

**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)

DECISION ON CLAIMANT’S APPLICATION FOR ADDITIONAL AWARD AND ON THE
APPLICABLE INTEREST RATE

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: May 9, 2022

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. THE CLAIMANT’S REQUEST	4
III. THE RESPONDENT’S REPLY	7
IV. ASSESSMENT BY THE TRIBUNAL	10
V. COSTS	14
VI. INTEREST RATE	15
VII. PUBLICATION.....	16
VIII. DECISION.....	18

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
Award	The Award rendered by the Tribunal in <i>PACC Offshore Services Holdings Ltd v. United Mexican States</i> (ICSID Case No. UNCT/18/5), on January 11, 2022
BIT or Treaty	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
CL-[#]	Claimant(s)’s Legal Authority
FET	Fair and equitable treatment
FIL	Mexico’s Foreign Investment Law
FPS	Full protection and security
OSA	Oceanografía, S.A. de C.V
PEMEX	Petróleos Mexicanos
R-[#]	Respondent’s Exhibit
RL-[#]	Respondent’s Legal Authority
The Three Measures	The Diversion Order, the Detention Order and the Blocking Order, as referred to in the proceeding and the Award
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

	<p>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.</p>
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I. INTRODUCTION

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 brought 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. The dispute related 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 concerned 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.

7. On January 11, 2022, the Tribunal rendered its Award. Attached to the Award was a Concurring and Dissenting Opinion by arbitrator Professor W. Michael Reisman.
8. In the Award, the Tribunal decided by majority:
 - 1) *“That the Tribunal ha[d] 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 [had] 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 [were] dismissed.”*
9. On February 10, 2022, pursuant to Article 39 of the UNCITRAL Arbitration Rules, the Claimant filed *Claimant’s Application for Additional Award* of the same date, together with: (i) a consolidated list of legal authorities, and (ii) copies of the new legal authorities (CL-217 to CL-219) with respect to the Award rendered by the Tribunal on January 11, 2022 (the “**Request**”)¹.
10. On February 10, 2022, ICSID confirmed receipt of the Request, noting that it had been transmitted to the Tribunal Members and the Respondent.
11. On February 11, 2022, the Tribunal invited the Respondent’s comments on the Request by no later than March 2, 2022.
12. On February 16, 2022, the Tribunal informed the Parties that (i) “[u]nless the Parties propose otherwise, the Tribunal intends to apply to this stage of the proceeding the procedural rules that were agreed by the Parties during the First Session held on

¹ The Tribunal uses the term “request” rather than “application” because request is the term used in Article 39 of the Arbitration Rules.

November 21, 2018, and recorded under Procedural Order No. 1, dated November 28, 2018 (“PO 1”), particularly under Section 7 of PO 1 regarding the Fees and Expenses of Tribunal Members, notwithstanding the provision set forth under Art. 40(3) of the UNCITRAL Rules”; (ii) “[t]o cover the costs of this stage of the proceeding, the Tribunal intends to use the funds that remain in the Trust Fund account that was created by ICSID for the present case with the advance deposits made by the Parties to cover the costs of the proceeding. This account has a balance of USD 375,255.52. Any remaining balance will be later refunded to the Parties”; (iii) “The Tribunal invites the Parties to confirm their agreement with the above proposal, and/or to state any observations they might have in this regard by Monday, February 21, 2022”; and (iv) “The Tribunal takes note that, under Article 39(2) of the UNCITRAL Rules, the Tribunal is ‘to render or complete its award within 60 days after the receipt of the request.’” (i.e., by Monday, April 11, 2022). This article also contemplates that “[t]he arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.” ‘Because the proceeding is bilingual and both versions of the Additional Award will need to be issued simultaneously, the Tribunal wishes to alert the Parties that such extension may be necessary.’”

13. On March 2, 2022, the Respondent filed its *Response to the Request for Additional Award* (the “**Reply**”).
14. On March 30, 2022, the Tribunal informed the Parties that, as anticipated in its letter of February 16, 2022, because of the translation requirements provided under Procedural Order No. 1, the Tribunal would need more than the 60 days provided under Article 39(2) to address Claimant’s Request, and estimates that the Additional Award would be issued no later than April 30, 2022.
15. On April 12, 2022, the Tribunal brought to the attention of the Parties that LIBOR is being discontinued and invited the Parties to consult with each other on an alternative, and inform the Tribunal of the consultation’s result by April 20, 2022. On that date the Parties informed the Tribunal that they were unable to agree on an alternative reference rate, and stated their respective positions on the matter.

