UNDER THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES AND THE INSTITUTION RULES AND ARBITRATION RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT, AND CHAPTER 14 OF THE UNITED STATES-MEXICO-CANADA AGREEMENT

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

Claimants

v.

THE UNITED MEXICAN STATES

Respondent

STATEMENT OF CLAIM

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I. INTRODUCTION

1. Claimants were victims of Mexico's failed national strategy to reverse its declining oil production. In 2004, Mexico experienced a key moment in its history as an oil producing nation. Mexico's supergiant oilfield called Cantarell reached peak production and began to decline. This jeopardized Mexico's government revenues — approximately a third of which came from taxes on oil production — and, in turn, Mexico's sovereign credit rating. Thus, declining oil production from Cantarell was of national importance to Mexico.

2. Mexico had options. One was a very large oilfield called Chicontepec that was discovered in 1926 shortly before Mexico expropriated and nationalized its oil industry. Chicontepec reportedly contained more than 40% of Mexico's oil reserves. However, Chicontepec has a complex geology that presents technological and financial challenges in extracting oil. Multiple efforts to develop Chicontepec have rendered disappointing results.

3. Shortly after Cantarell's peak production, Mexico began an ambitious strategy to develop Chicontepec. The project would be the greatest investment in Mexico's oil history, requiring Petróleos Mexicanos or Pemex to drill a massive number of wells to reach high levels of oil production in an accelerated manner. Pemex is Mexico's national oil company that was charged with managing Mexico's oil production. The Mexican government has always owned and controlled Pemex, and has given Pemex certain State powers such as administrative rescission of contracts.

4. Claimants Finley Resources Inc. ("Finley"), MWS Management Inc. ("MWS"), and Prize Permanent Holdings, LLC ("Prize") were part of Mexico's strategy. They are three U.S. investors that made investments in Mexico through contracts with Pemex to develop Chicontepec. Pemex promised to request and pay for oilfield services (working over existing wells and drilling new wells). Overall, these contracts were valued at more than US$ 520 million.

5. To prepare for this work, Claimants made many investments. Among other things, they purchased equipment such as workover rigs and a drilling rig. They also purchased tools and materials such as drill pipe, fishing tools, and generators. They purchased trucks and trailers to use for housing and operations. They leased and purchased real estate. They hired and

trained employees and subcontractors. In addition, their contracts required them to provide substantial performance bonds. Overall, they invested more than US$ 30 million in Mexico.

6. Pemex never came close to requesting the expected contractual committed work. For the first contract, Pemex requested and paid for approximately half the contract value. Pemex cancelled all work requested under the second contract and paid nothing. Under the last contract, Pemex requested approximately 11% of that contract's value.

7. Pemex had repeatedly promised Claimants that "Pemex pays, Pemex pays." Their contracts had written representations from Pemex that the Mexican government had provided it with sufficient funds to satisfy the contractual commitments prior to executing the contracts. Yet, Pemex blamed a lack of budget for not requesting and not paying for the contractually committed work. After making significant investments to perform, Claimants were left bleeding cash with little, and then no hope of recovering their investment, no less their expected profit.

8. Under those circumstances, Claimants had no real choice but to agree with Pemex to terminate their first two contracts with Claimants, reserving their rights to recover damages against Pemex. As contemplated, Claimants initiated lawsuits against Pemex. Meanwhile, Pemex compromised with similarly-situated Mexican companies. After Claimants' lawsuits remained unresolved for over five years, Claimants initiated this arbitration. The Mexican courts did not administer justice promptly, completely, or impartially. All of this conduct by Pemex and the Mexican courts violated Claimants' investment protections of National Treatment and Fair and Equitable Treatment under the United States-Mexico-Canada Agreement ("USMCA").

9. What happened to Claimants' third contract was even more egregious. For the third contract, Claimants sued Pemex for repudiating it. Again, due to the change in national strategy, two years into that four-year contract, Pemex had not requested work for more than 100 days (and for more than 300 days overall). In response to their lawsuit, Pemex said it would not request any more work or pay anything more to Claimants. As a consequence, Claimants were unable to pay their subcontractors, among others, and were subjected to disparagement to their reputation with claims of fraud. This is all because Mexico decided to turn away from Chicontepec and Pemex refused to request and pay Claimants for work that it had promised.

10. Then, Claimants experienced the same retaliatory behavior from Pemex that other investors have complained of and is currently the subject of at least one pending arbitration against Mexico under the North American Free Trade Agreement ("NAFTA"). After months of telling Claimants that it had no budget to pay for the contractually committed work to justify its inactivity under the contract, Pemex claimed that it had issued a work order to drill a well for approximately US$ 1 million. It would be polite to call this work order questionable. Pemex did not follow the extensive process with Claimants to prepare the work order. Knowing that Claimants did not approve the work order, Pemex used their failure to perform to rescind the US$ 418 million contract. Pemex then had the audacity to try to call their US$ 41.8 million performance bond.

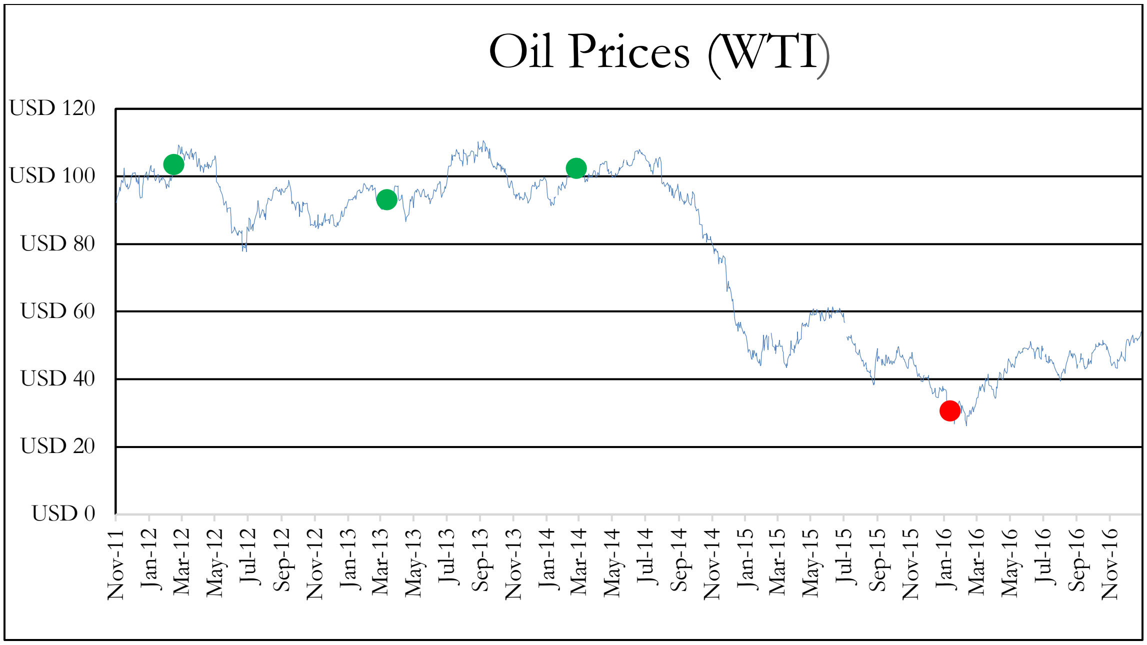
11. Worse, the Mexican courts condoned Pemex's behavior. After delaying resolution of the dispute, the court issued a decision that is legally indefensible. More concerning, Pemex knew in advance that the court intended to rule in its favor. Pemex told Claimants as much shortly beforehand.

12. Pemex's retaliation did not stop. It pushed to have the court order Claimants to pay the costs for their challenge to Pemex's rescission. Shortly after this Tribunal was constituted Pemex initiated the termination process for the last contract. Following the First Session during which Claimants expressed their concerns, Pemex claimed against the US$ 41.8 million performance bond. Notably, Pemex only paid Claimants approximately US$ 48 million of that US$ 418 million contract.

13. For this contract too, Pemex treated Claimants less favorably than it did Mexican nationals and their investments that were damaged because of Pemex's failure to request work in Chicontepec. Pemex agreed to pay the Mexican nationals while it has tormented Claimants and their investments. All of this conduct violates Claimants' investment protections of National Treatment and Fair and Equitable Treatment under the NAFTA and the USMCA.

14. Ultimately, Mexico's strategy to develop Chicontepec to reverse its declining oil production failed. The wells did not yield the expected production. Even when the price of oil was hovering around US$ 100, Pemex did not have the budget to fulfill its commitments. Eventually the price of oil collapsed in 2016, forcing Pemex to find ways out of contracts like Claimants' last contract. The graph below shows when Claimants executed their contracts with

Pemex (green dots) and when Pemex told Claimants that it would not request any more work under their last contract (red dot):



15. In a 2015 publication, a Pemex executive explained how Mexico simply changed its strategy on where to allocate capital during the progression of Claimants' three contracts:

> Q: How do you view the future of the North region?
>
> A: Given current gas prices, the North region has shown that it is not attractive to allocate CAPEX to areas where the production cost will be higher than the sale price. Chicontepec also showed that too much CAPEX was spent there for small returns. We now view it as a long-term project that needs to be thoroughly studied before production. Furthermore, much of the North was removed from PEMEX's portfolio during Round Zero, so we only need to keep working on limited areas of Burgos, Poza Rica, and Chicontepec. Finally, this was all before the budget cuts, which only confirmed that PEMEX will emphasize on areas where there is a higher bet of finding oil.

16. Mexico changed its strategy to focus away from Chicontepec. Mexico decided to shift its resources "where there is a higher bet of finding oil." Claimants' contracts and related investments were collateral damage to Mexico's decision. In accordance with well-settled principles of international law, Claimants seek full reparation for the losses resulting from Mexico's violations of the NAFTA, the USMCA, and international law, in the form of monetary compensation sufficient to remedy the consequences of Mexico's wrongful acts. As

of June 8, 2022, Claimants estimate their damages to be at least US$ 200 million plus interest and fees and costs associated with this proceeding.

17. This Statement of Claim proceeds as follows: Part II is the factual background of the case, describing Claimants, their investments, and the Mexican government's behavior that violated Claimants' investment protections. Part III is the legal argument, including why the Tribunal has jurisdiction and how Mexico and Pemex's behavior violates the NAFTA and the USMCA. Part IV contains the request for relief. Damages will be explained in more detail according to the procedural timetable.

II. FACTS

A. Parties

1. Claimants

a) Finley Resources, Inc.

18. Finley is an enterprise constituted under the laws of the United States and asserts claims on its own behalf under NAFTA Article 1116.[1]

19. Finley also asserts claims under NAFTA Article 1117(1) on behalf of Drake-Mesa, S. de R.L. de C.V. and Drake-Finley S. de R.L de C.V, Mexican enterprises that Finley owns and/or controls.[2] Finley (along with Prize) has had control over Drake-Finley and Drake-Mesa for all relevant events in this arbitration.[3]

20. Finley is an energy company based in Fort Worth, Texas.[4] Finley specializes in providing oilfield services.[5] It also conducts exploration and production activities, which include the exploration, development and production of oil and gas.[6] Finley currently operates in six U.S. states: Texas, Oklahoma, Utah, Wyoming, Mississippi, and New Mexico.[7]

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1 **C-0001**, Proof of Claimants' Nationality. Jim Finley is the founder and CEO of Finley. Claimants submit a witness statement from Mr. Finley in support of their claims.
2 **C-0012**, Ownership of Drake-Mesa. Mr. Finley owns the majority of Drake-Mesa Big Sky, LLC.
3 Witness Statement of L. Kernion, ¶¶ 26, 76; Witness Statement of J. Finley, ¶ 36.
4 Witness Statement of J. Finley, ¶ 2.
5 Witness Statement of J. Finley, ¶ 6.
6 Witness Statement of J. Finley, ¶ 6.
7 Witness Statement of J. Finley, ¶ 6.

21. Finley's work as an oilfield services company is relevant to this arbitration. Exploration and production companies utilize oilfield services companies like Finley to perform certain services when exploring, developing and producing hydrocarbons.[8] These services include drilling and completing new oil and gas wells and reworking or recompleting existing wells. This latter work can include repairing and optimizing an existing well.[9]

22. In general, drilling an oil and gas well requires:[10]

- Coordinating and positioning teams of employees (depending on the project, the number of employees and subcontractors can be in the hundreds).
- Preparing the wellsite by clearing, bulldozing, and flattening the land.
- Mobilizing the drilling rig (transporting it to the site to drill the borehole). This involves loading the rig onto a convoy of trucks to take it to the site. This often requires coordinating with local governments, and depending on the location, the time to mobilize can take days.
- Assembling the rig to drill the wellbore.
- Drilling the borehole to reach the target zone (where hydrocarbons are believed to exist) by penetrating through the subsurface, which can include various layers of rock and sediment. To provide perspective, the borehole can be several miles deep.
- Removing and disposing of the displaced rock and sediment.
- Inserting casing (steel pipe) and cementing it to complete the wellbore.

Mr. Finley provides a brief overview of this work:[11]

> Our work is often complex and capital intensive. Drilling wells miles beneath the surface requires significant preparation, the mobilization of huge equipment, the preparation of the surface area, the operation of a myriad of safety equipment, all while cycling "mud" through the wellbore. Assuming the well is successful and oil and gas is discovered, we complete the well by lowering and cementing pipe into the wellbore. Thereafter, we open holes in the pipe to allow the oil and gas to flow to the surface, where it is contained and transported to a point of sale. These activities are dangerous and cost many millions of dollars.

[8] Witness Statement of J. Finley, ¶ 10.
[9] Witness Statement of J. Finley, ¶ 10.
[10] Witness Statement of J. Finley, ¶ 15.
[11] Witness Statement of J. Finley, ¶ 11.

23. Oilfield services companies make significant investments depending on the project. These can include:[12]

- Purchasing equipment and other specialized materials.
- Purchasing or leasing real estate.
- Constructing infrastructure.
- Constructing access to the job site, including clearing land and building roads.
- Hiring staff.
- Providing lodging for the workers.
- Engaging subcontractors.

24. Finley has expertise in extracting hydrocarbons using methods such as fracking. Jim Finley generally explains the distinction between these methods and more traditional, vertical wells:[13]

> [O]il and gas is not always located in reservoirs that have fluid characteristics that allow the oil and gas to flow readily into a wellbore. Oil and gas is also located in geologically complex formations with tight, porous rock characteristics where the oil and gas does not readily flow into the wellbore. In this case, more complex and expensive techniques are required to produce oil and gas from these reservoirs.
>
> One of these techniques is hydraulic fracturing. After drilling the well, we pump engineered fluids at a high pressure into the wellbore. This causes vertical fractures or fissures to open. We then inject grains of sand mixed with a treatment fluid to keep the fracture open so the oil and gas can be extracted.

25. Other companies also perform oilfield services. These include Halliburton, Baker Hughes, Schlumberger, and Weatherford.[14] There are also Mexican companies that Finley competes with.[15] Some of these companies also have experience with developing complex resources similar to Finley.

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12 Witness Statement of J. Finley, ¶ 12.
13 Witness Statement of J. Finley, ¶¶ 16-17.
14 Witness Statement of J. Finley, ¶ 20.
15 Witness Statement of J. Finley, ¶ 20.

26. As explained further below, in 2011, Pemex began targeting international oilfield services companies to assist it with increasing Mexico's production of hydrocarbons.[16] Finley was one of those targets.

27. Ultimately, Finley entered into a substantial contract with Pemex to drill new oil wells, including using hydraulic fracturing technology. Overall, Finley anticipated that Pemex would request approximately US$ 418 million worth of work. To be able to perform, Finley had to provide Pemex with a US$ 41.8 million performance bond and, with its partners, it invested over US$ 30 million in Mexico to establish a significant presence there. It purchased and imported specialized and expensive equipment into Mexico, purchased real estate in Mexico, leased warehouses, moved its U.S. employees to Mexico, hired and trained local employees, and formed an enterprise (Drake-Finley) to manage certain operations.[17]

28. Pemex did not come close to fulfilling its commitment to Finley. Instead, Pemex performed erratically and eventually repudiated their contract, claiming it had no budget to continue asking Finley to perform work. When Finley sought relief from Mexico's court system, Pemex retaliated by issuing a questionable work order, which it relied upon to try to terminate the contract in violation of the agreed contract terms.

29. Then, the Mexican court system treated Finley arbitrarily and denied Finley justice. Pemex and Finley began litigating Finley's effort to obtain relief, but that court dismissed Finley's effort to obtain relief *sua sponte*, claiming that it should be arbitrated. Later, Finley challenged Pemex's effort to terminate the contract, but that court rendered an indefensible decision favoring Pemex. And Pemex's retaliation continues. Since initiating this arbitration, Pemex has sought to call Finley's US$ 41.8 million performance bond for a contract that Pemex unambiguously told Finley that it could no longer perform because it did not have the funds to pay Finley for any further work.

30. Both Pemex and Mexico's court system denied Finley a fair opportunity to realize the benefits of its investments in Mexico. Finley incurred significant losses and continues to incur such losses in defending against Pemex's baseless attacks against the performance bond. Mexico's abusive conduct with respect to Finley's investments is further explained in Section II.B below.

[16] *See* Witness Statement of J. Finley, ¶ 24; Witness Statement of L. Kernion, ¶¶ 12-13.
[17] Witness Statement of J. Finley, ¶ 36.

b) MWS Management, Inc.

31. MWS is an enterprise constituted under the laws of the United States and asserts claims on its own behalf under USMCA Article 14.E.2(a).[18]

32. MWS is an oilfield services company headquartered in Fort Worth, Texas. Mr. Finley owns 49% of the shares of MWS.[19] Finley and MWS share an office in Fort Worth.[20] MWS operates primarily in the Permian Basin, located in west Texas and eastern New Mexico.[21] When Pemex was targeting U.S. oilfield service companies to help increase its hydrocarbon production.

33. MWS (along with Bisell) entered into the first two contracts with Pemex that are the subject of this arbitration. These two contracts are known as the "803 Contract" and the "804 Contract." Overall, MWS anticipated that Pemex would request US$ 93 million worth of work from MWS under the contracts. To be able to perform, MWS had to provide Pemex with performance bonds of approximately US$ 10.3 million under the 803 and 804 Contracts, and with its partners, it invested over US$ 30 million in Mexico to establish a significant presence there. It purchased and imported equipment into Mexico, purchased real estate in Mexico, leased warehouses, moved its U.S. employees to Mexico, and hired and trained local employees.

34. As explained below, Pemex fell woefully short of upholding its end of the bargain. For the 803 Contract, Pemex requested and paid for just over 50% of the amount it had agreed to request from MWS. For the 804 Contract, Pemex cancelled the limited work it had requested and paid nothing to MWS. Pemex asked, and MWS agreed, to terminate the contracts, with MWS reserving its rights to pursue damages against Pemex. However, after over five years, Mexico's legal system did not render a decision on the merits of MWS's lawsuits. MWS was denied the opportunity to realize the benefits of its investments in Mexico and suffered significant losses, as a consequence of Mexico's actions. Mexico's conduct with respect to MWS's investments is explained in Section II.B below.

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[18] **C-0001**, Proof of Claimants' Nationality. Jim Finley is MWS's President. Claimants submit a witness statement from Mr. Finley in support of their claims.
[19] Witness Statement of J. Finley, ¶ 7.
[20] *See* Witness Statement of J. Finley, ¶ 2.
[21] Witness Statement of J. Finley, ¶ 7.

c) Prize Permanent Holdings, LLC

35. Prize is a company constituted under the laws of the United States and asserts claims on its own behalf under NAFTA Article 1116 and USMCA Article 14.E.2(a).[22]

36. Prize also asserts claims under NAFTA Article 1117(1) on behalf of Drake-Mesa, S. de R.L. de C.V., a Mexican enterprise that Prize owns and controls.[23] Prize owns shares of Drake-Mesa, and, for all relevant events in this arbitration, exercised managerial control over Drake-Mesa (along with Finley).[24]

37. Prize also assets claims under USMCA Article 14.E.2(b) on behalf of Bisell Construcciones e Ingeniería, S.A. de C.V. ("Bisell"), a Mexican enterprise that Prize owns and controls.[25] Prize owns 50% of the shares of Bisell, and, for all relevant events in this arbitration, exercised managerial control over Bisell.[26]

38. Through subsidiaries, Prize has owned and operated oil and gas wells throughout south Texas. Luis Dangeville Kernion established Prize in the early 2000s, and it is based in San Antonio, Texas.[27] In addition, Prize has had a long history of performing oilfield services in Mexico through its subsidiary Bisell. This includes projects with Pemex.[28] For example, Bisell has constructed and maintained offshore rigs, constructed pipelines, and performed well completions.[29] As a result, Prize (through Bisell) is experienced with conducting oil and gas operations with Pemex.[30]

39. Because of their existing relationship, Pemex encouraged Bisell to assist with increasing Mexico's hydrocarbon production.[31] Ultimately, through Drake-Mesa and Bisell, Prize entered into three contracts with Pemex to perform oilfield services. Overall, Prize anticipated that

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22 **C-0001**, Proof of Claimants' Nationality. Luis Kernion is Prize's founder and President. Claimants submit a witness statement from Mr. Kernion in support of their claims.
23 **C-0012**, Ownership of Drake-Mesa; Witness Statement of L. Kernion, ¶ 17.
24 Witness Statement of L. Kernion, ¶ 17; Witness Statement of J. Finley, ¶ 36.
25 **C-0011**, Ownership of Bisell.
26 Witness Statement of L. Kernion, ¶ 7.
27 Witness Statement of L. Kernion, ¶ 6.
28 Witness Statement of L. Kernion, ¶¶ 4, 5, 7, 12.
29 Witness Statement of L. Kernion, ¶ 7 .
30 Witness Statement of L. Kernion, ¶ 9.
31 Witness Statement of L. Kernion, ¶ 12.

