

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC

v.

United Mexican States

(ICSID Case No. ARB/21/25)

**PROCEDURAL ORDER NO. 5 ON CLAIMANTS' ADDITIONAL REQUEST FOR
DOCUMENT PRODUCTION**

Members of the Tribunal

Mr. Manuel Conthe Gutiérrez, President of the Tribunal

Dr. Franz X. Stirnimann Fuentes, Arbitrator

Prof. Alain Pellet, Arbitrator

Secretary of the Tribunal

Ms. Anneliese Fleckenstein

Date: February 28, 2023

I. INTRODUCTION

1. By letter dated January 27, 2023, the Claimants filed a Request for Additional Documents (“the Additional Request”), in which they asked that the Tribunal:

A. Order Mexico to disclose:

- (1) all WhatsApp exchanges between Rodrigo Loustaunau and Rob Keoseyan between September 1, 2018, and October 15, 2018. Claimants contend this is the relevant time period for any messages relating to the September 26, 2018, meeting at La Aceituna and the possible settlement of the domestic litigation of the 821 Contract;
- (2) all WhatsApp exchanges between Rodrigo Loustaunau and Rob Keoseyan between January 17, 2023 (when Claimants’ counsel first contacted Mr. Keoseyan and the Teams meeting) to present;
- (3) a call log from Mr. Loustaunau’s mobile phone to show any calls made to or received from Mr. Keoseyan (mobile phone: [REDACTED]) between January 17, 2023, to present.

B. To the extent Mexico claims that Mr. Loustaunau claims he does not have such documents, order Mexico to cause Mr. Keoseyan to disclose to Mexico the above documents. As noted above, Mr. Keoseyan has stated that he continues to have business relationships with Pemex, and thus, Pemex should not have difficulty obtaining these documents from Mr. Keoseyan.

2. Claimants argue that the requested documents A(1) through (3) are in possession of Mexico’s sole fact witness, Mr. Rodrigo Loustaunau Martínez; and that they only learned of their existence on January 23, 2023, from conversations they had that day with Mr. Roberto (Rob) Keoseyan.

3. Claimants further claim that the requested documents are relevant and material to Claimants' claims against Mexico, Mexico's responses to same, and to the credibility of Mr. Loustaunau's testimony.
4. According to Claimants, Section 15.15 of Procedural Order No. 1 allows a party to seek leave to request additional documents upon a showing that such request is justified because of the discovery or allegation of a new fact that the requesting party did not know and that such ignorance could not have been prevented through the exercise of due diligence. Claimants have met their burden under Section 15.15, as they did not know of the existence of the WhatsApp exchanges between Rob Keoseyan and Rodrigo Loustaunau regarding the 821 Contract, including the meeting at La Aceituna on September 26, 2018, and the exchanges regarding a settlement on October 1, 2018.
5. Claimants further state that, in its Counter-Memorial, Mexico argues that no meeting took place and asserts no evidence exists supporting such meeting. Mexico responded to Claimants' Requests for Disclosure arguing that its "Legal Department" (which includes Rodrigo Loustaunau) could not find any responsive documents regarding any exchanges with Rob Keoseyan. Finally, Mr. Loustaunau testifies that he did not recall Mr. Keoseyan contacting him about the September 26, 2018, meeting at La Aceituna in Mexico City. Mr. Keoseyan also testifies that he was not aware of Mr. Keoseyan's work history within Pemex's legal department. The interactions that Claimants' counsel had with Mr. Keoseyan call into question Mexico's assertions in its Counter-Memorial and its responses and objections to Claimants Request for Disclosure No. 13.

II. RESPONDENTS' OBJECTIONS

6. After the Tribunal's invitation to comment, in its letter dated February 3, 2023, Respondent objected to Claimants' requests, on several grounds:
 - The Additional Requests do not meet the requirements set out in paragraph 15.15 of Procedural Order No.1, referred to by Claimants in support of the admissibility of the

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Request, as Claimants have failed to demonstrate that a new fact has arisen which they could not have known had they exercised an adequate due diligence. Specifically, Claimants should have got in contact with Mr. Keoseyan before submitting their Statement of Claim. Were the Tribunal to change the rules enshrined in paragraph 15.15 of Procedural Order No.1, Respondent should also be allowed to submit requests for documents production after getting Claimants' Reply.