II. THE CLAIMANT'S REQUEST

16. According to the Claimant, the Tribunal failed to carry out its mandate by acting *infra petita* and failing to decide claims over which it had jurisdiction:

*“It has done so, first, by refusing jurisdiction over and therefore declining to decide all of Claimant’s claims based on Mexico’s measures other than the Diversion Order seizing the funds owed to the Invex Trust, the Detention Order seizing Claimant’s vessels, and the Blocking Order preventing Claimant from doing business directly with PEMEX (Section III below). Second, and of central importance to this Application, even as to those Three Measures [“**the Three Measures**”] over which it did accept jurisdiction, the Award did not decide two of Claimant’s remaining FET claims nor all three of its FPS claims.”²*

17. The Claimant requests the Tribunal to rectify these omissions by making an Additional Award.
18. As regards jurisdiction, the Claimant contends that the Tribunal created at Mexico’s invitation a jurisdictional requirement of “*proximate causation*” not found in the Treaty, and proceeded to rule that many of the challenged measures did not meet this requirement. The Claimant alleges that the Award added a jurisdictional limitation without any interpretation or analysis of the Treaty; it further asserts that even if this requirement could be read into the Treaty, it would have been satisfied in respect of all the challenged measures. The Claimant submits that “*Even if some of the measures did not name Claimant or its investments on their face, those Mexican measures (i) were targeted acts, rather than measures of general application, and so had an impact limited to a specific set of entities; and (ii) had a foreseeable and fully knowable impact on a specific set of foreign investors, because Mexico’s FIL required them to do business in collaboration with OSA or a similar Mexican entity.*”³
19. The Claimant concludes its arguments on jurisdiction by affirming that the Tribunal had jurisdiction over all of Claimant’s claims and requests that “*the Tribunal render an Additional Award on its claims of expropriation, lack of fair and equitable treatment,*

² Request, para. 7, emphasis in the original.

³ Id., para. 11, emphasis in the original.

*and lack of full protection and security arising out of the Unlawful Sanction, the Seizure Order, and the Insolvency Measures.”*⁴

20. As to the merits, the Claimant observes that “[t]he Award did not carry out any analysis of whether the Diversion Order or the Blocking Order breached Mexico’s FET obligation. In fact, the Diversion Order and the Blocking Order are never even mentioned—by name or in substance—anywhere in the Award’s nine-paragraph FET section.”⁵ According to the Claimant, this was notwithstanding that the claims based on the Diversion Order and the Blocking Order were “claims presented in the arbitral proceedings”.⁶ For this reason, Claimant asserts, the Tribunal should give an Additional Award.
21. The Claimant contends that the same language by which the Award’s reasoning concluded that the Detention Order breached the FET requirement applies also to the Diversion Order. The Claimant affirms that:

*“It is undisputed that property of the investor (the funds owed directly to the Trust, and indirectly to POSH) was transferred to the State (SAE’s bank account), at the State’s (SAE’s) request, through the State’s (the Insolvency Court’s) own measures. In other words, an organ of the State deprived Claimant of its claim to money and transferred the economic value of that interest to the State’s own coffers.”*⁷

22. The Claimant proceeds to review the various theories used by the Respondent in its defence of the Diversion Order, and then concludes that “Respondent took funds that were the property of Claimant, placed them in its own bank accounts, and never accounted for a dollar it received.”⁸

⁴ Id., para. 12.

⁵ Id., para. 16, emphasis in the original.

⁶ Id., para. 19.

⁷ Id., para. 24.

⁸ Id., para. 30

23. On account of breach of the FET, the Claimant seeks damages of \$24.8 million, being the amount allegedly diverted from the Invex Trust to SAE. According to the Claimant, this amount is distinct from the damages awarded for the Detention Order's FET breach.
24. As regards the breach of full protection and security, the Claimant alleges that the Tribunal did not decide claims based on the Three Measures of which it complained. The Claimant argues that the Tribunal misapplied the theory of judicial economy, and asserts that:

“The Award said only that the measures had already been ‘considered’ in the expropriation and FET sections. That is not a sufficient basis to decline to determine whether the measures did or did not breach the legally distinct FPS obligation of Article 4.”⁹

According to the Claimant, the Tribunal should rule in favour of the Claimant in respect of alleged breaches of the FPS, that are said to arise from the Detention Order, the Diversion Order and the Blocking Order.

25. The Claimant submits that, as demonstrated in its Statement of Claim, the applicable customary international law standard also includes legal protection and security, and arbitrary government action that undermines the legal security of an investment violates this standard. The Claimant affirms that the Three Measures taken together *“invalidated POSH’s legal, contractual, and other acquired rights and, as such, failed to provide full protection and security to POSH’s investments.”*¹⁰ Further, the following individual components of Mexico’s conduct listed by the Claimant are each said to constitute FPS violations on their own account:

- *“Mexico failed to honor the rule of law by detaining the ten vessels owned by POSH’s Subsidiaries. Not only did Mexico fail to protect, but it actively attacked POSH’s Investment with the detention of the vessels. The Detention Order was issued for purposes other than permitted by law, as directly noted in the Award.*

⁹ Id., para. 38.

¹⁰ Id., para. 41.

- *Mexico failed to protect the legal rights of POSH and its Subsidiaries during the insolvency proceeding against OSA. Mexico deprived POSH, as beneficiary, of the payments owed by PEMEX to the Irrevocable Trust.*
 - *Mexico failed to protect POSH's Investment when it arbitrarily prevented PEMEX from rescinding the contracts with OSA and replacing them with new contracts with the Subsidiaries. SAE refused to cancel OSA's contracts and the Insolvency Court prohibited PEMEX from rescinding them, fatally condemning POSH's operations in Mexico.”¹¹*
26. Claimant concludes by referring to the statement at the end of the Award that “*All other claims and requests are dismissed.*” The Claimant affirms that such boiler plate language is no substitute for the missing decisions of the Tribunal.¹²

