INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

FINLEY RESOURCES INC., MWS MANAGEMENT INC., AND PRIZE PERMANENT HOLDINGS, LLC

Claimants

and

UNITED MEXICAN STATES

Respondent

ICSID CASE NO. ARB/21/25

REVISED DECISION ON JURISDICTION AND LIABILITY

Members of the Tribunal
Mr. Manuel Conthe Gutiérrez, President
Dr. Franz X. Stirnimann Fuentes, Arbitrator
Prof. Alain Pellet, Arbitrator

Secretary of the Tribunal
Ms. Anneliese Fleckenstein

Date of dispatch to the Parties: January 8, 2025

REPRESENTATION OF THE PARTIES

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

Mr. Andrew B. Derman
Mr. Andrew Melsheimer
Mr. Gabriel Ruiz
Mr. Javan Porter
Mr. Cole Browndorf
Ms. Laura Zielinski
Holland & Knight LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201
United States of America

Representing the United Mexican States:

Mr. Alan Bonfiglio
Mr. Jorge Escalona Gálvez
Ms. Laura Mejía Hernández
Mr. Rafael Alejandro Augusto Arteaga Farfán
Mr. Rafael Rodríguez Maldonado
Mr. Oscar Manuel Rosado Pulido
Secretaría de Economía
Dirección General de Consultoría Jurídica
de Comercio Internacional
Calle Pachuca No. 189, Piso 19
Colonia Condesa,
Demarcación Territorial Cuauhtémoc
C.P. 06140 Mexico City
Mexico

Mr. Stephan E. Becker
Mr. Gary Shaw
Pillsbury Winthrop Shaw Pittman, LLP
1200 Seventeenth Street, NW
Washington, D.C. 20036
United States of America

Mr. Greg Tereposky
Tereposky & DeRose, LLP
81 Metcalfe Street, Suite 1000
Ottawa, Ontario
K1P 6K7
Canada

TABLE OF CONTENTS

TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Administrative Rescission	Administrative decision issued by PEP on August 28, 2017 declaring the rescission of the 821 Contract
2017 Annulment Proceeding	Drake-Finley, Finley Resources and Drake-Mesa ("Drake-Finley *et al*.") filled an administrative proceeding before the TFJA against the administrative rescission of the 821 Contract issued on August 28, 2017 by PEP. The TFJA issued its judgment on October 4, 2018 (the "TFJA Judgment"), in which the rescission of the 821 Contract was confirmed
2019 Annulment Proceeding	Annulment proceeding initiated by MWS and Bisell in connection with the 804 Contract before the TFJA. The trial was filed before the Sixth Chamber of the TFJA under file number 5403/19-17-06-5
803 Contract	Contract No. 424042803 signed by Bisell and MWS with PEP on February 20, 2012 to perform work called *trabajos de restitución de la Producción* or work to restore production
804 Contract	Contract No. 424043804 signed by Bisell and MWS with PEP on March 20, 2013 for the drilling of new wells
809 Contract	Contract No. 424043809 signed between PEP and Integradora y Zapata on March 1, 2013 to perform work in wells located in the Northern region (Paquete VI)
821 Contract	Contract No. 421004821 signed by Finley, Drake-Mesa and Drake-Finley with PEP on February 28, 2014 to carry out integrated works for drilling and completion of onshore wells
Acta Circunstanciada	Settlement entered into by PEP and Integradora y Zapata on April 9, 2018, ending their contractual dispute on the 809 Contract. Exhibit C-0062
Acta de Extinción	Agreement executed on June 25, 2018 between PEP and Integradora y Zapata declaring the

	extinction of their rights and obligations under the 809 Contract
Appeal for Review 1685/2020	Appeal for review filed by Drake-Finley *et al*. against the decision issued by the Fourteenth Collegiate Court, which denied the Direct Amparo 74/2019 filed against the 2017 Annulment Proceeding ruling
ATG	*Proyecto* "*Aceite Terciario del Golfo*"
Baku Energy Partners	Baku Energy Partners S.A. de C.V.
Baku Exploración y Producción	Baku Exploración y Producción S.A. de C.V.
Bisell	Bisell Construcciones e Ingeniería S.A. de C.V.
C-[#]	Claimants' Exhibit
CL-[#]	Claimants' Legal Authority
Claimants	Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC., jointly
Claimants' Additional Request for Document Production	Request filed on January 27l, 2023 by the Claimants for the production of additional documents allegedly in possession of Mexico's sole fact witness. Exhibit R-110
CNH	*Comisión Nacional de Hidrocarburos*, the Mexican public agency which, *inter alia*, had to authorize the drilling of oil wells
Coapechaca 1240 Well	Well located in the oil field of Coapechaca which PEP's Work Order 028-2016 ordered the contractors of the 821 Contract to drill

Contracts	The 803 Contract, the 804 Contract, and the 821 Contract
Counter-Memorial	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, dated December 2, 2022
CPHB	Claimants' Post-Hearing Brief, dated April 15, 2024
Decision on MP	Tribunal's decision on the Claimants' Request for MP issued on January 26, 2022
Direct Amparo 74/2019	Direct Amparo filed by Drake-Finley *et al*. against the TFJA Judgment on January 18, 2019
Dorama Bond	US$ 41.8 million guarantee provided to PEP by the three contractors of the 821 Contract, as required by Clause 10 of the Contract
Drake-Finley	The Mexican company Drake-Finley, S. de R.L. de C.V., one of the three contractors in the 821 Contract
Drake-Finley *et al*.	Drake-Finley, Finley Resources and Drake-Mesa, as the claimants in the 2017 Annulment Proceeding in Mexico
Drake-Mesa	The Mexican company Drake-Mesa, S. de R.L. de C.V., one of the three contractors in the 821 Contract

Escrito de Alegatos	Submission made in 2018 by Drake-Finley *et al*. in the 2017 Annulment Proceeding in Mexico
FET	Fair and equitable treatment
Finiquito	A document defined in the Contracts (Clauses 17 of the 803 Contract and 18 of the 804 and 821 Contracts) as follows: "Physically received the works, PEP and the CONTRACTOR must elaborate within the term of 90/120 calendar days, the "*finiquito*" (*i.e.,* settlement) of the works, in which the fulfilment of the reciprocal obligations between the parties will be established. Likewise, the adjustments, revisions, modifications and recognitions that may arise, and the balances for and against, as well as the agreements, conciliations or transactions that are agreed to end the controversies that, where appropriate, have been presented, will be recorded"
Finley	Finley Resources Inc., a U.S. company which is one of the Claimants in this arbitration and was one of the contractors in the 821 Contract
First Asali Report	Expert Report filed by the Respondent on December 2, 2022 together with the Respondent's Counter-Memorial
Hearing	Hearing on Jurisdiction and Liability held in Washington, D.C. from December 4 to December 8, 2023
ICJ	International Court of Justice
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006

ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ILC Articles	International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts
Integradora	Integradora de Perforaciones y Servicios, S.A. de C.V.
Integradora and Zapata	Integradora de Perforaciones y Servicios, S.A. de C.V. and Zapata Internacional, S.A. de C.V.
La Aceituna	Restaurant where the Claimants allege an informal meeting was held between Rob Keoseyan, Luis Kernion, and Rodrigo Loustaunau on September 26, 2008
LFPA	Mexico's Federal Law of Administrative Procedure
LFPCA	Mexico's Federal Law of the Contentious Administrative Procedure
Mexico or the Respondent	United Mexican States
Mr. Finley	Jim D. Finley, CEO of Finley and President of MWS
MST	Minimum standard of treatment
MWS	MWS Management, Inc., a U.S. company which is one of the Claimants in this arbitration and was one of the contractors in the 803 and 804 Contracts
NAFTA	North American Free Trade Agreement, which entered into force on January 1, 1994
Ordinary Civil Trial 120/2015	Civil trial initiated by MWS and Bisell against PEP in the federal district court in Veracruz,

	Mexico for the alleged breach of PEP's obligations under the 804 Contract
Ordinary Civil Trial 200/2016	Civil trial initiated by Finley, Drake-Mesa and Drake-Finley against PEP for the alleged breach of the 821 Contract.
Ordinary Civil Trial 75/2015	Civil trial initiated by MWS and Bisell against PEP in the federal district court in Veracruz, Mexico for the alleged breach of PEP's obligations under the 803 Contract
PACMA	"*Programa de Apoyo a la Comunidad y Medio Ambiente*", *i.e.*, local works that, under the 803, 804 and 821 Contracts, the contractors had to carry out in support of rural communities and the environment
Parties	The Claimants and the Respondent, jointly
Pemex	*Petróleos Mexicanos*
Pemex Law 2008	*Ley de Petróleos Mexicanos*, dated November 28, 2008
Pemex Law 2014	*Ley de Petróleos Mexicanos*, dated August 11, 2014
PEP (or, occasionally, P.E.P.)	*Petróleos Exploración y Producción*, a subsidiary of Pemex
PO1	Procedural order rendered on December 17, 2021 on the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues
PO2	Procedural order rendered on August 10, 2022 on the confidentiality of the proceeding
PO3	Procedural order rendered on October 5, 2022 on additional matters on confidentiality; PO3 partially amended PO2
PO4	Procedural order rendered on February 3, 2023 on the production of documents and the contested document production requests

PO5	Procedural order rendered on February 28, 2023 on the Claimants' Additional Request for Document Production
PO6	Procedural order rendered on May 26, 2023 on the Respondent's Request for Redactions
PO7	Procedural order rendered on July 29, 2023 granting the Respondent an extension to file its Rejoinder
PO8	Procedural order rendered on August 14, 2023 on the extension of the deadline for the submission of amicus curiae briefs and the Parties' comments to them
PO9	Procedural order rendered on November 15, 2023 on the organization of the Hearing
PO10	Procedural order rendered on November 22, 2023 on the urgent production request of new evidence by the Claimants
PO11	Procedural order rendered on January 26, 2024, which confirmed the Tribunal's decision to admit the *Escrito de Alegatos*.
PO12	Procedural order rendered on February 26, 2024 on the issues to be addressed in the Parties' post-hearing briefs
Prize	Prize Management Holdings, a U.S. company which is one of the Claimants in this arbitration
PROAS	Programs, works and/or actions assigned to the Contracts' contractors, as part of their PACMA obligations
Procedural Calendar	Procedural calendar for the jurisdictional and merits phase of the proceeding contained in PO1
R-[#]	Respondent's Exhibit
Rejoinder	Respondent's Rejoinder on the Merits and Reply on Jurisdiction, dated August 17, 2023

Reply	Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, dated April 14, 2023
Request for MP	Claimants' Request for Interim Measures for Protection, dated December 14, 2021
Request or Request for Arbitration	Request for arbitration filed by the Claimants to ICSID on March 25, 2021
Respondent's Request for Redactions	Respondent's Transparency Schedule to Claimants' Reply and request for the redaction of names and personal information of external individuals to the proceeding
RL-[#]	Respondent's Legal Authority
RLPM	*Reglamento de la Ley de Petróleos Mexicanos* or Regulations to Mexico's Petroleum Law
Rodrigo Zamora Etcharren and Daniel Amézquita Díaz First Expert Report	Expert Report filed by the Claimants on June 10, 2022 together with Claimants' Statement of Claim
Rodrigo Zamora Etcharren and Daniel Amézquita Díaz Second Expert Report	Expert Report filed by the Claimants on April 14, 2023 together with Claimants' Reply
Royal Shale Corporation	Royal Shale Corporation S.A. de C.V.
Royal Shale Holdings	Royal Shale Holdings, S.A. de C.V.
RPHB	Respondent's Post-Hearing Brief, dated April 15, 2024.
SCJN or Supreme Court	Mexico's Supreme Court or *Suprema Corte de Justicia de la Nación*
Second Asali Report	Expert Report filed by the Respondent on August 17, 2022 together with the Respondent's Rejoinder
Second Witness Statement of L. Kernion	Mr. L. Kernion's Second witness statement filed by the Claimants on April 13, 2023 together with Claimants' Reply
Statement of Claim	Claimants' Memorial on the Merits, dated June 10, 2022

Submission of the United States	Submission filed by the U.S. as Non-Disputing Party pursuant to NAFTA and USMCA on August 31, 2023
Supplement to Request for MP	Claimants' Supplement to their initial Request for MP, dated December 18, 2021
TFJA	*Tribunal Federal de Justicia Administrativa* or Federal Tribunal of Administrative Justice
TFJA Judgment	Ruling issued by the TFJA within the 2017 Annulment Proceeding on October 4, 2018, which confirmed the rescission of the 821 Contract. Exhibit RZ-0039
Third Unitary Court	Third Unitary Court in Civil Matters of the First Circuit
Tr. Day [#] [page:line]	Transcript of the Hearing. The documents are both in English and Spanish
Tribunal	Arbitral tribunal constituted on October 22, 2021, in accordance with Article 37(2)(a) of the ICSID Convention. Its members are: Manuel Conthe Gutiérrez (Spanish), President, appointed by the Chairman of the Administrative Council in accordance with Article 38 of the ICSID Convention; Franz X. Stirnimann Fuentes (Peruvian/Swiss), appointed by the Claimants; and Alain Pellet (French), appointed by the Respondent.
TUCMA Judgment	Second appeal ruling issued by the Third Unitary Court within the 898/2017 Appeal, which dismissed the claimants' claims against PEP, without imposing costs on them, on April 2, 2019
United States or the U.S.	The United States of America
USMCA	The United States-Mexico-Canada Agreement, which entered into force on July 1, 2020
Villahermosa Meeting	Meeting of representatives from PEP's Legal Department and operational units held in Villahermosa (Tabasco) on May 16, 2018, where it was decided that the amount to be

	claimed under the bond for the 821 Contract would be the full amount of the guarantee, *i.e.*, US$ 41.8 million.
Weatherford	Foreign company allegedly assigned to perform work in the 1240 Coapechaca Well, and one of PEP's contractors in the ATG
Witness Statement of J. Finley	Mr. J. Finley witness statement filed by the Claimants on June 10, 2022 together with Claimants' Statement of Claim
Witness Statement of L. Kernion	Mr. L. Kernion's first witness statement filed by the Claimants on June 10, 2022 together with Claimants' Statement of Claim
Work Order 028-2016	Work order issued by PEP on November 18, 2016 ordering the Claimants, as contractors of the 821 Contract, to drill the Coapechaca 1240 Well
Zapata	Zapata Internacional, S.A. de C.V.

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of: (1) the North American Free Trade Agreement ("**NAFTA**"), which entered into force on January 1, 1994, and (2) the United States-Mexico-Canada Agreement ("**USMCA**"), which entered into force on July 1, 2020. Pursuant to the Protocol Replacing the NAFTA with the USMCA, the NAFTA was superseded by the USMCA on the date the latter entered into force.

2. The Claimants are Finley Resources, Inc. ("**Finley**"); MWS Management, Inc. ("**MWS**"); and Prize Permanent Holdings, LLC ("**Prize**"), entities incorporated, in the case of Finley and MWS, or established, in the case of Prize, under the laws of Texas (jointly referred to as the "**Claimants**").

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

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

5. This dispute concerns the Claimants' purported investment in conducting oilfield services to drill and complete oil and gas wells,[1] and Mexico's alleged breaches of its obligations under the NAFTA and the USMCA treaties.

II. PROCEDURAL HISTORY

6. On **March 25, 2021**,[2] ICSID received a request for arbitration from Finley, MWS, and Prize against Mexico, together with Exhibits 1 through 10 (the "**Request**" or "**Request for Arbitration**"), which was transmitted to Mexico on the same date.

7. On April 6, 2021, Mexico submitted a letter to the Centre objecting to the registration of the Request, stating that: (1) the alleged investments do not qualify as covered investments

[1] Request for Arbitration, ¶ 13.

[2] This date is in bold because under the three-year limitation period foreseen in the North American Free Trade Agreement ("**NAFTA**") and the United States-Mexico-Canada Agreement ("**USMCA**") it determines the Tribunal's jurisdiction *rationae temporis* and will be mentioned many times in this Decision. Similarly, in Chapter III on "Factual Background", some other key dates relevant to determine the Tribunal's jurisdiction *rationae temporis* will also appear in bold.

under the USMCA or legacy investments under the NAFTA; and (2) that the claims are time-barred under both treaties.

8. Following the Centre's request for additional information of April 19, 2021, on 30 April 2021 the requesting parties addressed Mexico's points, to the extent that they were relevant to the Request's registration. The requesting parties' communication attached Exhibits 11 and 12.

9. On May 12, 2021, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7 d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

10. In accordance with Article 1123 of the NAFTA and Article 14.D.6 of the USMCA, the tribunal would consist of three arbitrators, one to be appointed by each party and the third, presiding arbitrator to be appointed by agreement of the Parties.

11. On June 3, 2021, Dr. Franz X. Stirnimann Fuentes, a national of Switzerland and Peru, accepted his appointment by the Claimants as arbitrator.

12. By letter dated August 10, 2021, the Claimants requested the Chairman of the ICSID Administrative Council appoint the president of the tribunal, pursuant to Article 38 of Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "**ICSID Convention**") and Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**").

13. On August 12, 2021, Prof. Alain Pellet, a national of France, accepted his appointment by the Respondent as arbitrator.

14. On October 21, 2021, ICSID informed the Parties of the appointment of Mr. Manuel Conthe Gutiérrez, a national of Spain, as President of the Tribunal.

15. The Tribunal is thus composed of Mr. Manuel Conthe Gutiérrez, a national of Spain, President, appointed by the Chairman of the ICSID Administrative Council in accordance with Article 38 of the ICSID Convention; Dr. Franz X. Stirnimann Fuentes, a national of

Switzerland and Peru, appointed by the Claimants; and Prof. Alain Pellet, a national of France, appointed by the Respondent.

16. On October 22, 2021, in accordance with Rule 6(1) of the ICSID Arbitration Rules, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Anneliese Fleckenstein, ICSID Senior Legal Counsel, was designated to serve as Secretary of the Tribunal.

17. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on December 3, 2021, by video conference to discuss procedural matters and the schedule of the arbitration.

18. On December 7, 2021, following consultations with the Parties, Dr. Jean-Baptiste Merlin was appointed as Assistant to Prof. Pellet. Dr. Merlin resigned on August 31, 2022 and was not replaced.

19. On December 14, 2021, the Claimants filed a Request for Interim Measures of Protection ("**Request for MP**"), together with Exhibits C-0001 through C-0017, and Legal Authorities CL-0001 through CL-0012. The Claimants' primary request for relief was for the Tribunal to order "Mexico to cease any action that may deprive the Tribunal of jurisdiction to hear Claimants' claims, including any action related to concluding the 821 Contract or calling on the US$ 41 million performance guarantee, until this arbitration concludes."[3]

20. Following the first session, on December 17, 2021, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues ("**PO1**"). PO1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, and that the procedural languages would be English and Spanish. Since Prof. Pellet is not proficient in Spanish, he is signing the Spanish version of decisions, including the Decision on Jurisdiction and Liability, and the Award to be issued by the Tribunal on the basis of the assurance provided by his co-arbitrators that the text accurately reflects the English version. However, its

[3] Request for Interim Measures for Protection, December 14, 2021 ("**Request for MP**"), ¶¶ 5, 39.

paragraph 11.3 expressly provided that "within 14 days following the corresponding submission, the submitting party shall make its best efforts to submit a courtesy translation into the other procedural language of the pleadings, witness statements and expert opinions."[4] PO1 also contained the procedural calendar for the jurisdictional and merits phase of the proceeding (the "**Procedural Calendar**").

21. On December 18, 2021, the Claimants submitted a supplement to their initial Request for MP ("**Supplement to Request for MP**"), together with the statement of Cristina Vizcaino, an attorney in Mexico who had represented the Claimants in the Contract No. 421004821 (the "**821 Contract**") litigation and had been asked on December 15, 2021, by some *Petróleos Exploración y Producción's* ("**PEP**") officials and a public notary to acknowledge receipt of the settlement of the works ("*finiquito*") for the 821 Contract. The Claimants again reiterated their request for "Mexico to cease any further action that may deprive the Tribunal of jurisdiction to hear Claimants' claims, to wit, any action related to the '*finiquito*' of the 821 Contract or making a claim against the US$ 41.8 million performance guarantee."[5]

22. Following invitation from the Tribunal, on January 3, 2022, the Respondent submitted its response to the Claimants' Request for MP, together with Exhibits R-0001 through R-0017, and Legal Authorities RL-0001 through RL-0017.

23. On January 18, 2022, following consultation with the Parties, the Tribunal held a Hearing on the Request for MP by video conference.

24. On January 26, 2022, the Tribunal issued its decision on the Request for MP, as supplemented, rejecting said request ("**Decision on MP**"). The Tribunal, based on a *prima facie* assessment, was "not persuaded that granting the requested measures is necessary to prevent the serious or irreparable damage to Claimants in terms of a loss of the Tribunal's jurisdiction."[6]

[4] Procedural Order No. 1 ("**PO1**"), ¶ 11.3.

[5] Claimants' Supplement to their initial Request for MP, December 18, 2021 ("**Supplement to Request for MP**"), ¶ 14.

[6] Decision on the Request for MP ("**Decision on MP**"), ¶ 43.

25. In accordance with PO1, on June 10, 2022, the Claimants submitted their Memorial on the Merits (the "**Statement of Claim**"), together with the first expert report of Rodrigo Zamora and Daniel Amézquita ("**Rodrigo Zamora Etcharren and Daniel Amézquita Díaz First Expert Report**"); the witness statement of Jim Finley ("**Witness Statement of J. Finley**"); the witness statement of Luis Kernion ("**Witness Statement of L. Kernion**"); Exhibits C-0001 through C-0120; and Legal Authorities CL-0001 through CL-0088.

26. Following exchanges between the Parties, and as stipulated by Section 23.3 of PO1, on August 20, 2022, the Tribunal issued Procedural Order No. 2 concerning the confidentiality of the proceeding, governing "the disclosure to the public, and use by the parties, of confidential information and materials filed or resulting from this arbitration" ("**PO2**").[7]

27. After further exchanges between the Parties regarding the scope of PO2, on October 5, 2022 the Tribunal issued Procedural Order No. 3, partially amending PO2. The Tribunal confirmed that supporting documents of the pleadings were to be regarded as part of such pleadings, and, as such, were subject to the principle of public disclosure as addressed in PO1 ("**PO3**").

28. On December 2, 2022, the Respondent submitted its Counter-Memorial on the Merits and Memorial on Jurisdiction, together with the first expert report of Jorge Asali ("**First Asali Report**"); the witness statement of Rodrigo Loustaunau; Exhibits R-0018 through R-0096; and Legal Authorities RL-0018 through RL-0091 ("**Counter-Memorial**").

29. In accordance with Section 15 of PO1 and the Procedural Calendar, each side served on the other side document production requests in the form of a Redfern Schedule. The Parties then exchanged their objections to production and each side then completed its Redfern Schedule by including its responses to the other side's objections. The Parties ultimately submitted their completed Redfern Schedules to the Tribunal on January 13, 2023.

30. On January 27, 2023, the Claimants filed a request for the production of additional documents allegedly in the possession of Mexico's sole fact witness, Mr. Loustaunau, "relevant and material to Claimants' claims against Mexico, Mexico's responses to same,

[7] Procedural Order No. 2 ("**PO2**"), ¶ 12.

and to the credibility of Mr. Loustaunau's testimony" ("**Claimants' Additional Request for Document Production**").[8]

31. Following an invitation from the Tribunal, the Respondent submitted its response objecting to the Claimants' request on February 3, 2023, together with Legal Authorities RL-0092 through RL-0096.

32. Thereafter, also on February 3, 2023, the Tribunal issued Procedural Order No. 4 on the production of documents and decided on the contested document production requests filed on January 13, 2023 ("**PO4**").

33. On February 28, 2023, the Tribunal issued Procedural Order No. 5 concerning the Claimants' Additional Request for Document Production, ordering the Respondent to produce all WhatsApp exchanges between Mr. Loustaunau and Mr. Keoseyan between September 1, 2018, and October 15, 2018 ("**PO5**").

34. By letter dated March 27, 2023, the Respondent informed the Tribunal that Mr. Keoseyan had denied the existence of WhatsApp exchanges with Mr. Loustaunau and the alleged meeting held on September 26, 2018. Accordingly, it requested the Tribunal's confirmation of the Respondent's compliance with PO5.

35. On April 14, 2023, the Claimants submitted their Reply on the Merits and Counter-Memorial on Jurisdiction, together with the second expert report of Mr. Zamora and Mr. Amézquita ("**Rodrigo Zamora Etcharren and Daniel Amézquita Díaz Second Expert Report**"); the second witness statement of Mr. Finley; and the second witness statement of Mr. Kernion ("**Second Witness Statement of L. Kernion**"); Exhibits C-0098, C-0121 through C-0143, and C-0145 through C-0156; and Legal Authorities CL-0089 through CL-0091 and CL-0095 through CL-0102 (the "**Reply**").

36. On April 28, 2023, pursuant to PO2, the Respondent sent its Transparency Schedule to the Claimants' Reply, requesting the redaction of the names and personal information of certain individuals that it claimed were external to this arbitration but were mentioned in

[8] **R-0110**, Claimants' request for additional documents ("**Claimants' Additional Request for Document Production**").

the Claimants' Reply and in Exhibits C-0129 and C-0130 ("**Respondent's Request for Redactions**").

37. By letter dated May 5, 2023, the Claimants filed a response to the Respondent's Transparency Schedule, objecting to the redaction of information requested by the Respondent.

38. On May 26, 2023, the Tribunal issued Procedural Order No. 6 on the Respondent's Request for Redactions, dismissing the request, ruling that the name of a person does not fall under protected information pursuant to PO2 ("**PO6**").

39. On May 28, 2023, the Claimants filed for leave to introduce new evidence "inadvertently omitted from the exhibits submitted [with its Reply]."

40. Following an invitation from the Tribunal, on June 2, 2023, the Respondent submitted its comments on the Claimants' request, not objecting to the introduction of the new evidence, but requesting that certain information should be redacted prior to introduction into the evidentiary record.

41. On June 6, 2023, the Tribunal invited the Claimants to submit any observations they might have on the Respondent's request for redaction, which they did, by letter dated June 8, 2023. In their letter, the Claimants argued that the Respondent's request for redaction was "untimely, and for this reason alone, it should be rejected," and that the Respondent had not met its burden to show that said evidence fell under PO2.

42. On June 13, 2023, the Tribunal issued its decision, granting the Respondent's request that the new evidence not be made public.

43. By letter dated July 21, 2023, the Respondent asked for a 21-day extension to submit its Rejoinder on the Merits and Reply on Jurisdiction, due on April 26, 2023.

44. On July 26, 2023, the Claimants noted that they did not oppose a reasonable delay, and could accept a one-week extension, but not the three-week extension requested.

45. On July 29, 2023, the Tribunal issued Procedural Order No. 7, granting a 13-day extension for the Respondent to file its Rejoinder ("**PO7**").

46. On August 11, 2023, the Centre informed the Parties that:

> "The Tribunal has considered the convenience to make some additional adjustments to the Procedural Calendar, and it is its intention to extend by two weeks both the deadline for amicus curiae submissions, as well as for the Parties' subsequent comments, unless any of the Parties objects by 1 p.m. EST (Washington, D.C. time) of Monday, August 14, 2023. The other deadlines contemplated in the Procedural Calendar set forth under 'Annex A – Amended' of April 26, 2023 (i.e., for Notification of Witnesses, Pre-Hearing Conference and Hearing) would remain unaltered."

47. Accordingly, on August 14, 2023, the Tribunal issued Procedural Order No. 8 concerning the extension of the deadline for the submission of *amicus* briefs to be due by August 31, 2023, and the Parties' comments on Non-Disputing Party Submissions/*amicus curiae* by September 14, 2023 ("**PO8**").

48. Pursuant to the extension granted under PO7, on August 17, 2023, the Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction ("**Rejoinder**"), together with the second expert report of Mr. Asali ("**Second Asali Report**"); the second witness statement of Mr. Loustaunau; Exhibits R-0108 through R-0136; and Legal Authorities RL-0092 through RL-0126.

49. On August 29, 2023, the Tribunal had a draft Procedural Order No. 9 circulated on the Organization of the Hearing and invited the Parties to confer and agree on as many points as possible and to send their joint proposals to the Tribunal prior to the Pre-Hearing Conference scheduled on October 27, 2023.

50. On August 31, 2023, the United States of America (the "**United States**" or the "**U.S.**") filed a written submission as a Non-Disputing Party pursuant to NAFTA Article 1128 and USMCA Article 14.D.7.2. (the "**Submission of the United States**").

51. Also on August 31, 2023, the Respondent submitted its Transparency Schedule for the redactions of its Rejoinder, concerning the redaction of certain information contained in the second witness statement of Mr. Loustaunau.

52. By letter dated September 14, 2023, the Claimants objected to the redaction of certain information requested by the Respondent.

53. Following the Tribunal's confirmation, on September 22, 2023, the Respondent submitted its comments on Claimants' objections of September 14, 2023.

54. Following an agreement for an extension, on September 22, 2023, the Parties submitted their comments to the Submission of the United States.

55. On October 6, 2023, the Parties notified the opposing party which witness and experts each party called for cross-examination.

56. On October 17, 2023, the Parties submitted the points on which they agreed, as well as the points of disagreement on the Draft of Procedural Order No. 9 on the Organization of the Hearing.

57. Having received the Parties' joint proposal, on October 19, 2023, the Tribunal circulated a revised Draft of Procedural Order No. 9, including the amendments on the publicity of the Hearing on jurisdiction and liability.

58. On October 27, 2023, pursuant to Section 19.1 of PO1, a pre-hearing organizational meeting between the Parties and the Tribunal was held via Zoom videoconference to discuss any outstanding procedural, administrative, and logistical matters in preparation for the Hearing on jurisdiction and merits. During the session, the Claimants raised the issue of introducing additional exhibits into the record.

59. By letter dated November 3, 2023, the Claimants reiterated their wish to include in the Electronic Hearing Bundle four additional exhibits and sought the Tribunal's guidance on whether that required that they make an application under Section 16.3 of PO1.

60. At the invitation of the Tribunal, on November 6, 2023, the Respondent stated that the submission of additional evidence could only be made under Section 16.3 of PO1 and that the "exceptional circumstances" required by that Section were not forthcoming.

61. On November 13, 2023, the Tribunal communicated to the Parties that the submission of new evidence by any party after the Reply and Rejoinder was subject to Section 16.3 of PO1 and, hence, if the Claimants intended to file the new evidence described in their November 3, 2023, letter, they should explain the exceptional circumstances on which they were basing their request.

62. Consequently, the Tribunal invited the Claimants to explain those exceptional circumstances as soon as possible, if possible that same day or, at the latest, by November 14, 2023. The Respondent was also invited to comment on the Claimants' communication

within two days following the Claimants' comments. Both Parties complied with the Tribunal's instructions.

63. On November 15, 2023, the Tribunal issued Procedural Order No. 9 on the Organization of the Hearing ("**PO9**").

64. On November 22, 2023, the Tribunal issued Procedural Order No. 10, granting the Claimants' request to urgently produce and file the new evidence indicated in their letter of November 3, 2023 ("**PO10**"). The Tribunal further invited the Respondent, if it so wished, to produce and file urgently any documents or other additional evidence which it considered responsive to the Claimants' newly filed documents, with a written statement on the content of that evidence.

65. Pursuant to Section 20.7 of PO1, on November 24, 2023, each party submitted their respective Chronology of Relevant Facts, *Dramatis Personae*, and List of Substantive Issues.

66. A Hearing on Jurisdiction and Liability was held at the Centre's facilities in Washington, D.C. from Monday, December 4, to Friday, December 8, 2023 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:

Manuel Conthe Gutiérrez	President
Franz X. Stirnimann Fuentes	Arbitrator
Alain Pellet	Arbitrator

ICSID Secretariat:

Anneliese Fleckenstein	Secretary of the Tribunal

For the Claimants:

Andrew B. Derman	Holland & Knight LLP
Andrew Melsheimer	Holland & Knight LLP
Javan Porter	Holland & Knight LLP
Cole Browndorf	Holland & Knight LLP
Luis Dangeville Kernion	Prize Permanent Holdings, LLC
Jim Finley	Finley Resources, Inc.; MWS Management, Inc.
Matthew Cooper	Finley Resources, Inc.

For the Respondent:

Alan Bonfiglio Ríos	Secretaría de Economía
Rafael Rodríguez Maldonado	Secretaría de Economía
Rafael Alejandro Augusto Arteaga Farfán	Secretaría de Economía
Laura Mejía Hernández	Secretaría de Economía
Jorge Escalona Gálvez	Secretaría de Economía
Oscar Manuel Rosado Pulido	Secretaría de Economía
Stephan E. Becker	Pillsbury Winthrop Shaw Pittman LLP
Gary J. Shaw	Pillsbury Winthrop Shaw Pittman LLP

For the United States of America:

David Bigge	Chief of Investment Arbitration, International Claims and Investment Disputes (L/CID), U.S. Department of State
Mary Muino	Attorney-Adviser, International Claims and Investment Disputes (L/CID), U.S. Department of State

Interpreters:

Silvia Colla	English-Spanish Interpreter
Daniel Giglio	English-Spanish Interpreter
Charles Roberts	English-Spanish Interpreter

Court Reporters:

Dawn Larson	English Court Reporter
Dante Rinaldi	Spanish Court Reporter

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

On behalf of the Claimants:

Jim Finley	Finley Resources, Inc.; MWS Management, Inc.
Luis Kernion	Prize Permanent Holdings, LLC
Rodrigo Zamora Etcharren	Galicia Abogados, S.C.
Daniel Amézquita Díaz	Galicia Abogados, S.C.

On behalf of the Respondent:

Rodrigo Loustaunau Martínez	Petróleos Mexicanos
Jorge Asali Harfuch	Bufete Asali, S.C.

68. On December 23, 2023, the Claimants requested the Tribunal's authorization to admit a new document, that they had mentioned during the Hearing, entitled "*Escrito de Alegatos*", which was a submission that Finley, Drake-Finley, S. de R.L. de C.V. ("**Drake-Finley**"),

and Drake-Mesa. S. de R.L. de C.V. ("**Drake-Mesa**") made in 2018 ("***Escrito de Alegatos***") during the annulment proceeding of PEP's administrative rescission of the 821 Contract (the "**2017 Annulment Proceeding**").[9]

69. On January 2, 2024, the Respondent informed the Tribunal that it had delivered to the Claimants a copy of the *Escrito de Alegatos* submitted by Drake-Finley and the other claimants in the 2017 Annulment Proceeding.

70. On January 12, 2024, the Respondent objected to the admission of the *Escrito de Alegatos* as it was not relevant or material and, besides, the exceptional circumstances required by paragraph 16.3 of PO1 for late submissions did not apply.

71. Also on January 12, 2024, both Parties filed the documents requested from them by the Tribunal during the Hearing: in the case of the Claimants, an organizational chart showing the relationship between the companies involved in their alleged investments in Mexico; and in the case of the Respondent, a "Who is Who" of *Petróleos Mexicanos* ("**Pemex**") and PEP's key officials related to the dispute.

72. On January 16, 2024, the Tribunal advanced to the Parties its decision to admit the *Escrito de Alegatos*, a decision which it confirmed with reasons in Procedural Order No. 11, dated January 26, 2024 ("**PO11**").

73. On February 26, 2024, the Tribunal issued Procedural Order No. 12, which *inter alia* invited the Parties to address in their post-hearings briefs a number of issues of interest for the Tribunal ("**PO12**").

74. The Parties filed simultaneously post-hearing briefs on April 15, 2024 ("**CPHB**" and "**RPHB**" for the Claimants' and Respondent's briefs, respectively).

75. The Parties filed their submissions on costs on May 17, 2024.

76. Following the Hearing, the members of the Tribunal deliberated by various means of communication, including a meeting in Paris, France, on May 28, 2024.

[9] **C-0163**, *Escrito de Alegatos* submitted by Finley Resources Inc., ("**Finley**"), Drake-Finley, S. de R.L. de C.V. ("**Drake-Finley**"), and Drake-Mesa. S, de R.L. de C.V. ("**Drake-Mesa**"), May, 2018 ("***Escrito de Alegatos***").

77. On August 16, 2024, the Claimants informed the Tribunal[10] that on May 22, 2024, Finley and Prize had sent a Notice of Intent to submit a claim to arbitration under Annex 14-E of the USMCA to Mexico's Ministry of the Economy. They explained that Finley and Prize had felt compelled to send this Notice as a result of Mexico's "consolidation" argument in this arbitration. Claimants believe that their claims with respect to Pemex's unilateral *finiquito* for the 821 Contract and Pemex's subsequent call on the US$ 41.8 million guarantee provided to PEP by the 821 Contract's contractors (the "**Dorama Bond**") should be adjudicated in this arbitration. From its briefing, Mexico appears to believe otherwise. Thus, to protect any claims under USMCA Annex 14-E regarding these acts, Finley and Prize sent a Notice of Intent to Mexico. The Claimants further informed that on August 14, 2024, Finley, Prize, and the Ministry of the Economy had begun the consultation and negotiation contemplated under USMCA Article 14.D.2.

78. On August 28, 2024, after seeking and getting the Tribunal's authorization to respond to the Claimants' communication of August 16, 2024, the Respondent asked the Tribunal to disregard it.[11] It argued that "[i]t is both unusual and inappropriate for the Claimants to attempt to initiate a new arbitration concerning the same facts that are the subject of this pending arbitration. In any event, the effort by the Claimants to initiate a parallel proceeding is not relevant to this arbitration, and there is no basis for entering the attachment to the Claimants' email into the record. Also, it is far too late for the Claimants to submit legal arguments regarding the Dorama Bond. Therefore, the Respondent requests that the Tribunal disregard the Claimants' communication of August 16, 2024."

III. FACTUAL BACKGROUND

79. This Chapter will provide the essential factual background necessary to understand the broad outlines of the dispute and particularly the jurisdictional objections raised by the Respondent, to be dealt with in Chapter V. However, a more detailed description of the

[10] Electronic communication addressed by the Claimants to the Tribunal on August 16, 2024, which included a copy of said notice of intent.

[11] Respondent's letter to the Tribunal, August 28, 2024.

facts related to the administrative rescission of the 821 Contract, one of the most prominent liability issues to be decided in this Decision, will be set out in Chapter X.

80. The description of the factual background in this Chapter will be largely based on uncontested documentary evidence. But it will also be based on some factual allegations made by the Claimants or their witnesses which the Respondent has not challenged and the Tribunal hence considers uncontroversial.

A. THE CLAIMANTS

81. The Claimants in this arbitration are three U.S. companies:[12]

- Finley, a company incorporated in Texas, with its domicile in 1308 Lake St. Fort Worth, Texas;[13]

- MWS, a company incorporated in Texas on April 30, 2001by Mr. Finley, with its domicile also in 1308 Lake St., Ste. 200 Fort Worth, Texas;[14] and

- Prize, a company established in Texas by Mr. Luis Kernion on February 25, 2011, with its domicile in 182 E. Edgewood Place San Antonio, Texas 78209.[15]

82. Mr. Finley is the main shareholder of the first two companies, Finley and MWS; while Mr. Luis Kernion is the controlling member of the third one, Prize. As Mr. Kernion was first in getting involved in Mexico in oil field contracts for Pemex, his company, Prize, will be described first.

(1) Prize Permanent Holdings, LLC

83. Prize is a limited liability company formed by Mr. Luis Kernion and based in San Antonio, Texas. Mr. Kernion had a long history of performing oilfield services for Pemex (like maintaining rigs, constructing pipelines and performing well completions) through its

[12] Request for Arbitration, p. 1, ¶¶ 6-8.

[13] The company was originally incorporated on September 17, 1993 as "Orogeny Corporation". On April 5, 1999, its name was changed to "Finley Resources Inc."; Jim Finley being its sole director and shareholder. See **C-0001**, pp. 2-6 of the PDF.

[14] **C-0001**, pp. 8-13 of the PDF.

[15] **C-0001**, pp. 17-24 of the PDF.

Mexican subsidiary Bisell Construcciones e Ingeniería S.A. de C.V. ("**Bisell**"). Prize became the main controlling shareholder of the Mexican companies which signed the Contracts with PEP: first, together with Mr. Finley's MWS, Contracts No. 424042803 (the "**803 Contract**") and No. 424043804 (the "**804 Contract**"); and subsequently, with Mr. Finley's "Finley Resources", Contract 421004821 (the "**821 Contract**").

(2) MWS Management, Inc.

84. MWS is an oilfield services company headquartered in Fort Worth, Texas, where it shares its office with Finley. Mr. Finley owns 49% of its shares.

85. Together with Bisell, MWS was the contractor in the 803 and 804 Contracts.

(3) Finley Resources, Inc.

86. Finley is an energy company based in Fort Worth, Texas, whose shareholder and CEO is Mr. Finley. Besides other oil services, it conducts exploration, development and production of oil and gas, including the drilling of wells and the use of fracking techniques. This special expertise was the reason which led to Finley's involvement as contractor in the biggest, most complex and last contract with PEP, the 821 Contract.

(4) Subsidiaries in Mexico which were part of the Contracts

a. Bisell Construcciones e Ingeniería S.A. de C.V.

87. Bisell is a Mexican company established on November 20, 2002 and controlled by Prize, which on January 22, 2014 acquired 50% of its capital.[16] Together with Mr. Finley's company MWS, Bisell signed, as contractor, the 803 and 804 Contracts.

b. Drake-Mesa, S. de R.L. de C.V.

88. Drake-Mesa. is another Mexican company, created on February 23, 2012, and controlled by Prize since January 15, 2014, when Prize became the owner of 50% of its shares and

[16] **C-0011**, Prize Ownership of Bisell; Claimants' Memorial on the Merits ("Statement of Claim"), ¶ 37.

the stake of Drake Mesa Big Sky LLC, in which Mr. Finley claims to be the majority owner, was reduced from 50% to 25%.[17]

89. In 2014, together with Finley and Drake-Finley, Drake-Mesa signed jointly, as contractor, the 821 Contract.

c. Drake-Finley, S. de R.L. de C.V.

90. Drake-Finley is a special-purpose company, set up jointly on February 18, 2014 by Prize - who owned 80% of its shares, plus an additional 10% through Drake-Mesa- and by Finley Resources – who owned 10% of its shares-, to carry out the 821 Contract.[18] Together with Finley and Drake-Mesa, Drake-Finley also signed the 821 Contract as a contractor.

(5) Other companies used by the Claimants to carry out their alleged investments

91. During the course of the arbitration, it has gradually emerged that, in order to carry out their alleged investments in Mexico, the Claimants used a number of companies which were not part of the Contracts but that the Claimants have argued were under their control and were instrumental in carrying out the transactions and investments required by the performance of the Contracts.

92. As it will be explained below when dealing with Mexico's jurisdictional objections, the Respondent has questioned the proof of such alleged investments and raised doubts about their real ownership. A short description of the main companies allegedly controlled by the Claimants is made in the following paragraphs.

a. Baku Energy Partners and Baku Exploración y Producción

93. Baku Energy Partners S.A. de C.V. ("**Baku Energy Partners**") and Baku Exploración y Producción S.A. de C.V. ("**Baku Exploración y Producción**") are Mexican subsidiaries of Prize and Mr. Kernion, which the Claimants allege they used to purchase the real estate property (*e.g.,* the so-called "yard") required in order to carry out the Contracts.[19]

---

[17] **C-0012**, Prize Ownership of Drake-Mesa; Statement of Claim, ¶ 19. See also **C-0034**, Contract No. 421004821 signed between Finley, Drake-Mesa, Drake-Finley and PEP on February 28, 2014, for integrated works for drilling and completion of onshore wells (the "821 Contract"), contractor' statement 2.1.

[18] **C-0034**, 821 Contract, contractor's statement 2.1.

[19] Organization Chart of Prize submitted by the Claimants on January 12, 2024.

b. Drake-Mesa, LLC

94. Drake-Mesa is a U.S. company, formerly known as "Drake-Finley LLC" which, according to the Claimants "aggregated funds and purchased rigs, related equipment, and supplies."[20]

c. Royal Shale Holdings and Royal Shale Corporation

95. Royal Shale Holdings, S.A. de C.V. ("**Royal Shale Holdings**") and Royal Shale Corporation S.A. de C.V. ("**Royal Shale Corporation**") are Mexican companies in which Prize had 50% of the shares (the remaining 50% belonging to a company called Corporación Estratégica Pixiu, S.A. de C.V.). Both Royal Shale Holdings and Royal Shale Corporation each owned 25% of Bisell. Additionally, Royal Shale Holdings owned 25% of Drake-Mesa.[21]

B. THE RESPONDENT

96. The Respondent in this arbitration is the United Mexican States, whom the Claimants seek to hold responsible for breaches of the NAFTA and the USMCA resulting from events related to three Contracts -the so-called 803, 804 and 821 Contracts- subscribed by **PEP**, a subsidiary of **Pemex**.

97. Pemex is Mexico's national oil and gas company.[22] Created in 1938, it is the exclusive producer of Mexico's oil and gas resources[23] and is controlled by Mexico's government, as stated in Mexico's hydrocarbon law.[24]

---

[20] Contribution Chart submitted by the Claimants on January 12, 2024.

[21] Organization Chart of Prize, submitted by the Claimants on January 12, 2024.

[22] **C-0022,** *Petróleos Mexicanos* **("Pemex**") Investor Presentation, September 2012, slide 4.

[23] **C-0022,** PEMEX Investor Presentation, September 2012, slide 4.

[24] See **CL-0013,** Ley de Petróleos Mexicanos, Diario Oficial de la Federación, November 28, 2008, ("**Pemex Law 2008**"), Article 3 ("Petróleos Mexicanos is a decentralized organization with productive purposes, legal personality and its own assets, domiciled in the Federal District whose purpose is to carry out exploration, exploitation and other activities referred to in the previous article, as well as exercise, in accordance with the provisions of this Law, the central management and strategic direction of the oil industry. Petróleos Mexicanos will be able to count on decentralized subsidiary organizations to carry out the activities covered by the oil industry.") (Tribunal's translation); **CL-0014,** Ley de Petróleos Mexicanos, Diario Oficial de la Federación, August 11, 2014, ("**Pemex Law 2014**"), Article 2 ("Petróleos Mexicanos is a productive state enterprise, belonging exclusively to the Federal Government, with a legal personality and its own estate, and is endowed with technical, operational, and managerial autonomy, in accordance with what is set forth in this Law. Petróleos Mexicanos will have its domicile in the Federal District [Mexico City], without prejudice to its ability to establish other domiciles, in Mexico or abroad, in order to carry out its activities.") (emphasis added) (Tribunal's translation).

98. PEP, the public entity which signed the contracts at the origin of the dispute, is a subsidiary of Pemex. In the contracts it presents itself as "a decentralized agency of the Federal Public Administration for productive purposes, of a technical, industrial and commercial nature, with its own legal personality and assets, subsidiary of Petróleos Mexicanos, grouped in the Sector coordinated by the Ministry of Energy."[25]

C. THE ORIGIN OF THE CONTRACTS

99. In 2006, as part of their strategy to reverse the trend of declining production, Mexico and Pemex approved the so-called *Proyecto Aceite Terciario del Golfo* ("**ATG**") to develop a hydrocarbon field with complex geological structures in the Chicontepec basin, a region straddling the states of Veracruz and Hidalgo.

100. As recognized at the time by the *Comisión Nacional de Hidrocarburos* ("**CNH**"), "given [Chicontepec's] complex geological characteristics, its profitable exploitation can be difficult and expensive compared to the large deposits in the southeast of the country. The deposits in Chicontepec are of low permeability, generally compartmentalized, with a high clay content. Additionally, when starting the extraction of crude, significant volumes of dissolved gas are released, which constrain the flow of oil to the wells. The Chicontepec exploitation project was always postponed, not only because of the low productivity of its wells and the complex internal structure of its deposits, but also because of the technical and economic challenges it represented for extracting hydrocarbons, despite its vast resource potential."[26]

101. Given the technical challenges and size of this field, Pemex sought additional capacity to perform the work to meet ambitious production targets and invited international oil and gas companies to perform certain specified works.[27]

102. As part of that strategy, in late 2011 Pemex published an invitation to participate in an international public tender in conformity with Mexico's free trade agreements for the re-

[25] While the Claimants have systematically preferred to use the term "Pemex" instead of the more specific *Petróleos Exploración y Producción* ("PEP"), this Decision will refer mostly to PEP, as the party to the contracts at the core of the dispute.

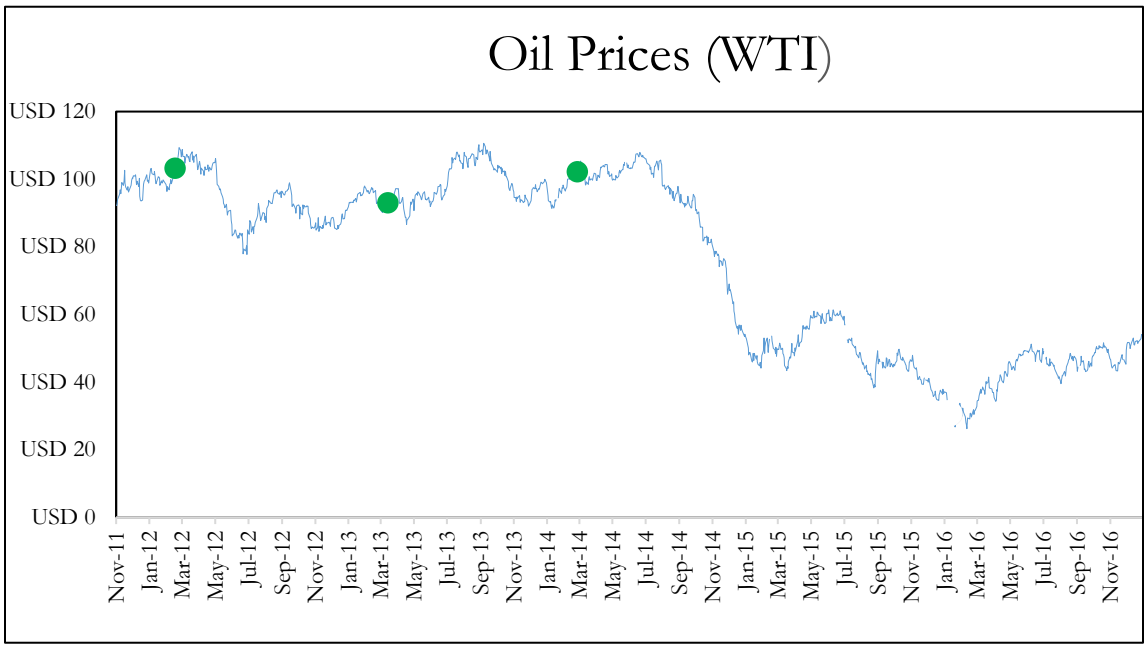
[26] **C-0037**, *Comisión Nacional de Hidrocarburos* ("**CNH**"), "Project Tertiary Oil of the Gulf: First Review and Recommendations", April 2010, p. 3. Tribunal's translation.

[27] Statement of Claim, ¶ 51.

working of existing oil wells (*trabajos de restitución de la producción*). Pemex qualified MWS and Bisell to submit a bid, accepted their bid, and in early 2012 Pemex awarded them their first contract to perform workovers of existing oil wells, the 803 Contract.[28]

103. Over the next two years, Finley, MWS, Bisell, and Drake-Mesa entered into two other contracts with Pemex. These were integrated services contracts for Claimants to drill new wells. The second contract was the 804 Contract, entered into by MWS and Bisell. This contract was the result of a direct negotiation with Pemex and not a public bid process. The third contract was the 821 Contract, entered into by Finley and Drake-Mesa. This contract was the result of a bid round that Pemex announced in 2013 and followed similar pre-qualification and bidding procedures as the 803 Contract.[29]

104. The Claimants underline that the three Contracts were signed during a period (2012-2014) when the international price of oil was relatively high, as shown in the following graph, where the green dots represent the date of signature of Contracts 803, 804 and 821, respectively:[30]



[28] Statement of Claim, ¶¶ 83-85.

[29] Statement of Claim, ¶ 86.

[30] The graph comes from the Statement of Claim, ¶ 14. As it was not relevant in this context, a red dot in the original graph has been removed by the Tribunal.

105. As shown in the graph above, the price of oil took a significant dive in the summer of 2014, and this led Pemex to reconsider its strategy for the Chicontepec oil field project.

106. As stated by the Claimants,[31] under the Contracts they offered around US$ 52 million in performance bonds and through a number of companies purchased and imported equipment into Mexico, purchased and leased real estate in Mexico, hired and trained local employees, and sent U.S. workers to Mexico to perform the work. The Respondent has argued, however, that the Claimants have not proved that they carried out such investments.

D. THE 803 CONTRACT

(1) Main terms

107. In late 2011, Pemex published an invitation to participate in an international public tender for the re-working of existing oil wells (*trabajos de restitución de la producción*). It subsequently qualified MWS and Bisell to submit a bid and, finally, in early 2012 accepted their bid and awarded them the 803 Contract,[32] which the parties signed in February 2012. Under the 803 Contract, the "Contractor" (MWS and Bisell) agreed to perform work called *trabajos de restitución de la producción*, *i.e.*, "work to restore production" or "working over wells", as Pemex had drilled wells, but certain wells needed repairs or workovers to restore or enhance production.

108. The 803 Contract indicated the "List of Machinery and/or Equipment" that MWS and Bisell would have to supply, import into Mexico, and transport to the site.[33] Among other equipment, MWS and Bisell had to initially purchase three workover rigs.[34] To perform workovers, MWS and Bisell had also to purchase equipment and materials such as steel

[31] Statement of Claim, 40.

[32] **C-0032**, Contract No. 424042803 signed between Bisell, MWS and PEP on February 20, 2012 to perform work called *trabajos de restitución de la producción* or work to restore production (the "**803 Contract**").

[33] **C-0032**, 803 Contract, Clauses 39, 40, and Annex DT-3.

[34] Witness statement of J. Finley, June 10, 2022 ("**Witness Statement of J. Finley**"), ¶ 33; witness statement of L. Kernion, June 18, 2022 ("**Witness Statement of L. Kernion**"), ¶ 26.

piping.[35] The contract required a certain percentage of MWS and Bisell's equipment and materials to be of national (Mexican) origin.[36]

109. Relatedly, part of the local content requirement under the 803 Contract required MWS and Bisell to hire personnel with Mexican nationality to do the work.[37] Accordingly, MWS and Bisell trained their Mexican staff to operate the equipment in a safe manner and to protect the environment. To do so, MWS and Bisell retained and paid third-party instructors to further this training.[38]

110. The Claimants have argued that MWS and Prize needed a place to store and assemble the equipment they were required to purchase.[39] They also needed a place to lodge their employees. They leased and subsequently purchased land in the town of Poza Rica, near the Chicontepec oil field, which they cleared of vegetation, levelled and hardened with gravel. They also purchased land to store their equipment and leased a warehouse in Poza Rica, which they used to store the more expensive equipment and materials.

111. Claimants had to transport their workers and equipment from the yard in Poza Rica to each site where PEP wanted them to perform the work.[40] This was a complex process. It required loading a convoy of trucks with workers and equipment and driving them to the site.[41] This included transporting mobile office trailers. These trips were often made through difficult conditions, including unpaved roads.

112. The work was scheduled to begin on February 20, 2012, and last until December 31, 2013. Pemex would request work through work orders. Each such work order specified the work to be completed, where it would be completed, and the timeframe for MWS and Bisell to do so.[42]

---

[35] Witness Statement of J. Finley, ¶ 33; Witness Statement of L. Kernion, ¶ 26.

[36] **C-0032,** 803 Contract at Clause 6 ("The CONTRACTOR undertakes to comply with the percentage of national content to which it committed, in the terms of Annex DT-01 of this contract. This percentage must be fulfilled despite the subcontracting carried out.").

[37] **C-0032,** 803 Contract, Clause 6; Anexo G-1 at 2 ("*Mano de Obra*" or "Labor").

[38] Witness Statement of L. Kernion, ¶¶ 32-33.

[39] Statement of Claim, ¶¶ 97-101.

[40] See **C-0032**, 803 Contract, Clause 40; Witness Statement of L. Kernion, ¶¶ 30, 36, 80.

[41] See Witness Statement of J. Finley, ¶ 15.

[42] Witness Statement of L. Kernion, ¶ 94.

113. Clause 17 of the 803 Contract regulated the document that was to be signed by the parties upon finalization of the works. This document was called "*finiquito*" in Spanish, a term translated as "settlement" in the English version of the contract. The text of the clause was as follows:

> "Physically received the works, P.E.P., through the person designated by the Area Responsible for the Administration and Supervision of the Execution of the Contract, and the CONTRACTOR must elaborate within the term of 90 (ninety) calendar days, the settlement of the works, in which the fulfillment of the reciprocal obligations between the parties will be established. Likewise, the adjustments, revisions, modifications and recognitions that may arise, and the balance for and against, as well as the agreements, conciliations or transactions that are agreed to end the controversies that, where appropriate, have been presented will be recorded.
>
> The aforementioned period may be extended by agreement between the parties, up to a period equal to that originally agreed, by means of the formalization of a deed.
>
> The document stating the completion of the work will be part of this contract.
>
> If applicable, PEP will request the CONTRACTOR in the settlement the presentation, extension, reduction or extension of the guarantee instruments and, in general, those necessary to guarantee the obligations that must be fulfilled after the termination of the contract.
>
> In the event that the CONTRACTOR does not appear at the settlement, PEP will proceed to do so unilaterally and, where appropriate, to record the payment before the corresponding judicial authority." (emphasis omitted)

114. Under the 803 Contract, the parties agreed to resolve their disputes before Mexico's federal courts in Veracruz, as stated in Clause 33:[43]

> "This contract shall be governed by the Federal Laws of the United Mexican States and other provisions emanating from them, in force. In the event that any dispute arises related to this contract, the parties expressly agree to submit to the jurisdiction of the Federal Courts of the City of Poza Rica de Hidalgo, Veracruz, therefore, the CONTRACTOR irrevocably waives any jurisdiction that may correspond to him by reason of his present or future domicile even in the case of federal jurisdiction, or for any reason." (emphasis omitted)

[43] **C-0032**, 803 Contract, Clause 33.

(2) The performance of the contract

115. In early 2012, the parties began performing. PEP issued work orders and MWS and Bisell performed workovers of PEP's wells.

116. On July 25, 2013, Pemex requested in writing that MWS and Bisell add four workover rigs to the three existing rigs, with a view to allow Pemex to meet the strategic objectives and production goals for the ATG.[44]

117. On October 30, 2013, as a follow-up to the budgeting instructions issued earlier that month by Pemex Planning and Budgeting Department, the managers of the ATG's projects were informed that no additional budgets would be available for the remainder of 2013 and, thus, "for the remainder of 2013 and for 2014," in the case of contracts already signed "no works or services should be carried out, no orders or request issued or commitments entered unless there is certainty that the cash budget to pay them is available."[45]

118. On November 11 and 14, 2013, MWS and Bisell wrote to PEP complaining about it not sending work orders.[46] But on December 26, 2013, PEP advised MWS and Bisell that it would not be issuing any more work orders under the contract and that their equipment should remain at their base.[47]

119. Even if the contract term was extended from the original December 31, 2013, to June 30, 2014, Pemex did not request any further work and in 2014 announced that it would proceed with the process of issuing a *finiquito*.

120. The *finiquito* was negotiated throughout 2014 and signed by the parties on February 10, 2015.[48] Among the most relevant paragraphs are the following:

- In section VII it is stated that "amounts retained to the contractor under the 2% destined to the *Proyecto de Apoyo a la Comunidad y Medio Ambiente* ("**PACMA**") works

[44] **C-0067**, Letter from Pemex to MWS and Bisell, July 25, 2013.

[45] **C-0068**, Pemex Internal Letter, October 30, 2013, p. 1. Tribunal's translation. The original text in Spanish reads: "*3.- De contratos vigentes, no realizar obra, ni realizar servicios, emitir [ó]rdenes, pedidos o cualesquier otro compromiso, si no se cuenta con la certeza de contar con presupuesto en flujo de efectivo para poder pagar.*"

[46] **C-0069**, Letter from Bisell and MWS to Pemex, November 11, 2013; **C-0070**, Letter from Bisell and MWS to PEMEX, November 14, 2013.

[47] **C-0073**, Letter from Pemex to MWS and Bisell, December 26, 2013.

[48] **C-0074**, *finiquito* for 803 Contract, February 10, 2015.

amounts to US$ 533,867.52" (or 2% of the total compensated amount, *i.e.*, US$ 26,693,376.42).

- In section IX titled "final balances of the contract" the total amount of the contract is declared to be US$ 48,000,000.00, while the amount executed and paid is stated as US$ 26,550,013.80.
- In section XII, titled "terms under which the finiquito is carried out", it is stated the following:

> "The contractor states in its memorandum Bisell-MWS-004-2005 to reserve its rights to proceed as it deems appropriate to claim non-recoverable expenses, as well as waiting times and the revision of indirect [expenditures] and financing."[49]

- In this same section XII, PEP states that it does not recognize what has been declared by the contractor.

(3) The litigation under the contract

121. On October 13, 2015, MWS and Bisell initiated a civil lawsuit against PEP in the federal district court in Veracruz, Mexico, for the alleged breach of its obligations under the 803 Contract (the "**Ordinary Civil Trial 75/2015**"). In the lawsuit MWS and Bisell sought to recover damages based on their reservation of rights under the *finiquito*.

122. Shortly thereafter, on October 26, 2015, PEP sent to MWS and Bisell a "notice of conclusion of validity" of the 803 Contract ("*conclusión de la vigencia del Contrato 803*"). The document stated as follows:[50]

> "You are hereby informed that the legal obligations resulting from the paragraphs contained in the settlement (*finiquito*) dated February 10, 2015 of contract 424042803 that covers the "Production Restitution Works in the Northern Region Assets (Package III)" and its clauses have been fulfilled.