Pemex would request from Bisell and Drake-Mesa approximately US$ 521 million worth of work.[32]

40. To be able to perform, Bisell (along with MWS, Finley, and Drake-Mesa) had to provide Pemex with three performance bonds, totaling US$ 52 million.[33] It also made significant investments — along with the rest of Claimants — to perform work for Pemex. These investments included establishing an enterprise of Mexico (Drake-Mesa), purchasing and importing equipment into Mexico, purchasing equipment within Mexico, purchasing real estate in Mexico, and hiring and training employees.[34] With Finley and MWS, Prize invested over US$ 30 million.[35]

41. As explained briefly above and further below, Pemex did not perform as agreed under any of the contracts. For one contract, Pemex repudiated the contract. Moreover, the Mexican legal system denied Bisell and Drake-Mesa justice. After five years, two Mexican courts never ruled on the merits of Bisell's claims for monetary damages against Pemex. For the third contract, the court rendered an indefensible decision favoring Pemex. And since initiating this arbitration, Pemex has sought to recover all of Finley and Drake-Mesa's US$ 41.8 million performance bond for one of the contracts that Pemex unambiguously had told Finley and Drake-Mesa that it did not have the funds to pay for any further work.

42. As a result of the conduct of Pemex and Mexico's court system, Prize did not get a fair opportunity to realize the benefits of its investments in Mexico. Prize also incurred significant losses. Mexico's conduct with respect to Prize's investments is explained in Section II.B below.

2. Mexico

43. Claimants' claims arise principally out of the conduct of the following state organs of Mexico:

- Petróleos Mexicanos is Mexico's state-owned oil and gas company. Pemex is an organ of the Mexican government with delegated governmental authority.

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32 Witness Statement of L. Kernion, ¶ 115.

33 As explained below, these bonds were as follows: US$ 4.8 million under the 803 Contract (MWS and Bisell), US$ 5.5 million under the 804 Contract (MWS and Bisell), and US$ 41.8 million under the 821 Contract (Finley and Prize).

34 Witness Statement of L. Kernion, ¶¶ 26-33.

35 Witness Statement of L. Kernion, ¶ 115.

- PEMEX Exploración y Producción S.A. de C.V. ("PEP") is a subsidiary of Petróleos Mexicanos. PEP is engaged in the exploration and production of oil and gas. Petróleos Mexicanos and PEP are referred to as "Pemex" unless otherwise indicated.

- Mexico's court system, including its civil court system and its administrative court system. Mexico's civil court system has jurisdiction over disputes between individuals and/or corporations that are not acting in the course of their business as authorities of the government of Mexico.[36] Mexico's administrative court system has jurisdiction over certain disputes between private parties and government agencies or entities.[37]

44. Two other state organs of Mexico are relevant to this arbitration. *First*, the Ministry of Energy is the Mexican government body responsible for defining energy policy and regulating the energy sector in Mexico.[38] *Second*, the National Hydrocarbons Commission (the "CNH") is the Mexican governmental agency responsible for gathering and maintaining information on oil and gas exploration, operating research projects on hydrocarbons, and regulating the exploration and production of hydrocarbons.[39]

45. The acts of all of these entities are attributable to Mexico.

a) Pemex

46. In 1922, Mexico was the world's second-largest producer of crude oil.[40] Until 1938, foreign oil companies largely controlled that production.[41] These companies included Royal Dutch Shell, Exxon, Sinclair, and Gulf Oil.[42]

47. In 1938, Mexico's then-President Lázaro Cárdenas ordered the nationalization of the international oil companies' assets.[43] Several months after the nationalization, President Cárdenas signed a decree creating Pemex and giving it exclusive rights to conduct all oil and gas activities in Mexico.[44]

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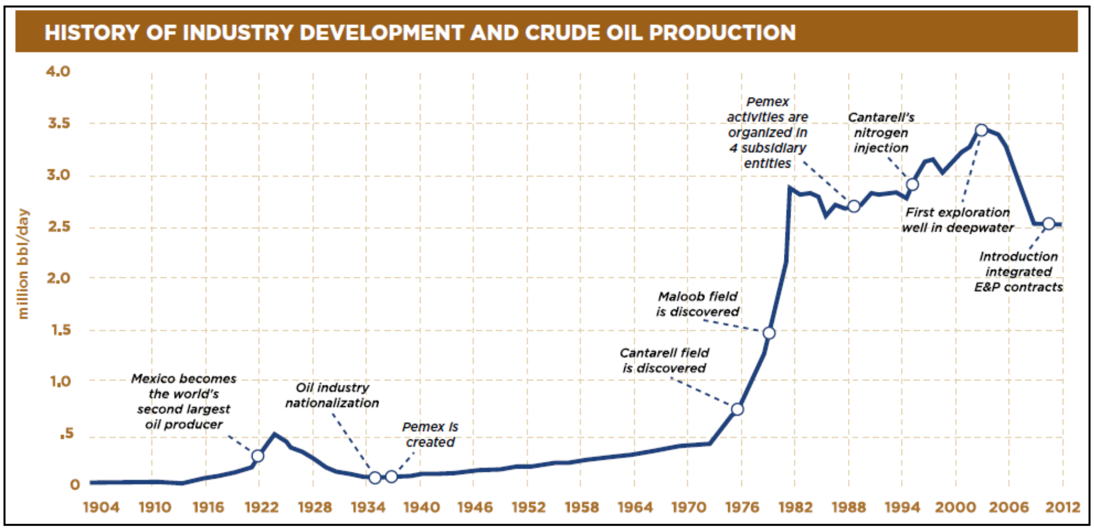
[36] Claimants submit the Expert Report on Mexican Law from attorneys Rodrigo Zamora Etcharren and Daniel Amézquita Díaz (referred to in the text hereinafter as, the "Expert Report on Mexican Law"). Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶¶ 2, 6 et seq.
[37] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶¶ 2, 25 et seq.
[38] **C-0018,** Mexico Oil and Gas Review (2012) at 12, 205, 302.
[39] **C-0018**, Mexico Oil and Gas Review (2012) at 12, 56.
[40] **C-0018**, Mexico Oil and Gas Review (2012) at 36.
[41] **C-0018**, Mexico Oil and Gas Review (2012) at 36.
[42] **C-0018**, Mexico Oil and Gas Review (2012) at 36.
[43] **C-0018**, Mexico Oil and Gas Review (2012) at 36.
[44] **C-0018**, Mexico Oil and Gas Review (2012) at 36.

48. Pemex inherited sizeable reserves with Mexico's expropriation. This allowed Mexico to be a net exporter until 1971.[45] That is when Mexico's domestic market demand started to outpace Pemex's production.[46] If Mexico wanted to return to being a net exporter, Pemex needed to invest more money in exploration and production. Pemex spent approximately US$ 3 billion between 1974-1976, and as a result, it discovered two significant fields (Cantarell and Maloob-1).[47]

49. Among these two fields, the Cantarell field was particularly significant. In the mid-1970s, Pemex's production rapidly increased, which was largely driven by Cantarell:[48]



Pemex's success caused it to become a critical component of Mexico's economy. Pemex's tax payments often comprise approximately a third of Mexico's revenue.[49] Mexico cannot dispute that its fiscal health has been inextricably tied to Pemex's oil production. As a result, both Pemex officials and Mexico's politicians have significant pressure to continue to increase production.

45 **C-0018**, Mexico Oil and Gas Review (2012) at 36.
46 **C-0018**, Mexico Oil and Gas Review (2012) at 36.
47 **C-0018**, Mexico Oil and Gas Review (2012) at 36.
48 **C-0018**, Mexico Oil and Gas Review (2012) at 36.
49 **C-0018**, Mexico Oil and Gas Review (2012) at 46 ("For many Mexicans, the country's control of the oil and gas industry is still a symbol of its sovereignty. As Pemex currently provides about one-third of the Mexican government's income, the subject is also very meaningful for the political parties."); **C-0019,** Plante, Michael D. and Jesus Cañas, *Reforma Energética: Mexico Takes First Steps to Overhaul Oil Industry*, FEDERAL RESERVE BANK OF DALLAS (Second Quarter 2014) at 16, https://www.dallasfed.org/-media/documents/research /swe/ 2014/swe1402g.pdf (last checked June 6, 2022).

50. However, Pemex's production began to decline in the early 2000s.[50] The production decline impacted Mexico's federal budget and its GDP. As such, it was an issue that both Mexico's politicians and Pemex needed to address.

51. In response, Mexico and Pemex developed strategies to reverse the trend of declining production. Part of this strategy was to develop a hydrocarbon field with complex geological structures called Chicontepec. Mexico called this the "Proyecto Aceite Terciario del Golfo" or ATG and approved it in 2006.[51] Given the technical challenges and size of Chicontepec, Pemex sought additional capacity to perform the work to meet ambitious production targets. As such, Pemex invited international oil and gas companies to perform certain work. This arbitration arises from Mexico's invitations to Claimants to perform such work.

b) Mexico controlled Pemex's actions against Claimants

52. Mexico has suggested that Pemex's actions are not attributable to Mexico. Mexico appears to suggest that Pemex is a "State Productive Enterprise," and thus, Mexico implies Pemex is somehow detached from the Mexican state. As explained below, this is both factually incorrect and wholly inconsistent with Mexico's prior positions on this matter. Under NAFTA and the USMCA, the actions of Pemex are attributable to Mexico.

53. Pemex is controlled by Mexico's government, which is codified in Mexico's hydrocarbon law.[52] This law provides, in part, that Pemex is the "exclusive property of the federal Government."

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[50] **C-0018**, Mexico Oil and Gas Review (2012) at 10.

[51] **C-0020,** *Proyecto Aceite Treciario Del Golfo Primera Revision Y Recomendaciones*, CNH (2010) at 6 ("As of 2006, the official name that Pemex-PEP has given to the exploration and exploitation of hydrocarbons in Chicontepec is the 'Aceite Terciario del Golfo' (ATG) project. . . This project, one of those that would require the largest investment in the country's oil history, has as an intention to develop a comprehensive strategy for the exploitation of the region, ambitious regarding the massive drilling of wells, in order to quickly reach high levels of oil production."), https://www.gob.mx/cms/uploads/attachment/file/109350/Proy_aceite_terciario_del_golfo._Primera_rev_y_recomendaciones.pdf (last checked June 6, 2022).

[52] *See, e.g.*, **CL-0013,** Ley de Petróleos Mexicanos, Diario Oficial de la Federación (Nov. 28, 2008) ("Pemex Law 2008") at Art. 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."); **CL-0014,** Ley de Petróleos Méxicanos, Diario Oficial de la Federación (2014) ("Pemex Law 2014"), Art. 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

54. Mexico's President appoints Pemex's executive management: the CEO and the Managing Directors of Pemex's four subsidiaries (Pemex Exploration and Production ("PEP"), Pemex Refining, Pemex Gas, and Basic Petrochemicals and Pemex Petrochemicals).[53] Mexico's Secretary of Energy is the chairman of Pemex's board of directors.[54] Mexico's Finance Minister is also on Pemex's board of directors. Six of its board members are government representatives, five represent the Pemex labor union, and Mexico's president nominates the four "independent, professional" members. The Mexican Senate reviews and approves these latter four members.[55]

55. Indeed, one of Pemex's former "independent, professional" board members explained that his role was cosmetic:[56]

> I have not contributed to a significant decision since joining the board in 2009 . . . Most of the important decisions are discussed at a governmental level, and then ratified by the committees. As independent board members we are on the margins of the debate, letting our opinions be heard, but not necessarily being listened to.

He concluded, ". . . in my opinion, very little has changed since the introduction of the independent board; Pemex is still largely ruled by the government."[57]

56. Because Mexico's President selects Pemex's senior executives, they do not always have the industry experience that would be customarily found in a major oil and gas company. This includes Pemex's senior leadership during the period relevant to this arbitration. For example, former Mexican President Felipe Calderón (2006-2012) appointed Juan José Suárez Coppel, an economist, as Pemex's CEO (2009-2012). Next, former Mexican president Enrique Pena Nieto (2012-2018) appointed Emilio Lozoya Austin, an economist and part of Mr. Nieto's election campaign, as Pemex's CEO (2012-2016). An appointment process of Mexico's President selecting Pemex's CEO is not indicative of Pemex being an independent oil company, as Mexico has suggested.

Federal District [Mexico City], without prejudice to its ability to establish other domiciles, in Mexico or abroad, in order to carry out its activities.").

53 **C-0018**, Mexico Oil and Gas Review (2012) at 9. As noted earlier, unless a distinction is necessary, Claimants use "Pemex" to refer to both Pemex (parent) and "PEP" (subsidiary).

54 **C-0018**, Mexico Oil and Gas Review (2012) at 9.

55 **C-0018**, Mexico Oil and Gas Review (2012) at 9.

56 **C-0018**, Mexico Oil and Gas Review (2012) at 9.

57 **C-0018**, Mexico Oil and Gas Review (2012) at 18.

57. In fact, Pemex explains how it differs from other international oil companies in its 2010-2024 Business Plan. Pemex must balance between the different roles it plays in the Mexican economy with various actors who have their own interests.[58] Pemex views itself as the main provider of energy to Mexico and plays a "predominant role" in the growth of Mexico's economy and its energy security. Pemex is also the main contributor to public finances and the entity responsible for the supply of main oil products.[59]

58. In this regard, Pemex explained its strategic importance to Mexico in a 2012 "investor presentation."[60] Pemex contributes approximately one-third of Mexico's federal budget. The Mexican Congress approves Pemex's budget, and thus, Pemex has explained that its budget is part of the federal budget.[61]

59. Moreover, Pemex has promoted its financial interconnectivity with the Mexican government. In its investor presentation, in this regard, Pemex relied on the following statements from international ratings agencies such as Moody's, S&P, and Fitch:[62]

> - "Although PEMEX's debt is not guaranteed by the Mexican government, our ratings reflect implicit government support given the company's strategic importance to the government and nation."- *Moody's*
> - "Our ratings on PEMEX (BBB) reflect our opinion that there is an "almost certain" likelihood of the company receiving extraordinary government support; therefore, we equalize our ratings on PEMEX with those on Mexico."- *S&P*
> - "PEMEX's ratings (BBB) reflect its link to the government of Mexico and the company's fiscal importance to the sovereign."- *Fitch*

This further shows that Pemex's financial well-being is equated with that of Mexico's.

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58 **C-0021,** Business Plan for Pemex and its Subsidiaries 2010-2024 (June 1, 2010) at 4 ("Pemex, unlike international oil companies, to be successful In achieving your business objectives, you must strike a balance between the different roles it plays in the national economy, where they participate multiple actors and interest groups, with influence on decisions strategic.").

59 **C-0021,** Business Plan for Pemex and its Subsidiaries 2010-2024 (June 1, 2010) at 4 ("[Pemex] is the main contributor to public finances and is the responsible for supplying the main oil products.").

60 **C-0022,** Pemex Investor Presentation (Sept. 2012) at 20-21.

61 **C-0022,** Pemex Investor Presentation (Sept. 2012) at 20.

62 **C-0022,** Pemex Investor Presentation (Sept. 2012) at 21.

60. The National Hydrocarbons Commissions or "CNH" is Mexico's regulator of its hydrocarbon sector. Its former president accurately described Pemex: "[l]egally speaking, Pemex is not a company."[63] Rather, "it is a government entity."[64] He continued to explain how Pemex's role within the Mexican government forced it to focus on short-term political strategies rather than corporate, long-term goals of creating value:[65]

> "Pemex doesn't have shares, shareholders or capital. It is a government entity, which has been driven by a short-term strategy. Even after the legal reform of 2008, it is still not clear what the legal mandate of Pemex is. Even though Congress introduced in Article 7 of the Pemex Law the mandate to create value, this mandate is among several objectives in the article. So, despite the intention, it is still not clear whether Pemex's objective in practice is to create value. Based on Pemex's results and current strategy, it would seem that short-term production goals are currently driving Pemex, rather than the long-term goal of creating value."
>
> The President of the CNH believes that Pemex is currently focusing too much on the implications of its strategy for Mexico as a whole, rather than simply focusing on the company. "Pemex should behave in an efficient and competitive way like other NOCs do, and concentrate on maximizing value, because these objectives would go a long way to reducing costs and increasing efficiency. And

61. Additionally, Pemex has made other public representations before U.S. courts that it is part of the Mexican government. Pemex has used this fact in arguing that it has sovereign immunity

[63] **C-0018**, Mexico Oil and Gas Review (2012) at 12.
[64] **C-0018**, Mexico Oil and Gas Review (2012) at 12.
[65] **C-0018**, Mexico Oil and Gas Review (2012) at 12.

under U.S. law. As recently as 2016, Pemex argued that it should be afforded with the same immunity as the Mexican government because of Mexico's control over it:[66]

> Pursuant to Article 25 of the Constitution of the United Mexican States and the Petróleos Mexicanos Act, Petróleos Mexicanos (a government-owned productive company) and its Government-Owned Subsidiary Productive Companies (among them Pemex Exploración y Producción and Pemex Transformación Industrial), are under the total control and exclusive ownership of the Mexican government. . . The chairman of the Board of Directors of Petróleos Mexicanos is the Secretary of Energy of the Mexican government. . . The budget of Petróleos Mexicanos and of its Government-Owned Subsidiary Productive Companies is drafted by the Federal Executive Branch and authorized by the Congress of the Unión. . . The employees of government-owned productive companies are public servants subject to the regime of responsibilities set by the Mexican Congress.

62. Pemex has also made similar representations to the United States Securities and Exchange Commission. For example, when offering bonds to the U.S. market, Pemex admitted that (1) it and its subsidiaries, including PEP, are public entities; (2) the federal government controls it and its budget; and (3) the federal government can intervene in its commercial and operational affairs:[67]

> ***The Mexican Government controls PEMEX and it could limit PEMEX's ability to satisfy its external debt obligations or could reorganize or transfer PEMEX or its assets.***
>
> Petróleos Mexicanos is a decentralized public entity of the Mexican Government, and therefore the Mexican Government controls us, as well as our annual budget, which is approved by the *Cámara de Diputados* (Chamber of Deputies). However, our financing obligations do not constitute obligations of and are not guaranteed by the Mexican Government. The Mexican Government has the power to intervene directly or indirectly in our commercial and operational affairs. Intervention by the Mexican Government could adversely affect our ability to make payments under any securities issued by us.

> The Mexican Government would have the power, if the *Constitución Política de los Estados Unidos Mexicanos* (Political Constitution of the United Mexican States) and federal law were amended, to reorganize PEMEX, including a transfer of all or a portion of Petróleos Mexicanos and the subsidiary entities or their assets to an entity not controlled by the Mexican Government. Such a reorganization or transfer could adversely affect production, cause a disruption in our workforce and our operations and cause us to default on certain obligations. See also "—Considerations Related to Mexico" below.

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[66] **C-0067,** *Declaration of Julio Mora Salas, Castillo, et al. v. P.M.I. Holdings, N.S., Inc., et al.*, No. 4:14-cv-03435, ECF 174-1, at ¶¶ 2-5 (S.D. Tex. Apr. 25, 2016). The court accepted Pemex's argument. **C-0024**, *Castillo, et al. v. P.M.I. Holdings, N.S., Inc., et al.*, 4:14-CV-03435 (S.D. Tex. Jul. 13, 2016) ("Because the Pemex Defendants are foreign sovereigns under the FSIA, and because Plaintiffs have failed to establish that an exception to foreign sovereign immunity applies, the FSIA requires the Court to grant the Pemex Defendants' Motion to Dismiss. Accordingly, all claims against them must be dismissed.").

[67] **C-0025,** Pemex Form 20-F, United States Securities and Exchange Commission at 8, 11 (Dec. 31, 2010), https://sec.report/lux/doc/1321455 (last checked June 6, 2022).

Petróleos Mexicanos with the central planning and management of Mexico's petroleum industry. On July 17, 1992, the Mexican Congress created the subsidiary entities out of operations that had previously been directly managed by Petróleos Mexicanos. Petróleos Mexicanos and its four subsidiary entities, Pemex-Exploration and Production, Pemex-Refining, Pemex-Gas and Basic Petrochemicals and Pemex-Petrochemicals, are decentralized public entities of the Mexican Government, and each is a legal entity empowered to own property and carry on business in its own name.