III. THE RESPONDENT'S REPLY

27. The Respondent argues that the Tribunal should reject the Request because to accept it would re-open the merits of the controversy and require a further review of the facts and legal questions already analyzed and decided by the Tribunal.¹³ According to the Respondent, neither the Treaty or the Arbitration Rules contain an appeal mechanism: in its view, Article 39 of the Arbitration Rules may not be used to reopen the controversy under the guise of a so-called simple Request for an Additional Award.¹⁴
28. The Respondent recalls that, according to Article 18(4) of the Treaty and Article 34(2) of the Arbitration Rules, the Award is final and binding. The consent of Mexico to arbitration does not include a review of the facts and legal argument related to the controversy by means of an appeal such as the one filed by Claimant.¹⁵
29. According to the Respondent, the Tribunal fulfilled its obligation to assess and analyze the positions of the parties, and to resolve the factual and legal questions in accordance

¹¹ Id., para. 41 (footnotes omitted).

¹² Id., para. 43.

¹³ Reply, para. 2.

¹⁴ Id., para. 3.

¹⁵ Id., para. 5.

with the applicable law. This, the Respondent asserts, was no easy task given the deficiencies in the Claimant's presentation of its claims.¹⁶

30. The Respondent asserts that the first request of the Claimants invites the Tribunal to revoke its decision on jurisdiction and adopt the approach set forth in the dissenting opinion, and then determine that Mexico breached the Treaty by the measures excluded in the Award for lack of jurisdiction. The Respondent observes that the fact that by majority the Tribunal had decided that it has no jurisdiction does not amount to a failure to decide the merits of the Claimant's claims.¹⁷
31. The Respondent addresses the criticism of the Claimant related to references by the Award to NAFTA, and the Claimant's assertion that the Tribunal failed to interpret and apply the Treaty in accordance with the Vienna Convention. The Respondent submits that the Claimant fails to recognize that the NAFTA authorities referred to by the Tribunal were referred to by the Claimant. Moreover, the Respondent asserts, the Tribunal did interpret and apply the Treaty in accordance with the requirements of the Vienna Convention, including the ordinary meaning of its terms.¹⁸
32. The Respondent concludes on jurisdiction that it is incorrect to affirm that the Tribunal had jurisdiction on all the claims formulated by POSH, and no additional claim on the basis of a different ruling on jurisdiction is justified.¹⁹
33. The Respondent refers to the other aspects of the Claimant's claim. These concern the three measures that are referred to as the Detention Order, the Blocking Order and the Diversion Order.²⁰ As regards the Detention Order, the Claimant argued that the Tribunal should have made a separate determination in respect of the alleged breach of FPS, in addition to the breach of FET. The Respondent submits that the Claimant did not actually present a separate claim for damages due to the alleged breach of FPS. The Respondent

¹⁶ Id., para. 15.

¹⁷ Id., paras. 18-21.

¹⁸ Id., paras. 23-24.

¹⁹ Id., para. 25.

²⁰ Id., para. 26.

explains that the Claimant presented only one claim for damages derived from the temporary detention of the boats. The Claimant did not seek to prove – and indeed did not even argue - that there was a distinct damage quantification. According to the Respondent, it is now too late to introduce this new argument. Further, according to the Respondent, the Claimant informed the Tribunal that the damages were the same.²¹

34. On the Blocking Order, the Respondent recalls that the Tribunal determined explicitly and without ambiguity that the Subsidiaries had no right to enter into contracts with Pemex. It follows from this, according to the Respondent, that the premise of the Claimant's allegations was not proven. In these circumstances there could be no claim for damages for violations of the Treaty for an act that never occurred and could not arise, namely, that the Subsidiaries were deprived of the right to contractually negotiate with Pemex.²²
35. As regards the Diversion Order, the Respondent refers to and reproduces sections of the Claimant's pleadings which emphasize that the Claimant relied on the same facts to sustain claims for various breaches of the Treaty, namely, the provisions on expropriation, FET and FPS.²³ The Respondent also recalls the complete analysis by the Tribunal of the facts related to the Invex Trust and the Diversion Order. The Respondent concludes that, if the Mexican tribunals acted reasonably and the Claimant failed to have recourse to the legal mechanisms available, then there would be no claim for a violation of FET or FPS. In the Respondent's submission, the Tribunal could not reach a different determination for the violation of the Treaty unless the Tribunal would revoke its own conclusions as reflected in the Award.²⁴

²¹ Id., paras. 27-28.

²² Id., paras. 29-32.

²³ Id., para. 37.

²⁴ Id., paras. 39-53.

IV. ASSESSMENT BY THE TRIBUNAL

36. The Tribunal has carefully considered the arguments and submissions of the parties. The starting point in order to assess the Request is Article 39 of the Arbitration Rules. The relevant provisions state as follows:
1. *“Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.*
 2. *If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or complete its award within 60 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.”*
37. It is plain from the text of Article 39 that the Tribunal may render an award or an additional award as to claims presented and not decided by the Tribunal only if the Tribunal considers the request to be justified. In this regard, as one commentary has noted, *“Article 39(2) grants the arbitral tribunal wide discretion to determine if a request for an additional award is ‘justified’.”*²⁵ It is also plain that the claims that form the basis of the Request must have been presented to the Tribunal. The task of the Tribunal under Article 39 is only to complete that which has been decided in the Award, assuming that any completion is necessary. Article 39 does not create a mechanism for appeal on a matter (or matters) that have already been decided. It is not a door to revise the Award, or to introduce new arguments, or present new claims. It is generally recognized that Article 39 has *“no effect in cases of deliberate omission where an arbitral tribunal has for specific reasons intentionally chosen not to address a claim or issue in the award.”*²⁶
38. With these parameters in mind, the Tribunal addresses the arguments put forward by the Claimant in its Request, and determines whether an additional award is justified.
39. The Claimant’s Request is based on two premises: (a) that the Tribunal has jurisdiction on all claims presented by the Claimant and its reasoning on jurisdiction is defective, and