[49] **C-0074**, *finiquito* for 803 Contract, February 10, 2015. Tribunal's translation. The original text in Spanish reads: "*Las [sic] contratista manifiesta en su oficio número Bisell-MWS-004-2015 dejar a salvo sus derechos para proceder como a su derecho convenga para el reclamo de gastos no recuperables, así como tiempos de espera y revisión de porcentaje de indirectos y financiamiento.*"

[50] **R-0115-ENG**, Notice of conclusion of validity of Contract 803, October 26, 2015. Tribunal's translation. The Tribunal has corrected some minor inaccuracies which it has noted in this English translation of the original text in Spanish, **R-0115-ESP**.

> Therefore, having complied with the provisions of Article 66 of the *Reglamento de la Ley de Petróleos Mexicanos*, which establishes that 'At the conclusion of contacts a Settlement will be made, in which the fulfillment of the reciprocal obligations between the parties will be established', as such settlement has been fully formalized and as of the date of this document there are no more debts or pending work within the contractual and settlement terms, the conclusion of the validity of contract number 424042803 is notified."

123. The table below summarizes the extraordinarily complex set of rulings and appeals in the judicial proceedings commenced by MWS and Bisell in connection with the 803 Contract.[51]

Date	Act	Exhibit
October 8, 2015	MWS and Bisell submit a civil lawsuit against PEP, which begins the Ordinary Civil Trial 75/2015 in which they claimed PEP's alleged failure to comply with the obligations established in the 803 Contract and requested the payment of more than US$ 21 million.	R-0062
October 15, 2015	The Eleventh District Judge residing in Poza Rica, Veracruz dismisses MWS and Bisell's claim in the Ordinary Civil Trial 75/2015 due to lack of jurisdiction, considering that the nature of the controversy was administrative and not civil.	JAH-0016 RZ-0007
October 20, 2015	MWS and Bisell appeal against the decision in the Ordinary Civil Trial 75/2025 by the Eleventh District Judge in Appeal 35/2015, which was heard by the Fourth Unitary Circuit Court of the Seventh Circuit.	RZ-007
December 30, 2015	The Fourth Unitary Court revokes the decision that dismissed the claim in the Ordinary Civil Trial 75/2015 and declares that the nature of the action is civil and not administrative.	RZ-007
January 6, 2016	Following the decision of the Fourth Unitary Court, the Eleventh Civil District Judge residing in Poza Rica, Veracruz, admits MWS and Bisell's claim in the Ordinary Civil Trial 75/2015.	JAH-0017 RZ-009
January 14, 2016	PEP is notified of the civil lawsuit within the Ordinary Civil Trial 75/2015.	RZ-009

[51] The table is an excerpt, edited by the Tribunal, of the very helpful chronology of events concerning the 803 Contract provided in tabular form by the Respondent on November 27, 2023, in preparation of the Hearing on Jurisdiction and Liability (the "**Hearing**"), as requested in PO1.

January 22, 2016	PEP appeals the admission of the claim in the Ordinary Civil Trial 75/2015 citing lack of subject-matter jurisdiction.	JAH-0019 RZ-009
January 28, 2016	PEP submits its Statement of Defense in the Ordinary Civil Trial 75/2015.	R-0063
January 29, 2016	MWS and Bisell file a cross-appeal opposing PEP's appeal.	R-0064
February 2, 2016	The Eleventh Civil Judge residing in Poza Rica, Veracruz, admits the cross-appeal filed by MWS and Bisell.	R-0064
February 29, 2016	The Eleventh Civil Judge residing in Poza Rica, Veracruz, resolves MWS and Bissell's appeal by ruling that it was unfounded.	R-0064
July 14, 2016	PEP obtains and files an Interlocutory Judgment from the Eleventh Civil Judge, residing in Poza Rica, Veracruz, declaring not to have jurisdiction (*incidente de incompetencia*) to hear the Ordinary Civil Trial 75/2015.	JAH-0021 R-0065
August 10, 2016	MWS and Bisell file an appeal against the Interlocutory Judgment of July 14, 2016. This appeal was sent to the Fourth Unitary Court and registered as Appeal 30/2016.	R-0066 R-0067
September 2, 2016	The Fourth Unitary Court issues Appeal Ruling 30/2016 in which it declares Appeal 30/2016 inadmissible, and determines that it was unable to, *inter alia*, determine whether the appeal was filed within the deadline.	R-0066
September 21, 2016	Pursuant to the Interlocutory Judgment, the Ordinary Civil Trial 75/2015 concludes with an interim judgment declaring that it lacks jurisdiction to hear the civil lawsuit filed by MWS and Bisell. Further, it states that the matter must be sent to the *Tribunal Federal de Justicia Administrativa* ("**TFJA**").	R-0066
October 14, 2016	MWS and Bisell submit an appeal against the Interim Judgment of September 21, 2016 before the Fourth Unitary Court. The appeal is registered as Appeal 36/2016.	RZ-011
January 26, 2017	The Fourth Unitary Court issues Appeal Ruling 36/2016 through which it revokes the interim Judgment of September 21, 2016.	RZ-008
February 20, 2017	PEP submits an Indirect Amparo 4/2017 before the First Unitary Court against Appeal Ruling 36/2016.	RZ-012

March 9, 2017	The recognition and enforcement of Appeal Ruling 36/2016 is suspended by the First Unitary Court.	RZ-012
May 2, 2017	The First Unitary Court issues a decision denying Amparo 4/2017 to PEP.	RZ-008
June 2, 2017	PEP submits a review appeal against the decision in Amparo 4/2017. Their review appeal is registered as Review Appeal 233/2017 before the First Collegiate Court.	RZ-013
May 10, 2018	The First Collegiate Court decides that the acts derived from the 803 Contract are of a private nature and therefore governed by commercial legislation	RZ-013
June 11, 2018	The Ordinary Civil Trial 75/2015 resumes before the Eleventh Civil District Judge.	R-0068
December 11, 2019	PEP submits an Appeal 1/2020 which is filed in the Fourth Unitary Court against the decision of the Eleventh Civil Judge rejecting certain evidence submitted by PEP.	R-0069
January 6, 2020	The evidentiary hearing of Ordinary Civil Trial 75/2015 is set; however, it is deferred due to the submission of Appeal 1/2020.	R-0070
March 28, 2020	Suspension of all labor activities of the Judicial Branch of the Federation derived from the COVID-19 virus.	JAH-0024
August 14, 2020	Bisell and MWS submit their notice of intent to submit a Claim to Arbitration under Annex 14-D as amended by Annex 14-E of the USMCA.	C-0009
September 18, 2020	Bisell and MWS submit a supplement to their Notice of Intent to Submit a Claim to Arbitration under Annex 14-D as amended by Schedule 14-E of the USMCA.	C-0009
September 23, 2020	The Fourth Unitary Court resolves Appeal 1/2020 and orders the admission of some documentary evidence offered by PEP.	R-0072
November 30, 2020	The suspension of deadlines and terms caused by the COVID pandemic within the Ordinary Civil Trial 75/2015 is lifted.	R-0071
March 18, 2021	MWS and Bisell submit a withdrawal before the Eleventh Court, residing in Poza Rica, Veracruz, by which the Ordinary Civil Trial 75/2015 was discontinued.	R-0073 C-0125

March 22, 2021	The Eleventh Court, residing in Poza Rica, Veracruz, requests the legal representative of MWS and Bisell to appear before it for purposes of identifying and recognizing the signature(s) on the withdrawal document that was submitted in name of both companies.	R-0074
April 5, 2021	The Eleventh Court, residing in Poza Rica, Veracruz, determines that the letter of withdrawal from MWS and Bisell had not been submitted, since their legal representative did not appear to acknowledge his signature.	R-0075
October 1, 2021	The Ordinary Civil Trial 75/2015 is deemed to have expired due to procedural inactivity.	R-0076

E. THE 804 CONTRACT

(1) Main terms

124. On March 20, 2013, MWS and Bisell entered into a second contract with PEP, the so-called 804 Contract,[52] this time not for the workover of existing wells but for the drilling of new wells. Under Clause 4.1 of the 804 Contract, the works would be carried out between March 20, 2013, and September 30, 2013.

125. Clause 5 of the 804 Contract set its maximum budget at US$ 55 million and its minimum one at US$ 22 million. It added:

> "It is noted that the budget indicated above will not represent in any way for PEP the obligation to spend the maximum budget established in the contract."

126. Concerning the equipment to be supplied by the contractor, Clause 41 states:

> "The CONTRACTOR shall supply all equipment and Materials, necessary during the execution of the Works in accordance with the Contract Specifications, and shall be responsible for the proper administration, handling and maintenance during the transport and storage of all equipment and Materials. In addition, the CONTRACTOR shall be responsible for the delivery of equipment and Materials to the Site, or to areas outside the Site used by the CONTRACTOR for its temporary installations. Any Material that is damaged or lost during its transport or storage, or during the execution of the Works, will be repaired or replaced by the CONTRACTOR, at its expense." (emphasis omitted)

[52] **C-0033**, Contract 804.

127. The 804 Contract included the "settlement" (*finiquito*) in Clause 18, which is very similar to the *finiquito* Clause in the 803 Contract. Other than the term for the parties to agree on the text of the *finiquito* –120 days in the case of the 804 Contract, as opposed to 90 in the 803 Contract– the only relevant difference between the *finiquito* clauses was that Clause 18 of the 804 Contract was more specific in describing who were expected to sign the *finiquito*, and reads as follows:

> "The document containing the [*Finiquito*] will be signed by the technical representatives of PEP and the Contractor, as well as by the legal representatives of the Parties, and will be part of the Contract."[53]

128. It also included an additional paragraph stating:

> "The term of the Contract will (*sic*.). end until the Settlement is formalized or, in the event that it results in balances in favor of any of the Parties, until de date on which the corresponding amounts are paid in full."[54]

(2) The performance of the contract

129. PEP did not issue its first work order[55] under the 804 Contract until July 12, 2013, *i.e.*, four months into the 6-month contract, for the drilling of a well to be carried out between July 19 and August 19, 2013. Shortly thereafter, PEP issued a second work order[56], for the drilling of a second well between July 25 and August 25, 2013.

130. However, on September 2, 2013, a few weeks after the contractors had notified PEP that their crew and equipment had arrived at the job site, PEP cancelled the first work order and told the Contractors to demobilize their equipment and return to their base of operations. It based the decision on "operational strategies since at the moment no drilling will be carried out, to continue with the completion activities [of other wells] and to be in a position to

---

[53] **C-0033**, Contract No. 424043804 signed between Bisell, MWS and PEP on March 20, 2013 for the drilling of new wells (the "**804 Contract**"), Clause 18. The English version of this clause of the 804 Contract is not completely accurate and has been corrected by the Tribunal: While the Spanish text reads "*El documento donde conste el Finiquito de los Trabajos*", the English text says "the document containing the Completion of the Works." Thus, the Tribunal has considered it preferably to keep the Spanish term "*finiquito*".

[54] In the Tribunal's view, the English translation "will end" is wrong and should have been "will not end". The reason for the mistranslation is in all probability that the Spanish version of the clause reads "*La vigencia del Contrato concluirá hasta que…*", *i.e.,* without a negative particle "no", a language convention which is common in Mexico, Central America, Colombia and Ecuador, but not elsewhere. See Diccionario Panhispánico de Dudas, "*hasta*", second paragraph, available at https://www.rae.es/dpd/hasta.

[55] **C-0076**, Letter from PEMEX to MWS and Bisell, July 12, 2013.

[56] **C-0077**, Letter form PEMEX to MWS and Bisell, July 25, 2013.

comply with the operational program and production goals of PEP's General Directorate."[57]

131. As stated by the Claimants, PEP cancelled also the second work order.[58]

132. On October 15, 2013, PEP advised the manager of the 804 Contract that its term would have to be extended until December 31, 2013, as it had not been possible to get the necessary budgetary allocation in time.[59] The decision was communicated to the Contractors on October 30, 2013.[60]

133. On February 14, 2014, PEP communicated to the contractors the need to extend again the term of the contract by 90 days,[61] *i.e.*, up to March 31, 2014, an extension which was agreed by the parties on February 28, 2014 by signing the Second Contract Amendment (*Convenio No. 2 del Contrato 804*).[62] In the Amendment it was clearly indicated that no works had taken place so far, with the maximum and minimum amounts of the Contract (*i.e.*, US$ 55 and 22 million, respectively) remaining unchanged. According to the Claimants, shortly thereafter PEP asked to terminate the contract, which the Contractors unwillingly accepted.

134. One year later, on April 10, 2015, the parties signed the *finiquito*.[63]

135. The *Acta de Finiquito* clearly states that "no works were carried out during the execution period of the contract." The final statements by the parties read as follows:

> "The Contractor states that it reserves its rights to the recognition, authorization and payment of the minimum amount of 40% of the total amount of the contract set out in its clause 5, as well as the non-recoverable expenses resulting from several suspensions, the waiting times and the revision of the percentage of indirect [expenditures] and financing. On its side, PEP states that it does not recognize what has been declared by the contractor."[64]

---

[57] **C-0078**, Letter from PEMEX to MWS and Bisell, September 2, 2013. Tribunal translation.

[58] Statement of Claim, ¶ 147; Witness Statement of L. Kernion, ¶ 60.

[59] **C-0080**, PEMEX Internal Memo, October 15, 2013.

[60] **C-0081**, PEMEX Letter to Bisell, October 30, 2013.

[61] **C-0087**, Letter from PEMEX to MWS and Bisell, February 14, 2014.

[62] **C-0120**, 804 Contract Amendment, February 28, 2014.

[63] **C-0024**, 804 Contract Finiquito, April 10, 2015.

[64] **C-0024**, 804 Contract Finiquito, p. 4. Tribunal's translation. The original text in Spanish reads: "*La Contratista manifiesta dejar a salvo sus derechos para el reconocimiento, autorización y pago del importe mínimo del 40% del*

(3) The litigation under the contract

136. On December 4, 2015, MWS and Bisell initiated a civil lawsuit (the "**Ordinary Civil Trial 120/2015**") against Pemex in the federal district court in Veracruz for breach of its contractual rights under the 804 Contract, in which they claimed losses or damages for more than US$ 22 million.[65]

137. This civil suit led to years of litigation. The table below summarizes the main steps, rulings and appeals in the judicial proceedings commenced by MWS and Bisell in Mexico in connection with the 804 Contract:[66]

Date	Act	Exhibit
December 9, 2015	The Eleventh District Judge dismissed the claim for lack of subject matter jurisdiction and held that the issue in dispute was not of a civil nature but of an administrative nature.	RZ-017
December 16, 2015	Bisell and MWS submitted the Appeal 1/2016 heard by the Third Unitary Court, through which they challenged the dismissal of their claim by the Eleventh District Judge.	RZ-018
February 12, 2016	Appeal Ruling 1/2016 issued by the Third Unitary Court which confirmed the decision of the Eleventh District Judge.	RZ-018
March 14, 2016	MWS and Bisell submit Direct Amparo 214/2016, which was heard by the First Collegiate Court.	RZ-016
October 7, 2016	The First Collegiate Court issued the Direct Amparo Decision 214/2016 in which it denied protection to MWS and Bisell by	RZ-016 R-0089

monto total del contrato establecido en la cláusula quinta del mismo y de los gastos no recuperables con motivos de diversas suspensiones, los tiempos de espera así como la revisión del porcentaje de indirectos y financiamientos."

[65] **R-0088**, Ordinary Civil Trial 120/2015 lawsuit, December 4, 2015.

[66] The table is also an excerpt, edited by the Tribunal, of the very helpful chronology of events concerning the 804 Contract provided in tabular form by the Respondent on November 27, 2023, in preparation of the Hearing, as requested in PO1.

	determining that the nature of their claims was not civil and therefore the competent instance to hear them was the administrative one.	
March 5, 2019	MWS and Bisell initiated a nullity trial before the TFJA (the "**2019 Annulment Proceeding**"). The trial was filed before the Sixth Chamber of the TFJA under file number 5403/19-17-06-5.	R-0090
March 11, 2019	The TFJA issued a ruling rejecting the claim of MWS and Bisell as inadmissible on the grounds that it did not meet the admissibility requirements established by the Federal Administrative Litigation Procedure Law.	RZ-025
May 17, 2019	The TFJA admitted the appeal submitted by MWS and Bisell against its ruling.	RZ-019
October 1, 2019	The TFJA admitted the lawsuit to be processed regarding the breach of 804 Contract.	RZ-020
December 10, 2019	The PEP Responsibilities Unit submitted an appeal stating that it did not intervene in the alleged act.	RZ-021 RZ-025
August 20, 2020	The TFJA ruled that the PEP Responsibilities Unit was not a party of 804 Contract, so it could not have the status of the requested authority.	RZ-021 RZ-023
December 1, 2020	The TFJA issued a second ruling for the admission of the lawsuit in which it summoned PEP and required it to present the administrative file corresponding to the conciliation procedure issued by the PEP's Responsibilities Unit, since it had been taken as evidence offered by MWS and Bisell and it was admitted.	RZ-025

March 5, 2021	PEP submitted an appeal against the requirement to present the conciliation procedure file.	R-0097
March 18, 2021	MWS and Bisell submitted their withdrawal from the 2019 Annulment Proceeding.	R-0073 C-0126
April 5, 2021	The TFJA required ratification of the withdrawal submitted by MWS and Bisell within a period of three days.	RZ-063
August 17, 2021	The TFJA issued a ruling in which it determined that, since MWS and Bisell did not ratify their withdrawal, it ordered the continuation of the 2019 Annulment Proceeding.	R-0117
August 18, 2021	The TFJA admitted the appeal submitted by PEP against the ruling that ordered PEP to present the file of the conciliation procedure.	RZ-025
December 2, 2021	Resolution of the appeal submitted by PEP, issued by the TFJA in which it determined that the administrative file corresponding to the conciliation procedure could not be admitted as evidence within the 2019 Annulment Proceeding.	RZ-025
February 17, 2022	The TFJA considered that PEP had responded to the Statement of Claim and considered that the court's request for the presentation of evidence consisting of the two administrative files had been met by PEP.	JAH-0027
June 3, 2022	MWS and Bisell submitted again a written withdrawal from the 2019 Annulment Proceeding.	R-0118.
June 14, 2022	MWS and Bisell ratified their withdrawal from the 2019 Annulment Proceeding.	R-0118
June 15, 2022	The TFJA ordered the dismissal of the 2019 Annulment Proceeding.	R-0118

F. THE 821 CONTRACT

138. In August 2013, Pemex formally announced the international tender for a contract for "integrated works for drilling and completion of onshore wells" for an estimated four years.[67] Similar to the 803 Contract, interested bidders needed to pre-qualify and meet Pemex's technical and financial requirements.

139. On February 12, 2014, Pemex awarded the 821 Contract to Finley and Drake-Mesa; the contract was signed on February 28, 2014.[68]

(1) Main terms

140. In the declarations of the 821 Contract, PEP made a contractual representation that it "has allocated the resources to carry out the Works under this Contract."

141. Clause 3 on "good faith and fairness", reads:

> "In the fulfillment of their obligations under the Contract, PEP and the CONTRACTOR will act in accordance with the provisions of the LPM, the RLPM, the DAC and other applicable Federal Mexican Legal Provisions, as well as based on the principles of good faith and equity. The provisions of the Contract as well as any statement made by PEP or the CONTRACTOR in relation to it, shall be interpreted in accordance with the provisions of the LPM, the RLPM, the DAC and other applicable Mexican Legal Provisions of a federal nature.[69]
>
> Good faith and fairness in this context includes, without limitation, the duty to cooperate, not to intentionally mislead and to perform the Contract for the mutual benefit of PEP and the CONTRACTOR, agreeing that each has the right to achieve its reasonable objectives, and requires PEP and the CONTRACTOR:
>
> I. Sharing relevant information with the other party, subject only to confidentiality obligations;
>
> II. Cooperate and consult each other in the manner necessary to achieve the completion of all the Work;

---

[67] **C-0043**, International Public Tender FTA Number 18575088-542-13 (2013) (821 Contract), p. 3 of the PDF. Tribunal's translation.

[68] **C-0034**, 821 Contract.

[69] LPM means "Ley de Petróleos Mexicanos", Mexico's Petroleum Law or Pemex Law. RLPM means "*Reglamento de la Ley de Petróleos Mexicanos*" or the Regulations to Mexico's Petroleum Law. DAC means "*Disposiciones Administrativas de Contratación en materia de Adquisiciones, Arrendamientos, Obras y Organismos Susibidiarios*" or the Administrative Rules regarding Contracting with respect to Acquisitions, Leases, Works, and Subsidiarios.

III. Warn of potential consequences, including those of costs of proposed actions;

IV. Avoid unnecessary interference in the activity of the other party; and

V. Answer the questions of the other party in a timely manner, which, if possible, will not prevent the progress of the Work.

Whenever consultation is required between PEP and the CONTRACTOR in terms of the Contract, it means that there will be a direct exchange of views before final decisions are made on the matter." (emphasis omitted)

142. Under Clause 4.1, the period for the execution of the works ran from March 1, 2014, up to December 31, 2017.

143. Clause 5, on "minimum and maximum amount of the contract", reads:

> "The minimum budget that PEP will exercise in the Contract is $648,291,600.00 M.N. (Six hundred and forty-eight million two hundred and ninety-one thousand six hundred pesos 00/100 M.N.) plus $119,000,000.00 USD (One hundred and nineteen million US dollars 00/100 USD), not including VAT ("Minimum Contract Amount"), while the maximum budget that PEP may exercise is $1,605,475,080.00 M.N. (One thousand six hundred and five million four hundred and seventy-five thousand eighty pesos 00/100 M.N.), plus $294,700,000.00 USD (Two hundred and ninety-four million seven hundred thousand US dollars 00/100 USD) excluding VAT ("Maximum Contract Amount").
>
> PEP will not be obliged to exercise the Maximum Amount of the Contract, without prejudice to the fact that it may be increased in terms of the provisions of CLAUSE 13, "MODIFICATIONS TO THE CONTRACT".
>
> PEP clarifies that since the prices of annex DE-2 "Catalogue of Unit Prices, presented by the consortium Drake-Mesa S. de R.L. de C.V./Finley Resources Inc. in Package 5, the maximum and minimum amounts awarded in National Currency (pesos) were presented only in US dollars, for the purpose of registration in the institutional PEP systems, as well as the payment of the works, the maximum and minimum amounts awarded in the same currency, considering an exchange rate of $12.9889 M.N. pesos per dollar, which corresponds to the exchange rate of the date of celebration of the act of presentation and opening of proposals.
>
> Based on the provisions of the previous paragraph, the minimum amount approved to dollars is $168'911,201.10 (One hundred and sixty-eight million nine hundred and eleven thousand two hundred and one dollar[s] 10/100 USD), not including VAT, while the maximum amount approved to dollars is $418'303,621.55 (Four hundred eighteen million three hundred three thousand six hundred and twenty-one dollars 55/100 USD)." (emphasis omitted)

144. Under Clause 6.6, the Contractor was liable for a conventional penalty in case it did not comply with its obligations under the contract. The clause envisaged several contractual penalties.

145. The "Contract Penalty for Delay in the Initiation of Drilling Work Orders" was regulated as follows:

> "In the event that the CONTRACTOR, for reasons attributable to him, does not comply in a timely manner with the start of operations on the start date established in each Work Order issued for the drilling of wells, PEP will apply a conventional penalty in the amount of $17,500.00 USD. (Seventeen thousand five hundred Dollars of the United States of America, 00/100), for each Day of arrears, counted from the date of commencement established by the Work Order in question and until the date on which the CONTRACTOR actually commences operations, inclusive. This penalty will be applied up to a maximum period of 15 (fifteen) Days, after which without the CONTRACTOR having started the corresponding Works, the relative Work Order is considered breached, and PEP may issue a new Work Order […]." (emphasis omitted)

146. The "Contract Penalty for Administrative Termination of the Contract" was regulated as follows by Clause 6.6.3:

> "In the event that in accordance with the provisions of CLAUSE 15 "TERMINATION OF THE CONTRACT", PEP determines the administrative termination of the Contract for breach of the CONTRACTOR, PEP will apply to it a conventional penalty consisting of the amount equivalent to the amount of the Guarantee of Compliance that according to the Contract must be in force on the date on which PEP communicates to the CONTRACTOR the administrative termination of the Contract." (emphasis omitted)

147. Under Clause 10.1, on "guarantees of compliance", the contract stated:

> "In order to guarantee the fulfilment of the obligations derived from this Contract, the CONTRACTOR delivered to PEP, in original, prior to the signing of the same, bond policy before, in favor and at the disposal of PEP, for the value equivalent to 10% (ten percent) of the maximum amount of the contract (Guarantee of Compliance), issued by a guarantor institution legally constituted in the Mexican Republic, in terms of the Federal Law on Bonding Institutions and in favor of PEP." (emphasis omitted)

148. In the same clause, the declarations made by the Contractor included, as letter H, the following one:

"Your agreement for the guarantor to settle to PEP the maximum limit guaranteed in the event that the works object of this contract are not useful or usable by PEP and despite the fact that the corresponding certificate of progress has been issued, on the understanding that any exception derived from the investment and or partial or total application of the advance and/or payment of invoices will not be valid for the purpose of determine the enforceability of the total amount guaranteed in the security, since, taking into account the object of this contract, the obligation to invest and/or apply the advance and the payment of invoices is indivisible since it has as its object an execution that only being satisfied in full can be useful or usable for PEP, consequently, any application and/or partial or total investment of the advance and/or payment of invoices received by the CONTRACTOR that does not result, in accordance with the object of this contract, in a useful and usable work for PEP will be ineffective in substantiating any exception that seeks to distort the enforceability of the total amount guaranteed." (emphasis omitted)

149. Clause 15.1 on "administrative termination" of the contract reads as follows:

"PEP may, at any time, administratively terminate the Contract, without the need for a judicial or arbitral declaration, through the procedure established in this Clause, in the event that the CONTRACTOR is located in any of the following cases:

a) If the CONTRACTOR does not submit to PEP the Guarantee of Compliance and/or amending documents and/or letters of consent, as the case may be, of the institution that granted the Guarantee of Compliance, within the maximum period indicated for each case in paragraph 10.1 of CLAUSE 10 "GUARANTEES";

b) If the CONTRACTOR does not execute the Works in accordance with the provisions of the Contract or without justified reason, it does not comply with the written orders given by the Construction Resident;

c) If the CONTRACTOR is declared subject to bankruptcy, bankruptcy or suspension of payments, or any other similar figure;

d) If during the execution of the Contract the CONTRACTOR loses the technical, financial and operational capacities that it has accredited for the award of the Contract;

e) If the CONTRACTOR is revoked or permanently canceled any governmental permission or authorization necessary for the fulfillment of its obligations under the Contract;

f) If the CONTRACTOR unjustifiably interrupts or abandons the Works or refuses to repair or replace any part of it, which has been detected as defective by PEP;

g) When without the express authorization of PEP the CONTRACTOR assigns or transfers the obligations and rights of the Contract in any way;

h) When without the express authorization of PEP the CONTRACTOR assigns or transfers the shares, social parts and interests of the CONTRACTOR or its joint and several obligors;

i) If the CONTRACTOR changes his nationality, in the event that it has been established as a requirement to have a certain nationality or, if being a foreigner, invokes the protection of his government in relation to the Contract;

j) It is located in the cases of the "ANTI-CORRUPTION CLAUSE";

k) When the CONTRACTOR relapses into breach of any of the obligations contained in Annex "SSPA" of the Contract. For the purposes of this Clause, recidivism shall be understood as the failure to comply, for two or more different events, or for two or more times of the same event;

l) When the CONTRACTOR causes an accident due to non-compliance with the general requirements indicated in format 4 of Annex "SSPA" of the Contract;

m) When, due to the execution of the Contract, the CONTRACTOR causes the death of one or more people, due to lack of foresight, negligence, breach of any of the requirements or obligations established in the Annex "SSPA", or for the breach of other obligations of the Contract or the provisions on Safety, Health at Work and Environmental Protection. In this case, PEP may initiate the administrative termination procedure once the competent judicial authorities determine by a final and irrevocable judgment that the responsibility for this event is attributable to the CONTRACTOR;

n) When in the development of the Contract the CONTRACTOR incurs in environmental crimes for non-compliance with any of the requirements of the Annex "SSPA", obligations of the Contract or the provisions on Safety, Health at Work and Environmental Protection. In this case, PEP may initiate the administrative termination procedure once the competent judicial authorities determine by a final and irrevocable judgment that the conduct carried out by the CONTRACTOR constitutes an environmental crime;

o) When, as a result of the monthly verifications for the performance evaluation, the CONTRACTOR obtains three consecutive grades of less than 90% (ninety percent), PEP may initiate the process of administrative termination of the Contract, in accordance with diagram 1 of Annex "SSPA";

p) When as a result of the annual review for the evaluation of the performance of the CONTRACTOR, it obtains a rating of less than 80% (eighty percent), in accordance with the provisions of Annex "DT-2."

In case of updating the previous assumption and PEP chooses not to terminate the Contract, it will carry out three performance evaluations of the CONTRACTOR consecutively with a bimonthly periodicity, carried out which and if a rating of less than 80% persists, PEP will initiate the procedure of administrative termination of the Contract.

q) If the CONTRACTOR subcontracts part of the work object of the Contract, other than those authorized in paragraph VI "Subcontracting" of Annex "DT-2", or changes subcontractor, without the prior written authorization of PEP;

r) In the event that the CONTRACTOR accumulates 15 (fifteen) Unfulfilled Orders during the Contract Execution Period; and

s) In the event that the CONTRACTOR fails to comply with its obligations under the terms established in the Contract.

In the event that the CONTRACTOR is placed in any of the cases indicated in this Clause, prior to the determination of the termination, PEP may grant a period to correct said breach, without prejudice to the conventional penalties that, where appropriate, have been agreed. The period will be determined by PEP according to the circumstances of the Contract. If, at the end of this period, the CONTRACTOR has not remedied the breach, PEP may determine the administrative termination in accordance with the procedure indicated in this Clause." (emphasis omitted)

150. Clause 17, on "suspension of work", reads as follows:

"PEP may temporarily suspend, in whole or in part, the Contracted Works in any state in which they are, when the needs of the project or the Contract so require, without implying the termination of the Contract. When the resumption of the Works is linked to a certain fact or act of realization but of an indeterminate date, the period of the suspension will be subject to the updating of that event, without prejudice to the fact that the early termination of the Contract may be chosen.

If this is the case, PEP will communicate the suspension to the CONTRACTOR, indicating the causes that motivate it, the date of its beginning and the probable resumption of the Works, as well as the actions that it must consider in relation to its personnel, machinery and Equipment of the CONTRACTOR.

For the purposes of this Clause, the time that elapses between the issuance of Work Orders by PEP shall not be considered as suspension of the Works or the Contract.

[…]

The Construction Resident, prior to the suspension being lifted or once he informs the CONTRACTOR of the recognition of the suspension, as the case may be, will proceed to prepare the detailed act of suspension for its formalization and, together with the CONTRACTOR, will determine the adaptations to the Program of Execution of the Works, considering exclusively the deferrals caused by the suspension, adjusting without modifying the corresponding operational periods and processes." (emphasis omitted)

151. Clause 17.1 regulates the recognition by PEP of "non-recoverable expenses" in the following terms:

> "When PEP determines or recognizes the suspension of the Works, upon request submitted by the CONTRACTOR for this purpose, PEP will pay the CONTRACTOR the Non- Recoverable Expenses corresponding to the following concepts, provided that, in the opinion of PEP, they are reasonable, are duly verified and are directly related to the Contract:
>
> I. Reduced equipment rents or, as long as they cannot be transferred to another work front or if it is cheaper, to the freight of the withdrawal and return of the same to the Site;
>
> II. The scheduled labor that remains on the Site during the period of the suspension that has not been transferred to another work front and that is registered in the Log or in the attendance control document defined by PEP and the CONTRACTOR;
>
> III. The cost of maintenance, maintenance and surveillance of the work site during the suspension.
>
> Once the amounts of the Non-Recoverable Expenses have been calculated in terms of the provisions of this Clause, the percentages for Indirect, financing or profit may not be applied to said amounts.
>
> It is expressly agreed by the Parties that in case of suspensions derived from Fortuitous Event or Force Majeure recognized by PEP, the payment of Non-Recoverable Expenses will not be appropriate." (emphasis omitted)

152. Clause 17.2 regulates the "Request for recognition of suspension, granting of extension and payment of Non- Recoverable Expenses" as follows:

> "The request for recognition of suspension and, where appropriate, the request for Payment of Non-Recoverable Expenses, must be presented by the CONTRACTOR to the Construction Resident, within 20 (twenty) Days following the date on which the CONTRACTOR resumes the suspended Works, accompanied by the corresponding supporting documentation.
>
> The CONTRACTOR expressly accepts that after the indicated period without having submitted said request(s) in the terms indicated in this Clause, it precludes for the CONTRACTOR the right to claim the payment of Non-Recoverable Expenses incurred, so any subsequent request made by the CONTRACTOR in this regard, will be considered inadmissible by PEP." (emphasis omitted)

153. Clause 18 regulates the *finiquito* ("settlement") as follows:

> "Physically received all the Works through the Act of Total Reception, PEP, through the Resident of Work, and the CONTRACTOR, must prepare within the term of 120 (one hundred and twenty) Days the Settlement of the

Works, which will be part of the Contract and in which the fulfillment of the reciprocal obligations between the Parties will be established. Likewise, in said Settlement the adjustments, revisions, modifications and recognitions that may arise and the balances in favor and against the Parties, as well as the agreements, conciliations or transactions that are agreed to end the controversies that, where appropriate, have been presented.

The aforementioned period may be extended by duly documented agreement between the Parties, up to a period equal to that originally agreed, by means of the formalization of a record.

The document containing the Completion of the Works will be signed by the technical representatives of PEP and the CONTRACTOR, as well as by the legal representatives of the Parties.

Where appropriate, PEP will request the CONTRACTOR and the latter will be obliged to present, prior to the signing of the Settlement, the modification to the Guarantee of Hidden Defects and Vices that is necessary to guarantee the obligations covered by said guarantee that subsist after the Termination of the Contract.

In the event that the CONTRACTOR does not appear at the Settlement, PEP will proceed to carry it out unilaterally and, in the event that the Settlement shows that there is a balance in favor of the CONTRACTOR and he refuses to collect it, PEP may record the payment before the corresponding jurisdictional authority. The term of the Contract will end until the Settlement is formalized or, in the event that it results in balances in favor of any of the Parties, until the date on which the corresponding amounts are paid in full." (emphasis omitted)

154. Clause 41 regulates the "supply of equipment and materials" as follows:

"The CONTRACTOR shall supply all equipment and Materials, necessary during the execution of the Works in accordance with the Contract Specifications, and shall be responsible for the proper administration, handling and maintenance during the transport and storage of all equipment and Materials. In addition, the CONTRACTOR shall be responsible for the delivery of equipment and Materials to the Site, or to areas outside the Site used by the CONTRACTOR for its temporary installations. Any Material that is damaged or lost during its transport or storage, or during the execution of the Works, will be repaired or replaced by the CONTRACTOR, at its expense." (emphasis omitted)

155. Clause 47.2, on "arbitration", reads as follows:

"All disagreements, discrepancies, differences or controversies arising out of or relating to the interpretation or performance of this Agreement, which have not been resolved by any of the mechanisms provided for in the Agreement, shall be definitively resolved by arbitration conducted in accordance with the Arbitration Rules of the International Chamber of

Commerce in force on the date of submission of the demand for arbitration, by three arbitrators appointed pursuant to the Arbitration Rules.

The administrator of the arbitration will be the International Court of Arbitration of the ICC, the seat of the arbitration will be Mexico City, Federal District, Mexico, the arbitration will be in Spanish, including all acts and documents that are generated due to the substantiation of the procedure, being the legislation applicable to the substance of the business the Mexican federal laws, its regulations and other provisions deriving therefrom, including and above all, the Mexican Petroleum Law, its Regulations, the Administrative Contracting Provisions on acquisitions, leases, works and services of the substantive activities of a productive nature of Petróleos Mexicanos and Subsidiary Organizations, and the other provisions issued by the Board of Directors of Petróleos Mexicanos, in terms of Article 53 of the Mexican Petroleum Law.

The parties agree from this moment in order to agree to their interests, to exclude themselves from the Provisions on the "Emergency Arbitrator" referred to in the Arbitration Rules of the International Chamber of Commerce in force as of January 1, 2012 (two thousand twelve) or the Rules that replace it, if it considers that figure.

The procedures for administrative termination and early termination of the contract, established by PEP are of an administrative nature, so they will not be subject to arbitration." (emphasis omitted)

156. Clause 47.3, on "jurisdiction", reads as follows:

> "In the event that PEP administratively terminates the Contract or terminates the Contract early, as well as in the event that the PEP, pursuant to Clause Sixteen, denies a request by the CONTRACTOR to terminate the Contract early and the CONTRACTOR chooses to combat such determinations, the parties expressly agree to submit to the jurisdiction of the Federal Courts with jurisdiction in the Mexico City, Federal District, therefore, the CONTRACTOR irrevocably waives to submit to any other federal and/or non- jurisdictional instance." (emphasis omitted)

157. Finally, Clause 48, on "community and environmental support" reads as follows:

> "The CONTRACTOR undertakes to comply with the criteria and rules of operation established in the PACMA Annex that is part of this contract, and all the obligations immersed in it and that are mentioned in the following: The obligatory contribution by the CONTRACTOR, which in the case of this program will be at least 2% of the total amount of this contract, Criteria and Rules of Operation, Conditions and Form of Payment Subject to Key Performance Indicators, Additional Causes of the Established Termination Clause, among others." (emphasis omitted)

(2) The performance of the contract

158. Finley and Drake-Mesa began work under the 821 Contract in May 2014. For the next few months, PEP issued work orders, and Finley and Drake-Mesa performed the work.

159. However, on November 13, 2014, an internal memo[70] addressed to the managers of the ATG indicated that the budget allocations for the project had been less than 50% of the amount requested and, hence, drilling and termination activities had to be suspended. It further indicated that the operational program in 2015 would have to be adjusted to the budget allocated in that year.

160. As a result, PEP did not request any work under the 821 Contract from November 2014 until March 2015, when it requested work again.

161. On July 16, 2015, PEP announced to the Contractor its intention to amend the 821 Contract such that the Contractor offered PEP a 5% discount on its billing for work done during 2015.[71] However, on August 12, 2015 the Contractor responded and recalled that it had just been asked by PEP, by letter dated July 28, 2015,[72] to stay prepared and wait until the next work order was sent, with the waiting period not being considered a "suspension", as set out in Clause 17. Hence, the Contractor considered itself unable to accept the proposed amendment "until this situation of suspension of the work covered by the contract is regularized."[73]

162. On September 24, 2015, the Board of Directors of Pemex decided to extend from 20 to 180 days the term of the payments to its contractors,[74] a change which PEP announced it would be including as an amendment to the 821 Contract.[75]

163. The Claimants state that at "some point between 2014 to 2016, Pemex issued a work order that resulted in us having to subcontract with Halliburton to complete the work. We subcontracted with Halliburton and Haliburton performed the work. Pemex did not pay for

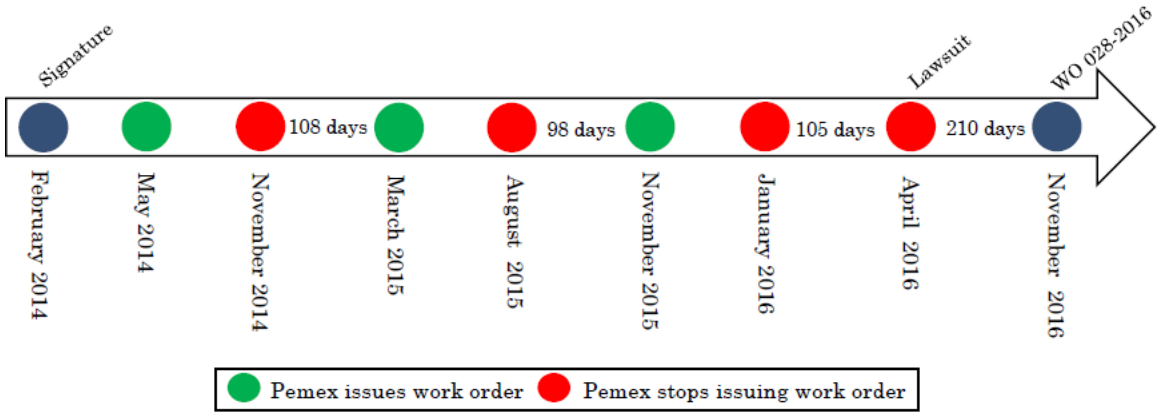
[70] **C-0091**, Pemex Internal Email, November 13, 2014.
[71] **C-0092**, Letter from Pemex to Finley and Drake-Mesa, July 16, 2015.
[72] **C-0094**, Letter from Pemex to Finley and Drake-Mesa, July 28, 2015. PEP's request is contained in this letter.
[73] **C-0093**, Letter from Finley and Drake-Mesa to Pemex, August 12, 2015.
[74] **C-0095**, Pemex Internal Letter, September 24, 2015.
[75] **C-0096**, Letter from Pemex to Finley and Drake-Mesa, January 21, 2016.

this work, and consequently, we could not pay Halliburton. Halliburton then sued us in the U.S. Ultimately, we settled with Halliburton for approximately US$ 800,000."[76]

164. In November 2015, PEP resumed requesting work, but stopped again in January 2016. And, on January 22, 2016, PEP wrote again to the contractors ordering to stay prepared and wait until the next work order was sent, reminding them that, under Clause 17, the waiting period between work orders was not to be considered a "suspension".

165. By April 2016, PEP had not requested work for over 100 days, with the cumulative period of inactivity under the contract amounting to 300 days of inactivity. As this inactivity was producing heavy losses for the contractor, Finley and Drake-Mesa sought relief from a Mexican federal civil court on April 29, 2016.

166. Overall, if the work order issued on November 16, 2016, is also included–, as discussed below, –the timeline of the work orders and periods of inactivity under the 821 Contract was as follows:[77]



167. After submitting its civil claim against PEP on April 29, 2016, in order to contain their mounting costs Finley and Drake-Mesa laid off their employees and no longer kept their equipment or any employees on standby pending PEP ordering a work order, which left

[76] Witness Statement of J. Finley, ¶ 50; Statement of Claim, ¶ 188.

[77] Claimants' Opening Presentation at the Hearing, slide 25.

them unready to perform.[78] Specifically, they moved most of their equipment from their yard in Poza Rica to another storage yard where the equipment remains to this day.[79]

(3) The commercial litigation under the contract (Ordinary Civil Trial 200/2016)

168. As indicated above, on April 29, 2016, Finley and Drake-Mesa initiated a civil lawsuit against PEP before the Eighth Civil District Court in Mexico City, based on the following claims:[80]

- Payment of the minimum amount of the contract (*i.e.*, US$ 120,856,548.84)
- Payment of non-recoverable expenses resulting from suspension of works
- Payment of damages generated by the lawsuits against the Claimants initiated by their subcontractors (*e.g.*, Halliburton)

169. The table below summarizes the main steps, rulings and appeals in the judicial commercial proceedings commenced by Finley and Drake-Mesa in Mexico in connection with the 821 Contract:[81]

Date	Act	Exhibit
April 29, 2016	Drake-Finley, Finley and Drake-Mesa filed a civil lawsuit against PEP, for the alleged breach of the 821 Contract, which was transferred to the Eighth Civil District Court in Mexico City ("**Ordinary Civil Trial 200/2016**").	R-0045 R-0046 RZ-026
November 8, 2017	Ordinary Civil Trial 200/2016 ruling issued by the Eighth Civil District Court, which determined that it lacked jurisdiction to hear the claim.	R-0045
November 16, 2017	Drake-Finley and PEP filed appeals against the Ordinary Civil Trial 200/2016 ruling, (registered as "898/2017 Appeal" and "899/2017 Appeal" respectively), before the	R-0047

[78] Statement of Claim, ¶ 193; Witness Statement of J. Finley, ¶ 52; Witness Statement of L. Kernion, ¶ 86.

[79] Witness Statement of L. Kernion, ¶ 87.

[80] **RZ-0026**, District Court Judgment CP-82, November 8, 207.

[81] The table is also an excerpt, edited by the Tribunal, of the very helpful chronology of events concerning the 821 Contract provided in tabular form by the Respondent on November 27, 2023, in in preparation of the Hearing, as requested in PO1.

	Third Unitary Court.	
April 19, 2018	First ruling issued by the Third Unitary Court[82] by which, *inter alia*, it confirmed that the Eighth Civil District Judge lacked jurisdiction to hear claims between PEP and Drake-Finley due to the ICC arbitration clause established in the 821 Contract.	R-0047
May 25, 2018	PEP and Drake-Finley started Amparo proceedings against the 898/2017 Appeal ruling. The trials were registered as Direct Amparo 425/2018 and Direct Amparo 426/2018 before the Tenth Collegiate Court in Civil Matters of the First Circuit.	RZ-031
February 8, 2019	Ruling issued by the Tenth Collegiate Court of the Direct Amparo 425/2018, which confirmed that the Parties had not resorted to the arbitration clause and the case had to be heard by the Third Unitary Court.	RZ-031
April 2, 2019	Second appeal ruling issued by the Third Unitary Court within the 898/2017 Appeal, which dismissed the claimants' claims against PEP, without imposing costs on them (the "**TUCMA Judgment**").	R-0048 JAH-0032
April 10, 2019	PEP filed the Direct Amparo 306/2019 against the TUCMA Judgment, to obtain a favorable ruling on costs.	RZ-032
August 22, 2019	Direct Amparo 306/2019 ruling issued by the Tenth Collegiate Court granting the protection required by PEP for the purpose of the Third Unitary Court in Civil Matters of the First Circuit (the "**Third Unitary Court**") issuing a resolution addressing the issue of expenses and costs.	RZ-032
September 9, 2019	Third ruling issued by the Third Unitary Court in the 898/2017 Appeal in compliance with the Direct Amparo 306/2019 ruling, which refused to condemn Drake-Finley to pay expenses and costs.	RZ-032

[82] Given the heavy docket of the Third Unitary Tribunal, the ruling was in fact made, in keeping with applicable rules, by the Auxiliary Unitary Tribunal seated in Acapulco. See first expert report of Jorge Asali ("**First Asali Report**"), ¶ 120.

September 24, 2019	PEP filed Direct Amparo 783/2019 against the third ruling in the 898/2017 Appeal.	RZ-033
June 22, 2020	The Tenth Collegiate Court issued the Direct Amparo 783/2019 ruling in which it granted protection to PEP with the effect that the Third Unitary Court issued a new resolution in which it justified the reasons why Drake-Finley was excepted from being sentenced to pay expenses and costs.	RZ-035
October 23, 2020	The Third Unitary Court issued the fourth ruling in the 898/2017 Appeal in compliance with the Direct Amparo 306/2019 ruling, in which it sentenced Drake-Finley to pay expenses and costs.	RZ-033
November 17, 2020	PEP filed Direct Amparo 540/2020 against the fourth ruling in the 898/2017 Appeal alleging that it did not condemn Drake-Finley to pay the costs and expenses of the process, *i.e.*, first and second instance.	RZ-036
September 28, 2021	The Tenth Collegiate Court issued the Direct Amparo 540/2020 ruling in which it resolved that the Third Unitary Court should condemn Drake-Finley to pay expenses and costs in both instances.	RZ-036
October 21, 2021	In compliance with the Direct Amparo 540/2020 ruling, the Third Unitary Court issued the Fifth Appeal Ruling within the 898/2017 Appeal in which it condemned Drake-Finley to pay expenses and costs in both instances (*i.e.*, for the Ordinary Civil Trial 200/2016 and for the 898/2017 Appeal) in favor of PEP.	RZ-038

(4) The administrative rescission of the contract

170. As they will loom large in this arbitration, Chapter X of this Decision will discuss in detail the facts related to the administrative rescission by PEP of the 821 Contract. Thus, at this stage, for the purpose of the jurisdictional and attribution issues to be considered in Chapter V, it will suffice to recap in the table below the key milestones in the administrative rescission of the 821 Contract and its aftermath:

Date	**Act**	**Exhibit**

May 31, 2016	The Head of the PACMA North Regional Office informs the PEP's manager of the 821 Contract, Luis Gómez Herrera, of the non-compliance with 7 Works or Actions Programs ("**PROAS**") and the pertinent adjustments to the payment of invoices.	C-0122
November 25, 2016	PEP issues **Work Order 028-2016** for the drilling by the Contractors of the 821 Contract of the Coapechaca 1240 well (the "**Coapechaca 1240 Well**").	R-0041
December 16, 2016	Communication from PEP to Drake-Finley *et al.* notifying the non-compliance with PACMA obligations and requesting the regularization of said processes.	R-0109
July 31, 2017	PEP notifies Drake Finley *et al*. of the initiation of the administrative termination procedure.	C-0104
August 14, 2017	Drake-Finley *et al*. submit a written response within the administrative termination proceeding of the 821 Contract.	R-0108
August 16, 2017	PEP goes to Drake-Finley's offices to attempt to notify Drake-Finley's legal representative of the opening of the hearing period of the administrative termination procedure of 821 Contract. Since the legal representative was not at the address, PEP delivered a summons stating that it would return to notify the legal representative on August 17, 2017.	R-0013
August 17, 2017	For the second time PEP attempts to notify Drake-Finley's legal representative at the contractor's offices the opening of the hearing period of the administrative termination proceeding of the 821 Contract. PEP notifies Mrs. Cristina Vizcaíno Díaz, since the legal representative was not at Drake-Finley's offices.	R-0013
August 28, 2017	PEP issues the "**Administrative Rescission"** of the 821 Contract.	R-0042
August 29, 2017	Drake-Finley *et al*. are notified the resolution of Administrative Rescission of the 821 Contract.	R-0014
September 4, 2017	Drake-Finley *et al*. starts an administrative proceeding before the TFJA against the administrative rescission resolution, which began the 2017 Annulment Proceeding.	R-0044 RZ-039

May 16, 2018	A meeting of representatives from PEP's Legal Department and operational units is held in Villahermosa, Tabasco (the "**Villahermosa Meeting**") and it is decided that the amount to be claimed under the bond for the 821 Contract will be the full amount of the guarantee, *i.e.*, US$ 41.8 million.	C-0128
September 18, 2018	PEP and Drake-Finley agree to suspend the preparation of the *finiquito*, in accordance with the interim measures issued within the 2017 Annulment Proceeding.	C-0107
October 4, 2018	The TFJA issues its judgment on the 2017 Annulment Proceeding and confirms the legality of the termination of the 821 Contract (the "**TFJA Judgment**").	RZ-039
January 18, 2019	Drake-Finley promotes a direct Amparo against the ruling issued by the TFJA, which was referred to the Fourteenth Collegiate Court on Administrative Matters of the First Circuit (the "**Direct Amparo 74/2019**").	R-0051
January 30, 2020	Judgment issued by the Fourteenth Collegiate Court denying Direct Amparo 74/2019 against the 2017 Annulment Proceeding ruling.	R-0050
March 5, 2020	Drake-Finley files an appeal for review against the Direct Amparo 74/2019 ruling, which was transferred to the SCJN (the "**Appeal for Review 1685/2020**").	R-0053
March 17, 2020	The SCJN dismisses Appeal for Review 1685/2020 upon determining that it was inadmissible.	R-0054
March 25, 2021	Finley, MWS, and Prize submit their Request for Arbitration.	N/A
October 18, 2021	First notification from PEP to Drake-Finley informing that the formalization of the *finiquito* of the 821 Contract will be on October 27, 2021.	R-0008
October 19, 2021	Second notification from PEP to Drake-Finley informing that the formalization of the *finiquito* of the 821 Contract will be on October 27, 2021.	R-0009

November 5, 2021	Third notification from PEP to Drake-Finley through letter PEP-DG-SASEP-CSTPIP-2533-2021 dated October 27, 2021 requiring them to attend a new meeting to formalize the *finiquito* of the 821 Contract on November 10, 2021.	C-0013
November 10, 2021	Drake-Finley do not attend the meeting called to sign the *finiquito*. PEP unilaterally issues the *finiquito* for the 821 Contract.	R-0043
December 2, 2021	PEP submits the formal claim to Finanzas Dorama, S.A. of the bond corresponding to 821 Contract for US$ 41.8 million dollars.	C-0014
January 12, 2022	Finley receives a communication from Finanzas Dorama indicating that on December 2, 2021, Pemex made the formal claim for the bond for 821 Contract for US$ 41.8 million.	C-0108

G. PEP's 809 CONTRACT WITH INTEGRADORA AND ZAPATA

171. To the extent that (i) the National Treatment claims made by the Claimants are based on the alleged discriminatory treatment to the Claimants given by PEP and Mexico in comparison to the Mexican company Integradora de Perforaciones y Servicios, S.A. de C.V. ("**Integradora**") and Zapata Internacional, S.A. de C.V. ("**Zapata**") (together "**Integradora and Zapata**") and (ii) the Respondent has raised a jurisdictional objection *ratione temporis* on those claims, a brief summary of the relevant dates of the contract between PEP and Integradora and Zapata, Contract No. 424043809 (the "**809 Contract**"), is contained in the table below:

Date	Act	Exhibit
February 26, 2013	PEP awards 809 Contract to Integradora y Zapata through a direct award.	R-0098
March 1, 2013	The 809 Contract is signed.	R-0098
March 1, 2013	Integradora and Zapata receive the first work order.	R-0100
August 26 to December 9, 2013	Suspension of work under 809 Contract due to the flooding of one of the wells due to the passage of tropical storm "Fernand".	R-0101
August 21, 2015	PEP and Integradora and Zapata sign the *finiquito* of the 809 Contract. In the *finiquito* Integradora and Zapata declare as outstanding	R-0099

	several contractual claims against PEP.	
April 9, 2018	PEP and Integradora and Zapata sign an *acta circunstanciada*, which is an agreement between the parties settling their contractual disputes (the "***Acta Circunstanciada***").	C-0062
June 25, 2018	PEP and Integradora and Zapata sign an *Acta de Extinción* (extinction) of rights and obligations under the 809 Contract (the "***Acta de Extinción***").	JAH-0066

IV. THE PARTIES' PRAYERS FOR RELIEF

A. THE CLAIMANTS' POSITION

172. In their Statement of Claim, the Claimants asserted that "Mexico breached the NAFTA and the USMCA by failing to afford Claimants with National Treatment and Minimum Standard of Treatment. These breaches caused direct and substantial harm to Claimants for which they seek compensation in this arbitration."[83] They added that "[i]n accordance with customary international law, Claimants seek full reparation for their losses. As will be further elaborated upon in the damages phase of this arbitration, Claimants incurred substantial losses of at least US$ 200 million in lost profits, out-of-pocket losses, lost opportunity costs, and reputation damages."[84]

173. In their Reply,[85] the Claimants were more specific, and requested that the Tribunal find that:

- The Tribunal has jurisdiction over this arbitration and reject all of Mexico's objections regarding the 803 Contract, the 804 Contract, and the 821 Contract;

- Pemex's actions are attributable to Mexico;

[83] Statement of Claim, ¶ 382.

[84] Statement of Claim, ¶ 383.

[85] Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, April 14, 2023 ("**Reply**"), ¶ 507.

- Mexico breached the National Treatment standard under USMCA Article 14.4 and NAFTA Article 1102 by treating Mexican nationals and their investment more favorably than Claimants and their investments;

- Mexico breached its obligations to provide Fair and Equitable Treatment ("**FET**") under USMCA Article 14.6(1) and NAFTA Article 1105 by failing to provide due process and justice to Claimants and their investments;

- Mexico breached its obligation to provide FET under USMCA Article 14.6(1) and NAFTA Article 1105 by discriminating against Claimants and their investments;

- Claimants are entitled to an award for their costs and expenses incurred because of this arbitration, including the fees and expenses of Claimants' external counsel, the fees and expenses of Claimants' expert witnesses, Claimants' potion of the Tribunal's fees and expense, Claimants portion of the administrative fees and expenses, and Claimants' expenses and fees associated with the hearing on the merits; and

- Claimants are entitled to an award for sanctions against Mexico for its conduct in this arbitration and denying Claimants the ability to submit facts to the Tribunal for the proper adjudication of this dispute, *inter alia*, by withholding documents that it was ordered to disclose that would contradict Mexico's position in this arbitration, using withheld documents such as the 809 Contract affirmatively against Claimants, and shielding testimony from witnesses who have direct knowledge of the facts at issue in dispute.

174. Finally, in their Post-Hearing Brief, Claimants request that the Tribunal find that:[86]

- It has jurisdiction over this arbitration and reject all of Mexico's objections;

- Pemex's actions are attributable to Mexico;

- Mexico breached its National Treatment obligations;

[86] Claimants' Post-Hearing Brief, April 15, 2024 ("**CPHB**"), ¶ 331.

- Mexico breached its Minimum Standard of Treatment ("**MST**") (including FET) obligations;

- Claimants are entitled to an award for their costs and expenses; and

- Claimants are entitled to an appropriate monetary award as sanctions for Mexico's conduct in this arbitration.

B. THE RESPONDENT'S POSITION

175. The Respondent has throughout the arbitration consistently requested the Tribunal "to dismiss the Claimants' claims in their entirety, with the corresponding cost award in favor of the Respondent."[87]

V. JURISDICTION

176. This Chapter will analyze and address the objections raised by the Respondent to the exercise of jurisdiction by this Arbitral Tribunal to decide the Claimants' claims.

A. GENERAL OBJECTIONS

(1) The Respondent did not consent to the consolidation of the three separate claims

a. The Respondent's position

177. According to the Respondent,

> "Claimants have improperly and unilaterally sought to consolidate claims under the NAFTA Chapter XI (through USMCA Annex 14-C) and under USMCA Article 14.D.3. The Parties to the USMCA did not authorize - much less gave their consent to- a single Investor-State tribunal to hear claims under Annex 14-C and Annex-D simultaneously."[88]

[87] Respondent's Rejoinder on the Merits and Reply on Jurisdiction, August 17, 2023 ("**Rejoinder**"), ¶ 365 and Respondent's Post-Hearing Brief, April 15, 2024 ("**RPHB**"), ¶ 240.

[88] Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, 2 December 2022 ("**Counter-Memorial**"), ¶ 301.

178. In the Respondent's view, Article 14.2.4 USMCA lists the three annexes (*i.e.*, 14-C, 14-D and 14-E) in a disjunctive manner, using the word "or" instead of "and". The article "or" is used to indicate one or the other.[89]

179. Thus, for the Respondent "[t]he word 'or' in Article 14.2(4) is used in the disjunctive sense so that an investor may choose only one annex under which to submit a claim. The word 'only' earlier in the text confirms the disjunctive use of the word 'or'".[90] In the Respondent´s view, each annex (or bucket) has distinct requirements, which render them mutually exclusive. In this regard, Annex 14-C governs exclusively claims arising prior to the USMCA, while Annex 14-E governs exclusively claims arising after the USMCA entered into force. "The exclusive scope of each annex forces investors to file claims under one or the other. Counsel for the Claimants agreed on this latter point."[91]

180. For the Respondent,

> "Footnote 21 further confirms that investors like the Claimants cannot consolidate claims under Annexes 14-C and 14-E. If an investor is eligible to submit claims under Annex 14-E, then pursuant to Footnote 21, Mexico and the United States "do not consent" to claims brought under Annex 14-C. Here, Finley, MWS and Prize -as a single group of claimants- submitted two of their claims, namely a denial of justice claim and a 'discrimination claim,' pursuant to both Annexes simultaneously. They obviously thought those two claims could be raised under either Annex. Since, according to the Claimants, the two claims were eligible under Annex 14-E, they should not have been brought under Annex 14-C. Their strategy directly contradicts the guidance provided in Footnote 21."[92]

181. The Respondent insists that, as stated in Footnote 21 of Chapter 14 of the USMCA, Mexico and the U.S. "did not consent to arbitrate Annex 14-C claims when the claimant is eligible to bring claims under Annex 14-E."[93] Furthermore, "[u]nder NAFTA Article 1126(2), a tribunal may only consolidate claims that have been 'submitted to arbitration under

[89] Counter-Memorial, ¶ 304.
[90] RPHB, ¶ 169.
[91] RPHB, ¶ 170.
[92] RPHB, ¶ 171.
[93] Rejoinder, ¶ 222.

[NAFTA] Article 1120'. Read plainly, consolidation under the NAFTA is limited to claims under the NAFTA."[94]

182. The Respondent concludes that the Claimants have carried out a "self-consolidation" which "is beyond the scope of the Respondent's consent to arbitration and is outside this Tribunal's jurisdiction."[95]

183. As a supplementary argument, the Respondent argues that "[o]nly one investment 'dispute' can be raised in a single arbitration under the USMCA," as Articles 14.E.2 of the USMCA and 25 of the ICSID Convention refer to a "dispute" (singular).[96]

b. The Claimants' position

184. The Claimants argue that they "brought their claims under one treaty, the USMCA, through two of its annexes, Annex 14-C (NAFTA) and Annex 14-E. Claimants have not 'consolidated' claims between two different treaties."[97]

185. However, even if they brought their claims under one treaty, the Claimants, when preparing their claims, had to take into account, and interpret, the rules set out in the USMCA concerning when its various Annexes applied.

186. For the Claimants, under USMCA Annex 14-C Mexico consented to allow claims to be brought under the NAFTA (via USMCA Annex 14-C) if related to acts or facts which had taken place while that Treaty was still in force, if brought within three years of the termination of the NAFTA.[98] Thereafter, investors were to bring their claims against Mexico under two other options: USMCA Annex 14-D and Annex 14-E.

187. For the Claimants, consistent with that, Article 14.2(3) of the USMCA explains that, with the exception of claims under USMCA Annex 4-C, Mexico's investment protections under

[94] Counter-Memorial, ¶ 303.
[95] Counter-Memorial, ¶ 305.
[96] Rejoinder, ¶ 223.
[97] CPHB, ¶ 131.
[98] **C-0005**, USMCA, Annex 14-C, ¶ 3.

the USMCA do not apply to an act or fact that took place, or a situation that ceased to exist, before the USMCA came into effect:[99]

> "For greater certainty, this Chapter, except as provided for in Annex 14-C (Legacy Investment Claims and Pending Claims) does not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement."