Pemex's CEO certified these statements were true :[68]

I, Juan José Suárez Coppel, certify that:

1. I have reviewed this annual report on Form 20-F of Petróleos Mexicanos;

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

63. Finally, Pemex admits in its three investment contracts with Claimants that PEP is part of the Mexican government:[69]

> It is 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 . . .

64. The above evidence is a sample of the publicly-available evidence that shows Pemex's acts are attributable to the Mexican government. If Mexico submits evidence in support of its suggestion that Pemex's acts are not, Claimants reserve their rights to respond and supplement the above.

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[68] **C-0025,** Pemex Form 20-F, United States Securities and Exchange Commission at 188 (Dec. 31, 2010), https://sec.report/lux/doc/1321455 (last checked June 6, 2022).; *see also* **C-0026,** Pemex Form 20-F, United States Securities and Exchange Commission (Dec. 31, 2011); **C-0027,** Pemex Form 20-F, United States Securities and Exchange Commission (Dec. 31, 2012), https://www.sec.gov/Archives/edgar/data/932782/000119312513187870/d528399d20f.htm (last checked June 6, 2022); **C-0028,** Pemex Form 20-F, United States Securities and Exchange Commission (Dec. 31, 2013), https://www.pemex.com/ri/reguladores/ReportesAnuales_SEC/2013_20F_i.pdf; **C-0029,** Pemex Form 20-F, United States Securities and Exchange Commission (Dec. 31, 2014), https://www.sec.gov/Archives/edgar/data/932782/000119312515162672/d913051d20f.htm; **C-0030,** Pemex Form 20-F, United States Securities and Exchange Commission (Dec. 31, 2015) https://www.sec.gov/Archives/edgar/data/932782/0001193125165919 (pemex.com) (last checked June 6, 2022); **C-0031,** Pemex Form 20-F, United States Securities and Exchange Commission (Dec. 31, 2016), https://www.pemex.com/ri/reguladores/ReportesAnuales_SEC/2016_20F_i.pdf (last checked June 6, 2022).

[69] **C-0032,** 803 Contract; **C-0033,** 804 Contract; **C-0034,** 821 Contract.

c) Mexico controlled the actions of its court system

65. Under international law the actions of Mexico's court system are attributable to Mexico.[70] Mexico has not claimed otherwise. If Mexico asserts that acts of its court system are not attributable to it, Claimants reserve their rights to respond accordingly.

B. Claimants' investments in Mexico

66. Claimants made numerous investments in Mexico. *First*, they entered into three contracts with Pemex to perform various oilfield services as part of Mexico's effort to extract hydrocarbons.[71] *Second*, they provided approximately US$ 52 million in performance guarantees to perform such work (under each of the three contracts). *Third*, Claimants purchased equipment and imported it into Mexico to perform work for Pemex. *Fourth*, Claimants purchased and leased real estate for its operations in Mexico. *Fifth*, Claimants hired and trained local employees and sent their U.S. employees to Mexico to perform the work. *Sixth*, Claimants established a local entity that managed their operations under their contracts with Pemex. The background of how Claimants made these investments in Mexico is provided below.

1. Pemex seeks to increase production in Chicontepec

67. The facts behind Claimants' entry into Mexico should not be controversial. In the 1970s, Mexico's production of oil and gas rapidly increased.[72] As explained above, this was the result of Pemex's discovery of the Cantarell field.

68. However, in 2004, Pemex announced that Cantarell production was due to peak in 2006. When 2006 arrived, the field had already peaked, and production from it was declining at a rate of around 15% per year.[73] Overall, Mexico's decline in production was in spite of Pemex's increasing investment:[74]

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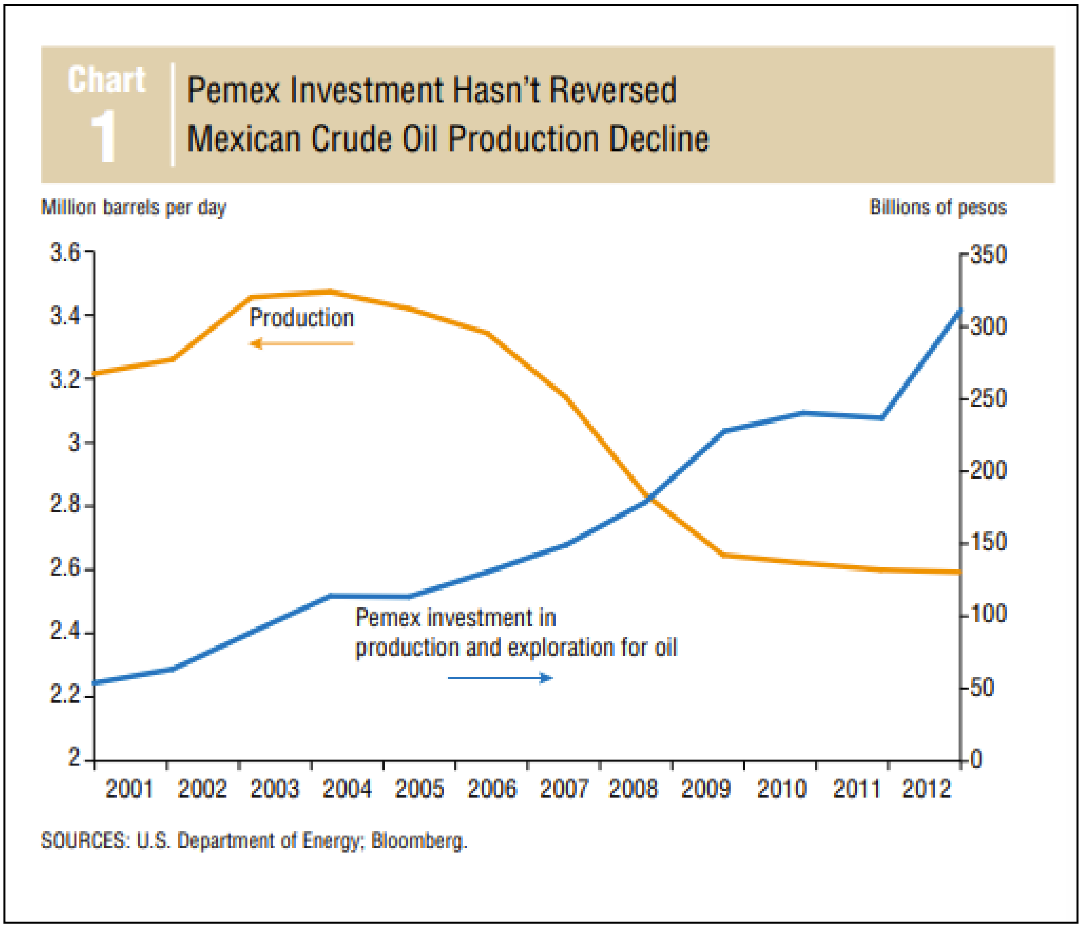
[70] See Section III.B below.

[71] As explained below, these bonds were as follows: US$ 4.8 million under the 803 Contract (MWS and Bisell), US$ 5.5 million under the 804 Contract (MWS and Bisell), and US$ 41.8 million under the 821 Contract (Finley and Prize).

[72] *See* Paragraph 49 above.

[73] **C-0018**, Mexico Oil and Gas Review (2012) at 37.

[74] **C-0019,** Plante, Michael D. and Jesus Cañas, *Reforma Energética: Mexico Takes First Steps to Overhaul Oil Industry*, FEDERAL RESERVE BANK OF DALLAS (Second Quarter 2014) at 16, https://www.dallasfed.org/-/media/documents/research/swe/2014/swe1402g.pdf (last checked June 6, 2022).



69. The decline in production was problematic for Mexico. Oil and gas account for around 5% of Mexico's GDP.[75] As noted above, oil also accounted for approximately one third of Mexico's federal revenues.[76] Because of this reliance on hydrocarbons, commentators explained that Mexico becoming a net oil importer could result in "an economic crisis of tremendous proportions":[77]

[75] **C-0019,** Plante, Michael D. and Jesus Cañas, *Reforma Energética: Mexico Takes First Steps to Overhaul Oil Industry*, FEDERAL RESERVE BANK OF DALLAS (Second Quarter 2014) at 16, https://www.dallasfed.org/-/media/documents/research/swe/2014/swe1402g.pdf (last checked June 6, 2022).

[76] **C-0018**, Mexico Oil and Gas Review (2012) at 31; **C-0035,** *PEMEX General Director Carlos Morales-Gil on PEMEX's E&P activities in Mexico* (June 10, 2013) YOUTUBE, https://www.youtube.com/watch?v=N7SZK11f2RI (last checked June 6, 2022).

[77] **C-0018**, Mexico Oil and Gas Review (2012) at 26.

> "If Mexico becomes a net oil importer we are going to have an economic crisis of tremendous proportions, because we are going to be fiscally bankrupt, and the states in Mexico depend largely on the finance provided by the federal government," says Miriam Grunstein, Division of Legal Studies at CIDE, "and political control of the state depends on how much the federal government gives to the states, and to the municipalities."

70. Mexico needed to reverse the downward trend of its oil production. One possibility was to increase production in an onshore region called the Chicontepec basin or just Chicontepec. This basin is extremely large, with over 6,200 km^2 of terrain:[78]

MAJOR MEXICO OIL AND GAS FIELDS

Several major oil and gas deposits in Eastern Mexico are likely to attract significant production activity under deregulation.

Source: *Southwest Economy*, Federal Reserve Bank of Dallas, Second Quarter 2014

[78] **C-0036,** Graves, *Patrick, Mexico's Energy Deregulation Could Benefit Texas*, TEXAS COMPTROLLER (June 2015), https://comptroller.texas.gov/economy/fiscal-notes/2015/june/energy.php (last checked June 6, 2022).

71. The Chicontepec basin was discovered in 1926. It started producing hydrocarbons in 1952.[79] In 2009, Pemex reported that the original volume of crude oil reserves in Chicontepec was an estimated 136.78 billion barrels, of which 501 million were proven reserves.[80]

72. Although Mexico has known for some time that Chicontepec is an extensive resource of hydrocarbons, the CNH explains that developing Chicontepec profitably has been difficult and expensive compared to other areas in Mexico.[81] Chicontepec has complex geological characteristics: its deposits have low permeability (the oil does not flow easily), are generally compartmentalized, and have a high clay content.[82] Thus, fully exploiting Chicontepec had always been postponed because of the low productivity of its wells, the complex internal structure of its deposits, and the technical and economic challenges it presented in extracting hydrocarbons.[83]

73. During the 1980s, Pemex drilled 79 exploration wells, and 61 of them were producers.[84] In addition, Pemex partially developed several fields into the 1990s. Moreover, it conducted studies in other fields that it had discovered. Even though Chicontepec began producing in 1952, it was considered to be at the initial stages of development by the early 2000s.[85] Thus, when Mexico's oil production began to decline, Chicontepec was an attractive option to develop further.

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[79] **C-0018**, Mexico Oil and Gas Review (2012) at 264.

[80] **C-0037,** Project Tertiary Oil of the Gulf: First Review and Recommendations, CNH (2010) at 3-5.

[81] **C-0037,** Project Tertiary Oil of the Gulf: First Review and Recommendations, CNH (2010) at 3 ("However, 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."); **C-0018**, Mexico Oil and Gas Review (2012) at 11.

[82] **C-0037,** Project Tertiary Oil of the Gulf: First Review and Recommendations, CNH (2010) at 3; **C-0018**, Mexico Oil and Gas Review (2012) at 11, 22

[83] **C-0037,** Project Tertiary Oil of the Gulf: First Review and Recommendations, CNH (2010) at 3 ("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.").

[84] **C-0037,** Project Tertiary Oil of the Gulf: First Review and Recommendations, CNH (2010) at 4 ("Based on recommendations generated through various internal studies at Pemex-PEP, during the 1980s Pemex drilled 79 exploratory wells, of which 61 were producing.").

[85] **C-0037,** Project Tertiary Oil of the Gulf: First Review and Recommendations, CNH (2010) at 5 ("Thus, Chicontepec, and its successor, the Tertiary Oil of the Gulf (ATG) project, despite having begun activities in 1952, today is in a stage of initial production. . . .").

74. In 2006, President Vicente Fox announced a new investment plan to revitalize Chicontepec.[86] Pemex would invest US$ 37.5 billion over a 20-year period with the intention of boosting oil output to one million barrels per day.[87] Pemex estimated this would require drilling as many as 20,000 wells to reach this production output.[88] To attain these levels, Pemex would require different technologies and new operational techniques. However, by the end of 2009, production from Chicontepec had not exceeded 32,000 barrels per day.[89] This is despite Pemex having spent approximately US$ 11.1 billion between 2006 and 2009.[90]

75. Around this time, the CNH was formed and began operations.[91] As noted above, Mexico created the CNH in 2008 as part of what was then called Mexico's "energy reform."[92] The CNH was to be an independent regulator for the upstream oil and gas sector that could collect geological and geophysical information to be an arbiter of the country's oil and gas assets. Although Pemex remained the sole entity that could exploit oil and gas, creating the CNH laid the groundwork for potential future reforms that would invite other investors and stakeholders to participate. Relevant here, the CNH was charged with regulating all investment, exploration, drilling, and development plans for upstream operators in Mexico, including Pemex which was the only company that could hold a license at the relevant time.

76. One of the CNH's first actions was a review of Pemex's development of Chicontepec. The CNH was particularly critical.[93] Pemex was drilling a high number of wells with few tangible results. Over a year and a half, Pemex drilled 2,000 wells, with only half producing oil. The following graph contrasts Pemex's production projections ("ACB") in 2006, 2008, and 2009

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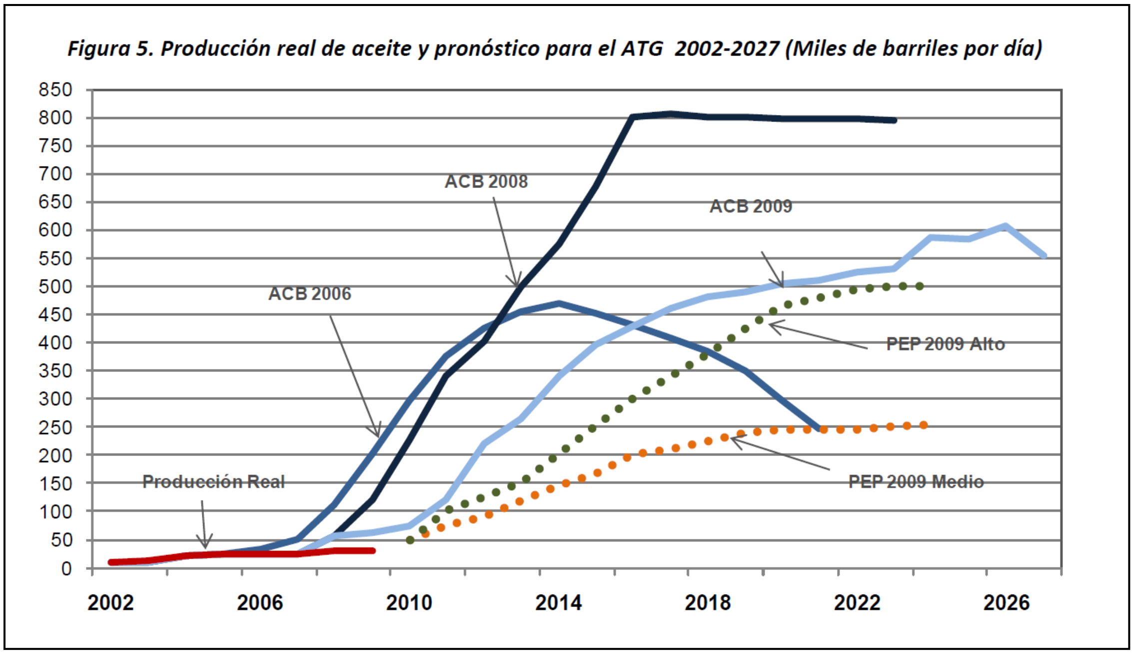
86 **C-0018**, Mexico Oil and Gas Review (2012) at 264.
87 **C-0018**, Mexico Oil and Gas Review (2012) at 264.
88 **C-0018**, Mexico Oil and Gas Review (2012) at 264.
89 **C-0037,** Project Tertiary Oil of the Gulf: First Review and Recommendations, CNH (2010) at 7 ("[I]t can be highlighted that until the end of 2009 the ATG project had not exceeded the production of 32 thousand barrels per day.").
90 **C-0018**, Mexico Oil and Gas Review (2012) at 264.
91 **C-0018**, Mexico Oil and Gas Review (2012) at 264.
92 **C-0018**, Mexico Oil and Gas Review (2012) at 12; **C-0038,** Pedro Alcalá, *CNH: A Brief Explanation*, MEXICO BUSINESS NEWS (Nov. 11, 2021), https://mexicobusiness.news/oilandgas/news/cnh-brief-explanation (last checked June 6, 2022).
93 **C-0018**, Mexico Oil and Gas Review (2012) at 264; *see generally* **C-0037,** Project Tertiary Oil of the Gulf: First Review and Recommendations, CNH (2010).

from Chicontepec or "ATG" in thousands barrels of oil per day against Pemex's actual results ("Producción Real"):[94]



As can be seen, Pemex was not meeting its production targets. Moreover, the CNH observed that if Pemex continued to drill using its current technology and considering the productivity of the wells drilled, the ATG project would not turn cash-flow positive until six years *after* its original projected termination date.[95] One CNH commissioner commented, "We came to the conclusion that there was a major problem in terms of project management. In our opinion, the approach that had been implemented was incorrect."[96]

77. One main criticism was that Pemex was prioritizing production targets — and expending too much capital to do so — instead of focusing on understanding the complex geology of Chicontepec, which in turn might render better production results. Pemex responded to the CNH's recommendations and scaled back its drilling. Pemex went from drilling 794 wells in 2009 to 438 in 2010 to 322 in 2011.[97] Pemex also followed the CNH's recommendation to study Chicontepec and learn how to implement technologies and operational techniques to yield better results.[98] By the end of 2011, the average number of operating wells increased

[94] **C-0037,** Project Tertiary Oil of the Gulf: First Review and Recommendations, CNH (2010) at 9.
[95] **C-0037,** Project Tertiary Oil of the Gulf: First Review and Recommendations, CNH (2010) at 28.
[96] **C-0018**, Mexico Oil and Gas Review (2012) at 266.
[97] **C-0018**, Mexico Oil and Gas Review (2012) at 264.
[98] **C-0039,** Mexico Oil and Gas Review (2013) at 72.

again, and output improved from 44,700 barrels of oil per day to 63,900 barrels of oil per day.[99] Notably, this was around the time that Pemex tendered bids for contracts to workover (restore) wells in Chicontepec, one of which would become Claimants' "803 Contract."[100]

78. One former CNH commissioner made an important observation. He noted that Pemex would need help to develop Chicontepec.[101] No major company was operating a deposit like Chicontepec by itself. Instead, dozens of companies were operating fields of similar size and complexity. Similarly, the CNH observed that developing Chicontepec would require a sizeable number of wells, "reaching the extreme of what would be possible for Pemex to handle."[102]

79. The former CNH commissioner agreed that it was impossible for one company like Pemex to drill thousands of wells per year and to take care of those wells every day.[103] If Pemex wanted to be successful in developing Chicontepec, he believed that it would need many other companies to participate. He suggested that an integrated service contract could work for Pemex to be successful in Chicontepec.[104]

80. During this time, Pemex had been recruiting international oilfield services companies to work in Mexico, including U.S. oilfield services companies. Mexico likened Chicontepec to an unconventional resource because of its geological complexity, which required advanced technology to extract hydrocarbons.[105] U.S. companies had this experience because of the recent shale revolution in Texas, which abuts Mexico.[106]

81. To recruit international oilfield services companies, Pemex officials were promoting opportunities to invest in Mexico. Luis Kernion explains:[107]

> Around this time, I was building pipelines for Pemex so I was around Pemex officials almost every day. The high-level Pemex officials that I was in regular communication with included the Chicontepec managers at Pemex. I was also in contact with Carlos Morales Gil, the Director General of Pemex Exploration and

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[99] **C-0018**, Mexico Oil and Gas Review (2012) at 264.
[100] **C-00040**, International Public Tender FTA Number 18575051-582-11 (2011) (803 Contract), http://dof.gob.mx/nota_detalle_popup.php?codigo=5217444 (last checked June 6, 2022).
[101] *See* **C-0018**, Mexico Oil and Gas Review (2012) at 267.
[102] **C-0037,** Project Tertiary Oil of the Gulf: First Review and Recommendations, CNH (2010) at 51.
[103] **C-0018**, Mexico Oil and Gas Review (2012) at 267.
[104] **C-0018**, Mexico Oil and Gas Review (2012) at 267.
[105] **C-0018**, Mexico Oil and Gas Review (2012) at 268.
[106] *See, e.g.*, Witness Statement of J. Finley, ¶ 28.
[107] Witness Statement of L. Kernion, ¶ 12.

