termination of the existing contracts irrespective of the sequestration of the vessels. Second, the Blocking Order, itself hardly a treatment which is fair or equitable, would have been passed regardless, thus blocking POSH's ability to substitute OSA in the contracts with PEMEX. But such perspective disregards the rules under the BIT. Article 6(2)(a) of the BIT specifically provides that compensation for an expropriation be calculated *ex-ante* from the date of the expropriation; that is the valuation date. Compensation for a lawful expropriation must:

> "be equivalent to the **fair market value of the expropriated investment immediately before the expropriation occurred**. The fair market value shall not

[93] *See further infra.*

> reflect any change in value because the intended expropriation had become publicly known earlier."[94]

86. Whether the *measure*, *i.e.*, the Detention Order was temporary, its effects on the value of the investment were long-term and devastating. There is thus no need to play the "what if" game with respect to compensation for expropriation. In an analogy from creeping expropriation, the compensation to the Claimant should be calculated based on the value of the investment as of the date of the Detention Order.

87. The fact that the Diversion Order contributed to GOSH's lack of equity after the vessels were released, may not undermine this conclusion. Once the Respondent expropriated the investor's claim to money and diverted the payments from the Irrevocable Trust, it created a situation in which the investor had no alternative but to terminate the contracts. To insist that POSH should have kept its then sequestered vessels, performing the OSA contracts, knowing that it would not receive any payments would have been absurd. Because of the Diversion Order POSH would not have received any income from the contracts even if it had not terminated them. Whether the Diversion Order was a contributing factor, it is a factor wholly attributable to the Respondent, and, again to recall, the consistency or inconsistency of that measure with domestic law is immaterial.

88. Therefore, whether in combination with the Diversion Order or even of its own accord, compensation for the sequestration of the vessels should be *ex-ante* and based on the fair market value of the investment before the Detention Order was issued.

89. Two final points on compensation. First, the Award relies for compensation on the calculation done by Dr. Alberro without explaining why it found it more accurate than the Versant

[94] Mexico-Singapore BIT, Art. 6(2)(a) [**Exhibit CL-1**].

report, *e.g.*, with respect to the different operating costs.[95] Second the Award fails to adjust that compensation to its decision.[96]

90. The compensation for the detention period for the six GOSH vessels (Caballo Argento, Caballo Babieca, Caballo Copenhagen, Caballo Monoceros, Caballo Scarto, Don Casiano) was calculated at only 59 days instead of 120 days, while for the vessels with expired contracts, it was 80% of the total detention period (based on a reduction the Award accepts).[97] Both experts excluded from compensation for the detention period losses incurred during the time the vessels were servicing PEMEX, counting only lost hires after the Diversion Order which led to the contracts' termination. That would have made sense, as the losses for the period between March 16, 2014 and May 16, 2014, were included in the claim for the Invex Trust, and counting them here would have been double counting. But having rejected the claim based on the Diversion Order, the Award should have revised the compensation for the Detention Order.

91. As POSH indicated, it only kept the vessels in the contracts and performing work for PEMEX during this period because the payments were to be sent to the Irrevocable Trust.[98] As a contemporary, May 12, 2014, email from Captain Seow makes clear:

> "Since 1 March 2014, after we learnt that OSA has been taken over by SAE, the Judicial Administrator of Mexico, we have been in discussions with Pemex and SAE on the outstanding that OSA owed to our companies in Mexico. We met them for the first time since [*sic*] **12 March 2014, and since then have been meeting them regularly**, providing to them information on the outstanding debt owed by OSA to us, **and also to request for the redelivery of our vessels. SAE requested that we should continue to operate the vessels chartered to OSA, that are serving Pemex, and assured us that since the payments rights had been**

[95] Versant Second Report, ¶¶ 125 – 131; Dr. Alberro Second Report, ¶¶ 87 – 92.

[96] Dr. Alberro Second Report, ¶ 24 Table 1.

[97] Award, ¶ 263.

[98] *See, e.g.,* Email from G. Seow to R. Granguillhome Morfin, May 12, 2014 [**Exhibit C-148**].