²⁵ D. Caron and L. Caplan, “The UNCITRAL Arbitration Rules”, OUP (2nd. 2012) p. 823. **RL-0129**.

²⁶ *Id.*, p. 823.

(b) that the Tribunal failed to decide the FET claims based on the Diversion and the Blocking Order, and all three FPS claims based on the Detention Order, the Diversion Order and the Blocking Order. The Tribunal will first address the jurisdiction question and then each of the FPS and FET claims.

40. As to jurisdiction, effectively the Claimant requests the Tribunal to overturn its own decision on lack of jurisdiction in respect of the claims of expropriation, lack of fair and equitable treatment and lack of full protection security arising out of the Disqualification Order [Unlawful Sanction], the Attachment [Seizure] Order, and the Insolvency Measures.
41. The Tribunal did not decide claims based on the Disqualification Order, the Attachment Order and the Insolvency Measures because it decided that it had no jurisdiction to decide them. As noted above, the purpose of an additional award under Article 39 is to permit the Tribunal to fill a gap in the Award, to complete it. It is not its purpose to create an opportunity for revoking it. Notably, the Claimant ignores the Respondent's objections to the Tribunal's jurisdiction. The Tribunal needed to address those and decided to uphold them in part.
42. The Claimant also ignores the Treaty three-year time bar that the Tribunal took into account in respect of components of the alleged composite act: *"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"*²⁷.
43. Turning now to the FPS and FET claims, the Tribunal observes first that there is no consensus on whether FPS encompasses a secure legal environment. While the Claimant adduces significant authority in support of the obligation of the State party to provide a secure legal environment, the same can be said of Mexico's contrary argument. The Tribunal does not find it necessary to enter the controversy.

²⁷ Award, para. 154.

44. In the Request the Claimant contends that “*the Three Measures invalidated POSH’s legal, contractual, and other acquired rights and, as such, failed to provide full protection and security to POSH’s investments.*”²⁸ The Claimant adds that “[i]ndividual components of that course of conduct also make out FPS violations on their own account.”²⁹ The individual components are listed in paragraph 41 of the Request, the Tribunal addresses each below and, where relevant, refers also to the FET claims.
45. The first component of the claim is based on the Detention Order. This order has been extensively considered by the Tribunal in the Award as part of the expropriation and FET breach claims. The Tribunal rejected the expropriation claim and determined that the Detention Order breached the FET obligation of the Respondent. The Tribunal awarded damages to the Claimant on that account. A determination of whether the Detention Order was in breach of the FPS obligation would not have resulted in an increase in the amount of damages and would have served no purpose.³⁰
46. The second component is based on Mexico’s failure to protect the legal rights of POSH and its Subsidiaries during the insolvency proceeding against OSA because POSH and GOSH lacked standing to file *amparo* lawsuits. The other element of this component is linked to the deprivation of POSH of the payments owed by PEMEX to the Irrevocable Trust. As explained in the Award, an international tribunal considering a claim of judicial expropriation should only interfere with the findings of a domestic court in the context of a claim in very exceptional circumstances.³¹ As the factors to be considered by the Tribunal in this regard closely resemble aspects of the FPS and FET standards relied on by the Claimant (namely, unreasonableness, arbitrariness and a lack of due process), it follows that the Award’s findings on expropriation are of equal relevance to the FET claim. The Award decided both matters and rejected them as part of the expropriation claim. The Award determined that the Claimant failed to establish that the courts were not available. As to the Trust, the Mexican courts found that the Trust was illicit because

²⁸ Request, para. 41.

²⁹ Id., para. 41.

³⁰ Reply, para. 27.

³¹ Award, para. 228.

it was established at a time when OSA was already in financial difficulty. The circumstances that justified the rejection of the expropriation claim in the Award equally justify the rejection of FPS and FET claims.

47. The third component of the FPS is in reference to the Blocking Order. It is based on the allegation that “*Mexico failed to protect POSH’s investment when it arbitrarily prevented PEMEX from rescinding the contracts with OSA and replacing them with new contracts with the Subsidiaries.*”³² Although the Claimant relies on the language of arbitrariness in relation to the Blocking Order and the subsequent decisions of domestic courts, the Claimant did not refer to the usual indicia of arbitrariness (such as a lack of due process, acting for improper purposes and acting on the basis of prejudice or personal opinion), or suggest that the FET or FPS standards had been breached for another reason such as discrimination. The Claimant’s argument in relation to the Blocking Order therefore appears to rest on a having a right to the new contracts. The Tribunal had concluded in respect of the expropriation claim that the claim must fail because the Claimant had not shown that it had a right to new contracts³³, and similar reasoning and conclusion apply to the FET and FPS claims.
48. The Claimant concludes in respect of the FPS claim: “*In sum, the State’s actions breached its ‘obligation of vigilance’ and failed to ‘take all measures necessary to ensure the full enjoyment of protection and security of [the] investment’ in violation of Mexico’s FPS obligation under Article 4 of the Treaty. These wrongful failures of protection cumulatively caused the complete deprivation of the use, value, and enjoyment of the investment ...*”³⁴
49. Whether the basis of the claim is considered as a whole or in its individual components, the Tribunal concludes that the Claimant has not shown the need for an additional award in respect of the FPS claim. The Tribunal reaches the same conclusion in respect of the FET claim based on the Diversion Order and the Blocking Order.