188. For the Claimants, in Footnote 21 the United States and Mexico clarified their consent regarding reserved NAFTA claims under USMCA Annex 14-C and stated that if an investor is eligible to submit its claim under the USMCA, then it must submit such claim under the USMCA:[100]

> "Mexico and the United States do not consent under paragraph I with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)."

189. In the Claimants' opinion,

> "Footnote 21 simply states that if an investor alleges a breach (a) arising prior to July 1, 2020, it should proceed under Annex 14-C, and (b) arising after July 1, 2020, it should proceed under Annex 14-E. Footnote 21 says nothing about when an investor alleges breaches arising before and after July 1, 2020, and how to address them in one arbitration."[101]

190. In the Claimants' opinion,

> "[a]t bottom, USMCA Article 14.2(4) has nothing to do with consolidation of claims. It simply explains the different ways a U.S. investor can bring an investment claim against Mexico depending on when the claim arose or the type of claim."[102]
>
> "An investor can initiate arbitration under Annex 14-C, Annex 14-D or Annex 14-E."[103]

[99] **C-0005**, USMCA, Article 14.2(3).

[100] **C-0005**, USMCA, Annex 14-C, ¶ 1 c), footnote 21.

[101] CPHB, ¶ 139.

[102] Reply, ¶ 236.

[103] CPHB, ¶ 133.

191. Thus, for the Claimants "Article 14.2(4) contains no restriction that requires an investor to pick one way to the exclusion of the others. If the USMCA Parties wanted such a limitation, they would have inserted 'either' as follows:"[104]

> "For greater certainty, an investor may only submit a claim to arbitration under this Chapter as provided under **either** Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)." (emphasis added by the Claimants)

192. But "[t]hey did not, because Article 14.2(4) does not apply as Mexico argues in this arbitration. Indeed, Mexico's argument also fails to consider that the use of 'only' could indicate that 'or' is inclusive, permitting multiple 'buckets' to be brought together in an arbitration. As was properly noted at the hearing, 'in terms of efficiency, it's far easier for a Claimant to be able to include in its claim, as is commonly done in many other cases, different, separate claims, with different legal basis'."[105]

193. In order to apply the rules described, the Claimants

> "simply took the factual circumstances surrounding their claims and attached them to either the NAFTA or the USMCA, as guided by the above USMCA provisions. If Mexico's conduct was (seemingly) final prior to the USMCA's effectiveness, as it was for the 821 Contract when this arbitration commenced, those claims were made under Annex 14-C (NAFTA). If Mexico's conduct was continuing into the USMCA, then those claims were to be made under Annex 14-E."[106]

194. More specifically, to the extent that the TFJA's decision on Claimants' challenge to Pemex's administrative rescission was issued in October 2018, before the USMCA's entry into force, "such claim clearly fell under Annex 14-C (NAFTA). Consequently, any other claims related to the 821 Contract should likewise fall under Annex 14-C (NAFTA)."[107]

195. In keeping with that approach, the Claimants have brought to this arbitration, under the same Annex 14-C, acts by PEP related to the 821 Contract which took place once this

[104] CPHB, ¶ 136, citing **C-0005**, USMCA, Article 14.2(4); English Tr. Day 1, 237:17-238:13; Spanish Tr. Day 1, 286:4-287:2.

[105] CPHB, ¶ 136.

[106] CPHB, ¶ 129.

[107] CPHB, ¶ 125.

arbitration had already started and, hence, when the USMCA was already in force. As they explain,

> "Pemex has taken acts that violate Mexico's investment protections after this arbitration commenced. Pemex executed its unilateral *finiquito* and then made claims against the US$ 41.8 million Dorama Bond. It would be inefficient not to address these acts as part of this arbitration. However, to the extent the Tribunal declines to address these acts as part of Claimants' existing claims and believes they should have been brought under the USMCA, Claimants reserve their rights to initiate a new arbitration against Mexico because of this wrongful conduct."[108]

196. Concerning the 803 and 804 Contracts, the Claimants argue that "[h]ow to assert the claims related to the 803 Contract and the 804 Contract was not as clear. The underlying acts commenced prior to and continued after the USMCA's effective date."[109] The Claimants have tried to verify their understanding as to how to raise these claims (Annex 14-C vs. Annex 14-E), specifically Footnote 21, with that of the U.S. Trade Representative within the State Department of the United States, but they state that "[u]nfortunately, the United States was unable to provide a clear answer. The United States did, however, advise that the overarching goal was 'to move away from the NAFTA into the USMCA,' and thus, if possible, claims should be brought under the new USMCA."[110]

197. In the Claimants' interpretation of the Treaty provisions on consolidation,

> "NAFTA Article 1126 and USMCA Article 14.D.12 address claims that different United States investors assert against Mexico in different arbitrations that present common questions of law or fact and arise out of the same events or circumstances. Under those circumstances, a tribunal might consolidate the various claims into one arbitration. However, these provisions do not apply when the same U.S. investors have claims based on the same/similar operative facts under both the NAFTA and its successor the USMCA."[111]

198. Finally, concerning whether an investor can bring multiple claims to an arbitration, the Claimants argue that

> "Mexico is not correct when it asserts that tribunals have interpreted the word 'claim' to limit an investor's ability to raise multiple disputes in a

[108] CPHB, ¶ 207.

[109] CPHB, ¶ 126.

[110] CPHB, ¶ 127.

[111] Reply, ¶ 228.

> single arbitration. Notably, Mexico cites no NAFTA tribunal that has made such a determination. Instead, Mexico relies on one decision under the Energy Charter Treaty (*Kruck v. Spain*). The facts of this decision are wholly different, and it does not stand for the proposition that multiple claims cannot be brought in one arbitration."[112]

199. The Claimants conclude that

> "there is no reason to split this arbitration apart into an untold number of arbitrations and render separate decisions for each. That would be wholly inefficient and is not required under either the NAFTA or the USMCA."[113]
>
> "It is telling that Mexico does not recommend the natural consequence of its argument: splitting apart this arbitration."[114]

c. The Tribunal's analysis

200. In the Tribunal's view, the Respondent's objection to the Tribunal's jurisdiction requires the analysis of two separate issues: (1), whether this is a case of "consolidation"; and (2), assuming it is not, whether the Claimants were entitled to bring into a single arbitration separate claims (or sub-claims) based on different Annexes of the USMCA.

201. To address the first issue, the Tribunal will have to assess the meaning of the legal term "consolidation".

202. To do so, a natural starting point are the ICSID Rules, specifically, Rule 46, on Consolidation or Coordination of Arbitration, whose paragraph (1) reads:

> "Parties to two or more pending arbitrations administered by the Centre may agree to consolidate or coordinate these arbitrations." (emphasis added)

203. Rule 46, thus, makes clear that consolidation requires the existence of two or more separate arbitrations which may, or may not, be consolidated.

204. This understanding is confirmed by authoritative scholarly writing: [115]

> "Consolidation refers to the ability to combine multiple arbitral proceedings, initially commenced separately often against the same respondent State, into a single proceeding." (emphasis added)

---

[112] CPHB, ¶ 143.

[113] CPHB, ¶ 146.

[114] Reply, ¶ 237.

[115] Meg Kinnear and Chrysoula Mavromati, *Consolidation of Cases at ICSID*, Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum, Michael Pryles, Neil Kaplan and Michael J. Moser (eds), Kluwer Law International, 2018, pp. 243-264. Authority not submitted by the Parties.

205. The text of Article 14.D.12 of the USMCA, on consolidation, leads to the same conclusion:

> "(1) If two or more claims have been submitted separately to arbitration under Article 14.D.3.1 (Submission of Claims to Arbitration) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraph 2 through 10." (emphasis added)

206. For the Tribunal it is thus clear that the term "consolidation" presupposes necessarily the existence of two or more separate arbitration procedures, which may or may not be "consolidated" for the sake of efficiency when they have in common questions of law or fact. Consequently, for the Tribunal the present arbitration is not a case of "consolidation", in spite of the use by the Respondent of the term "self-consolidation" to describe the way in which the Claimants have purportedly crafted their claim.

207. In other words, "consolidation" is the joinder of two or more proceedings that have been commenced separately before different tribunals.[116] It involves the merger of related cases after two (or more) individual cases have been initiated.[117] In this respect, consolidation differs from multiparty claims which involve two or more claimants jointly initiating a single proceeding against the same respondent on the basis of the same or different instruments of consent. The present case is not a case of joinder of two or more proceedings, nor does it involve the merger of two (or more) individual cases after they have been initiated.

208. In the Tribunal's view, therefore, this arbitration is a case in which the Claimants have brought within a single arbitration procedure, in keeping with the provisions of one single treaty, *i.e.*, the USMCA, separate claims with different legal bases–*i.e.*, the USMCA and its predecessor, NAFTA–as foreseen by the procedural provisions of the USMCA, on the

[116] Gabrielle Kaufmann-Kohler, Laurence Boisson de Chazournes, Victor Bonnin and Makane Moïse Mbengue, *Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently,* ICSID Review - Foreign Investment Law Journal 21(1), 2006, pp. 59, 64. Authority not submitted by the Parties.

[117] Lara Pair, *Consolidation in International Commercial Arbitration the ICC and Swiss Rules*, Eleven International Publishing, 2012, p. 9. Authority not submitted by the Parties.

basis of when the alleged breaches by Mexico materialized. Hence, in the absence of two or more arbitrations, the Treaty rules on "consolidation" do not apply.

209. The Tribunal will now turn to the second question at the root of the Respondent's jurisdictional objection: whether the Claimants were entitled to bring under a single arbitration claims (or sub-claims) based on separate Annexes of the USMCA.

210. As already indicated, this is a dispute that involves multiple parties, where three claimants (Finley Resources, MWS and Prize) have jointly initiated a single proceeding, *i.e.*, this ICSID proceeding, against the same respondent (*i.e.*, Mexico), based procedurally on the same instrument of consent in force at the time they submitted their notice of arbitration, *i.e.*, the USMCA (including its provisions on "legacy investments" under NAFTA), and which relates to three, closely related, contracts for works carried out in Mexico.

211. Historically, numerous multiparty cases have been commenced at ICSID where more than one party asserts rights based on the same factual circumstances in a single claim.[118] In such instances, as long as each individual claimant participating in the claim meets the applicable jurisdictional requirements, there is no bar to registering such related cases in one and the same proceeding.[119]

212. In this respect, the Tribunal does not see any reason why the conjunction "or" in Article 14.2 of the USMCA needs to be interpreted in a disjunctive manner (*i.e.*, one or the other, but not both), as preventing a claimant from submitting a mix of claims (or sub-claims) under separate Annexes of the USMCA. The most natural interpretation of the article is that each claim (or sub-claim) has to identify clearly under which of the sections of Annex 14 the claim is presented (*i.e.*, either C, D or E), without restricting a claimant's ability to present separate claims (or sub-claims) under different Annexes.

---

[118] See *Noble Energy Inc. and Machala Power Cía. Ltda. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12. Authority not submitted by the Parties; *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19. Authority not submitted by the Parties.

[119] In particular, the jurisdictional requirements are found in Articles 25 and 36 of the ICSID Convention. See Berk Demirkol, *Does an Investment Treaty Tribunal Need Special Consent for Mass Claims*, Cambridge Journal International & Comparative Law, 2013, pp. 612, 613. Authority not submitted by the Parties; Antonio R. Parra, *Desirability and Feasibility of Consolidation: Introductory Remarks,* ICSID Review 21(1), 2006, pp. 132, 133. Authority not submitted by the Parties.

213. The Tribunal is cognizant of the temporal peculiarities of the claims in this arbitration, to the extent that the facts underlying the claims straddle separate periods in which the NAFTA and the USMCA were in force, respectively. Consequently, this has forced the Claimants to interpret the temporal procedural rules contained in the USMCA (including footnote 21) and, in the Tribunal's view, they have interpreted those rules in a consistent and reasonable manner.

214. As the Claimants have argued, the facts related to 821 Contract pose a particular legal conundrum, to the extent that some of them took place before the entry into force of the USMCA (*e.g.*, the ruling of the TFJA in 2018), which led them to present that claim under Annex 14-C ("legacy investments"), while other facts took place after that date, some even after this arbitration had already commenced (*e.g.*, the unilateral signature of the *finiquito* on November 10, 2021 and the subsequent calling upon of the Dorama Bond). In the Tribunal's view, the Claimants were right in presenting their claim(s) related to the 821 Contract under Annex 14-C of the USMCA and, hence, under the legacy provisions of the NAFTA. Also, in the Tribunal's view, it would neither have been reasonable or appropriate nor procedurally economical to require the Claimants to argue their case concerning the *finiquito* or the calling of the Dorama Bond separately, as a new Annex 14-E claim, let alone start a new arbitration to deal with that alleged breach instead.

215. Finally, the Tribunal would like to stress that by bringing different claims or sub-claims under a single arbitration procedure the Claimants have not put the Respondent at a disadvantage in any way: Mexico has been able to present its defenses adequately on each individual claim and in fact has applied some of them across the board to all the claims (that has been the case, for instance, of Mexico's view that PEP's actions cannot be attributed to Mexico, an argument that will be discussed further below). As argued by the Claimants, requiring them to split this arbitration apart into many separate arbitration procedures would have been extremely inefficient.

216. In conclusion, this jurisdictional objection is dismissed in its entirety, since (i) this is not a case of "consolidation", and (ii) Article 14 of the USMCA did not prevent the Claimants from including in their Statement of Claim claims (or subclaims) based on separate Annexes of the USMCA.

(2) The Claimants have not demonstrated that they made an investment

a. The Respondent's position

217. The Respondent bases this objection on two separate arguments: (1), the Claimants just signed and performed "services contracts" in Mexico, which were of a commercial nature and, hence, do not qualify as "investments" under the Treaties and the ICSID Convention; and (2), even assuming that they made genuine investments, they have not produced convincing proof that they actually did.

218. As to the first question concerning the nature of the Claimants' involvement in Mexico, the Respondent argues that the Claimants did not make investments in Mexico, but only carried out three services contracts in Mexico, which do not quality as "investments" under the Treaties: "Contract 821 is a service contract excluded by Article 1139"[120], as the latter states that investment does not mean "claims to money that arise solely from … commercial contracts for the sale of goods or services." Further, Respondent contends that "the *Salini* test and the *Joy Mining* decision are inapplicable in this context," since "the *Salini* test is used solely to determine whether an investment exists for the purposes of the ICSID Convention."[121] "Contract 821 is for necessary services for certain oil wells. Indeed, the Claimants refer to themselves as 'oilfield services' companies."[122] For the Respondent, similar arguments apply to the 803 and 804 Contracts.[123]

219. The Respondent also rejects the Claimants' allegation that the Dorama Bond was part of their investments: "The Dorama bond is not an investment within the meaning of Article 1139."[124] It is not either an "investment" under Article 25 of the ICSID Convention.[125]

220. Turning now to the second question, the Respondent maintains that the Claimants have failed to offer convincing proof that they made investments in Mexico: "In the Counter-Memorial, it was pointed out that the only proof of capital committed in Mexico came from

[120] Rejoinder, ¶¶ 264-268.
[121] Rejoinder, ¶ 265.
[122] Rejoinder, ¶ 267.
[123] Rejoinder, ¶ 292.
[124] Rejoinder, ¶¶ 261-263.
[125] Rejoinder, ¶¶ 270-273: Respondent's Opening Presentation at the Hearing, slide 35.

self-serving witness statements. The Claimants do not offer any additional reliable evidence in their Reply."[126]

221. For the Respondent,

> "[t]hroughout their submissions, the Claimants repeatedly allege that they 'purchased' equipment and imported it into Mexico. But notably, the Claimants have not submitted a single purchase receipt or other document evidencing the purchase. Nor have they submitted any reliable evidence of what equipment was sent to Mexico. Instead, they submitted a 'list of equipment that would be committed under the 821 Contract.'"[127]

222. Moreover,

> "the Claimants did not provide any information from the books and records of Drake-Mesa, S. de R.L. de C.V., even though they claim to own and control that entity. It is also noteworthy that Mr. Finley says that Drake-Mesa, S. de R.L. de C.V. owns the rigs, but in the same witness statement [he has] indicated that the rigs are assets of the U.S. entity Drake-Mesa, LLC. Because both companies cannot simultaneously own the same assets, Mr. Finley's testimony is inconsistent and incoherent."[128]

223. Similarly, the Respondent argues that

> "according to Mr. Kernion, any land purchased by the Claimants was acquired for purposes of Contract 803, not Contract 821. The Claimants do not dispute this. Instead, they argue for the first time in their Reply that the land was purchased for use under all three contracts. This is not supported by the evidence."[129]

224. Furthermore, in the Respondent's view "[t]here is not enough evidence to establish a controlling interest in the Mexican companies."[130]

225. The Respondent insists that

> "[n]otwithstanding that the Tribunal allowed the Claimants to file approximately 800 pages of new evidence shortly before the hearing, placing the Respondent at a procedural disadvantage, the new evidence actually showed that others, not the Claimants, had purchased the equipment. In particular, the invoices provided showed that purchases of equipment were made by limited liability companies and a limited

[126] Rejoinder, ¶ 249.

[127] Rejoinder, ¶ 250.

[128] Rejoinder, ¶ 253.

[129] Rejoinder, ¶ 254.

[130] Rejoinder, ¶¶ 256-260.

> partnership, all owned by Mr. Finley personally and not by the Claimants. Further, the Claimants withheld any information from the Mexican entities, presumably because their books and records would show that they did not purchase the equipment."[131]

226. For the Respondent, "Mr. Finley is not a claimant in his individual capacity, nor are Drake-Finley LLC (Texas entity), Drake-Mesa LLC (Wyoming entity), or Mesa Well Services, LLP (Texas entity)."[132] Furthermore,

> "[a]t the hearing, Mr. Finley and Mr. Kernion confirmed that the land and equipment were either leased or purchased by third-party entities, not the Claimants. Mr. Kernion's written statement further confirmed that some of the land was purchased prior to the 803 and 804 contracts for other purposes. Documents submitted by the Claimants showed that a Mexican company named Baku, which is not even part of this arbitration, purchased the Poza Rica property in March 2015, after Contracts 803 and 804 were already over."[133]

227. The Respondent concludes that it "has never experienced a case such as this one in which the Claimants, despite being given extra opportunities, declined to produce evidence of their purported investments in Mexico. It must therefore be assumed that such evidence does not exist."[134]

b. The Claimants' position

228. The Claimants are adamant that they made genuine investments in Mexico, since an investment under NAFTA Article 1139 h) includes "interests arising from the commitment of capital or other resources in the territory of a Party to the economic activity in such territory, such as: (i) contracts involving the presence of an investor's property in the territory of a Party, including turnkey or construction contracts, or concession […]"[135].

229. For the Claimants, "[t]he overwhelming evidence shows that significant capital was contributed to Mexico in connection with the 821 Contract."[136] "At bottom, what matters is whether under the 821 Contract there was a commitment of capital or other resources in

[131] RPHB, ¶ 176.
[132] RPHB, ¶ 177.
[133] RPHB, ¶ 178.
[134] RPHB, ¶ 179.
[135] Reply, ¶ 270.
[136] Reply, ¶ 271.

Mexico to Mexico's economic activity"[137] For the Claimants, the same arguments apply to the investments they made by reason of the 803 and 804 Contracts, which qualify as investments under USMCA Article 14.1.[138]

230. In the Claimants' opinion,

> "a U.S. investor that commits capital or other resources in Mexico to conduct work for a Mexican company would be an investment. The fact that a contract is to conduct work or may be referred to as to a 'service contract' has no bearing on whether the limited exception under NAFTA 1139 applies. In any event, the 821 Contract is not a 'service contract', but instead, one for integrated works."[139]

231. The Claimants further argue that "the tribunal in *Salini* described a straightforward and common-sense approach to analyzing the type of conduct surrounding a contract that would qualify it as an investment:

> "It is not disputed that [the claimants] used their know-how, that they provided the necessary equipment and qualified personnel for the accomplishment of the works, that they set up the production tool on the building site, that they obtained loans enabling them to finance the purchases necessary to carry out the works and to pay the salaries of the workforce, and finally that they agreed to the issuing of bank guarantees. […] This is exactly what Finley, Drake-Mesa and Drake-Finley did with respect to the 821 Contract."[140]

232. In the Claimants' view,

> "starting in 2012, Claimants made investments that would later benefit the 821 Contract. Claimants purchased real and personal property over time for work to be performed under a series of contracts with Pemex, beginning with the 803 Contract. Claimants expected a long-term relationship with Pemex, even beyond the 821 Contract. It is axiomatic that a company would acquire and maintain real estate and equipment for use in multiple contracts with Pemex."[141]

[137] Reply, ¶ 273.

[138] Reply, ¶¶ 385-387.

[139] Reply, ¶ 275.

[140] Reply, ¶¶ 282-283.

[141] Reply, ¶ 285.

> "If this were incorrect, then to qualify as an 'investment', a company would have to purchase separate equipment for each specific project. That is both uneconomic and nonsensical."[142]

233. Concerning the issue of whether the Dorama Bond was an "investment", the Claimants insist that "the Dorama bond and the 821 Contract should be viewed as a whole. The Dorama Bond was a part of the fulfilment of obligations under the 821 Contract, which itself was an investment in Mexico. As a result, because the 821 Contract meets the *Salini* test, so does the Dorama Bond."[143]

234. The Claimants recall that

> "PEMEX required the Dorama Bond to assure that Finley, Drake-Mesa, and Drake-Finley would invest at least US$ 41.8 million in work for the exploitation of Mexico's hydrocarbons. By providing the Dorama Bond to obtain the 821 Contract, the Dorama Bond became part of the investment risk that Claimants assumed."[144]

235. For the Claimants,

> "Pemex's actions against the Dorama Bond during this arbitration explain why it is an investment. Based on its unilateral *finiquito,* Pemex is currently claiming against the entire US$ 41.8 million Dorama Bond as a penalty for Pemex's administrative rescission based on one unfulfilled work order valued at approximately US$ 1 million. Pemex is not treating the Dorama Bond as a contingent liability but instead as collateral or an asset. By definition, this makes the Dorama Bond a commitment of capital and an investment."[145]

236. Turning now to the issue of whether the Claimants have demonstrated that they, themselves, made investments in Mexico, the Claimants argue that they "were required to conduct work on behalf of Pemex over the course of four years. It is nonsensical to suggest that Claimants did not own or control the assets that were used to contribute under all three contracts, including the 821 Contract."[146]

237. The Claimants insist that

---

[142] Reply, ¶ 285, footnote 294.

[143] Reply, ¶ 300.

[144] CPHB, ¶ 191.

[145] CPHB, ¶ 192, referring to **C-0014**, Letter from Pemex to Fianzas Dorama, S.A., received December 3, 2021.

[146] Reply, ¶ 303.

> "Finley committed significant capital and other resources by importing workover rigs, drilling rigs, and related drilling equipment and materials into Mexico. For equipment originating from U.S., Finley used a special purpose company called Drake-Mesa, LLC to purchase the rigs, and transferred ownership of them to its affiliated Mexican company Drake-Mesa upon their import into Mexico. In total, Finley purchased nine rigs, along with related equipment, transportation and tools. The rigs and associated equipment cost over US$ 22 million."[147]

238. According to the Claimants, they

> "have explained how each contract obligated Bisell, MWS, Finley, Drake-Mesa, and Drake-Finley to provide equipment to perform the requested work. Indeed, each contract includes an annex outlining the capital commitments required for work to be performed. Had they failed to provide this equipment or make these commitments, they would have been in breach. Pemex never raised this issue during the administrative rescission."[148]

239. In the Claimants' view,[149] Mexico argues that the intermediary companies such as Drake-Mesa LLC and Baku either should have brought claims directly or their U.S. parent should have brought them on their behalf. This argument ignores that plain language of the NAFTA and the USMCA that define investments to include those made both directly and indirectly. Indeed, the tribunal in *S.D. Myers v. Canada* recognized that corporate formalities do not prohibit a claimant from proving it has made an investment:[150]

> "Taking into account the objectives of the NAFTA, and the obligation of the Parties to interpret and apply its provisions in light of those objectives, the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organize the way in which it conducts its business affairs."

240. The Claimants recall that at the Hearing they "explained, using slides, the investments each made, whether directly or indirectly through their ownership in intermediate companies. After the hearing, in response to the Tribunal's request, Claimants submitted a chart showing Claimants' respective contributions, both directly and indirectly. They also submitted a chart[151] showing Prize's ownership in the various intermediate entities that

[147] Reply, ¶ 304.

[148] CPHB, ¶ 179.

[149] CPHB, ¶ 198.

[150] **CL-0053**, *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, ¶ 229.

[151] Claimants' Organizational Charts, submitted on January 12, 2024.

made investments in Mexico. Overall, all of this evidence shows that Claimants committed approximately US$ 23 million in capital to Mexico, directly and indirectly, through the purchase of drilling and workover rigs, along with related equipment."[152]

c. The Tribunal's analysis

241. In order to assess this jurisdictional objection, the Tribunal will have to address the two issues raised by the Respondent: (1) whether the resources that the Claimants committed and sunk in Mexico by reason of the Contracts should be regarded as an "investment" entitling Claimants to the protection dispensed to investments by the NAFTA and USMCA (as an ancillary issue, this will require a brief analysis of the nature of the Dorama Bond); and (2) whether the Claimants have proved that they, rather than other entities, made the investments they claim they made.

242. Concerning the first issue, the Tribunal will first recall the definitions of "investments" in the NAFTA and the USMCA.

243. According to Article 1139 of the NAFTA, "investment" means:

> "(a) an enterprise;
>
> (b) an equity security of an enterprise;
>
> (c) a debt security 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 state enterprise;
>
> (d) a loan 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 state enterprise;
>
> (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

[152] CPHB, ¶ 200,; referring to **C-0148**, Assets List.

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,

(i) claims to money that arise solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or

(j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h)."

244. And, according to Article 14.1 of the USMCA "investment" means:

"every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. An investment may include:

(a) an enterprise;

(b) shares, stock and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments, and loans;

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to a Party's law; and

(h) other tangible or intangible, movable or immovable property, and related property rights, such as liens, mortgages, pledges, and leases,

but investment does not mean:

(i) an order or judgment entered in a judicial or administrative action;

(j) claims to money that arise solely from:

(i) commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit in connection with a commercial contract referred to in subparagraph (j)(i)."

245. The Tribunal notes that the NAFTA and USMCA definitions of "investment" are similar, even if Article 14.1 of the USMCA adds as typical characteristics of an investment "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk". The definitions under both treaties are quite broad and do not differ essentially from Article 25 of the ICSID Convention, such that the *Salini* test developed in connection with the latter may reasonably be applied, if need be, to the former.

246. In the Tribunal's view, several of the resources the Claimants argue that they committed in Mexico to the performance of the Contracts qualify as "investments" under the NAFTA and USMCA definitions.

247. *First*, the most cursory reading of the Contracts shows that they required the contractors, in order to be able to perform their obligations, to import into Mexico special machinery and equipment, as described, for instance, in Annex DT-6[153] of the 821 Contract. This Annex DT-6 is a 41-page technical document which describes in detail the material and equipment to be used by the contractor in the performance of its contractual obligations and it makes explicitly clear that the contractor will be required to have that material and equipment available to be used on site in Mexico while the contract is being performed. Similar arguments could be made with respect to the 803 and 804 Contracts, in light of their clauses describing the contractors' obligations to supply and import equipment. The key consideration here is that such machinery and equipment qualify, under both Article 1139 (g) of the NAFTA and Article 14.1 (h) of the USMCA, as "tangible property" acquired for business purposes.

[153] **C-0147**, 821 Contract, Annex DT-6 ("*Relación mínima de materiales y equipo que como mínimo proporcionará el contratista*").

248. For such reason, the Tribunal sees merit in the Claimants' assertion, concerning the 821 Contract, that "Finley committed significant capital and other resources by importing workover rigs, drilling rigs, and related drilling equipment and materials into Mexico."[154]

249. *Second*, the yards and warehouses that the Claimants have argued that they had to lease or purchase through a subsidiary named Baku Exploración y Producción[155] to keep and store their equipment clearly qualify as "real estate" or "immovable property" under both Article 1139 (g) of the NAFTA and Article 14.1 (h) of the USMCA.

250. *Third*, the Claimants have argued, and the Contracts confirm, that they used Mexican subsidiaries under their ownership or control, like Drake-Mesa and Drake-Finley, in order to carry out the Contracts. In the case of Drake-Finley, for instance, the 821 Contract confirms that it was a special purpose company set up jointly on February 18, 2014 by Drake-Mesa and Finley Resources to comply specifically with the obligations under the 821 Contract.[156] The key consideration here is that, to the extent that these were Mexican companies under the ownership or control of the U.S. Claimants which were used, and in some cases – as in the case of Drake-Finley – specifically set up to comply with the Claimants' contractual obligations, they qualify as investments under both Article 1139 (a) of the NAFTA and Article 14.1 (a) of the USMCA.

251. In light of the above, the Tribunal concludes that the Claimants committed resources in Mexico which qualify as "investments" under both the NAFTA and the USMCA. And this being a Decision on Jurisdiction and Liability, not a full award containing decisions on *quantum*, the Tribunal can stop its analysis of this issue here, without any need to analyze at this stage whether all the expenditures and items that the Claimants claim that they committed in Mexico were "investments", or whether, as they claim, "they invested more than US$ 30 million in Mexico."[157]

252. Concerning the Dorama Bond, the Parties have discussed extensively in this arbitration whether the Dorama Bond is an "investment", as argued by the Claimants, or just a

[154] Reply, ¶ 304.

[155] Statement of Claim, ¶ 27; Reply, ¶ 305.

[156] **C-0034,** 821 Contract, contractors' statement 2.1.

[157] Statement of Claim, ¶ 5.

contractual "guarantee/contingent liability", as argued by the Respondent. Hence, the Tribunal will now assess briefly the Parties arguments in this respect.

253. In support of the Respondent's view it is fair to say that a reading of Article 1139 of NAFTA indicates that the prototypical modalities of "investment" are what economists and accountants usually describe as "assets" (*e.g.*, the ownership of a company, a loan to an enterprise, real estate, or other property), excluding claims to money that arise solely from commercial contracts for the sale of goods or services or commercial credit. Liabilities, either actual or contingent, thus do not seem to fit the prototypical modality of investment. Indeed, Article 14.1 of the USMCA starts with the assertion that "investment means every asset that […]." (emphasis added)

254. Accordingly, were it considered in isolation (*e.g.*, as a performance bond related to the cross-border provision of services to PEP from the U.S.), the Dorama Bond would arguably not qualify as an "investment in Mexico." The Claimants themselves recognize as much when, in their Reply to Mexico, they accept that "the tribunal in *Joy Mining*[158] determined that a bank guarantee securing a sales contract, without more, such [as] a commitment of capital or resources to the host state, would not be an investment under its analysis."[159]

255. However, the Tribunal also notes that letter h) of Article 1139 of the NAFTA includes the following concept:

> "Interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
>
> - Contracts involving the presence of an investors' property in the territory of a Party, including turnkey or construction contracts, or concessions, or
> - Contracts where remuneration depends substantially on the production, revenues or profits of an enterprise."

256. In the Tribunal's view, the Dorama Bond is indeed, as argued by Mexico, a "contingent liability", not an "asset", but it is so closely related to the investment made by the Claimants as a result of the 821 Contract; it entails such a massive potential "commitment of

[158] **RL-0023**, *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, August 6, 2004, ¶¶ 61-63.

[159] Reply, ¶ 281.

resources" by the Claimants if the bond is called by PEP; and its calling by PEP may affect so dramatically the return obtained by the Claimants from their overall investment in Mexico that the Dorama bond may be seen as part and parcel of the "interest" arising from the commitment of "other resources" by the Claimants in Mexico.

257. In other words, viewed in isolation, the Dorama bond would not qualify as an "investment in Mexico" and could not be considered on a stand-alone basis as the main, let alone only, proof that the Claimants made an investment in Mexico, but the Dorama bond is part and parcel of the Claimants' investment and "interests" in Mexico which resulted from their commitment to perform under the 821 Contract (*e.g.,* importing capital equipment into Mexico, renting and subsequently purchasing warehouses, offices and real estate, hiring and paying specialized workers, etc.). The calling of the Dorama bond is, in fact, a Damocles' sword currently hanging on the Claimants' venture in Mexico which may decisively affect the *ex-post* return of the investment they made to carry out the 821 Contract. Hence, irrespective of whether it may, or may not, be considered an "investment" -a question which the Tribunal does not need to settle in this jurisdictional Decision-, the Dorama Bond will be analyzed in detail in Chapter XII of this Decision.

258. Finally, the Tribunal is not convinced by the Respondent's argument that the fact that the Contracts were characterized as "services contracts" demonstrates that the Claimants did not make any investments. The concepts of "contract" and "investment" are indeed different, but it is also clear that for the performance of complex contracts suppliers are frequently compelled to make investments, either at home or in the country where their client is located (*i.e*., in Mexico, in this arbitration). In a contract, the contractor commits itself, in a binding manner, to supply a service to its customer and, depending on the nature of those services and the location of the customer, the contract may or may not require the supplier or contract to "commit capital and resources" in the country of residence of its client to be able to perform its contractual obligations.

259. Thus, the fact that a contract is described as a "services contract" does not in itself give any indication as to whether it will require the supplier to incur significant expenditures and "sink in" resources in order to provide the services. Only the terms of the contract and the nature and location of the services to be provided will determine whether the supplier will

be compelled to make a local "investment" to be able to perform the contract or whether it will be able to provide the service from its home base, and thus engage in a cross-border supply.

260. Turning now to the question of whether the Claimants have proved that they, themselves, actually made the investments they claim to have made in Mexico, the Tribunal starts by noting that that the information provided by the Claimants on how they structured and channeled into Mexico the investments they made has been presented only gradually and grudgingly, mostly in response to objections from Mexico. It is true that the Treaties allow for investments to be made "indirectly". But the transparency, detail and comprehensiveness of the information provided by the Claimants in this arbitration falls short of the customary standards followed by most claimants when describing to tribunals, in investment arbitration cases, the structure and internal relations, in terms of ownership and control, of the various entities and individuals comprising, directly or indirectly, the group of claimants.

261. Nonetheless, in the Tribunal's view the Claimants have provided enough evidence that they controlled those entities, and the fact that PEP never complained about how the contractors met their obligation to supply materials and equipment confirms that conclusion.

262. That said, the actual participation of Mexican or foreign investors or shareholders other than the Claimants in the group of entities that were used in order to perform the Claimants' obligations under the Contracts, and the timing of their involvement, will be critically reviewed by the Tribunal in the *quantum* phase of this arbitration.

(3) PEP's actions cannot be attributed to Mexico

a. The Respondent's position

263. The Respondent argues that "[t]he action of Pemex, and particularly PEP, in connection with the Contracts entered into with Claimants were not 'regulatory, administrative or other governmental authorities' under NAFTA and/or the USMCA."[160] Hence, they cannot be attributed to Mexico.

[160] Counter-Memorial, ¶ 415.

264. The Respondent recalls that NAFTA Article 1503(2) provides that:

> "Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges."

265. Similarly, Article 22.3 of the USMCA provides:

> "Consistent with Article 1.3 (Persons Exercising Delegated Governmental Authority), each Party shall ensure that if its state-owned enterprises, state enterprises, or designated monopolies exercise regulatory, administrative, or other governmental authority that the Party has directed or delegated to those entities to carry out, those entities act in a manner that is not inconsistent with that Party's obligations under this Agreement."

266. Furthermore, the Respondent indicates that a footnote to Article 22.3 of the USMCA further explains the following:

> "Examples of regulatory, administrative, or other governmental authority include the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges."

267. From the above, the Respondent concludes that "[o]bviously, under both agreements, the obligations for a government-owned state enterprise such as PEMEX are limited to situations where it exercises 'regulatory, administrative, or other governmental authority.'"[161]

268. For the Respondent, the provisions on State responsibility in the USMCA Article 22.3 and NAFTA Article 1503 (2) are a *lex specialis* which trumps customary international law (and particularly, article 5 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (the "**ILC Articles**").[162]

> "According to this *lex specialis*, the state is responsible for the acts of a state-owned enterprise like Pemex only when the enterprise exercises regulatory, administrative or other governmental authority that the state delegated to it. Examples of regulatory, administrative, or other governmental authority include the power to expropriate, grant licenses,

[161] Counter-Memorial, ¶ 424.

[162] Counter-Memorial, heading of ¶¶ 416-417.

> approve commercial transactions, or impose quotas, fees, or other charges. By contrast, executing contracts and terminating contracts according to their terms are not acts of regulatory, administrative or governmental authority."[163]

269. In the Respondent's view,

> "[t]he fact that Pemex is a State productive enterprise is not sufficient to establish attribution."[164]
>
> "Entering into contracts is not an act of regulatory, administrative or other governmental authority."[165]
>
> "The Claimants' approach in arguing that commercial activities of state enterprises are regulatory and administrative functions would, in effect, make NAFTA Article 1503(2) and Article 22.3 of the USMCA meaningless, in violation of the interpretative principle of *effet utile*."[166]

270. In support of its view that entering into service contracts is not an act of regulatory, administrative or other governmental authority under the NAFTA and the USMCA, the Respondent submits that "[t]he tribunal in *UPS v. Canada* concluded that the decisions on the purchase of services were commercial acts and therefore not subject to NAFTA Chapter XV liability."[167]

271. The Respondent further argues that

> "the Tribunal in *Adel A Hamadi Al Tamimi* determined that 'the mere fact that a number of [the state- owned entity's] board members also served as government ministers does not by itself demonstrate that [the entity] exercised regulatory, administrative or governmental powers.' Similarly, the manner in which Pemex was characterized in 1938 is not pertinent to whether the entering into contracts is a regulatory or administrative function, and even still, Claimants acknowledge more recent statements made by Pemex that it is a 'decentralized' entity, meaning that it is not under the exclusive control of the Mexican government."[168]

272. For the Respondent,

---

[163] RPHB, ¶ 209.

[164] Counter-Memorial, heading of ¶¶ 420-434.

[165] Counter-Memorial, heading of ¶¶ 435-439.

[166] Counter-Memorial, ¶ 440.

[167] Counter-Memorial, ¶ 436; **RL-0038**, *United Parcel Services of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007 ("***United Parcel***"), ¶ 78.

[168] Counter-Memorial, ¶ 438; **RL-0040**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, November 3, 2015, ¶ 325.

> "the Claimants have adopted a '*thirty-thousand foot view*' of Pemex, arguing that all the actions of Pemex are administrative in nature, and thus attributable to the Respondent, because Pemex operates pursuant to a general 'charge from the Mexican central government to exploit hydrocarbons.'" For the Respondent, that view is entirely too broad, however. As the Respondent explained, "the pertinent question is whether the impugned acts were an exercise of regulatory or administrative authority."[169]

273. Finally, according to the Respondent,

> "the administrative rescission of Contract 821 was carried out pursuant to a contractual right guaranteed by the contract itself. By rescinding the 821 Contract, Pemex was acting within its capacity as a commercial party. It was not 'granting', 'approving' or 'imposing' rights or exercising regulatory, administrative or governmental authority."[170]

b. The Claimants' position

274. The Claimants recall that under Article 2 of the *Ley de Petróleos Mexicanos* of 2008 ("**Pemex Law 2008**"), "the State shall carry out the activities that correspond to it exclusively in the strategic area of petroleum, other hydrocarbons and basic petrochemicals, through Petróleos Mexicanos and its subsidiary organizations in accordance with the Regulatory Law of Article 27 [of the Constitution]."[171]

275. In the Claimants' view,

> "Pemex exercised state authority when it entered into and conducted itself under the 803 Contract, the 804 Contract, and the 821 Contract."[172]
>
> "Mexico repeatedly admits in its Counter-Memorial that the contracts were administrative in nature."[173]
>
> "Mexico emphasizes how these contracts are different because they give Pemex a special power to unilaterally terminate the administrative contracts it entered into since it must ensure the efficient use of public resources."[174]

[169] RPHB, ¶ 210.

[170] RPHB, ¶ 214. Emphasis in the original.

[171] **CL-0013**, Pemex Law 2008, Article 2 quoted in Statement of Claim, ¶ 293, footnote 509.

[172] Reply, ¶ 432.

[173] Reply, ¶ 433.

[174] Reply, ¶ 434.

276. During the Hearing, in slides 100 and 101 of their opening presentation, the Claimants stressed that, according to Mexico's expert,

> "[f]rom a *substantive* point, the administrative nature of a contract implies the existence in its clauses of a special regime (usually called "exorbitant"). This means that administrative contracts may, and even must, contain clauses that place the provider or contractor in a subordinate relationship with Pemex, so that the latter may guarantee the fulfilment of the state powers conferred to it, as well as the satisfaction of collective needs."[175]
>
> "Because of this administrative nature, the termination of the contracts entered into by PEMEX is subject to a special regime which, in accordance with the principles of public contracting set forth in Article 134 of the Mexican Constitution, provides for a series of powers and procedures aimed at ensuring that the public interest prevails."[176]

277. The Claimants insist that these were not typical commercial contracts given that Pemex had the power belonging to a governmental entity: the administrative rescission. This allowed Pemex to "unilaterally terminate the administrative contracts it entered into since it must ensure the efficient use of public resources."[177] Pemex exercised this governmental power when it administratively rescinded the 821 Contract, which "enjoy[ed] a presumption of validity" as an administrative act.[178] "This process allowed Pemex to act as 'judge, jury, and executioner', subject only to a challenge to an administrative court, which also is part of the executive branch of Mexico's government. Thereafter, Pemex used its administrative rescission as a basis to issue a unilateral *finiquito* of the 821 Contract, which is also a regulatory function."[179]

278. For the Claimants, Mexico's defense has been inconsistent.

> "To avoid attribution, Mexico argues that Pemex's actions were not administrative in nature. Conversely, Mexico argues that Pemex's actions were administrative in nature to justify Pemex's actions towards Claimants (administratively rescinding the 821 Contract and prolonging the domestic litigation regarding the 803 and 804 Contracts). Mexico cannot have it both ways. If Mexico insists that Pemex's actions towards Claimants were administrative in nature, Mexico must concede that Pemex's actions were

[175] First Asali Report, ¶ 23.

[176] Second expert report of Jorge Asali ("**Second Asali Report**"), ¶ 11.

[177] Counter-Memorial, ¶ 33, citing First Asali Report, ¶¶ 23-24.

[178] English Tr. Day 4, 775:4-5; Spanish Tr. Day 4, 891:15-16.

[179] CPHB, ¶ 228.

administrative with respect to attribution under the NAFTA and the USMCA."[180]

279. As a sign of another inconsistency in Mexico's approach, the Claimants state that "Mexico selected Rodrigo Loustaunau, a Pemex employee, as its Party Representative for this arbitration. At the same time, Mexico argues that Pemex's actions cannot be attributed to Mexico. It is irreconcilable for Mexico to claim Pemex's acts are not attributable to Mexico yet have an internal Pemex attorney act as Mexico's Party Representative."[181]

c. ***The Tribunal's analysis***

280. Despite the initial hesitations and contradictions among Mexican lower courts on whether the disputes concerning PEP's contracts had to be heard by the civil or administrative courts, there is common ground between the Parties that the three Contracts which are the subject of this arbitration were administrative in nature. The Tribunal shares this view.

281. The administrative nature of all three Contracts was clearly asserted in the First Asali Report.[182] He further confirmed this characterization during the Hearing, when, testifying specifically on the 821 Contract, he declared that it was of "administrative nature" and, hence, "one of the powers of the contracting entity [*i.e.*, PEP] deriving from the exorbitant regime ('*régimen exorbitante'*) of administrative contracts is the power to terminate by itself and before itself ('*por sí y ante sí'*) such contracts, that is, without the need for a prior judicial declaration."[183]

282. The administrative nature of the 821 Contract was also confirmed by the TFJA, to the extent that during the administrative process related to the rescission of the 821 Contract, PEP argued the private nature of its activities and the TFJA's lack of jurisdiction, but the TFJA rejected those arguments.[184]

---

[180] Reply, ¶ 436.

[181] CPHB, ¶ 238.

[182] First Asali Report, p. 6, ¶ 21.

[183] First Asali Report, ¶ 24.

[184] See **RZ-039**, *Tribunal Federal de Justicia Administrativa* judgement, October 4, 2018 (the "**TFJA Judgment**"), pp. 44-50, in which the TFJA rejects PEP's objection to its jurisdiction. The text of the TFJA' s complete sentence in Spanish will be referred to as the **RZ-0039**. The translation into English of the extract of the sentence requested by the Tribunal and submitted by the Claimants will be referred to as **RZ-0039 ENG**. As the latter contains only excerpts of the full sentence in Spanish and is only 76 pages long, the page numbers of the same paragraphs in **RZ-0039** and

283. To the extent that the 803 and 804 Contracts contained clauses similar to those of the 821 Contract which established an "exorbitant regime" that, *inter alia*, allowed PEP to rescind the contracts unilaterally,[185] there is no doubt in the Tribunal's mind that the 803 and 804 Contracts are also administrative in nature.

284. The key question is this: Does the administrative nature of the Contracts or the fact that PEP is a State enterprise automatically mean that any decision taken by PEP in the execution of the Contracts should be attributed to Mexico and fall under the purview of the NAFTA and the USMCA? Or, more specifically: was the drafting and signature by PEP of the *finiquitos* for the 803, 804 and 821 Contracts acts in which PEP acted as a public authority involving Mexico's responsibility under the USMCA or NAFTA?

285. In the Tribunal's view, the answer to that key question should be in the negative: the facts that PEP is a State enterprise and that the three Contracts were administrative in nature do not automatically make all acts by PEP in the execution of the Contracts acts of "regulatory, administrative or other governmental authority" attributable to Mexico and subject to the disciplines of the NAFTA and the USMCA.

286. The key test to apply is whether the specific disputed acts by PEP were, or were not, acts in which PEP exercised governmental authority.

287. This view is confirmed by previous awards, including most notably de *Jan de Nul v. Egypt* award:[186]

> "163. Article 5 of the ILC Articles reads as follows:
>
> ARTICLE 5

RZ-0039 ENG differ significantly. See the judgement in **RZ-039**, pp. 44-50, in which the TFJA rejects PEP's objection to its jurisdiction.

[185] **C-0032**, 803 Contract, Clause 14.1, pp. 21-23; **C-0033**, 804 Contract, pp. 33-37.

[186] **RL-0043**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008, ¶ 163, ¶¶ 167-171 (award submitted by the Respondent in its Counter-memorial as **RL-0043**). See **RL-0044**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010 ("***Hamester v. Ghana***"), ¶¶ 202-204; see also, more recently and thus not referred to by the Parties: *Stabil LLC, Rubenor LLC, Rustel LLC, Novel-Estate LLC, PII Kirovograd-NAFTA LLC, Crimea-Petrol LLC, Pirsan LLC, Trade-Trust LLC, Elefteria LLC, VKF Satek LLC and STEMV Group LLC v. The Russian Federation*, PCA Case No. 2015-35, Final Award, April 12, 2019, ¶¶ 175-176; or *Rand Investments Ltd., William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand and Sembi Investment Limited v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award, June 29, 2023, ¶¶ 485-489.

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State, under Article 4 but which is empowered to by the law of that State to exercise elements of the governmental authority ["à exercer des prérrogatives de puissance publique", in the French version] shall be considered an act of the State under international law, provided that the person or entity is acting in that capacity in that particular instance.

In other words, for an act to be attributed to a State under Article 5, two cumulative conditions have to be fulfilled:

- first, the act must be performed by an entity empowered to exercise elements of governmental authority (i);

- second, the act itself must be performed in the exercise of governmental authority (ii).

[…]

167. It is common ground that for an act of an independent entity exercising elements of governmental authority to be attributed to the State it must be shown that the act in question was an exercise of such governmental authority.

168. Relying on the functional test adopted by the *Maffezini* tribunal, this Tribunal 'must establish whether specific acts or omissions are essentially commercial rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial. Commercial acts cannot be attributed to the State, while governmental acts should be so attributed'.

169. Consequently, the fact that the subject matter of the Contract related to the core functions of the SCA, i.e., the maintenance and improvement of the Suez Canal, is irrelevant. The Tribunal must look to the actual acts complained of. In its dealing with the Claimants during the tender process, the SCA acted like any contractor trying to achieve the best price for the services it was seeking. It did not act as a State entity. The same applies to the SCA's conduct in the course of the performance of the Contract.

170. It is true though that the Contract was awarded through a bidding process governed by the laws on public procurement. This is not a sufficient element, however, to establish that governmental authority was exercised in the SCA's relation to the Claimants and more particularly in relation to the acts and omissions complained of. What matters is not the 'service public' element, but the use of '*prérogatives de puissance publique'* or governmental authority. In this sense, the refusal to grant an extension of time at the time of the tender does not show either that governmental authority was used, irrespective of the reasons for such refusal. Any private contract partner could have acted in a similar manner.

> 171. On such basis, the Tribunal concludes that, although the SCA is a public entity empowered to exercise elements of governmental authority, the acts of the SCA vis à vis the Claimants are not attributable to the Respondent in this arbitration on the basis of Article 5 of the ILC Articles, as they were not performed pursuant to the exercise of governmental authority." (emphasis added)

288. The distinction made by the *Jan de Nul v. Egypt* award between "*acts de puissance public*" (or "with elements of governmental authority," in the terminology of Article 5 of the ILC Articles) and acts in which that element is absent is reflected in the arbitration clause which the Parties included as Clause 47.2 of the 821 Contract, which reads in the relevant part:

> "All disagreements, discrepancies, differences or controversies arising out of or relating to the interpretation or performance of this Agreement, which have not been resolved by any of the mechanisms provided for in the Agreement, shall be definitively resolved by arbitration conducted in accordance with the Arbitration Rules of the International Chamber of Commerce in force on the date of submission of the demand for arbitration, by three arbitrators appointed pursuant to the Arbitration Rules.
>
> […]
>
> The procedures for administrative termination and early termination of the contract, established by PEP are of an administrative nature, so they will not be subject to arbitration."

289. This arbitration clause makes a clear distinction between purely contractual disputes, which in the case of the 821 Contract the Parties could have submitted to ICC arbitration, and disputes resulting from PEP's decisions to rescind or terminate the contract early, which are declared to be "administrative" and are excluded from the ICC arbitration. In the Tribunal's view, those acts which Clause 47.2 describe as "administrative" are precisely those which, under Article 5 of the ILC Articles, contain "elements of governmental authority", and which, under Article 22.3 of the USMCA, are "acts of delegated authority".

290. Thus, only those acts by PEP which are the exercise of exorbitant powers could engage Mexico's international responsibility and be amenable to be adjudicated in an investment arbitration under NAFTA or the USMCA and fall under this Tribunal's jurisdiction. And this raises the question: Which were those acts in the specific case considered in this arbitration?

291. In the Tribunal's view, none of the acts carried out by PEP with respect to the 803 and 804 Contracts, including the signing of the two 2015 *finiquitos* and its refusal to agree to the

contractors' outstanding claims under those two contracts, can be characterized as an act of "delegated authority" or containing "elements of governmental authority."

292. In terms of the conduct of the parties, the Tribunal recalls that the *finiquitos* of the 803 and 804 Contract were signed both by PEP and by the contractors, and were not "unilateral", even if the contractors reserved their right to seek redress for their grievances in the Mexican courts. Also, neither the 803 nor the 804 Contract were administratively rescinded by PEP. And the fact that PEP vigorously defended its position in the Mexican courts against the Claimants' lawsuits may be regarded as a continuation of its purely contractual decision to bring to an end the contracts and to sign the *finiquitos* of these contracts with the contractors.

293. Thus, by fighting Claimants' lawsuits in court for years, rather than offering them an out-of-court settlement, as it did with Integradora and Zapata, PEP may indeed have afforded a better treatment to the latter than to the Claimants. But to the extent that in so doing PEP was not exercising any administrative or regulatory authority, any such alleged discrimination is not subject to, and therefore cannot run afoul of, the USMCA's provision on National Treatment.

294. The situation is radically different, however, in the case of the 821 Contract, as in this case PEP actually took advantage of the "exorbitant regime" typical of administrative contracts: in 2017 it rescinded administratively the Contract and in 2021 it issued a unilateral *finiquito* which imposed a penalty on the Claimants and foresaw the calling of the Dorama Bond. The fact that the Contract included a clause which recognized PEP such extraordinary powers does not detract from the fact those were "acts of authority", in which PEP engaged Mexico's responsibility under NAFTA, both as regards the MST and the National Treatment obligations.

295. In this connection, the Tribunal recalls that the Respondent's own legal expert, Mr. Asali, repeatedly confirmed during the Hearing that PEP's 2021 unilateral *finiquito* of the 821 Contract in 2021 was an "administrative act".

296. Consequently, the legal nature of the *finiquito* of the 821 Contract is radically different from the *finiquitos o*f the 803 and 804 Contracts. The reason is twofold.

297. First, the *finiquito* of the 821 Contract was unilateral, signed only by PEP. While the possibility of PEP signing unilaterally a *finiquito* existed for all three Contracts, it was only exercised in the case of the 821 Contract.

298. Second, the *finiquito* of the 821 Contract was not the consequence of a mutually agreed termination of the contract, but the result of a purely administrative act by PEP based on the "exorbitant regime" afforded by Mexican laws to public authorities. To that extent, the *finiquito* of the 821 Contract engaged as much Mexico's responsibility as the administrative rescission by PEP of the 821 Contract.

299. In conclusion, *ratione materiae* the Tribunal:

a) Does not have jurisdiction over PEP's actions concerning the 803 and 804 Contracts. Consequently, it lacks jurisdiction to decide on the Claimants' claim that the treatment by PEP of the Claimants under the 803 and 804 Contracts entailed a breach by Mexico of its National Treatment obligations under Article 14.4 of the USMCA.

b) Has jurisdiction to decide the Claimants' claims resulting from PEP's administrative rescission of the 821 Contract, from the issuance of the unilateral *finiquito* for that Contract and from the calling of the Dorama Bond.

(4) The National Treatment Claims are time-barred

a. The Respondent's position

300. In support of its contention that Claimants' national treatment claims under the Treaties are time-barred, according to the Respondent,

> "[l]egally, the date of the settlement with Zapata and Integradora is irrelevant. Under Articles 1116 (2) and 1117 (2), the three-year period begins to run when a claimant first acquires knowledge of a breach and loss. An Article 1102 breach occurs when the treatment towards the claimant occurs; not when the treatment towards a comparator occurs […] The obligation is on the foreign investor, which means a breach of that obligation occurs when the government 'accords…treatment' to the foreign investor. The Claimants had knowledge of that treatment -that is, the administrative rescission of Contract 821- in 2016 (*sic*)."[187]

[187] Rejoinder, ¶ 291.

301. In support of its interpretation, the Respondent quotes paragraph 154 of the Decision on Jurisdiction and Admissibility in *Resolute Forest v. Canada*, where the tribunal wrote:

> "Breaches of Articles 1102(3) and 1105(1) occur when the governmental conduct complained of occurs."[188]

302. For the Respondent,

> "the *dies a quo* [for computing the 3-year time limit] is the date the claimant learns of the treatment the claimant itself experienced, which will likely be the date of the treatment itself. The Claimants on the other hand believe the *dies a quo* is the date the claimant learns of the treatment towards the comparator-investor. The Claimants are mistaken."[189]

303. The Respondent insists that

> "the *dies a quo* is the date the claimant learns of the treatment towards itself, not towards a comparator. In this case, that is February and April 2015 (for Contracts 803 and 804) and August 2017 (for the 821 Contract). This is evident by the scope of the NAFTA articulated in Article 1101, which states: "This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party […]." Accordingly, the treaty only governs those actions (or treatments) directed at the investor bringing the claim (or its investment), not a third party. Acts towards third parties may be considered for purposes of comparison in the context of national treatment, but the impugned act is the one towards the claimant-investor. Thus, the *dies a quo* for national treatment is when the investor learns of the conduct towards itself."

304. For the Respondent,

> "[t]his conclusion is consistent with the larger context of the treaties. If the *dies a quo* is tied to the treatment toward the comparator, then investors would be free to raise national treatment claims decades after the discriminatory treatment took place, as long as they bring a claim within three years of learning about it. Adopting that view would essentially erase the time bar and grant investors the right to bring claims *ad infinitum*. However, there is no evidence that the Treaty Parties ever intended that. On the other hand, if the *dies a quo* is tied to the treatment of the claimant-investor, then investors have three years from the date of that treatment to file a claim, just like all other breaches of the treaty. The Claimants have

[188] Rejoinder, ¶ 291, footnote 282; citing **RL-0031**, *Resolute Forest Products, Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018 ("***Resolute Forest***"),¶ 154.

[189] RPHB, ¶ 195.

not articulated a reason why national treatment should be treated different."[190]

305. Finally, the Respondent argues that even assuming *arguendo* that the *dies a quo* is tied to the treatment of the 809 Contract, Pemex settled that contract in August 2015 nearly three years before the critical date, and six years before initiating this arbitration. If the Claimants genuinely did not know about the settlement immediately, certainly they should have known about it before March 25, 2018. A party cannot unilaterally extend the limitations period by neglecting (or consciously avoiding) making itself aware of relevant facts.[191]

b. The Claimants' position

306. According to the Claimants,

> "Mexico argues that having a comparator is irrelevant: 'the date of the settlement with Zapata and Integradora is irrelevant'. Mexico contends that a National Treatment breach 'occurs when the treatment towards the claimant occurs; not when the treatment towards a comparator occurs'. Put simply, Mexico argues that an investor must raise a National Treatment claim when Mexico commits an adverse act even if the investor does not know of a comparator that was treated more favourably in like circumstances. This is not how National Treatment operates. A National Treatment claim necessarily requires treatment towards at least two entities -a U.S. investor and a Mexican national-. A U.S. investor cannot be treated less favourably unless there is also treatment to a domestic comparator. In this case, Claimants could not have been treated less favourably than Integradora and Zapata unless there was treatment afforded to Integradora and Zapata."[192]

307. The Claimants stress that

> "Pemex agreed to pay Integradora and Zapata on April 9, 2018. Pemex paid these Mexican nationals at some point before June 25, 2018, when they executed the Acta de Extinción.[193] Both of these events occurred after the three-year cut-off of March 25, 2018. The Tribunal's analysis can end there."[194]
>
> "Nevertheless, the NAFTA and the USMCA contemplate that an investor may not know of these events at the time and instead learn of them at a later

[190] RPHB, ¶ 198 and Appendix, ¶ 8.

[191] RPHB, ¶ 196.

[192] CPHB, ¶¶ 218-219.

[193] **JAH-0066**, 809 Contract, *Acta de Extinción*, June 25, 2018.

[194] CPHB, ¶ 221.

> date. Hence, they incorporate the concept of 'first acquires or should first acquire knowledge of the alleged breach'. Claimants did not know of the 809 Contract settlement until September 2020. Notably, Mexico has not submitted any evidence that Claimants could have known of the settlement beforehand. Again, September 2020 is after March 25, 2018, and within the three-year cut-off. Thus, Claimants' National Treatment claims are not time-barred."[195]

308. The Claimants underline that they

> "have established that they did not know of a comparator until September 2020, when they obtained Pemex's *Acta Circunstanciada* with the Mexican nationals holding the 809 Contract. Mexico has provided no evidence to the contrary. Claimants submitted their National Treatment claims within three years of learning about this settlement. As such, these claims are timely."[196]

309. The Claimants further explain that Article 14.2(3) of the USMCA

> "explains why Claimants brought their National Treatment claim with respect to the 821 Contract under the NAFTA and not the USMCA. At the time Claimants initiated this arbitration, the acts and events underlying Mexico's breach had concluded with the administrative court's decision in October 2018 (at least Claimants understood as much until Pemex proceeded with its unilateral *finiquito* after this arbitration began).[197] Although Claimants learned of PEMEX's settlement with the Mexican nationals in September 2020, the operative acts upon which Claimants' National Treatment claim was based had already concluded before July 1, 2020."[198]

310. The Claimants disagree with the conclusions drawn by the Respondent from *Resolute Forest v. Canada.* According to the Claimants,

> "*Resolute Forest* agrees with the simple concept that 'one cannot know of a breach until the facts alleged to constitute the breach have actually occurred'.[199] That tribunal continued that 'the breach nonetheless occurs when the State act is first perfected and can be definitely characterized as a breach of the relevant obligation'. In *Resolute Forest*, the tribunal based the time bar period on the actions of the State towards the comparator."[200]

---

[195] CPHB, ¶ 222.

[196] CPHB, ¶ 217.

[197] As Mexico notes in its Counter-Memorial, the amparo action to the administrative court's decision was rejected in January 2020. Counter-Memorial, ¶ 171. The appeal for review filed by Drake-Finley against the decision against the amparo court's decision was dismissed in March 2020 (the "**Appeal for Review 1685/2020**"). See Counter-Memorial, ¶ 178.

[198] CPHB, ¶ 206.

[199] **RL-0031**, *Resolute Forest*, ¶ 154.

[200] CPHB, ¶ 220.

311. The arbitral ribunal stated that the measures taken by the Nova Scotia Government to favor the Canadian company (Port Hawkesbury) took place "three months before the critical date." Thus, it focused on the action in support of the local companies, not towards the foreign claimant.

312. According to the Claimants, they only learned in September 2020 that they were being treated differently than how Pemex had treated the Mexican nationals with the 809 Contract. Pemex had agreed to pay the Mexican nationals for unrequested work in April 2018.

> "It is axiomatic that MWS and Prize could not have known that they had incurred a loss or damage 'by reason or arising out of' Mexico's breach of its USMCA obligations until they knew, or had reason to know, of such breach."[201]
>
> "That occurred in September 2020, and at that time, they were still being treated less favorably than the Mexican nationals because they were continuing to litigate while the Mexican nationals had been paid. Claimants have based their breach on the litigation that they were subjected to from September 2020 onward. All of this was after July 1, 2020, and Article 14.2(3) does not apply."[202]

c. The Tribunal's analysis

313. Having already decided, *ratione materiae,* that the Tribunal does not have jurisdiction on the alleged breach by Mexico of its National Treatment obligations as a consequence of PEP's acts concerning the 803 and 804 Contracts, there is no need for the Tribunal to analyze whether these particular claims are also time-barred as a result of the three-year limitation period enshrined in Annex 14-E.4 of the USMCA.