> **assigned to an irrevocable trust account, our revenues for these vessels is assured.**"[99]

Such practice by the Respondent is consistent with its other contemporary practice, and specifically its sequestration of the vessels to ensure their servicing of PEMEX while stringing the investor along with the pretext that it only had to prove ownership to secure their release. Thus, SAE created a reasonable expectation on the part of POSH with respect to performance of the service in this period and their assurance under the trust arrangement, only to flip and ask the Insolvency Court to stop the payments after the services were provided:

> "The payment rights of the 6 vessels had been assigned to an irrevocable Trust Account in 2013, and as such our revenue for these vessels should have been assured.
>
> Unfortunately, unbeknownst to us, SAE requested the Third District Court hearing the bankruptcy proceedings to order Pemex Exploracion y Produccion ('PEP') to stop payment to the trusts of the collection rights over the PEP Contracts assigned by OSA to the Trust, and instead to pay directly to SAE/OSA under the grounds that the funds are required to effect payments to OSA's workers and to maintain the company in operation."[100]

92. On SAE's request, the Mexican Insolvency Court, in effect, nullified the trust arrangement retrospectively, diverting any outstanding payments to the State's accounts rather than the Irrevocable Trust. As far as those outstanding amounts were for services provided by the vessels during the unlawful detention period, those ought to be included in the compensation and there is no risk of double counting, if one were to reject the claim concerning the Detention Period (on which I disagree with the Award). The Award cannot have it both ways. If the decision to retroactively divert outstanding amounts was unlawful under Mexican law, then even under the

[99] *Id.*

[100] *Id.*

Award's analysis it should sound in the BIT. But if it were lawful, and the assignment of receivables was, in effect, nullified retroactively, Mexico should not be allowed to hide behind the arrangement and avoid compensating the investor for losses incurred during the unlawful detention period due to this arrangement. It is clear that should POSH have known that SAE's assurances on the trust arrangement were false, it would not have kept the vessels servicing PEMEX between March 16, 2014, and May 16, 2014, but rather withdrawn them immediately, or perhaps even before then (the first meeting with SAE seems to have been on March 12, 2014 per the email above).

93. Even though the BIT is silent on the standard for compensation for a breach of FET, as I explained above, the standard for expropriation is quite clear. If, as I suggest, the Detention Order is viewed as an expropriation, then the fair market value must be traced back to the moment of expropriation, *i.e.*, March 16, 2014. That is the evaluation date, not the withdrawal of the vessels on May 16, 2014. This includes the actual hires lost for the period between March 16, 2014 and May 16, 2014, and the potentially lost hires from May 17, 2014, until the vessels' release. As I explained above, it is clear that the loss from the Detention Order extended beyond the mere loss of revenue during this time, but even if limited to this period, there is no justification for excluding half the period.

94. Viewed as an expropriation, it is true that when tracing the loss from the evaluation period one needs to exclude the actual cash flow and the value recovered by the investor. But that only indicates that the actual payments received by POSH for services during the detention period must be excluded. Yet because the Respondent diverted the payments retroactively for the services provided during the unlawful detention period between March 16, 2014 and May 16, 2014, only those actually paid into the Invex Trust before the Diversion Order should be excluded. Funds

which were diverted should not be excluded from the fair market value valuation as of March 16, 2014.

95. Although my analysis is in terms of expropriation, it could be applied to an FET analysis as well. To use a different valuation date for FET, would allow Mexico to reap the benefits of its unfulfilled assurances to POSH, on the basis of which POSH continued to service PEMEX, irrespective of the unlawful Detention Order. The Respondent, it will be recalled, sequestered the vessels to service PEMEX while stringing the investor along under the pretext that it must prove ownership of the vessels to release them. It led the investor to continue to service PEMEX by providing assurances that its revenue was assured through the trust only to go behind the investor's back and have another one of its organs divert the payments retroactively. Even then it continued sequestering the vessels under the same pretext, until the investment was destroyed. Even if the Diversion Order was not a breach, which I believe it was, the compensation for the Detention Order should include the loss of investment, and at the very least, the loss incurred through the entire unlawful detention period.

96. With respect to the Claimant's claims concerning the Detention Order and compensation, I therefore concur in part and dissent in part. I dissent on the rejection of the expropriation claim with respect to the Detention Order, but concur that the Detention Order was a breach of FET. I dissent on the compensation: (1) the compensation for the Detention Order should extend to include the entire period; (2) damages from the Detention Order should include the long-term effects of the Detention Order on the value of the entire investment.

Concurring in part and dissenting in part,

[Signed]

Prof. W. Michael Reisman
Arbitrator

Date : January 7, 2022