> Production (appointed by President Fox in 2004). Based on what Pemex officials were telling me, I understood that Pemex needed help to quickly raise production at Chicontepec. The Pemex officials told me that they thought that I would be a good person to assist with developing Chicontepec. I had a long and successful history in the oil and gas business in both Mexico and in the U.S. The Pemex officials further told me that I would be treated fairly and valued as a partner and that working with them would be mutually beneficial. Pemex would be able to increase their production, and we would have the opportunity to make a significant profit.

Mr. Kernion remembers Pemex officials asking if he knew of any U.S. companies that might be interested in investing in Mexico.[108]

82. Luis Kernion recommended Jim Finley and his companies Finley and MWS because of their good reputation for performing complex oilfield services.[109] Thereafter, Mr. Finley and Mr. Kernion had multiple discussions with Pemex officials about investing in Mexico. They were told:[110]

- Pemex needed help increasing production from Chicontepec.
- Pemex would value them as a partner and treat them fairly.
- In case of a dispute, Mexico's legal system would treat them fairly.
- Pemex would pay all amounts owed. Both Mr. Kernion and Mr. Finley recall that the Pemex officials repeatedly told them that "Pemex pays, Pemex pays."

83. In late 2011, Pemex published its invitation to participate in an international public tender in conformity with Mexico's free trade agreements for the re-working of existing oil wells ("*trabajos de restitución de la producción*").[111] Among other things, the bid package contained (a) the model contract that would be used; (b) the prequalification criteria for the bidder's technical capabilities and economic capacity; (c) rules for financial aspects of the bid; (d) technical requirements for the work, along with the type of equipment the contractor would have to purchase; and (e) a description of the work to be performed.[112]

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108 Witness Statement of L. Kernion, ¶ 13.
109 Witness Statement of L. Kernion, ¶ 13.
110 Witness Statement of J. Finley, ¶ 46; Witness Statement of L. Kernion, ¶¶ 12, 14-15, 18; *see, e.g.*, **C-0041,** Email from M. Alvarez to L. Kernion (Feb. 9, 2012).
111 **C-0040**, International Public Tender FTA Number 18575051-582-11 (2011) (803 Contract), http://dof.gob.mx/nota_detalle_popup.php?codigo=5217444 (last checked June 6, 2022); *see also* Witness Statement of L. Kernion, ¶ 16.
112 **C-0042,** 803 Contract Bid Materials; Witness Statement of L. Kernion, ¶ 16.

84. Pemex qualified MWS and Bisell to submit a bid.[113] Once qualified, Jim Finley and Luis Kernion carefully considered the material terms of the potential projects and submitted a bid:[114]

> Before beginning the qualification process, I remember discussing the proposed terms of our investments with Jim Finley. They seemed reasonable to us. We understood that we would have to invest capital to perform the work. For example, we would be required to purchase equipment and import it to Mexico, purchase other equipment in Mexico, lease and purchase real estate, and build warehouses on the real estate. We would also be required to hire and train employees.
>
> Despite the fact that our initial capital expenditures would be significant, I believed that we had a reasonable opportunity to recoup our investments and earn a profit. Pemex would be agreeing to request a certain amount of work from us under the contract. Before, Pemex had also repeatedly told us that it pays and promoted the fairness of its legal system. I also understood that our contracts would be subject to NAFTA's protections.

85. Pemex accepted the bid from MWS and Bisell, and in early 2012, Pemex awarded them their first contract to perform workovers of existing oil wells.[115] This was Contract No. 424042803, known as the "803 Contract." This contract is explained in further detail below.

86. Following entering into the 803 Contract, 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 Contract No. 424043804 (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.[116] The third contract was Contract No. 421004821 (the "821 Contract") (entered into by Finley and Drake-Mesa). The 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.[117]

87. Under these three contracts, Claimants made significant investments in Mexico. As noted above, Claimants secured around US$ 52 million in performance bonds, purchased and

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[113] Witness Statement of L. Kernion, ¶¶ 16-17.
[114] Witness Statement of L. Kernion, ¶¶ 17-18.
[115] **C-0032,** 803 Contract; Witness Statement of L. Kernion, ¶¶ 19, 24.
[116] **C-0033,** 804 Contract.
[117] **C-0043**, International Public Tender FTA Number 18575088-542-13 (2013) (821 Contract), http://dof.gob.mx/nota_detalle.php?codigo=5312360&fecha=29/08/2013#gsc.tab=0 (last checked June 6, 2022).

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.[118]

88. Jim Finley and Luis Kernion discussed their investments in Mexico with numerous Pemex officials. They recall the following Pemex executives, most of whom were appointed by Mexico's President:

 Juan José Suárez Coppel, CEO of Pemex	**Juan José Suárez Coppel**[119] was Pemex's CEO from 2009 to late 2012. Former President Calderon appointed Mr. Coppel. Claimants met with him and discussed investing in Mexico.[120]
 Emilio Lozoya Austin, Director General of PEMEX	**Emilio Lozoya**[121] succeeded Mr. Coppel as CEO of Pemex when President Peña Nieto appointed him. He was Pemex's CEO from late 2012 to 2016. Among other occasions, Jim Finley and Luis Kernion met with Mr. Lozoya before executing the 821 Contract when Pemex invited them to its promotional booth at the OTC conference in Houston, Texas.[122] Since leaving his position at Pemex, the Mexican government has brought charges of bribery and corruption against Mr. Lozoya.[123] He is currently imprisoned in Mexico City.

[118] Witness Statement of J. Finley, ¶¶ 32-37; Witness Statement of L. Kernion, ¶¶ 12, 14-15, 18, 50, 63 108.
[119] **C-0018**, Mexico Oil and Gas Review (2012) at 359.
[120] Witness Statement of J. Finley, ¶ 38; **C-0044,** Email from B. Irani to J. Finley (May 31, 2012).
[121] **C-0039,** Mexico Oil and Gas Review (2013) at 10.
[122] **C-0045,** Email from Pemex to J. Finley (April 25, 2013); **C-0046,** Email from Pemex to J. Finley (May 5, 2013); Witness Statement of L. Kernion, ¶ 67, 69; Witness Statement of J. Finley, ¶¶ 41-42.
[123] **C-0047,** *Emilio Lozoya will remain in jail; magistrate dismisses appeal against his pre-trial detention*, INFOBAE (April 8, 2022), https://www.infobae.com/en/2022/04/09/emilio-lozoya-will-remain-in-jail-magistrate-dismisses-appeal-against-his-pre-trial-detention/ (last checked June 6, 2022).

<u>Froylan Gracia</u>[124] was the second-in-command to Pemex's CEO, Emilio Lozoya, starting in late 2012. Claimants were in regular contact with Mr. Gracia about investing in Mexico.[125]

Mr. Gracia encouraged Claimants to expand their investments in Mexico with the 821 Contract. For example, he sent the following email to Jim Finley:[126]

> I just got the news about your decision to cease further investments in Mexico. I understand and share your concerns about your past experiences with regards to bids and payments in [Chicontepec]. It is a very disturbing situation that the new Pemex administration is fixing. . . I will personally address your concerns with my CEO as we do not want to [lose] further investments coming into Mexico.
>
> As you know we have been looking for a favorable solution to the contract that was awarded to your partners and you, and to the completition of some payments that are past due.
>
> ***
>
> I hope your decision is not final as we would really benefit from your company's expertise, if it is, I would request if we can continue our discussion regarding how to detonate development of shale exploration and production activities in Mexico.

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124 **C-0048,** *By the son of a winemaker in the shadow of Lozoya*, NEWSBEEZER (Aug. 19, 2020), https://newsbeezer.com/mexicoeng/by-the-son-of-a-winemaker-in-the-shadow-of-lozoya/ (last checked June 6, 2022).

125 *See, e.g.*, **C-0049,** Email from F. Gracia to J. Finley (March 12, 2013) ("Great news!! I presented your proposal to our CEO and he is very exicted to see these involvement in our sector. Please let me know if you need anything else."); **C-0050,** Email from L. Kernion to J. Finley (April 1, 2013) ("Froylan is gonna Land in the Love field Airport around 1pm; I will be there to pick them Up; But I will need another vehicle ; Because they are coming with Wife's and they are gonna take my Car ; let me know how you can Help me; thanks") (April 1, 2013); **C-0051,** Letter from F. Gracia to J. Finley (April 10, 2013); **C-0052,** Email from F. Gracia to J. Finley (May 21, 2013); **C-0053,** Email from F. Gracia to J. Finley (Jan. 13, 2014) ("Best wishes for 2014. I will most likely travel to Houston to the NAPE meeting, I believe that would be a good time and place to meet considering you agenda. Let me know if that works."); **C-0054,** Email from L. Kernion to J. Finley (Jan. 9, 2014) ("Froylan just called me he wants to meet with Us"); **C-0055,** Email from F. Gracia to J. Finley (Jan. 13, 2014); **C-0056,** Email from F. Gracia to L. Kernion (Jan. 22, 2014) ("Are we on for tomorrow?").

126 **C-0057,** Email from F. Gracia to J. Finley (May 5, 2013).

	**<u>Sergio Guaso</u>**[127] was the President of Finance and Administration at Pemex. Claimants met with him about investing in Mexico.[128]
	**<u>Carlos Morales Gil</u>**[129] was the Director General of PEP. Claimants discussed investing in Mexico with Mr. Morales.[130]

89. These executives were some of those in the Mexican government (including Pemex) who encouraged Claimants to make investments as part of Mexico's plan to reverse its declining production of oil with Pemex's development of the Chicontepec basin. Because of their representations, Claimants believed that they would have an opportunity to earn a profit from their investment and that Mexico would treat their investments fairly. Claimants' investments — their three contracts with Pemex and other investments in Mexico — are discussed further below.

2. The 803 Contract (MWS and Bisell)

90. Pemex, MWS, and Bisell signed this contract in February 2012.[131] MWS is a U.S. company. Bisell is a Mexican enterprise that a U.S. entity (Prize) owns and controls. Under the 803 Contract, the "Contractor" (MWS and Bisell) agreed to perform various oilfield services on

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127 **C-0058**, Pemex's Guaso Brings International Perspective to DUG Permian Basin, GLOBE NEWSWIRE (March 14, 2013), https://www.globenewswire.com/news-release/2013/03/14/530801/24098/en/Pemex-s-Guaso-Brings-International-Perspective-to-DUG-Permian-Basin.html (last checked June 6, 2022).

128 **C-0041,** Email from M. Alvarez to L. Kernion (February 9, 2012); **C-0119,** Email from Q. Alma to L. Kernion (March 23, 2013) ("I hope you are very well. I am writing to you because Mr. Guaso is going to be in Forth Worth on April 2 and 3 and we would like to meet with you. We propose to meet on the 3rd at 1 p.m."); **C-0059,** Email from A. Sepulveda to J. Finley (Oct. 22, 2012) ("On behalf of Sergio Guaso, Business Development VP at PEMEX, I would like to extend our appreciation for your attendance in today's meeting."); **C-0060,** Email from L. Kernion to J. Finley (Oct. 11, 2012) ("Jim; would you like to host; Sergio Guaso for the 22 of October in FW?? He is also asking if you can get some of your Friends and potential investors in that meeting?; he called me twice today; let me know please!").

129 **C-0018**, Mexico Oil and Gas Review (2012) at 76.

130 *See, e.g.*, Witness Statement of J. Finley, ¶ 26; Witness Statement of L. Kernion, ¶¶ 12, 65, 67; **C-0061,** Email from J. Finley (March 13, 2013) ("Great news!! I presented your proposal to our CEO and he is very exicted to see these involvement in our sector. Please let me know if you need anything else.").

131 **C-0032,** 803 Contract at Clause 2.5 ("MWS Management Inc., is a company organized under the laws of the State of Texas of the United States of America"); Clause 2.1 ("[Bisell] is a commercial company legally constituted and with legal existence in accordance with the legal provision of the United Mexican States.").

behalf of Pemex in Chicontepec. In turn, Pemex agreed to request such work from the Contractor and once completed, pay for it.

91. MWS and Prize's claims in this arbitration arise from Mexico's court system allowing their lawsuit against Pemex over the 803 Contract to remain unresolved for over five years.[132] Briefly reviewing the 803 Contract and Pemex's conduct leading up to the litigation are relevant for a few reasons. *First*, it contextualizes the detrimental impact of the nearly six-year delay on MWS and Prize. *Second*, it explains why the 803 Contract, as well as MWS and Bisell establishing a presence in Mexico in preparation to perform under the contract, are "investments."[133] *Finally*, it is the first of three contracts to perform work for Pemex under which Claimants did not get a fair opportunity to realize the benefits of their investments but instead saw them destroyed by Mexico.

a) Relevant terms of the 803 Contract

92. Under the 803 Contract, Pemex agreed to request, and MWS and Bisell agreed to perform, work called "*trabajos de restitución de la producción*" or "work to restore production" in Chicontepec.[134] This is commonly called "working over wells." Pemex had drilled wells, but certain wells needed repairs or workovers to restore or enhance production.

93. Working over a well is typically a significant operation.[135] It involves repairing or stimulating a producing well to restore, prolong, or enhance its production. It requires a workover rig to be on-site, and the work often involves removing and replacing the string of tubing called production tubing (tubing is the small diameter pipe inside a well that allows oil to pass to the surface).

94. To perform the workovers that Pemex would request, the 803 Contract required MWS and Bisell to purchase and use new equipment.[136] Among other equipment, MWS and Bisell had to initially purchase three workover rigs.[137] Thereafter, MWS and Bisell purchased additional

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[132] Meanwhile, Pemex settled and paid claims brought by similarly situated domestic companies. **C-0062,** Acta Circunstancia (April 9, 2018).
[133] To avoid doubt, Prize's claims are based on its ownership/control of Bisell.
[134] **C-0032,** 803 Contract at Clause 1. Annex DE-2 contains the list of work that Pemex might request during the contract's term.
[135] Witness Statement of J. Finley, ¶ 18.
[136] **C-0032,** 803 Contract at Clause 39. The 803 Contract lists this equipment in Annex DT-3; Witness Statement of L. Kernion, ¶ 26.
[137] Witness Statement of J. Finley, ¶ 33; Witness Statement of L. Kernion, ¶ 26.

rigs.[138] The following picture is of one of the workover rigs that MWS and Bisell purchased and imported into Mexico:[139]

To perform workovers, MWS and Bisell had to acquire and install a rig as well as purchase equipment and materials such as steel piping.[140] The contract required a certain percentage of MWS and Bisell's equipment and materials to be of national (Mexican) origin.[141]

95. Relatedly, part of the local content requirement under the 803 Contract required MWS and Bisell to hire Mexicans to do the work.[142] 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 third-party instructors to further this training.[143] These new skills enhanced the capabilities and benefited the local staff during and following the 803 Contract's conclusion.

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138 Witness Statement of J. Finley, ¶ 39; Witness Statement of L. Kernion, ¶ 37.
139 Witness Statement of L. Kernion, ¶ 26.
140 Witness Statement of J. Finley, ¶ 33; Witness Statement of L. Kernion, ¶ 26.
141 **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.").
142 **C-0032,** 803 Contract at Clause 6; Anexo G-1 at 2 ("Mano de Obra" or "Labor").
143 Witness Statement of L. Kernion, ¶¶ 32-33.

96. Pemex also required MWS and Bisell to provide a bond as a performance guarantee.[144] The amount of the bond was set at 10% of the contract amount (US$ 48 million). MWS and Bisell provided such a bond.[145]

97. MWS and Prize needed a place to store and assemble the equipment they were required to purchase. They also needed a place to lodge their employees. They leased then purchased land in the town of Poza Rica, which is near Chicontepec:[146]

98. MWS and Prize referred to their land in Poza Rica as the "yard."[147] The following picture shows the "yard" before they developed it:[148]

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144 **C-0032,** 803 Contract at Clause 9.
145 Witness Statement of L. Kernion, ¶ 25.
146 **C-0063,** *Well Construction and Field Development in Mexico*, OILFIELD REVIEW (Winter 2003-2004) https://web.archive.org/web/20060502065056/http:/www.slb.com/media/services/resources/oilfieldreview/ors03/win03/p46_53.pdf (last checked June 6, 2022).
147 Witness Statement of L. Kernion, ¶¶ 27-30.
148 Witness Statement of L. Kernion, ¶ 28.

Eventually, they developed the yard. This required the clearing of vegetation, the leveling of the area, and the hardening of the land with gravel.

99. Claimants also purchased land in the town of Tamos, which is in the north of Mexico and close to Tampico.[149] Claimants purchased this property to store their equipment.

100. In addition to purchasing land, MWS and Bisell leased a warehouse in Poza Rica. They used this warehouse to store the more expensive equipment and materials. The picture below is from inside of the warehouse with an estimated US$ 2 million of equipment (pumps and fishing tools) and a few of Claimants' employees:[150]

149 Witness Statement of L. Kernion, ¶ 31.
150 Witness Statement of L. Kernion, ¶ 30.

101. Claimants had to transport their workers and equipment from the yard in Poza Rica to each site where Pemex wanted them to perform the work.[151] This was a complex process. It required loading a convoy of trucks with workers and equipment and driving them to the site.[152] This included transporting mobile office trailers. These trips were often made through difficult conditions, including unpaved roads. Transporting the equipment to and from the yard to the work site would cost around US$ 300,000 round trip.[153]

102. MWS and Bisell were at sole risk in performing work for Pemex, including the necessary preparations required to fulfill the work orders.[154] MWS and Bisell made significant investments and accepted such risk believing that Mexico would honor its commitments. Pemex contractually committed itself to request US$ 48 million worth of work.[155] Pemex further assured MWS and Bisell that it "has [allocated] the resources to carry out the work covered by this Contract."[156] This representation meant that Pemex had secured funds before tendering bids for the contract. Moreover, it was typical for Pemex to request work beyond the amount provided for in the contract (as the budgeted amount was often greater than the amount provided for in the contract).[157]

103. Additionally, Pemex had represented to MWS and Bisell that "Pemex pays, Pemex pays" and that it would meet its contractual commitments.[158] In this regard, Pemex agreed to pay MWS and Bisell within 20 days after receiving an invoice.[159] If Pemex did not timely pay an invoice, MWS and Bisell would be entitled to receive interest on these unpaid amounts.[160] Accordingly, MWS and Bisell reasonably expected that they would be in a position to recoup their investments and earn a profit.[161]

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151 *See* **C-0032,** 803 Contract at Clause 40; Witness Statement of L. Kernion, ¶¶ 30, 36, 80.
152 *See* Witness Statement of J. Finley, ¶ 15.
153 Witness Statement of L. Kernion, ¶ 80.
154 **C-0032,** 803 Contract at Clause 20.
155 **C-0032,** 803 Contract at Preamble and Clause 4.1; *see also* Witness Statement of J. Finley, ¶¶ 48-53; Witness Statement of L. Kernion, ¶¶ 17-18.
156 **C-0032,** 803 Contract at Clause 1.4.
157 Witness Statement of L. Kernion, ¶¶ 15, 34.
158 Witness Statement of J. Finley, ¶¶ 48-53; Witness Statement of L. Kernion, ¶¶ 15, 20, 33.
159 **C-0032,** 803 Contract at Clause 4.2.
160 **C-0032,** 803 Contract at Clause 4.2.
161 Witness Statement of L. Kernion, ¶ 12.

104. The work was scheduled to begin on February 20, 2012, and last until December 31, 2013.[162] Pemex would request work through work orders.[163] A work order specifies the work to be completed, where it would be completed, and the timeframe for MWS and Bisell to do so.[164]

105. The design of a well is a sophisticated operation that, if not done properly, can prove ineffective and must be done in a safe manner to protect the workers and the environment. Pemex would hold regular meetings about the technical aspects of the project, the work needed, and the best way to complete the work. During these meetings, Pemex sought technical advice and feedback from a representative that MWS and Bisell had hired to be present at Pemex's offices and facilitate the coordination between the companies and the preparation of the work orders. This representative was consulted by Pemex on the best way to accomplish the work before a work order was issued. Consequently, the work order was issued by Pemex, but the project was jointly designed and ultimately approved by MWS and Bisell. Once a work order was finalized, the representative would sign the work order to confirm receipt.

106. The 803 Contract allows the parties to agree to an early termination for listed reasons.[165] For example, they can terminate the contract early for force majeure, when things impede performance of the contract, or when the contract is no longer profitable for Pemex. If Pemex, MWS, and Bisell agree to terminate the contract early, they proceed to a process under the contract called a "finiquito."[166]

107. The finiquito process is essentially a settlement.[167] The parties agree that their reciprocal obligations have been fulfilled, and they agree to any needed adjustments, revisions, modifications, or recognitions, and to any balances owed from one to the other.

108. Finally, under this contract, the parties agreed to resolve their disputes before Mexico's federal court in Veracruz:[168]

> 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

[162] **C-0032,** 803 Contract at Clause 3.
[163] **C-0032,** 803 Contract at Clauses 2, 3.
[164] Witness Statement of L. Kernion, ¶ 94.
[165] **C-0032,** 803 Contract at Clause 15.
[166] **C-0032,** 803 Contract at Clause 15.2.
[167] **C-0032,** 803 Contract at Clause 17.
[168] **C-0032,** 803 Contract at Clause 33.