314. Thus, the only relevant question for the Tribunal with respect to this jurisdictional objection refers to the 821 Contract and is this: Has the Tribunal jurisdiction to decide whether Mexico breached its National Treatment obligation under Article 1102 of NAFTA with respect to the 821 Contract?

315. To answer that question the Tribunal does not need to take a view on the issue, extensively pleaded by the Parties, of whether the three-year period starts running from the moment of

[201] Reply, ¶ 429.
[202] CPHB, ¶ 202.

the knowledge by the claimants of the more favorable treatment granted to a domestic investor or, alternatively, from the moment when the claimant suffered an alleged loss or damage. The Tribunal may leave that contentious issue undecided. This is so because:

- The *Acta Circunstanciada* between PEP and Integradora and Zapata was signed on April 9, 2018.
- The decision by the PEP's Legal Department and operational managers to call in its entirety the US$ 41.8 Dorama Bond was taken during the "Villahermosa Meeting" on May 16, 2018.
- The *finiquito* of the 821 Contract was issued unilaterally by PEP on November 10, 2021.

316. Consequently, to the extent that the *Acta Circunstanciada* was signed less than three years before the cut-off date of March 25, 2018, that the decision taken by PEP's managers in Villahermosa concerning the Dorama Bond took also place less than three years before such cut-off date, and that the unilateral issuance of the *finiquito* of the 821 Contract was an administrative act which took place when the arbitration was already in full swing, there exists no time-bar for the Tribunal to decide the alleged claim that Mexico breached Article 1102 of NAFTA concerning the 821 Contract.

317. Thus, in the Tribunal's view, the claims for the alleged breach by Mexico of its National Treatment obligation under Article 1102 of NAFTA in the case of the 821 Contract cannot be considered time-barred. Hence, the merits of such claims shall be analyzed in the merits section of this Decision.

B. OBJECTIONS SPECIFIC TO THE 803 AND 804 CONTRACTS

(1) The 803 and 804 Contracts and any associated investments were not in existence on the date the USMCA entered into force.

a. The Respondent's position

318. For the Respondent, the 803 and 804 Contracts expired when their *finiquitos* were signed (*i.e.*, on February 10, 2015, for the 803 Contract and April 10, 2015, for the 804 Contract).[203]

319. Thus, for the Respondent, "[a]ny rights and obligations that may still exist no longer derive from Contract 803, but from the [*finiquito*] as an independent administrative act with respect to Contract 803."[204]

320. In the Respondent's view, "Contracts 803 and 804 expired under their own terms in 2015 and thus concluded before the USMCA entered into force. Because those Contracts and any investments in Mexico associated with those Contracts ceased in 2015, they are not 'covered investments' under the USMCA."[205]

321. The Respondent submits that

> "[t]he Claimants take the position that the *finiquito* or settlement process for Contracts 803 and 804 left these contracts open because MWS and Bisell 'reserved their rights under each *finiquito*.' At the Hearing, however, it was established that the *finiquitos* for Contracts 803 and 804 -both finalized and signed in 2015- did not contain any reservation of rights under the Contracts themselves […]. Mr. Asali, the legal expert of the Respondent, then confirmed that any rights under the Contracts ended when the respective *finiquitos* were finalized. He explained that 'any right reserved in the *finiquito* would have as a source the *finiquito* itself and not the respective Contracts', and that the *finiquito* 'terminates the Contract, but it is not part of the Contract.' Mr. Asali also confirmed that the *finiquito* is independent and puts an end to the contract in question."[206]

322. In addition, the Respondent argues that "the Claimants failed to establish that they had any other assets relating to the contracts in Mexico as of July 2020. Indeed, it is the position of

[203] Respondent's Opening Presentation at the Hearing, slide 49.

[204] Second Asali Report, ¶ 26.

[205] RPHB, ¶ 201. Emphasis in the original.

[206] RPHB, ¶ 202.

the Respondent that, with the Contracts long since terminated or expired, the Claimants could not have had any relevant investment left in Mexico."[207]

b. The Claimants' position

323. The Claimants make a distinction between the "execution period" or "*plazo de ejecución*" of the 803 and 804 Contracts -the period for the performance of the works, which ended when the *finiquito* was signed- and the "termination" of the Contracts, which did not take place when the *finiquitos* were signed.

324. In this connection, the Claimants recall that Clause 3[208] of the 803 Contract makes clear that the validity (*vigencia* in Spanish) of the contract continues until the parties sign an act that extinguishes all of the parties' rights and obligations. Likewise,

> "Clause 18 of the 804 Contract is clear that the contract remains in effect until the *finiquito* is formalized, or in the case the *finiquito* has amounts owed, until such amounts are paid in full. MWS and Bisell reserved their rights under each *finiquito*. As a result, neither the 803 Contract nor the 804 Contract terminated."[209]

c. The Tribunal's analysis

325. In the Tribunal's view, there is merit in the Claimants' distinction between the "execution period" of the Contracts–which ended at the latest with their *finiquitos*–and the "termination" of the Contracts, which, according to the Contracts, could only take place once legal claims resulting from the contracts had been adjudicated. For both Contracts, the legal claims thereunder had not yet been adjudicated by the time the USMCA entered into force. To that extent, in a legal sense, the 803 and 804 Contracts had not "terminated" as of July 1, 2020, when the USMCA entered into force.

326. The wording of the 803 and 804 Contracts confirms this conclusion.

327. *First*, the wording of Clause 2 of the 803 Contract is clear: the contract will remain in effect until such time that "a juridical act is finalized that extinguishes the totality of the rights

[207] RPHB, ¶ 203.

[208] There is a minor typo here. The correct reference is to Clause 2, as rightly stated in CPHB, ¶ 150.

[209] Reply, ¶¶ 402-403.

and obligations of the parties."[210] *Second*, likewise, as explained above, Clause 18 of the 804 Contract specifies that "the term of the Contract will end until the Settlement is formalized or, in the event that it results in balances in favor of any of the Parties, until the date on which the corresponding amounts are paid in full."

328. Therefore, this jurisdictional objection is dismissed.

(2) Royal Shale Holding and Royal Shale Corporation did not submit their consents to arbitration and waivers

329. During its initial presentation at the Hearing, the Respondent argued that Royal Shale Holdings and Royal Shale Corporation had each a 25% participation in Bisell, but had not submitted the consent to arbitration and waiver required by Article 14.D.5 of the USMCA.[211]

330. The Respondent made its statement that Royal Shale Holdings and Royal Shale Corporation had a 25% stake in Bisell on the basis of the public deed, dated April 22, 2014, that the Claimants had submitted as exhibit **C-0011** with their Request for Arbitration, on March 25, 2021.

331. However, neither the Respondent nor the Claimants mentioned this issue in their Post-Hearing Briefs.

332. In the Tribunal's view, this objection should be dismissed on substantive grounds, because, as explained below, it goes beyond the requirements set forth in Article 14.D.5.1 (e) of the USMCA.

333. The claims related to the 803 and 804 Contracts were submitted in this arbitration under Article 14.D.3.1 of the USMCA, indents (a) -which refers to the claimant, acting "on its own behalf"- and (b) which refers to the claimant acting on behalf of an enterprise "that it owns or controls, directly or indirectly". While Article 14.D.5.1 (d) just requires the consent of "the claimant", Article 14.D.5.1 (e) requires that written waivers are submitted by the claimant -in the case of claims submitted under Article 14.D.3.1 (a)- or "by the

[210] **C-0032**, 803 Contract, Clause 2. Tribunal's Translation (The original clause in Spanish reads: "*La vigencia del presente contrato inicia a partir de la fecha de firma y concluye hasta que se formalice el acto jurídico mediante el cual se extingan en su totalidad los derechos y obligaciones de las partes.*")

[211] Respondent's Opening Presentation at the Hearing, slide 52.

claimant and the enterprise" - in the case of claims submitted under Article 14.D.3 (b)-. It is clear from the text that the latter expression refers to the enterprise controlled by the claimant.

334. It should be recalled that the claims related to the 803 and 804 Contracts were presented by two of the Claimants in the arbitration *i.e.*, Prize and MWS. Prize controls Bisell, the Mexican enterprise which, together with MWS, were the contractors in the 803 and 804 Contracts.

335. While it is true that, as stated by the Claimants, after the restructuring of Bisell which took place in 2013, Royal Shale and Royal Shale Corporation kept a 25% stake in Bisell, these companies are not claimants in this arbitration, were never parties to the 803 or 804 Contracts and, finally, were just individual minority shareholders in Bisell. Hence, under Article 14.D.5.1 (d) and (e), the Claimants in this arbitration were not required to submit neither a consent to arbitration nor any waiver from Royal Shale or Royal Shale Corporation.

336. Consequently, for the reasons stated, this jurisdictional objection is dismissed.

(3) Most of the measures do not fall within the scope of the USMCA

a. The Respondent's position

337. For the Respondent, the Tribunal

> "lacks jurisdiction under the USMCA for claims associated with Contracts 803 and 804 because the relevant conduct occurred prior to its entry into force."[212]
>
> "[A] Claim may not be brought under the USMCA with respect to measures that took place before July 1, 2020. Article 14.2(3) of the USMCA states that Chapter 14 'does not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement.'"[213]

338. The Respondent stresses that

> "[a] breach of the USMCA may only occur if the act in question took place while the USMCA was in force. The Minutes of the April 9, 2018 to

[212] RPHB, ¶ 200.

[213] Rejoinder, ¶ 297.

> memorialize the settlement of Contract 809 was an action that took place well before July 1, 2020. And the administrative termination of Contracts 803 and 804 took place even earlier."[214]

339. For the Respondent,

> "the last material event in the various legal proceedings involving Contract 803 was the suspension of all cases in Mexico because of the pandemic on March 20, 2020. The only events after that date were the filings by MWS and Bisell for their withdrawal of their case in March 2021 and the expiration of the proceeding in October 2021 due to procedural inactivity. The Claimants have not identified any measure that took place after the USMCA entered into force."[215]

340. The Respondent further argues that

> "[w]ith respect to Contract 804, the only events that occurred in the Annulment Proceeding 2019 Lawsuit after July 1, 2020 were as follows: (i) in August 2020, the Head of PEMEX Unit of Responsibilities was dismissed from the proceedings, (ii) in December 2020, the Court admitted the complaint against PEMEX and ordered PEMEX to submit certain files to the court, (iii) in March 2021, PEMEX appealed the order to submit the files, and days later (iv), on June 3, 2021, MWS and Bisell forfeited their claim. None of these events can be said to have denied justice to MWS and Bisell. Indeed, the last decision rendered by the court after July 1, 2020 was the decision to admit the complaint against Pemex. The Claimants withdrew that claim 11 months later."[216]

b. The Claimants' position

341. For the Claimants, MWS's and Prize's claims related to the 803 and 804 Contracts are two-fold.

342. *First*,

> "Mexico failed to afford Claimants Fair and Equitable Treatment under USMCA 14.6 by denying them justice and due process with respect to their domestic litigation. These lawsuits were pending when Claimants had to seek their discontinuance to initiate this arbitration. Claimants' knowledge of Mexico's breach of its USMCA obligation occurred well after the March 25, 2018 'cut-off" date."[217]

---

[214] Rejoinder, ¶ 298.

[215] Rejoinder, ¶ 299.

[216] Rejoinder, ¶¶ 300-301.

[217] Reply, ¶ 427.

343. *Second*, MWS and Prize claim that Mexico treated at least one Mexican oilfield company more favorably, and that Mexico discriminated against the MWS and Prize in its treatment, breaching its obligations under the USMCA. MWS and Prize did not know about this disparate treatment until they actually obtained the *finiquito* of the 809 Contract in late 2020. This is well within the March 25, 2018 "cut-off" date.[218]

344. In their Reply, the Claimants explain the difficulties they encountered when deciding whether their claims related to the 803 and 804 Contracts were to be made under the NAFTA or the USMCA. In the Claimants' view, the problem arose because

> "[t]here is a conflict between Footnote 21 and USMCA Article 14.2(3). Under Footnote 21, Mexico required Claimants to bring claims under the USMCA that otherwise could have been brought under the NAFTA. However, USMCA Article 14.2(3) does not allow consideration of facts relevant to a NAFTA claim, to wit, before July 1, 2020. This is an irreconcilable conflict. It would be unjust for Mexico to suggest that acts or facts that would have been examined under the NAFTA no longer pertain to the USMCA claim that Mexico forced under Footnote 21."[219]

345. The Claimants submit that, insofar as the domestic lawsuits with respect to the 803 Contract and the 804 Contract were ongoing when Claimants submitted the Request for Arbitration, at a time when the USMCA was already in force, they made all their claims under the USMCA instead of splitting claims between it and the NAFTA. "Indeed, because there are no material differences in the protections under the treaties, doing so would have been putting form over substance."[220]

346. However, the Claimants assert that they could have also brought some of their claims associated with the 803 Contract and the 804 Contract under USMCA Annex 14-C(1), which allows an investor to bring a NAFTA claim for a "legacy investment" (made during the effectiveness of the NAFTA and in existence upon the USMCA's entry into force). However, Footnote 21 to USMCA Annex 14-C(1) states:

> "Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to

[218] Reply, ¶ 428.

[219] Reply, ¶ 415.

[220] Reply, ¶ 412.

> arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)."

347. Thus, even if these were NAFTA claims, Footnote 21 required the Claimants to bring them under the USMCA if they relate to "covered government contracts", which, in the Claimants' view, the 803 Contract and the 804 Contract were.[221]

348. At any rate, the Claimants argue that MWS and Bisell were denied justice and due process in the Mexican court system. This was ongoing when they asserted their USMCA claims. Thus, Mexico's objection does not apply to this claim.

349. The Claimants also argue that Mexico discriminated against MWS and Bisell and treated the Mexican service companies holding the 809 Contract more favorably. The Claimants did not receive written confirmation about the *Acta Circunstanciada* for the 809 Contract, indicating disparate treatment, until September 2020. Thus, Mexico's objection does not apply to these claims either.

c. The Tribunal's analysis

350. In the Tribunal's view, the fact that the lawsuits started by MWS and Bisell in Mexico in connection with the 803 and 804 Contracts were still undecided by the time the Claimants submitted their Request for Arbitration on 25 March, 2021, at a time when the USMCA was in force, makes clear that the Tribunal has jurisdiction to decide the issue of whether the Claimants suffered a "denial of justice" concerning those lawsuits.

351. Since the Tribunal has already decided, *ratione materiae*, that it does not have jurisdiction on the claims for the alleged breach by Mexico of its National Treatment obligations with respect to the 803 and 804 Contracts, it would not be strictly necessary that it analyzes whether those claims are based on acts by Mexico which took place after the USMCA entered into force (*i.e.*, after July 1, 2020) and, hence, meet the requirement set out in Article 14.2(4) of the USMCA.

352. Notwithstanding that, the Tribunal notes that, concerning the 803 and 804 Contracts, it shares the Respondent's view that it also lacks jurisdiction with respect to the claims for breach of the National Treatment obligations under the USMCA, to the extent that the

[221] Reply, ¶ 414.

alleged sovereign act on which the claims are ultimately based, namely, the signing of the *Acta Circunstanciada* between PEP and Integradora and Zapata, took place on April 9, 2018, well before the USMCA entered into force. Hence, this is a second reason which buttresses the Tribunal's conclusion that it lacks jurisdiction concerning those specific claims.

(4) The Claimants do not have a qualifying investment dispute that permits claims under Annex 14-E

a. The Respondent's position

353. According to the Respondent, "USMCA Chapter 14 applies only to a 'covered investment', which is defined to mean 'an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter.'"[222]

354. For the Respondent,

> "[t]he Claimants argue that the investments allegedly associated with the contracts were made while the NAFTA was in force and continued to exist in Mexico as of the date of entry into force of the USMCA. However, the allegedly associated investments cannot be considered in isolation from Contracts 803 and 804 because the contracts and any related investments are inextricably linked […]. They must be treated as a single investment for purposes of determining whether MWS and Prize had 'covered investments'. When the Contracts 803 and 804 expired, so did the investments associated with Contracts 803 and 804."[223]
>
> "Both Contract 803 and 804 expired under their own terms and ceased to exist before the date of entry into force of the USMCA, and nothing prevented the Claimants from disposing of the equipment and land they acquired, or from using it for other purposes."[224]
>
> "Clearly, Claimants did not have a covered investment under the USMCA –nor an established, acquired, or expanded covered investment– as of July 1, 2020."[225]

[222] Counter-Memorial, ¶ 396.

[223] Counter-Memorial, ¶ 397.

[224] Counter-Memorial, ¶ 398.

[225] Counter-Memorial, ¶ 399.

355. The Respondent insists that "[t]he Claimants have not established that they held investments separate from the written contracts […] there is no documentary evidence at all that MWS or Bisell purchased land or equipment, or leased warehouses."[226]

b. The Claimants' position

356. In the Claimants' view,

> "Mexico argues that Claimants do not have a 'qualifying investment dispute', as defined in USMCA Annex 14-E. Mexico does not meaningfully explain this argument. As best Claimants understand, Mexico contends that a 'qualifying investment dispute' requires a claim based on more than a government contract. Once again, Mexico is isolating language from a definition to create an issue that does not exist."[227]

357. For the Claimants,

> "[u]nder Annex 14-E, an investor can bring a 'qualifying investment dispute' to arbitration if it is a party to a 'covered government contract'. USMCA Article 14.D.1 defines 'qualifying investment dispute' as a dispute between an investor of an Annex Party, *i.e.*, the United States and the other Annex Party, *i.e.*, Mexico. Claimants are U.S. companies and have a dispute with Mexico, thus, there is a 'qualifying investment dispute.'"[228]

358. The Claimants submit that

> "[t]he 803 Contract and the 804 Contract are written agreements between a national authority of Mexico. Footnote 33 of Paragraph 6(c) (definition of 'national authority') [of the USMCA] explains that this includes a state enterprise when exercising government authority delegated to it by an authority at the central level of government. This necessarily includes Pemex, and Mexico has not stated otherwise."[229]

359. According to the Claimants,

> "Claimants relied on the 803 Contract and the 804 Contract in making investments in Mexico. Thus, Mexico appears to take issue with the phrase 'other than the written agreement itself'. This is not as complicated as Mexico pretends. This simply states that executing a written agreement with Pemex, without anything more such as making capital commitments under the agreement, is not a 'covered government contract'. Said differently, merely entering into a contract with Pemex, without anything more, does

[226] Rejoinder, ¶ 303.

[227] CPHB, ¶ 162.

[228] CPHB, ¶ 163.

[229] CPHB, ¶ 165.

> not give rise to a claim that can be brought to arbitration under Annex 14-E. Instead, that dispute must first go to a Mexican court and remain unresolved for 30 months before being eligible for arbitration. That is not the situation with either the 803 Contract or the 804 Contract, and thus, this objection should be rejected."[230]

c. The Tribunal's analysis

360. In the Tribunal's view, in order to be able to perform their services under the 803 and 804 Contracts, the Claimants made an "investment" in Mexico, and it is that investment -not the contracts, as such- which is protected under the USMCA. The contracts and their evolution were key to determine the actual return the Claimants got on their investment, and the ultimate reason why they claim that Mexico breached the Treaties.

361. Over the course of the years, as the three Contracts which are the object of this arbitration -*i.e.*, the 803, 804 and 821 Contracts- were signed and performed, the Claimants made investments in Mexico, without each and every asset invested in being necessarily assigned, in exclusivity, to one of the three Contracts. While it is true that some specific equipment have been assigned in practice by the Claimants to one particular contract -*e.g.,* the equipment and material described in the Annex DT of the 821 Contract was assigned in all likelihood to such contract-, business logic dictates that other assets -like, for instance, the yard in Poza Rica- were jointly used by the Claimants in the performance of more than one contract, without any need to have a biunivocal correspondence between assets and contracts.

362. Finally, the Tribunal has already explained that, contrary to the Respondent's view, the 803 and 804 Contracts were not legally terminated, in a legal sense, in 2015 when their performance period came to an end and their *finiquitos* were signed.

363. Thus, in the Tribunal's opinion, whatever the merits of the Claimants' claims with respect to the 803 and 804 Contracts, as a result of these Contracts the Claimants made investments in Mexico which allow them to submit relevant claims in this arbitration under Annex 14-E of the USMCA.

[230] CPHB, ¶ 166.

(5) The claims raised under Annex 14-E are time-barred

a. The Respondent's position

364. For the Respondent, "the Claimants cannot say when the denial of justice occurred. Nor do they identify the act upon which their claim is based or how they learned of this act […]." The Claimants' "supposed realization of loss 'more than five years' into a series of independent litigations ins entirely arbitrary. It is made up by the Claimants to avoid the time bar."[231]

365. For the Respondent, "the Claimants indisputably knew of the impugned acts giving rise to the claims well before the critical date [*i.e.*, March 25, 2018]."[232]

> "Regarding the denial of justice claim, the Claimants have not satisfied their burden. The Respondent explained in the Rejoinder that the statements from the Claimants about when they acquired knowledge are unsupported, self-serving and completely arbitrary. At the hearing, the Claimants offered nothing new. They addressed the time bar only in the context of Contract 821 and said *nothing* about when they learned of the supposed delays related to Contracts 803 and 804. Either the Claimants concede that they cannot satisfy their burden in this regard, or they have wrongfully combined separate court proceedings for all three Contracts into a single court proceeding and complained of delay. Either way, the denial of justice is time barred."[233]

366. Concerning the National Treatment claim, the Respondent submits that

> "the termination of Contracts 803 and 804 occurred years before the critical date, same as the rescission of Contract 821 […] [A] breach of Article 1102 legally occurs when the government accords treatment to the foreign investor. In this case, that treatment occurred well before the cut-off date. The fact that the Claimants learned of a possible comparator years later does not create a breach of the NAFTA where none existed prior."[234]

b. The Claimants' position

367. The Claimants have responded to this objection when they addressed the previous ones.

---

[231] Rejoinder, ¶ 305.

[232] RPHB, ¶ 206.

[233] RPHB, ¶ 207.

[234] Rejoinder, ¶¶ 308-309.

368. During the Hearing the Claimants insisted that "Mexico's and Pemex' s acts towards 803 Contract and 804 Contracts were continuing when arbitration commenced."[235]

c. The Tribunal's analysis

369. In the Tribunal's view, the conclusions it has already reached when addressing previous objections apply to this one as well.

370. Specifically, the Tribunal has already decided that the claim for "denial of justice" was not time-barred, to the extent that the two lawsuits relating to the 803 and 804 Contracts were still unadjudicated by the Mexican courts when the USMCA entered into force. Hence, this Tribunal has jurisdiction to decide the issue of whether the Claimants suffered an unjustifiable delay by the Mexican courts in dealing with these lawsuits which amounted to a "denial of justice" under the USMCA.

C. OBJECTIONS SPECIFIC TO THE 821 CONTRACT

(1) Annex 1120.1 of NAFTA establishes a "fork in the road" and the Claimants already claimed a breach of NAFTA in their Direct Amparo 74/2019.

a. The Respondent's position

371. The Respondent starts its objection by recalling that "Annex 1120.1 [of NAFTA] reflects that in Mexico, unlike the United States and Canada, the NAFTA is "self-executing" under domestic law, meaning an investor can raise certain claims under NAFTA in proceedings before a Mexican court. But under the plain language of Annex 1120.1, an investor must choose between arbitration and the Mexican courts. As stated by the U.S. Government in its "Statement of Administration Action" submitted to the U.S. Congress with the NAFTA for approval:

> "Because the NAFTA will give rise to private rights of action under Mexican law, Annex 1120.1 avoids subjecting the Mexican Government to possible 'double exposure' by providing that a claim cannot be submitted to Chapter Eleven arbitration where the same claim has been made before a Mexican court or administrative tribunal."[236]

[235] Claimants' Opening Presentation at the Hearing, slide 63.

[236] Counter-Memorial, ¶ 313; citing **R-0104**, The NAFTA Implementation Act, Statement of Administrative Action, November 3, 1993, p. 147.

372. For the Respondent,

> "Annex 1120.1 NAFTA imposes a genuine 'fork in the road' requirement: once the Claimants pursued their claim of NAFTA violations in the Mexican courts, they lost the right to bring the same legal claims under NAFTA Chapter Eleven […] [T]he NAFTA does not allow the Claimants to have 'two bites of the apple' in alleging violations of Section A of the NAFTA."[237]

373. In spite of that, according to the Respondent,

> "[o]n January 18, 2019, Drake-Finley filed the Direct Amparo 74/2019, which was addressed by the Fourteenth Collegiate Court in Administrative Matters of the First Circuit. Drake-Finley argued that the Annulment Proceeding 2017 resolution was unconstitutional and that it breached NAFTA Articles 1101, 1104 and 1105."[238]

374. More specifically, the Respondent recalls that in their Direct Amparo 74/2019 the Claimants argued as follows:

> "The definitive resolution of October 4, 2018, issued by the Honorable First Section of the Superior Chamber of the Federal Tribunal on Administrative Justice, in the trial number 20356/17-17-12-2/1599/18-S1-04-04, which resolved to establish the legality and validity of the controverted resolutions, causes a grievance to the plaintiff since it breaches the principles of legal security, the essential formalities of the proceeding, the access to full justice, consistency and completeness of the resolutions (…), which is in violation of the Political Constitution of the United Mexican States article 1, in relation to articles 8, 10 and 17 of the Universal Declaration of Human Rights, as well as the diverse article 50 of the Federal Law of Contentious-Administrative Procedure, 1105 of the North American Free Trade Agreement.
>
> […]
>
> Likewise, the FTA, Chapter XI, Section A-Investment, regulates the investments carried out by nationals of the States Party in the territory of the other State Party, which in accordance to articles 1101, 1104 and 1105 must have full protection and have all the benefits that the State Party may provide."

375. Furthermore,

> "[t]hrough Appeal for Review 1685/2020, Drake-Finley raised the same arguments again, but the SCJN dismissed this challenge as lacking

[237] Counter-Memorial, ¶ 314.

[238] Counter-Memorial, ¶ 315.

> constitutional importance and relevance. This means that in two different judicial instances Claimants raised issues related to the NAFTA."[239]

376. Thus, according to the Respondent,

> "Claimants did invoke the same NAFTA provisions in two legal proceedings before Mexican courts, as they did in this proceeding. As a consequence of this, the Tribunal lacks jurisdiction to hear the Case ARB/21/25 and the Claimants' right to bring claims under the NAFTA in relation to Contract 821 is precluded."[240]

b. The Claimants' position

377. For the Claimants,

> "Finley, Drake-Mesa, and Drake-Finley did not assert a breach of the NAFTA before the amparo court that is asserted in this arbitration. Moreover, they did not assert any breach of the NAFTA at all. The amparo court did not adjudicate any breach of the NAFTA because none were asserted. Put simply, asking an amparo court to determine whether the administrative court's actions violated constitutional rights by not favorably interpreting the 821 Contract because of its NAFTA protection is not making a claim for breach of a NAFTA obligation."[241]

378. According to the Claimants, the *Escrito de Alegatos* they submitted to the TFJA make particularly clear that "Finley, Drake-Mesa, and Drake-Finley did not make a claim to the administrative court that Mexico breached Article 1105 of NAFTA. Instead, this submission explains their argument that the NAFTA's protections should be considered as part of the court's interpretation of the 821 Contract when examining Pemex's administrative rescission:

> "Therefore, this Honorable Chamber must interpret the facts and legal arguments presented in this proceeding in the most favorable way to my clients, **since a superior and guaranteed protection must be protected for the great investment and confidence that they have placed in Mexico, its economy and people.**
>
> * * *
>
> For all of the foregoing, **any interpretation and analysis carried out by this Honorable Chamber must be carried out in the manner most favorable to the interests of my clients**, for the protection of the

[239] Counter-Memorial, ¶ 317.

[240] Counter-Memorial, ¶ 318.

[241] Reply, ¶ 245.

> investment (the Contract) and of Finley Resources, Inc., as a foreign investor, in terms of NAFTA and the Federal Constitution."[242]

379. The Claimants thus conclude that "it is misleading to imply that Finley, Drake-Mesa, and Drake-Finley asserted breaches of NAFTA obligations before a Mexican court. They did not."[243]

c. The Tribunal's analysis

380. The Tribunal starts its analysis by recalling the texts of Annex 1120.1 of NAFTA and of Article 1 of Mexico's Constitution, as the latter makes reference to the international treaties signed by the Mexican State, one of which was the NAFTA.

381. According to letter (a) of Annex 1120.1 (Submission of a Claim to Arbitration), applicable to Mexico:

> "An investor of another Party may not allege that Mexico has breached an obligation under [Section A] […] both in an arbitration under this Section and in proceedings before a Mexican court or administrative tribunal."

382. After the 2011 constitutional reform, Article 1 of Mexico's Political Constitution reads:

> "In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself.
>
> The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favour of the protection of people at all times." (emphasis added)

383. Article 1 of Mexico's Constitution makes clear that, as argued by the Respondent, Mexico follows a "monist" (or, in the Respondent's terminology, "self-executing") approach towards International Law, in such a manner that the international treaties signed by Mexico are considered automatically part of Mexico's legal system.

384. As another preliminary consideration before the Tribunal addresses this specific jurisdictional objection, it is important to note that in paragraph 453 of this Decision the Tribunal will conclude that it does not have jurisdiction to declare whether the

[242] CPHB, ¶ 171. Original emphasis.

[243] Reply, ¶ 247.

administrative rescission by PEP of the 821 Contract did or did not entail a breach of Mexico's Minimum Standard of Treatment obligation, since the administrative rescission was issued by PEP on August 28, 2017, well before the cut-off date under Annex 1120.1 of NAFTA (*i.e.*, March 25, 2018).

385. Hence, when dealing with the Respondent's "fork in the road" jurisdictional objection, the Tribunal will not need to consider any claim related to the administrative rescission by PEP of the 821 Contract and will limit its analysis to those claims over which it has jurisdiction.

386. Bearing in mind these preliminary considerations, the Tribunal will now explain the reason why it has decided to dismiss this jurisdictional objection.

387. The reason for dismissing this objection is that the substantive subject-matter of Drake-Finley *et al*.'s claim in the annulment proceedings before the TFJA was different from that of this arbitration

388. The Tribunal will analyze in detail the substance of the claims made by Drake-Finley *et al.* in the annulment procedure in Chapter XI when dealing with the merits of the claim of denial of justice. And such analysis will clarify something that is also very relevant here: that Drake-Finley's statement of claim before the TFJA , which was summarized in the TFJA's judgment dated October 4, 2018, focused on the lack of competence of PEP's officials signing the administrative rescission and the improper way in which it was notified, together with a number of references, explicit and implicit, to the *exceptio non adimpleti contractus*.

389. In their pleadings before the TFJA, the Amparo Court and Mexico's Supreme Court, the Claimants notably argued that, when deciding and interpreting whether PEP's administrative rescission had violated their rights, the Mexican courts had to bear in mind that those rights where human rights under the NAFTA, which deserved special protection according to the Mexican Constitution, as they were rights enshrined in an international treaty subscribed by Mexico.

390. The Mexican courts, however, rejected outright the Claimants' reference to NAFTA as a source of human rights, as stated by the Fourteenth Collegiate Court's judgment, on January 30, 2020, in Direct Amparo 74/2019:

> "Consequently, the request made by the plaintiffs is ineffective, since articles 1101, 1104 and 1105 of the North American Free Trade Agreement do not establish human rights that can be subject to the exercise of interpretation provided for in article 1st of the Magna Carta."[244]

391. After denying that the NAFTA established any human rights, the Amparo Court made no further analysis of NAFTA.

392. Drake-Finley *et al*. lodged an appeal for review (*revisión*) with the Supreme Court, but the SCJN refused to hear the case because it lacked "constitutional importance and relevance."

393. The Claimants' claims before this Tribunal are different in nature from those they made in the Mexican courts. Let's recall that in their prayers for relief in this arbitration concerning the 821 Contract they have alleged that "Mexico breached its obligations to provide Fair and Equitable Treatment under […] NAFTA Article 1105 by failing to provide due process and justice to Claimants and their investments". Hence, in response to such request the Tribunal will have to analyze, within the limits of its jurisdiction, whether the acts of any Mexican tribunal or court, including the TFJA, could have entailed a breach by Mexico of the Minimum Standard of Treatment enshrined in Article 1105 of the NAFTA.

394. The key conclusion here is that the Claimants' claims in this arbitration concerning Article 1105 of the NAFTA are different from the substantive claims they made before the Mexican tribunals and courts, because in this arbitration the Claimants' claims refer to the actual conduct and decisions of such Mexican tribunals and courts. In other words, a claim put before an international arbitration tribunal that a domestic tribunal, through its conduct or decisions, denied justice to a foreign investor is different from the claim lodged before the domestic tribunal whose acts or decisions are claimed to be a treaty breach. Therefore, it is clear for the Tribunal that the Claimants' claim that the Mexican courts and tribunals denied them justice cannot, by its very nature, run afoul of the "fork in the road" restriction of Annex 1120.1.

395. Additionally, the Claimants are also claiming in this arbitration a breach by Mexico of its National Treatment obligation under Article 1102 of the NAFTA as a result of the *Acta*

[244] **R-0050**, Judgment issued by the Fourteenth Collegiate Court within the Direct Amparo 74/2019, January 30, 2020. Tribunal's translation.

Circunstanciada that PEP signed on April 8, 2018, with Integradora and Zapata. Now, insofar as they lodged all their claims in Mexico well before that date, it is materially impossible, *ratione temporis*, that they alleged such NAFTA breach in their various judicial proceedings in Mexico. Consequently, the "fork in the road" provision embedded in Annex 1120.1 could not possibly apply to the claims in this arbitration based on Article 1102 of the NAFTA.

396. To conclude, as the Claimants' domestic claim in Mexico concerning the rescission of the 821 Contract did not include, like in this arbitration, any breaches by Mexico of Articles 1102 or 1105 of NAFTA, there was no "fork in the road".

397. Hence, this jurisdictional objection is dismissed.

(2) Claimants did not submit a waiver from Drake-Finley as required by NAFTA Article 1121.

a. The Respondent's position

398. According to the Respondent, Article 1121(1) of NAFTA establishes as a condition precedent to the submission of a claim to arbitration that the company must waive its right to initiate or continue before any administrative or judicial court any proceeding with respect to the allegedly infringing measure. In their view, "absent the consent and waivers required by Articles 1116 and 1117, there has been no consent to the arbitration by the Respondent. Further, it has been established by NAFTA tribunals, and confirmed by the NAFTA Parties, that the absence of a consent and waiver cannot be corrected in the course of the arbitration unless the NAFTA Party has consented, which in this case it has not."[245]

399. The Respondent emphasizes that "despite the Claimants' attempts to cure their waiver violation, there is no way in which it can be cured. If this Tribunal were to allow it, it would be tantamount to it consenting to arbitration on behalf of the respondent State."[246]

400. In the Respondent's view this is so because "[p]ursuant to the plain text of Article 1121, waivers must be submitted in writing and included with the request for arbitration. The Respondent further explains that waivers are a prerequisite to the consent of Mexico. The

[245] Rejoinder, ¶ 238.

[246] Rejoinder, ¶ 239.

Claimants do not dispute these points, which were all confirmed by the United States in its oral submission." The United States said:

> "[B]ecause the Parties have conditioned their consent upon the waiver requirements under NAFTA Article 1121, a valid and effective waiver is a precondition to the Parties' consent to arbitrate claims and to a tribunal's jurisdiction under USMCA Annex 14-C. A Claimants' failure to file an effective waiver before the Constitution of the Tribunal would result in the dismissal of arbitration, unless the Respondent State agrees otherwise because a tribunal would have been constituted without the consent of the Respondent State as contemplated in NAFTA Article 1122(1)."[247]

401. The Respondent argues that "[t]he only defense raised by the Claimants is that Drake-Finley supposedly 'cured' its mistake by submitting a waiver with its Reply. They support this defense with awards rendered by non-ICSID tribunals. The Respondent emphasizes that the conclusions reached in these awards are not persuasive because they do not respect the plain meaning of the text, as is required under the Vienna Convention. Furthermore, they completely ignore the written text of the NAFTA and wrongfully seek to create consent on behalf of the State."[248]

402. For the Respondent "it is not enough for an investor to simply withdraw its claims before the local courts. As the tribunal in *Waste Management v. Mexico [I]* explained, any waiver under Article 1121 'implies a formal and material act' by a person tendering the waiver, and both acts must be present for Article 1121 to be satisfied. The formal act refers to 'certain formal or *ad substantiam* requisites' of the waiver that must be 'duly complied with by the Claimant'. The material act refers to the conduct of the investor in compliance with the waiver. In this case, there is no dispute that the formal act -compliance with Article 112- was not carried out."[249]

403. Finally, the Respondent argues that to the extent that the Claimants did not include on time a consent or waiver by Drake-Finley "Claimants did not comply with the conditions precedent and expressly set out in Article 1121 of NAFTA, and therefore cannot bring a

[247] See RPHB, ¶ 188.

[248] RPHB, ¶ 189.

[249] RPHB, ¶ 190; citing **RL-0127**, *Waste Management Inc., v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, June 2, 2000.

claim on behalf of Drake-Finley under Article 1117, and cannot bring a claim for losses or damages to Drake-Finley under Section 1116."[250]

b. The Claimants' position

404. According to the Claimants, in this arbitration Mexico has failed to address

> "the decisions from NAFTA tribunals, from *Ethyl Corp v. Canada* onward, that have had little difficulty finding that an investor can remedy a failure to submit a written waiver when the investor has otherwise complied with the material requirements of NAFTA Article 1121 (not to initiate a new proceeding or maintain a preexisting one). In fact, Mexico did not disclose, nor did it respond when Claimants raised it, the recent decision in *B-Mex* that determined that the failure to submit a waiver can be cured. Similarly, Mexico also does not address how the only decisions to have found that failure to submit a waiver at the outset to be jurisdictionally fatal also are instances where the investor continued to pursue a claim in local courts over the same subject matter as the arbitration. That is telling."[251]

405. The Claimants submit that "other tribunals have allowed a missing consent and waiver to be cured."[252] The Claimants further argue that "[t]hree years ago, Mexico made the same argument before the tribunal in *B-Mex, LLC and others v. The United Mexican State*. After examining the issue, that tribunal concluded such a defect could be cured."[253]

406. Similarly, the Claimants continue, that in *Pope & Talbot v. Canada*, the tribunal "found that nothing in NAFTA Article 1121 prevented a waiver from having retroactive effect to validate a claim commenced beforehand."[254] Additionally, the tribunal found that "Canada was not prejudiced by the delayed submission of the waiver. The Canadian investment Enterprise had not attempted to initiate any proceeding in relation to the measures being adjudicated in the NAFTA arbitration."[255]

407. Furthermore, in *International Thunderbird Gaming Corporation v. United Mexican States*, the tribunal found that "to disregard the waivers would amount to an over-formalistic reading of Article 1121 of the NAFTA" and it joined "the view of other NAFTA Tribunals

[250] Counter-Memorial, ¶ 322.
[251] CPHB, ¶ 172
[252] Reply, ¶ 248.
[253] Reply, ¶ 250.
[254] Reply, ¶ 253.
[255] Reply, ¶ 254.

that have found Chapter Eleven provisions should not be construed in an excessively technical manner".[256] It further argued that

> "[t]he consent and waiver provisions were designed to prevent conflicting outcomes or double recovery for the same conduct or manner. Because the Mexican investment enterprises did not initiate or continue any remedies in Mexico while taking part in the NAFTA arbitration, the claimant effectively complied with Article 1121 by submitting waivers during the arbitration."[257]

408. The Claimants conclude that "Drake-Finley met the material requirements of NAFTA Article 1121; it sought to discontinue, and discontinued, its pending domestic proceedings against Pemex, *i.e.*, 'constructive waiver'. Drake-Finley's actions were more than just words, and accomplished the intended effect of NAFTA Article 1121. Drake-Finley's written waiver was just a mere formality, and Mexico suffered no prejudice because of Drake-Finley's delayed submission of its written consent and waiver."[258]

c. The Tribunal´s analysis

409. As a preliminary issue concerning the scope of this jurisdictional objection, the Tribunal observes that, during the Hearing, the Tribunal posed to the Respondent the question of the practical consequences of the fact that it was only Drake-Finley S.A. de C.V., one of the three contractors in the 821 Contract, which had not submitted its waiver on time:

> "[President] So, to what extent, the fact that one of the three entities didn't present on time its waiver affects the entire consortium and makes the Tribunal lose its jurisdiction altogether? Or it just means that the Tribunal, under that hypothesis, would not have jurisdiction only concerning claims benefiting Drake Finley. That's the question I wanted to pose to you […]."[259]
>
> "[…] my impression on reading that paragraph 322 [of the Respondent's Counter-Memorial] is that for the Respondent, what the Tribunal cannot do is to rule favorably on any claim by Drake Finley. But [my question is] whether that

[256] Reply, ¶ 258; citing **CL-0017**, *International Thunderbird Gaming Corporation v. the United Mexican States*, Award, January 26, 2006, ¶ 117.

[257] Reply, ¶ 259.

[258] Claimants' Response to the written submission of the United States as a Non-Disputing Party (the "**Submission of the United States**"), September 22, 2023, ¶ 12.

[259] English Tr. Day 3, 647:10-18; Spanish Tr. Day 3, 743:11-21.

> would entirely deprive the Tribunal of its jurisdiction, or would it merely […] deprive it of jurisdiction in relation to claims having to do with Drake Finley."[260]

410. In its response during the Hearing, the Respondent seemed to accept that this jurisdictional objection, even if accepted, would not deprive generally the Tribunal of jurisdiction to decide the claims presented by the Claimants concerning the 821 Contract, but just those related to their subsidiary in Mexico, Drake-Finley:

> [Mr. Bonfligio]: "The fact of not having properly presented, in keeping with Article 1121 of the NAFTA, Drake Finley's waiver has, as a consequence, that the Tribunal should determine that it does not have jurisdiction to resolve the case with respect to this entity, Drake Finley."[261]

411. Turning now to the objection as such, it is not controversial that Drake-Finley did not submit its waiver in this arbitration until Claimants' Reply, on April 14, 2023,[262] *i.e.*, well after the submission of the arbitration claim by the Claimants in 2021.

412. Furthermore, the Tribunal has also noted that, according to the U.S.,

> "[...] a valid and effective waiver is a precondition to the Parties' consent to arbitrate. [...] The purpose of the waiver provision [*i.e.*, Article 1121.1 of NAFTA] is to avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple forums with respect to the same measure, and to minimize not only the risk of double recovery, but also the risk of 'conflicting outcomes' (and thus legal uncertainty).'"[263]

413. However, in the Tribunal's view, a number of additional facts need to be taken into account.

414. *First*, on March 19, 2021, Drake-Finley, together with Drake-Mesa and Finley Resources, withdrew their claims (*desistieron*) in the Direct Amparo 540/2020, Direct Amparo 875/2019 and the 898/2017 and 899/2017 Appeals.[264]

415. *Second*, according to paragraph 127 of the First Asali Report, the TUCMA Judgment issued by the Third Unitary Court on the civil procedure on 821 Contract, became final (*firme*),

---

[260] English Tr. Day 3, 649:8-14; Spanish Tr. Day 3, 745:16-22.

[261] English Tr. Day 3, 651: 12-16; Spanish Tr. Day 3, 748:7-12.

[262] **C-0146**, Consent and Waiver on behalf of Drake-Finley, April 14, 2023.

[263] Submission of the United States, ¶ 11.

[264] See Annex **RZ-037**, Withdrawal writs, March 19, 2021.

as Drake-Finley and the other claimants in the procedure did not appeal or challenge it in Mexico within the prescribed time frame.

416. *Third*, according to paragraph 134 of the First Asali Report, the decision of March 17, 2020, of the Supreme Court was not challenged, and therefore this put an end to the administrative procedure against the rescission of 821 Contract.

417. *Fourth*, according to the 821 Contract, Drake-Finley was a special purpose vehicle established by, and under the full control of, Drake-Mesa and Finley Resources[265], and Clause 46 of the 821 Contract, while declaring that Finley Resources, Drake-Mesa and Drake-Finley assumed jointly and severally the Contract, established that Finley Resources had been designated a leader in the execution of the Works object of the Contract.

418. In light of all these circumstances it can be reasoned that as of the time when the Request for Arbitration was filed, Drake-Finley no longer had any "rights" to initiate or continue in Mexican courts any of the claims concerning 821 Contract that the Claimants have submitted in this arbitration and, therefore, it did not need to "waive" any such rights, because it had none.

419. As a consequence, there was no risk for Mexico of having to "litigate concurrent and overlapping procedures in multiple forums," double recovery or "conflicting outcomes (and thus legal certainty)," which in the U.S. view, shared by Mexico, is the rationale for the requirement of a valid and effective waiver.

420. In other words, for the Tribunal the requirement of Article 1121 of NAFTA should be understood as a substantive one, not as a purely formalistic requirement, and was met substantively by the Claimants by the time they filed their Request for Arbitration.

421. In the Tribunal's view, the fact that the Claimants ended up submitting, albeit well after their notice of arbitration, Drake-Finley's waiver is not a binding recognition on their part that the jurisdictional objection raised by the Respondent is well founded.

422. This is so because the Claimants could not anticipate how this Tribunal would react to the jurisdictional objection raised by the Respondent and in all likelihood engaged in what is

[265] **C-0034**, 821 Contract, Contractors' Statement, 1.2.

known in many jurisdictions as "pleading in the alternative" or "alternative pleading", *i.e.,* adducing alternative arguments, in case one of them stands a better chance to convince the judge or tribunal.[266]

423. This technique, while looked with suspicion in some jurisdictions, is legitimate and not unusual or forbidden in international arbitration or under the ICSID Arbitration Rules.

424. The key conclusion here is that, in legal pleadings, the parties are allowed to submit arguments in the alternative and, hence, the estoppel doctrine does not apply.

425. Consequently, this jurisdictional objection is dismissed also.

(3) 821 Contract and any associated investments are not "legacy investments" because they had been extinguished as of the date the USMCA entered into force

a. The Respondent's position

426. The Respondent submits that "Contract 821 was not in existence on the date of the entry into force of the USMCA (July 1, 2020) and consequently, it cannot be considered a 'legacy investment.'"[267] It further reminds the Tribunal "that the termination of Contract 821 was upheld by the Mexican courts. Given this lawful and final determination by the Mexican court, it cannot be said that Contract 821 was 'in existence' after that determination."[268]

427. The Respondent rejects the Claimants' assertion that "Contract 821 was in force due to the *finiquito*. However, the *finiquito* of Contract 821 did not begin until November 2021, a fact that Claimants confirm. Thus, as of July 1, 2020, the *finiquito* process was irrelevant."[269]

428. Concerning the Claimants' contention that some of their property remained in Mexico as of July 2020, "they offered no evidence of this. In fact, Mr. Finley had no idea whether any of the equipment -acquired by entities other than the Claimants- remained in Mexico."[270] In the Respondent's view, "there was no reason for Claimants to continue to employ

[266] The Oxford Dictionary of Law defines "alternative pleading" as follows: "In civil proceedings, the practice of including in a statement of case two or more inconsistent allegations and inviting the court to grant relief in respect of whichever allegation it finds to be well-founded."

[267] RPHB, ¶ 181.

[268] RPHB, ¶ 182.

[269] RPHB, Appendix, ¶ 3.

[270] RPHB, Appendix, ¶ 3.

Mexican workers, or to maintain facilities or equipment (either leased or purchased by Claimants) in Mexico after Contract 821 terminated, unless they were being used for a different purpose."[271]

429. The Respondent insists that "the Claimants have not submitted any evidence that any of that equipment remained in Mexico as of July 1, 2020. Indeed, it would be logical that the Claimants would have returned such equipment for use in their U.S. operations or sold it."[272] The Respondent underlines that Mr. Kernion declared that "we moved much of our equipment from our yard in Poza Rica to store it at our yard in Reynosa. Our equipment remains in the yard in Reynosa today. The last time I checked, our equipment was rusting". Initially Mr. Finley also declared that he "just assumed all our rigs are still there," but when Mr. Finley was shown a charge for the movement of rigs from the border to the "Jourdanton yard" -located in Texas-, he acknowledged that it suggested that some rigs were returned to the United States.[273] "Mr. Finley said he assumed there were still rigs in Mexico, but he did not know for certain. When pressed on the issue -and upon prompting from counsel for the Claimants- Mr. Finley theorized that they may still be in Mexico, but if they were they were essentially abandoned."[274]

430. The Respondent further argues that "[t]he Claimants also argued that they still had property in Mexico as of July 1, 2020, but offered no documentary evidence of that. Further, to the extent any the property did remain there, as of July 2020 it could not have been in use for Contracts 803, 804 or 821, all of which ended years earlier."[275]

431. Finally, the Respondent argues that

> "[d]uring the hearing, Claimants' counsel disclosed that MWS had actually loaned equipment - not sold or transferred ownership to any Mexican entity. Respondent pointed out that loaning equipment is not an investment. In addition, Claimants' counsel initially asserted that all the platforms were 'permanently imported' into Mexico, but two days later admitted that at least some of the rigs were returned to the United States. As discussed above, it is notable that Claimants did not submit any documentary evidence

[271] Counter-Memorial, ¶ 355.
[272] Rejoinder, ¶ 277.
[273] RPHB, ¶ 86.
[274] RPHB, ¶ 184.
[275] RPHB, ¶ 183.

> from the Mexican entities relating to their assets, which clearly indicates that no such evidence exists. Claimants have completely failed to meet their burden of proof on this issue."[276]

b. The Claimants' position

432. The Claimants argue that "Mexico's objection is based on a false premise. Mexico argues that 'the 821 Contract ended on December 31, 2017'. It did not."[277] According to the Claimants, "Clause 18 of the 821 Contract makes clear that the validity (*vigencia*) of the contract continues until either a *finiquito* is formalized or once any balance owed under such *finiquito* is paid in full:

> 'The vigencia will end once the Finiquito is formalized or, in the event the Finiquito results in a balance favoring either of the Parties, on the date on which such amount is paid in full'."[278]

433. The Claimants recall that "Mexico notes that it notified Finley and Drake-Mesa of the *finiquito* process on October 18, 2021. Thus, the 821 Contract was in effect when Claimants asserted their NAFTA claims under USMCA Annex 14-C."[279]

434. As additional proof for the Claimants, "Pemex's unilateral *finiquito* of the 821 Contract[280] clearly states:[281]

> 'The termination of this Contract 421004821 will occur once the CONTRACTOR pays the totality of the indicated amounts, not without warning that PEP reserves the right to take any administrative, judicial or jurisdictional action that it considers necessary to enforce its rights'."

435. The Claimants conclude that "[i]n fact, the 821 Contract remains in effect to this day. Pemex claims that amounts are owed under the unilateral *finiquito* that it executed in December 2021. This is why Pemex is attempting to claim Claimants' US$ 41.8 million Dorama bond."[282]

---

[276] RPHB, ¶ 185.

[277] Reply, ¶ 312.

[278] Reply, ¶ 314, citing **C-0034**, 821 Contract, Clause 18, ¶ 6.

[279] Reply, ¶ 315.

[280] **R-0043**, *Finiquito* for the 821 Contract, Article XII, November 10, 2021.

[281] CPHB, ¶ 160;,citing **R-0043**, *Finiquito* for the 821 Contract, Article XII, November 10, 2021.

[282] Reply, ¶ 316.

c. The Tribunal's analysis

436. As the Tribunal has stated earlier with respect to 803 and 804 Contracts, the concept that a contract and its associated investments legally expired when the execution period of the contract ended –in the case of the 821 Contract, as a result of its administrative rescission –should be rejected on two separate grounds.

437. *First*, Clause 18 of the 821 Contract makes it clear that "the term of the Contract will [not] end until the Settlement is formalized or, in the event that it results in balances in favor of any of the Parties, until the date on which the corresponding amounts are paid in full." As argued by the Claimants, Mexico itself makes explicit reference to this fact in its unilateral *finiquito*.

438. *Second*, arguing, as Mexico does, that the Contract and its associated investment ended when the contract was administratively rescinded would have the absurd result of depriving the Claimants of any Treaty protection from acts that took place after such date, like the ruling of the TFJA, the signature by PEP of the *finiquito* or the calling of the Dorama bond. Thus, such interpretation should be rejected.

439. The Tribunal thus concludes that this jurisdictional objection must be dismissed.

(4) Legacy claims are time-barred

440. This section will only deal with the Respondent's jurisdictional objection to the Claimants' claim for breach of the MST (or, more specifically, "denial of justice") concerning the 821 Contract, as the Respondent's time-bar objection to the claims for breach of National Treatment was addressed previously for all the Contracts.

a. The Respondent's position

441. The Respondent submits that "the claims related to Contract 821 are time-barred if the Claimants first acquired, or should have first acquired, knowledge of the alleged breach and any resulting losses prior to March 25, 2018. The Counter-Memorial establishes that

the Claimants acquired knowledge of both as early as 2017. The Claimants do not dispute these facts."[283]

442. The Respondent recalls in this connection that, according to Articles 1116.2 and 1117.2 of NAFTA, an investor may not make a claim "if more than three years have elapsed 'from the date on which the investor […] first acquired, or should have first acquired knowledge' of the alleged breach and loss." […] "The use of the word 'first' is critical. The word 'first' modifies the phrase 'acquired knowledge' to denote a single moment in time when the three-year period begins to run."[284]

443. For the Respondent,

> "[t]he Claimants stitch together 'a series of disjointed acts' that they say 'materialized into a breach' in October 2018 when the Mexican court 'endorsed Pemex's fabrication of a work order so Pemex could administratively rescind the 821 Contract'. But there is nothing to connect these series of 'disjointed acts' into a 'scheme', and the Claimants have not provided any evidence of collusion between Pemex and the courts."[285]

444. For the Respondent, the Claimants' statement

> "that the 'scheme' 'materialized' into a NAFTA breach when the Mexican court issued a decision in favor of Pemex directly contradicts the description of the claim given previously by the Claimants. In the Statement of Claim, they alleged that numerous acts by Pemex breached Article 1105, most of which occurred years before the court issued its decision. In their Reply Memorial, however, their claim has changed and the breach now occurs in October 2018, six months into the three-year limitation period. It is obvious that the Claimants changed their claim so that it could fall within the three-years limitations period."[286]

445. The Respondent takes issue with the Claimants' contention

> "that the denial of justice claim arose, at the earliest, on October 4, 2018 - the same as the alleged 'scheme'. But that date is entirely arbitrary. The Claimants do not explain why justice was denied on that day, other than to say that the court ruled in favor of Pemex. Notably, by that date, the court had already dismissed one years-long lawsuit initiated by the Claimants

[283] Rejoinder, ¶ 278.

[284] Rejoinder, ¶¶ 280-281.

[285] Rejoinder, ¶ 285.

[286] Rejoinder, ¶ 286.

against Pemex. Obviously, the selection of October 4, 2018 as the date of breach was chosen so as to fall within the three year period."[287]

446. The Respondent insists that

> "[t]he Claimants knew prior to the rescission that they were incurring alleged losses because of actions taken by Pemex, as evidenced by the claims of Drake-Finley against PEP in the Civil Proceeding 200/2016."[288] However, "[t]o avoid the statute of limitations, the Claimants point to acts subsequent to the critical date, specifically acts of the federal judiciary. But those subsequent acts do not renew the three-year time limit, nor do they change the fact that Claimants knew of their claims and losses years before the critical date. The situation is similar to that of *Corona v. Dominican Republic* where the claimant had knowledge of the contested act (refusal of a permit) before the critical date, but alleged that the subsequent acts (refusal of an appeal for reconsideration) occurred after the critical date. The court dismissed the claim as untimely because the subsequent act was not "an independent action" but 'an implicit confirmation of its [the government's] earlier decision'."[289]

b. The Claimants' position

447. The Claimants take issue with the Respondent's approach to "continuous breaches". According to the Claimants, "Mexico finds the earliest possible act and speculates that Claimants must have had knowledge of a NAFTA breach from that one act. Mexico then claims that all subsequent acts cannot be considered, including those that clearly fall within the 'cut-off' date. Mexico must admit that its approach grants it *carte blanche* to continue to engage in adverse acts even into the 'cut-off' date because those acts would be immunized by any that Mexico committed three years beforehand."[290]

448. Concerning specifically their "denial of justice" claim, the Claimants argue that

> "in October 2018, the Mexican administrative court condoned the rescission without respecting Finley's and MWS's contractual protection. It was not until that decision that Mexico's action had materialized into a breach of its NAFTA obligations -a Mexican court had endorsed Pemex's fabrication of a work order so Pemex could administratively rescind the 821 Contract. Then, Pemex continued its quest against Finley and Drake-Mesa into this

[287] Rejoinder, ¶ 288.

[288] Rejoinder, ¶ 287.

[289] RPHB, Appendix, ¶ 5.

[290] Reply, ¶ 356.

arbitration by proceeding with a unilateral *finiquito* and claiming against the US$ 41.8 million Dorama bond."[291]

"A reasonable person would not have appreciated Mexico's behavior had risen to a breach until the administrative court issued its egregious judgement Mexican court decision in October 2018, condoning PEMEX' s administrative rescission of a US$ 418 million contract based on a dubious US$ 1 million work order. In fact, a reasonable person might not have appreciated such until its challenge to the October 2018 was rejected by the amparo court in January 2020."[292]

449. For the Claimants,

"breaches of contract are not the same as breaches of investment obligations. When Pemex's behavior evolved to implicate breaches of Mexico's obligations of National Treatment and Minimum Standard of Treatment (Fair and Equitable Treatment), Claimants initiated this arbitration within the three-year requirement under both treaties."[293]

"Mexico's Minimum Standard of Treatment violation under the 821 Contract materialized on October 4, 2018 when the administrative court denied the challenge to Pemex's administrative rescission. At that point, a reasonable person would appreciate that Pemex's actions, coupled with those of the administrative court, had risen beyond mere breach of contract claims. Following the administrative court's egregious decision to ignore Clause 15.1(r), it became clear that Mexico was not affording a Minimum Standard of Treatment, including Fair and Equitable Treatment, to Claimants' investments."[294]

450. The Claimants stress that they

"could not have initiated their claim for a violation of Minimum Standard of Treatment prior to receiving *any* substantive ruling from a Mexican court. Had they done so, Mexico would have argued that those claims were not ripe and that Claimants had failed to afford the Mexican legal system sufficient time to render a just result. Moreover, Mexico would have argued that Claimants were raising contract claims and not investment claims, similar to the argument that Mexico is making now."[295]

451. The Claimants recall that "[b]oth October 2018 and January 2020 are well within the 'cut-off date' of March 25, 2018."[296]

---

[291] Reply, ¶ 351.

[292] Reply, ¶ 352.

[293] CPHB, ¶ 209.

[294] CPHB, ¶ 211.

[295] CPHB, ¶ 213.

[296] Reply, ¶ 353.

452. Finally, the Claimants explain why they are addressing in this arbitration, on the basis of the alleged breach by Mexico of its MST obligations with respect to the 821 Contract, the breaches which have taken place when this arbitration was already ongoing. They argue that

> "PEMEX has taken acts that violate Mexico's investment protections after this arbitration commenced. PEMEX executed its unilateral *finiquito* and then made claims against the US$ 41.8 million Dorama Bond. It would be inefficient not to address these acts as part of this arbitration. However, to the extent the Tribunal declines to address these acts as part of Claimants' existing claims and believes they should have been brought under the USMCA, Claimants reserve their rights to initiate a new arbitration against Mexico because of this wrongful conduct."

c. The Tribunal's analysis

453. As argued by the Respondent, under Articles 1116.2 and 1117.2 of NAFTA "an investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."[297] As a consequence, the Tribunal does not have jurisdiction to declare whether the administrative rescission by PEP of the 821 Contract did or did not entail a breach of Mexico's MST obligation, since it was decided in August 2017, well before the cut-off date (*i.e.*, March 25, 2018).

454. However, as recognized by both Parties in their PHBs, the Tribunal has the power to analyze, in the merits section of this Decision, the facts surrounding that rescission in order to decide on potential breaches which may have happened after the cut-off date and are, hence, within the Tribunal's jurisdiction.

455. In the Tribunal's opinion, leaving aside the August 2017 rescission of the 821 Contract, the Tribunal has *ratione temporis* jurisdiction on four events related to the 821 Contract which took place after the cut-off date.

456. In chronological order, the first event was the TFJA Judgment, on October 4, 2018, which upheld the administrative rescission by PEP of the 821 Contract.

[297] RPHB, Appendix, heading of question 3, p. A-2.

457. The second event was the decision taken on May 16, 2018, by PEP's representatives of its Legal Department and operational units, during the meeting held in Villahermosa (the "Villahermosa Meeting"), to claim the entire amount of the Dorama Bond.[298]

458. The third event was the judgment by the TUCMA on April 2, 2019, which dismissed the claim in the Ordinary Civil Trial 200/2016.

459. The fourth event was the signing by PEP, on November 10, 2021, of the unilateral *finiquito* of the 821 Contract, which formalized the decision, already taken in the Villahermosa Meeting, to call the entire amount of the Dorama Bond.

460. Since the issuance of the unilateral *finiquito* of the 821 Contract and the calling of the Dorama Bond took place when the USMCA was already in force, it could be argued that the Claimants should have based any such claim on the USMCA, and not the NAFTA. The Claimants themselves mentioned this point in their PHB, as already indicated, and reserved their right to start a new arbitration were this Tribunal to decide that it could not address such allegedly wrongful act. In fact, as mentioned in paragraph 77 above, on August 16, 2024 the Claimants informed the Tribunal[299] that on May 22, 2024 Finley and Prize had sent a Notice of Intent to Submit a Claim to Arbitration under Annex 14-E of the USMCA to Mexico's Ministry of the Economy, with a view to protect any claims under USMCA Annex 14-E regarding Pemex's unilateral *finiquito* for the 821 Contract and Pemex's subsequent call on the US$ 41.8 million Dorama Bond.