³² Request, para. 41, third bullet.

³³ Award, para. 250.

³⁴ Request, para. 42.

50. Overall, Mexico’s obligation of vigilance under FPS is no substitute for investors carrying out due diligence. Mexico is not responsible for the investor’s choice of business partners, a matter ignored by the Claimant now and in its pleadings, and discussed in the Award.

V. COSTS

51. The Request is silent on costs. The Respondent has requested that the costs be charged to the Claimant since there was no reason to request an Additional Award. The Tribunal has found that the Request was not justified under the terms of Article 39.
52. Article 42 of the Arbitration Rules on allocation of costs provides that “*the costs of the arbitration shall in principle be borne by the unsuccessful party or parties*”, but the Tribunal may apportion the costs otherwise provided that the apportionment is reasonable, taking into account the circumstances of the case. In the circumstances of this proceeding, in which the Tribunal has concluded that the Claimant has not established the need for an additional award, the Tribunal considers that it is reasonable for each party to bear its own costs, and for the Claimant to bear the costs of the Tribunal and the ICSID Secretariat related to the Request.
53. The costs of the proceeding related to the Request, including the fees and expenses of the Tribunal, and ICSID’s direct expenses, amount to (in USD):

Arbitrators’ fees and expenses	
Andrés Rigo Sureda	USD 16,500.00
W. Michael Reisman	USD 4,500.00
Philippe Sands	USD 7,500.00
Direct expenses	USD 2,244.00
Total	USD 30,744.00

VI. INTEREST RATE

54. In the Award the Tribunal decided that the amount of damages would carry interest at LIBOR without any additional percentage points. On April 12, 2022, the Tribunal brought to the attention of the Parties that LIBOR is being discontinued and invited the Parties to consult with each other on an alternative, and inform the Tribunal of the consultation's result by April 20, 2022. On that date the Parties informed the Tribunal that they were unable to agree on an alternative reference rate. The Parties' positions are summarized below.
55. The Claimant's position is that LIBOR can and should continue to be used as the applicable interest rate, whereas Respondent proposes to replace LIBOR with the Secured Overnight Financing Rate (SOFR). According to the Claimant, LIBOR should continue to be used for the following two reasons:

“First, the Tribunal’s Award dated January 11, 2022 awards Claimant damages with “interest at LIBOR” (see paragraph 283(3)). Absent a good reason, the interest rate should not be modified. Pertinently, LIBOR rates will continue to be published until June 2023, and it is expected that Respondent would have paid all damages owed to Claimant, including interest, well before such date.

Second, because SOFR is based on loans backed by U.S. Treasury bonds, it is a virtually risk-free rate and is therefore not a “commercially reasonable rate” within the meaning of Article 6.2(c) of the Mexico-Singapore Treaty. Unlike LIBOR, which represents interest on unsecured loans, SOFR does not reflect any credit risk and does not react to market changes in the way that LIBOR does. Thus, SOFR is not an appropriate alternative to LIBOR in this case, at least not without applying a premium to SOFR. As the choice of a premium can be subjective, the more appropriate approach would be to continue relying on LIBOR, which Mexico argued during the arbitration and the Tribunal accepted is a commercially reasonable rate.”³⁵

56. The Respondent explains that it suggested to the Claimant to adopt the SOFR rate because it is a weighted average of the rates agreed for loans between financial institutions due the next day. The Respondent based its suggestion on the fact that this is

³⁵ Claimant's email of April 20, 2022.

the rate recommended by the Alternative Reference Rates Committee to substitute the LIBOR rate. The Respondent emphasizes that the suggestion was no made *motu proprio* but in reply to the Tribunal's question. The Respondent agrees with Claimant that the LIBOR rate will continue to be published until June 2023. The Respondent concludes that it is in agreement to continue using the LIBOR rate until then and, if the Tribunal considers it necessary to fix as from now a reference rate for a later period, the Respondent considers that the SOFR is an appropriate commercial reasonable rate for the currency in which damages have been awarded by the Tribunal.³⁶

57. The Tribunal notes that the Parties do not object to the use of the LIBOR rate until June 2023. They differ on which rate of interest to apply should this be necessary after 2023. The Treaty requires that the rate be reasonable and commercial. The Claimant has disputed that the SOFR is a commercial rate because it is a rate for practically risk-free loans. The Tribunal agrees and observes that (i) LIBOR is the starting point on which the Parties agree; (ii) LIBOR will be published for more than a year after this Decision; (iii) the Tribunal awarded interest at a compounded annual rate accruing from May 2014; and (iv) the need to determine the applicable rate will only materialize, if at all, in May 2024. For these reasons the Tribunal decides that the LIBOR rate applied since May 2023 shall be in effect until the amount awarded is paid.