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.

b) Pemex did not perform as agreed

109. MWS and Bisell invested significant amounts in Mexico to perform under the 803 Contract. These investments included:[169]

- Purchasing special drilling equipment to meet Pemex's specifications (e.g., workover rigs and other necessary equipment and materials, including steel piping).
- Importing such equipment into Mexico.
- Obtaining a performance bond of approximately US$ 5 million.
- Purchasing mobile offices for use on the work site.
- Leasing, and later purchasing, the real estate in Poza Rica known as the "yard."
- Leasing a warehouse in Poza Rica.
- Purchasing real estate in Tamos to use as another storage area for equipment.
- Hiring and training over one hundred employees.

For a period of time, the parties performed under the 803 Contract. Thus, Mexico cannot dispute that Claimants made the above investments.

110. In early 2012, the parties began performing.[170] Pemex issued work orders, and MWS and Bisell performed workovers of Pemex's wells.[171] For example, the picture below depicts a workover that Pemex requested where MWS and Bisell erected the pictured rig to successfully complete the requested operation:[172]

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169 Witness Statement of J. Finley, ¶¶ 33-37; Witness Statement of L. Kernion, ¶¶ 26-34.
170 Witness Statement of L. Kernion, ¶ 36.
171 *See* Witness Statement of L. Kernion, ¶¶ 26, 36.
172 Witness Statement of L. Kernion, ¶ 36.

111. Later in 2012, Jim Finley met with the then-CEO of Pemex Juan José Suárez Coppel and other Pemex officials.[173] Pemex was looking for additional help in performing the necessary work to develop Chicontepec.[174] This would require MWS and Bisell to invest more in Mexico. Soon thereafter, in September 2012, Pemex inquired whether MWS and Bisell could import additional equipment into Mexico on short notice.[175]

112. Shortly after this letter, Mexico's recently elected President Enrique Pena Nieto took office.[176] He appointed his long-time friend and campaign advisor Emilio Lozoya as Pemex's new CEO.[177] As a result, Mr. Lozoya would install his own team at Pemex. This included Froylan Gracia, who was well-known in Mexico's political and social circles.

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173 Witness Statement of J. Finley, ¶ 38; **C-0064**, Email from B. Irani to J. Finley (May 31, 2012).
174 Witness Statement of J. Finley, ¶ 38.
175 **C-0065,** Letter from Pemex to Claimants (Sept. 4, 2012).
176 Witness Statement of L. Kernion, ¶ 38.
177 Mr. Lozoya was President Peña Nieto's campaign manager and led his transition team. **C-0039,** Mexico Oil and Gas Review (2013) at 9; It is well known that Mr. Lozoya was a long-time friend of President Pena Nieto.

113. Into 2013, Pemex continued to issue work orders for MWS and Bisell to workover wells.[178] MWS and Bisell continued their prior discussions about investing more in Mexico with Froylan Gracia and other Pemex officials. For example, Pemex welcomed news from Jim Finley in March 2013 of his possibility of acquiring a jack-up rig that could be used in Mexico's offshore opportunities.[179] Mr. Finley saw potential for growth in Mexico's oil and gas sector and wanted to make a significant contribution.

114. Around this time, Pemex began to fall behind on payments. Jim Finley raised this issue with Froylan Gracia. Because MWS and Bisell are service companies, receiving timely payments is critical to coordinating and maintaining crews and equipment for this type of work. Otherwise, the service company could find itself quickly "in the hole." Mr. Gracia assured Mr. Finley that Pemex would get current and encouraged him to invest more in Mexico:[180]

> As you know we have been looking for a favorable solution to the contract that was awarded to your partners and you, and to the completition of some payments that are past due.
>
> In addition we have explored ways to award one of the blocks currently being bidded.
>
> I am commited in bringing additional investments into my country and understand that Pemex has to undergo several changes, structurally and in the managment, In order for changes to happen.
>
> This changes will happen once the Energy Reform starts getting discussed.
>
> As you know opportunities in Mexico will be plentiful for our onshore activities, where you have a vast amount of experience and knowledge.
>
> I will be glad to elaborate further with you on this matter.
>
> I hope your decision is not final as we would really benefit from your company's expertise, if it is, I would request if we can continue our discussion regarding how

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C-0066, Ashley Johnson, *Who is Emilio Lozoya? Son of power, Harvard graduate and friend of Peña Nieto*, GLOBELIVEMEDIA (Nov. 4, 2021), https://globelivemedia.com/people/who-is-emilio-lozoya-son-of-power-harvard-graduate-and-friend-of-pena-nieto/.

178 Witness Statement of L. Kernion, ¶ 41.

179 **C-0049,** Email from F. Gracia to J. Finley (March 12, 2013) ("Great news!! I presented your proposal to our CEO and he is very exicted to see these involvement in our sector. Please let me know if you need anything else.").

180 Witness Statement of J. Finley, ¶ 40; **C-0057,** Email from F. Gracia to J. Finley (May 5, 2013). Mr. Gracia's native language is not English. Thus, his communications in English may have misspellings and grammatical errors.

to detonate development of shale exploration and production activities in Mexico.

115. A few months after Froylan Gracia's email above, in July 2013, Pemex formally requested that MWS and Bisell add four workover rigs to the three existing rigs.[181] According to Pemex, this would help achieve their "production goals" for Chicontepec.[182] MWS and Bisell acquired these rigs, related equipment and imported the same into Mexico. To operate and maintain the rigs and equipment, MWS and Bisell hired and trained additional staff.[183]

116. As the end of 2013 approached, Pemex had requested approximately US$ 26 million in work from MWS and Bisell.[184] The 803 Contract was going to terminate on December 31, 2013.[185] Pemex still had approximately US$ 22 million in work to request.

117. This is when things started to get complicated. Pemex stopped requesting work and told MWS and Bisell that it lacked the budget to request any more work.[186] According to an internal Pemex document dated October 30, 2013, Pemex had ordered that for current contracts, no more work was to be requested unless they had the budgeted cash flow to pay.[187] This was inconsistent with what Pemex had represented. Before tendering bids for the contract, Pemex had to have secured funds earmarked for such contract / work. This is why Pemex had represented to MWS and Bisell in the 803 Contract: "[Pemex] has allocated the resources to carry out the Works under this Contract."[188]

118. Pemex not issuing work orders was particularly concerning for MWS and Bisell. They had their equipment and employees ready to perform to accommodate Pemex-issued work orders. This came at their expense. They faced significant economic losses if Pemex did not request, and pay for, work.[189] Moreover, they incurred opportunity costs because this equipment and certain employees could have been doing work elsewhere, i.e. the United States.

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181 **C-0067,** Letter from Pemex to MWS and Bisell (July 25, 2013).
182 **C-0067,** Letter from Pemex to MWS and Bisell (July 25, 2013).
183 Witness Statement of L. Kernion, ¶ 37.
184 Witness Statement of L. Kernion, ¶ 41.
185 **C-0032,** 803 Contract at Clause 3.
186 Witness Statement of L. Kernion, ¶ 41.
187 **C-0068,** Pemex Internal Letter (Oct. 30, 2013).
188 **C-0032,** 803 Contract at Clause 1.4.
189 *See* Witness Statement of J. Finley, ¶¶ 53-54 ; Witness Statement of L. Kernion, ¶¶ 43-46.

119. Luis Kernion went to Pemex's offices to better understand the situation:[190]

> To understand what was happening, I went to Pemex's office in Poza Rica. I spoke with José López ("Pepe"). At the time, Pepe was managing the workover operations of Pemex's wells in Chicontepec. Pepe told me that Pemex lacked the budget to request further work under the 803 Contract.
>
> Pepe then told me not to worry. He told me that at any moment Pemex's budgetary issues could change and Pemex would begin issuing work orders again. He asked us to keep our equipment and workforce on standby for when matters returned to normal. While we were on standby, Pemex would pay us a day rate. Although that rate was less than the amount we would have received for actually doing work, he said that Pemex would "make it up to us." He mentioned Pemex possibly extending the term of our contract for the period that it had not been issuing work orders to us.
>
> In addition to Pepe, I was in communication with Pemex officials in various sectors, including (a) operations, (b) contracts, (c) legal, (d) financial, and (e) local officials responsible for Chicontepec (e.g., Plácido Gerardo Reyes Reza and Antonio Narváez). During this time, I was getting mixed messages about the situation for the 803 Contract (and the 804 and 821 Contracts as well). However, in general, Pemex officials were telling us not to worry and that they would comply with their obligations to start requesting work.

120. On November 11, 2013, MWS and Bisell wrote to Pemex about it not sending work orders.[191] MWS and Bisell wrote again on November 14, 2013.[192] Pemex did not respond to MWS and Bisell. Claimants do not have all of Pemex's internal communications. However, internally, Pemex circulated a memo on November 19, 2013 about the budget situation for the 803 Contract.[193] Oscar Hernandez Bartoluchi, the recipient of MWS and Bisell's letter, is a manager of contracts in Chicontepec or "ATG." He reported to his superiors that MWS and Bisell were asking about Pemex's intention to comply with its obligations, i.e. issuing work orders and paying for work. He explained that MWS and Bisell had six workover rigs ready to perform work and they wanted to know Pemex's budgetary situation.[194]

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190 Witness Statement of L. Kernion, ¶¶ 42-44.

191 **C-0069,** Letter from Bisell and MWS to Pemex (Nov. 11, 2013).

192 **C-0070,** Letter from Bisell and MWS to Pemex (Nov. 14, 2013).

193 **C-0071,** Pemex Internal Memo (Nov. 19, 2013).

194 **C-0071,** Pemex Internal Memo (Nov. 19, 2013) ("The contractor reiterates that it has 6 well repair equipment at PEP's disposal, for which it requests if appropriate due to the current budget situation, internal requests are issued and user bases for the purpose of carrying out the work covered by the contract."). On December 18, 2013, Oscar Bartoluchi sent another internal memo with "high importance" to his colleagues charged with finance and budget matters. Mr. Bartoluchi apparently was going to seek an extension of the contract and needed their help with filling out a form showing the budget that was required for the application. This is

121. On December 26, 2013, Pemex wrote to MWS and Bisell.[195] Pemex told them that it would not be issuing any more work orders and that their equipment should remain at their base. Pemex then put the contract in suspense, resulting in an extension of the term of the contract from December 31, 2013 to June 30, 2014.[196]

122. Pemex did not request any further work from MWS and Bisell during the extended term.[197] Luis Kernion explains how this put MWS and Bisell in a difficult situation:[198]

> Pemex's decision not to issue any more work orders put us in a difficult position. Per Pemex's request, we had been keeping our equipment and personnel on standby. We were paying our employees with the expectation that Pemex would resume performance and "make us whole" as it had promised. We were bleeding money.

123. In 2014, Pemex told MWS and Bisell that the contract would be ending and that it would proceed with the finiquito process.[199] MWS and Bisell asked Pemex to reconsider its position, to no avail.[200] MWS and Bisell had limited bargaining power. They had spent millions preparing for Pemex to request at least US$ 48 million worth of work.[201] As such, MWS and Bisell had no practical choice but to agree to terminate the contract early and proceed with the finiquito. Luis Kernion explains why:[202]

> It was very important for us to sign the finiquito. If we did not do so, Pemex would pursue a unilateral finiquito. Based on my experience, I knew exactly what would happen during this process. Pemex would "invent" an issue under the contract and attribute it to us (e.g., claiming they had a well blow out and that it was our fault). Thereafter, Pemex would attempt to call on the bond that we obtained for 10% of the contract value (US$ 4.8 million). This is despite the fact that it was Pemex who did not meet its work obligations under the contract. Over the next couple years, we were in this same predicament with the 804 Contract and the 821 Contract. In fact, with the 821 Contract, Pemex has continued trying to finalize the finiquito and call upon our performance bond into 2022.

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despite Pemex having told MWS and Bisell that it did not have the budget to request any more work. **C-0072,** Pemex Internal Memo (Dec. 18, 2013).

195 **C-0073,** Letter from Pemex to MWS and Bisell (Dec. 26, 2013).

196 Witness Statement of L. Kernion, ¶ 47.

197 Witness Statement of L. Kernion, ¶ 47.

198 Witness Statement of L. Kernion, ¶ 48.

199 Witness Statement of L. Kernion, ¶ 49.

200 Witness Statement of L. Kernion, ¶ 47.

201 Witness Statement of L. Kernion, ¶¶ 47-50.

202 Witness Statement of L. Kernion, ¶ 50.

124. The finiquito negotiations took place throughout 2014 and were finalized in February 2015.[203] In the final finiquito, Pemex refused to agree to pay MWS and Bisell the remaining amounts owed under the contract. Pemex would not even agree to pay the "standby rate" that one of its officials had promised.[204] Moreover, Pemex refused to compensate MWS and Bisell's out-of-pocket costs.[205] Thus, MWS and Bisell reserved their rights to seek such damages under the contract via litigation.[206]

c) 803 Contract litigation

125. On October 13, 2015, MWS and Bisell initiated a civil lawsuit against Pemex in the federal district court in Veracruz, Mexico for breach of its obligations under the 803 Contract.[207] MWS and Bisell sought to recover damages based on their reservation of rights under the finiquito.[208] This lawsuit was dismissed on jurisdictional grounds shortly thereafter.[209]

126. The court claimed that the 803 Contract was not civil in nature. Rather, it was administrative. As such, according to the court, MWS and Bisell needed to pursue their remedies in Mexico's administrative court system.[210] This decision was appealed on October 20, 2015.[211] The court of appeals reversed the decision and ordered the court of first instance to admit MWS and Bisell's complaint on December 30, 2015.[212] On January 6, 2016, MWS and Bisell's claims were finally admitted to the civil court.[213] Thereafter, MWS and Bisell were subjected to procedural delay tactics by Pemex, which were allowed by the court.[214]

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203 **C-0074,** Finiquito Contract 803 (Feb. 10, 2015).
204 Witness Statement of L. Kernion, ¶ 49.
205 *See* Witness Statement of L. Kernion, ¶ 49; **C-0074,** Finiquito Contract 803 (Feb. 10, 2015).
206 **C-0074,** Finiquito Contract 803 (Feb. 10, 2015).
207 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 44. The expert report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz details the procedure of the case.
208 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 45 (citing First Amparo Judgment CP-803 [RZ-008], p. 13.).
209 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 46 (citing First Appeal Resolution CP-803 [RZ-007], p. 4).
210 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 46 (citing First Appeal Resolution CP-803 [RZ-007], p. 4).
211 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 47 (citing First Appeal Judgment CP-803 [RZ-007], p. 1.).
212 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 47 (citing First Appeal Judgment CP-803 [RZ-007], p. 13.).
213 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 48 (citing SISE 75/2015 [RZ-009]).
214 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶¶ 49-61, 157.

127. Over five years after MWS and Bisell commenced this lawsuit, the court had still not reached a substantive decision. Claimants experts, Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, testify about numerous irregularities in the legal proceedings involving the 803 Contract, including taking over five years to resolve issues of jurisdiction without proceeding to the merits.[215] Indeed, the experts conclude that MWS and Bisell "did not have [their] day in court."[216] Because of the extensive delays, it was futile to continue these proceedings. As such, MWS and Bisell requested that the court dismiss this lawsuit in order to file this arbitration.[217]

3. 804 Contract (MWS and Bisell)

128. The second contract that is the subject of this arbitration is called the "804 Contract." MWS and Bisell (collectively) and Pemex entered into this agreement in March 2013.[218] MWS and Bisell agreed to perform various oilfield services in Chicontepec on behalf of Pemex.

129. Pemex presented the opportunity for the 804 Contract directly to MWS and Bisell. Pemex did not announce an international tender. Pemex told MWS and Bisell that this work was important and time-sensitive.[219]

130. At the time, Pemex's efforts to reverse its downward production trend were not working.[220] 2012 was the eighth year in a row that Pemex reported a production decrease. Thus, one of Pemex's objectives remained "to increase production of hydrocarbons."[221] Pemex noted that the contracts signed in 2012 were still insufficient to develop Chicontepec according to their plans; further developing it required new tools for drilling and completing wells.[222]

131. MWS and Bisell had been performing under the 803 Contract in response to the work orders Pemex was issuing. MWS and Bisell believed that Pemex's overture was part of its desire to bolster its efforts to develop Chicontepec. Similar to the 803 Contract, Pemex officials repeatedly told MWS and Bisell, "Pemex pays, Pemex pays." Moreover, MWS and Bisell

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[215] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶¶ 49-61, 157.
[216] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 159.
[217] Witness Statement of L. Kernion, ¶ 52.
[218] As explained above, Bisell is a Mexican enterprise that Prize owns and/or controls.
[219] Witness Statement of L. Kernion, ¶ 55.
[220] **C-0039,** Mexico Oil and Gas Review (2013) at 26.
[221] **C-0075,** Pemex Business Plan 2013-2017 at 43 ("Objectivo 2: incrementar la produccion de hidrocarburos").
[222] **C-0075,** Pemex Business Plan 2013-2017 at 43 ("Objectivo 2: incrementar la produccion de hidrocarburos").

understood that Pemex had set aside funds to pay for the 804 Contract.[223] Thus, MWS and Bisell directly negotiated the 804 Contract with Pemex.

132. MWS and Prize's claims against Mexico with respect to their investments under the 804 Contract are similar to their claims regarding the 803 Contract. For over five years, Mexico's court system failed to adjudicate MWS and Bisell's litigation regarding the 804 Contract, thereby arbitrarily depriving Claimants of their investments and denying them justice. However, the 804 Contract and Pemex's conduct leading up to the litigation are relevant for other reasons. *First*, it contextualizes the detrimental impact of the nearly six-year delay on MWS and Bisell. *Second*, it explains why the 804 Contract, as well as MWS and Prize furthering their presence in Mexico to perform, are "investments."[224] *Finally*, it is the second of three contracts to perform work for Pemex under which Claimants did not get a fair opportunity to realize the benefits of their investments but instead saw them destroyed. Pemex's failure to perform under this contract is relevant to Claimants' situation with respect to Claimants' other two contracts with Pemex — the 803 Contract and the 821 Contract. Claimants provide an overview of the 804 Contract and what transpired thereunder.

a) Relevant terms of the 804 Contract

133. Under the 804 Contract, Pemex agreed to request work from MWS and Bisell to improve production in the area within the "North Region" of Chicontepec.[225] This work was different than the workovers of wells under the 803 Contract. Pemex agreed to issue work orders for MWS and Bisell to drill new wells in order to enhance production in Chicontepec.[226]

134. The 804 Contract differed from the 803 Contract in other ways. Under this contract, Pemex agreed to request at least US$ 55 million in work.[227] Pemex gave MWS and Bisell the impression that it was desperate to increase production, and thus, they understood that Pemex intended to request this amount of work.[228] Relatedly, the 804 Contract required MWS and

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[223] Witness Statement of J. Finley, ¶ 47; Witness Statement of L. Kernion, ¶ 58.
[224] To avoid doubt, Prize's claims are based on its ownership/control of Bisell.
[225] **C-0033,** 804 Contract.
[226] **C-0033,** 804 Contract at Clause 4.1; Witness Statement of L. Kernion, ¶ 56.
[227] **C-0033,** 804 Contract at Clause 5. Pemex also set a minimum amount of US$ 22 million.
[228] *See* Witness Statement of J. Finley, ¶¶ 30-52; Witness Statement of L. Kernion, ¶¶ 55-56, 58.

Bisell to provide a performance guarantee for 10% of the maximum budget of the contract (US$ 55 million).[229]

135. Similar to the 803 Contract, MWS and Bisell had to purchase additional equipment and supply materials:[230]

> 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.