461. In the Tribunal's view, however, there is merit in the Claimants' statement that it would be procedurally inefficient to force the Claimants to start a new arbitration concerning the 2021 *finiquito* and the Dorama Bond, since they are directly linked to the administrative rescission of the 821 Contract and to all the facts of this case.

462. Besides procedural efficiency considerations, in the Tribunal's opinion two additional considerations speak in favor of upholding its jurisdiction to decide on the *finiquito* of the 821 Contract and the calling of the Dorama Bond.

---

[298] **C-0122**, Pemex Internal *Programa de Apoyo a la Comunidad y Medio Ambiente* ("**PACMA**") Memos (2016-2017).

[299] Electronic communication addressed by the Claimants to the Tribunal on August 16, 2024, which included a copy of the Notice of Intent filed by Finley and Prize to Mexico's Ministry of the Economy.

463. *First*, the Tribunal notes that Mexico has not raised any issue of jurisdiction based on the fact that the *finiquito* was unilaterally signed and the Dorama Bond called when the USMCA was already in force; indeed, it has tacitly accepted that the *finiquito* of the 821 Contract and the calling of the Dorama Bond were discussed in this arbitration, as announced by the Claimants in December 2021. To wit, when referring to the interim measures they had requested concerning the *finiquito* and the Dorama Bond, the Claimants stated that "[t]o the extent that Mexico's actions give rise to additional claims under NAFTA or the USMCA, Claimants reserve their right to assert them as part of these proceedings," as they actually did.[300] In rejecting such request for interim measures, the Respondent tacitly accepted that this Tribunal subsequently considered the *finiquito* and the Dorama Bond, when it stated the following:

> "By seeking to prohibit PEP from enforcing the rights under the Dorama Bond, the Claimants' requests asks the Tribunal to pre-judge whether it has jurisdiction and whether the termination of Contract 821 was invalid, which is prohibited by NAFTA Article 1134."[301]

464. It is true that in its PHB the Respondent argued in passing that "Pemex filed its formal claim for the Dorama Bond after the NAFTA terminated, as the Claimants confirm, and thus, Article 1105 does not apply." But it added that "[e]ven if Article 1105 was applicable, the act of calling on the Dorama Bond by Pemex is not egregious, shocking or unjust."[302] In the Tribunal's view, this belated, oblique reference by the Respondent to the non-applicability of Article 1105 of NAFTA does not change the fact that Mexico never questioned NAFTA as the legal basis for all the Claimants' claims related to the 821 Contract.

465. *Second*, as indicated above, the substantive decision to claim the entire US$ 41.8 million amount of the Dorama Bond was taken by PEP's management during its meeting in Villahermosa (the "Villahermosa Meeting"), on May 16, 2018, well before the USMCA entered into force in July 2020.

[300] Request for MP, ¶ 5.

[301] Respondent's response to Request for MP, January 3, 2022, ¶ 78.

[302] RPHB, ¶ 222.

466. *Third,* the protection afforded to investors by the NAFTA and the USMCA concerning Minimum Standard and National Treatment are similar and, thus, the rules to be applied by the Tribunal when considering the merits of the claims related to the *finiquito* and the Dorama Bond will be the same.

467. To conclude, concerning the Claimants' claims related to the 821 Contract and the alleged breach by Mexico of its MST obligations, there is no time-bar limiting this Tribunal's jurisdiction to consider the following acts:

- The 2018 TFJA judgment.
- The May 2018 decision by PEP's management during the "Villahermosa Meeting" to call the Dorama Bond.
- The TUCMA Judgment.
- The 2021 unilateral *finiquito*, including the calling of the Dorama Bond.

(5) The Tribunal lacks jurisdiction over contractual disputes

a. The Respondent's position

468. According to the Respondent, all the complaints raised by the Claimants concerning Contract 821 are contractual claims. And, as argued by the tribunal in *Hamester v. Ghana*, "it is not sufficient for a claimant to invoke contractual rights that have allegedly been infringed to sustain a claim for a violation of the FET standard.'"[303] Otherwise, "all investor-state contracts would be under the protection of the FET standard, and the latter would effectively constitute a broadly interpreted umbrella clause which the NAFTA does not contain."[304]

469. For the Respondent,

> "[t]he Claimants do not dispute that contract claims are outside the Tribunal's jurisdiction. Instead, they insist that they have not raised any contract claims. However, the alleged 'scheme to rescind the 821 Contract

[303] Counter-Memorial, ¶ 531, citing **RL-0044**, *Hamester v. Ghana*, ¶ 337.
[304] Counter-Memorial, ¶ 532.

and call the US$ 41 million bond' is a contract claim disguised as an Article 1105 claim."[305]

470. In the Respondent's view,

> "the [*Escrito de Alegatos*] reflect, as Respondent has mentioned in its pleadings and at the Hearing, that […] the current dispute is a contractual discussion."[306]
>
> "[I]t is clear from the [*Escrito de Alegatos*] that the current dispute concerns the interpretation and application of contract clauses. In other words, the dispute raised by the Claimants is a clear example of a purely contractual dispute that does not fall within the Tribunal's jurisdiction."[307]

b. The Claimants' position

471. The Claimants argue that "[t]his case is not about contract claims" but, as argued in *Waste Management v. Mexico II*, "this does not mean that the Tribunal lacks jurisdiction to take note of or interpret the contract."[308]

472. The Claimants further state that Clause 3 of the 821 Contract, entitled "Good Faith and Equity",

> "prohibited Pemex from how it treated Finley, Drake-Mesa, and Drake-Finley. PEMEX was not allowed to suspend works indefinitely under Clause 17 without paying nonrecoverable costs. But that is exactly what Pemex did in January 2016. Similarly, Clause 3 also prohibited Pemex from initiating an administrative rescission based on Work Order 028-2016. Pemex specifically had 'the duty to cooperate, not to intentionally mislead and to perform the Contract for the mutual benefit of PEP and the CONTRACTOR'. Pemex did not do that either. Instead, Pemex's Luis Gomez and Rodrigo Hernandez both admitted to Luis Kernion that Pemex fabricated this work order to administratively rescind the contract because it lacked the funds to continue paying for work."[309]

473. According to the Claimants,

> "Mexico asserts that 'Claimants do not attempt to explain how the 'scheme' was sufficiently egregious or shocking to breach the minimum standard of treatment.' This is remarkable. According to Mexico, it is not egregious or shocking when its national oil company fakes a work order to

[305] Rejoinder, ¶ 269.

[306] RPHB, ¶ 164.

[307] RPHB, ¶ 165.

[308] Claimants' Opening Presentation at the Hearing, slide 92.

[309] CPHB, ¶¶ 921-93.

> administratively rescind a US$ 418 million contract, despite a contractual provision that prohibits doing so. Moreover, Mexico contends that it is not egregious or shocking when its national oil company defends such behavior before an administrative court reviewing the administrative rescission, which itself ignored the protection against such conduct even though it was presented conspicuously to the court."[310]
>
> "In any event, Mexico's argument proves Claimants' point. Claimants are not asking this Tribunal to adjudicate Pemex's behavior under the 821 Contract. Claimants are asking this Tribunal to assess whether Mexico's conduct, through Pemex and its courts, complies with Mexico's obligation to provide a Minimum Standard of Treatment towards Claimants' investments, which in this particular instance, was the 821 Contract. Clearly Mexico did not."[311]

c. The Tribunal's analysis

474. In the Tribunal's view, the Claimants' reasoning on the nature of their claims has been occasionally unclear, suggesting at times that they were pursuing a contractual rather than a Treaty claim (*e.g.,* with their allegations, just quoted, concerning Clause 3 of the 821 Contract on good faith obligations). But in other pleadings they have made it clear that there is no disagreement between the Parties on this issue: this Tribunal lacks jurisdiction to hear pure contractual claims related to any of the three contracts.

475. This is particularly apparent for the 821 Contract, where Clause 47.2 states:

> "All disagreements, discrepancies, differences or controversies arising out of or relating to the interpretation or performance of this Agreement, which have not been resolved by any of the mechanisms provided for in the Agreement, shall be definitely resolved by arbitration conducted in accordance with the Arbitration Rules of the International Chamber of Commerce in force on the date of submission of the demand for arbitration, by three arbitrators appointed pursuant to the Arbitration Rules (…). The procedures for administrative termination and early termination of the contract established by PEP are of an administrative nature, so they will not be subject to arbitration."

476. Thus, save for the Claimants' occasional ambiguities on this issue, in the Tribunal's opinion it is common ground that the jurisdiction of this Tribunal is circumscribed to potential breaches by Mexico of its obligations under the USMCA and NAFTA. The

[310] CPHB, ¶ 224.

[311] CPHB, ¶ 225.

Tribunal considers, however, that, contrary to the Respondent's view, the Claimants have described alleged Treaty breaches by Mexico that do not refer to mere contractual breaches by PEP. As it should be apparent by now from the Tribunal's analysis in previous sections, on purely jurisdictional grounds the Tribunal will have to assess the merits of the following alleged non-contractual breaches by Mexico of its obligations under the USMCA and the NAFTA Treaties:

- Concerning the 803 and 804 Contracts, whether Mexico:
    - Incurred in "denial of justice" to the extent that, as alleged by the Claimants, Mexican courts failed to rule on a timely manner on the suits brought by them in 2015.
- Concerning the 821 Contract, whether:
    - The TUCMAJudgment in the Ordinary Civil Trial 200/2016 entailed a "denial of justice" by Mexico.
    - The TFJA Judgment upholding the administrative rescission of the 821 Contract amounted to a "denial of justice" by Mexico.
    - The unilateral *finiquito* and the decision to call the Dorama Bond entailed a breach by Mexico of its MST and National Treatment obligations under NAFTA.

D. CONCLUSIONS

477. As just indicated and in light of all the considerations made in this Chapter V on jurisdiction, the Tribunal has come to the conclusion that it retains jurisdiction on the following claims:

- In connection with the 803 and 804 Contracts:
    - Whether Mexico incurred in "denial of justice" to the extent that, as alleged by the Claimants, Mexican courts failed to rule on a timely manner on the lawsuits brought by the Claimants against PEP in 2015 in the Mexican courts.
- In connection with the 821 Contract:

- Whether the TUCMA Judgment in the Ordinary Civil Trial 200/2016 entailed a "denial of justice" by Mexico.
- Whether the TFJA Judgment upholding the administrative rescission of the 821 Contract amounted to a "denial of justice" by Mexico.
- Whether the 2021 unilateral *finiquito* and the decision to call the Dorama Bond entailed a breach by Mexico of its MST obligation and/or its National Treatment obligation under NAFTA.

478. Specifically, with regard to the 821 Contract, the Tribunal lacks jurisdiction *ratione temporis* to decide whether the unilateral rescission in 2017 of the 821 Contract entailed, or entailed not, a breach by Mexico of its MST and National Treatment obligations. However, as confirmed by both Parties in their Post-Hearing Briefs, the Tribunal has the power to analyze all the facts related to the unilateral rescission of the 821 Contract, whatever their date, in order to decide on the second and third issues on the 821 Contract detailed above.

VI. GENERAL ISSUES

A. FAIR AND EQUITABLE TREATMENT

479. To the extent that some of the claims to be adjudicated by the Tribunal are based on the alleged breach by Mexico of the MST, including FET, this section will start by recalling the relevant provisions of the NAFTA and the USMCA.

480. In the case of NAFTA, Article 1105(1) states:

> "Each party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

481. In the case of the USMCA, Article 14.6 reads:

> "1. Each Party shall accord to covered investments 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 standard of treatment to be afforded to covered investments. 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. The obligations in paragraph 1 to provide:
>
> a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> b) "full protection and security" requires each Party to provide the level of public police protection required under customary international law.
>
> […]
>
> 4. For greater certainty, the mere fact that a Party takes or fails to take action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."

(1) Views of the United States of America

482. Pursuant to Article 1128 of the NAFTA, Article 14.D.7(2) of the USMCA and Section 24 of PO1, on August 31, 2023, the United States of America made a submission on questions of interpretation of the NAFTA and the USMCA. This section will reproduce the most relevant paragraphs of the views of the United States on the MST.

483. The United States recall that

> "[o]n July 31, 2001, the Free Trade Commission […] issued an interpretation reaffirming that 'Article 1105(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 another Party.'"[312]
>
> "Specifically, 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[313]
>
> "A determination of a breach of the minimum standard of treatment 'must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters

[312] Submission of the United States, ¶ 35.

[313] Submission of the United States, ¶ 36.

within their own borders'. International tribunals do not have an open-ended mandate to 'second-guess government decision-making.'"[314]

"A denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a 'notoriously unjust' or 'egregious' administration of justice 'which offends a sense of judicial propriety'. More specifically, a denial of justice exists where there is, for example, an 'obstruction of access to courts', 'failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgement.'"[315]

"The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence, the particular nature of judicial action, and the unique status of the judiciary in both international and municipal legal systems. […] Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice."[316]

"[D]omestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law."[317]

"The concept of 'legitimate expectations' is not a component element of 'fair and equitable treatment' under customary international law that gives rise to an independent host State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standards of treatment not to frustrate investors' expectations; instead, something more is required. An investor may develop its own expectation about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment."[318]

"[C]laims alleging breach of the good faith principle in a Party's performance of its NAFTA or USMCA obligations do not fall within the limited jurisdictions grant afforded in Chapter Eleven and Chapter Fourteen, respectively."[319]

[314] Submission of the United States, ¶ 43.

[315] Submission of the United States, ¶ 47.

[316] Submission of the United States, ¶ 48.

[317] Submission of the United States, ¶ 49.

[318] Submission of the United States, ¶ 54.

[319] Submission of the United States, ¶ 57.

(2) The Claimants' position

484. In their pleadings, including their comments on the Submission of the United States, the Claimants have expressed the following (summarized) views on the MST and the FET standard.

485. According to the Claimants,

> "[t]he tribunal in *Pope & Talbot v. Canada*[320] interpreted NAFTA Article 1105 to require investors and their investments to receive the benefits of the fairness elements under ordinary standards applied in NAFTA countries, without any requirement to show government conduct that is 'egregious', 'outrageous', 'shocking', or otherwise extraordinary. Subsequently, the tribunal in *Waste Management v. Mexico II*[321] summarized the developing FET standard under the NAFTA and explained that conduct infringed upon the FET standard if it 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'. In applying this standard, that tribunal considered it relevant to analyze whether the State's conduct contradicted its prior representations which were reasonably relied upon by the investor. In its view, the FET standard is flexible and had to adapt t
>
> o the case at hand. Thereafter, the tribunal in *Gami Investments v. Mexico*[322] further explained, 'the record as a whole -not isolated events- determines whether there has been a breach of international law.'"[323]

486. The Claimants further argue that "[e]ven more recently, the NAFTA tribunal in *Merrill & Ring Forestry v. Canada*[324] took note of the evolution of the FET standard and found:

> "What matters is that the standard protects against all such acts or behavior that might infringe a sense of fairness, equity, and reasonableness. Of course, the concepts of fairness, equitableness and reasonableness cannot be defined precisely: they require to be applied to the facts of each case. In fact, the concept of fair and equitable treatment has emerged to make possible the consideration of inappropriate behavior of a sort, which while

---

[320] **CL-0075**, *Pope & Talbot Inc v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, ¶ 118.

[321] **CL-0054**, *Waste Management Inc. v. United Mexican States,* ICSID Case. No. ARB (AF)/00/3, Award, April 30, 2004 ("***Waste Management II***"), ¶ 99.

[322] **CL-0055**, *GAMI Investments Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award, November 15, 2004, ¶ 103.

[323] Statement of Claim, ¶ 336.

[324] **CL-0056,** *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010 ("***Merrill***"), ¶¶ 210, 213.

> difficult to define, may still be regarded as unfair, inequitable, or unreasonable.
>
> […]
>
> Specifically this standard provides for the fair and equitable treatment of alien investors within the confines of reasonableness. The protection does not go beyond that required by customary law, as the FTC has emphasized. Nor, however, should protected treatment fall short of the customary law standard."[325]

487. The Claimants argue that, even if

> "[w]ith respect to USMCA Article 14.6, Claimants were unable to locate a publicly-available award that could provide guidance on its interpretation (…), [t]he text of the USMCA codifies the developing FET standard under NAFTA. For example, the USMCA clarifies that customary international law is the standard for FET, and it specifies denial of justice as part of FET, something that NAFTA tribunals had already established. Thus, the same FET standards developed under NAFTA should apply equally to FET claims under the USMCA."[326]

488. In the Claimants' view,

> "the FET standards under both NAFTA and the USMCA reflect the customary international law minimum standard of treatment that protects an investor or its investments from matters that infringe a sense of fairness, equity, and reasonableness, as determined by the particular circumstances to that investor and its investment. Tribunals[327] regularly consider a few elements of the FET under customary international law, including (a) avoiding unreasonable, arbitrary, and discriminatory measures; (b) ensuring transparency, due process, and justice; (c) avoiding harassment, coercion, and abusive treatment; (d) protecting an investor's legitimate expectations; and (e) acting in good faith."[328]

489. Concerning specifically good faith, the Claimants submit that

> "arbitral tribunals regularly consider good faith as fundamental to the FET. According to the tribunal in *Sempra Energy International v. Republic of*

[325] Statement of Claim, ¶ 337.

[326] Statement of Claim, ¶ 338.

[327] See *e.g.*, **CL-0046**, *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009 ("***Waguih Elie George Siag et al***"), ¶ 450; **CL-0058**, *MTD Equity Sdn. Bhd. & MTD Chile S.A. . v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, ¶ 113; **CL-0059**, *Mondev International Ltd .v. The United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002 ("***Mondev***"), ¶ 127; **CL-0060**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Award, June 26, 2003 ("***Loewen***"), ¶ 133.

[328] Statement of Claim, ¶ 339.

> *Argentina*,[329] '[t]he principle of good faith is thus relied on as the common guiding beacon that will orient the understanding and interpretation of obligations, just as happens under civil codes'. Other tribunals have shared a similar sentiment. For example, the tribunal in *Siag v. Egypt*[330] stated, '[t]he general, if not cardinal principle of customary international law that States must act in good faith is thus a useful yardstick by which to measure the Fair and Equitable standard'. Some tribunals[331] have noted that the FET standard is generally objective, but other tribunals[332] have confirmed that state conduct carried out with a demonstrable lack of good faith can constitute a breach of the obligation to afford FET."[333]

490. For the Claimants,

> "the FET standard may be violated without bad faith. The NAFTA tribunal in *Loewen v. United States*[334] confirmed: '[n]either State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice'. Similarly, the NAFTA tribunal in *Mondev v. United States*[335] stated, '[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.'"[336]

491. In a footnote to that paragraph of their Statement of Claim,[337] the Claimants make additional references to awards which have found that the State may commit breaches of their international obligations without necessarily acting in bad faith:

---

[329] **CL-0061**, *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, September 28, 2007, ¶¶ 291, 298.

[330] **CL-0046**, *Waguih Elie George Siag et al.*, ¶ 450.

[331] See *e.g.,* **CL-0073**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005 ("***CMS***") ¶ 280; **CL-0069**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, Award, August 18, 2008, ¶ 341.

[332] See *e.g.*, **CL-0066**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, ¶ 609; **CL-0079**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, July 24, 2008, ¶ 602.

[333] Statement of Claim, ¶ 355.

[334] **CL-0045**, *Loewen*, Decision on Jurisdiction, ¶ 132.

[335] **CL-0059**, *Mondev*, ¶ 116.

[336] Statement of Claim, ¶ 356.

[337] Statement of Claim, ¶ 356, footnote 624.

- *Occidental v. Ecuador I:* "[T]his is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not."[338]

- *CMS v. Argentina*: "The Tribunal believes this is an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard."[339]

- *El Paso v. Argentina:* "[A] violation can be found even if there is a mere objective disregard of the rights enjoyed by the investor under the FET standard, and […] such a violation does not requires subjective bad faith on the part of the State."[340]

492. However, in the Claimants' view, "the presence of bad faith 'will certainly suffice' to establish a violation of the FET standard. According to the tribunal in *Frontier Petroleum v. Czech Republic,*[341] bad faith can include:

- The use of legal instruments for purposes other than those for which they were created.
- A conspiracy by state organs to inflict damage upon or to defeat the investment.
- The termination of the investment for reasons other than the one put forth by the government.
- The termination of the investment based on local favoritism.
- Reliance by a government on its internal structures to excuse non-compliance with contractual obligations."[342]

---

[338] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Award, July 1, 2004, ¶ 186. The Claimant mistakenly quotes Exhibit **CL-0080**, which instead responds to *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012 (Occidental II).

[339] **CL-0073**, *CMS*, ¶ 280.

[340] **CL-0081**, *El Paso Energy International Company v. The Argentine Republic,* ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶ 357.

[341] **CL-0082**, *Frontier Petroleum Services Ltd v.The Czech Republic*, UNCITRAL, PCA Case No. 2008-09, Final Award, November 12, 2010 ("***Frontier Petroleum Services***"), ¶ 300.

[342] Statement of Claim, ¶ 357.

493. Finally, the tribunal in *Waste Management v. Mexico II*[343] explained,

> "[A] conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement-would constitute a breach of Article 1105(1). A basic obligation of the state under Article 1105(1) is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means."

494. In summary, "the presence of bad faith conduct is not required to show a violation of good faith under the FET standard. However, if bad faith conduct occurred, it is sufficient to establish such a violation."[344]

495. In subsequent pleadings, the Claimants have insisted that FET "is not limited to [an] obligation not to deny justice." As argued by the tribunal in *Waste Management v. Mexico II*,[345]

> "A basic obligation of the State under Article 1105(1) is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means. […] [T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety -as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in the administrative process."[346]

496. The Claimants have also argued that, according to the tribunal in *Merril &Ring Forestry v. Canada*,[347] "'what matters is that the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.'"[348]

(3) The Respondent's position

497. For the Respondent, the Claimants describe incorrectly the relevant legal standards.

---

[343] **CL-0054**, *Waste Management II*, ¶ 138.

[344] Statement of Claim, ¶ 359.

[345] **CL-0054**, *Waste Management II*, ¶¶ 98, 99, 138.

[346] Claimants' Opening Presentation at the Hearing, slides 71-72; citing **CL-0054**, *Waste Management II*.

[347] **CL-0056**, *Merrill*, ¶ 210.

[348] Claimants' Opening Presentation at the Hearing, slides 73.

498. *First*, the Respondent indicates that "NAFTA Article 1105(1) and Article 14.6 of the USMCA differ from other substantive obligations of NAFTA and the USMCA, such as those relating to discrimination, as they grant the minimum standard of treatment only to *investments*, and not to investors."[349]

499. *Second*, for the Respondent, "NAFTA Article 1105 Minimum Standard of Treatment, as interpreted by the Free Trade Commission ("FTC"), and as set forth in Article 14.6 of the USMCA, is that of customary international law. Specifically, there is no confirmation that States when referencing FET in treaties meant anything other than the minimum standard of treatment, as classically understood."[350] In the Respondent's view, "the identification of rules of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice and whether such general practice is accepted as law (that is, accompanied by *opinio juris*)."[351] In this regard, arbitral awards themselves "are not State practice."[352] In contrast, "[S]tate endorsement of a particular articulation of an international rule by an arbitral tribunal is itself evidence of State practice and of *opinio juris*."[353]

500. As a consequence, the Respondent submits that the Claimants err in seeking to cite indiscriminately to NAFTA and non-NAFTA awards in discussing the MST. As should be plain, "[t]he manner in which the notion of fairness and equity to be granted to the investor is represented a treaty may vary," and "[t]he manner in which a treaty structures the standard and its association with other standards will be decisive in defining its meaning." Whereas NAFTA tribunals must "apply the minimum standard of treatment existing under custom", the same, of course, is not true of all multi- or bilateral investment treaties. As one practitioner has noted, "the result [under the NAFTA] has been a standard that includes

[349] Counter-Memorial, ¶ 447.

[350] Counter-Memorial, ¶ 449. Emphasis added.

[351] Counter-Memorial, ¶ 451.

[352] Counter-Memorial, ¶ 452, citing **RL-0058**, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Canada's Response to Non-Disputing Party Submissions, June 26, 2015, ¶ 12.

[353] Counter-Memorial, ¶ 452, citing **RL-0052**, Christophe Bondy, *Fair and Equitable Treatment-Ten Years On*, Evolution and Adaptation: The Future of International Arbitration, Jean Engelmayer, Mohamed Abdel Raouf (eds), ICCA Congress Series, Kluwer Law International, 2019, p. 215.

a more limited range of obligations than FET as a treaty standard open to arbitral interpretation, and one with a relatively higher threshold for breach."[354]

501. For these reasons, according to the Respondent, in *Glamis v. United States*[355] the tribunal rejected the notion that "BIT jurisprudence has converged with customary international law" and stated:

> "Certainly, it is possible that some BITs converge with the requirements established by customary international law; there are, however, numerous BITs that have been interpreted as going beyond customary international law, and thereby requiring more than that to which the NAFTA State Parties have agreed."

502. The Respondent criticizes that "the Claimants rely on cases that did not arise under the NAFTA or the USMCA, but rather arose under treaties with an autonomous Fair and Equitable Treatment standard. NAFTA Article 1105 is supplemented by the binding interpretation of the NAFTA FTC issued on July 31, 2001,[356] which states that Article 1105 "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 another Party" and that "[t]he 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 the customary international law minimum standard of treatment of aliens."

503. For the Respondent, the standard for concluding that government conduct is inconsistent with the MST is high. The tribunal in *Waste Management II v. Mexico*[357] established that:

> "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."

---

[354] Counter-Memorial, ¶ 453.

[355] **RL-0055**, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, June 8, June 2009, ¶ 609.

[356] **RL-0063**, Interpretative Notes on Certain Provisions of Chapter 11, NAFTA Free Trade Commission, July 31, 2001.

[357] **RL-0035**, *Waste Management II*, ¶ 98.

504. The Respondent recalls that in *Cargill v. Mexico*,[358] the tribunal also elaborated on this issue as follows:

> "As outlined in the Waste Management II award quote above, the violation may arise in many forms. It may relate to a lack of due process, discrimination, a lack of transparency, a denial of justice, or an unfair outcome. But in all of these various forms, the 'lack' or 'denial' of a quality or right is sufficiently at the margin of acceptable conduct and thus we find-in the words of the 1128 submissions and previous NAFTA awards-that the lack or denial must be 'gross,' 'manifest,' 'complete,' or such as to 'offend judicial propriety.' The Tribunal grants that these words are imprecise and thus leave a measure of discretion to tribunals. But this is not unusual. The Tribunal simultaneously emphasizes, however, that this standard is significantly narrower than that present in the *Tecmed* award where the same requirement of severity is not present.
>
> […]
>
> In summation, the Tribunal finds that the obligations in Article 1105(1) of the NAFTA are to be understood by reference to the customary international law minimum standard of treatment of aliens. The requirement of fair and equitable treatment is one aspect of this minimum standard. To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety."

505. The Respondent indicates that the "Claimants cite *Pope & Talbot* as precedent for the FET standard, apparently without realizing that it was that very tribunal that the NAFTA Parties overrode when the NAFTA FTC issued its interpretation on July 31, 2001. In any event, it is clear that the violation of the Minimum Standard of Treatment is not conduct that is simply 'improper and discreditable', as Claimants allege."[359] The full *Mondev v. United States* paragraph that they cite actually states:[360]

> "The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in

[358] **RL-0053**, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶¶ 285, 296.
[359] Counter-Memorial, ¶ 460.
[360] **RL-0032**, *Mondev*, ¶ 127.

> mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment."

506. For the Respondent, "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 violations of a national law, general claims of unfairness, and self-defined 'expectations' are not sufficient to argue a violation of the Fair and Equitable Treatment standard under the Minimum Standard of Treatment under customary international law."[361]

507. According to the Respondent,

> "[t]he standard the Claimants must meet to establish a denial of justice under Article 1105 is extremely high. Acts of the judiciary are accorded greater deference or presumption of regularity under international law than the acts of other branches of government. This deference is based on the principle of judicial independence and the unique status of the judiciary under international law. Foreigners traditionally have no cause of action against the courts of the host state provided that 'a reasonable standard of civilized justice' is provided and 'fairly administered'. As a result, claims for denial of justice are strictly limited to instances of 'misconduct' by the judicial branch 'as a whole', or 'gross denial of justice'. As the tribunal in *Loewen* put it, instances of '[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety.'"[362]

508. The Respondent further argues that

> "[i]nternational tribunals such as this one have a limited scope of review when faced with a claim of denial of justice. As the Tribunal will recall: 'It is not the Tribunal's function to act as a court of appeal or review in relation to the Mexican judicial system regarding the subject matter of the present claims'. Rather, the Tribunal must 'measure the conduct of Mexico towards the Claimants against the international law standards set up by Chapter Eleven of NAFTA'. The Tribunal may disagree with the outcome but that

[361] Counter-Memorial, ¶ 462.

[362] RPHB, ¶ 225.

> is not enough. If the Claimants do not establish a 'notoriously unjust' administration of justice, or a 'gross denial of justice' as the *Thunderbird* tribunal put it, then Mexico is not liable under Article 1105."[363]

509. The Respondent quotes[364] approvingly the submission of the United States Government in *Eli Lilly v. Canada:*[365]

> "Denial of justice in its historical and 'customary sense' denotes 'misconduct or inaction of the judicial branch of the government' and involves 'some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process.'"

510. The Respondent stresses that under Article 14.6 of the USMCA, "legitimate expectations" are not an independent or autonomous element of the MST.

511. Concerning good faith, the Respondent submits that "[t]he NAFTA Parties have consistently held that Article 1105 does not impose any substantive, stand-alone obligation of good faith, and the NAFTA tribunals have concurred."[366]

(4) The Tribunal's analysis

512. As explained by the tribunal in *Merrill v. Canada*,[367] the concept of a "minimum standard of treatment" was born in the 21st century, as a result of the rulings of the several international claims commissions established by States to resolve claims by aliens. Prominent among those commissions was the Mexico-United States Claims Commission, which in 1926 rendered an influential decision in a case in which two United States citizens, the widow and daughter of a Mr. Neer - the superintendent of a mine in Durango (Mexico) who was shot and killed by a group of armed men which accosted him while riding home together with his wife- complained that the local authorities have shown lack of diligence in apprehending and punishing the culprits of the killing. The Commission dismissed the claim – it argued that the local authorities had proceeded promptly to the examination of

---

[363] RPHB, ¶ 226.

[364] RPHB, ¶ 225, footnote 239.

[365] See **RL-0134**, *Eli Lilly and Co. v Government of Canada*, ICSID Case No. UNCT/14/2, Submission of the United States, March 18, 2016, ¶ 20.

[366] Counter-Memorial, ¶ 475; citing **RL-0068**, *Grand River Enterprises Six Nations, LTD., et al. v. United States of America*, UNCITRAL, United States Counter-Memorial, December 22, 2008, p. 94; **CL-0056**, *Merrill*, ¶¶ 186-187; **RL-0071**, *United Parcel Services of America, Inc. c. Gobierno de Canada,* Canada's Counter-Memorial, June 22, 2005, ¶¶ 915, 921-922.

[367] See **CL-0056**, *Merrill*, ¶¶ 195-196.

the corpse and examined some witnesses, including Mrs. Neer, and arrested some suspects, subsequently released for want of evidence- and famously stated:

> "[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. "[368]

513. As stated by the *Merrill v. Canada* tribunal,[369]

> "the approach of the Neer Commission and of other tribunals which dealt with due process may best be described as the first track of the evolution of the so-called minimum standard of treatment. In fact, as international law matured and began to focus on the rights of individuals, the minimum standard became a part of the international law of human rights, applicable to aliens and nationals alike. This evolution led to major international conventions on human rights as well as to the development of rules of customary law in this field. […] A second track that concerned specifically the treatment of aliens in relation to business, trade and investments." And, a result of the development of international customary law along this second track, "[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention." (emphasis added).

514. In the Tribunal's view, the *Neer v. Mexico* case, even if a very early exponent of international customary law on denial of justice, is also of interest because the American Commissioner, Fred K. Nielsen, in his concurring opinion, drew on previous decisions and authors to make a distinction between modalities of "denial of justice" (or, more generally, breaches of the MST) which is very relevant for this arbitration:[370]

> "'It is not the denial of justice by the courts alone which may form the basis for reclamation against a nation, according to the rules of international law'. 'There can be no doubt' -says Halleck- 'that a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or

[368] *L.F.H. Neer and Pauline Neer (U.S.A) v. United Mexican States*, Decision, Mixed Claims Commission United States and Mexico, October 15, 1926("***Neer***"), published in the United Nations' Report of International Arbitral Awards, Volume IV, 2006, pp. 61-62, available at https://legal.un.org/riaa/cases/vol_IV/60-66.pdf.

[369] **CL-0056**, *Merrill*, ¶¶ 201, 205, 208.

[370] *Neer*, Concurring opinion by American Commissioner Fred K. Nielsen, p. 65; citing Ralston, International Arbitral Law and Procedure, p. 51; *Foreign Relations of the United States*, 1902, p. 870. Authorities not submitted by the Parties.

judicial department of the Government, so far as the acts are done in their official capacity.'"

515. Thus, the MST and FET standards should be understood as encompassing not only a "denial of justice" by local courts, but also acts of domestic public authorities which run afoul of those standards, including grossly unfair administrative decisions.

516. The extensive analysis by the Parties and by the United States of America of the MST has also enabled the Tribunal to draw some conclusions that will be applied later on when assessing whether Mexico breached this standard or not.

517. The Tribunal's first conclusion is that it should apply the MST as recognized under customary international law, respecting a strict definition of the standard which may not necessarily be as broad as defined in some BITs or awards.

518. In particular, this Tribunal shall not consider "good faith" as a stand-alone standard, in keeping with the views of the International Court of Justice ("**ICJ**").[371]

519. As a second conclusion, the Tribunal shares the view expressed in awards such as *Loewen v. United States*, *Occidental v. Ecuador*, *CMS v. Argentina* and *El Paso v. Argentina*, which held that there is no need for a State to act in bad faith for the standard to be breached. A breach of the standard should be an "objective" result, which may, or may not, be the result of an action of a public authority acting in bad faith.

520. A third, obvious conclusion is that the MST includes, as stated in Article 14.6 of the USMCA, "the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world." Being anchored in customary international law, the principle that the MST requires not to deny justice applies as well under Article 1105 of the NAFTA.

---

[371] As stated by the International Court of Justice ("ICJ") in **RL-0073**, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Decision on Jurisdiction of the Court and Admissibility of Application, December 20, 1988, p. 105, ¶ 94 ("The principle of good faith is, as the Court has observed, 'one of the basic principles governing the creation and performance of legal obligations' (*Nuclear Tests, Z.C.J.* Reports 1974, p. 268, ¶ 46; p. 473, ¶ 49); it is not in itself a source of obligation where none would otherwise exist."); see also ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Preliminary Objections, Judgment, June 11, 1998, p. 297, ¶ 39; ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening)*, Preliminary Objections, Judgment, February 2, 2024, p. 55, ¶ 142. Authorities not submitted by the Parties.

521. Finally, while "denial of justice" by domestic courts is indeed a typical breach of the FET standard, in the Tribunal's view is clear that the FET standard may also be breached by acts of non-judicial authorities, including administrative authorities, when, of course, those acts can be attributed to the host State. Hence, the Tribunal will consider each of the two categories in turn.

a. Denial of justice

522. Within the general category of denial of justice, at least two separate categories of breaches can be discerned: on the one hand, a prolonged absence, without justification, of a substantive judgment on a claim; and, on the other, a judgment which, as a result of a lack of due process or other procedural failings, or in light of its patently wrong reasoning, can be considered fundamentally unfair and unjust for the foreign investor.

523. Concerning pure delays, the Tribunal needs only to stress at this stage that, as argued by the Respondent, the requirement under Article 14.D.5 that at least 30 months have elapsed without the claimant having obtained a final decision by a court of last resort of the respondent should be strictly considered as such, *i.e.*, as a condition for a claim of denial of justice be submitted to arbitration, not as a definition of when a delay in obtaining a judgment amounts to denial of justice.

524. Concerning unjust judicial decisions, this Tribunal subscribes to the view that arbitral tribunals, like this one, are not appeal instances for domestic court decisions and, hence, they should practice "deference" to the domestic judiciary. The Tribunal subscribes in their entirety the views expressed in this regard by the United States of America, already quoted:[372]

> "The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence, the particular nature of judicial action, and the unique status of the judiciary in both international and municipal legal systems. […] Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice."[373]

[372] Submission of the United States, ¶ 48.

[373] Submission of the United States, ¶ 48.

525. During the Hearing the Tribunal duly noted that in this arbitration the Claimants have presented claims of "denial of justice" which refer both to Mexican courts belonging to the judiciary and to an administrative tribunal, the TFJA, which is part of the Executive Power, not of Mexico's independent judiciary. Precisely for that reason, in the questions that the Tribunal addressed to the Parties after the Hearing, it included this one: [374]

> "Could the fact that the TFJA is part of the Executive Power, not of Mexico's judiciary, have any bearing on the degree of deference the Arbitral Tribunal should pay to its rulings?"

526. In their response to this question, the Claimants argued that they "have not located any legal authorities in the NAFTA context providing for a lesser degree of deference owed to administrative or agency acts. In the specific context of rulings from the TFJA, Mexican law does not indicate a different level of deference owed to the TFJA vis-à-vis the Mexican federal judiciary. The TFJA is a federal level tribunal with competence for a specific subject matter of cases: the challenge of federal administrative acts. Thus, current authority finds the TFJA's ruling should be held to the same level of scrutiny as any court decision from the Mexican judiciary."[375]

527. The Respondent's answer was that

> "[t]he degree of deference that the Arbitral Tribunal must give to the decisions or judgments of the TFJA must be the same as it would give to a decision issued by the Mexican Judiciary. In other words, the standard required for the actions of an administrative court, a civil court or a constitutional court to constitute a denial of justice is the same (*i.e.*, high)."[376]

528. In support of that point of view, the Respondent argued that the TFJA is a "jurisdictional body with autonomy to issue its rulings"[377] and pointed to a number of mechanisms that guarantee the accountability of its decisions and limit external interference.

> "*First,* the appointment of magistrates involves two branches of Mexico's government: the Executive and Legislative Branches, which means that there is no direct imposition by the Executive Branch. *Second,* the TFJA has budgetary autonomy from the executive branch, *i.e.*, it exercises the budget

[374] PO12, Annex 1, Question 8.

[375] CPHB, ¶ 107.

[376] RPHB, Appendix, ¶ 44.

[377] See **R-0093**, Organic Law of the Federal Administrative Justice Tribunal Article 1, ¶ 2.

> assigned to it by the Chamber of Deputies without being subject to the provisions of the executive branch. […] *Third,* the TFJA has regulations that avoid conflict of interest[378] and is one of the institutions in charge of fighting corruption in the National Anticorruption System. *Fourth,* its officers must have technical skills and aptitudes related to the subject matter (*i.e.*, a law degree issued at least 10 years prior to appointment and a minimum of 8 years of experience in administrative matters). *Fifth,* its decisions may be challenged before the Federal Judiciary through an amparo proceeding. In short, the Federal Judiciary exercises a review of the decisions issued by the TFJA (*i.e.*, full appeal). […] As noted by [Respondent's legal expert Mr. Asali]: '[at the amparo proceeding the Judge] It can get into any issue that was analyzed by the lower court [TFJA] […] [b]ecause one is protecting the Constitutional right to proper foundation and reasoning of the act of the Authority.' *Sixth,* the 2017 Nullity Judgment was reviewed and confirmed by the Federal Judiciary in the Direct Amparo Trial 74/2019 and the Appeal for Review 1685/2020. *Seventh,* the TFJA guarantees its independence and autonomy in its Organic Law, which recognizes its management independence."[379]

529. The Tribunal need not take at this stage any specific view on whether the degree of deference to be paid to the rulings of administrative, non-judicial "tribunals" should be identical to the deference due to the judgments of courts belonging to an independent judiciary. But the Tribunal wishes to note that the fact that an administrative body carries the name of "tribunal" does not automatically mean that under customary international law its rulings should be assimilated to the judgments and decisions of judges and tribunals which are part of an independent judiciary.

530. In spite of such assertion of principle, the Tribunal, when considering the judgment of the TFJA on PEP's administrative rescission of the 821 Contract, will apply, by analogy, the view summarized in *Waste Management v. Mexico II*, quoted by the Respondent and citing *S.D. Myers v. Canada*, *Mondev v. United States*, *ADF Group v. United States* and *Loewen v. United States*, that for a judicial decision to entail a breach of the Minimum Standard of Treatment it has to lead "to an outcome that offends judicial propriety;" and with the view in *Cargill* that the denial of justice should be "gross", "manifest", "complete", or such as to "offend judicial propriety"; and with the view in Thunderbird that there should have been a "notoriously unjust" administration of justice or a "gross denial of justice."

[378] **R-0093**, Organic Law of the Federal Court of Administrative Justice, Article 5.

[379] RPHB, Appendix, ¶¶ 47-53.

b. Unfair administrative decisions

531. While the variety of grossly unfair administrative decisions may be wide, the Tribunal shares specifically the view in *Frontier Petroleum v. Czech Republic* that "bad faith action by the host state includes the use of legal instruments for purposes other than those for which they were created."[380]

532. As the Tribunal suggested to the Parties both during the Hearing as well as subsequently in one of the questions that it addressed to them, what the *Frontier Petroleum* described is in fact a well-known legal concept, coined in the XIX century by the French *Conseil d´Etat*, which came to be known as *détournement de pouvoir*,[381] a term also well known in Spanish-speaking jurisdictions, where it is called "*desviación*" or "*desvío de poder*", which may be translated into English as "misuse" or "misapplication of power".

533. Given its French origin, the concept of *détournement de pouvoir* or "misuse" or "misapplication" of power made gradually its way into administrative law of Civil Law jurisdictions, including, Italy, Spain, Mexico and many others. In June 1950, during the preparatory works of the European Convention of Human Rights, the concept was included in the Convention draft and was finally reflected in Article 18 of the Convention, which states:

> "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

---

[380] **CL-0082,** *Frontier Petroleum Services*, ¶ 300.

[381] The concept was used by the French Council of State (*Conseil d´Etat*) in its decision of November 26, 1875 on the *Pariset case*. With a view to increase public revenues, the act of August 2, 1872 declared the manufacturing of matches -a business which at the time was very profitable- a State monopoly and ordered all the factories to be expropriated against compensation. To reduce the amount of this compensation and make their owners more amenable to negotiation, the finance minister engineered the plan to order the prefects to close match factories on the pretext that their activities were incompatible with the provisions on hazardous, arduous or unhealthy undertakings. However, one of the owners, M. Pariset, complained to the Council of State about the decision taken by the prefect of his area. And in its very famous decision, the Council declared the prefect's order invalid because they had applied their police powers to achieve a goal other than that for which those powers had been entrusted to them (in the original French, "*qu'il a ainsi usé des pouvoirs de police qui lui appartenaient sur les établissements dangereux, incommodes ou insalubres pour un objet autre que celui à raison desquels ils lui étaient conférés.*" The text of the *arrêt Pariset* is available at https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007633030/.

534. As the European Court of Human Rights explained on 28 November 2017 in its judgment on *Merabishvili v. Georgia*[382], the concept of misuse of power is by now a well-established concept in European Union law, as reflected in Article 263(2) of the Consolidated Version of the Treaty on the Functioning of the European Union. But it is also recognized in Article 30 *in fine* of the American Convention on Human Rights, which provides that:

> "The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."[383] (emphasis added)

535. As a practical conclusion, as already stated by the tribunal in *Frontier Petroleum v. Czech Republic,* it seems consistent with customary international law to consider the use by public authorities of legal instruments for purposes other than those for which they were created–*i.e.*, cases of misapplication of power–particularly when carried out in bad faith and causing serious damage to investors, to entail a breach of the Minimum Treatment and FET standards.

B. NATIONAL TREATMENT

536. The starting point for analyzing whether a breach of the National Treatment standard has taken place or not under the NAFTA or the USMCA is of course the text of each treaty.

537. Thus, 'national treatment' is described in the NAFTA and USMCA as follows:

a. NAFTA

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

[382] European Court of Human Rights, *Application no.72508/13*, Strasbourg, November, 28 2017, ¶ 157, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-178753%22]}. Authority not submitted by the Parties.

[383] American Convention on Human Rights (Signed at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969). Its text is available at https://www.oas.org/en/iachr/mandate/Basics/3.AMERICAN%20CONVENTION.pdf

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

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

4. For greater certainty, no Party may:

(a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

(b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party."

b. USMCA

"**Article 14.4: National Treatment**

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

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a government other than at the central level, treatment no less favorable than the most favourable treatment accorded, in like circumstances, by that government to investors, and to investments of investors, of the Party of which it forms a part.

4. For greater certainty, whether treatment is accorded in "like circumstances" under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives."

538. Accordingly, to establish a breach of National Treatment under the NAFTA and the USMCA, a claimant must show that it or its investments (i) were given "treatment"; (ii) were in "like circumstances" with domestic investors and investments; and (iii) the treatment given was "less favourable" than that given to domestic investors or investments.

539. In sum, Article 1102 (NAFTA) and Article 14.4 (USMCA) are intended to prevent, in very similar terms, discrimination based on nationality.[384]

540. Consequently, for purposes of any alleged breach of National Treatment under the NAFTA and the USMCA, the appropriate comparison is between the treatment given to a claimant or its investment, on the one hand, and the treatment given to a domestic investor or investment, in like circumstances, on the other hand.

541. Hence, it is incumbent upon a claimant to identify domestic investors or investments in like circumstances as comparators.[385] Following this, determining whether a domestic investor or investment identified by a claimant is in "like circumstances" with a claimant or its investment(s) is a fact-specific inquiry.

542. As noted in the Submission of the United States as a Non-Disputing Party in this arbitration, "the United States 'understands the term "circumstances" to denote conditions or facts that accompany treatment as opposed to the treatment itself."[386] (emphasis added) Thus, when determining whether a claimant was in "like circumstances" with comparators, it or its investment should be compared to a domestic investor or investment that is alike in all relevant aspects but for nationality of ownership.[387] (emphasis added)

[384] **CL-0060**, *Loewen*, ¶ 139 (accepting that "Article 1102 [National Treatment] is direct[ed] *only* to nationality-based discrimination") (emphasis added); **RL-0048**, *Mercer International Inc. v. Government of Canada,* ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, ¶ 7.7 (accepting the positions of the United States and Mexico that the National Treatment and Most-Favored Nation obligations are intended to prevent discrimination on the basis of nationality, see ¶¶ 7.4 ff.).

[385] Submission of the United States, ¶ 31.

[386] Submission of the United States, pp. 15-16, ¶ 32.

[387] Submission of the United States, ¶ 32.

C. ADVERSE INFERENCES

(1) The Tribunal's question

543. As the question of "adverse inferences" had been raised on several occasions by the Claimants and rebutted by the Respondent, the Tribunal invited the Parties to address the following issue in their Post-Hearing Briefs:[388]

> "What would be the legal basis, if any, which could allow the Tribunal to draw adverse inferences from the Parties' behaviour in this arbitration (e.g. Respondent's failure to produce communication PEP-DG-SSE-GSIAP dated May 3, 2017?). Were such legal basis forthcoming, what specific adverse inferences, if any, could or should the Tribunal draw in this arbitration?"

(2) The Claimants' position[389]

544. For the Claimants, "[b]oth the relevant ICSID and IBA Rules governing this arbitration permit the Tribunal to make adverse inferences where appropriate."

545. In their view, "Procedural Order No. 1 provides that the applicable arbitration rules for this dispute are the 2006 ICSID Arbitration Rules. Rule 34(3) of the 2006 ICSID Arbitration Rules permits the Tribunal to 'take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.'" The Claimants add:

> "Furthermore, Procedural Order No. 1 further states that the 2020 IBA Rules on the Taking of Evidence in International Arbitration 'will guide the Tribunal and the parties regarding document disclosure (and other evidentiary matters) in this case, but shall not be binding on either the Tribunal or the parties'. Article 9 of the 2020 IBA Rules provides: If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.
>
> If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the

[388] PO12. Question No. 4.

[389] See CPHB, ¶¶ 279-328.

> Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party."

546. Claimants further argue that they have satisfied each of the five requirements or prongs of the so-called "Sharpe Test", which has emerged in international arbitration to determine whether adverse inferences should be drawn.[390] Under this test, (1) the party seeking the inference must produce all available evidence corroborating the inference sought; (2) the requested evidence must be accessible to the inference opponent; (3) the inference sought must be reasonable, consistent with the facts in the record, and logically related to the likely nature of the evidence withheld; (4) the party seeking the inference must produce prima facie evidence; and (5) the inference opponent must know, or have reason to know, of its obligation to produce evidence rebutting the inference sought.

547. The Claimants argue that "[a]s stated at the hearing, Mexico's witness selection and failure to disclose responsive documents give the Tribunal ample grounds to make the necessary adverse inferences.[391] "Examples of these inferences are explained below. Under the circumstances, Claimants invite the Tribunal to make any additional inferences it finds appropriate." [392]

548. As specific cases of adverse inferences, the Claimants refers to the selection of witnesses and the failure to disclose documents.

549. Concerning the selection of witnesses, the Claimants argue that "Mexico has not called as witnesses those PEP officials who had relevant information on the dispute. Those include, in particular,

> "Epitacio Solis, [who] signed the notice of administrative rescission of the 821 Contract, along with Rodrigo Hernandez and Luis Gomez.[393] David Pérez, along with Luis Gomez, signed Pemex's unilateral *finiquito* resulting from the administrative rescission.[394] Mr. Solis was also copied, along with Alfonso Guati, to the infamous May 8, 2017 memo from Rodrigo Loustaunau to Arturo Musalem, requesting notification of the pending

[390] **RL-0093**, Jeremy Sharpe, *Drawing Adverse Inferences from the Non-production of Evidence*, Arbitration International Vol. 22(4), 2006, p. 551.

[391] English Tr. Day 1, 93:22-94:5; Spanish Tr. Day 1, 110:7-13.

[392] CPHB, ¶ 289.

[393] **C-0104**, Letter from PEMEX to Finley and Drake-Mesa, July 31, 2017.

[394] **R-0043**, *Finiquito* for the 821 Contract, November 10, 2021.

> administrative rescission.[395] Examining Work Order 028-2016 reveals a host of Pemex officials who have relevant information.[396] In addition to Luis Gomez, David Perez, and Epitacio Solis -whose names appear here as well- Mexico could have presented Daniel Olguin Lora, Pedro Rojas Gomez, Hector Agustin Mandujano Santiago, Carlos Solano Rodriguez, Jose Gerardo Hernandez Rojas, Fernando Rojas Mendoza, or Jesus Constantino Reyes Macedo. At a minimum, Mexico should have submitted testimony from Luis Gomez. His name is on almost every key document in this arbitration. But Mexico did not. Instead, Mexico chose Rodrigo Loustaunau, even though, according to his testimony, most of the issues in this arbitration fall outside of his competence."[397]

550. With respect of document disclosures, the Claimants recall that

> "[t]he Tribunal ordered Mexico to disclose documents in response to Claimants' eighteen requests. Mexico disclosed a total of 154 documents. For some of Claimants' requests, Mexico disclosed nothing, openly defying the Tribunal's disclosure orders. For other requests, Mexico claimed that it could not find documents after PEMEX's legal department purportedly conducted exhaustive searches."[398]

551. The Claimants recall that they

> "requested a number of documents relating to the budgets of the 803 Contract, the 804 Contract, and the 821 Contract. These included the original budgets, financial ledgers showing initial funding and subsequent outflows, and communications concerning the budgets for each of the three contracts. The Tribunal ordered Mexico to disclose these documents."[399] (emphasis added)
>
> "Mexico did not comply with the Tribunal's order. Instead, Mexico disclosed three consolidated financial statements for PEMEX spanning from 2011 to 2015. These disclosures provide no information that is relevant to this arbitration. Indeed, Mexico knows that consolidated financial statements are not responsive and meaningless."[400]

552. The Claimants also indicate that they

> "sought numerous categories of documents relating to Work Order 028-2016, and the Tribunal unequivocally ordered the disclosure of relevant

[395] **C-0103**, Internal PEMEX Letter, May 8, 2017.

[396] **C-0098**, PEMEX's work order issued to drill the Coapechaca 1240 Well (the "**Work Order 028-2016**"), November 18, 2016.

[397] English Tr. Day 3, 541:15-21; Spanish Tr. Day 3, 612: 2-18. See also CPHB, ¶¶ 291-294.

[398] CPHB, ¶ 297.

[399] CPHB, ¶ 302. Emphasis added.

[400] CPHB, ¶ 303.

> documents.[401] Among the documents ordered to be disclosed were PEMEX's application to and correspondence with the CNH for the permit to drill the Coapechaca 1040 grouping of wells. Additionally, the Claimants requested communications with third parties, including Weatherford, about the Coapechaca 1240 well and documents reflecting whether the work was ever performed."[402]
>
> "Once again, Mexico did not comply with its disclosure obligations. Worse, Mexico admitted at the hearing that additional documents do in fact exist. Claimants explained the notable discrepancies in the documents accompanying Work Order 028-2016. For the first time, Mexico confirmed that Weatherford provided information that Mexico alleges was required by the CNH for PEMEX to obtain a drilling permit. Mexico had access to information that it was specifically ordered to disclose. Notably, Mexico never addressed how PEMEX already had this technical information, which Claimants submitted as exhibit C-0162. Obviously, Luis Gomez or David Perez, the persons who signed Work Order 028-2016, could have explained this issue and other details about the drilling of the Coapechaca 1240."[403]

553. The Claimants argue that

> "[i]n spite of Mexico's behavior, Claimants have been able to piece together the story of the Coapechaca 1240 well. PEMEX never intended Finley, Drake-Mesa, and Drake-Finley to drill it. It was always assigned to Weatherford, which explains Mexico's unexpected but welcomed admission at the hearing. Instead, PEMEX invented Work Order 028-2016 to rescind the 821 Contract, just as Luis Gomez and later Rodrigo Hernandez told Luis Kernion. Although the evidence shows that Work Order 028-2016 was fake, to the extent any doubt exists, Claimants encourage the Tribunal to make an adverse inference because of Mexico's behavior that PEMEX fabricated Work Order 028-2016 for the sole purpose of administratively rescinding the 821 Contract."[404]

554. The Claimants also accuse the Respondent of failing to disclose, as ordered by the Tribunal, contract administrative files, 821 Contract rescission documents, compromises reached by PEP with Mexican nationals and WhatsApp messages.[405]

[401] See PO4, Annex 1, Request Nos. 9 and 10.

[402] CPHB, ¶ 308.

[403] CPHB, ¶ 309.

[404] CPHB, ¶ 310.

[405] CPHB, ¶¶ 311-326.

(3) The Respondent's position

555. In its response to the Tribunal's query, the Respondent bases the possibility of adverse inferences by the Tribunal on the same ICSID and IBA provisions mentioned by the Claimants (*i.e.*, Rule 35 of the ICSID Rules and Article 3 of the IBA Rules), and refers as well to the so-called "Sharpe test".[406]

556. But, contrary to the Claimants, the Respondent argues that the Claimants have not met the conditions required under the Sharpe test.

557. Concerning specifically Request No. 11 to produce the official letter PEP-DG-SSE-GSIAP-541-2017, the Respondent argues[407] that

> "[i]t is important to bear in mind that Pemex and its subsidiary production companies -such as PEP- have complex structures and hundreds of employees. Furthermore, the Claimants' requests for production of documents involved searches for documents more than 5 years old, which implies great complexity. Nevertheless, the Respondent wishes to emphasize that it made its best efforts in good faith to comply with Claimants' document production requests, so much so that it produced 54 documents in response to request 11.A - including the official letter authorizing the administrative rescission procedure of Contract 821 dated June 26, 2017."

558. With respect to Request No. 6, on the financial ledgers showing the flow of funds to PEP to fund the contracts, the Respondent argues that

> "the Respondent provided Pemex's audited financial statements for the years 2011 to 2015. Not only that, the Respondent pointed out that such information is public and provided Claimants with the website on which they could be located, a website that included the financial statements of Pemex and its subsidiaries for other years."[408]
>
> "The fact that Claimants included categories of documents in their request for production of documents does not imply that such information exists in the form in which Claimants wish it to exist. In this regard, the Tribunal will be able to corroborate that Respondent properly complied with the Tribunal's own order and issued the documents responsive to the respective request."[409]

[406] RPHB, Appendix ¶¶ 9-14.

[407] RPHB, Appendix, ¶ 22.

[408] RPHB, Appendix, ¶ 23.

[409] RPHB, Appendix, ¶ 24.

559. Finally, in the Respondent's view, "it was the Claimants who engaged in deficient document production."[410] As an example of the foregoing, the Respondent mentions its request for production by the Claimants of documents related to the permanence in Mexico of the alleged investments made by the Claimants under the 803 Contract. "The Claimants did not produce any documents in response to this request."[411] As a second example, the Respondent argues that

> "documents related to the permanence in Mexico of the alleged investments made by Claimants under Contracts 804 and 821 were requested. Although the Claimants stated that they would produce documents in their possession, custody or control showing where they were located, they did not produce documents in response to such requests."[412]

(4) The Tribunal's analysis

560. Having summarized in general terms the views expressed by the Parties on adverse inferences, the Tribunal does not need to discuss at this stage this issue. In practical terms, since the most relevant part of the "adverse inferences" requested by the Claimants refer to the circumstances surrounding the administrative rescission of the 821 Contract, a cursory reference to adverse inferences will be made in the section on the 821 Contract. As will be further explained there, the Tribunal will not need to make any adverse inference to reach any relevant, let alone, material conclusion, since the Tribunal will rely on written evidence. Nonetheless, those conclusions will be reinforced by some of the adverse inferences mentioned by the Claimants.

VII. CLAIMS RELATED TO THE 803 AND 804 CONTRACTS

561. As already explained in the Chapter on jurisdiction, concerning the 803 and 804 Contracts the Tribunal has jurisdiction on just one issue: whether Mexico incurred in "denial of justice" to the extent that, as alleged by the Claimants, Mexican courts failed to rule on a timely manner on the suits brought by the Claimants against PEP in 2015.

[410] RPHB, Appendix, ¶ 16.
[411] RPHB, Appendix, ¶ 17.
[412] RPHB, Appendix, ¶ 19.

A. THE CLAIMANTS' POSITION

562. During the Hearing, the Claimants summarized succinctly their claim in this way: "Mexican courts denied justice and due process, [as] no domestic court ruled on 803 Contract and 804 Contract claims for more than five years. 30-month period under the USMCA."[413]

563. In their Post-Hearing Brief, the Claimants further stated that "[c]ustomary international law cannot accept having lawsuits sitting unadjudicated before courts for more than five years. That is what happened with respect to Claimants' lawsuits related to reservations for payment under their *finiquito*s for the 803 Contract and 804 Contract. In fact, the United States and Mexico agreed in USMCA Article 14.D.5 that not having a decision by a competent court within 30 months of initiating a proceeding is long enough to initiate investment arbitration. Certainly, not having any decision within five years qualifies as a failure to accord a Minimum Standard of Treatment."[414]

B. THE RESPONDENT'S POSITION

564. In its Post-Hearing Brief, the Respondent underlined that

> "[t]he claim for denial of justice as it relates to Contracts 803 and 804 is limited to allegations of delay. The Respondent emphasizes that the Claimants did not pursue its delay allegations at the hearing. They did not utter the words 'delay' or 'denial of justice' in their entire opening. They made no mention of this supposed 30-month 'benchmark' endorsed in their previous submissions. Their expert said nothing about this either. In all, there is not a single reference by the Claimants to these claims in the whole transcript, at least none that the Respondent could find. This is striking."[415]

565. The Respondent further contends that the 30-month period is mentioned in Article 14.D.5 1(b) as a condition precedent, not as a definition of denial of justice.[416]

---

[413] Claimants' Opening Presentation at the Hearing, slide 75.

[414] CPHB, ¶ 51.

[415] RPHB, ¶ 227.

[416] Counter-Memorial, ¶ 486.

566. Concerning the 803 Contract, the Respondent submits that "6 judicial procedures derived from Civil Proceeding 75/2015."[417] "[It's] duration was completely normal considering its complexity."[418]

567. Concerning the 804 Contract, the Respondent argues that in the Ordinary Civil Trial 120/2015 "Claimants fully exercised their procedural rights and the trial was resolved in a reasonable time."[419] In the subsequent 2019 Annulment Proceeding, "the TFJA administered justice in a prompt and expeditious manner."[420]

568. The Respondent further argues that

> "[T]he delays alleged in this regard did not amount to a denial of justice. Given the complexities of these proceedings, the time it took to resolve the myriad of appeals cannot be described as egregious or shocking. Indeed, the expert of the Claimants refers to the long proceeding time merely as an 'irregularity,' which is nothing close to a 'manifest injustice' or 'notoriously unfair' administration of justice. Furthermore, at the hearing, both legal experts of the Claimants and the Respondent agreed that the delays were caused primarily by the Claimants. For example, in Civil Trial 200/2016 the Claimants submitted expert evidence on engineering matters, PEMEX appointed an expert to rebut the allegations of the Claimants' expert, and filed an amended complaint, which gives the defendant the opportunity to file a response to the amended complaint. Simply put, the Claimants have not satisfied their burden to establish an egregious or shocking manifest injustice by the Mexican courts."[421]

C. THE TRIBUNAL'S ANALYSIS

569. The Tribunal shares the Respondent's view.

570. Without any need of making allowances for the delays in legal proceedings resulting from the eruption in 2020 of the COVID pandemic, just a cursory look at the tables in paragraphs 123 and 137 of this Decision on Jurisdiction and Liability shows that the absence of a substantive ruling of the merits of the lawsuits concerning 803 and 804 Contracts cannot be regarded as "denial of justice".