- The Additional Request does also not meet the requirements established in the IBA Rules. It reverses the rules on the burden of proof by transferring it to Respondent; it is general and invasive and amounts to an “expansive American- or English-style discovery”, which is generally inappropriate in international arbitration; and it refers to private communications between witnesses and persons who have not participated in this arbitration, which are protected under Mexican law and which Respondent has no means to obtain.
- Through the Additional Request, Claimants have engaged in a new round of allegations which is not foreseen in paragraph 14 of Procedural Order No.1 and have submitted, without the Tribunal's prior consent, new factual evidence which should only be filed in the Claimants' forthcoming Reply.
- Claimants have made the baseless allegation that Mr. Keoseyan had been intimidated to prevent his testimony in this arbitration, which Respondent rejects emphatically. Respondent further argues that Mr. Keoseyan is not a witness for Respondent, does not participate in this arbitration and is not under the control of Respondent. Hence, there is no basis to order Respondent to pressure Mr. Keoseyan into cooperating with Claimants.

III. CLAIMANTS' REPLY TO RESPONDENT'S OBJECTIONS

7. On February 6, 2023, without prior leave by the Tribunal, Claimants spontaneously reacted by email to the objections raised in Respondent's February 3, 2023, letter.

8. Claimants observed that Mexico had not denied the existence of the WhatsApp(s) exchanged requested under A(1) and (2), nor that Mr. Loustaunau had communicated with Mr. Keoseyan in advance of and after the Teams call between Claimants' counsel and Mr. Keoseyan on January 23, 2023, as asserted in the context of Request A(3).
9. Claimants further noted that such documents, related to communications between Mr. Loustanau and Mr. Keoseyan, were responsive to Claimants' original Requests 13(c) and (f), in response to which Mexico had claimed that "exhaustive searches were carried out in the physical and electronic files of the Legal Department of Pemex, but no document related to this request was located." Hence, the documents were material to the arbitration's outcome and should be disclosed.
10. On February 7, 2023, Respondent responded by email and complained that Claimants had made, once again, new allegations without prior leave by the Tribunal and asked that they either be rejected or Respondent be given the opportunity to respond.
11. On February 8, 2023, the Tribunal noted that pursuant to the agreed Redfern schedule, the Requesting Party, in this case the Claimants, had an opportunity to reply to the objections to the document request and understood that they had done so through their February 6, 2023, message. After noting Respondent's objections to Claimants' behavior, the Tribunal stated that, considering that the Redfern schedule envisaged this submission from the Requesting Party, the Tribunal would accept it as part of the record. However, the Tribunal reminded the parties that, for the good order of the proceeding, going forward it expected that the parties first obtain leave from the Tribunal before making any observations or submissions.

IV. TRIBUNAL'S ANALYSIS

11. The Tribunal will address each group of Claimants' requests separately, as their nature is different.

- **Request A(1)**

12. The Tribunal starts by noting that this request is closely related to Claimants' original Request 13, particularly Requests 13.C, 13.E and 13.F, which referred to "Pemex's communications with any third party (including Rob Keoseyan)" related to the 821 Contract. In its Procedural Order No. 4 the Tribunal did not order any such document production on the basis of Respondent's statement that "exhaustive searches were carried out in the physical and electronic files of the Legal Department of Pemex, but no document related to this request was located".
13. In the Tribunal's view, the WhatsApp exchanges between Mr. Loustaunau and Mr. Keoseyan, while not part of the formal files of Pemex's Legal Department, were, apparently, written and received by Mr. Loustaunau not in a private context and not as a private citizen, but in a professional context and in his capacity as a member of Pemex' Legal Department. Furthermore, in their Additional Request Claimants have provided evidence that those WhatsApp exchanges have taken place and that Claimants have been unable to obtain them on their own, through Mr. Keoseyan.
14. Finally, in its decision in Procedural Order No.4 on Claimants' Request 13 the Tribunal specifically stated that it reserved the right to revisit it in light of Claimants' Request of January 27, 2023.
15. Hence, as part of the revision of such decision, without any need to discuss whether the Request meets the conditions set out in Article 15.15 of Procedural Order No. 1 referred to by Claimants, the Tribunal has come to the conclusion that the scope of Claimants' original Request 13 can reasonably be declared to cover the requested WhatsApp exchanges and, consequently, their production by Respondent should be ordered.