MWS and Bisell also had a local-content requirement. A certain percentage of the equipment and materials needed to be purchased from Mexico.[231]

136. To perform this work, MWS and Bisell had to purchase and import significant equipment and materials. For example, they purchased new drilling rigs.[232]

137. Similar to the 803 Contract, MWS and Bisell had to hire dozens of new workers.[233] MWS and Bisell also had to train these workers to conduct operations and to comply with environmental and safety matters.[234] To perform work, the workers and appropriate equipment would travel in a convoy from the base of the yard to the site where the work was to be performed. Because of the equipment and crews involved, this cost approximately US$ 300,000 round trip.[235]

138. MWS and Prize were at their sole risk in performing work for Pemex, including the necessary preparations required to fulfill the work orders.[236] MWS and Bisell increased their investments and accepted this risk believing that Mexico would honor its commitments.[237] Pemex further

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229 **C-0033,** 804 Contract at Clause 10.
230 **C-0033,** 804 Contract at Clause 41, DT-9; Witness Statement of L. Kernion, ¶ 57.
231 **C-0033,** 804 Contract at Clause 7.
232 Witness Statement of J. Finley; Witness Statement of L. Kernion, ¶ 57.
233 Witness Statement of L. Kernion, ¶ 57.
234 **C-0033,** 804 Contract at Clause 38.
235 *See* Witness Statement of J. Finley, ¶ 39; Witness Statement of L. Kernion, ¶ 80.
236 **C-0033,** 804 Contract at Clause 21.
237 **C-0033,** 804 Contract at Preamble, Clause 5. MWS and Bisell were also required to deliver a financial guarantee to Pemex equivalent to 10% of the value of the contract, or approximately US$ 5.5 million. **C-0033,** 804 Contract at Clause 9. Pemex also agreed to request at least US$ 22 million of work.

assured MWS and Bisell that it "has provided the resources to carry out the Work under this Contract."[238] This representation meant that Pemex had secured the funds before entering into the contract. Moreover, as explained above, it was typical for Pemex to request work beyond the amount provided for in the contract (because the budgeted amount was often greater than the amount provided for in the contract).[239]

139. Similar to what Pemex said regarding the 803 Contract, Pemex represented to MWS and Bisell that "Pemex pays" and that it would meet its contractual commitments.[240] To support this promise, this contract also required Pemex to pay MWS and Bisell within 20 days of receiving an invoice.[241] If Pemex did not timely pay an invoice, MWS and Bisell would be entitled to interest.[242]

140. One important distinction in the 804 Contract was the inclusion of an express obligation on MWS and Bisell on the one hand and Pemex on the other hand to act in good faith. Specifically, Pemex promised that it would perform its obligations (issuing work orders and paying for work) "based on the principles of good faith and equity":[243]

> 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 Mexican Legal Provisions of a federal nature, 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.
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> 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

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238 **C-0033,** 804 Contract at Clause 1.4.
239 Witness Statement of L. Kernion ¶ 15.
240 Witness Statement of J. Finley, ¶ 46; Witness Statement of L. Kernion, ¶ 58. In 2013, the interest rate was at .75 percent monthly on unpaid balances. See https://www.senado.gob.mx/comisiones/finanzas_ publicas/docs/LIFEF_2013.pdf (last checked June 6, 2022).
241 **C-0033,** 804 Contract at Clause 6.3.
242 **C-0033,** 804 Contract at Clause 6.3.
243 **C-0033,** 804 Contract at Clause 3. LPM means Ley de Petróleos Mexicanos or Mexico's Petroleum Law. RLPM means Reglamento de la Ley de Petróleos Mexicanos or the Regulations to Mexico's Petroleum Law. DAC means las Disposiciones Adminstrativas de Contratación en material de Adquisitiones, Arrendamientos, Obrasy Organismos Susibidiarios or the Administrative Rules regarding Contracting with respect to Acquisitions, Leases, Works, and Subsidiaries.

mutual benefit of PEP and the CONTRACTOR, agreeing that each has the right to achieve its reasonable objectives, and requires PEP and the CONTRACTOR:

(a) Sharing relevant information with another party, subject only to confidentiality obligations;

(b) Cooperate and consult each other in the manner necessary to achieve the completion of all the Work;

(c) Warn of potential consequences, including the costs of proposed actions;

(d) Avoid unnecessary interference with the activity of the other party; and

(e) Respond to the questions of the other party in a timely manner, which, if possible, will not prevent the progress of the Work.

Each time the terms of the Contract require a consultation between PEP and the CONTRACTOR, there will be a direct exchange of views before final decisions are made on the matter.

141. The original term for the 804 Contract was 6 months; the work was scheduled to begin on March 30, 2013 and last until September 30, 2013.[244] In contrast, the 803 Contract had a 22-month term before Pemex twice sought its extension.

142. The following relevant operations under the 804 Contract are similar to those described above for the 803 Contract:

- Preparing and issuing work orders. However, the 804 Contract expressly clarified that MWS and Bisell's representative was required to assist Pemex to "[p]repare and subscribe to the Work Orders";[245]
- Modifications to the contract by written agreement;[246]
- The limited grounds for early termination;[247]
- The finiquito process;[248] and

244 **C-0033,** 804 Contract at Clause 4.1. Pemex later sought to extend the term of the 804 Contract twice.
245 **C-0033,** 804 Contract at Clause 20.
246 **C-0033,** 804 Contract at Clause 13.
247 **C-0033,** 804 Contract at Clause 16.
248 **C-0033,** 804 Contract at Clause 18. As explained above, the finiquito process is essentially a settlement. The parties agree that their reciprocal obligations have been fulfilled, and they agree to any needed adjustments, revisions, modifications, or recognitions, and to any balances owed from one to the other. Unlike the 803 Contract, the finiquto process in the 804 Contract was to commence 120 days following termination of the contract.

- The requirement that disputes will be resolved in Mexico's federal courts in Veracruz.[249]

b) Pemex's conduct under the 804 Contract

143. MWS and Bisell further invested in Mexico to perform under the 804 Contract. They provided a performance bond for approximately US$ 5.5 million (10% of the value of the contract).[250] They also purchased new drilling rigs and other equipment and materials required under the contract to drill the wells that Pemex would request them to drill. Moreover, they hired and trained workers, among other things, to perform the work safely.

144. Pemex, on the contrary, never performed as agreed under the 804 Contract.[251] From the outset, Pemex did not issue its first work order for four months. During that time, MWS and Bisell had their employees and equipment waiting and ready to perform but doing nothing. This resulted in MWS and Bisell incurring significant costs.[252] This does not include the opportunity costs of using the equipment and certain employees elsewhere, i.e. in the United States.

145. MWS and Bisell raised their concerns with various Pemex officials, including Froylan Gracia.[253] As noted above, Mr. Gracia said that he would raise these issues with Pemex's CEO (Emilio Lozoya) and that they "do not want to [lose] further investments coming into Mexico."[254] Mr. Gracia further explained,[255]

> Hope you are fine. I just got the news about your decision to cease further investments in Mexico. I understand and share your concerns about your past experiences with regards to bids and payments in the "Zona Norte" [Chictontepec]. It is a very disturbing situation that the new Pemex administration is fixing. As you know, our CEO is very interested in your proposal. We had arranged a time for introductions with you and Emilio at the OTC, as we would like to see Finley Resources and your partners growing in Mexico. I will personally address your concerns with my CEO as we do not want to loose further investments coming into Mexico.
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> As you know we have been looking for a favorable solution to the contract that

249 **C-0033,** 804 Contract at Clause 45.
250 Witness Statement of J. Finley, ¶ 39; Witness Statement of L. Kernion, ¶ 56.
251 Witness Statement of L. Kernion, ¶ 59.
252 *See* Witness Statement of L. Kernion, ¶¶ 59, 61-62. Because this arbitration has been bifurcated, Claimants reserve their rights regarding the quantum of their damages for a later phase of this arbitration.
253 Witness Statement of L. Kernion, ¶ 59; **C-0057,** Email from F. Gracia to J. Finley (May 5, 2013).
254 **C-0057,** Email from F. Gracia to J. Finley (May 5, 2013).
255 **C-0057,** Email from F. Gracia to J. Finley (May 5, 2013). Mr. Gracia's native language is not English. Thus, his communications in English may have misspellings and grammatical errors.

> was awarded to your partners and you, and to the completion of some payments that are past due.
>
> ***
>
> I hope your decision is not final as we would really benefit from your company's expertise, if it is, I would request if we can continue our discussion regarding how to detonate development of shale exploration and production activities in Mexico.

146. Not long after MWS and Bisell's complaints, on July 12, 2013, Pemex requested work from MWS and Bisell.[256] This was four months into the 6-month contract. Approximately two weeks later, on July 25, Pemex issued a second work order for MWS and Bisell to drill a second well.[257]

147. MWS and Bisell planned to commence work under both of these work orders.[258] As Luis Kernion explains, "[t]o do the work, I recall that we had to transport our equipment from the yard in Poza Rica to the work site."[259] However, after MWS and Bisell arrived at the job site with their crew and equipment, Pemex cancelled the first work order.[260] Pemex told them to demobilize their equipment and return to their base of operations. Pemex explained why it cancelled the work: because of "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 comply with the operational program and production goals of PEP's General Directorate." Similarly, Pemex cancelled the second work order before MWS and Bisell's crew and equipment could leave the yard.[261]

148. Over six months had passed since the parties had signed the 804 Contract. However, MWS and Bisell had not been able to perform — or receive compensation for — any work. Meanwhile, MWS and Bisell were incurring significant expenses to maintain their equipment in a state of readiness.[262]

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256 **C-0076,** Letter from Pemex to MWS and Bisell (July 19, 2013).
257 **C-0077,** Letter from Pemex to MWS and Bisell (July 25, 2013).
258 Witness Statement of L. Kernion, ¶ 60.
259 Witness Statement of L. Kernion, ¶ 60.
260 **C-0078,** Letter from Pemex to MWS and Bisell (Sept. 2, 2013).
261 Witness Statement of L. Kernion, ¶ 60.
262 *See* Witness Statement of J. Finley, ¶ 53; Witness Statement of L. Kernion, ¶¶ 61-63.

149. By September 2013, Pemex had not requested any work under the 804 Contract. Internally, it noted that the 804 Contract had a value of US$ 55 million and that it needed this work to fulfill the operational (development) program for Chicontepec.[263] Because the 804 Contract would be expiring at the end of the month, Pemex would be seeking a three-month extension until the end of December 2013.[264] Pemex described this as an "extemporaneous agreement" and explained that it was needed because "it was initially planned to contract from September 1 of this year, the 'Integrated Works to Complete Wells in the Northern Region,' however, it was not possible to allocate the corresponding budgetary resources in a timely manner, postponing the date of contracting and start of these works."[265]

150. On October 30, 2013, Pemex formally notified Bisell and MWS about the extension.[266] This is the same day that Pemex internally instructed to stop any further work because of budgetary issues.[267] By this time, MWS and Bisell had little choice but to agree to an extension.[268] They had invested significant amounts in Mexico, were bleeding cash due to Pemex's failure to request work, and needed to salvage their investment. Luis Kernion explains their predicament:[269]

> At this point, we had two options. We could have sued Pemex or we could continue under the contract. We had already made a significant investment in Mexico in both equipment and labor based on Pemex's representations to us, so we chose to agree to the extension. Based on their representations to me and in the contract, we continued to believe that Pemex would act in good faith and request at least US$ 55 million under the contract. If Pemex needed an extension to request the work, we reluctantly agreed.

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263 **C-0079,** Pemex Internal Memo (Sept. 19, 2013).
264 **C-0079,** Pemex Internal Memo (Sept. 19, 2013).
265 **C-0080,** Pemex Internal Memo (Oct. 15, 2013).
266 **C-0081,** Pemex Letter to Bisell (Oct. 30, 2013).
267 **C-0081,** Pemex Internal Memo (Oct. 30, 2013) ("In the aforementioned budget version, PEMEX obtained an increase to the current expense budget ceiling of 10,000 million pesos for the remaining months of fiscal year 2013. This amount was less than the sum of the additional resources requested by the Agencies (Organismos), so Corporate (Corporativo) informs that there will be no additional resources for the rest of 2013. . .").
268 Witness Statement of L. Kernion, ¶ 61; **C-0033,** 804 Contract Amendment (Nov. 20, 2013).
269 Witness Statement of L. Kernion, ¶ 61.

151. One week after agreeing to the first extension, Pemex began communicating internally about another one.[270] This time, Pemex wanted to extend the contract to March 31, 2014.[271] Pemex again referred to the value of the 804 Contract as US$ 55 million.[272]

152. On February 14, 2014, Pemex formally notified MWS and Bisell of the change.[273] Pemex explained that it was extending the contract by 90 days.[274] Again, MWS and Bisell had little choice but to agree to the extension.[275] On February 28, 2014, MWS and Bisell agreed to a second extension of the 804 Contract.[276] These extensions resulted in serious financial implications for MWS and Bisell, as the expected return on their investments was delayed.

153. Even worse, despite extending the contract twice, Pemex did not issue another work order.[277] Instead, a few months later, Pemex asked to terminate the contract early. It was MWS and Bisell's clear preference to have Pemex perform as agreed under the contract. However, their expenses were mounting without any revenue as an offset. Under the circumstances, they had no choice but to terminate the contract.[278]

154. In March 2014, the parties started the finiquito process.[279] The negotiation of the finiquito took more than a year and was concluded in April 2015. In the finiquito, MWS and Bisell reserved their rights to seek damages.[280]

c) 804 Contract litigation

155. On December 8, 2015, MWS and Bisell initiated a civil lawsuit against Pemex in the federal district court in Veracruz for breach of its obligations under the 804 Contract.[281] MWS and Bisell sought, among other damages, approximately US$ 22 million for work that Pemex failed

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270 **C-0082,** Pemex Internal Memo (Nov. 7, 2013).
271 **C-0083,** Pemex Internal Memo (Nov. 28, 2013). Like with the other extensions, Pemex communicated internally among various departments. Pemex continued deliberating this extension internally throughout December 2013 and January 2014. **C-0084,** Pemex Internal Memo (Dec. 10, 2013); **C-0085,** Pemex Internal Memo (Dec. 13, 2013); **C-0086,** Pemex Internal Memo (Jan. 2, 2014).
272 **C-0086,** Pemex Internal Memo (Jan. 2, 2014).
273 **C-0087,** Letter from Pemex to MWS and Bisell (February 14, 2014).
274 **C-0087,** Letter from Pemex to MWS and Bisell (February 14, 2014).
275 Witness Statement of L. Kernion, ¶ 62; **C-0120,** 804 Contract Amendment (Feb. 28, 2014).
276 **C-0120,** 804 Contract Amendment (Feb. 28, 2014).
277 Witness Statement of L. Kernion, ¶ 63.
278 Witness Statement of L. Kernion, ¶ 63.
279 **C-0024,** 804 Contract Finiquito (April 10, 2015).
280 **C-0024,** 804 Contract Finiquito (April 10, 2015).
281 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 63 (citing Amparo Judgment CP-804 [RZ-016], p. 7).

to request.[282] The court dismissed this lawsuit on December 9, 2015.[283] According to the court, MWS and Bisell needed to pursue their remedies in Mexico's administrative court system.[284]

156. This decision was appealed on December 16, 2015.[285] The court of appeals affirmed the court of first instance on February 12, 2016 and concluded that the lawsuit was administrative in nature.[286]

157. In response to the court of appeals, MWS and Bisell filed an *amparo* on March 14, 2016.[287] An *amparo* is a remedy to enforce constitutional rights in Mexico.[288] The Amparo Court denied the writ.[289] Mexican legal experts Rodrigo Zamora Etcharren and Daniel Amézquita Díaz testify that there were irregularities in this *amparo* proceeding. In particular, the Amparo Court committed a serious error because it "should have applied the principle of *suplencia de la queja* and, thus, should have considered Bisell and MWS's arguments re subject-matter jurisdiction instead of dismissing them based on mere formalities."[290]

158. The experts also had concerns about the length of the civil proceedings. They testify, "for over ten months Bisell and MWS attempted to have a day in court, and such attempt was futile as the court never admitted their claim."[291] Indeed, the experts conclude that "justice was not administered in an expeditious or prompt manner."[292]

159. MWS and Bisell then commenced an administrative action against Pemex on March 5, 2019.[293] Mexico's administrative courts are specialized courts within Mexico's executive branch. They

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[282] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 64 (citing Amparo Judgment CP-804 [RZ-016], p. 8).
[283] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 65 (citing Dismissal District Court Decision [RZ-017], p. 9).
[284] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 65 (citing Dismissal District Court Decision [RZ-017], p. 9).
[285] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 66 (citing Appeal Judgment CP-804 [RZ-018], p. 1).
[286] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 66 (citing Appeal Judgment CP-804 [RZ-018], p. 30).
[287] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 67 (citing Amparo Judgment CP-804 [RZ-016], p. 36).
[288] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 37.
[289] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 67 (citing Amparo Judgment CP-804 [RZ-016], p. 36).
[290] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 174.
[291] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 68.
[292] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 158.
[293] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 63.

are regularly used by Pemex. MWS and Bisell sought to challenge: (i) Pemex's administrative resolution terminating the 804 Contract; and (ii) the meeting minutes that were issued by Pemex related to the termination (as such minutes are considered to be administrative resolutions).[294] On March 11, 2019, the administrative court dismissed the case.[295] MWS and Bisell appealed the dismissal.[296] Thereafter, on July 12, 2019, the dismissal was reversed in part.[297] The court admitted MWS and Bisell's challenge to Pemex's termination of the 804 Contract.[298] Pemex further appealed the admission of MWS and Bisell's claim to the administrative proceeding.[299] This resulted in the administrative proceeding extending years beyond what it should have. Indeed, Mexican legal experts Rodrigo Zamora Etcharren and Daniel Amézquita Díaz testify that there were unjustified delays during this administrative proceeding.[300]

160. For over five years, MWS and Bisell sought resolution of its dispute with Pemex in Mexico's court system. However, the court did not reach a decision on the merits. Because of the extensive delays, it was futile to continue these proceedings. As such, MWS and Bisell requested that the court dismiss this lawsuit in order to file this arbitration.[301]

4. 821 Contract (Finley and Drake-Mesa)

161. This is the third and final contract with Pemex to perform various oilfield services in Chicontepec. There were two counterparties to Pemex: Finley and Drake-Mesa.[302] As explained above, Finley is a U.S. enterprise, and Drake-Mesa is a Mexican enterprise that Finley

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294 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 69.
295 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 71.
296 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 72 (citing Official communication dated 11 March 2019 [RZ-019], issued by the Sixth Metropolitan Regional Chamber of the Administrative Court (docket no. 5403/19-17-06-5).
297 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 72 (citing Official communication dated 11 March 2019 [RZ-019], issued by the Sixth Metropolitan Regional Chamber of the Administrative Court (docket no. 5403/19-17-06-5).
298 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 72 (citing Official communication dated 1 October 2019 [RZ-020], issued by the Sixth Metropolitan Regional Chamber of the Administrative Court (docket no. 5403/19-17-06-5) and published on 29 November 2019).
299 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 74 (citing Official communication dated 2 January 2020 [RZ-021], issued by the Sixth Metropolitan Regional Chamber of the Administrative Court (docket no. 5403/19-17-06-5).
300 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶¶ 160 et seq.
301 Witness Statement of L. Kernion, ¶ 64.
302 **C-0034,** 821 Contract at Clauses 1.9, 2.1.

and Prize own and/or control.[303] Finley and Prize's claims in this arbitration arise from (1) Pemex repudiating the 821 Contract and (2) Mexico's court system endorsing such conduct.

162. In the spring of 2013, Finley and Prize were discussing making further investments with high-level Pemex officials. These officials encouraged Finley and Prize to further invest in Mexico. Specifically, these discussions were with Emilio Lozoya (Pemex's CEO), Carlos Morales Gil (PEP's Director General), and Froylan Gracia (Pemex's number two official).[304] They talked about doing more work in Mexico in the Chicontepec region and the Peña Nieto administration's proposed energy reforms, which contemplated allowing private companies to acquire direct rights to explore for and produce hydrocarbons.[305]

163. Luis Kernion met with Emilio Lozoya and Froylan Gracia in Mexico City about Claimants doing further work in Mexico:[306]

> Emilio was new to his position, but he knew that we were working under the 803 and 804 Contracts. He was polite and told me that our work was important to Pemex and Mexico and that we were valued as a partner. He wanted to talk about the Mexican oil market and opportunities for companies to work with Pemex. He said that Pemex was interested in international companies that could provide services and those that could own an exploration/exploitation block in Mexico.

Mr. Kernion also talked with Mr. Lozoya about Pemex's anticipated tender that eventually would lead to the 821 Contract:[307]

> Emilio and I also talked about the upcoming tender. He said that Pemex had a plan for this tender of 10 new packages. Pemex planned to put operators to work and have them bring equipment and personnel to the assigned areas. The operators who performed satisfactorily would then have some sort of option to that particular area or block once the Senate approved the hydrocarbon reforms. I recall Emilio using the example of Grupo Diavaz. One of its affiliates DS Servicios Petroleros does service operations for Pemex.

164. To provide context, Pemex had been generally performing as agreed under the 803 Contract for approximately one year.[308] However, Finley and MWS were one or two months into the 804 Contract and Pemex had not requested any work. In addition to discussing additional

303 Witness Statement of J. Finley, ¶ 36; Witness Statement of L. Kernion, ¶ 26.
304 Witness Statement of L. Kernion, ¶¶ 65-72; Witness Statement of J. Finley, ¶¶ 26, 40-43.
305 Witness Statement of L. Kernion, ¶ 68; Witness Statement of J. Finley, ¶¶ 26, 40-43.
306 Witness Statement of L. Kernion, ¶ 70.
307 Witness Statement of L. Kernion, ¶ 71.
308 Witness Statement of L. Kernion, ¶ 65.

opportunities, Luis Kernion was meeting with Froylan Gracia primarily, and to a lesser extent Emilio Lozoya, to discuss the two contracts.

165. Jim Finley was also communicating with Emilio Lozoya and Froylan Gracia.[309] Mr. Gracia learned that Pemex's conduct was affecting whether Mr. Finley and Luis Kernion would invest more in Mexico. In response, Mr. Gracia said that he would raise the issue with Mr. Lozoya and encouraged Mr. Finley to continue investing in Mexico.[310] In particular, Mr. Gracia stated that Pemex wanted to continue discussions with them on how to increase production in shale fields (like Chicontepec):[311]

> I hope your decision is not final as we would really benefit from your company's expertise, if it is, I would request if we can continue our discussion regarding how to detonate development of shale exploration and production activities in Mexico.