---

[417] Respondent's Opening Presentation at the Hearing, slide 109.

[418] Respondent's Opening Presentation at the Hearing, slide 154.

[419] Respondent's Opening Presentation at the Hearing, slide 117.

[420] Respondent's Opening Presentation at the Hearing, slide 117.

[421] RPHB, ¶ 228.

571. As the Respondent has argued, the absence of a ruling by the Mexican courts on the merits of the Claimants' civil suits concerning these two contracts can be traced to several factors, including:

- Some initial ambiguity and absence on clear-cut jurisdictional criteria on whether challenges to PEP's decisions had to be brough to civil or administrative courts;
- The Mexican rules on the possibility of appeals and amparos of judicial decisions, which have been described in ample detail by the experts of both Parties in their respective reports; and most notably; and
- The fact that PEP made use of all its defenses under such procedural rules.

572. The Tribunal has already indicated in paragraphs 293 and 299 that it does not have jurisdiction to decide whether PEP's persistent efforts to defeat the Claimants in court, rather than to settle out-of-court, was a discrimination with respect to Integradora and Zapata amounting to a breach by Mexico of the National Treatment standard. Hence, there is nothing for the Tribunal to say concerning the thorough way in which PEP fought in court the lawsuits based on the 803 and 804 Contracts. To conclude, all the claims for denial of justice concerning 803 and 804 Contracts must be dismissed.

VIII. CLAIMS RELATED TO THE 821 CONTRACT: AN OVERVIEW

A. OVERVIEW OF THE CLAIMANTS' CASE

573. For the Claimants, Pemex executed a "scheme to terminate the 821 Contract and call Claimants' US$ 41.8 million bond," thereby violating the FET standard under NAFTA"[422] Subsequently, Mexican courts denied Claimants justice and due process.[423] Finally, "Mexico discriminated against Claimants and their investments" by purportedly treating them less favorably than Mexican companies in like circumstances resulting in loss or damage for the Claimants and thereby breaching its national treatment obligation under the Treaties.[424]

[422] Statement of Claim, p. 128, heading 2.
[423] Statement of Claim, p. 131, heading 3.
[424] Statement of Claim, p. 135, heading 4.

574. During the Hearing, the Claimants underlined that: [425]

- "Facts crystallized when administrative court rejected the challenge to Pemex's administrative rescission in October 2018 (at earliest). […] [The] Mexican courts denied justice and due process, [as a result of] [a]dministrative court decision affirming Pemex's administrative rescission based on Work Order 028-2016 when the 821 Contract required 15 unfulfilled work orders.

- Pemex engaged in retaliation due to being sued.

- Pemex was arbitrary and discriminatory and not acting in good faith when issuing Work Order 028-2016.

- Pemex retaliated and failed to safeguard legitimate expectations by pursuing an administrative rescission based on unfulfilled work order (15 required) and promoting this rescission before the administrative court.

- Pemex was not in good faith when it communicated with administrative court *ex parte*.

- Facts continued during this arbitration. Pemex retaliated and was not in good faith by ignoring the cure provision while seeking to impose a unilateral *finiquito* and making claims against the Dorama Bond."

575. In their Post-Hearing Brief, the Claimants summarized the facts underpinning their claims concerning the 821 Contract:[426]

- "Pemex's Board of Directors reduced its budget and issued the following directive in February 2015:[427]

> 'Fourth. - Regarding the review of projects and contracts presented to this Board, authorized the Management to negotiate and agree the modification of terms, amounts, rates and, in general, all stipulation that can be adapted to reduce costs and promote efficiencies in a comprehensive manner and for

[425] Claimants' Opening Presentation at the Hearing, slides 74-75.

[426] CPHB, ¶ 52.

[427] **R-0032**, Acuerdo del Consejo de Administración de PEMEX (Resolution of the Board of Directors), February 13, 2015.

> the benefit of the interests of Petroleos [*sic*] Mexicanos and their Subsidiary Entities, including those that deal with terms for which the prior authorization of this Board is required in terms of article 10 of the "Provisions administrative contracting in terms of acquisitions, leases, works and services of the substantive activities of a Production of Petroleos [*sic*] Mexicanos and Subsidiary Entities.
>
> Likewise, it authorized the Management to formalize the anticipatory terminations that proceed in accordance with the terms agreed in the contracts, trying in any case that the corresponding settlements be in the best conditions for the purposes of the 2015 Budget Adjustment. The Management will report quarterly to this Board, through the Acquisitions, Leasing, Works and Services Committee, the contractual modifications that have been agreed, as well as the contracts which have been terminated anticipatorily.'

- By July 2015, Pemex began seeking changes to the 821 Contract, first by proposing discounts, and then in September 2015 by changing its payment date for work orders from 20 days to six months.[428] Then, Pemex refused to pay for work orders.[429] After intermittently requesting work, Pemex stopped issuing work orders altogether in January 2016;[430]

- Pemex claimed that it did not have to issue work orders and that the time between issuing any work orders would not be considered a suspension under Clause 17 (requiring the payment to Claimants);[431]

- By April 2016, Pemex had not requested work for over 100 days, and overall, there had been 300 days of inactivity under the 821 Contract;[432]

- A Pemex employee told Luis Kernion to file a lawsuit, advising that it would encourage Pemex to resume issuing work orders;[433]

[428] Statement of Claim, ¶¶ 184, 186; **C-0092**, Letter from PEMEX to Finley and Drake-Mesa , July 16, 2015; **C-0095**, PEMEX Internal Letter, September 24, 2015.

[429] Statement of Claim, ¶ 188.

[430] Statement of Claim, ¶ 189; Witness Statement of L. Kernion, ¶ 82.

[431] Statement of Claim, ¶ 189; **C-0097**, Letter from PEMEX to Finley and Drake-Mesa, January 22, 2016.

[432] Statement of Claim, ¶ 192; Witness Statement of L. Kernion, ¶ 83.

[433] English Tr. Day 2, 439:5-12; Spanish Tr. Day 2, 493:22-494:8.

- On April 29, 2016, Finley and Drake-Mesa initiated the civil lawsuit, hoping Pemex would comply with its obligations under the contract;[434] Pemex then told Claimants that it would not be issuing any more work orders as long as the civil lawsuit was pending;[435]

- Because of Pemex's failure to request work, Finley and Drake-Mesa began to lay off employees and de-mobilized their equipment, moving it from their yard in Poza Rica to a location where it remains today, rusting;[436]

- Luis Kernion told Pemex that it was laying off employees and moving its equipment, and Pemex knew as much because of its continual oversight and inspections;[437]

- Six months later in November 2016, after nearly eleven months of inactivity, Pemex issued Work Order 028-2016 to drill the Coapechaca 1240;[438]

- Pemex did not obtain the drilling permit required to drill the Coapechaca 1240 before issuing Work Order 028-2016;

- Pemex did not work with Finley, Drake-Mesa, or Drake-Finley in preparing Work Order 028-2016 prior to its issuance;

- The 'Movement of Drilling Equipment', a scheduling document that Pemex issues and that Claimants had in their possession showed that Weatherford was scheduled to drill the Coapechaca 1240;[439]

[434] Statement of Claim, ¶ 191.
[435] Statement of Claim, ¶ 192; Witness Statement of L. Kernion, ¶ 85.
[436] Statement of Claim, ¶ 193; Witness Statement of J. Finley, ¶ 53; Witness Statement of L. Kernion, ¶¶ 86-87.
[437] Statement of Claim, ¶ 194; Witness Statement of L. Kernion, ¶ 88.
[438] Statement of Claim, ¶ 195; **C-0098**, PEMEX Work Order 028-2016, November 18, 2016.
[439] Statement of Claim, ¶ 200; **C-0099**, Internal PEMEX Document (2015).

- The 'Movement of Drilling Equipment' attached to Work Order 028-2016 was noticeably different than the one in Claimants' possession and diverged from Pemex's customary format;[440]

- The 'Movement of Drilling Equipment' attached to Work Order 028-2016 showed that "EQ02" was to drill the Coapechaca 1240;[441]

- Claimants equipment was not called "EQ02" but instead PMX-805;[442]

- The drilling permit that Pemex obtained showed the Coapechaca 1240 was to be drilled in a program along with the Coapechaca 140, 1680, and 122;[443]

- The 'Movement of Drilling Equipment' in Claimants' possession shows that Weatherford was assigned to drill these other Coapechaca wells along with the Coapechaca 1240;[444]

- Luis Gomez, the Pemex official who oversaw the 821 Contract, told Luis Kernion that Pemex was trying to cancel the 821 Contract because of a lack of funds and that Pemex's commercial and legal departments collaborated in the preparation of Work Order 028-2016;[445]

- Finley, Drake-Mesa, and Drake-Finley did not perform Work Order 028-2016;

- Pemex used this one unfulfilled work order to initiate an administrative rescission under Clause 15 of the 821 Contract;

[440] Statement of Claim, ¶ 201; **C-0098**, PEMEX Work Order 028-2016, November 18, 2016.
[441] Statement of Claim, ¶ 201; **C-0098**, PEMEX Work Order 028-2016, November 18, 2016.
[442] Statement of Claim, ¶¶ 200-201.
[443] Statement of Claim, ¶ 203; **C-0101**, Resolución No. CNH.UTEXP.038/2017, August 10, 2017.
[444] Statement of Claim, ¶¶ 200, 203; **C-0099**, Internal PEMEX Document (2015).
[445] Statement of Claim, ¶ 204; Witness Statement of L. Kernion, ¶¶ 97-98.

- Clause 15. r) of the 821 Contract does not allow Pemex to initiate an administrative rescission unless and until there are 15 unfulfilled work orders; instead, Clause 6.6.1.A imposes a daily penalty, up to 15 days, after which Pemex can issue a new work order;

- After receiving notice of the administrative rescission and draft *finiquito* from Pemex, Luis Kernion went to Pemex's headquarters in Mexico City and met with Rodrigo Hernandez, the Subdirector of Services at Pemex Exploracion y Produccion [*sic*];[446]

- Rodrigo Hernandez told Luis Kernion that Pemex was trying to rescind the 821 Contract to avoid paying Finley, Drake-Mesa, and Drake-Finley;[447]

- Rodrigo Hernandez also told Luis Kernion that Pemex was planning to claim against the US$ 41.8 million Dorama Bond;[448]

- In September 2017, Finley, Drake-Mesa, and Drake-Finley initiated a challenge to Pemex's administrative rescission;[449]

- In September 2018, Luis Kernion had a telephone conversation with Roberto Keoseyan;[450]

- Shortly thereafter, Luis Kernion went to Mexico City to meet with Roberto Keoseyan along with Adolfo Hellmund and Rodrigo Loustaunau (Mr. Keoseyan would later equivocate about this meeting and Rodrigo Loustaunau denies attending);[451]

- Luis Kernion testified that Roberto Keoseyan told him that the administrative judge would be ruling in Pemex's favor;[452]

[446] Statement of Claim, ¶ 209.
[447] Statement of Claim, ¶ 209; Witness Statement of L. Kernion, ¶ 104.
[448] Statement of Claim, ¶ 210; Witness Statement of L. Kernion, ¶ 104.
[449] Statement of Claim, ¶ 216; **RZ-039**, TFJA Judgment.
[450] Statement of Claim, ¶ 216; Witness Statement of L. Kernion, ¶¶ 105-106.
[451] Second witness statement of L. Kernion, April 13, 2023 ("**Second Witness Statement of L. Kernion**"), ¶ 10.
[452] Statement of Claim, ¶ 217.

- Luis Kernion testified at the hearing that Rodrigo Loustaunau told him at this meeting, '*[t]us compañías están terminadas y van a perder*.'[453]

- Not long thereafter, on October 4, 2018, the administrative judge decided in Pemex's favor, finding that Pemex was proper in administratively rescinding the 821 Contract because of Work Order 028-2016 under Clause 15.1(s);[454] and

- After appeals of this decision were exhausted and this arbitration commenced, Pemex issued a unilateral *finiquito* of the 821 Contract then proceeded to make another claim against the US$ 41.8 million Dorama Bond."[455]

576. The Claimants conclude that "Pemex's actions towards Claimants' investments, coupled with the treatment they received from the Mexican legal system, present a textbook case of a State failing to accord investments treatment in accordance with international law."[456]

B. OVERVIEW OF THE RESPONDENT'S CASE

577. As a general consideration, the Respondent asserts that

> "the energy industry is exposed to various risks, including the fall in oil barrel prices. The Respondent has also explained that in mid-2014 an international crisis in oil prices began at the international level, a situation that is corroborated by both the Claimants and Mr. Finley. Faced with this situation, most of the companies with operations in the exploration and production sector cut their expenses and investments, which is acknowledged by the Claimants. Therefore, it is not logical for Mr. Finley, who has been working in the energy sector since 1981, to consider that 'as to the price of oil, we were not taking a price risk, given the minimum and maximum in the Contract.' Even more so if he accepts that he has long experience with customers or suppliers with financial difficulties."[457]

[453] Spanish Tr. Day 2, 404:17-18; English Tr. Day 2, 355 6-7 ("Your companies are terminated, and you're going to lose.")

[454] **RZ-0039**, TFJA Judgment.

[455] Reply, ¶ 13; **R-0043**, *Finiquito* for 821 Contract, November 10, 2021; **C-0108**, Letter from Dorama to Finley, December 7, 2021.

[456] CPHB, ¶ 53.

[457] RPHB, ¶¶ 81-82.

578. In a similar vein, the Respondent contends[458] that the Claimants failed to make, prior to investing in Mexico, the adequate due diligence that any diligent foreign investor seeking to make an investment within the meaning of an investment treaty must conduct so that it is aware of the inherent risks of the project it seeks to develop. Had they done that due diligence, "the Claimants would have been aware of the administrative termination clause contained in Contract 821, which they are now trying to make the tribunal believe was a 'scheme' by PEMEX to terminate such contract."[459]

579. One of the key allegations of the Respondent's throughout the arbitration has been that the "Contract 821 was terminated due to [contractual] breaches."[460] In support of that position, the Respondent argued during the Hearing that:[461]

- In their allegations to the commencement of the rescission procedure,[462] Drake-Finley, Drake-Mesa and Finley recognized that they breached the 821 Contract (*e.g.*, PACMA obligations).[463]

- Point VII.3 of the PACMA Annex states that repeated unfulfillments of PACMA obligations (six) will be a cause of rescission. PEP notified the lack of compliance on four occasions.[464]

- Work Order 028-2016 was legal, and the Contractor could only reject it for two reasons which did not apply:

    1. That it exceeded the maximum amount of the Contract; or

    2. That it went beyond the end of the execution of the Contract.

[458] RPHB, ¶¶ 94-98.

[459] RPHB, ¶ 100.

[460] Respondent's Opening Presentation at the Hearing, slide 75.

[461] Respondent's Opening Presentation at the Hearing, slides 77-85.

[462] **R-0108**, Written response from Drake-Finley, Drake-Mesa and Finley within the administrative termination proceeding of the Contract 821, August 14, 2017.

[463] Respondent's Opening Presentation at the Hearing, slide 78.

[464] **R-0109**, Communication from PEP to Drake-Finley notifying the non-compliance with PACMA obligations, December 16, 2016 and other dates.

- The Claimants did not comply with Annex DT-2 of the Contract, as they did not prepare the execution of the Work Order.

- PEP could not ask the authorization from CNH, as it lacked information to be provided by the contractor.

- In the Teams meeting conversation between Mr. Melsheimer and Mr. Keoseyan concerning the informal meeting at a restaurant named "La Aceituna", Mr. Keoseyan expressed at least on 17 occasions that he did not recall that Mr. Loustaunau attended the meeting. Furthermore, Mr. Keoseyan and Mr. Pallada visited also the judge on behalf of the Claimants.[465]

580. The Respondent rejects outright the existence of any "scheme" to rescind the 821 Contract.

> "The description of the scheme alleged to violate Article 1105 has evolved throughout this arbitration. In the Statement of Claim, the scheme (and the associated breach) was focused exclusively on Pemex. After Mexico raised the time bar issue, the Claimants arbitrarily expanded their alleged scheme in the Reply to include an October 4, 2018 decision rendered by the Mexican courts. And at the Hearing, they claimed the scheme 'materialized' into a breach of the NAFTA on that date."[466]

581. For the Respondent,

> "[t]he evidence presented does not establish any 'scheme' to unjustly rescind Contract 821, much less an effort by Pemex to collude with the Mexican courts. The supposedly fake work order issued by Pemex has never been substantiated. The Respondent made this point several times,[467] with no response from the Claimants. Mr. Kernion also confirmed at the hearing that the Claimants never raised the issue of a fake work order in their lawsuits against Pemex.[468] Thus there is nothing to suggest that the work order was fake or issued as part of a scheme to rescind Contract 821."[469]

582. With respect to the claim of denial of justice, the Respondent recalls that the Ordinary Civil Trial 200/2016 concerning the 821 Contract was started by Drake-Finley on April 29, 2016,

---

[465] Respondent's Opening Presentation at the Hearing, slide 98.

[466] RPHB, ¶ 217. By mistake, the courtesy translation of RPHB refers to the USMCA, even if the original RPHB in Spanish refers to TLCAN.

[467] Counter-Memorial, ¶ 537; Rejoinder, ¶ 358.

[468] English Tr. Day 2, 378:18-382:22; Spanish Tr. Day 2, 427:15-432:4.

[469] RPHB, ¶ 218.

led to eight procedures, and the Claimants' claims were rejected in the TUCMA Judgment.[470] Thus, as in the others, there was no significant delay in this judicial process.[471]

583. Finally, as previously indicated, for the Respondent "Good faith" is not an autonomous stand-alone obligation under the FET standard (like arbitrariness or denial of justice).[472]

584. The Respondent concludes that the parties agree that the award in *Waste Management v. Mexico II* provides the applicable standard. At the Hearing, counsel for the Claimants called it a "great definition."[473] Applying this standard, the Claimants must establish conduct on the part of Pemex that was "arbitrary, grossly unfair, unjust or idiosyncratic, [was] discriminatory and expose[d] the claimant to sectional or racial prejudice, or involve[d] a lack of due process leading to an outcome which offends judicial propriety.'"[474] "The Claimants have not met that burden.[475]

C. A GUIDE TO THE ISSUES RELATED TO THE 821 CONTRACT

585. As previously indicated, the bulk of this arbitration has centered around the 821 Contract. Hence, this Decision on Jurisdiction and Liability will devote separate Chapters to each of the main issues related to this contract, as follows:

- The Ordinary Civil Trial 200/2016, *i.e.*, the "commercial" litigation started by the Claimants' lawsuit against PEP lodged on April 29, 2016, which led to the TUCMA Judgment on April 2, 2019;
- The administrative rescission of the contract by PEP on August 28, 2017;
- The TFJA Judgment of October 4, 2018, upholding the administrative rescission;

[470] Respondent's Opening Presentation at the Hearing, slide 92; **R-0048**, Second appeal ruling issued by the Third Unitary Court in Civil and Administrative Matters of the First Circuit, April 2, 2019 (the "**TUCMA Judgment**") within the appeal proceeding followed by Drake-Finley and PEP against the Ordinary Civil Trial 200/2016 ruling (the "**898/2017 Appeal**")

[471] Counter-Memorial, ¶ 523.

[472] Respondent's Opening Presentation at the Hearing, slides 149-150.

[473] English Tr. Day 1, 204:3; Spanish Tr. Day 1, 247:1.

[474] Counter-Memorial, ¶ 458; citing **RL-0035**, *Waste Management II*, ¶ 98.

[475] RPHB, ¶ 216.

- The unilateral *finiquito* by PEP of the 821 Contract on November 10, 2021, and the calling of the Dorama Bond.

IX. THE ORDINARY CIVIL TRIAL 200/2016

A. THE TUCMA JUDGMENT

586. In response to PEP's decision not to issue new work orders under the 821 Contract, on April 29, 2016, Finley Resources, Drake-Mesa and Drake-Finley filed a civil claim against PEP before the District Courts in Mexico City.[476] This led to the Ordinary Civil Trial 200/2016 (**"***juicio civil ordinario* 200/2016").

587. The Claimants' request of relief included the specific performance by PEP of (i) payment obligations in the amount of US$ 120,856,548.84, (ii) payment of non-retrievable expenses in accordance with Clause 17 of the 821 Contract, and (iii) payment of various concepts provided for in the 821 Contract. Additionally, the claimants' request of relief included payment of legal interests accrued over said amounts, damages and legal costs and expenses.[477]

588. On April 2, 2019, the Third Unitary Court rendered its final judgment in the Ordinary Civil Trial 200/2016 (the "**TUCMA Judgment**").

589. In its judgment, the Court stated as follows: [478]

> "[I]t is observed that the main action claimed by the plaintiff consists of contractual compliance for the difference amounting to $120,856,548.84 USD (…) as it was not possible to exercise the minimum amount to which it was obliged and the updating of the original costs of the works in order to adjust them to the real conditions, as well as the payment of non-recoverable expenses caused by the suspensions of work that occurred during the term of the contract, the payment and recognition of financial expenses, the payment of damages and payment of court costs and legal expenses."

590. As a consequence, according to the Court: [479]

[476] **RZ-026**, District Court Judgment CP-821, p. 1.

[477] **RZ-026**, District Court Judgment CP-821, pp. 2-7.

[478] **R-0048**, TUCMA Judgment, pp. 123-124.

[479] **R-0048**, TUCMA Judgment, p. 124-125.

> "[T]he plaintiff had to prove the existence of the contractual relationship between the parties; the obligation to comply with the minimum contract amount; the existence of any suspension in the jobs requested by the agency; the existence of concepts and amounts derived from the suspension of work and the existence of damage to the plaintiff's assets.
>
> Derived from the above, it is established that the elements of the action are as follows:
>
> - The existence of the contractual relationship between the parties.
> - The obligation to comply with the minimum amount of the contract.
> - The existence of any suspension of work requested by the agency.
> - The existence of concepts and amounts derived from the suspension of work.
> - The existence of damages to the plaintiff's assets."

591. According to the Court, the claimants had proved the existence of the contractual relation and PEP's obligation to comply with the minimum amount of the contract. But it added the following: [480]

> "Now, the fact that a minimum and maximum budget had been agreed upon, did not mean that if the minimum amount was not exercised, the difference had to be paid to the contractor, because this was not agreed upon in the basic pact of action.
>
> Indeed, in the basic consensus of the action, the amount relative to the minimum and maximum amount of the contract was established, also, that the agency was not obliged to exercise the maximum amount and the monetary amount of each one of those items, but not any obligation on the part of the dependence in relation to the fact that if the amount was not exercised at a minimum, the difference had to be paid to the contractor.
>
> Hence, the contract does not have that scope, as it does not foresee as a consequence, the payment to the contractor of the difference for the minimum amount established in the consensus."

592. Concerning the suspension of the works, the judgement states:[481]

> "Regarding the suspension of work that occurred during term of the contract, to prove that fact, the plaintiff offered the letters: PEP-SPRM-APATG-1452-2014 dated twelve September 2014 (LVI) (56) in which the lack of budget resources was reported; PEP-SPRN-APATG-1855-2014 dated November 13, 2014 in which the APATG Well Design and Engineering Coordinator is informed that the project does not have

[480] **R-0048**, TUCMA Judgment, pp. 128-129.

[481] **R-0048**, TUCMA Judgment, pp. 129-130 and **R-0048 ENG**, pp. 11-12.

> resources (LXXXII) (82); PEP-SPRN-APATG-1862-2014 dated November 13, 2014 in which it was made known to t service provider companies to suspend drilling and well completion activities. (LXXXIII)(83); GSAPRN-GMSCP-RCGSAP-3041-2014 date November 14, 2014, in which the plaintiff's Construction Superintendent was informed of the suspension of drilling and completion of wells of contracts (LXXXIV) (84); PEP-SSAP-GSAPRN-GMSCP-RATG-1291-2015 dated July twenty-eight, 2015, by which he communicated to the plaintiff that as soon as the interventions in execution were completed, it must take the aforementioned measures until the next work order (Exhibit 259); and PEP-DDP-SSE-GSIAP-CSIAPZN-RCATC-0068-2016 dated January twenty-two, 2016, by which he informed the plaintiff that as soon as the interventions in execution were completed, it must take the aforementioned measures until the next order of work (Exhibit 318).
>
> Evidence that is in accordance with numerals 202 and 205 of the Code Federal Civil Procedures, is given full evidentiary value, as it is certified copies.
>
> With these means of proof, the suspension of the work was proven; However, in the basic agreement of the action, that possibility was contemplated in clause 17."

593. The Court, while recognizing that Clause 17 envisaged the payment by PEP to the contractor of the non-recoverable expenses and that the claimants had requested PEP to pay them, found nonetheless that the claimants had failed to state, let alone prove, the specific amounts for which it was seeking to be reimbursed: [482]

> "From the lawsuit, it can be seen that the plaintiff requested the payment of non-recoverable expenses for the work suspensions that occurred during the contract, regarding of the periods of one hundred and eight, ninety-eight and one hundred and five days.
>
> However, this concept is not stated, nor proven and, if applicable, the amounts, for which a sentence should be made regarding that area, since precisely in his initial writing he states that it would be conducted in the incident of sentence execution, without establishing a basis some for it."

594. The Court further added: [483]

> "Now, in clause 17.1 of the Contract, it was established that the non-recoverable expenses had to be reasonable, duly verified and directly related with the contract, and that they should correspond to: l. The reduced equipment rents, provided that they could not be moved to another work front or if it would be cheaper to remove and return to the site; II. The

[482] **R-0048**, TUCMA Judgment, p. 132.

[483] **R-0048**, TUCMA Judgment, pp. 133-134.

> scheduled labor that belonged on the site during the period of the suspension that had not been transferred to another work front and that was registered in the log or in the document of attendance control defined by the parties; III. The cost for maintenance, conservation and surveillance of the work site during suspension.
>
> Thus, in relation to the above, since it is not a request concrete and specific it could not be established whether they were reasonable or not, or, whether they were directly related to the contract, or if they were the concepts specified in sections [I], II and III of the noted clause; added to the fact that it did not specifically state how I would check such expenses.
>
> Without it being able to determine that concept in the execution of the sentence, in accordance with the provisions of article 353, of the Federal Code of Civil Procedures, which establishes that when there is a condemnation of fruits, interests, damages or losses, the amount will be set in liquid amount, or, at a minimum, the bases will be established according to which liquidation must be made when they are not the main object of the trial.
>
> Thus, article 353 of the Federal Code of Civil Procedure, establishes:
>
> '***Article 353***. *When there is a condemnation of fruits, interest, damages or losses, the amount will be set in the amount liquid, or, at least, the bases will be established with according to which the liquidation must be made, when not be the main object of the trial*.'
>
> Therefore, it would not be viable to make a generic sentence, in order for an incident to demonstrate the corresponding amount, since this option is restricted to cases in which fruits, interests, damages or losses are claimed, in accordance with the article 353, of the Commercial Code, without in particular, claiming any of the above concepts."

595. In keeping with those reasons, the Third Unitary Court dismissed the lawsuit of Finley Resources, Drake-Mesa and Drake-Finley.

B. THE CLAIMANTS' POSITION

596. As previously indicated in paragraph 575, the Claimants have explained that they lodged their lawsuit in Mexico against PEP concerning the 821 Contract as a shot across the bow to prompt PEP to issue again work orders under the Contract. In the Claimants' words, "[a] Pemex employee told Luis Kernion to file a lawsuit, advising that it would encourage Pemex to resume issuing work orders."[484]

[484] CPHB, ¶ 52, fifth bullet; referring to English Tr. Day 2, 439:5-12; Spanish Tr. Day 2, 493:22-494:8.

597. Whilst in their pleadings, the Claimants have paid scant attention to this civil procedure, the Claimants' expert, Mr. Zamora, did address it in his first expert report, stating the following:[485]

> "Following the conclusion of said evidentiary stage, and even though none of the parties requested the referral of the case to arbitration, on 8 November 2017, the District Court (8DC) unexpectedly issued its judgment declaring that the 8DC lacked jurisdiction, as Agreement 821 provided for arbitration as the mechanism to resolve disputes ("District Court Judgment CP-821").
>
> Such decision to refer the case to arbitration, despite the fact that none of the parties requested such referral, directly breached Mexican arbitral law and judicial precedents."

598. In Mr. Zamora's view, "the violations committed by the 8DC were not cured with the issuance of a decision on the merits, since the referral to arbitration judgment caused a significant delay (eighteen months) in the proceeding."[486] "Also, the 8DC decision caused for the judgment on the merits to be issued by the Appellate Court (3UC) which had not been the one that received the evidence (almost three years after Claimants filed the civil claim against Pemex)."[487] "As stated in the First Expert Report, the *ex officio* action of the 8DC was contrary to Article 17 of the Constitution and Article 1424 of the Commerce Code in clear violation to Claimants' rights."[488]

599. On the other hand, the Claimants' expert, Mr. Zamora, recognized that on February 8, 2019, the Amparo Court ordered the Third Unitary Court to assume jurisdiction. And on April 2, 2019, "almost three years after Claimants filed the civil claim against PEMEX," the court issued its final judgment, declaring that: (i) Claimants failed to prove their case; and (ii) Pemex was not liable.

600. In the wake of that ruling, insofar as the Mexican courts did not condemn the Claimants to pay the costs of the legal proceedings, PEP sought new judicial decisions ordering the Claimants to pay the costs of all the instances, an outcome which it finally got on October

---

[485] Rodrigo Zamora Etcharren and Daniel Amézquita Díaz First Expert Report, June 8, 2022 ("**Rodrigo Zamora Etcharren and Daniel Amézquita Díaz First Expert Report**"), ¶¶ 110-111.

[486] Rodrigo Zamora Etcharren and Daniel Amézquita Díaz second expert report, April 14, 2023 ("**Rodrigo Zamora Etcharren and Daniel Amézquita Díaz Second Expert Report**"), ¶ 53.

[487] Rodrigo Zamora Etcharren and Daniel Amézquita Díaz Second Expert Report, ¶ 54.

[488] Rodrigo Zamora Etcharren and Daniel Amézquita Díaz Second Expert Report, ¶ 55.

21, 2021, with the fifth judgment of the Court of Appeals.[489] Thus, in the opinion of the Claimants' expert, "[t]he evidence shows that Pemex was employing deliberate efforts to use all remedies available to Pemex not only to obstruct, delay, derail or sabotage CP-821, but also to obtain more economic benefits from Claimants by seeking in several instances the order for Claimants to pay the costs of the proceedings."[490]

601. To the best of the Tribunal's knowledge, the Claimants have not made any other specific criticism of the procedure; nor have they taken issue, except for its delay, with the TUCMA Judgment.

C. THE RESPONDENT'S POSITION

602. The Respondent submits that "[a]s described by the Claimants, Drake-Finley initiated a claim against PEP in March 2016. Finley/Drake-Mesa appealed the tribunal's decision in November 2017. The appellate court ruled in April 2018. Amparo claims were then initiated [*sic*] in June 2018, and the amparo was granted in February 2019. This proceeding, like the others, had no significant delays."[491]

603. In analyzing the duration of the Ordinary Civil Trial 200/2016, the Respondent refers to the view of legal expert, Mr. Asali, in his First Expert Report:[492]

> "148. The period of approximately 18 months that elapsed for the substantiation of the first instance of the proceeding is an ordinary and adequate duration for the processing of a first instance in a federal trial, mainly considering that the plaintiffs filed an extension to their original claim. The second and third instances were substantiated in a period of approximately 6 and 8 months, respectively, from the admission of the recourses, which again is circumscribed to the ordinary duration for the substantiation of those instances."

604. The Respondent concludes that "[i]nstead of resolving the controversies of Contract 821 through the agreed arbitration clause, the Claimants decided to initiate commercial

[489] **RZ-038**, Fifth Judgment of the Court of Appeals CP-821, October 21, 2021.

[490] Rodrigo Zamora Etcharren and Daniel Amézquita Díaz First Expert Report, ¶ 120.

[491] Counter-Memorial, ¶ 523.

[492] Counter-Memorial, ¶ 525, citing First Asali Report, ¶ 148.

litigation 200/2016, which was complex, but resolved by Mexican courts within a reasonable period of time."[493]

D. THE TRIBUNAL'S ANALYSIS

605. For the Tribunal, it is hard to see any trace of "denial of justice" in the Ordinary Civil Trial 200/2016 or in the TUCMA Judgment. The Claimants seem to have recognized as much, as evidenced by the paucity of their allegations on this specific issue during the arbitration.

606. In the Tribunal's view, there was no significant delay in the judicial process, even in spite of the mistake of the Eighth District Court (8DC), subsequently corrected, when considering that the case had to be referred to arbitration: the initial lawsuit was filed in late April 2016 and the final judgment was forthcoming in early April 2019 -the TUCMA Judgment-, *i.e.*, less than three years later. It is true that the judicial process subsequently dragged on, but this was the consequence of PEP's sustained efforts, ultimately successful, to recover legal costs from the claimants.

607. Finally, for the Tribunal, the TUCMA Judgment does not contain any trace of arbitrariness. In fact, on the basis of the evidence submitted by the Claimants, the Third Unitary Court declared as proven that PEP had suspended *de facto* the execution of the 821 Contract, in sharp contrast with the finding of the TFJA on this very same issue, as it will be explained later on.

X. THE ADMINISTRATIVE RESCISSION OF THE 821 CONTRACT

608. Given the relevance in this arbitration of the administrative rescission of the 821 Contract, this Chapter will address separately the following topics:

- First, it will summarize briefly the key contractual clauses that have a bearing on the topic.
- Second, it will analyze the work order issued by PEP on November 18, 2016, to drill the Coapechaca 1240 Well (the "**Work Order 028/2016**"), whose lack of fulfilment

[493] Respondent's Opening Presentation at the Hearing, slide 157.

by the contractors was the first key reason used by PEP to justify the rescission of the Contract.

- Third, it will summarize the PACMA obligations, whose lack of fulfilment by the contractors was the second key reason used by PEP to justify the rescission of the Contract.

609. Throughout this Chapter the Tribunal will be mindful of the limits of its jurisdiction set out in Chapter V. Nonetheless, as also stated in that Chapter, the Tribunal will consider itself empowered to analyze all relevant facts or circumstances which may help elucidate those issues which the Tribunal is bound to adjudicate.

A. CONTRACTUAL CLAUSES

610. Clause 15.1 of the Contract, on administrative rescission, includes, *inter alia*, the following three circumstances when the contract can be rescinded:

> "**b)** If the CONTRACTOR does not execute the Works in accordance with the provisions of the Contract or without justified reason, it does not comply with the written orders given by the Construction Resident.
>
> […]
>
> **r)** In the event that the CONTRACTOR accumulates 15 (fifteen) unfulfilled Work Orders during the Execution Period of the Contract.
>
> **s)** In the event that the CONTRACTOR fails to comply with its obligations under the terms established in the Contract."

611. Clause 6.6.1 of the Contract, on conventional penalties for delay in the execution of Works, establishes a conventional penalty of US$ 17,500 for each day of arrears in the commencement of a work order. The Clause stipulates the following:

> "This penalty will be applied up to a maximum period of 15 (fifteen) Days, after which without the CONTRACTOR having started the corresponding Works, the relative Work Order is considered unfulfilled, and PEP may issue a new Work Order."

612. As explained below, this Clause is mentioned in the unilateral *finiquito* of 821 Contract,[494] when it states that the conventional penalty resulting from that clause amounted to US$ 262,500 (*i.e.*, 15 days at US$ 17,500 each).

[494] **R-0043**, *Finiquito* for the 821 Contract, November 10, 2021, p. 20.

B. WORK ORDER 028/2016

(1) Factual background

613. As part of its programming of the movements of drilling equipment, at some point in time in 2015, PEP assigned to Weatherford, one of the contractors working for PEP in the ATG, the drilling of several wells, including the so-called "Coapechaca 1240 Well".[495]

614. On October 4, 2016, the CNH, *i.e.*, the Mexican government agency with regulatory authority over the exploration and production of hydrocarbons, published its *Lineamientos de Perforación de Pozos* or Guidelines for Drilling Wells[496]. Article 25 of the Guidelines required oil operators, like PEP, to obtain a permit from the CNH to drill wells.

615. In November 2016, Finley and Drake-Mesa received from PEP a new work order, to drill the Coapechaca 1240 Well for approximately US$ 1 million.[497]

616. PEP did not have a permit from the CNH to drill Coapechaca 1240 Well and only requested the authorization on June 5, 2017.[498] Upon receiving the request, on June 15, 2017, the CNH required PEP to explain and rectify some inconsistencies in its request and in response PEP provided the CNH on June 22, 2017, the required explanatory technical information. On August 10, 2017, the CNH provided PEP with the authorizing to drill the Coapechaca 1240 Well, as well as the Coapechaca wells 1480, 1680, and 122[499], which were part of a grouping called "Coapechaca 1460" that Pemex had scheduled Weatherford to drill.

(2) The Claimants' position

617. The Claimants have argued that Work Order 028-2016 was "fake", *i.e.*, it was fabricated "in order to administratively rescind the 821 Contract."[500]

---

[495] **C-0099**, Internal PEMEX Document (2015). The Coapechaca 1240 Well is referred as "COA 1240" in the Exhibit.
[496] **C-0100,** Guidelines for Drilling Wells, CNH, October 4, 2016.
[497] **C-0098,** PEMEX Work Order 028-2016, November 18, 2016.
[498] **C-0101,** Resolución No. CNH.UTEXP.038/2017, August 10, 2017, Preamble, ¶ 4.
[499] **C-0101,** Resolución No. CNH.UTEXP.038/2017, August 10, 2017, Resolution 1, ¶ 2.
[500] CPHB, ¶ 59.

618. According to the Claimants, this is not only proven by the testimony of Luis Kernion that this was said by PEP officials, like Luis Gomez and Rodrigo Hernandez, but also demonstrated by a number of objective facts. They are essentially the following:[501]

619. *First*, the "Movement of Equipment" showed that Pemex scheduled Weatherford to drill the Coapechaca 1240 Well. This is consistent with the revelation by one of Mexico's attorneys during its opening presentation that Weatherford provided Pemex with the information necessary to obtain a permit to drill the Coapechaca 1240 Well.[502]

620. *Second*, Work Order 028-2016 was issued on November 25, 2016, and instructed that drilling was to begin 22 days later on December 17, 2016. The CNH's regulations regarding drilling permits provide that the CNH has 15 working days to decide on the sufficiency of applications for a drilling permit.[503] Thereafter, the CNH has 30 working days to conduct a technical analysis before issuing a permit. Under the CNH's regulations, Pemex would not have obtained a drilling permit to drill the Coapechaca 1240 Well to allow Finley to meet the drilling time frames of Work Order 028-2016.

621. According to the Claimants,[504] at the Hearing, Mr. Loustaunau testified that Finley should have drilled the well anyway, as "the Party that will be penalized is PEP, not the subcontractor or the provider."[505] In the Claimants' view, "it is alarming when the attorney heading PEMEX's litigation department advocates disregarding Mexican law, *i.e.*, the CNH's regulations requiring a permit to drill a well. No prudent oil and gas company would disregard the law and drill a well without a permit."[506] The Claimants assert that "if Mr. Loustaunau was willing to promote disregarding the CNH's regulations, it is reasonable to conclude that PEMEX's legal department was willing to assist in preparing a fake work order designed to administratively rescind a US$ 418.3 million contract."[507]

---

[501] See CPHB, ¶¶ 58-62.

[502] English Tr. Day 1, 153:16-21; Spanish Tr. Day 1, 184:3-8.

[503] **C-0100**, Guidelines for Drilling Wells, CNH, October 4, 2016, Article 30(I).

[504] CPHB, ¶ 252.

[505] English Tr. Day 3, 600:6-8; Spanish Tr. Day 3, 686:2-3.

[506] CPHB, ¶ 63.

[507] CPHB, ¶ 64.

622. For the Claimants, to comply with Pemex's Board directive to find ways to reduce Pemex'S obligations under its contracts, Pemex could have put the 821 Contract into suspense under Clause 17 or anticipatorily terminated the contract under Clause 16. But both options would have required Pemex to honor its contractual commitments. In an effort to avoid the financial cost associated with such terminations, Pemex designed an administrative rescission under Clause 15.[508]

(3) The Respondent's position

623. According to the Respondent,

> "[t]he evidence presented does not establish any 'scheme' to unjustly rescind Contract 821, much less an effort by Pemex to collude with the Mexican courts. The supposedly fake work order issued by Pemex has never been substantiated. The Respondent made this point several times, with no response from the Claimants. Mr. Kernion also confirmed at the hearing that the Claimants never raised the issue of a fake work order in their lawsuits against Pemex. Thus, there is nothing to suggest that the work order was fake or issued as part of a scheme to rescind Contract 821."[509]

624. The Respondent further argues that

> "[a]part from the total lack of evidence to support the alleged scheme, the acts taken by Pemex 'as a whole' to rescind Contract 821 were not shown by the Claimants to be egregious, shocking, grossly unfair, prejudicial, unjust or idiosyncratic. Nor did they establish any legitimate expectation that the Contract would not be rescinded under any circumstances. Indeed, the recission was based on the failure of the Claimants to comply with the terms of Contract 821, as the Respondent explained in its previous submissions. The right to rescind on that basis was clearly stated in the Contract. It cannot be the case that Mexico -through Pemex- violates Article 1105 when Pemex exercises rights it lawfully holds under a service contract." [510]

C. PACMA OBLIGATIONS

(1) Factual background

625. On May 31, 2016, the head of the PACMA North Regional office informed in writing, for the first time, to Mr. Luis Gómez Herrera, PEP's manager (*residente del Contrato*) for the

[508] CPHB, ¶¶ 65-66.

[509] RPHB, ¶ 218.

[510] RPHB, ¶ 220.

821 Contract, that Drake-Mesa and Finley had failed to execute or complete 7 of the PROAS that Finley had been assigned to carry out.[511]. The document shows that the execution of the projects had been authorized on January 26, 2015, and that the contractor was obliged to carry them out within 90 days after their authorization (*i.e.*, by late April 2015).

626. In that memorandum the head of PACMA's Regional office requested Mr. Gómez Herrera to apply to the contractors the 0.7% downward adjustment (*reducción a la baja o deductiva*) on the most recent outstanding invoice for each of the 7 uncompleted projects.

627. Subsequently, the PACMA Regional office sent similar letters to PEP on uncompleted PACMA projects on October 5, 2016, November 28, 2016, December 14, 2016, February 1, 2017, and March 2, 2017.[512]

628. In early March 2017 the PACMA Regional office sent two additional letters, one on March 3 and the second on March 6. The first one makes clear that, particularly after February 2017, PEP had requested information to the PACMA's Regional office on the Claimants' uncompleted PACMA projects, as the head of PACMA's Regional office, Mr. Héctor García García, included the following paragraph at the end of his letter:

> "I should appreciate that you formally consider met the requests derived from the memorandums mentioned and the agreements reached in the working meetings I attended, together with staff from the PACMA North Regional Office, on February 10 and 21 of the current year, with the 'Coordinación de Servicios de Intervenciones a Pozos Zona Norte', likewise I request to be informed officially of the status of the Contract, in order to define the situation of the PROAs."[513]

629. On December 16, 2016, PEP's Mr. Gómez Herrera notified Finley for the first time of Finley's failure to carry out the PACMA projects.[514]

---

[511] **C-0122**, Pemex Internal PACMA Memos (2016-2017).

[512] The letters and their dates are included in **C-0122**, Pemex Internal PACMA Memos (2016-2017).

[513] **C-0122**, Pemex Internal PACMA Memos (2016-2017), p. 14. Tribunal's translation. The original text in Spanish reads: "*Agradezco mucho, se de por atendido su solicitud de manera formal derivado de los oficios citados en antecedentes y de los acuerdos en las reuniones de trabajo en las que asistí con personal de la Oficina Regional PACMA Norte, con fechas 10 y 21 de febrero del año en curso con la Coordinación de Servicios de Intervenciones a Pozos Zona Norte, así mismo solicito me informe de manera oficial el estatus que guarda el contrato en comento, a fin de definir la situación de los PROA's*".

[514] **R-0109**, Communication from PEP to Drake-Finley notifying the non-compliance with PACMA obligations, December 16, 2016, and others.

(2) The Claimants' position

630. For the Claimants, "[t]he evidence also shows how the PACMA obligation was not a serious issue and used to supplement, if not be a backup for, a claim regarding Work Order 028-2016. Each of the 'PROA's' identified in Mexico's first alleged notice of violation are for works assigned in either December 2014 or January 2015."[515]

631. Pemex did not raise concerns about this issue until December 2016 (according to Mexico). "Had PACMA been a serious issue, Pemex would not have waited nearly a year to complain. In fact, according to Mexico, Pemex was able to administratively rescind the 821 Contract because of PACMA alone."[516] But it did not. "The evidence shows that Pemex was not concerned with, nor did it pursue the PACMA issue until after it issued Work Order 028-2016."[517]

(3) The Respondent's position

632. The Respondent starts by recalling that "in the Drake-Finley rescission proceeding, Drake-Mesa and Finley acknowledged that they had breached their obligations under Clause 48th."[518]

633. For the Respondent, the Claimants make incorrect descriptions of the PACMA obligations when they consider that

> "the last sentence of the memo to Luis Gomez explains how the PACMA area understood the issue was to be resolved. Pemex was to deduct any outstanding amount from any upcoming payment to Finley/Drake-Mesa/Drake-Finley."[519]
>
> "[C]ontrary to what Claimants state, the May 31, 2016 official letter addressed to Mr. Luis Gómez Herrera- and the other official letters that constitute exhibit C-0122- do not 'explain how the PACMA area

[515] CPHB, ¶ 83. .

[516] CPHB, ¶ 84. .

[517] CPHB, ¶ 84.

[518] Rejoinder, ¶ 45. The Respondent quotes as proof the reply of Drake-Finley, Drake-Mesa and Finley in the administrative rescission proceeding. See written response from Drake-Finley, Drake-Mesa and Finley within the administrative termination proceeding of the Contract 821, August 14, 2017, pp. 19 and 21 ("Main reason why the breach of the PROA's is not attributable to my client […]" and "[…] there were factual circumstances that affected the performance of my client, being attributable the breach to the lack of diligence of PEP in the compliance of its contractual obligations.")

[519] Rejoinder, ¶ 48, citing Reply, ¶ 81-

> understood that the matter should be resolved'; they are in fact express statements of Drake- Finley's breaches and the request for the application of a penalty derived from such breaches."[520]

634. For the Respondent, the Claimants are also wrong when they consider that "somehow, despite having failed to comply with several works in support of the community, such breaches would be cured by 'recovering [the] outstanding amounts associated with the PACMA in the settlement of the contract.'" Claimants refer to section VII of the PACMA Annex, but, in the Respondent's view, "that paragraph does establish how PACMA-related amounts would be recovered in the event of administrative rescission. What the Claimants fail to mention is that, if the administrative rescission derived, *inter alia*, from breaches of the obligations to perform PACMA-related works, such recovery does not cure such breaches. Rather, it is a mechanism to ensure support for the communities and the environment."[521]

635. The Respondent stresses that

> "section VII of the PACMA Annex expressly states that repeated non-compliance with six ICD indicators constitute an additional cause for the rescission clause of Contract 821."[522]
>
> "It is clear that, since the development of six PROAs had not even started and the development of others had not been completed, Drake-Finley committed more than six repeated violations, and therefore the administrative rescission of Contract 821 was more than justified."[523]

636. Finally, in the Respondent's view "Claimants refer to clauses 3 and 15.1 of Contract 821 to argue that PEP never gave Drake-Finley the opportunity to cure the breaches of Contract 821 and that it did not act in good faith by proceeding directly to the administrative termination."[524] But "PEP did give Drake-Finley the opportunity to cure its PACMA breaches and it was they who chose not to do so."[525]

637. The Respondent concludes that the

[520] Rejoinder, ¶ 49.
[521] Rejoinder, ¶¶ 50-51.
[522] Rejoinder, ¶ 52.
[523] Rejoinder, ¶ 52.
[524] Rejoinder, ¶ 57.
[525] Rejoinder, ¶ 58.

> "Tribunal will be able to corroborate: i) that the Claimants' interpretation of the community and environmental support obligations and Exhibits C-0122 and C-0124 are completely incorrect, ii) that Pemex did not act improperly with respect to Drake-Finley's breaches of its PACMA obligations and that in any event it gave it the opportunity to cure such breaches, iii) that the rescission of Contract 821, based on Drake-Finley's defaults, was properly carried out and iv) that the obligation of good faith does not impose additional obligations to those derived from contractual good faith."[526]

D. THE ADMINISTRATIVE RESCISSION

638. On July 31, 2017, Mr. Rodrigo Hernández Gómez, Subdirector of Services at PEP, notified Finley and Drake-Mesa the initiation of the administrative procedure to rescind the 821 Contract.[527] The letter based the intended rescission on the breach by the contractors of two main obligations: (1) not having picked up and carried out the drilling Work Order 028-2016 concerning the Coapechaca 1240 Well, as well as being absent during the on-site meeting called by PEP for November 30, 2016 PEP to verify the contractors' readiness to start the drilling; and, (2) not having completed or initiated eight PACMA projects in support of local communities and the environment, as required in keeping with Clause 48 of the Contract. The letter gave the contractors 10 working days to make any allegations and provide any evidence that they considered appropriate.

639. On August 14, 2017, the contractors submitted to PEP their allegations against the initiation of the rescission procedure.[528] The contractors mainly argued that: the PEP official signing the letter did not have the delegated powers necessary to start the rescission process; that the work order had not been properly notified to the contractors; that PEP had not met its obligation to demand the minimum amount of work set out in the contract; that PEP had incurred in *de facto* suspensions of the contract, a lack of diligence by PEP which affected the capacity of the contractors to meet their obligations, as it had prevented them to be reimbursed for the non-recoverable expenses, an issue which was being discussed in the Ordinary Civil Trial 200/2016.

---

[526] Rejoinder, ¶ 60.

[527] **C-0104**, Letter from PEMEX to Finley and Drake-Mesa, July 31, 2017.

[528] **R-0108**, Written response from Drake-Finley, Drake-Mesa and Finley within the administrative termination proceeding of the Contract 821, August 14, 2017.

640. On August 28, 2017, PEP issued the formal resolution declaring the 821 Contract rescinded.[529] As explained by the Respondent,[530] in its resolution PEP concluded that Drake-Finley had committed five actions that breached the grounds b) and s) of Clause 15 of 821 Contract. The actions were the following:

- Failure to comply with Work Order 028-2016, and verification tour orders. Drake-Finley did not even comply with minimum requirements such as attending meetings or calls in order to deliver the original documents of Work Order 028-2016.

- Failure to comply with the object of 821 Contract by not executing work order 028-2016.

- Failure to comply with Annex DT-2 of 821 Contract, which required Drake Finley to submit to PEP the drilling work program, perform verifications, and provide the necessary drilling equipment to perform the required work.

- Failure to inform PEP about Drake-Finley's change of conventional domicile. This situation is relevant because a continuing conduct of Drake-Finley and the Claimants has been to evade notifications made by PEP.

- Failure to comply with Clause 48 of 821 Contract related to community and environmental support.

E. THE TRIBUNAL'S CONCLUSION

641. In the Tribunal's view, without any need to rely on "adverse inferences", the Claimants have provided enough documentary evidence proving that Work Order 028-2016 was bogus or purely artificial -"fake", in the Claimants' terminology-, as its real purpose was not to have the Claimants drill the Coapechaca 1240 Well, but to deliberately "fabricate" a reason to allow PEP to administratively rescind the 821 Contract and provide an additional argument for its defense in the civil procedure 200/2016.

642. There are several pieces of documentary evidence which underpin this conclusion.

[529] **R-0042**, Administrative rescission decision of the 821 Contract by PEP, August 28, 2017.
[530] Counter-Memorial, ¶ 108.

643. *First*, on November 25, 2016, when PEP signed the Work Order, it did not have the mandatory authorization of the CNH to have the well drilled, nor did it have any reasonable expectation that this authorization might be forthcoming before the Claimants had been asked to start drilling the well, *i.e.*, on December 17, 2016. This is so because the documentary evidence shows that PEP only asked the CNH for authorization on June 5, 2017[531], *i.e.*, more than six months after Work Order 028/2016 was issued.

644. Thus, on December 17, 2016, a number of PEP officials attended in the Coapechaca 1240 Well the act of "*Lista de Verificación de Prearranque del Equipo de Perforación* PMX-805" for the start of the perforation. They waited for 40 minutes, but the contractor did not show up, nor did it present the perforation equipment or the crew to manage it.[532] This can only be seen as part of a maneuver or ploy by PEP, as described by the Claimants, to have a justification for PEP's subsequent administrative rescission of the 821 Contract.

645. *Second*, the Claimants have provided documentary evidence -namely, PEP's internal document on the programming of movements of perforation equipment-[533] which confirms that in 2015 PEP had assigned the drilling of the Coapechaca 1240 Well to another contractor, Weatherford, not to Drake-Finley. This is consistent with the fact that when in June 2017 PEP requested the CNH's authorization to drill the well, it was Weatheford, as the contractor for the drilling of that well, which provided PEP with the technical information required to respond to the CNH's requirements, as confirmed by-a member of Mexico's counsel during the Hearing.[534]

646. *Third*, the memorandum sent by Mr. Loustaunau on May 8, 2017, to PEP officials[535], urging them to rescind administratively the 821 Contract, makes explicitly clear that PEP's

[531] **C-0138**, Letter from PEMEX to CNH, June 5, 2017.

[532] **C-0104**, Letter from PEMEX to Finley and Drake-Mesa, July 31, 2017, p. 14.

[533] **C-0099**, p., Internal PEMEX Document (2015), p. 1, second row ("Weatherford PMX-926"), second box from right to left. Due to lack of space, the 0 of the well number assigned to Weatherford for development, "CoaCOA. 1240", inadvertently moved to the line underneath within the box.

[534] English Tr. Day 1, 153:16-21; Spanish Tr. Day 1, 184:3-8 (His testimony was the following: "the same Work Order was put to another Company, also of foreign origin, Weatherford, which did cooperate with PEP providing the information it needed to obtain said authorization.")

[535] **C-0103**, Internal PEMEX Letter, May 8, 2017.

Legal Department had an interest in having the 821 Contract rescinded, so as to buttress its defense in the Ordinary Civil Trial 200/2016.

647. In the Tribunal's view it is worth recalling the complete text of Mr. Loustaunau's memorandum of May 8, 2017:

> "I hereby refer to official letter PEP-DG-SSE-GSIAP-541-2017 dated May 3, 2017 (attached), by means of which you were requested, among other things, to proceed with the notice of the commencement of the administrative termination of contract number 421004821, executed between PEMEX Exploración y Producción (PEP) and DRAKE-FINLEY, S. de R.L/de C.V., FINLEY RESOURCES, INC. and DRAKE-MESA, S. de R.L. de C.V., for the "Comprehensive drilling and completion works of land wells in the North and South regions of PEP".
>
> In this regard, I request that once you are notified of the administrative termination of the above-mentioned contract, you immediately send a certified copy of it to the undersigned.
>
> The foregoing is due to the fact that a Civil Ordinary Lawsuit is currently being processed by Drake against PEP, in which it intends to order the State Productive Company to pay benefits with an approximate value of 2.5 billion pesos, reason for which the termination of the contract will be exhibited in the above-mentioned Lawsuit, in order to impute non-compliance to the contractor.
>
> It is worth mentioning that the Federal Code of Civil Procedures grants 3 days to offer supervening evidence, hence the urgency that the certified copy of the administrative termination be sent to the undersigned immediately after its notice."[536]

648. In the Tribunal's view, this documentary evidence, supplemented by the statement of Mexico's counsel during the Hearing that it was Weatherford the contractor which had provided PEP with the technical information requested to get the CNH's authorization to drill the Coapechaca 1240 Well, makes it plain, on its own, without any need for "adverse inferences", that Work Order 028-2016 was bogus or, in the Claimants' terminology, "fake".

649. However, even if this is not necessary for the Tribunal to reach the conclusion that Work Order 028/2016 was an artifice, the conduct of PEP during this arbitration appears to confirm that conclusion. This is so for several reasons.

[536] **C-0103.**

650. *First*, other that the Work Order 028/2016 itself, the Respondent has not produced the slightest evidence on the origin or rationale for the work order.[537]

651. *Second*, the Respondent has not presented as witnesses any of the PEP officials involved in the issuance of Work Order 028/2016, nor in the rescission process, which could have explained the rationale for the Work Order or the rescission and discredit the statements of the Claimants' witnesses that PEP orchestrated a "scheme" against the contractors.

652. *Third,* the Respondent has failed to produce the document that Mr. Loustaunau attached to his memorandum to PEP officials dated May 8, 2017, which could have provided background information and shed some light on the memorandum.[538] Other than Mr. Loustaunau himself, who wrote it, the memorandum was sent to Mr. Alfredo Musalem and copied to Mr. Alfonso Guati and Mr. Epitacio Solís. It therefore beggars belief to follow the Respondent's allegation that it has been unable to find it. Having been sent to several PEP officials, it is not credible to the Tribunal that Mexico could not find the memorandum in PEP's files: the only rational conclusion for the Tribunal is that Mexico decided not to produce it because it undermined its position in this arbitration.

653. Turning now to the PACMA obligations, in the Tribunal's view there are several reasons to conclude that the alleged breach by the Claimants of their "PACMA obligations" was, as argued by the Claimants, just an artifice to justify the administrative rescission of the 821 Contract and provide PEP with an additional argument for its defense in the civil procedure 200/2016 started by the Claimants in April 2016.

654. *First*, the Tribunal notes the remarkable difference in how PEP approached the contractors' PACMA obligations in the 821 Contract and the 803 Contract, the two contracts in which the Claimants did effective work for PEP.

655. In the case of the 803 Contract, Clause 41 required the contractor to comply with a community and environmental support program with a minimum value of two percent (2%) of the budget for each fiscal year, similar to Clause 48 of the 821 Contract. Furthermore,

[537] Whilst the Tribunal, as stated, does not rely on any adverse inference, it notes that the Respondent did not produce any such evidence despite the Tribunal's order to do so.

[538] Again, whilst the Tribunal does not need to rely on any adverse inference, it notes that the Tribunal specifically ordered that that document be produced.

Clause 14.1 a) of the 803 Contract, very much as Clause 15.1 of the 821 Contract, authorized PEP to administratively rescind the contract at any time in case the contractor "fails to comply with its obligations in the terms established in the contract and its annexes." In other words, even if the 803 and 821 Contracts were not identical, they established a similar regime concerning the PACMA obligations of the contractors and PEP's power to rescind the contract for any contractors' failure to comply with its obligations.

656. Yet, how PEP acted in either case is strikingly different. In the 803 Contract, the *finiquito* shows that the contractors (*i.e.*, MWS and Bisell) were paid US$ 26,5 million for the execution of work orders, but did not execute a single PACMA project. In contrast, in the 821 Contract, the contractors completed PACMA projects worth US$ 62,951.75.[539] However, in the *finiquito* of the 803 Contract PEP just deducted 2% (*i.e.*, US$ 533,867.52) of the total amount of the work done, for the benefit of PACMA projects, without the slightest indication anywhere that PEP considered that there had been a serious breach of the 803 Contract which justified its administrative rescission. Thus, in the Tribunal's opinion, PEP behaviour with respect to the PACMA obligations in the 803 Contract lends credibility to the Claimants' assertion that for PEP the PACMA obligations of the contractors was not a serious issue, but merely an artifice to rescind the 821 Contract.

657. *Second*, the Tribunal's sees further confirmation that the execution of the PACMA projects was not a real cause for rescinding contracts in the fact that in all its memoranda to PEP's Managers, the PACMA's Regional Office just asked that 0.7% be withheld of any outstanding invoices to be paid to the contractors. It was only in the March 3, 2017, letter when the head of the PACMA Regional Office, Mr. Héctor García García, requested "to be informed officially of the status of the Contract, in order to define the situation of the PROAs,"[540] as if he surmised by then that the status of the Contract might change.

658. *Third*, the amount of the PACMA projects not carried out or completed by the Claimants amounted in absolute terms to US$ 896,582.11, as indicated in the *finiquito* of the 821 Contract, which was the shortfall between the 2% of the payments made by PEP and the

[539] **R-0043**, *Finiquito* for the 821 Contract, November 10, 2021.

[540] **C-0122**, Pemex Internal PACMA Memos (2016-2017). See the Tribunal's translation in footnote 513.

amount of the projects duly completed by the contractors. In the Tribunal's view, it is not believable that PEP would have considered in earnest, for genuine public policy reasons, to rescind administratively a US$ 418.3 million contract by reason of such – in comparison – trifling contractual breach.

659. *Fourth*, and closely related to the previous points, the timing of PEP's activity concerning the incomplete fulfilment by the contractors of the 821 Contract of the PACMA projects is most suspect. Indeed, in keeping with the Contract, the final deadline for the completion of all the PACMA projects assigned to the contractors was April 2015. However, it was only on May 31, 2016, shortly after the Claimants had lodged their lawsuit against PEP in the Ordinary Civil Trial 200/2016, when, for the first time, PACMA's Regional Office informed PEP of the status of the PROAs assigned to the contractors.[541]

660. Yet, it then took six months for PEP, until 16 December 2016, shortly after it had issued the Work Order 028/2016, to notify Finley Resources, Drake-Finley and Drake-Mesa, for the first time that they had not complied with eight PROAs (numbers 2934, 4642, 2936, 4641, 4643, 2935, 2928 and 2929), and that they should contact the regional office of PACMA to regularize the situation, and that PEP would apply the PACMA Annex of the 821 Contract on key performance indicators.[542] Subsequently, PEP sent to the contractors similar communications on February 3, March 3 and March 30, 2017.[543]

661. It is worth recalling that, as stated by the Claimants' witnesses, Mr. Kernion and Mr. Finley, after submitting its civil claim against PEP, in order to contain their mounting costs Finley and Drake-Mesa laid off their employees and changed their operations, leaving the companies in a situation where they were no longer in a state of readiness to perform.[544] Specifically, they moved most of their equipment from their yard in Poza Rica to another storage yard where the equipment remains to this day.[545] Thus, the Claimants were notified

[541] **C-0122**, Pemex Internal PACMA Memos (2016-2017).