- **Requests A(2) and A(3)**

16. Requests A(2) and A(3) are of a different nature from Request A(1), as they do not refer to exchanges or conversations that took place back in 2018 on the possible settlement of the domestic litigation of the 821 Contract, but to recent contacts between Mr.

Loustaunau and Mr. Keoseyan after the latter had been contacted by Claimants' counsel. From paragraph 18 of Claimants' Additional Request of January 27, 2023, it is clear that the purpose of these requests is to help explain why "Mr. Keoseyan abruptly changed his position about sharing these WhatsApp messages as promised during the Teams meeting, Mr. Keoseyan did not want to breach the personal trust he has with Mr. Loustaunau, so he would not share the messages".

17. While the Tribunal takes assertions of interference with a party's efforts to obtain evidence seriously, explaining the alleged change of heart of Mr. Keoseyan with respect to sharing the 2018 WhatsApp communications with Claimants does not have at this stage, in the Tribunal's view, enough relevance or materiality to the outcome of this arbitration.

18. Thus, the Tribunal concludes that there is no need at this stage to order Respondent to produce the 2023 WhatsApps and call log requested by Claimants under A(2) and A(3)

- **Request B**

19. Concerning this request, the Tribunal notes that it is premised on the hypothesis that Mr. Loustaunau would claim, in response to this new Procedural Order, that he does not have the 2018 WhatsApps requested under A(1). In the Tribunal's view, there is no reason to make such hypothesis, as Mexico has not stated that it cannot provide the requested documents by reason of lack of possession, custody or control. Furthermore, the Tribunal has full confidence that both Mr. Loustaunau and Respondent will make a strenuous and good faith effort and use all potential means available to them, to get a copy of the 2018 WhatsApps and comply with the Tribunal's order concerning Request A(1).

Additional remarks

20. As explained above, the Tribunal's decision concerning Request A(1) is not an application of paragraph 15.15 of Procedural Order No.1 -which is meant for exceptional circumstances when the discovery or allegation of a new fact has taken place-, but just

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the result of the Tribunal's revisiting its decision in Procedural Order No.4 on Claimants' Requests 13. Irrespective of that, the Tribunal remains open to apply in the future, at the request of either Party, the special rule of paragraph 15.15 were the exceptional circumstances and conditions therein envisaged to be applicable to the request at hand.

21. If the 2018 WhatsApp exchanges whose production is ordered by the present Procedural Order contain any personal or private information unrelated to the 821 Contract and to Claimants' original Request 13, Respondent will be allowed to redact them as necessary, while providing exclusively to the Tribunal its unredacted text.
22. In the Tribunal's view, Claimants included Exhibits 1 and 2 in its letter dated January 27, 2023, in order to support their Additional Request, and not as new evidence in this arbitration. Thus, in keeping with the spirit of paragraph 15.13 of Procedural Order No.1, these exhibits will not be considered to form part of the record of factual exhibits of the case, except, of course, if Claimants were subsequently to file them as exhibits together with their Reply.
23. The Tribunal reserves the right to revisit this decision in light of the outcome of its order concerning Request A(1) or any other relevant circumstances.

V. ORDER

24. In light of the foregoing, the Tribunal ORDERS Respondent to produce, by March 6, 2023, the documents mentioned in Claimants' Request A(1), *i.e.*:

all WhatsApp exchanges between Rodrigo Loustaunau and Rob Keoseyan between September 1, 2018, and October 15, 2018.

On behalf of the Tribunal

[Signed]

Manuel Conthe Gutiérrez
President of the Tribunal
Date: 28 February 2023