166. As an example, Pemex had a booth with a private meeting room at the Offshore Technology Conference (OTC) in Houston. [312] Pemex invited Jim Finley to a private meeting with Emilio Lozoya. Mr. Finley and Luis Kernion attended the conference and met with Mr. Lozoya, Froylan Gracia, and Carlos Morales Gil.[313]

167. Jim Finley describes how, during the meeting, he was encouraged to invest more in Mexico:[314]

> During the meeting, I spoke with Emilio about expanding our investments in Mexico. He knew that we had already invested in Mexico and wanted us to invest more. Emilio explained that Pemex was targeting private companies because it needed their experience for directional drilling and hydraulic fracturing in Chicontepec.

168. A few months after the OTC meeting, 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 (1,454 days).[315] Similar to the 803 Contract, interested bidders needed to pre-qualify and meet Pemex's technical and financial

[309] Witness Statement of J. Finley, ¶¶ 26, 40-43.
[310] Witness Statement of J. Finley, ¶ 40.
[311] **C-0057,** Email from F. Gracia to J. Finley (May 5, 2013).
[312] **C-0057,** Email from F. Gracia to J. Finley (May 5, 2013).
[313] Witness Statement of L. Kernion, ¶ 67; Witness Statement of J. Finley, ¶¶ 26, 40-43.
[314] Witness Statement of J. Finley, ¶ 42.
[315] **C-0043**, International Public Tender FTA Number 18575088-542-13 (2013) (821 Contract), http://dof.gob.mx/nota_detalle.php?codigo=5312360&fecha=29/08/2013#gsc.tab=0 (last checked June 6, 2022).

requirements.[316] During the qualification process, Jim Finley and Luis Kernion continued discussions with Froylan Gracia — and other high level Pemex officials — about investing in Mexico:[317]

> During the qualification process, I continued to be in frequent contact with Froylan and Pepe. The qualification process and subsequent bidding process took a while. During the discussions leading up to submitting our bid, Pepe told me that Pemex already had the funds to cover the entire project. He also told me that "Pemex pays, Pemex pays." Moreover, the contracts awarded under this tender would be big, meaning Pemex would be requesting a large amount of work and spending a lot of money. Both Pepe and Froylan told me that if we performed well under one of these contracts, this would open the door for us to obtain a block to explore/exploit hydrocarbons. To explain this comment, he was referring to the new administration's agenda to promote legislation that would open the Mexican hydrocarbon sector to foreign investment.

Ultimately, Finley and Drake-Mesa pre-qualified and submitted a bid in late 2013. As a reminder, Drake-Mesa is owned by Finley and Prize.

169. Following the bid round, Jim Finley and Luis Kernion continued discussing their investments in Mexico with Froylan Gracia. For example, in January 2014, Mr. Gracia emailed Mr. Finley: "Best wishes for 2014. I will most likely travel to Houston to the NAPE meeting, I believe that would be a good time and place to meet considering you agenda. Let me know if that works."[318] Eventually, on February 12, 2014, Pemex awarded the 821 Contract to Finley and Drake-Mesa.[319] Pemex, Finley, and Prize finalized the contract on February 28, 2014. The relevant terms of the contract, Pemex's egregious conduct with respect to Finley and Drake-Mesa's investments, and the ensuing disputes are addressed below.

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[316] Witness Statement of L. Kernion, ¶ 73; Witness Statement of J. Finley, ¶ 43. **C-0088,** 821 Prequalification Requirements.

[317] Witness Statement of L. Kernion, ¶ 74; Witness Statement of J. Finley, ¶ 43.

[318] **C-0053,** Email from F. Gracia to J. Finley (Jan. 13, 2014).

[319] **C-0089,** Email from L. Kernion to J. Finley (Feb. 12, 2014).

a) Relevant terms of the 821 Contract

170. Under the 821 Contract, Pemex agreed to request work from Finley and Drake-Mesa to drill wells in Chicontepec.[320] The work included hydraulic fracturing.[321] Pemex was to begin issuing work orders on March 1, 2014, and continue through December 31, 2017.[322] This was just shy of four years (1,402 days) of work for Finley and Drake-Mesa.

171. Pemex agreed to request US$ 418.3 million in work.[323] Pemex assured Finley and Drake-Mesa with a contractual representation that it "has allocated the resources to carry out the Works under this Contract."[324] To support their work obligation, Finley and Drake-Mesa were required to deliver a financial guarantee to Pemex equivalent to 10% of the maximum contract price, or US$ 41.8 million.[325]

172. Similar to the 804 Contract, Pemex agreed that it would perform its obligations — e.g., issuing work orders and paying for work performed — on principles of good faith and equity:[326]

> 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.
>
> 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

---

320 **C-0034,** 821 Contract. LPM means Ley de Petróleos Mexicanos or Mexico's Petroleum Law. RLPM means Reglamento de la Ley de Petróleos Mexicanos or the Regulations to Mexico's Petroleum Law. DAC means las Disposiciones Adminstrativas de Contratación en material de Adquisitiones, Arrendamientos, Obrasy Organismos Susibidiarios or the Administrative Rules regarding Contracting with respect to Acquisitions, Leases, Works, and Subsidiaries.

321 **C-0034,** 821 Contract at Clause 6.6.1.B.

322 **C-0034,** 821 Contract at Clause 4.1.

323 **C-0034,** 821 Contract at Preamble and Clause 5. Pemex also agreed to request a minimum of US$ 169 million in work.

324 **C-0034,** 821 Contract at Clause 1.4.

325 **C-0034,** 821 Contract at Clause 10.

326 **C-0034,** 821 Contract at Clause 3. LPM means Ley de Petróleos Mexicanos or Mexico's Petroleum Law. RLPM means Reglamento de la Ley de Petróleos Mexicanos or the Regulations to Mexico's Petroleum Law. DAC means las Disposiciones Adminstrativas de Contratación en material de Adquisitiones, Arrendamientos, Obrasy Organismos Susibidiarios or the Administrative Rules regarding Contracting with respect to Acquisitions, Leases, Works, and Subsidiaries.

mutual benefit of PEP and the CONTRACTOR, agreeing that each has the right to achieve its reasonable objectives, and requires PEP and the CONTRACTOR:

a) Sharing relevant information with the other party, subject only to confidentiality obligations;

b) Cooperate and consult each other in the manner necessary to achieve the completion of all the Work;

c) Warn of potential consequences, including those of costs of proposed actions;

d) Avoid unnecessary interference in the activity of the other party; and

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

Each time the terms of the Contract require a consultation between PEP and the CONTRACTOR in terms of the Contract, there will be a direct exchange of views before final decisions are made on the matter.

173. Finley and Drake-Mesa were also responsible for supplying equipment and certain materials in furtherance of this work.[327] When purchasing materials and equipment, Finley and Drake-Mesa had a local-content requirement (i.e., purchasing a certain percentage from Mexico).[328] Relatedly, Finley and Drake-Mesa also agreed to hire and use local workers from Mexico.[329] In addition, Finley and Drake-Mesa could subcontract certain activities:[330]

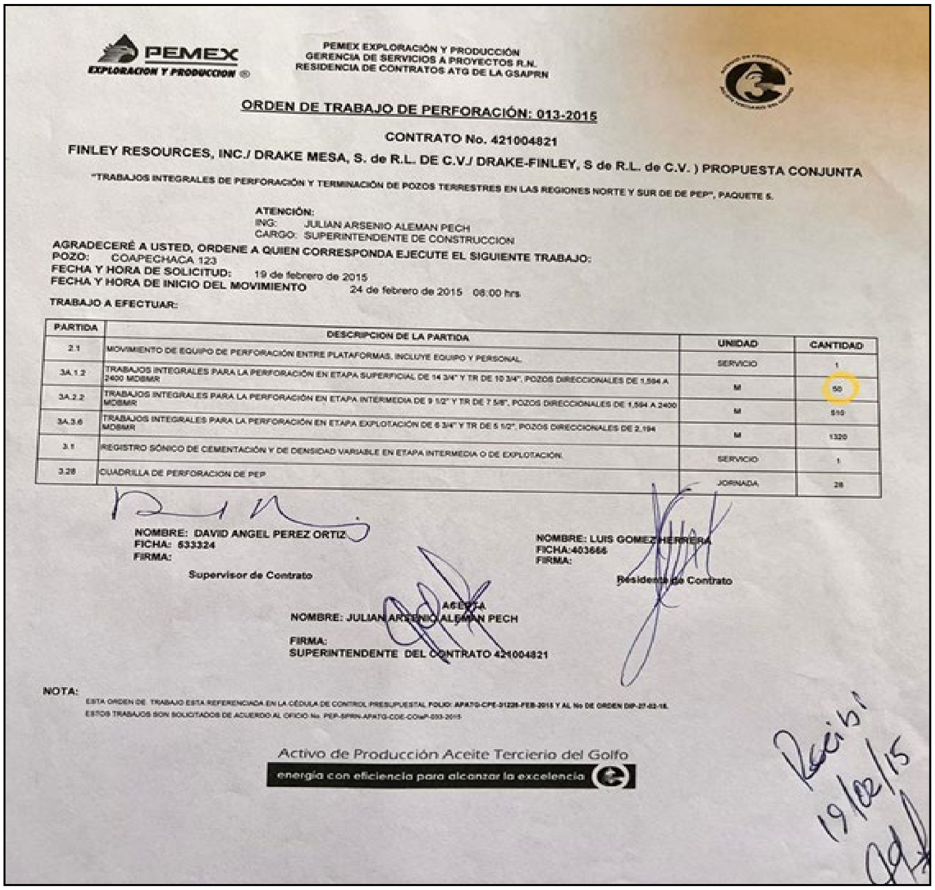
> The subcontracting of the following works and services is allowed: transportation of equipment and additional, tightening and hydrostatic testing for the introduction of pipe, inspection and cleaning of the pipe on site, supply and transportation of control fluids, testing of surface connections, well drilling, washing and filtering of wells.

174. Pemex agreed to issue work orders to Finley and Drake-Mesa.[331] Operationally, this was similar to the 803 and 804 Contracts. The work order specified the specific work to be completed, where it would be completed, and the timeframe for Finley and Drake-Mesa to do so.[332] Finley

327 **C-0034,** 821 Contract at Annex DT-6.
328 **C-0034,** 821 Contract at Clause 7, Anexo GIN.
329 **C-0034,** 821 Contract at Clause 7, Anexo GIN. MWS and Drake-Mesa could use some of the workers that were hired for the 803 and 804 Contracts. However, the 821 Contract included work that was different than under the 803 and 804 Contracts, Finley and Drake-Mesa needed to hire and train additional workers. Witness Statement of J. Finley; Witness Statement of L. Kernion, ¶ 76.
330 **C-0032,** 803 Contract at Clause 25.
331 **C-0034,** 821 Contract at Clause 44.
332 Witness Statement of L. Kernion, ¶ 94

and Drake-Mesa also had to have an employee in Pemex's offices to (a) assist Pemex with the preparation of work orders and (b) receive and approve them.[333]

175. Below is an example of a work order under the 821 Contract. Pemex identifies the well to be drilled, the date of issuance, the start date for the mobilization of the equipment and crew, and what work is to be performed. Pemex's supervisor for the 821 Contract (David Perez) and its overseer for the contract (Luis Gomez) signed the work order. Finley and Drake-Mesa's representative also signed where it provides "*aceptada*" or accepted:[334]



PEMEX
EXPLORACION Y PRODUCCION

PEMEX EXPLORACIÓN Y PRODUCCIÓN
GERENCIA DE SERVICIOS A PROYECTOS R.N.
RESIDENCIA DE CONTRATOS ATG DE LA GSAPRN

ORDEN DE TRABAJO DE PERFORACIÓN: 013-2015

CONTRATO No. 421004821

FINLEY RESOURCES, INC./ DRAKE MESA, S. de R.L. DE C.V./ DRAKE-FINLEY, S de R.L. de C.V.) PROPUESTA CONJUNTA

"TRABAJOS INTEGRALES DE PERFORACIÓN Y TERMINACIÓN DE POZOS TERRESTRES EN LAS REGIONES NORTE Y SUR DE DE PEP", PAQUETE 5.

ATENCIÓN:
ING: JULIAN ARSENIO ALEMAN PECH
CARGO: SUPERINTENDENTE DE CONSTRUCCION

AGRADECERÉ A USTED, ORDENE A QUIEN CORRESPONDA EJECUTE EL SIGUIENTE TRABAJO:
POZO: COAPECHACA 123
FECHA Y HORA DE SOLICITUD: 19 de febrero de 2015
FECHA Y HORA DE INICIO DEL MOVIMIENTO 24 de febrero de 2015 08:00 hrs

TRABAJO A EFECTUAR:

PARTIDA	DESCRIPCION DE LA PARTIDA	UNIDAD	CANTIDAD
2.1	MOVIMIENTO DE EQUIPO DE PERFORACIÓN ENTRE PLATAFORMAS, INCLUYE EQUIPO Y PERSONAL.	SERVICIO	1
3A.1.2	TRABAJOS INTEGRALES PARA LA PERFORACIÓN EN ETAPA SUPERFICIAL DE 14 3/4" Y TR DE 10 3/4", POZOS DIRECCIONALES DE 1,594 A 2400 MDBMR	M	50
3A.2.2	TRABAJOS INTEGRALES PARA LA PERFORACIÓN EN ETAPA INTERMEDIA DE 9 1/2" Y TR DE 7 5/8", POZOS DIRECCIONALES DE 1,594 A 2400 MDBMR	M	510
3A.3.6	TRABAJOS INTEGRALES PARA LA PERFORACIÓN EN ETAPA EXPLOTACIÓN DE 6 3/4" Y TR DE 5 1/2", POZOS DIRECCIONALES DE 2,194 MDBMR	M	1320
3.1	REGISTRO SÓNICO DE CEMENTACIÓN Y DE DENSIDAD VARIABLE EN ETAPA INTERMEDIA O DE EXPLOTACIÓN.	SERVICIO	1
3.28	CUADRILLA DE PERFORACION DE PEP	JORNADA	28

NOMBRE: DAVID ANGEL PEREZ ORTIZ
FICHA: 633324
FIRMA:
Supervisor de Contrato

NOMBRE: LUIS GOMEZ HERRERA
FICHA:403666
FIRMA:
Residente de Contrato

ACEPTA
NOMBRE: JULIAN ARSENIO ALEMAN PECH
FIRMA:
SUPERINTENDENTE DEL CONTRATO 421004821

NOTA:
ESTA ORDEN DE TRABAJO ESTA REFERENCIADA EN LA CÉDULA DE CONTROL PRESUPUESTAL FOLIO: APATG-CPE-31228-FEB-2015 Y AL No DE ORDEN DIP-27-02-15.
ESTOS TRABAJOS SON SOLICITADOS DE ACUERDO AL OFICIO No. PEP-SPRN-APATG-CDE-COaP-033-2015

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19/02/15

176. The 821 Contract was similar to the 803 and 804 Contracts in additional ways:

- Finley and Drake-Mesa were subject to penalties for delays in performing the work.[335]

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333 Witness Statement of J. Finley, ¶ 54; Witness Statement of L. Kernion, ¶¶ 88-89. This process was the same as under the 803 and 804 Contracts explained above.
334 **C-0090,** Pemex 821 work order (Feb. 24, 2015).
335 **C-0034,** 821 Contract at Clause 6.6.

- Finley and Drake-Mesa would invest 2% of the amount of the contract into the local community and for the benefit of the environment.[336]
- The parties could only modify the contract by written agreement.[337]
- Pemex was allowed to exercise its administrative power to rescind the contract in certain circumstances, following which it could proceed to the finiquito or termination of the contract.[338]

177. Pemex's authority to administratively rescind the 821 Contract is relevant to this arbitration.[339] The 821 Contract contained a detailed process if Pemex seeks to use its administrative authority to rescind the contract. The 803 and 804 Contracts had similar provisions.

178. The administrative rescission provisions of all three contracts generally follow Article 70 of Pemex's administrative rules.[340] Notably, Article 70 authorizes rescission when certain listed events occur and for "any other event that is stipulated in the contract."[341] This explains an important distinction between the 821 Contract and Claimants' first two contracts.

179. Under the 821 Contract, Pemex's ability to rescind administratively with respect to work orders is limited. Specifically, Pemex can only rescind the contract administratively if the Contractor (Finley and Drake-Mesa) accumulates 15 unfulfilled work orders:[342]

> 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:
>
> * * *
>
> In the event that the CONTRACTOR accumulates 15 (fifteen) Unfulfilled Orders during the Contract Execution Period.

---

336 **C-0034,** 821 Contract at Clause 48.
337 **C-0034,** 821 Contract at Clause 13.
338 **C-0034,** 821 Contract at Clauses 15 and 18.
339 The 803 Contract and the 804 Contract also give Pemex the authority to administratively rescind those contracts. However, Pemex did not use this authority for those contracts, and thus, those contract provisions were not included above.
340 **CL-0015**, Disposiciones Administrativas de Contratacion (Jan. 6, 2010).
341 **CL-0015**, Disposiciones Administrativas de Contratacion (Jan. 6, 2010) at Article 70(j).
342 **C-0034,** 821 Contract at Clause 15.1.

This provision was important to Finley and Prize in their decision to proceed with the 821 Contract:[343]

> [T]he 821 Contract does not allow Pemex to rescind it for one unfulfilled work order. This contract is different from our first two contracts with Pemex. We negotiated with Pemex to include a limitation of Pemex's ability to rescind because of unfulfilled work orders. Under the 821 Contract, Pemex cannot rescind our contract unless we accumulate 15 unfulfilled work orders. This protection was important to us when we were making this additional investment in Mexico because it constrained Pemex's ability to rescind a contract with very significant and sizeable commitments on its part (US$ 418 million maximum).

Such a provision was particularly important for the 821 Contract, which had a term of nearly four years.

180. Finally, one other relevant provision of the 821 Contract differs from the 803 and 804 Contracts. In their third contract, the parties agreed that any contractual disputes under the 821 Contract were to be decided by ICC arbitration.[344] However, the parties agreed that administrative rescission and early termination (*terminación anticipada*) by Pemex are administrative in nature and not subject to arbitration.[345] These disputes were to be resolved in the Mexico City federal courts:[346]

> 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.

b) Pemex's conduct under the 821 Contract

181. Finley and Drake-Mesa made significant investments in Mexico to perform under Pemex's work orders:[347]

- Establishing Drake-Finley, a Mexican company. This entity managed the operations performed under the contract.

343 Witness Statement of L. Kernion, ¶ 101.
344 **C-0034,** 821 Contract at Clause 47.2.
345 **C-0034,** 821 Contract at Clause 47.2.
346 **C-0034,** 821 Contract at Clause 47.3.
347 Witness Statement of J. Finley, ¶¶ 33-37, 45; Witness Statement of L. Kernion, ¶ 76.

- Providing a financial guarantee of US$ 41.8 million (10% of the contract value, which was US$ 418 million).
- Purchasing special drilling equipment to meet Pemex's specifications for the 821 Contract. These purchases included rigs for drilling, fracking, and completion of wells, new piping, mobile offices, satellite equipment, and frack sands.
- Hiring dozens of new employees.
- Training those employees.

These investments are in addition to those that MWS and Bisell made to perform under the 803 and 804 Contracts. As explained above, those investments included purchasing special drilling equipment to meet Pemex's specifications.

182. Finley and Drake-Mesa began work under the 821 Contract in May 2014.[348] For the next few months, Pemex issued work orders, and Finley and Drake-Mesa performed the work.[349] Below is a picture of fracking operations that they conducted for Pemex:[350]

183. However, by November 13, 2014, Pemex was corresponding internally about its lack of budgeted funds for the 821 Contract.[351] Thereafter, Pemex did not request work under the

348 Witness Statement of L. Kernion, ¶ 77. As explained above, Pemex had not requested any work under the 803 Contract for approximately six months. It had also issued only one work order that it then cancelled under the 804 Contract. Thus, at this juncture, the 821 Contract became the only active contract under which Claimants were operating.
349 Witness Statement of L. Kernion, ¶ 77.
350 Witness Statement of L. Kernion, ¶ 77.
351 **C-0091,** Pemex Internal Email (Nov. 13, 2014).

821 Contract from November 2014 to March 2015.[352] Finley and Drake-Mesa fulfilled their obligation to maintain their equipment and crew in a state of readiness to perform.[353] But Pemex did not issue any work orders. Finley and Drake-Mesa incurred significant losses because of Pemex's inaction.[354] This does not include the opportunity costs of using the equipment and certain employees elsewhere, i.e. in the United States.