[542] **R-0109**, Communication from PEP to Drake-Finley notifying the non-compliance with PACMA obligations, December 16, 2016, and others, p. 1.

[543] **R-0109**, Communication from PEP to Drake-Finley notifying the non-compliance with PACMA obligations, December 16, 2016, and others, pp. 2-4.

[544] Statement of Claim, ¶ 193; Witness Statement of J. Finley; Witness Statement of L. Kernion, ¶ 86.

[545] Witness Statement of J. Finley, ¶ 53.

about the unfulfilled PACMA projects when, due to the lack of work orders, they were no longer in a state of readiness to perform.

662. As it has already been indicated, on February 11 and 21, 2017 working meetings were held between officials from PACMA Regional Office and PEP's office of *Coordinación de Servicios de Intervención de Pozos Zona Norte*. As a result of those meetings, on March 3 and 6, 2017 PACMA's officers provided PEP with additional information on the PROAs that PEP had requested and as already indicated, Mr. García from the PACMA Regional Office requested official confirmation from PEP that his office had fully complied with PEP's information requests.[546]

663. This flurry of meetings, reporting activity and interest of PEP in the execution of the PACMA projects associated with the 821 Contract took place shortly before Mr. Loustaunau's memorandum of 8 May 2017 quoted earlier.[547]

664. The sentence in the third paragraph of that memorandum ("the rescission of the contract will be exhibited in the above mentioned lawsuit, in order to impute non-compliance to the contractor") (emphasis added) not only makes plain that there was a link between the claim presented by the contractor against PEP in the Ordinary Civil Trial 200/2016 and the initiation of the rescission procedure, but also explains why PEP had been at so active, after the Claimants filed the civil lawsuit, to find additional cases of "non-compliance" by the contractors, this time with regard to PACMA obligations.

665. In the Tribunal's view, PEP's failure to produce the document attached to Mr. Loustaunau's memorandum of May 8, 2017 lends credibility to the Claimants' assertion that PEP deliberately sought to use the PACMA obligations as a justification to rescind the 821 Contract, instead of just applying the conventional penalty for such a breach envisaged in the Contract.

666. As already indicated several times, the Tribunal lacks jurisdiction *ratione temporis* to declare that Mexico breached its obligations under NAFTA when PEP rescinded administratively on August 28, 2017, the 821 Contract. But this being a relevant antecedent

[546] See **C-0122**, Pemex Internal PACMA Memos (2016-2017), especially p. 14.
[547] **C-0103**, Internal PEMEX Letter, May 8, 2017.

for the analysis of other issues to come in which it has jurisdiction, the Tribunal notes at this stage its distinct and clear conclusion that PEP engaged in a two-pronged "scheme" - based on the Work Order 028/2016 and on the Claimants' lack of completion of the PACMA projects- to administratively rescind the 821 Contract and get back, by calling the Dorama Bond, 41.5 of the US$ 46 million that it had paid to the Claimants.

XI. THE TFJA JUDGMENT ON THE ADMINISTRATIVE RESCISSION

A. THE CLAIMANTS' PLEADING BEFORE THE TFJA

(1) Factual background

667. The substance of the statement of claim made by Drake-Finley before the TFJA within the 2017 Annulment Proceeding[548] is summarized in the TFJA Judgment, dated October 4, 2018.[549]

668. While the bulk of the statement of claim focused on the lack of competence of PEP's officials signing the administrative rescission and the improper way in which it was notified, it also contained other statements which went beyond those main allegations and are particularly relevant for this arbitration. Those allegations were the following:

> "that the intermittent execution of the works and the lack of exercise of the minimum contract amount was due to causes only attributable to the defendant authority, having a collateral effect on the works"[550]
>
> "that the defendant authority lacked budget to execute works, suspending the execution thereof indefinitely for more than 18 months (evidence 11), an aspect that prevented imminently from exhausting the minimum amount that Pemex Exploración y Producción was bound to comply with"[551]
>
> "That however, trying to devise a fraudulent strategy[552] to justify its breaches accredited in the Federal Civil Ordinary lawsuit 200/2016, [PEP] initiated a contract termination proceeding, based mainly on the alleged notification of the work order 028 /2016 of November 2016, declaring that it was their intention that the plaintiff carry out the execution of the

[548] **R-0044**, Lawsuit filed by Drake-Finley, Finley, and Drake-Mesa against the administrative termination resolution of the 821 Contract before the TFJA issued by PEP on August 29, 2017 that began an annulment proceeding (the "**2017 Annulment Proceeding**"), September 4, 2017.

[549] **RZ-039**, TFJA Judgment.

[550] **RZ-039**, TFJA Judgment, p. 165; **RZ-039 ENG**, p. 9.

[551] **RZ-039**, TFJA Judgment, p. 166; **RZ-039 ENG**, pp. 9-10.

[552] The original text in Spanish reads: "*tratando de elucubrar una estrategia dolosa.*"

aforementioned works, without ever having exhausted the legal means to inform of such fact and much less made it known in the aforementioned trial."[553] (emphasis added)

"That [PEP], based on trickery, fabricated an alleged notification[554] unknown to DRAKE and then used it as a cause for termination, failing to note in the Notice of Initiation of Termination its non-compliance, since more than 18 months had elapsed without granting any work order due to LACK OF BUDGET."[555] (emphasis added)

"That the Contract 421004821 at hand establishes in its structure reciprocal obligations of mandatory fulfilment, which, by principle of law cannot be demanded to a party who has not complied, based on the principle of 'exceptio non adimpleti contractus. "'[556] (emphasis added)

"That the Defendant, in a "strange and suspicious manner",[557] did not grant value to such evidentiary documents because, according to the Defendant, such evidence was not related to the causes for termination and furthermore, under their consideration, were not suitable or pertinent to disprove them, which is clearly incorrect, imprecise and only denotes a partial valuation of an entity that in the Termination Proceeding has a double position of plaintiff and judge, and who, by taking advantage of their power of empire, abuses the application of the law against the companies that come to this country with the sole intention of investing in oil projects and opening international markets for Mexico and the United States."[558] (emphasis added)

"That it should be analyzed in a serious and responsible manner if there is sufficient reason to terminate the contract, based on the real causes that occurred in the contract, since the defendant only analyzes the causes that shall help them to conclude comfortably and without liability a contractual obligation that it has clearly breached."[559] (emphasis added)

"That it requests this Court to reassume jurisdiction and analyze the evidence in order to determine if there are breaches by DRAKE, if not, the Administrative Termination Procedure and the contested act, including its resolutions, should be declared VOID."[560]

"That the non-compliance of the PROA's [Programs, Works and/or Actions] is not attributable to it, since PEP had to exhaust a minimum

---

[553] **RZ-039**, TFJA t Judgment AP-821, pp. 165-166; **RZ-039 ENG**, pp. 9-10

[554] The original text in Spanish reads: "*basándose en argucias, fabricó una supuesta notificación.*"

[555] **RZ-039**, TFJA Judgment AP-821, pp. 166-167; **RZ-039 ENG**, p. 11.

[556] **RZ-039**, TFJA Judgment AP-821TFJA Judgment, p. 167; **RZ-039 ENG**, p. 11.

[557] The original text in Spanish reads: "*de manera por demás 'extraña y sospechosa'*".

[558] **RZ-039**, TFJA Judgment AP-821, pp. 167-168; **RZ-0039 ENG**, pp. 11-11-12.

[559] **RZ-039**, TFJA Judgment AP-821TFJA Judgment, p. 168; **RZ-039 ENG**, p. 12.

[560] **RZ-039**, TFJA Judgment, p. 168; **RZ-039 ENG**, p. 12.

> amount of the value of the contract, so that it could have a determinable and certain purpose for the compliance of its obligation, although such compliance would be based on the amount of the contract, and of such amount, 2% would be destined for the compliance of clause 48 called SUPPORT TO THE COMMUNITY AND ENVIRONMENT, therefore, the absence of the total exercise of the minimum amount nullifies that today it is required to comply with the contract."[561]
>
> "That there were factual circumstances that affected the plaintiff's performance, being its breach attributable to PEP's lack of diligence in the fulfillment of its contractual obligations, due to the lack of exercise of the minimum amount and PEP's lack of budget."[562]
>
> "That the relationship in time of the suspensions attributable to PEP is evident since the PROA's are mechanisms under which PEP informs that they get assigned works for its execution, which occurred in its entirety on December 23, 2014 and authorizing the Execution of the PROA's until January 23 and 26, 2015, during which time the suspension of the works due to causes attributable to PEP was in force."[563]
>
> "That not only the facts attributable to PEP that result in a notorious breach and that made it impossible for the plaintiff to diligently comply with its obligations are accredited, since the economic circumstances regarding the amount of the contract to determine the amount of the obligation of clause 48 and the suspensions of the works attributable to PEP are a consequence of the current situation regarding the compliance with the contract in question, therefore, the nullity of the appealed resolution must be determined."[564]

669. In its defense during the 2017 Annulment Proceeding, PEP alleged, *inter alia*, the following:

> "That if the plaintiff claims that it was PEMEX who breached the Contract, this is subject of another action filed in a civil proceeding."[565]

670. In keeping with the standard procedure, and in response to the administrative court's instruction, Finley, Drake-Mesa, and Drake-Finley presented a submission called "*Escrito de Alegatos*."[566]

---

[561] **RZ-039**, TFJA Judgment, p. 169; **RZ-039 ENG**, pp. 13-14.

[562] **RZ-039**, TFJA Judgment, p. 170; **RZ-039 ENG**, p. 14.

[563] **RZ-039**, TFJA Judgment, p. 170; **RZ-039 ENG**, p. 14.

[564] **RZ-039**, TFJA Judgment, p. 170; **RZ-039 ENG**, p. 14.

[565] **RZ-039**, TFJA Judgment, p. 180; **RZ-039 ENG**, p. 17.

[566] **C-0163**, *Escrito de Alegatos*. See *supra* ¶ 68.

671. While this 23-page document also discussed many other issues, it included some statements which are particularly relevant for this arbitration, as described below.

672. In Chapter III, under the heading "A. Illegality of Termination", the document stated the following:

> "However, with regard to the illegality of the contested resolution, it should be noted that it originates from a machination by the authority itself to cover its breach of the Contract, since PEP did not provide work orders for more than 18 months.
>
> Indeed, as evidenced in the Fourth concept of challenge to the initial claim, PEP stopped providing work to my clients for more than 18 months, which caused my clients to demand compliance with the Contract by filing a civil lawsuit (Ordinary Federal Civil Trial 200/2016).
>
> In this trial, as evidenced by Exhibit number 12, the various breaches of the authority with respect to the Contract were evidenced, which, in addition to not providing work orders for more than 18 months, consequently, did not comply with the minimum amount of the Contract.
>
> In retaliation to the requests of my clients and the filing of the civil lawsuit (filed in April 2016), the authority engineered Work Order 028/2016 of November of that year to generate a false breach of the Contract, since this order was never notified in terms of said instrument."[567] (emphasis added)

673. When explaining the fifth, sixth, and seventh challenges in the complaint, the document stated as follows: [568]

> "In spite of this attempt, and assuming without conceding that the work order was indeed notified, no grounds for termination were updated by my clients, since in terms of Clause 15.1. Administrative Termination, subparagraph r) of the Contract, the authority could only initiate the termination procedure and terminate the Contract when the Contractor (my clients) failed to comply with **15 WORK ORDERS, NOT ONE**.
>
> Indeed, the termination of the Contract by the authority is completely illegal because the Contract itself establishes that my clients had to accumulate 15 work orders to terminate it, as set out below:
>
> *Clause 15*
>
> TERMINATION OF THE CONTRACT
>
> 15. 1 Administrative Termination

[567] **C-0163**, *Escrito de Alegatos*, p. 9.

[568] CHPB, ¶ 71 reproduces the first paragraph of this quote, which is reproduced here in its entirety.

> PEP may, at any time, administratively terminate the Contract, without the need for a judicial or arbitration declaration, by means of the procedure set forth in this Clause. In the event that that the CONTRACTOR is in any of the following cases:
>
> r) In the event that that the CONTRACTOR accumulates 15 (fifteen) unfulfilled Work Orders during the Contract Performance Period; and
>
> Therefore, it was in no way sufficient for the authority (PEP) to indicate that my clients failed to comply with a work order to determine the termination of the Contract, since it requires 15 unfulfilled work orders to make possible (Tribunal's translation) the termination of the Contract.
>
> In this way, once again, the illegality of the termination and of the contested resolution is demonstrated, which derives from a reprisal against my clients for wanting to enforce the Contract."[569] (emphasis added)

(2) The Claimants' position

674. In the Claimants' view,

> "the Alegatos show that Finley, Drake-Finley, and Drake-Mesa raised Clause 15.1(r) of the 821 Contract to the administrative court, as well as Work Order 028-2016 being fabricated. The Alegatos is relevant for other reasons. For example, the Alegatos shows how the administrative court failed to provide justice with respect to how PEMEX 'notified' Finley, Drake-Finley, and Drake-Mesa about Work Order 028-2106. Finley, Drake-Finley, and Drake-Mesa explained to the administrative court that PEMEX failed to comply with the notice provisions under the 821 Contract and that it was illegal (extracontractual) for PEMEX to use the Bitacora system for such purposes. The Bitacora system is for providing updates during works in progress, not for notices to begin work under a work order. The administrative court ignored the notice requirements of the 821 Contract and created a new method for notice of work orders through the Bitacora system to justify PEMEX's administrative rescission. The Alegatos also contain relevant information regarding the treatment provided to Finley, Drake-Finley, and Drake-Mesa with respect to the PACMA issue."[570]

675. In their letter of December 22, 2023 to the Tribunal on the admission of the *Escrito de Alegatos*, the Claimants argued that

> "Mexico used the purported lack of raising Clause 15.1(r) and the fakeness of the work order to question the competency and capabilities of counsel who represented Finley, Drake-Finley, and Drake-Mesa in the annulment proceeding. Mexico implied that the administrative court did not deny

[569] **C-0163**, *Escrito de Alegatos*, pp. 10-11.

[570] Claimants' letter to the Tribunal of December 22, 2023, requesting authorization to submit the *Escrito de Alegatos*, footnote 1.

> justice, but instead the blame lied with Mexican counsel's purported failure and ineffectiveness. The Alegatos shows that this also is not true."[571]

(3) The Respondent's position

676. In their Rejoinder, the Respondent argued that "[Respondent's legal expert] Mr. Asali explains that it was Drake-Finley, Drake-Mesa and Finley who did not assert the arguments related to the provisions of Contract 821 that the Claimants allege the court ignored in a timely manner."[572]

677. For the Respondent,

> "it is surprising that neither Claimants nor Mr. Oseguera Kernion could answer the questions asked by Respondent's representative and by the President of the Tribunal as to why they did not argue in the 2017 Nullity Lawsuit the existence of an alleged false work order and the alleged confessions of PEMEX officials. Assuming without conceding that such allegations were true, the lack of expertise of counsel contracted by Claimants is in no way Respondent's responsibility and cannot give rise to a breach of NAFTA Article 1105."[573]

678. The Respondent argues that

> "[d]uring the Hearing, the Claimants regrettably exaggerated the importance of the existence of a document called *Escrito de Alegatos*[574] submitted by the Contractors in the Annulment Proceeding 2017. They also attempted to mislead the Tribunal by arguing that Mr. Asali had omitted to exhibit this document when he submitted his second expert report because in footnote 110 thereof he referred to a non-existent extension of claim ["*ampliación de demanda*"] in the Annulment Proceeding 2017."[575] (emphasis added)

679. In the Respondent's view,

> "[f]irst, Mr. Asali clarified during his examination that in the Annulment Proceeding 2017 there is no such extension of claim and that his quotation of the same was due to a human error due to a possible confusion with another court proceeding related to this arbitration. Consequently, in order

[571] Claimants' letter to the Tribunal of December 22, 2023, requesting authorization to submit the *Escrito de Alegatos*, ¶ 25.

[572] Rejoinder, ¶ 355.

[573] RPHB, ¶¶ 68-69.

[574] This specific Spanish term, rather than the more general English term "pleadings", will be used here, to make clear the distinction made by the Respondent between an "*ampliación de la Demanda*" or "extension of the claim" and a "*escrito de alegatos"*.

[575] RPHB, ¶ 145.

> to avoid altering the numbering of the exhibits, exhibit JAH-0086 was left unused. Second, as Claimant's own experts and Mr. Asali pointed out, and as Respondent explained during the Hearing and in its communication of January 12, 2024, an extension of claim and a pleading are **not** the same thing; their nature and implications under Mexican law are entirely different. Thus, Claimant's experts stated that '[an extension of claim is] a legal institute which is included in the Procedural Codes that allows the Claimant […] to submit additional elements to the Court for the Court to consider them'. Similarly, Mr. Asali explained that "[a]n Amended Complaint is an act by which some matter that is not made explicit or that is additional to the initial Complaint Brief supplements the cause of action, which in this case is a claim against the Authority Administrative Proceeding. So, the Amended Complaint is filed in order to add to the facts in a proceeding so as to allow the party to defend itself from all of the accusations made. Furthermore, Mr. Asali specified that the extension of the claim is 'presented at the outset of the proceeding. It cannot be presented subsequently, and it normally means that there was some supervening or unknown act. Likewise, both experts pointed out that the defendant in a lawsuit in which an extension is filed always has the opportunity to answer or respond to such writ."[576] (emphasis in the original)

B. THE MEETING AT "LA ACEITUNA" AND THE "ALEGATOS DE OREJA"

(1) The Claimants' position

680. In their Statement of Claim, the Claimants argued that in September 2018, when their legal challenge to the administrative rescission of the 821 Contract had been pending for nearly one year, and Finley and Drake-Mesa were waiting for a decision, Mr. Kernion received a phone call from an attorney in Mexico, Mr. Rob Keoseyan, a former attorney at Pemex who had apparently maintained contact with his former colleagues. According to Mr. Kernion, Mr. Keoseyan had told him that the Claimants' lawsuit against PEP was "one of Pemex's top three legal priorities. This was because of the high value of the 821 Contract (US$ 418 million). He further told me that Pemex had appointed a special representative to help 'end' the lawsuit so that Pemex could proceed with calling on our US$ 41.8 million bond."[577]

681. According to the Claimants' Statement of Claim and Mr. Kernion's testimony,

[576] RPHB, ¶¶¶ 146-150.

[577] Statement of Claim, ¶¶ 216-217.

> "'[s]hortly thereafter, Rob Keoseyan and I had a meeting in Mexico City with Rodrigo. Rodrigo told me 'your companies are done' and that Pemex was intervening in our court proceeding challenging the rescission of the 821 Contract.' Mr. Keoseyan further told Mr. Kernion that Pemex's representative appointed to 'handle' Finley and Drake-Mesa's challenge to the administrative rescission had met with the judge. The judge told Pemex's representative that he was going to decide in Pemex's favor."[578]

682. In their Reply, the Claimants added that

> "[c]ritically, Mexico does not deny that someone from Pemex (or on behalf of Pemex) met with the administrative judge overseeing the lawsuit. Likewise, Rodrigo Loustaunau does not deny that someone from Pemex (or on behalf of Pemex) met with the judge before the court issued its October 2018 judgment. Instead, both state that it is routine practice for Pemex to meet with judges to present its cases. Thus, it can be inferred that someone from Pemex met with the administrative judge before the court rendered its October 4, 2018 judgment."[579]

(2) The Respondent's argument

683. According to the Respondent, the *alegatos de oídas*[580]

> "are fully used and recognized by the administrative law experts of the Parties, as well as a common and recurring practice in Mexican administrative litigation. Needless to say, the legal experts of each party have extensive experience in administrative litigation in Mexico, who expressly recognized that it is a common and accepted practice by trial lawyers and judges in Mexico (*e.g.*, judges, magistrates and ministers). This practice is not prohibited in the Mexican legal system and although the formality of how it should be carried out is not regulated, it is an undoubted fact that it exists, which does not imply that this practice generates a denial of justice or that it implies an inequality or procedural disadvantage. It is simply an additional element that each disputing party has to summarize its case before the judge, where generally each litigant highlights the key points that his or her defense supports or the particularities of his or her case, and

[578] Statement of Claim, ¶ 217.

[579] Reply, ¶ 157.

[580] In its RPHB, the Respondent uses as synonymous the expressions "*alegatos de oídas*" and "*alegatos de oreja*", which has led the translators to use the English term "hearsay allegations" to translate "*alegatos de oreja*". But the two Spanish expressions do not seem to be equivalent: while "*alegatos de oídas*" seems to refer to arguments expressed by a witness on the basis not of his or her direct knowledge of the facts, but of what he or she heard others say (hence the English expression "hearsay"), the Mexican term "*alegatos de oreja*" refers to an *ex parte* or bilateral meeting between a party and the judge in which the party tries to "have the ear" of the judge and impress on the judge the strength of the party's case. As there is no clear translation into English of that practice ("*ex parte* meeting with the judge" might be the closest), the original Spanish expression "*alegatos de oreja*" will be used.

> the failure to exercise it does not violate your procedural or substantive rights." [581]

684. The Respondent further argues that

> "the Claimants and their experts cannot sustain their argument regarding the 'illegality' or 'irregularity' of the hearsay allegations. On the contrary, during the hearing, the contradictory nature of their argument was proven, since the Claimants' experts recognized that 'alegatos de orejas' are a practice commonly used by litigants in Mexico and that they themselves use it." [582]

(3) The Tribunal's analysis

685. The Tribunal does not attach particular importance to the meeting held at the restaurant La Aceituna. There are several reasons for this.

686. *First*, the Claimants have not provided conclusive evidence on who were the actual participants in the meeting and, particularly, they have not persuasively demonstrated that Mr. Loustaunau attended the meeting.

687. *Second*, the Respondent has argued convincingly that in Mexico it is not uncommon for the parties to a dispute to have bilateral meetings or conversations with the judge, without the presence of the opposing party, in order to persuade the judge of the strength of their case, in what are informally called *alegatos de oreja*. The Claimants themselves have recognized that both Mr. Robert Keoseyan and Mr. Juan José Paullada "went to visit the judge on behalf of Claimants after the September 26, 2018 meeting at La Aceituna."[583]

688. *Third*, the Claimants have not convincingly proved that the TFJA's judge confirmed to the PEP's attorney during their bilateral meeting that the TFJA's ruling would be favorable to PEP. The Tribunal should like to add that, had the Mexican judge done so, this might indeed be regarded as an ethical lapse under international standards on judicial propriety, and probably Mexico's own, but not as a behavior amounting to, or reinforcing a case of, "denial of justice".

[581] RPHB, ¶¶ 132-134.
[582] RPHB, ¶ 139.
[583] Reply, ¶ 147.

689. Therefore, the key issue for the Tribunal to consider is instead whether the substance of the TFJA's decision could be considered a case of "denial of justice", an issue to be discussed below.

C. DOMESTIC LEGAL RULES

690. This being an investment arbitration case, based, as far as the 821 Contract is concerned, on the Claimants' argument that Mexico acted in breach of its obligations under NAFTA, when analyzing the TFJA's judgment this Tribunal shall not apply Mexican, but international law and, most specifically, the NAFTA and customary international law on "denial of justice".

691. However, in order to better understand the legal constraints under which the TFJA operated, the Tribunal will make in the following paragraphs a brief summary of the most relevant legal provisions which guide and constrain the conduct of administrative courts like the TFJA. The Tribunal will also discuss the responses from the Parties in response to the written questions the Tribunal put in PO12 to the Parties on these matters after the Hearing.

(1) The Federal Law of Contentious Administrative Procedures (LFPCA)

692. As an administrative tribunal adjudicating disputes in the realm of administrative or public law (*contencioso-administrativo*, to use the Spanish term), TFJA conducts proceedings in accordance with the Federal Law of the Contentious Administrative Procedure ("**LFPCA**"), whose key provisions will be described below.

693. Concerning the powers of the TFJA to investigate and assess the facts of a case before adjudicating it, Article 41 of the LFPCA establishes the following:

> "Before the closure of the investigation, the judge, for a better understanding of the facts in dispute, may order the production of any document related thereto, order the performance of any diligence or provide for the preparation and expert evidence when questions of a technical nature are raised and it has not been offered by the parties.
>
> The judge may propose to the Plenary or to the Section that the investigation be reopened for the purposes indicated above."[584] (emphasis added)

[584] **R-0092,** *Ley Federal de Procedimiento Contencioso Administrativo*. Tribunal's translation.

694. On the purpose and scope of the so-called "*escritos de alegatos"*, Article 47 states as follows:

> "The judge, five days after the trial has been concluded and/or there is no outstandings issue that prevents its resolution, shall notify the parties that they have a term of five days to formulate written Alegatos of what is well proven. The Alegatos filed in time must be considered when rendering judgment; such Alegatos may not extend the *litis* set out in the agreements of admission to the claim or of admission to the extension to the claim, as the case may be."[585] (emphasis added)

695. Article 50 reads as follows:

> "The Court's judgments shall be based on law and shall rule on the plaintiff's claim arising from his claim, in relation to a contested decision, having the power to invoke well-known facts.
>
> Where several grounds of illegality are raised, the Chamber's judgment must first examine those that may lead to a declaration of nullity. In the event that the judgement declares the nullity of a decision due to the omission of the formal requirements demanded by law, or due to procedural defects, the judgement must indicate in what way they affected the defences of the individual and transcended the sense of the decision.
>
> The Chamber may correct any errors in the citation of the precepts that are considered to have been violated and examine as a whole the complaints and grounds of illegality, as well as the other reasoning of the parties, in order to resolve the issue actually raised, but without changing the facts set out in the claim and in the defence."[586] (emphasis added)

696. Concerning the reasons why an administrative decision may be declared illegal, Article 51 includes the following one:

> "V. When the administrative resolution issued in exercise of discretionary powers does not correspond to the purposes for which the law confers such powers."[587]

697. On the consequences when an administrative act lacks one of its essential requirements, Articles 5 and 6 establish the following:

> "**Article 5.-** The omission or irregularity of the elements and requirements required by Article 3 of this Law, or by the administrative laws of the

[585] **R-0092,** *Ley Federal de Procedimiento Contencioso Administrativo*. Tribunal's translation.

[586] **R-0092,** *Ley Federal de Procedimiento Contencioso Administrativo*. Tribunal's translation.

[587] **R-0092,** *Ley Federal de Procedimiento Contencioso Administrativo*. Tribunal's translation.

matters in question, will produce, as the case may be, nullity or annulment of the administrative act.

Article 6.- The omission or irregularity of any of the elements or requirements established in sections I to X of Article 3 of this law, shall result the nullity of the administrative act, which shall be declared by the hierarchical superior of the authority that issued it, unless the contested act comes from the head of a dependency, in which case the nullity will be declared by the same.

The administrative act which is declared legally void shall be invalid; will not be presumed legitimate or enforceable; It will be correctable, without prejudice to the fact that a new act may be issued. Individuals will have no obligation to comply and public servants must state their opposition to executing the act, justifying and motivating such refusal. The declaration of nullity will produce retroactive effects.

In the event of the act has been consummated, or if it is impossible in fact or law to reverse its effects, it will only give rise to the liability of the public servant who issued or ordered it."[588]

(2) The Federal Law of Administrative Procedure (LFPA)

698. Article 1 of the Federal Law of Administrative Procedure ("**LFPA**") establishes:

> "The provisions of this law are of public order and interest, and shall apply to the acts, procedures and resolutions of the centralized Federal Public Administration, without prejudice to the provisions of the International Treaties to which Mexico is a party.
>
> This Act shall also apply to the decentralized organizations of the parastatal federal public administration with respect to their acts of authority, to the services that the state provides exclusively, and to the contracts that private parties can only enter into with it."[589]

699. Concerning the elements and requirements of administrative acts, Article 3 establishes, *inter alia*, the following requirement:

> "The elements and requirements of the administrative act are as follows:
>
> […]
>
> III. Fulfil the purpose of public interest regulated by the rules in which it is specified, without being able to pursue other."[590]

[588] **R-0092,** *Ley Federal de Procedimiento Contencioso Administrativo*. Tribunal's translation.

[589] **R-0017,** *Ley Federal de Procedimiento Administrativo.* Tribunal's translation.

[590] **R-0017,** *Ley Federal de Procedimiento Administrativo.* Tribunal's translation.

(3) The Tribunal's questions to the Parties

700. In PO12 the Tribunal invited the Parties to address in their Post-Hearing Briefs the following three questions:[591]

> "5. Is there case law or doctrine in Mexico relating to Article 51.V of the Ley Federal de Procedimiento Contencioso Administrativo and Article 3.III of the Ley de Procedimiento Administrativo, as reflective of the concept of «*détournement de pouvoir*» (*i.e.*, "desviación" o "desvío" de poder in Spanish)? If there is any such case law or doctrine, would the existence of «desviación de poder», for example, in an administrative decision be a public order issue which Mexican tribunals should or can analyze at their own initiative?
>
> 6. What is the scope of the principle of «estricto derecho» as applicable to the TFJA's procedures? To what extent are Articles 41 and 50 of the Ley Federal de Procedimiento Contencioso Administrativo relevant in this regard?
>
> 7.Under Mexican law for administrative contracts, can contractors invoke the «*exceptio non-adimpleti contractus*» against public entities? Or is the application of such *exceptio* excluded *a priori*, because of the «exorbitant regime» applicable to administrative contracts?"

(4) The Claimants' position

701. According to the Claimants,

> "Article 51 of the LFPCA allows the Tribunal Federal de Justicia Administrativa (TFJA) to carry out an *ex officio*, or on its own initiative, analysis when (1) a lack of competence of the administrative authority is argued, or (2) a complete lack of legal grounds or reasons is argued. However, the TFJA is not permitted to carry out an *ex officio* analysis based on *desvío de poder*. Moreover, administrative acts involve discretionary powers and oftentimes subjective decision-making; thus, the threshold for a successful argument of *desvío de poder* is quite high. According to Daniel Amézquita, Claimants' administrative law expert, *desvío de poder* is 'not argued very often. There are not so many precedents. It's not easy to argue and prove this before the Court.' Typically, the concept of *desvío de poder* has been analyzed in the context of the imposition of administrative fines and whether such was imposed proportionately."[592]

702. The Claimants further argued that "Article 51 of the LFPCA allows the Tribunal Federal de Justicia Administrativa (TFJA) to carry out an *ex officio*, or on its own initiative, analysis

[591] PO12, Annex 1.

[592] CPHB, ¶¶ 101-102.

when (1) a lack of competence of the administrative authority is argued, or (2) a complete lack of legal grounds or reasons is argued. However, the TFJA is not permitted to carry out an ex officio analysis based on *desvío de poder*."

703. The Claimants argue that the principle of *estricto derecho*

> "establishes that the dispute must be resolved according to the statements and claims made by the parties. Article 50 of the LFPCA establishes that the TFJA must resolve the issues actually raised before it, without changing the facts stated in the complaint and in the answer. Article 50 further provides that courts should examine, as a whole, the grievances and causes of illegality, as well as the other reasoning of the parties. Article 41 of the LFPCA allows the magistrate to order, on its own motion, evidence deemed necessary to prove the facts and claims set forth in the complaint and the answer."[593]

704. According to the Claimants, their legal expert, Daniel Amézquita, "explained why the principle of *estricto derecho* did not prohibit the TFJA from considering the arguments in Claimants' Alegatos, including the specific reference to Clause 15.1(r)":[594]

> "The Tribunal or the Court, according to article 50 under administrative proceedings law, needs to analyze the full text of the Claim. If there is a claim beyond this chapter on the basis for challenge, and this is clear that a party is trying to present, it should be taking into account, including all of the documents that are attached to the Annulment Proceeding need to be considered by the Court because they are part of the Claim."[595]

705. For the Claimants, they did not raise new facts or challenges in the Alegatos. They raised Article 15.1 in their complaint. The Alegatos expounded on this challenge, as argued by their expert during the Hearing:

> "If in the Complaint I spoke of '15.1,' and I never mentioned 'Subparagraph (r),' and then later on in another Brief I make reference to 'Subparagraph (r),' from my viewpoint, that is not a new fact, that is not a new argument because the case had to do with interpreting Clause 15, independent of the paragraph or subparagraph because those things are part and parcel of the analysis that I have to conduct as a Court of a Clause."[596]

[593] CPHB, ¶ 103.

[594] CPHB, ¶ 104.

[595] English Tr. Day 4, 810:13-22; Spanish Tr. Day 4, 937:18-938:7.

[596] English Tr. Day 4, 976:13-22; Spanish Tr. Day 4, 1152:13-22.

706. Concerning the Tribunal's question on the application of the *exceptio non-adimpleti contractus* to administrative contracts, the Claimants explain that "this contract defense exists under Mexican law, which allows a party to withhold performance until its counterpart performs. However, this is a difficult argument to make in the context of a typical administrative contract because of the public policy goals associated with such contracts."[597]

(5) The Respondent's position

707. For the Respondent,

> "[t]he scope of the strict legal principle is based on the first paragraph of Article 50 of the LFPCA, which establishes that '[t]he judgments of the Tribunal shall be founded on the law and shall be based on the form of order sought by the applicant in his/her claim.' […] which means that the judge who analyzes the challenge to the administrative act or resolution may only examine the act based on the claims, grievances or arguments that the plaintiffs set forth in their pleadings or extensions, if any. Consequently, the judge is not allowed to go beyond what was claimed by the parties, *i.e.*, it is not allowed to supplement or correct the deficiencies of the claims or to analyze facts that were not raised." [598]

708. The Respondent stresses that "[o]ne of the objectives of this principle is not to leave the defendant in a state of defenselessness by asserting arguments that were not incorporated in the claim or extension and in respect of which it had no opportunity to answer or defend itself." [599]

709. The Respondent recognizes that "there are procedural figures that are not strictly exceptions to the principle of strict law, since they do not alter the controversy raised by the parties, but have the purpose of allowing the judge to have a better understanding of the facts or to correct certain errors or omissions of the parties. These examples are the following":

> "Article 41 of the LFPCA establishes that 'for a better understanding of the facts in dispute, [the judge] may order the production of any document related thereto, order the practice of any diligence or provide for the preparation and presentation of expert evidence when questions of a

[597] CPHB, ¶ 106.

[598] RPHB, Appendix, ¶ 31.

[599] RPHB, Appendix, ¶ 32.

> technical nature are raised and it has not been offered by the parties.' This has no greater purpose than to provide the judge with better and greater tools for a better understanding of the case, clarification of disputed facts or technical advice. Something not so far from what we saw in this arbitration.
>
> The third paragraph of Article 50 of the LFPCA establishes that '[judges] may correct any errors in the citation of the precepts that are considered to have been violated.' This means that the judge may correct the error of articles that are cited to justify a tort, without this meaning that the judge may change or modify the claims or facts. An example may be that the judge corrects errors that he/she notices in the citation of articles that are considered violated (*i.e.*, correcting the mistake, citation or invocation of an article).
>
> [B]ased on the first paragraph of Article 50 of the LFPCA, the judge has the power to invoke notorious facts, that is, facts that are public, undisputed, known and of obvious notoriety that are not necessary to be proven. Being a threshold in such a high level, it is unlikely that a judge would invoke a well-known fact ex officio." [600]

710. The Respondent, however, also observes that "the three examples listed in the previous paragraph, when the term "may" is used, are optional for the judges. Therefore, unlike the study of the competence of the authority issuing the administrative decisions, these three assumptions should not be exercised ex officio."[601]

711. The Respondent recalls that Mexican courts have specifically set criteria on the scope of the *escritos de alegatos*, and quote the following ruling of Mexican courts:[602]

> "Although Article 47 of the Federal Law of Contentious Administrative Procedure provides that the written pleadings must be considered when issuing the judgment, the fact is that the issues that they may contain are not unlimited, but are subject to recapitulate what was presented and proven by the parties from the claim and its answer as well as, if applicable, from the extension of the claim and its answer, or, in such pleadings it is possible to object to or refute the evidence offered by the counterpart of the party that formulates them. In this sense, it is not possible that they introduce new claims, that is to say, that had not been timely formulated for the integration of the litis, because even when they are asserted as a consequence of the declaration of nullity requested, they do not have origin in what was presented in the contentious administrative trial and, therefore, those

[600] RPHB, Appendix, ¶ 34.

[601] RPHB, Appendix, ¶ 35.

[602] RPHB, Appendix, ¶ 36, citing **R-0157**, Pleadings of good evidence in the federal contentious administrative proceeding. They should not introduce new claims, even when they are asserted as a consequence of the declaration of nullity requested.

> aspects must be requested from the claim or its extension; otherwise, the subject matter of the litigation is exceeded and Article 50 of the referred ordinance is transgressed, which, in addition, would result to the detriment of the opposing party, since the study and pronouncement of an issue is sought, regarding which it was not granted the opportunity to defend or manifest itself, and it would be contrary to the principle of equity." (emphasis in the original)

712. Concerning *desviación de poder*, the Respondent argues that even if "the administrative contentious trial is a trial of strict law, and therefore the controversy to be resolved is limited by the claims raised by the parties," it is also true that

> "in accordance with the first paragraph of Article 50 of the Federal Law of Contentious Administrative Procedure, Mexican administrative courts may invoke the alleged diversion of power, even if it has not been alleged by the parties, as long as it is a notorious fact (*i.e.*, an event of public domain). However, it is important to emphasize that, although the diversion of power could be seen as a notorious fact, it is necessary that through the facts and evidentiary means, the parties manage to prove the diversion of power, always respecting the principle of strict law that governs contentious administrative proceedings, as well as the principle of legal certainty. In addition to the foregoing, and although the TFJA has the power to assert notorious facts, this does not imply that the TFJA can make up for the deficiency of the complaint, in order to consider that the cause of action contains a certain argument, if the plaintiff did not make arguments (concepts of annulment) to expressly controvert the challenged act."

713. The Respondent adds that

> "Article 51 of the LFPCA provides in the third-to-last paragraph that the TFJA may only study *ex officio* issues of lack of jurisdiction and total absence of grounds or motivation. On its part, section I of the same article states that an administrative decision will be declared illegal when the incompetence of the official who issued, ordered or processed the proceeding from which it derives is demonstrated. The reading of this antepenultimate and section I leads to the conclusion that only the issue of lack of competence and lack of grounds can be asserted ex officio by the TFJA, even if the individual does not invoke a grievance in this regard."[603]

714. On the Tribunal's question about the applicability of the *exceptio non-adimpleti contractus* to administrative contracts, the Respondent starts by recalling that

> "[a]s explained by Mr. Asali in his first expert report, under Mexican law, an special regime is applicable to the administrative contracts entered into by Pemex derived from the provisions of Article 134 of the Political

[603] RPHB, Appendix, ¶ 30.

> Constitution of the United Mexican States, the Pemex Law (in this case, the Abrogated Pemex Law), as well as in the Administrative Provisions for Procurement, Leasing, Works and Services of the Substantive Activities of a Productive Nature of Petróleos Mexicanos and Subsidiary Agencies (DACs)."[604]

715. For the Respondent,

> "[t]his special regime allows Pemex to establish clauses in its contracts that could be null and void in the field of civil law, however, since they are of an administrative nature and their purpose is the pursuit of a public order purpose, they are allowed, giving rise to a special regime that is fully permitted. Part of this special regime allows contracts entered into by Pemex to be governed exclusively by the Pemex Law, its Regulations and the DACs." [605]

716. Therefore, in the Respondent's view,

> "in the event that the contractor wishes to sue PEMEX for breach of contract, it must sue before the competent courts for the administrative rescission of the contract, however, in order to be effective, it must be declared by a competent judicial authority." [606]
>
> "In other words, a contractor could only cease to perform a contract by alleging Pemex's breach of contract through the rescission of the contract and only when such has been declared by a competent court. This is in strict compliance with the principle of continuity that governs all administrative contracts."[607]

717. On the other hand, the Respondent continues,

> "according to the administrative rescission clause and in compliance with the special regime that allows PEP to exercise its power in any case in which the private party is in breach of its obligations, as agreed in the contract and in protection of the principles of public contracting of Article 134 of the Political Constitution of the United Mexican States. That is to say, PEP could declare the administrative rescission even when, assuming without conceding, it was not in compliance with its own obligations, and in this case the administrative rescission would be considered valid and would take full effect from the moment it was decreed by the authority, without the need of a judicial declaration. Consequently, as of the rescission determination decreed by Pemex, the contract is understood to be terminated and the rescission has taken full effect, even if a jurisdictional

[604] RPHB, Appendix, ¶ 37.

[605] RPHB, Appendix, ¶ 38.

[606] RPHB, Appendix, ¶ 40.

[607] RPHB, Appendix, ¶ 41.

proceeding has not been followed in which the court or judge analyzes the legality of such rescission."[608]

"Once the rescission is declared, the individual could challenge the validity of such rescission through a nullity proceeding before the TFJA and assert the exception of unfulfilled contract. However, it is important to point out that there is no judicial criterion that establishes that this exception has been exercised in administrative lawsuits."[609]

D. THE TFJA'S JUDGMENT

(1) A summary of the judgment

718. The TFJA upheld the administrative rescission of the 821 Contract by PEP, on the basis that the contractors had failed to comply with the contract.

719. In support of its ruling, the TFJA states:[610]

"In other words, the summary of the non-compliances imputed to the plaintiff, and which gave rise to the administrative termination of the contract is as follows:

a. Failed to comply with the orders given by the Resident of the contract regarding the signing of the Drilling Work Order 028-2016 and its technical supports for the start of the drilling of the Coapechaca 1240 well.

b. Failed to comply with the order to attend on November 30, 2016, at 14:00 hours to conduct the verification tour.

c. Failed to execute the Drilling Work Order 028-2016 in such a way that it did not conclude with the 'Comprehensive works of drilling and completion of land wells in the north and south regions of PEP' to which it was contractually bound (breach of Clause 2.- 'PURPOSE OF THE CONTRACT').

d. Did not prepare and submit to PEP's representative personnel the detailed schedule of the drilling works at least eight days prior to the beginning of the drilling; did not submit the equipment for its verification; did not drill the well object of the contract in the location indicated by PEP; did not provide the drilling equipment handled by the contractor, including the operation of all the peripheral equipment and the maintenance thereof, mobilize and demobilize the CONTRACTOR's equipment, materials and spare parts necessary to perform the comprehensive works, all of this at the work site (Non-compliance with Annex DT-2 'GENERAL AND SPECIFIC SPECIFICATIONS').

[608] RPHB, Appendix, ¶ 42.

[609] RPHB, Appendix, ¶ 43.

[610] **RZ-039**, TFJA Judgment, pp. 182-184; **RZ-039 ENG**, pp. 20-22.

e. Failed to communicate to PEP in writing its change of conventional domicile designated in the 'Representations' of the CONTRACT (breach of Clause 19 'COMMUNICATIONS BETWEEN THE PARTIES').

f. Failed to provide or make available to PEP the materials and equipment listed in the referred annex and with which it was to execute the works object of the Drilling Work Order 28-2016, since it did not appear with the corresponding equipment and materials at the location indicated in the mentioned order (Coapechaca Well 1240) on December 17, 2016 (non-compliance with Annex DT-6 'RELATION OF MATERIALS AND EQUIPMENT TO BE PROVIDED BY THE CONTRACTOR AS A MINIMUM').

g. Failed to execute the Programs, Works and/or Actions (PROA's) of support to the community and the environment that were contained in the Certificates numbers 4642, 4643, 2935, 2936, 2928 and 2929 as well as for not concluding those corresponding to certificates 2934, 4641 (non-compliance with Clause 48 'SUPPORT TO THE COMMUNITY AND ENVIRONMENT" and the "PACMA ANNEX').

Thus, this Section considers that the plaintiff has the procedural burden to fight all aspects of the termination, based on Article 8 of the Federal Administrative Procedure Law and Article 42 of the Federal Administrative Procedure Law.

The foregoing, because Clause 15 'TERMINATION OF THE CONTRACT' on which the appealed resolution is based, states that the contract shall be terminated 's) In the event that the CONTRACTOR fails to comply with its obligations under the terms established in the Contract'. Therefore, according to such clause, each one of the non-compliances with the terms of the contract, independently support the administrative termination.

In this sense, this Court would only be able to declare the nullity of the appealed resolution, exclusively in the event that the plaintiff disproves all the reasons for non-compliance, otherwise, that is, if only one non-compliance remains valid, it would be sufficient to support the legality of the termination."

720. At the end of its judgment, the TFJA concludes as follows:

"According to the foregoing, it is clear that the plaintiff failed to justify or disprove the breach of several obligations that was attributed to them by the defendant authority and that caused the termination of the contract, namely:

- Failed to comply with the orders given by the Resident of the contract regarding going to sign the Drilling Work Order 28-2016 and its technical supports for the start of the drilling of the Coapechaca 1240 well.

- Failed to comply with the order to attend on November 30, 2016, at 14:00 hours to perform the verification walkthrough.

- Failed to execute the Drilling Work Order 028-2016 so they did not conclude with the 'Comprehensive works of drilling and completion of land wells in the north and south regions of PEP' to which they were contractually bound (non-compliance with Clause 2.- 'PURPOSE OF THE CONTRACT').

- Failed to prepare and submit to PEP's representative personnel the detailed drilling work program at least eight days before the beginning of the drilling; failed to submit the equipment to verify it; failed to drill the well object of the contract in the location indicated by PEP; failed to provide the drilling equipment handled by the contractor, including the operation of all the peripheral equipment and the maintenance thereof, mobilize and demobilize the equipment, materials and spare parts of the CONTRACTOR, necessary to perform the comprehensive works, all of this at the site of the work (Non-compliance with Annex DT-2 'GENERAL AND SPECIFIC SPECIFICATIONS').

- Failed to communicate to PEP in writing its change of conventional domicile designated in the 'Representations' of the CONTRACT (non-compliance with Clause 19 'COMMUNICATIONS BETWEEN THE PARTIES').

- Failed to provide or make available to PEP the materials and equipment listed in the aforementioned annex and with which it was to perform the works subject of Drilling Work Order 28-2016, since they did not show up with the corresponding equipment and materials at the location indicated in the aforementioned order (Coapechaca Well 1240) on December 17, 2016 (non-compliance with Annex DT-6 'LIST OF MATERIALS AND EQUIPMENT TO BE PROVIDED BY THE CONTRACTOR AS A MINIMUM').

- Failed to execute the Programs, Works and/or Actions (PROA's) in support of the community and the environment that were contained in documents numbers 4642, 4643, 2935, 2936, 2928 and 2929, as well as for not concluding those corresponding to documents 2934, 4641 (non-compliance with Clause 48 'SUPPORT FOR THE COMMUNITY AND THE ENVIRONMENT' and 'ANNEX PACMA').

Therefore, it is considered that the two causes of termination invoked by the defendant authority were effectively fulfilled, in this sense, the challenged resolution is legal.

Therefore, by not demonstrating in this trial that these documents benefit their claims, it is clear that she also does not demonstrate that they were illegally dismissed by the Defendant authority.

As a conclusion of the foregoing, the plaintiff does not demonstrate that the challenged resolution was issued illegally."[611]

[611] **RZ-039**, TFJA Judgment, pp. 237-239 and **RZ-0039 ENG**, pp. 72-74.

(2) The Claimants' position

721. For the Claimants, "[a] reasonable and impartial person can readily find that the administrative court's refusal to address Clause 15.1(r), even when the Alegatos put the issue squarely before the court, is behavior that falls short of the conduct expected under the Fair and Equitable Treatment standard."[612]

(3) The Respondent's position

722. As already mentioned, the Respondent stresses the difference between *ampliación de demanda* and *escrito de alegatos*:

> "As Respondent explained in its communication of January 12, 2024, in Mexican legal practice, the [*alegatos*] are only an opportunity for the parties –before the judgment– to recapitulate what has been submitted and proven by the parties based on the claim and its answer, as well as, if applicable, on the extension of the claim and its answer. In addition, Article 47 of the Federal Law on Contentious-Administrative Proceedings states that 'the arguments presented in proper time shall be considered when the Judgment is issued. Said arguments may not expand the dispute as set in the agreements or decisions admitting the Claim or the admission of the amendment of the claim as the case may be.' The Claimants' experts confirmed that 'new arguments cannot be put in after the Complaint or the answer are filed,' and in fact pointed out that no new arguments can be introduced in a nullity proceeding through pleadings if such arguments were not raised in the nullity lawsuit."[613]

723. For the Respondent,

> "in the Annulment Proceeding 2017 lawsuit the Contractors' attorneys did not mention Clause 15.1 (r), nor did they argue the alleged falsity of Work Order 028-2016, nor was there any extension of claim during the Annulment Proceeding in which they did so." […] "Thus, any subsequent submission arguing the illegality of the administrative termination based on Clause 15.1(r) and the alleged falsity of the Work Order would invariably modify the *litis* and would be inadmissible. Mr. Asali explains that the setting of the litis is very important. 'The reason why the dispute was focused the way it was, was to make sure that the Respondent would not be defenseless.'"[614]

[612] CPHB, ¶ 86.

[613] RPHB, ¶¶ 151-153.

[614] RPHB, ¶¶ 155-157.

> The Respondent reiterates that "the Contractors made a very specific argument by invoking Clause 15.1 b) of Clause 15.1 of Contract 821 solely to justify the non-compliance with Work Order 028-2016 in 'the notorious fact of not knowing of its existence […], [as] the rules of notification in accordance with the provisions of the Clauses of the Contract were not complied with […].' On the other hand, in the Annulment Proceeding 2017, the Contractors did not argue the alleged falsity of Work Order 028-2016 either. In fact, the Contractors only argued the alleged illegality of the administrative termination of Contract 821-2016, 'as the Work Order 028/2016 has not been delivered, let alone the legal notice to go to the contract residence to review the enforceability of the work order.'"[615]

724. The Respondent adds that the judgment in the Annulment Proceeding 2017 shows that the TFJA did analyze the *Escrito de Alegatos*, as it states:

> "18. By order of June 1, 2018, the judge considered the alegatos submitted by the Claimant in the written pleading filed with this Court on May 25, 2018, which were reserved to be taken into account at the appropriate procedural moment."[616]

725. The Respondent reiterates that

> "the [Escrito de] Alegatos are not relevant and should not be used as support for Claimants' allegations. Mexican law, as well as its interpretation, prohibit courts from considering new arguments that were not included in the statement of claim or, if any, in the extension of claim."[617]

726. The Respondent concludes that

> "the Contractors were negligent or had a poor legal defense in the judicial proceedings before Mexican courts, as was the Annulment Proceeding 2017."[618]
>
> "The negligence or poor legal defense of the Contractors in the domestic jurisdictional proceedings (such as the Annulment Proceeding 2017) is not the responsibility of the Respondent, nor of PEP or PEMEX."[619]

727. Thus, for the Respondent, "[i]n conclusion and as demonstrated by Respondent, the TFJA correctly analyzed the alegatos filed by Drake-Mesa, Drake-Finley and Finley in the

---

[615] RPHB, ¶¶ 159-160.

[616] RPHB, ¶ 162; citing **R-0044**, Lawsuit filed by Drake-Finley, Finley, and Drake-Mesa that began the 2017 Annulment Proceeding, September 4, 2017, p. 48.

[617] RPHB, ¶ 163.

[618] RPHB, ¶ 164

[619] RPHB, ¶ 166.

Annulment Proceeding 2017 and, therefore, the judgment rendered in this trial was entirely legal."[620]

(4) The Tribunal's analysis

728. As the Tribunal has already explained, in deciding whether the TFJA's judgment involved a "denial of justice" under NAFTA it will apply the MST as recognized in customary international law, adhering to a strict definition of the standard which may not necessarily be as broad as defined in some BITs or awards. Furthermore, as also already explained, the Tribunal will not need to decide whether Mexico acted in bad faith for the standard to be breached. A breach of the standard should be seen as an "objective" result, which may, or may not, be the result of an action of a public authority acting in bad faith. In fact, a domestic tribunal may incur in "denial of justice" under customary international law even if it stuck strictly to the letter of the country's domestic laws or to the dominant interpretation or customary practices followed by domestic courts. However, arbitral tribunals, like this Tribunal, are not appeal instances for domestic court decisions and, hence, they should practice deference to the domestic judiciary and only conclude that a genuine "denial of justice" took place when the outcome of a legal proceedings "offends the sense of judicial propriety," to use the already quoted expression in the *Waste Management v. Mexico II* award.[621]

729. Bearing all those principles in mind, the Tribunal has come to the conclusion that the TFJA's judgment involved a denial of justice to the Claimants, for the reasons explained below.

a. The patently wrong interpretation of Clause 15.1 s)

730. The TFJA's interpretation of Clause 15.1 s) is that "the breach of only one of the obligations stated in the contract […] is sufficient for the termination of the contract to be considered lawful and duly supported."[622]

[620] RPHB, ¶ 167.

[621] **CL-0054,** *Waste Management II*, ¶ 98.

[622] See **RZ-039**, TFJA Judgment, p. 200; and **RZ-039 ENG**, pp. 36-37.

731. For all its deference to the TFJA, in this Arbitral Tribunal's view that assertion is patently wrong, as it runs counter to two basic principles of interpretation of contracts – *i.e.*, the "*effet utile"* interpretation and the "systematic interpretation"- which are not only generally accepted in most if not all legal systems of the world, but are also specifically enshrined in Mexico's Articles 1.853 and 1.854 of the Federal Civil Code, which read:

> "Article 1853.- If any clause of the contract admits several meanings, it shall be construed to have the meaning most suitable for it to be effective."[623]
>
> "Article 1854.- Clauses in contracts shall be construed in connection with each other, attributing to any doubtful clauses the meaning resulting from the whole."[624]

732. As a consequence of these principles, the interpretation of Clause 15.1 s) cannot be made in isolation from the rest of the contract and, in particularly, from the rest of Clause 15.1, including its letter r).

733. This is so because the effect that the TFJA attached to Clause 15.1 s) deprived the rest of letters in that same Clause of any practical effect. It is straightforward that Clause 15.1 s) cannot authorize the rescission of the 821 Contract on the basis of the unfulfillment of one single work order, because, if that were the case, the reference to the 15 unfulfilled work orders in Clause 15.1 r) would be idle. Why 15, rather that 10 or 50, if just the unfulfillment of one single work order entitled PEP to rescind the contract?

734. To that extent, whether Drake-Finley *et al*. did or did not make in the judicial procedure reference to Clause 15.1 r)–which they actually mentioned explicitly in their *Escrito de Alegatos*–is beyond the point: in performing its hermeneutic duty to interpret Clause 15.1 s) to ascertain whether it was applicable to the case at hand, the TFJA had necessarily *sua sponte* to read Clause 15.1 in its entirety. Had it done so, it would have necessarily arrived at the conclusion that Clause 15.1 r) limited inevitably the scope of letter s).

---

[623] **JAH-0012**, Federal Civil Code, Article 1853. Tribunal's translation. The original in Spanish reads: "*Si alguna cláusula de los contratos admitiere diversos sentidos, deberá entenderse en el más adecuado para que produzca efecto.*"

[624] **JAH-0012**, Federal Civil Code, Article 1853. Tribunal's translation. The original in Spanish reads: "*Las cláusulas de los contratos deben interpretarse las unas por las otras, atribuyendo a las dudosas el sentido que resulte del conjunto de todas.*"

735. It is for that same obvious reason that the reference to Clause 15.1 r) by the claimants in their *Escrito de Alegatos* did not change at all the *litis*: it was a clause that the TFJA would have had necessarily to consider *sua sponte* to assess the applicability of Clause 15.1 s). But it did not.

736. In the Tribunal's view, the TFJA should have analyzed Clause 15.1 r) *sua sponte* even if the claimants had never mentioned it (as was the case in their initial statement of claim). But the fact that the TFJA's judgment does not include the slightest reference to Clause 15.1 r) even after having been made aware of its relevance by the claimants through their *Escrito de Alegatos* makes the TFJA's mistake particularly grievous and serious.

b. The absolute disregard of the Escrito de Alegatos

737. As already indicated, according to Article 47 of LFPCA:

> "The Alegatos filed in time must be considered when rendering judgment; such Alegatos may not extend the *litis* set out in the agreements of admission to the claim or of admission to the extension to the claim, as the case may be." (Tribunal's translation)

738. In the Tribunal's view, the Respondent is wrong when it argues that the TFJA "analysed" the *Escrito de Alegatos*, to the extent that paragraph 18 of the judgment states that "by order of June 1, 2018, the judge considered the alegatos submitted." The judgment makes clear that the instructing judge duly noted that the *Escrito de Alegatos* had been submitted. Yet, except for that preliminary reference, there is not any other reference in the judgment to the *Escrito de Alegatos*.

739. Had the TFJA considered, for instance, that the *Escrito de Alegatos* unduly extended the *litis* -as the Respondent has argued in this arbitration-, the TFJA would have explained why that was the case, so that the reason for such conclusion could be assessed.

740. The utter neglect by the TFJA of the *Escrito de Alegatos* not only facilitated its neglect of Clause 15.1 s) -which it should have analyzed *sua sponte* as part of its hermeneutic work- but also of the references to a fraudulent behavior by PEP which the Claimants had made in their Statement of claim and reiterated in their *Escrito de Alegatos*. That neglect by the TFJA helps explains that the Amparo court considered the reference to the 15 unfulfilled work orders (*i.e.*, to Clause 15.1 r) as a new allegation.

c. The surprising reasoning on the de facto *suspension of the works*

741. The TFJA's judgment recalls that the claimants had argued that the works were intermittent and that there were several suspensions of the works and it actually reproduces the eight memos from PEP to the contractors[625].

742. However, the conclusion that the TFJA draws from such evidence is this surprising statement:

> "Now, the plaintiff's argument that the works were intermittent and that there were several suspensions of the works is unfounded; first, because it does not prove its assertions since [although it exhibits the following documents: […]."[626]
>
> […]
>
> "From its content, it is not clear that the defendant authority has suspended the execution of the works, since it only shows PEP's acknowledgment that it does not have sufficient budget and that therefore, it must communicate to the service companies that once the drilling program is concluded, they shall proceed to dismantle and transport the drilling equipment to its respective base.
>
> And only in the official document GSAPRN-GMSCP-RCGSAP-3041-2014 dated November 14, 2014, it is stated that in continuity with the official document PEP-SPRN-APATG-1862-2014 dated November 13, 2014, where it is indicated the suspension of drilling and completion of the wells of the national strategy contracts, it is instructed that once the drilling is concluded according to the drilling program of the Coapechaca 111 well, the PMX-805 drilling equipment is to be dismantled and transported to its respective base.
>
> That is to say, it is not stated that the total execution of the works related to the contract had been suspended. There is no evidence provided by the plaintiff from which such situation can be clearly inferred."[627]

743. The TFJA reproduces in its entirety Clause 17, on "Suspension of Work", and states:

> "Therefore, from the analysis of such clause, this Section observes that the contracted works in any state in which they are may be temporarily suspended, in whole or in part by PEP, when the needs of the project or of the contract so require, without implying the termination of the contract.
>
> Therefore, assuming that the works had been suspended, this does not imply PEP's breach of the contract, since the contract foresees such possibility,

[625] **RZ-039**, TFJA Judgment, pp. 228-233 and **RZ-039 ENG**, pp. 62-67.

[626] **RZ-039**, TFJA Judgment, p. 228 and **RZ-039 ENG**, p. 61.

[627] **RZ-039**, TFJA Judgment, p. 233 and **RZ-039 ENG**, p. 68.

which only brings as a consequence, in its case, the modification of periods and operative processes, as well as the rescheduling of the date programmed for the termination.

In addition, such clause does not establish that in the event of suspension of the work, the contractor would be relieved from complying with the work orders assigned to it once the suspension was terminated.

On the contrary, such clause establishes that PEP shall communicate the suspension, indicating the causes thereof, the date of its beginning and the probable resumption of the work.

In this sense, the plaintiff does not demonstrate that due to causes attributable to PEP they were prevented from executing the work order; on the contrary, under the terms of the contract under analysis, they were bound to execute it once it was assigned by the entity.

It is important to point out that Clause 6 of the contract analyzed shows that the parties agreed that there would be no advance payment for the execution of the contract. Moreover, it can be seen that in the contractor's representation it was stated that they had the economic conditions to undertake the execution of the works object of the contract.

In these considerations, if the plaintiff only received payment for the works executed and this was for an amount lower than the minimum contract amount, such situation does not justify the breach of the execution of work order 28/2016 and obligations related and inherent to it, since it was the plaintiff who declared to meet the economic conditions to bind themself to the execution of the works object of the contract, even without early payment.

Therefore, it cannot argue that they were prevented from executing the work orders because they were economically affected by the intermittence of the work, since they were bound to execute the work object of the contract under the agreed conditions, that is, as the work orders were assigned and without the obligation being subject to the exercise of the minimum contract amount, since this is not evident from the clauses of the contract."[628]

744. The conclusion of the TFJA concerning the intermittent nature of PEP's work orders and the *de facto* suspension of the Contract –which it considered not demonstrated– is at odds with the findings of the Third Unitary Court in the Ordinary Civil Trial 200/2016, which specifically stated that "the claimants had proved that the works had been suspended."[629] It is to be noted that the documentary evidence concerning the suspensions of work

[628] **RZ-039**, TFJA Judgment, pp. 234-235; **RZ-039 ENG**, pp. 69-71.