VII. PUBLICATION

58. On February 11, 2022, the Respondent requested that the Tribunal order the publication of the Award in accordance with Article 18.4 of the Treaty and Procedural Order No. 3.
59. In Procedural Order No. 6, dated February 24, 2022, the Tribunal decided “*To postpone publication of the Award until after the Respondent has filed its observations on the Additional Award Application and that Application has been resolved by the Tribunal.*”³⁷

³⁶ Respondent's email of April 20, 2022. Tribunal's translation.

³⁷ Procedural Order No. 6, dated February 24, 2022, para. 16(2).

The Tribunal now having addressed the Request (Application), the Award may be published together with this Decision.

VIII. DECISION

60. For the reasons forth above, the Tribunal by majority³⁸ decides that:
- a) the Request is rejected;
 - b) the Claimant shall bear the costs of the proceeding related to the Request, including the fees and expenses of the Tribunal, and ICSID's direct expenses, amounting to USD 30,744.00;
 - c) the Tribunal's decision under paragraph 283(3) of the Award, that the amount of damages would carry interest "*at LIBOR without any additional percentage points, compounded annually and accruing since May 16, 2014 until payment*", be supplemented by the Tribunal's additional decision that the LIBOR rate applied since May 2023 shall be in effect until the amount awarded is paid; and
 - d) the Award and this Decision be published.

³⁸ 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 on Claimant's
Application for Additional Award*

Date : May 2, 2022

[Signed]

Prof. Philippe Sands Q.C.
Arbitrator

Date : May 5, 2022

[Signed]

Dr. Andrés Rigo Sureda
President of the Tribunal

Date : May 9, 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

(UNCT/18/5)

Concurring and Dissenting Opinion of Professor W. Michael Reisman attached to the Decision
on Claimant's Application for Additional Award and on the Applicable Interest Rate

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

INTRODUCTION

1. As the Majority indicates, the Claimant presented four claims for an Additional Award: (A) on all its claims concerning the direct treatment of OSA by the Respondent; (B) on its FPS claim with respect to the Detention Order; (C) on its claimed breaches of FET and FPS arising out of the Diversion Order; and (D) on its claimed breaches of FET and FPS stemming from the Blocking Order. I concur with the Majority in rejecting the first and second claims. I believe that Majority errs when it rejects the third and fourth claims. The Claimant's requests, as I will explain, are a direct consequence of the Award's treatment of the BIT's distinct standards of treatment and its focus on what it takes to be general questions of arbitral policy rather than the facts and law of the dispute before it.

A. CLAIMANT'S FIRST AND SECOND REQUESTS: ADDITIONAL AWARD FOR CLAIMS ARISING FROM THE RESPONDENT'S TREATMENT OF OSA AND THE FPS CLAIM WITH RESPECT TO THE DETENTION ORDER

2. With respect to the Claimant's first claim, while the Claimant may be correct in its critique of the Award's decision on jurisdiction, as elaborated in my Concurring and Dissenting Opinion,³⁹ the Tribunal did consider and *decide* on the Claimant's jurisdictional claim. Therefore, the Article 39 procedure of the 2010 UNCITRAL rules does not lie for revisiting the Award's decision to reject its jurisdiction over these claims. Accordingly, I agree with the Majority that the Claimant's application with respect to this particular claim should be denied.⁴⁰

³⁹ Dissent, ¶¶ 4 – 29.

⁴⁰ The Majority's comment on the purported time-bar in paragraph 42 of its decision is irrelevant to the question before it now, and in, any event, was wrongfully applied in the Award.

3. With respect to the Claimant's second claim, while I believe that the compensation could have been calculated differently for FET, and ought to have been different if the Tribunal were to conclude that the Detention Order was an unlawful expropriation,⁴¹ the Award considered and rejected the expropriation claim. The Claimant did not show that the compensation would have been different if the Award were to conclude that the Detention Order was a breach of FPS as well as FET. I therefore concur with the Majority that the Claimant's request in this regard be rejected.⁴²

B. CLAIMANT'S THIRD REQUEST: ADDITIONAL AWARD FOR CLAIMED BREACHES OF FET AND FPS STEMMING FROM THE DIVERSION ORDER

4. Arbitral economy, though a legitimate practice, is only called for in instances where a tribunal finds liability due to a breach of a specific standard and then refrains from considering other standards because the claimed compensation would not be altered. When, however, a tribunal rejects a claim based on one standard, it must fully consider whether the facts constitute a breach of another standard calling for a separate finding of compensation. Different facts may be relevant inasmuch as each standard of treatment includes different elements and thus requires a different analysis. For example, the same set of facts may sound in expropriation but not in FET.

5. The Majority's decision to reject the Claimant's Application for an Additional Award for its claims arising out of the Diversion Order flows from its mix-and-match approach to treaty interpretation and application. It is unfortunate that rather than recognizing that the Claimant's

⁴¹ Dissent, ¶¶ 68 – 96.

⁴² Majority Decision, ¶ 45.