[629] **JAH-0032**, TUCMA Judgment, p. 129.

submitted to the TFJA and to the Third Unitary Court was identical.[630] And it also runs counter to the admission by the Respondent itself in this arbitration, when it recognized that "the crisis in oil prices [led to a] 'suspension' of drilling activities."[631]

d. The outright rejection of the "exceptio non adimpleti contractus"

745. The TFJA gives short shrift to the Claimants' reference to the *exceptio non adimpleti contractus* and determines that it has only to rule on the non-compliance by the claimants with their obligations under the contract:

> "This means that the contractor can only sue certain cases of breach by PEP to the contract and under the aforementioned rules and the corresponding jurisdictional channels; therefore, it is not for this Court to rule on PEP's breach of the contracts it subscribes with private parties.
>
> Therefore, if in this contentious administrative proceeding the challenged resolution is the termination determined by PEP derived from the noncompliance of the plaintiff with the clauses of the contract, it is clear that the dispute is exclusively about the noncompliance of the plaintiff with the contract, not about the noncompliance of the entity with such contract."[632] (emphasis added)

746. The TFJA's position seems at odds with the allegations made by Mexico in this arbitration, as indicated above:

> "Once the rescission is declared, the individual could challenge the validity of such rescission through a nullity proceeding before the TFJA and assert the exception of unfulfilled contract. However, it is important to point out that there is no judicial criterion that establishes that this exception has been exercised in administrative lawsuits."[633]

---

[630] TUCMA Judgment concludes that the works of the 821 Contract had been suspended on the basis of five PEP documents that it only mentions (**R-0048**, pp. 128-129), but which the TFJA judgement actually reproduces in their entirety (**RZ-039**, pp. 288-232 and **RZ-039 ENG**, pp. 62-67). Their dates are, in chronological order (which is how they are mentioned in the TUCMA Judgment) September 12, 2014; November 13, 2014 (consisting of two separate documents filed in this arbitration as **C-0091**); November 14, 2014; July 28, 2015; and January 22, 2016 (filed in this arbitration as **C-0097**). The TFJA judgement includes a copy of two additional documents: a memorandum dated September 19, 2014, as a follow-up to the September 12, 2014 memorandum already mentioned, in which PEP requests the contractors that "once the drilling program of the Coapechaca 102 well is concluded, take action to dismantle and transport the PMX-805 drilling rig to its respective base;" and another memorandum dated October 15, 2014, in which PEP similarly requests the contractors that "once the drilling of the Coapechaca 1320 well is concluded, to proceed to dismantle and transport the PMX-805 rig to its respective base." Hence, even if the evidence mentioned is slightly more extensive in the case of the TFJA judgement, it was practically the same as in the TUCMA Judgment.

[631] Respondent's Opening Presentation at the Hearing, slide 72.

[632] **RZ-039**, TFJA t Judgment , p. 211; and **RZ-039 ENG**, pp. 46-47.

[633] RPHB, Appendix, ¶ 43.

747. It is true that the Claimants' response to the query of the Tribunal on this point has been somewhat ambiguous, as if it had accepted that the *exceptio* does not apply to administrative contracts:

> "This contract defense exists under Mexican law, which allows a party to withhold performance until its counterpart performs. However, this is a difficult argument to make in the context of a typical administrative contract because of the public policy goals associated with such contracts."[634]

748. That said, it may well be that it is not usual in Mexico for claimants to invoke against public authorities the *exceptio non adimpleti contractus*, maybe because Mexican courts tend to reject that defense on public policy grounds. But this is an international arbitration, in which the Tribunal should apply the international standard of "denial of justice" as enshrined in NAFTA. In this respect, the Tribunal finds it hardly consistent with the principle of FET that a contractor is obliged in absolute terms to carry out social policy works even when the local government fails to discharge its obligations under the contract. But this is what the TFJA did.

749. Finally, when addressing the issue of whether PEP had failed to meet its obligation to order a minimum amount of work, the TFJA reasoned in a way which described in somewhat unrealistic way how the drilling under the contract could be carried out, as if it was materially feasible that PEP could order, and the contractor perform, in a matter of a few days or weeks the backlog of drilling orders necessary to reach the minimum of amount of work under the contract. The reasoning of the TFJA was the following:

> "[T]his judge considers that the defendant was in a position to exercise such minimum amount at any time before the date of completion of the works, *i.e.*, before December 31, 2017. This implies that until the last month (December 2017) the minimum contract amount could be exercised.
>
> Nor does it appear from the contract that the Defendant Authority was bound to pay any percentage of such minimum amount within any peremptory term, which implies that until the last month (December 2017), for example, 90% of the minimum contract amount could be paid.
>
> Thus, the plaintiff's argument is unfounded since it is clear from the contract that the defendant authority is only bound to pay the plaintiff for the work as it is executed in accordance with the work orders assigned and the estimates made by the contractor."

[634] CPHB, ¶ 106.

750. The formalistic nature of this reasoning and its unrealistic assumption that a drilling project which has been abandoned for months could have been fully executed, at PEP's behest, in a few days or weeks just before the expiration of the contract compounds the impression in an objective observer that the TFJA's interpretation of the contract systematically favored PEP.

*e. The disregard of the clear indications of PEP's abuse of power ("**détournement de pouvoir**").*

751. As already explained, under Article 41 of LFPCA, the judge instructing the case can, in order to better understand the disputed facts, order the production of any document related to them or carry out an investigation (*diligencias*).

752. Furthermore, as already indicated and argued by the Claimants in their pleadings before the TFJA, according to Article 50 of the LFPCA administrative tribunals may examine as a whole the complaints and causes of illegality, as well as the other arguments of the parties, with a view to decide the question effectively raised, but without changing the facts described in the claim (*demanda*) and the counter-memorial (*contestación*).

753. Moreover, under Article 51 an administrative decision may be annulled

> "V. When it was made in the exercise of discretionary powers but not to achieve the goals which justified the granting by the law of such powers."[635]

754. Finally, as previously explained, the LFPA establishes in Article 1 that its provisions are of "public order" (*las disposiciones de esta ley son de orden e interés públicos*) and in Article 3.III that an element and requirement of any administrative act is that is adopted "in pursuance of the public interest defined in the norm which regulate it, not of any other different objectives."

755. Thus, Article 51.V of the Federal Law on Contentious Administrative Procedure and Article 3.III of the Federal Law of Administrative Procedure are a reflection of the general legal principle which forbids any *détournement de pouvoir* (*i.e.,* "misuse of power" in English or, in Spanish, *desviación* or *desvío de poder*).

---

[635] **R-0092,** *Ley Federal de Procedimiento Contencioso Administrativo.* Tribunal's translation. The original in Spanish is: "*Cuando la resolución administrative dictada en ejercicio de las facultades discrecionales no corresponda a los fines para los cuales la ley confiera dichas facultades*".

756. Did the claimants point the TFJA towards any circumstances suggesting that the administrative rescission of the 821 Contract did not respond to any genuine policy reason allowing for the exercise of such "exorbitant" power?

757. An analysis of the Statement of Claim and the *Escrito de Alegatos* submitted by the Claimants before the TFJA shows that they did: both contain clear indications that the rescission of the Contract by PEP was fraudulent (as suggested by the use of the terms "fraudulent strategy", "trickery", "strange and suspicious manner", "machination" or "in retaliation"), as explained above in detail when describing Drake-Finley *et al*'s pleadings in paragraphs 668 and 672 of this Decision.

758. It is true that, in hindsight, with the much broader information provided to this Tribunal by the Claimants' counsel in the course of this arbitration, those early indications of *détournement de pouvoir* by PEP may seem now much more telling that they were at the time for the TFJA. As already mentioned, it may be recalled that the bulk of the claimants' allegation then focused on the lack of authority of the PEP official who signed the rescission and on the improper way in which it was notified. Those allegations were extensively and thoroughly discussed by the TFJA, and this may have led it inadvertently to neglect other issues which were less prominent at the time and were not advocated by the Claimants as a specific reason for the TFJA to annul the administrative rescission.

759. However, as previously stated, the international standard for "denial of justice" is an objective one, which does not necessarily require bad faith, deliberate bias or negligence in domestic courts. And, in this Tribunal's view, the fact that the TFJA neglected altogether the clear hints by the claimants in that process that PEP's decision to rescind the 821 Contract had been the result of an egregious and unjust "machination" is one additional factor supporting the Tribunal's decision that the Claimants in this arbitration suffered denial of justice.

(5) The Tribunal's Conclusion

760. In the Tribunal's view, the elements described in letters a) through e) above, when taken together, objectively entailed a denial of justice for the Claimants and support the Tribunal's conclusion that the result from the TFJA's proceeding meets the strictest

definition under customary international law of such breach: without this Tribunal passing judgment on the TFJA's behavior, the outcome of the nullity procedure before the TFJA was "notoriously unjust" and "egregious" in its injustice and "offends a sense of judicial propriety".

761. The TFJA is not part of Mexico's independence judiciary, but part of Mexico's Executive Power. Thus, most of the allegations of the U.S. Government concerning "denial of justice" do not technically apply in this particular case. Nonetheless, had the TFJA been part of Mexico's judiciary, this Tribunal's conclusions would have been exactly the same.

E. THE RULINGS OF THE AMPARO COURT AND THE SUPREME COURT

762. Being dissatisfied with the TFJA's Judgment, Finley, Drake-Mesa and Drake-Finley filed a direct *amparo* lawsuit on January 18, 2019.

763. The Direct Amparo 74/2019 lawsuit was assigned to the Fourteenth Collegiate Court in Administrative Subject Matters of the First Circuit, which in its judgment of January 30, 2020 denied the *amparo*.[636]

764. The Collegiate Court, after rejecting -as previously explained in paragraph 390 of this Decision- that NAFTA established any human rights justifying the application of the constitutional *pro-homine* principle, turned next from constitutional to mere legality issues.

765. In so doing, the Collegiate Court rejected also the claimants' allegations, because it considered that their claims, particularly the one on the need for the unfulfillment of 15 work orders being necessary for PEP to be authorized to rescind administratively the contract, were "novel" (*novedosas*) and "were not invoked in the initial statement of claim,"[637] such that the TFJA was not in a position to rule on them.[638] The Collegiate Court further added that the Claimants' *Alegatos* did not change its conclusions, as, in keeping

[636] **R-0050**, Judgment issued by the Fourteenth Collegiate Court within the Direct Amparo 74/2019, January 30, 2020.

[637] **R-0050**, Judgment issued by the Fourteenth Collegiate Court within the Direct Amparo 74/2019, January 30, 2020, pp. 38, 43. Tribunal's translation.

[638] **R-0050**, Judgment issued by the Fourteenth Collegiate Court within the Direct Amparo 74/2019, January 30, 2020, p. 43, third and fifth paragraphs.

with the Supreme Court's case law (and specifically case P./J.27/94), the *Alegatos* are not part of the *litis* in amparo proceedings.[639]

766. In its judgment the Collegiate Court upheld the TFJA's ruling as "the reasons that led to the rescission of the contract were legal ones, as they responded to the fact that the claimants failed to fulfil and obey work order 28/2016."[640]

767. The Claimants filed an appeal for review before Mexico's Supreme Court against the final ruling of the Fourteenth Circuit Court of Appeals. In their appeal they insisted that the rescission of 821 Contract was illegal because it violated to their detriment certain articles of NAFTA, which were applicable to them as foreign companies that made investments in Mexican territory.

768. However, on March 17, 2020, Mexico's Supreme Court dismissed the motion for review, as it did not comply with the procedural requirements of admission established for these cases.[641]

769. As stated in Article 3 of the ILC Articles, "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."[642] Hence, this being an international arbitration, the judgments of Mexico's Supreme Court and the Collegiate Court do not change this Tribunal's conclusion on the TFJA's judgment.

770. In the case of the Supreme Court's decision this is particularly so because the Supreme Court just declined to issue an opinion on the case as it lacked constitutional relevance.

771. In the case of the judgment of the Collegiate Court, it dealt not only with the constitutional aspects of the *amparo*, but also, albeit only briefly, with the causes of illegality of the rescission argued by the claimants. In so doing it drew on case law excluding the *Escritos de Alegatos* from the purview of the Direct Amparo 74/2019 procedure, thus, not

---

[639] **R-0050**, Judgment issued by the Fourteenth Collegiate Court within the Direct Amparo 74/2019, January 30, 2020, p. 47, last three paragraphs.

[640] **R-0050**, Judgment issued by the Fourteenth Collegiate Court within the Direct Amparo 74/2019, January 30, 2020, p. 45, second bullet. Tribunal's translation.

[641] **RZ-043**, SISE 74-2019.

[642] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Article 3.

expressing any views on that part of the claimants' allegation. As its main substantive point, it endorsed the TFJA's wrong conclusion that the unfulfillment of just one single work order, *i.e.*, Work Order 028/2016, empowered PEP to rescind the 821 Contract.

772. The Fourteenth Collegiate Court is part of Mexico's independent judiciary, not of its Executive Power, and its judgment thus deserves special deference. In this particular case, however, the Collegiate Court judgment just ruled, in a rather perfunctory way, on the basis of domestic Mexican procedural rules on the scope of the *amparo* proceeding, which prevented it from having at its disposal all the information necessary to render justice in a substantive manner. It should be borne in mind that the Collegiate Court, acting as *amparo* court, had a narrow legal mandate and, hence, did not have the investigative powers which the LFPCA afforded the TFJA, and did not benefit from the "discovery" process which is typical of international arbitration. The Collegiate Court could not have discovered, as this Tribunal could and did, that Work Order 028/2016 was an artifice to provide a justification for the termination of the 821 Contract, which entailed a misuse of power by PEP. Thus, for all its respect to the principle of deference by arbitral tribunals to an independent judiciary, this Tribunal would not be following its remit to decide whether Mexico respected its MST obligations enshrined in the NAFTA if it were to accept that by just failing to fulfil one single, evidently bogus work order, the Claimants deserved to have their contract administratively rescinded, let alone having the US$ 41.8 million Dorama Bond called.

XII. THE *FINIQUITO* OF THE 821 CONTRACTAND THE CALLING OF THE DORAMA BOND

A. FACTUAL BACKGROUND

773. On May 16, 2018, a meeting of a number of PEP officials was held in Villahermosa, Tabasco (the "**Villahermosa Meeting**") to "continue with the actions required to implement the claim of the performance bond under Clause 10 [of the Contract]."[643] The document states that *derivado de la reunión* (*i.e.*, as a consequence of the meeting) *se*

[643] **C-0128**, Intermal Pemex Memo (May 26, 2018).

informa (*i.e.*, it is reported) that the amount to claim under the bond is its entire amount of US$ 41.8 million.

774. On November 10, 2021, PEP drafted and signed unilaterally the *finiquito* of the 821 Contract.[644] The document notes the following:

> "Being 12:00 p.m. of November 10, 2021, It is stated that the Legal Attorney and Representative Common of companies DRAKE-FINLEY, S. DE R.L. DE C.V., FIN LEY RESOURCES, INC., y DRAKE-MESA, S. DE R.L. DE C.V. (JOINT PARTICIPATION) -henceforth the CONTRACTOR- did not appear at the indicated place and date, to carry out the Finiquito of the CONTRACT, however, having granted a prudent period of 50 minutes of wait. It should be noted that the Contractor was duly notified through the official documents PEP-DG-SASEP-CSTPIP-2533-2021 and PEP-DG-SASEP-CSTPIP-2534-2021, both dated on October 27, 2021, through Notary Public, to the procedural addresses indicated by the Contractor in the lawsuits filed against PEMEX Exploration and Production."[645]

775. The document recalls that "[i]n a session dated October 4, 2018, the First Section of the Superior Chamber of the Federal Court of Justice Administrative, resolved the Contentious Administrative Trial No. 20356/17-17-12-2, in favor of PEP, by declaring the validity of the resolution, contained in the official letter PEP-DG-SSE-759-2017 of August 28, 2017, for which the CONTRACT was rescinded."[646]

776. If one leaves aside two small conventional penalties for delays in the work done in December 2015 in the Coapechaca 162 well (for a total amount of US$ 46,796.46), under the *finiquito* the amounts to be claimed by PEP as a result of the Contractor's non-compliance with the contract were the following:

c. Conventional Penalty for Delay in the Initiation of Drilling of Work Order 028-2016

> "The application of numeral 6.6.1.A 'Conventional Penalty for Delay in the Work Execution', subnumeral A2 'Conventional Penalty for delay in the Drilling Work Order Initiation', is due to the fact that the CONTRACTOR did not initiate the corresponding work of the Drilling Work Order 028-2016 for the Coapechaca Well 1240, for which the penalty will be applied

[644] **R-0043**, *Finiquito* for the 821 Contract, November 10, 2021.

[645] **R-0043**, *Finiquito* for the 821 Contract, November 10, 2021. p. 2.

[646] **R-0043**, *Finiquito* for the 821 Contract, November 10, 2021. p. 3.

for a maximum period of 15 (fifteen) days, resulting in the calculation of the penalty as follows:[647]

ORDER No.	START DATE	PENALTIES DAYS	PENALTY PER DAY	AMOUNT TO BE PENALIZED
028-2016	17/12/2016	15	US$ 17,500.00	US$ 262,500.00

d. Conventional Penalty for the Administrative Rescission of the Contract

> "Based on section 15.2. 'Administrative Rescission Procedure' penultimate paragraph of the Clause 15 'RESCISSION OF CONTRACT'; and, section 6.6.3 'Conventional Penalty for Administrative Rescission of the Contract' of point 6.6 Conventional Penalties, of Clause 6 'REMUNERATION', both of the Contract, the amount claimed to FIANZAS DORAMA S.A., is the total amount guaranteed in the bond No.: 000240A30014, Folio: 448938, Security Code: 8PIG6Iu3, issued by the institution FIANZAS DORAMA S.A. in favor of PEP, which represents an amount of $41,830,362.16 (…) and in accordance with what was agreed upon by the CONTRACTOR and PEP in the fourth paragraph of section 6.6.3 of CLAUSE 6 'REMUNERATION', the CONTRACTOR will be released with respect to payment of the conventional penalty for administrative rescission of Contract 421004821, until the moment in which the debt of said conventional penalty for administrative rescission of Contract 421004821, has been covered in its entirety to PEP."[648]

e. Community and environmental support program "PACMA".

> "[B]ased on the exercised amount of Contract 421004821, for $47,976,692.90 USD (…), the 2% required to execute PACMA work is $959,533.86 USD and with the understanding that the CONTRACTOR executed the following PROA's, for a total amount of $62,951.75 USO, the differential to be recovered in favor of PEP is $896,582.11 USD (…), this based on 'VIII. EARLY TERMINATION OR ADMINISTRATIVE RESCISSION OF THE CONTRACT", point three of the PACMA Annex, which states:
>
> '*If the PROA's do not cover 2% (two percent) of the exercised amount of the contract at the time of the Early Termination or Administrative Rescission of the contract, the differential will be recovered in the finiquito.*'"[649]

[647] **R-0043**, *Finiquito* for the 821 Contract, November 10, 2021, p. 20.

[648] **R-0043**, *Finiquito* for the 821 Contract, November 10, 2021, p. 24.

[649] **R-0043**, *Finiquito* for the 821 Contract, November 10, 2021, p. 26.

777. In conclusion, according to the *finiquito* PEP was entitled to claim from the Claimants the full amount of the Dorama Bond (*i.e.*, US$ 41.8 million), plus US$ 262,500 for delays in the execution of Work Order 028-2016 and an additional US$ 896,582.11 for the shortfall between the 2% of the amount of contract actually disbursed and the actual PACMA works carried out by the contractors.

778. Finally, Section XII of the *finiquito* states:

> "The closing of this Contract 421004821 will take place once the CONTRACTOR pays in full the indicated quantities, but not before warning that PEP reserves the right to make any administrative, judicial or jurisdictional action that it considers appropriate to enforce its rights."[650]

B. THE NATURE OF PEP'S DECISION TO CALL THE DORAMA BOND

(1) The Tribunal's questions

779. In PO12, the Tribunal invited the Parties to address in their Post-Hearing Briefs the following question:

> "9. Should the calling of the Dorama Bond by PEP and the determination of the amount to be called under the Bond be considered (a) a purely contractual matter subject to the relevant provisions of the Contract, particularly Clause 6.6.3 of Contract 821; or, alternatively, (b) an administrative act, potentially attributable to Mexico? Under case (a) above, would Clause 10, letter H[651] of the Contract have any bearing on such determination? Under case (b), would the principles contained in the Ley de Procedimiento Administrativo on sanctions (including, specifically, Article 73)[652] have any bearing on such determination?"

---

[650] **R-0043**, *Finiquito* for the 821 Contract, November 10, 2021, p. 30.

[651] As mentioned in ¶ 148 of this Decision, letter H included the following representation by the contractor:):"Your agreement for the guarantor to settle to PEP the maximum limit guaranteed in the event that the works object of this contract are not useful or usable by PEP and despite the fact that the corresponding certificate of progress has been issued, on the understanding that any exception derived from the investment and or partial or total application of the advance and/or payment of invoices will not be valid for the purpose of determine the enforceability of the total amount guaranteed in the security, since, taking into account the object of this contract, the obligation to invest and/or apply the advance and the payment of invoices is indivisible since it has as its object an execution that only being satisfied in full can be useful or usable for PEP, consequently, any application and/or partial or total investment of the advance and/or payment of invoices received by the CONTRACTOR that does not result, in accordance with the object of this contract, in a useful and usable work for PEP will be ineffective in substantiating any exception that seeks to distort the enforceability of the total amount guaranteed."(emphasis added).

[652] Article 73 of Mexico's Federal Law on Administrative Procedure states: "The administrative authority shall base and give reasons for its decision [to impose an administrative sanction], considering: I. The damages that have occurred or may occur; II. The intentional or unintentional nature of the action or omission constituting the infringement; III. The gravity of the infringement; and IV. The recidivism of the offender." (Tribunal's translation).

(2) The Claimants' position

780. For the Claimants,

> "the Tribunal inquired about whether Pemex's calling on the US$ 41.8 million Dorama Bond should be considered a purely contractual matter or an administrative action that can be attributed to Mexico. Mexican law does not offer a clear answer on this issue. The Reglamento de la Ley de Pemex 2008 offers guidelines for Pemex contracts, and Article 61 of these guidelines establishes that every agreement, contract, and other act carried out by Pemex or its subsidiaries is regulated by both the administrative law and the applicable civil or common legislation. Ultimately, the nature of the act is determinative. Clause 6.6.3 of the 821 Contract permits the calling of the US$ 41.8 million Dorama Bond as a penalty in the event of an administrative rescission of the contract. The administrative rescission was an administrative act. This necessarily means that a call on the Dorama Bond is administrative in nature."[653]

781. The Claimants further add that

> "[i]n addition to being administrative in nature, Pemex's calling on the US$ 41.8 million Dorama Bond demonstrates a violation of Mexico's treaty obligations. It cannot be overstated. Pemex used one fake work order valued at US$ 1 million, along with a compliant administrative court, to rescind a US$ 418 million contract and convert a US$ 370 million liability (based on the maximum budget, or US$ 121 million based on the minimum budget) into a claim of more than US$ 42 million against Claimants. International law demands better treatment than this."[654]

782. According to the Claimants, had Pemex been sincere about Work Order 028-2016,

> "it would have charged a penalty of US$ 262,5000 when Finley did not drill the Coapechaca 1240 well. PEMEX would have then issued another work order, as stated under Clause 6.6.1.A. Once Finley did not perform 15 such work orders, Clause 15.1(r) would have allowed PEMEX to administratively rescind the contract. PEMEX did not follow its agreement. Instead, once Finley did not fulfill Work Order 028-2016, PEMEX administratively rescinded the 821 Contract. This eviscerated the protection under Clause 15.1(r). Worse, the administrative court affirmed the rescission, and PEMEX *still* proceeded to claim a monetary penalty for the exact same conduct. A reasonable and impartial person would find this behavior to be in bad faith, outrageous, and exactly what that the Fair and Equitable Treatment standard was formulated to protect against."[655]

---

[653] CPHB, ¶¶ 108-109.

[654] CPHB, ¶ 110.

[655] CPHB, ¶¶ 89-90.

(3) The Respondent's position

783. According to the Respondent,

> "Pemex filed its formal claim for the Dorama Bond after the NAFTA terminated, as the Claimants confirm, and thus, Article 1105 does not apply. Even if Article 1105 was applicable, the act of calling on the Dorama Bond by Pemex is not egregious, shocking or unjust. As the Respondent explained, Pemex had been trying to settle Contract 821 with Drake-Finely [sic] for years after it was rescinded but the Claimants evaded these attempts."[656]

784. The Respondent additionally argues that the claim related to the Dorama Bond is a matter of contractual nature and "so the Tribunal lacks jurisdiction *ratione materiae*."[657]

785. As grounds for the strictly contractual nature of the Dorama Bond, the Respondent relies on several arguments.[658]

786. "First, performance bonds such as the Dorama Bond are widely and commonly used in private contracts entered into between private parties that do not involve a state-owned company. Such performance bonds are in no way governmental in nature."

787. Additionally, according to Clause 2 of 821 Contract "Object of the Contract," the Claimants were obliged to carry out the integral drilling and completion works of land wells in PEP's Northern and Southern Regions. In other words, the Claimants' primary obligation under 821 Contract was to perform the work contemplated therein. In order to guarantee the proper execution of these works, under 821 Contract, Claimants' duty to guarantee the performance of their principal obligation was created in accordance with Clause 10.1 Performance Bond of 821 Contract, which provided as follows:

> "10.1 PERFORMANCE GUARANTEE.
>
> In order to guarantee compliance with the obligations derived from this Contract, the CONTRACTOR delivered to PEP, in original, prior to the signature of this Contract, a bond policy before, in favor of and at the disposal of PEP, for the equivalent of 10% (ten percent) of the maximum amount of the contract (Compliance Guarantee), issued by a Surety

[656] RPHB, ¶ 222.

[657] RPHB, Appendix, ¶¶ 55-56.

[658] See RPHB, Appendix, ¶¶ 57-61.

> institution legally incorporated in Mexico, in terms of the Federal Law of Surety Institutions and in favor of PEP.
>
> The scope of the bond, as well as its legal nature, was stipulated in the Dorama Bond itself, which established that its purpose was to "guarantee the compliance of contract number 421004821." Likewise, with respect to the nature of the Dorama Bond, it established t4. The bonds and all the contracts arising from the issuance thereof shall be deemed of a mercantile nature for all involved parties therein, either as "The Obligor", "The joint obligor(s)", "The beneficiary(ies)", except in case of a mortgage guarantee. Art. 2 LFIF."

788. The Respondent further recalls that the fact that PEP executes the Dorama bond is only the exercise of a contractual right that arose with the execution of the 821 Contract with the Claimants.[659]

789. Concerning the Tribunal's question as to whether Clause 10.H of the Contract would have any impact on such determination, the Respondent submits that "it has no impact on Clause 10.H of Contract 821, since the execution of the bond is a result of the administrative rescission of the contract and this in turn is a consequence of the Claimants' various breaches of their obligations under the 821 Contract."[660]

790. The Respondent recalls that "Clause 6.6 Conventional Penalties provided that the Parties agreed that when the Contractor failed to comply with the obligations stipulated in the Contract, PEP could apply different conventional penalties to the Claimants according to the type of contractual breach incurred by the Contractor."[661] And Clause 6.6.3, in particular, envisaged a Conventional Penalty for Administrative Rescission of the 821 Contract.[662]

791. Hence, according to the Respondent,

> "Clause 10.H is not applicable in the event that the contract has been rescinded for causes attributable to the Contractor, as was the case with the rescission of Contract 821. The clause clarifies that when the rescission has been decreed by Pemex due to a breach by the contractor, Pemex is contractually entitled to execute the performance bond. This confirms the contractual nature of the right to enforce the performance bond, since it is

[659] RPHB, Appendix, ¶ 61.

[660] RPHB, Appendix, ¶ 62.

[661] RPHB, Appendix, ¶ 63.

[662] RPHB, Appendix, ¶ 64.

> precisely from this clause that Pemex can enforce the bond (not from the law)." [663]

792. Thus, according to the Respondent, "[t]he power of Pemex to execute the bond arises directly from the contract and depends on its provisions."[664]

793. Finally, according to the Respondent, "there are legal precedents that indicate that the public entity that executes the bond is not an authority for the purposes of the *amparo* proceeding, from which it follows that such execution does not have the character of an act of authority either."[665]

794. The Respondent concludes that

> "the relationship that arises from the bond is not one of supra-subordination, but of contractually agreed voluntary coordination that can be exercised when the contracted obligations are not complied with. That is to say, it is not an act of authority that affects the legal sphere of the governed, but a consequence of the breach of contract, so that Article 73 of the LFPA does not even apply in this context."[666]

(4) The Tribunal's analysis

795. In the Tribunal's view, the signing by PEP of the unilateral *finiquito*, which confirmed its previous decision adopted during the meeting in Villahermosa in May 2018 to call in its entirety the Dorama Bond, was an "administrative act" of PEP, which went well beyond a purely contractual act and is thus an act of Mexico subject to the jurisdiction of this Tribunal. This conclusion is based on several grounds.

796. *First*, the signing of the unilateral *finiquito* and the calling of the Dorama Bond were the result of the administrative rescission of the Contract, which was an exercise of the "exorbitant" power typical of administrative contracts excluded from the Arbitration Clause of the Contract (47.2, fourth paragraph). As previously found in paragraph 298, the fact that the *finiquito* is regulated by the Contract does not imply that it is only a contractual

[663] RPHB, Appendix, ¶ 65.
[664] RPHB, Appendix, ¶ 66.
[665] RPHB, Appendix, ¶ 67.
[666] RPHB, Appendix, ¶ 68.

act: the rescission is also regulated in the Contract but it is not just a contractual issue, but an administrative act.

797. *Second*, and as already mentioned in paragraph 295, both in his second report and during the Hearing, Mexico's legal expert, Mr. Asali, characterized the *finiquito* of the contract as an "administrative act". Indeed, Mr. Asali made this qualification in his second report, when in his discussion of the *finiquito* of the 803 Contract he argued that

> "with the execution of the settlement ("*suscripción del finiquito*"), the term of Contract 803 necessarily expired and, consequently, all the rights and obligations arising therefrom were also extinguished. Any rights and obligations that may still exist no longer derive from Contract 803, but from the settlement [*finiquito*] as an independent administrative act with respect to Contract 803."[667]

798. Having that previous statement in mind, the President asked Mr. Asali during the Hearing whether in his view the *finiquito* of the 821 Contract could also be considered a separate administrative act. These were the President's question and Mr. Asali's response:[668]

> "PRESIDENT CONTHE: The Contract has been rescinded, but the rescission of the Contract in the 28 August Rescission Decision, the amount of the contractual penalty due to rescission is not specified, and unless the Parties correct me, I think the first time that in a document after the May 2018 meeting in Villahermosa where there was talk about the amount of the contractual penalty, the only administrative document where that quantifies the conventional or the contractual penalty, was the '*finiquito*' in 2021.
>
> I say this because as we have been speaking of [the statute of limitations] for the purposes of Jurisdiction of this Tribunal, we have an administrative act here of 10 November 2021?
>
> [MR. ASALI]: Yes."

799. The *finiquito* and the calling of the Dorama Bond being "administrative acts" and the latter being a contractual sanction, it appears self-evident that the penalty would have had to respect the principles inspiring the imposition of pecuniary sanctions in Mexico, as reflected in Article 73 of the LFPA. The question then arises as to which of the factors described in Article 73 were taken into account by PEP when deciding to exact a US$ 41.8 million sanction because of the Claimants failing to fulfil the isolated US$ 1 million bogus

[667] Second Asali Report, ¶ 26.

[668] English Tr. Day 5, 1106:17-1107:9; Spanish Tr. Day 5, 1300:8-1301:6.

Work-Order 28/2016 and incurring in a US$ 896,533.86 shortfall in the execution of PACMA projects (an amount which incidentally the *finiquito* was charging separately, on top of the amount of the Dorama Bond).

800. Had PEP been actually able to draw down on the bond, the result would have been indeed draconian: as the Claimants had only received payment from PEP in the amount of US$ 46.7 million for the work done under the 821 Contract, PEP would have been able to recoup the lion's share of that payment, thereby having the Claimants work almost for free for PEP's and Mexico's benefit for several years and crippling them financially.

801. PEP's conduct with the *finiquito* confirms the truth in the announcement that one senior PEP official had made to them, according to the Claimants:[669] that Pemex had not only sent Work Order 028/2016 to have a "legitimate reason" to terminate the contract and avoid paying them, but that Pemex's ultimate objective was to go after the US$ 41.8 million bond.

802. The Tribunal thus concludes that the unilateral *finiquito* and the calling of the Dorama Bond by PEP were notoriously unjust and even vindictive acts which, whatever their consideration under Mexican law -something outside the remit of this Tribunal-, entailed an egregious and shocking breach by Mexico of its obligation under NAFTA and the USMCA to grant foreign investors, like the Claimants, the MST and FET.

XIII. THE 809 CONTRACT AND NATIONAL TREATMENT

803. The Tribunal will first provide an overview of the main arguments advanced by the Parties on this issue, then dissect the key issues on which they disagree, and finally draw the relevant conclusions.

804. Before doing so, it is worth recalling that the Tribunal has previously decided that it does not have jurisdiction over the claims of the alleged breach by Mexico of its obligation of National Treatment, on the basis of the USMCA, concerning the 803 and 804 Contracts. Consequently, this Chapter will only deal with the alleged breach with respect to the 821 Contract.

[669] Statement of Claim, ¶ 210; Witness Statement of L. Kernion, ¶ 104.

A. OVERVIEW OF THE CLAIMANTS' POSITION

805. According to the Claimants, the *finiquito* of 809 Contract[670] recognized that Integradora and Zapata had a claim for the shortfall between the minimum amount of the contract (*i.e.*, US$ 24 million) and the US$ 8.4 million issuance of work orders.[671]

806. As a consequence, the *Acta Circunstanciada* signed by PEP with Integradora and Zapata on April 9, 2018[672] recognizes that:[673]

- Pemex was not issuing work orders under the 809 Contract;
- The two Mexican companies claimed compensation for Pemex's failure to issue work orders as provided under Clause 5 of the 809 Contract, which establishes a minimum budget;
- Pemex internally asked for a calculation of the non-recoverable costs (*gastos no recuperables*) and unit prices corresponding to the payment of wait times for the failure to assign work orders;
- Pemex calculated this amount to be US$ 42,167.14 per day (223 units corresponding to availability of personnel and drilling equipment);
- Pemex used Clause 17 (Suspension of Works) and Clause 18 (Anticipatory Termination) to arrive at this amount;
- Pemex recognized the economic effects on the Mexican companies because of its failure to assign work, up to an amount of US$ 13,493,484.80; Pemex calculated this based on the days that the Mexican companies' drilling equipment and personnel were idle, using the rate of US$ 42,167.14; and

[670] **R-0099**, *Finiquito* for the 809 Contract.

[671] Claimants' Opening Presentation at the Hearing, slides 65, 69.

[672] **C-0062**, Settlement between PEP and Integradora and Zapata on April 9, 2018 ("Acta Circunstanciada"), April 9, 2018.

[673] CPHB, ¶ 21.

- Pemex agreed to pay the Mexican nationals US$ 15.054 million in total, which includes amounts for the work performed but interrupted because of the assertion of *force majeure*.

807. According to the Claimants, "Mexico has not disputed the above facts. On their face, they show that Pemex treated the Mexican companies more favorably than Claimants. The Mexican companies were compensated for Pemex's failure to issue work orders based on the days that their personnel and equipment were idle at a daily rate of US$ 42,167.14. Claimants were not."[674]

808. In the Claimants' view, "[i]t is telling that Mexico has not offered one example of Pemex having rescinded a contract similar to those of Claimants."[675]

809. The Claimants also allege that presumably there are other examples of similar settlements with Mexican companies, but Mexico has failed to disclose these, as ordered under PO4, Annex 1, Request 16.[676]

B. OVERVIEW OF THE RESPONDENT'S POSITION

810. According to the Respondent,

> "all of the national treatment claims suffer the same shortcoming regardless of whether the claim falls under the NAFTA or the USMCA. *First,* the public procurement exception included in both Treaties bars the Claimants from raising these claims. *Second*, the Claimants have failed to show that the comparators are owned by Mexican nationals. *Third*, the Claimants have failed to show that the alleged discriminatory treatment was 'based on nationality.'"[677]

811. In their Post-Hearing Brief, the Respondent insisted on these points:

> "[T]he Claimants have not shown the comparator entities -Integradora and Zapata- to be (i) owned by Mexican nationals, or (ii) in like circumstances with the Claimants. The Claimants have further not shown that (iii) the actions taken by Pemex were based on the nationality of the Claimants. To date, these required elements still have not been established. Therefore, the

[674] CPHB, ¶ 22.
[675] CPHB, ¶ 29.
[676] Reply, ¶ 489.
[677] Rejoinder, ¶ 317.

national treatment claims related to all three Contracts should be dismissed."[678]

812. For the Respondent,

> "the work contemplated under Contract 809 was suspended due to a *force majeure* caused by the flooding in one of the wells after a tropical storm. Work on the other contracts was obviously not suspended for that reason. […] The *force majeure* event fundamentally changed the circumstances surrounding the conclusion of Contract 809, which means that Zapata and Integradora were not in like circumstances with the Claimants."[679]

813. The Respondent further argues that

> "States are afforded a level of discretion in the context of national treatment. There is ample authority in the submissions of the Respondent to support the view that Article 1102 and Article 14.4 only prohibit treatment that is based on the nationality of the investor. The Claimants have ignored this point entirely. To be clear, there is no evidence that the disparity in treatment alleged by the Claimants was based on a difference in nationality. Rather, all the evidence shows that Pemex settled Contract 809 in response to the effects of the tropical storm."[680]

C. THE "PUBLIC PROCUREMENT" EXCEPTION

(1) The Respondent's position

814. According to the Respondent, under Article 1108 of NAFTA and 14.12 of the USMCA, the articles on national treatment do not apply to "procurement by a Party or a state enterprise" (NAFTA Article1108.7a)) or "government procurement" (USMCA Article 14.125. a)). "The Claimants contend that the procurement exception does not apply because the acts in question 'do not pertain to any governmental purchase or obtaining of any goods or services'. Of course, the acts in question pertain to procurement."[681]

815. According to the Respondent, "[a] decision to enter into a procurement contract with a service provider naturally includes decisions regarding how to exit that procurement

[678] RPHB, ¶ 231.

[679] RPHB, ¶ 236.

[680] RPHB, ¶ 237.

[681] Rejoinder, ¶ 321.

contract. Both types of decisions are exempted from review under the NAFTA and the USMCA".[682]

(2) The Claimants' position

816. According to the Claimants,

> "Mexico ignores that 'government procurement' is a defined term under USMCA Article 1.5. It is the process by which Mexico obtains goods or services for government purposes and not with a view for use in the production or supply of goods for commercial sale. In the NAFTA context, the tribunal in *ADF Group* properly explained that this exception refers to the activity of obtaining by purchase goods and services. Mexico refuses to address USMCA Article 1.5 or the reasoning in ADF Group, both of which confirm that the 'government procurement' exception is not an automatic bar to assert a National Treatment claim."[683]

817. The Claimants recall that they

> "have not asserted any claims regarding the process that PEMEX used when entering into the 803 Contract, the 804 Contract, or the 821 Contract. Instead, the Claimants argue that PEMEX treated at least two Mexican companies (and their 809 Contract) more favorably than the Claimants and their contracts when PEMEX paid the Mexican companies for not issuing work orders using a daily rate for the remaining time on that contract."[684] (emphasis added)

(3) The Tribunal's analysis

818. In the Tribunal's view, none of the 803, 804 and 821 Contracts were "Government procurement" contracts, a concept which can only refer, as stated by the Claimants, to contracts for the supply of goods and services to be used by the contracting Government for its own purposes (*e.g.,* constructing a steel bridge in a public highway, as in the *ADF Group v. United States*).[685] In these types of contracts, it has been historically common for many Governments to have a preference for contracting with domestic, rather than foreign suppliers (as exemplified by the U.S. clause of "Buy American", at the heart of the dispute in the *ADF Group*), with a view to promoting the development of domestic suppliers, even

[682] RPHB, ¶ 239.

[683] CPHB, ¶ 31.

[684] CPHB, ¶ 32.

[685] **RL-0054**, *ADF Group Inc. vs United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003 ("***ADF Group***"), ¶ 161.

if that required setting aside the principle of "national treatment" for all suppliers, whether domestic or foreign. Preserving that possibility explains the carve-out for "government procurement" in Articles 14.12.5 a) of the USMCA and 1108.7 a) of NAFTA.

819. As indicated by the *ADF Group* tribunal[686], "procurement" is not defined in NAFTA Chapter 11, but it is defined in its Chapter 10, which is entitled "Government Procurement". And Article 1001.5 indicates that "procurement includes procurement by such methods as purchase, lease or rental, with our without an option to buy." The labelling of the Sections of Chapter 10 (*e.g.,* Section B, "Tendering Procedures" or Section C, "Bid Challenge") makes it clear that the focus is on the contracting process.

820. Even more fundamentally, as indicated by the Claimants, Article 1.5 of the USMCA defines specifically "government procurement" as "the process by which a government obtains the use or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale or use in the production or supply of goods or services for commercial sale or resale."[687]

821. In conclusion: none of the contracts at stake in this arbitration were "government procurement" contracts and, hence, they were not excluded from the provisions of the USMCA and NAFTA on National Treatment.

D. THE NATIONALITY OF INTEGRADORA AND ZAPATA

(1) The Respondent's position

822. For the Respondent,

> "[t]o successfully establish a violation of Article 1102 or Article 14.4 against Mexico, the Claimants must show that the comparator-investor is Mexican. That is what is meant in both Articles by the words 'own investors'. In this case, the Claimants are U.S. companies (Finley, MWS and Prize) who own Mexican entities (Bisell and Drake-Finley) that contracted with Pemex. They claim to be in like circumstances with other Mexican companies (Zapata and Integradora) that contracted with Pemex. The crucial question then is: who owns Zapata and Integradora. This question must be answered in order to properly compare them with the

[686] **RL-0054**, *ADF Group*, ¶ 161.
[687] **C-0005**, USMCA, Article 1.5; see CPHB, ¶ 31.

> Claimants (U.S. investors) and their Mexican subsidiaries. Otherwise, it is not a true comparison."[688]

823. For the Respondent,

> "[t]he requirement to establish Mexican ownership becomes more apparent when Article 1102 and Article 14.4 are read together with Article 1103 of the NAFTA and Article 14.5 of the USMCA ('most-favored nation treatment'). Like national treatment, the most-favored nation standards separately guarantee investors no less favorable treatment than that afforded, in like circumstances, to investors from third-party states, *i.e.*, Canada or states not party to the NAFTA or the USMCA. It is entirely possible that Zapata and Integradora are owned by nationals of third-party states, just as Bisell and Drake-Finley are owned by nationals of the United States. If that is the case, then the claims are not properly brought under Article 1102 or 14.4. The Claimants need to prove their case under Articles 1102 and 14.4. They have not done so."[689]

824. The Respondent further argues that

> "[a]t least one Tribunal has dismissed a similar claim brought under Article 1102 for this very reason. In *Vento Motorcycles v Mexico*, the U.S. claimant (Vento) created a joint venture with a Mexican company for the sale and marketing of motorcycles in Mexico. Ultimately, Vento alleged that Mexico imposed a less favorable import duty on Vento than on other Mexican companies. The tribunal considered these other Mexican companies to be investments, not investors, and concluded that Vento 'has not identified to whom or to what Vento should be compared *qua* investor'. The tribunal rejected the claim because Vento 'did not identify any of the Mexican owners of such corporations.' The United States supported this position in its submission as a non-disputing Party."[690]

(2) The Claimants' position

825. The Claimants argue that the 809 Contract[691] states that Integradora and Zapata are Mexican companies and reject Mexico's argument that they must further show that these Mexican companies are owned by Mexican nationals, as no such requirement is contained in the plain language of either the NAFTA or the USMCA.[692]

[688] RPHB, ¶ 232.
[689] RPHB, ¶ 233.
[690] RPHB, ¶ 234.
[691] **R-0098**, 809 Contract.
[692] CPHB, ¶ 33.

826. The Claimants further recall that, even if it was not necessary, they have provided information regarding Integradora, showing that it was owned by Mexican nationals.[693]

827. For the Claimants, Mexico has argued that the Claimants have not proven Zapata's ownership, but

> "Pemex knows who owns this company and, in light of Mexico's ease of obtaining documents from Pemex (for example, the Alegatos made in the 821 Contract administrative lawsuit), Mexico could have ascertained from PEMEX who owns Zapata. If Zapata were owned by anyone other than Mexican nationals, Mexico would have submitted that evidence. It did not. Mexico's failure to disclose evidence regarding the ownership of the Mexican companies should be deemed as an admission that Zapata and Integradora are Mexican companies."[694]

828. For the Claimants, this is consistent with the finding of the NAFTA tribunal in *Apotex v. United States*[695], which accepted that investors are necessarily at a disadvantage to the respondent State in terms of document discovery and noted that investors have such an impossible task when faced with incomplete documentary evidence that this requires to shift the burden at some point to the respondent State to rebut the investor's evidence. As the *Apotex* tribunal stated:[696]

> "[A]t some stage the evidential burden of proof shifts towards the respondent State and requires it to rebut the evidence adduced by the claimant. Otherwise, the claimant would be left to prove its case from whatever incomplete documentary evidence and witness testimony the respondent State may choose to present. That burden would be, invariably, an almost impossible task."

829. Hence, consistent with *Apotex v. United States*, if Mexico believed that either Integradora or Zapata were not Mexican companies, because they were not owned by Mexican nationals, it was incumbent upon Mexico to submit such evidence as, had it existed, it would have had easy access to it and could have submitted it. But it did not.[697]

---

[693] **C-0109**, Grupo IPS.

[694] CPHB, ¶ 35.

[695] **CL-0108**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014 ("***Apotex***"), ¶ 8.10.

[696] **CL-0108**, *Apotex*, ¶ 8.68.

[697] CPHB, ¶ 37.

(3) The Tribunal's analysis

830. In the Tribunal's view, the Claimants have submitted *prima facie* evidence that Integradora and Zapata were Mexican companies, and even provided additional information proving that, at least one of them, Integradora, was owned by Mexican nationals.

831. There is no legal provision in the Treaties requiring investors claiming a breach of the National Treatment obligations to ascertain who is the ultimate owner of a local company which they claim has been treated better than the foreign investor. Consistent with *Apotex v. United States*, if Mexico believed that both Integradora and Zapata were not Mexican-owned companies, it should have submitted evidence to that effect. It did not. Hence, the Tribunal may conclude that they were both Mexican companies.

E. THE "LIKE CIRCUMSTANCES" REQUIREMENT

(1) The Respondent's position

832. The Respondent argues that there were significant differences between the 809 Contract and the 803, 804 and 821 Contracts, including:

- The works under 809 Contract were suspended because of the flooding in one of the wells resulting from tropical storm Fernand.[698]
- 809 Contract expired naturally when its execution period ended.[699]
- Zapata e Integradora showed their intention to conciliate their discrepancies with PEP.[700]
- Zapata e Integradora proved that they had suffered adverse economic effects (*afectaciones económicas*), which were covered by PEP. This did not imply that they were paid the minimum amount of the contract.[701]

[698] Counter-Memorial, ¶¶ 291, 293.
[699] Counter-Memorial, ¶ 292.
[700] Counter-Memorial, ¶ 294.
[701] Counter-Memorial, ¶ 295.

- Zapata e Integradora requested an inspection of their equipment. [702]

833. Thus, according to the Respondent, the Claimants have not proved that the requirement of "like circumstances" applied.

(2) The Claimants' position

834. In the Claimants' opinion, Mexico does not address the decisions of prior NAFTA tribunals (like in *S.D. Myers v. Canada*) that have found that a comparator in the same economic or business sector satisfies the "like circumstances" requirement. Instead, Mexico engages in hair-splitting between the contracts entered into with the Claimants and the 809 Contract, identifying distinctions that are wholly irrelevant. In effect, Mexico attempts to create a new test for "like circumstances," converting it into "identical circumstances." There is no debate that Claimants and their contracts were in the same business or economic sector as Integradora and Zapata and the 809 Contract: engaging in work to extract hydrocarbons for Pemex in the Chicontepec field.[703]

835. For the Claimants, Mexico focuses on "a *force majeure*" event to claim that Integradora and Zapata were not in "like circumstances." But during the Hearing Mr. Finley's testimony explained that Claimants were equally affected by this event, tropical storm "Fernand".[704]

836. Even more fundamentally, the Claimants argue that the *force majeure* event had little to do with Pemex's payment to the Mexican nationals, as the amount paid to the Mexican nationals for the unrequested work under their contracts constituted approximately 90% of the total payment made, while the amount related to the force majeure event was only 8%, as shown in the *Acta Circunstanciada*:[705]

Payment for the "lack of assignment of work by PEP during the exercise of Contract 424043809"	US$ 13,493,484.80
Payment for the *force majeure* event	US$ 1,220,889.60
Plugging the Coapechaca 850 well	US$ 340,331.24

[702] Rejoinder, ¶ 164, fourth bullet.

[703] CPHB, ¶ 40.

[704] CPHB, ¶ 41.

[705] **C-0062**, *Acta Circunstanciada*, April 9, 2018.

Total	US$ 15,054,705.64

837. For the Claimants, Integradora and Zapata and their 809 Contract were in "like circumstances" as Claimants and their contracts, to the extent that Pemex stopped issuing work orders in both cases. However, Pemex resolved its failure to issue work orders to Integradora and Zapata by paying them US$ 42,167.14 per day for the remaining days under the 809 Contract. But, when faced with the exact same circumstances, Pemex did not pay Claimants but instead subjected them to prolonged litigation and a fake work order to trigger an administrative rescission.[706]

(3) The Tribunal's analysis

838. In the Tribunal's view, the Claimants have convincingly demonstrated that the *force majeure* event is not a significant factor when comparing the two cases, since the overall amount paid by PEP to Integradora and Zapata dwarfs the part of that compensation attributable to the flooding of the wells.

839. The Claimants are also right when pointing out key similarities between the two cases:

- Integradora and Zapata and the Claimants' companies were in the same business or economic sector, namely, providing oil drilling services to PEP.

- In both cases PEP failed to meet the minimum amount of the contract and stopped issuing work orders.

- In both cases the Contractor complained to PEP about the damage resulting from such lack of work orders.

840. The question for the Tribunal is this: Were there any other factors that could reasonably explain why PEP´s attitude in the two cases could have been legitimately so different? The Tribunal will thus, one by one, analyze the circumstances mentioned by the Respondent.

841. Mexico argues that 809 Contract expired naturally when its execution period ended. But this does not seem to be a relevant difference: 803 and 804 Contracts expired as well, and

[706] CPHB, ¶ 43.

were not rescinded; and 821 Contract was administratively rescinded at PEP's initiative, for the reasons discussed in paragraph 644 above. Thus, the manner how the contracts were terminated could not justify, as such, PEP's different treatment of the two cases.

842. Mexico further argues that "Zapata and Integradora showed their intention to conciliate their discrepancies with PEP," while the Claimants sued PEP in the Mexican courts, a decision that they took, at least in the case of 821 Contract -the Claimants argue-, at the prompting of some PEP's employees, in order to bring their grievances to the attention of PEP's senior management. In a similar vein, Mexico points to a more cooperative attitude of the 809 contractors when arguing that, on their own, they requested an inspection of their equipment.

843. This raises a fundamental issue: Could a more conciliatory approach of a contractor when raising a contractual grievance –*e.g.,* its willingness to resolve the issue through negotiations or conciliation, rather than resorting to the judicial system– justify a significantly different treatment by PEP of the contractor?

844. Indeed, this issue seems to be at the bottom of this arbitration, as the Claimants have repeatedly argued that the harsh treatment they got from PEP was in retaliation for their lodging of a suit against PEP in the Mexican courts.

845. After considering this fundamental issue, the Tribunal has reached the conclusion that the fact that the Claimants decided to go to the Mexican courts to enforce what they considered their contractual rights cannot reasonably justify such a severe discrepancy in the response they got from PEP as compared to Integradora and Zapata. The concept of "like circumstances" in Articles 14.4 of the USMCA and 1102 of NAFTA can only refer to the objective circumstances defining the investor's claim or situation, and cannot include how the investors try to sort out their contractual grievances with the national authorities. Considering otherwise would open the gates for governments' discrimination among different investors on the basis of their attitude, thereby sapping and even eviscerating the objective of the "national treatment" protection.

846. Finally, Mexico indicates that Zapata and Integradora proved that they had suffered adverse economic effects (*afectaciones económicas*) but they were not paid the minimum amount of the contract. This again, does not seem a relevant difference, as the Claimants' suits

against PEP made it clear that they had also suffered adverse economic effects from the *de facto* suspensions.

847. To conclude, concerning the gist of their economic grievance against PEP, the Claimants and Integradora and Zapata were in "like circumstances", as required by the USMCA and NAFTA.

F. THE DISCRIMINATORY INTENT "BASED ON NATIONALITY"

(1) The Respondent's position

848. According to the Respondent,

> "States are afforded a level of discretion in the context of national treatment. There is ample authority in the submissions of the Respondent to support the view that Article 1102 and Article 14.4 only prohibit treatment that is based on the nationality of the investor.[707] The Claimants have ignored this point entirely. To be clear, there is no evidence that the disparity in treatment alleged by the Claimants was based on a difference in nationality. Rather, all the evidence shows that Pemex settled Contract 809 in response to the effects of the tropical storm. For all the reasons above, the Claimants have not satisfied their burden."[708]

(2) The Claimants' position

849. The Claimants recall that in its initial Counter-Memorial, Mexico did not make reference to this new requirement and admitted that a National Treatment violation only requires Claimants to show (1) treatment, (2) "like circumstances" to a comparator, and (3) such treatment was less favorable than the comparator.[709]

850. For the Claimants, none of the awards cited by Mexico support this new requirement.

851. In *Total v. Argentina*,[710] the tribunal found that "a foreign investor who is challenging measures of general application as *de facto* discriminatory under Article 4 of the BIT has to show a *prima facie* case of nationality-based discrimination." But, the Claimants argue,

[707] Rejoinder, ¶ 329. See Counter-Memorial, ¶ 550.
[708] RPHB, ¶ 237.
[709] Counter-Memorial, ¶ 549.
[710] Rejoinder, ¶ 329, footnote 339.

"this analysis was conducted under a different treaty and do not apply to the facts of this arbitration."[711]

852. The Claimants add[712] that in the quote of *Feldman v. Mexico*, Mexico omitted a key sentence which does not stand for Mexico's view and reads:[713]

> "[I]t is not self-evident, as Respondent argues, that any departure from national treatment must be *explicitly* shown to be a result of the investor's nationality. There is no such language in Article 1102. Rather, Article 1102 by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances. In this instance, the evidence on the record demonstrates that there is only one U.S. citizen/investor, the Claimant that alleges a violation of national treatment under NAFTA Article 1102 […], and at least one domestic investor […] who has been treated more favorably. For practical as well as legal reasons, the Tribunal is prepared to assume that the differential treatment is a result of the Claimant's nationality, at least in the absence of any evidence to the contrary."

853. Thus, for the Claimants the plain language of Articles 14.4 of the USMCA and 1101 of the NAFTA includes no requirement to show that Mexico's disparate treatment was based on nationality. These treaty provisions merely require Claimants to show what Mexico originally asserted: (1) treatment, (2) "like circumstances" to a comparator, and (3) such treatment was less favorable than the comparator.

(3) The Tribunal's analysis

854. For the Tribunal, in *Total v. Argentina* what was at stake were the consequences of Argentina's Emergency Law and, specifically, the "pesification" of dollar-denominated electricity prices in the wake of the real's devaluation. It dealt with a general policy measure which applied to a huge number of companies operating in Argentina. And the tribunal's reasoning made sense in that particular case: to claim a breach of "national treatment" resulting from a *de facto* discrimination, you had to show that the Argentinian Government intended to discriminate particularly against foreign investors.

---

[711] CPHB, ¶ 45; citing **RL-0123**, *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, December 27, 2010, ¶ 213.

[712] CPHB, ¶ 46.

[713] **RL-0067**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶ 181.

855. This reasoning is irrelevant here, where there are only two cases to compare and Mexico has failed to demonstrate that it afforded to other oil services operators, either national or foreign, as a consequence of a general measure, the same treatment that it meted out to the Claimants.

856. Concerning *Feldman v. Mexico*, as indicated by the Claimants and contrary to Mexico's assertion, the tribunal reached a conclusion which this Tribunal shares:

> "For practical as well as legal reasons, the Tribunal is prepared to assume that the differential treatment is a result of the Claimant's nationality, at least in the absence of any evidence to the contrary."

G. THE TRIBUNAL'S CONCLUSIONS

857. In the Tribunal's view, the substantive conditions for the application of Article 1102 of the NAFTA on National Treatment apply in this case.

858. *First*, PEP entered into 821 Contract with the Claimants for the exploitation of hydrocarbons. Similarly, PEP also entered into a contract with two Mexican companies (Integradora and Zapata) for the exploitation of hydrocarbons (809 Contract).

859. *Second*, PEP stopped issuing work orders under 821 Contract and stopped paying Claimants because it lacked the budgeted funds. Similarly, it stopped issuing work orders under 809 Contract and stopped paying the Mexican companies because it lacked the budgeted funds.

860. However, PEP appears to have treated Claimants less favorably than the Mexican companies, even if they were in like circumstances. This was so because, unlike Claimants:

- PEP did not issue a purely artificial work order to the Mexican companies only to use it to administratively rescind their contract, it did not issue a unilateral *finiquito* and there was no attempt to draw down the entire performance bond, as was done in the case of the 821 Contract.

- The Mexican companies were not forced to initiate and continue legal proceedings before the TFJA and other superior courts (like the appeal court or the Supreme Court) to have the administrative rescission of their contracts annulled.

861. Instead, PEP paid the Mexican companies close to US$ 15 million and settled with them, as reflected in the "*Acta Circunstanciada*" agreed on April 9, 2018.

862. As already explained in paragraph 845 above, the Tribunal does not see merit in Mexico's contention that the Claimants and the Mexican companies under the 809 Contract were not under "like circumstances" because they had invoked *force majeure* to excuse performance. As Mr. Finley explained during the Hearing, the Claimants were equally affected by the *force majeure* event, tropical storm "Fernand". Besides, a review of the *finiquito* for the 809 Contract shows that the amount paid to the Mexican companies for the unrequested work under this contract constituted approximately 90% of the total payment made. In contrast, the amount related to the supposed *force majeure* event was only 8%. It is, therefore, hard to see how the Mexican companies and the Claimants are not in like circumstances. PEP stopped issuing work orders to both parties; however, PEP settled with the Mexican companies but did not do so with Claimants. Instead, they compelled Claimants to fight a prolonged litigation and used a bogus work order to trigger an administrative rescission.

863. To conclude, on balance, based on the facts of the case it is clear for the Tribunal that Mexican companies which were in "like circumstances" were treated by PEP more favorably than Claimants.

XIV. COSTS

864. This being a first phase of the arbitration dealing with jurisdiction and liability, to be followed by a *quantum* phase, the Tribunal has decided to postpone any decision on costs until the final Award or the termination of this arbitration.

XV. DECISION OF THE TRIBUNAL ON JURISDICTION AND LIABILITY

865. For the reasons set forth above, the Tribunal hereby decides as follows:

A. ON JURISDICTION

1. The Tribunal declares that it has jurisdiction to decide the following claims:

a) that Mexico breached Article 14.6 on MST of the USMCA as a result of the lack of due process and denial of justice resulting from delays by the Mexican courts in deciding the lawsuits related to the 803 and 804 Contracts.

b) that Mexico breached Article 1105 on MST and FET of the NAFTA as a result of the TUCMA Judgment which decided the contractual lawsuit related to the 821 Contract.

c) that Mexico breached Article 1105 on MST and FET of the NAFTA as a result of the TFJA Judgment, dated October 4, 2018, which upheld the administrative rescission by PEP of the 821 Contract.

d) that Mexico breached Articles 1105 on MST and FET of the NAFTA and Article 1102 on National Treatment of the NAFTA as a result of acts related to the 821 Contract which PEP or PEMEX carried out after March 25, 2018.

2. The Tribunal declares that it does not have jurisdiction on any of the other claims made by the Claimants in this arbitration.

B. ON LIABILITY

1. The Tribunal dismisses the claims that Mexico breached Article 14.6 on MST of the USMCA as a result of the alleged lack of due process and denial of justice resulting from delays by the Mexican courts in deciding the Claimants' lawsuits related to the 803 and 804 Contracts.

2. The Tribunal dismisses the claim that Mexico breached Article 1105 on MST of the NAFTA as a result of the TUCMA Judgment which decided the contractual lawsuit related to the 821 Contract.

3. The Tribunal declares that Mexico breached Article 1105 on MST and FET of the NAFTA as a result of the October 4, 2018, judgment of the TFJA which upheld the administrative rescission by PEP of the 821 Contract.

4. The Tribunal declares that Mexico breached Articles 1105 on MST and FET of the NAFTA and Article 1102 on National Treatment of the NAFTA as a result of the following acts by PEP related to the 821 Contract:

    a) The decision adopted on May 16, 2018, during a meeting of PEP's management in Villahermosa (Tabasco) (the "Villahermosa Meeting"), to call the Dorama Bond.

b) The issuance on November 10, 2021, of the unilateral finiquito of the 821 Contract Bond.

c) The continuation, after April 9, 2018 (*i.e.*, the date of the Acta Circunstanciada settling the dispute between PEP and Integradora and Zapata), of PEP's legal defense against the Claimants in the nullity proceedings decided by the TFJA Judgment on October 4, 2018.

d) Any other acts by PEP or Pemex which took place after March 25, 2018 and were carried out in preparation, or as a consequence, of the unilateral *finiquito* of the 821 Contract, like the calling of the Dorama Bond.

C. ON COSTS

The Tribunal decides to postpone any decision on costs until the final Award, or the termination by any other means, of this arbitration.

D. NEXT STEPS

Unless the Parties, by common accord, decide otherwise, the Tribunal will send for comments to the Parties, 30 days after the date of this Decision, a draft Procedural Order on the conduct of the next, *quantum* phase of this arbitration.

[Signed]

Dr. Franz X. Stirnimann Fuentes
Arbitrator

Date: October 30, 2024

[Signed]

Prof. Alain Pellet
Arbitrator

Date: October 29, 2024

[Signed]

Mr. Manuel Conthe Gutiérrez
President of the Tribunal

Date: October 30, 2024