Application is a direct result of mistakes in the Award, the Majority's response is simply beside the point:

“As explained in the Award, a tribunal considering a claim of judicial expropriation should only interfere with the findings of a domestic court in the context of a claim in very exceptional circumstances. As the factors to be considered by the Tribunal in this regard *closely resemble aspects of the FPS and FET standards relied on by the Claimant* (namely unreasonableness, arbitrariness and a lack of due process), it follows that the Award's findings on expropriation are of equal relevance to the FET claim. The Award decided both matters and rejected them as part of the expropriation claim. The Award determined that the Claimant failed to establish that the courts were not available. As to the Trust, the Mexican courts found that the Trust was illicit because it was established at a time when OSA was already in financial difficulty. The circumstances that justified the rejection of the expropriation claim in the Award equally justify the rejection of FPS and FET claims” [emphasis added].⁴³

6. The Majority explains that because it evaluated the Claimant's expropriation claim using the standard of FET, *i.e.*, denial of justice, instead of the expropriation standard required under the BIT, and because the Claimant relied on the FET standard for its FET and FPS claims, the Award in fact decided on the Claimant's FET and FPS claims when it decided on expropriation. The Majority tries to justify its merging between FET, FPS, and expropriation through a claim of “resemblances” between the factors to be considered for evaluating each standard of treatment. It is worth repeating the different standards which the Tribunal was asked to apply. For FET it is Article 4 of the BIT:

“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

⁴³ Majority Decision, ¶46.

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.”

And for expropriation it is Article 6 of the BIT:

“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.”

7. There are no resemblances between these distinct standards of treatment. In fact, the BIT makes it clear with respect to FET and FPS: “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.**”⁴⁴ The BIT not only provides for a different and objective standard for expropriation, but it makes clear that a finding of expropriation is different from finding a failure to provide FET and FPS. Yet, again in contrast to the BIT, for the Majority the standard for an expropriation claim seems to have undergone a metamorphosis into one of FET because a State Organ, which partook in the acts complained of, was a domestic court.

8. Even if, *arguendo*, the factual findings of the Award which underly its decision on expropriation, as reproduced in the Majority’s decision quoted above, may be relied upon to reject

⁴⁴ Emphasis added.

the FET and FPS claims, that would be so only because the Award failed to apply the standard of expropriation to the expropriation claim. The absurdity created is that, in fact, it would have been appropriate for an Additional Award to actually evaluate the Claimant's claim through an independent analysis of the expropriation provision because the Award applied FET and called it expropriation. Given this unfortunate redraft of the BIT's provisions by the Award, the Claimant could not have asked for an Additional Award on expropriation so it was forced to ask for one on its FET and FPS claims. Rather than accepting the mistakes it made in the Award, the Majority attempts to escape the results by trying to justify its merging the different standards.

9. Article 39 of the UNCITRAL rules is not concerned with language but with claims:

“1. Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to *claims presented* in the arbitral proceedings but *not decided* by the arbitral tribunal.”

The Majority ought to recognize that, in reality, the claim presented but not decided in the Award was the claim of expropriation with respect to the Diversion Order and the Invex Trust. I believe that the Claimant is entitled to an Additional Award on its expropriation claim with respect to the Diversion Order inasmuch as the Award in fact decided on its FET claim, but mistakenly used the terminology of “expropriation”. As I explained in my Dissent, I believe that once the standard of expropriation in the BIT is applied to the facts of the case, the Tribunal should conclude that the Respondent is in breach of its obligations per the BIT.

C. CLAIMANT'S FOURTH REQUEST: ADDITIONAL AWARD FOR CLAIMED BREACHES OF FET AND FPS STEMMING FROM THE BLOCKING ORDER

10. The Award in fact did not evaluate the Claimant’s FET claim with respect to the Blocking Order but solely as a claim of expropriation. The Majority’s failure to do so rests again in its misconceived treatment of the different standards of treatment provided for in the BIT by mixing FET and expropriation. For the Diversion Order, the Award applied the standard of FET and called it an expropriation analysis; for the Blocking Order, the Award applied an expropriation analysis and now calls it an FET analysis. The reasoning put forth by the Majority is that:

“Although the Claimant relies on the language of arbitrariness in relation to the Blocking Order and the subsequent decisions of domestic courts, the Claimant did not refer to the usual indicia of arbitrariness (such as a lack of due process, acting for improper purposes and acting on the basis of prejudice or personal opinion), or suggest that the FET or FPS standards had been breached for another reason such as discrimination. The Claimant’s argument in relation to the Blocking Order therefore appears to rest on a having a right to the new contracts. The Tribunal had concluded in respect of the expropriation claim that the claim must fail because the Claimant had not shown that it had a right to new contracts, and similar reasoning and conclusion apply to the FET and FPS claims.”⁴⁵

11. The Majority’s reading of the Claimant’s submissions concerning the Blocking Order and FET is unsupported by the pleadings. In the Statement of Claim, the Claimant explained that:

“188. Mexico had the opportunity to save POSH’s Investment in Mexico by allowing PEMEX to assign the contracts with OSA to POSH’s Subsidiaries. However, SAE did not cancel the GOSH Charters in the interest of preserving the insolvency estate, nor did the Insolvency Court allow PEMEX to rescind the GOSH and the SMP Service Contracts. These arbitrary and unreasonable measures directly impacted OSA’s business partners, including the Subsidiaries, and culminated the destruction of the Investment.

□

192. Mr. Montalvo also engaged in discussions with SAE which, as Conciliator, had the ability to cancel the GOSH and SMP Service Contracts with PEMEX in the interest of preserving the estate. SAE conveyed, however, that it would only cancel the contracts in exchange for a “hair cut to the debt of POSH Group” and “a higher

⁴⁵ Majority Decision, ¶47.

amount of commission” for OSA. SAE’s proposal was coercive, abusive and arbitrary. POSH’s Subsidiaries were OSA’s rightful creditors for services rightfully performed, and OSA’s commission (2.5%) was commercially reasonable, which SAE never denied. SAE was using its position of power to obtain undue benefits so they could “report back to the Ministry of Finance that they... managed” to reduce OSA’s debt. In a desperate attempt to salvage operations in Mexico, POSH conveyed that it would even be “agreeable to [SAE’s] proposal... of a partial waiver of the ‘pre-trust debt from OSA/SAE in return for the cancellation of all the 8 contracts with OSA/PEMEX.’”

□

194. In fact, while the discussions with SAE and PEMEX were ongoing, OSA—under SAE’s administration—requested that the Insolvency Court forbid PEMEX from rescinding its contracts with OSA, including the GOSH and the SMP Service Contracts. On August 15, 2014, the Insolvency Court so ordered. This eliminated any possibility for POSH’s Subsidiaries to contract directly with PEMEX and save POSH’s Investment in Mexico. PEMEX could not assign existing contracts per the court’s resolution, and refused to award new contracts to POSH’s Subsidiaries, on the ground that their vessels were still registered in PEMEX’s system as being used in the contracts PEMEX had with OSA

195. SAE’s actions and the Insolvency Court’s ruling were arbitrary and unreasonable, and culminated in the destruction of POSH’s Investment. □

202. In sum, POSH engaged in consultations with PEMEX and SAE seeking to contract eight vessels directly with PEMEX. This would have saved POSH’s Investment in Mexico. SAE and the Insolvency Court blocked that possibility. Their measures were arbitrary and unreasonable, as anticipated by all Mexican public entities and confirmed by subsequent events.”⁴⁶

And in the Reply:

“317. However, SAE blocked this path forward by refusing to cancel the GOSH Charters, citing the interest of preserving the insolvency estate, and the Insolvency Court did not permit PEMEX to rescind the GOSH and SMP Service Contracts until it was too late. These arbitrary and unreasonable measures directly impacted OSA’s business partners, including the Subsidiaries, and ultimately sealed the destruction of the Investment.”

⁴⁶ Claim, ¶¶ 188 – 202 [references omitted].

And in both the Reply and Claim:

“539. *Eleventh*, Mexico arbitrarily prevented PEMEX from rescinding the contracts with OSA and replacing them with new contracts with the Subsidiaries. SAE refused to cancel OSA’s contracts and the Insolvency Court prohibited PEMEX from rescinding them, fatally condemning POSH’s operations in Mexico. This measure was unreasonable and arbitrary for three reasons:

‘One: SAE was aware, or had an obligation to be, that OSA could not receive new contracts while it was undergoing insolvency proceedings since it did not meet the necessary economic requirements therefor. Two: SAE was aware of, and had acknowledged, that without new contracts, OSA could not meet its obligations under the current contracts with Pemex. Three: SAE was aware of, and had acknowledged, that the breach of the Pemex contracts resulted in conventional penalties, which would constitute claims against the estate...

The reasonable decision by the judge would have been to permit the rescission of the contracts. The reasonable decision by the Conciliator would have been to cancel the contracts in the interest of the estate’.”⁴⁷

12. It is one thing to conclude that a claimant did not have property rights subject to expropriation and an entirely different thing to conclude that a claimant was treated fairly and equitably or afforded a safe investment environment by the host-State. Thus, the conclusion that the Claimant arguably did not show “that it had a right to new contracts”⁴⁸ is only relevant for expropriation. If, in fact, the State blocked the Claimant’s attempt to restart its business operations through what was described in contemporaneous communications as blackmail,⁴⁹ that would constitute a breach of FET and perhaps FPS irrespective of whether there was or was not a right to new contracts.

⁴⁷ Reply, ¶ 505; *see also* Claim, ¶ 388.

⁴⁸ Majority Decision, ¶ 47.

⁴⁹ 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”).

13. In my Concurring and Dissenting Opinion I mentioned that the Blocking Order was hardly a treatment which was fair and equitable.⁵⁰ Whether or not the Majority reaches the same conclusion with respect to the treatment of POSH concerning acts composing and surrounding the Blocking Order, the Claimant is entitled to have its claims of FET and FPS evaluated based on the FET and FPS standards rather than the standard of expropriation.

14. The task of an arbitral tribunal is to decide the dispute before it within the four corners of the investment protection treaty; it is not to redraft the treaty to suit what it deems to be broader questions of policy or a desired outcome. Nor should a tribunal dispense with subsequent requests by a claimant to correct a failure by the tribunal to decide its claims by refashioning the claims. Accordingly, I concur in part and dissent in part to the Tribunal's rejection of the Claimant's application for an Additional Award.

W. Michael Reisman

⁵⁰ Dissent, ¶ 85.

[Signed]

W. Michael Reisman
Arbitrator

Date: May 2, 2022