184. In March 2015, Pemex began requesting work again.[355] However, by July 2015, Pemex sought to change the terms of the 821 Contract. It wanted a 5% discount on all work performed.[356] This was yet another attempt by Pemex to increase the burden on Finley and Drake-Mesa. Consequently, Finley and Drake-Mesa opposed the request.[357]

185. Next, Pemex demanded that Finley and Drake-Mesa move all of their equipment back to the yard in Poza Rica between each work order.[358] These costs were not considered when Finley and Drake-Mesa entered into the 821 Contract.[359] Moreover, it had been their practice to move from one job site to the next without having to return to their base of operations. As noted above, each trip between the work site and the yard cost approximately US$ 300,000.[360]

186. Thereafter, on September 24, 2015, Pemex began to analyze internally an amendment to the 821 Contract. Pemex was considering extending the period to pay for each work order. Pemex wanted to increase its payment from 20 days to six months.[361] Ultimately, Pemex decided that it could make this change unilaterally.[362]

187. This latter change put Finley and Drake-Mesa in a difficult position. They had entered into subcontracts in reliance on Pemex paying its invoices within 20 days and had agreed to pay its subcontractors on a similar timeline.[363] Pemex's payment change, coupled with its failure to issue the mandated work orders and timely pay for the limited work requested, resulted in

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352 Witness Statement of L. Kernion, ¶ 78.
353 *See* Witness Statement of L. Kernion, ¶ 78.
354 Witness Statement of L. Kernion, ¶ 78.
355 Witness Statement of L. Kernion, ¶ 79.
356 **C-0092,** Letter from Pemex to Finley and Drake-Mesa (July 16, 2015).
357 **C-0093,** Letter from Finley and Drake-Mesa to Pemex (Aug. 12, 2015).
358 **C-0094,** Letter from Pemex to Finley and Drake-Mesa (July 28, 2015).
359 Witness Statement of L. Kernion, ¶ 80.
360 Witness Statement of L. Kernion, ¶ 80.
361 **C-0095,** Pemex Internal Letter (Sept. 24, 2015).
362 **C-0096,** Letter from Pemex to Finley and Drake-Mesa (Jan. 21, 2016).
363 Witness Statement of L. Kernion, ¶ 81.

Finley and Drake-Mesa having disputes with its subcontractors.[364] These disputes required Finley and Drake-Mesa to devote significant resources to resolve them.[365]

188. Finally, after first having delayed its payments, Pemex then refused to pay for work orders altogether. Jim Finley explains the problems this caused:[366]

> [A]t 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 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. This came out of our own pockets. Pemex requested work and benefitted from that work, but we were the ones who ended up paying for that work.

189. In November 2015, Pemex resumed requesting work.[367] It had stopped issuing work orders in August 2015. Finley and Drake-Mesa did the work, only for Pemex to stop issuing work orders again in January 2016.[368] This is when Pemex devised a new excuse to avoid its obligations. On January 22, 2016, Pemex wrote to Finley and Drake-Mesa stating that it did not have to issue work orders under the 821 Contract.[369] This is inconsistent with the 821 Contract's plain language and Pemex's representations to Finley and Drake-Mesa when it was recruiting them to work in Mexico.[370] It is also inconsistent with Pemex's obligation of good faith and equity that it had agreed to under the contract.[371]

190. By April 2016, Pemex had not requested work for over 100 days. Overall, there had been over 300 days of inactivity under the 821 Contract.[372] Pemex had only requested approximately 11% of the maximum contract value (approximately US$ 370 million was remaining).[373] Similarly, MWS and Bisell had experienced extended periods of Pemex not requesting work under the 803 and 804 Contracts. Collectively, Finley, Drake-Mesa, MWS, and Bisell had invested over

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[364] Witness Statement of L. Kernion, ¶ 81.
[365] Witness Statement of L. Kernion, ¶ 81.
[366] Witness Statement of J. Finley, ¶ 50.
[367] Witness Statement of L. Kernion, ¶ 82.
[368] Witness Statement of L. Kernion, ¶ 82.
[369] **C-0097,** Letter from Pemex to Finley and Drake-Mesa (Jan. 22, 2016).
[370] **C-0034,** 821 Contract at Clauses 5, 44; Witness Statement of J. Finley; Witness Statement of L. Kernion.
[371] **C-0034,** 821 Contract at Clause 3.
[372] Witness Statement of L. Kernion, ¶ 83.
[373] Witness Statement of L. Kernion, ¶ 22.

US$ 30 million in Mexico to perform work for Pemex.[374] Pemex's refusal to request work was causing Claimants to incur substantial losses (they were still having to pay their employees and subcontractors without any revenue from Pemex). Pemex had repudiated the 821 Contract.

191. In light of these losses and Pemex effectively terminating the contract early, Finley and Drake-Mesa sought relief from a Mexican federal civil court on April 29, 2016.[375] Luis Kernion explains:[376]

> Because Pemex was not performing as agreed, we initiated legal action against it in a Mexican court. We were clear with Pemex. We wanted it to comply with its contractual obligations and request work, but its behavior forced us to seek judicial relief.

192. Thereafter, Pemex retaliated against Finley and Drake-Mesa for commencing the lawsuit. Pemex told them that it would not be issuing any more work orders as long as the lawsuit was pending.[377] At this point, Pemex had not issued a work order for over 100 days. And there had been over 300 days of business interruption under the 821 Contract (around 25% of the contract term). Pemex also had a long history of failing to request work under the 803 and 804 Contracts.

193. As a result, Finley and Drake-Mesa laid off their employees and changed their operations, leaving them not in a state of readiness to perform.[378] Luis Kernion explains:[379]

> Pemex's failure to uphold its commitments to request US$ 418.3 million in work took a serious financial toll. We were forced to terminate many of our employees and change our operations. Because of the mounting costs, we were no longer able to have our equipment and employees remain on standby pending Pemex issuing a work order (that Pemex told us in no uncertain terms that it had no intention of issuing any further work orders). We had no revenue, so it was not sustainable to maintain workers and equipment ready to perform.

Jim Finley adds, "[t]o be clear, our decision to layoff our workers was not due to any failure on their part. Rather, we made this decision because Pemex had stopped requesting work from us, so there was no work for them to perform."[380] Finley and Drake-Mesa moved most of

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[374] Witness Statement J. Finley, ¶ 46; Witness Statement of L. Kernion, ¶ 115.
[375] Witness Statement of L. Kernion, ¶ 84.
[376] Witness Statement of L. Kernion, ¶ 82.
[377] Witness Statement of L. Kernion, ¶ 85.
[378] Witness Statement of J. Finley; Witness Statement of L. Kernion, ¶ 86.
[379] Witness Statement of L. Kernion; *see also* Witness Statement of J. Finley.
[380] Witness Statement of J. Finley, ¶ 53.

their equipment from their yard in Poza Rica to another storage yard where the equipment remains today and is rusting:[381]

194. Pemex knew that Finley and Drake-Mesa were laying off their workers and moving their equipment. Luis Kernion told them.[382] Moreover, Pemex had an inspector who would regularly visit Claimants' yard in Poza Rica to ensure that their equipment was in compliance with Pemex's specifications under the contracts.[383] The inspector must have seen that Finley and Drake-Mesa were moving the equipment. Likewise, Pemex knew that Finley and Drake-Mesa were laying off their employees. They laid off the employee who served as their representative in Pemex's office.[384] It was obvious that he was missing from the daily meetings to discuss upcoming work and the lengthy discussions leading up to the preparation of work orders (especially any that Pemex would be issuing to Finley and Drake-Mesa).

195. In spite of this, in November 2016, Finley and Drake-Mesa received from Pemex what seemed to be a new work order.[385] Pemex requested Finley and Drake-Mesa to drill a well called the

381 Witness Statement of L. Kernion, ¶ 87.
382 Witness Statement of L. Kernion, ¶ 88.
383 Witness Statement of L. Kernion, ¶ 88.
384 Witness Statement of L. Kernion, ¶ 88.
385 **C-0098,** Pemex Work Order (Nov. 18, 2016); Witness Statement of L. Kernion, ¶ 90.

"Coapechaca 1240" for approximately US$ 1 million.[386] The timing of this purported work order was odd. By this point:

- Pemex had told Finley and Drake-Mesa that it would not be issuing any further work orders because of their lawsuit.
- Pemex had not issued any work order for 11 months. In fact, Pemex's documents supporting the work order reflect that Pemex had only requested 11.46% of the amount of the contract, which Pemex noted was US$ 418,579,608.02.[387] This reflects over 300 days of inactivity under the contract.
- Pemex had repeatedly told Finley and Drake-Mesa that it did not have the budget to issue any further work orders.
- Finley and Drake-Mesa had not been involved in the preparation of the work order, in stark contrast to the established practice.

196. In addition, Pemex did not tell them in advance that it wanted to drill the "Coapechaca 1240". Nor did Pemex work with Finley and Drake-Mesa in preparing the work order for the well. This was highly unusual. As noted above, planning a work order is an involved process. Pemex worked with Finley and Drake-Mesa before issuing one. Luis Kernion describes the collaboration involved in preparing a work order:[388]

> To provide context, I describe the process to prepare a work order under the three contracts. In general, a work order specifies the work to be completed, the location of the work, the timeframe to complete it, and the cost. As noted above, our representative based in Pemex's office would assist Pemex with the preparation of work orders and receive the work orders.
>
> This latter point is important. Preparing the Pemex's work orders was a very technical process. Pemex held daily meetings about the technical aspects of each project, the work needed, and the best way to complete this work. Pemex led the meetings. Each company was required to have a technical representative on site, and Pemex would seek technical advice from them on the work that was needed and the strategies to complete the work. We would often liaise with our representative at Pemex's office on how to approach certain technical issues. It would sometimes take weeks of dialogue with Pemex before it would prepare and issue a work order. Given the sophisticated nature of drilling a well combined with the safety and environmental risk, we would work with Pemex to jointly design and approve the operation. Our representative at Pemex's office is who

[386] **C-0098,** Pemex Work Order (Nov. 18, 2016).
[387] The 821 Contract reflects an amount of US$ 418,303,621.55. **C-0034,** 821 Contract at Clause 5.
[388] Witness Statement of L. Kernion, ¶¶ 94-95; *see also* Witness Statement of J. Finley, ¶ 54.

formally received work orders, and the receipt was acknowledged with his signature along with those of the Pemex officials responsible for the contract.

197. As explained above, Finley and Drake-Mesa's representative in Pemex's office typically signs a work order. This indicates that Finley and Drake-Mesa's representative in Pemex's office participated in its preparation, approved its contents, and accepted the performance of such work.[389] The participation of the service company is not just a formality but is a crucial part of the process.

198. Drilling is inherently dangerous. The design of a drilling campaign requires sophisticated engineering and complex logistics. Before a well is spud, great effort is expended to ensure that the well can be efficiently drilled to the intended target while protecting the safety of the people working at the site and the environment. This is why it is the norm to involve the service company in the design of work orders and let them approve the orders to be issued. Here, Finley and Drake-Mesa's representative did not sign Pemex's alleged November 2016 work order:[390]


PEMEX
EXPLORACION Y PRODUCCION

DIRECCIÓN DE DESARROLLO Y PRODUCCIÓN
SUBDIRECCIÓN DE SERVICIOS A LA EXPLOTACIÓN
GERENCIA DE SERVICIOS DE INTERVENCIONES A POZOS
COORDINACIÓN DE SERVICIOS DE INTERVENCIONES A POZOS ZONA NORTE
RESIDENCIA DE CONTRATOS ATG

ORDEN DE TRABAJO DE PERFORACIÓN: 028-2016

CONTRATO No. 421004821

FINLEY RESOURCES, INC./ DRAKE MESA, S. de R.L. DE C.V./ DRAKE-FINLEY, S de R.L. de C.V.(PROPUESTA CONJUNTA)

"TRABAJOS INTEGRALES DE PERFORACIÓN Y TERMINACIÓN DE POZOS TERRESTRES EN LAS REGIONES NORTE Y SUR DE DE PEP", PAQUETE 5.

ATENCIÓN:
ING: JOSÉ MIGUEL HERNÁNDEZ NAVIGAL
CARGO: SUPERINTENDENTE DE CONSTRUCCION

AGRADECERÉ A USTED, ORDENE A QUIEN CORRESPONDA EJECUTE EL SIGUIENTE TRABAJO:
POZO: COAPECHACA 1240
FECHA Y HORA DE SOLICITUD: 25 de noviembre de 2016
FECHA Y HORA DE INICIO DE MOVIMIENTO: 10 de diciembre de 2016 08:00 HRS
FECHA Y HORA DE INICIO DE LA PERFORACIÓN: 17 de diciembre de 2016 12:00 HRS

TRABAJO A EFECTUAR:

PARTIDA	DESCRIPCION DE LA PARTIDA	UNIDAD	CANTIDAD
3A.1.2	TRABAJOS INTEGRALES PARA LA PERFORACIÓN EN ETAPA SUPERFICIAL DE 14 3/4" Y TR DE 10 3/4", POZOS DIRECCIONALES DE 1,594 A 2400 MDBMR	M	50
3A.2.2	TRABAJOS INTEGRALES PARA LA PERFORACIÓN EN ETAPA INTERMEDIA DE 9 1/2" Y TR DE 7 5/8", POZOS DIRECCIONALES DE 1,594 A 2400 MDBMR	M	500
3A.3.8	TRABAJOS INTEGRALES PARA LA PERFORACIÓN EN ETAPA EXPLOTACIÓN DE 6 3/4" Y TR DE 5 1/2", POZOS DIRECCIONALES DE 2,194 MDBMR	M	1313
2.1	MOVIMIENTO DE EQUIPO DE PERFORACIÓN ENTRE PLATAFORMAS, INCLUYE EQUIPO Y PERSONAL	SERVICIO	1
3.1	REGISTRO SÓNICO DE CEMENTACIÓN Y DE DENSIDAD VARIABLE EN ETAPA INTERMEDIA O DE EXPLOTACIÓN.	SERVICIO	1
3.28	CUADRILLA DE PERFORACION DE PEP	JORNADA	20

NOMBRE: DAVID ANGEL PEREZ ORTIZ
FICHA: 533324
FIRMA:
Supervisor de Contrato

NOMBRE: LUIS GOMEZ HERRERA
FICHA:403666
FIRMA:
Residente de Contrato

ACEPTA
NOMBRE: JOSÉ MIGUEL HERNÁNDEZ NAVIGAL
FIRMA:
SUPERINTENDENTE DEL CONTRATO 421004821

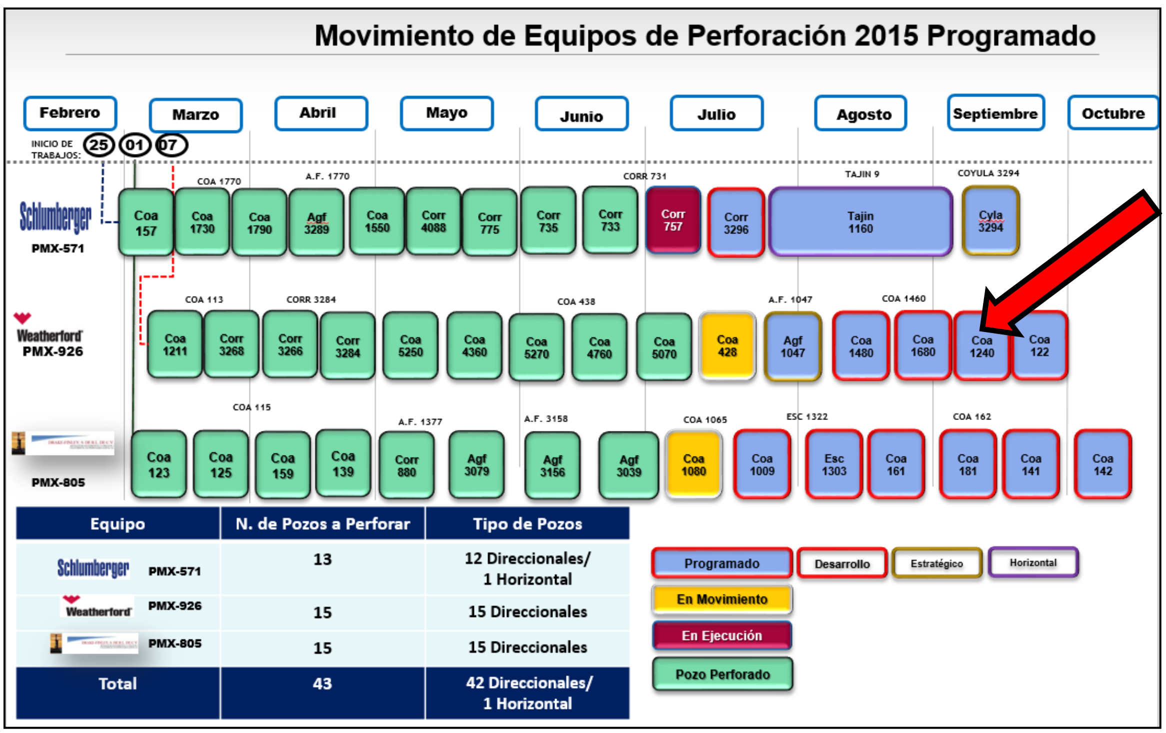
NOTA: ESTA ORDEN DE TRABAJO ESTA REFERENCIADA A LA SOLICITUD INTERNA SAP: [illegible], CEDULA DE CONTROL PRESUPUESTAL [illegible]-NOV-2016, PEDIDO SAP: [illegible] Y FOLIO RAF [illegible]-NOV-2016

Activo de Producción Aceite Terciario del Golfo
energía con eficiencia para alcanzar la excelencia

[389] Witness Statement of L. Kernion, ¶ 95; Witness Statement of J. Finley, ¶ 54.
[390] **C-0098,** Pemex Work Order (Nov. 18, 2016); Witness Statement of L. Kernion, ¶ 96.

199. Finally, there are even further oddities about the alleged November 2016 work order to drill the Coapechaca 1240 well. Pemex periodically prepared a scheduling document called "*Movimiento de Equipos de Equipos de Perforación*" or "Movement of Drilling Equipment." This schedule shows the contractors performing the work, the names of the wells they were scheduled to drill, and the status of the wells ("*programado*" or "scheduled"; "*en movimiento*" or "in motion"; "*en ejecución*" or "work underway"; and "*pozo perforado*" or "well drilled"). For the scheduled wells, the diagram identifies those that are in "*desarrollo*" or a "development well"; "*estratégico*" or a "strategic well"; and "*horizontal*" or a "horizontal well."

200. The figure below is one of the last schedules that Claimants could locate in their files.[391] It shows that Schlumberger, Weatherford, and Finley/Drake-Mesa were the three contractors performing work, the wells that Pemex assigned them to drill, and the status of those wells:[392]



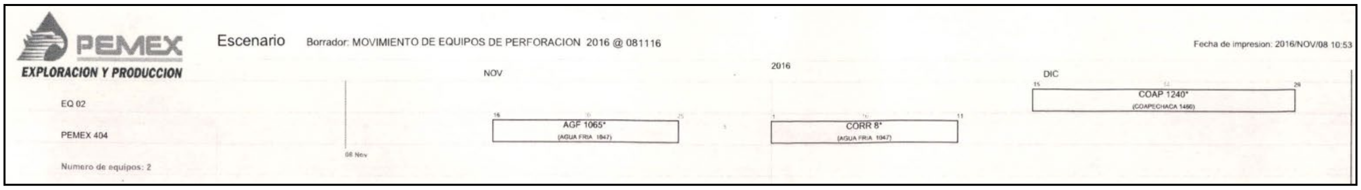
According to Pemex's schedule, as indicated by the red arrow, Weatherford was to drill the "Coa 1240" well or Coapechaca 1240 well. Finley and Drake-Mesa were not. Presumably,

[391] **C-0099,** Internal Pemex Document (2015). Claimants do not have complete files because of a computer malfunction.

[392] **C-0099,** Internal Pemex Document (2015).

Weatherford was to drill that well and three others (Coapechaca 1480, 1680, and 122) as part of a grouping called "Coapechaca 1460."

201. The "Movement of Drilling Equipment" that Pemex attached to its alleged work order was noticeably different than the one above:[393]



According to this document, there were only two teams, "EQ 02" and "Pemex 404." As noted above, this document would have reflected three teams: Schlumberger (PMX-571), Weatherford (PMX-926), and Finley/Drake-Mesa (PMX-805).

202. Moreover, Pemex had to have a permit to drill Coapechaca 1240 before it could issue a work order to drill that well. A month before Pemex issued the purported work order, on October 14, 2016, the Mexican government published the CNH's "*Lineamientos de Perforación de Pozos*" or "Guidelines for Drilling Wells."[394] As explained above, the CNH is the Mexican government agency with regulatory authority over the exploration and production of hydrocarbons. Article 25 of the Guidelines required Pemex to obtain a permit from the CNH to drill a well like the Coapechaca 1240.

203. In fact, Pemex did not seek a permit from the CNH to drill Coapechaca 1240 until June 5, 2017.[395] This is approximately seven months after Pemex's alleged work order to Finley and Drake-Mesa. According to the CNH's resolution authorizing the drilling, Pemex was approved to drill the Coapechaca 1240 well, as well as the Coapechaca 1480, 1680, and 122.[396] All four of these wells were part of a grouping called "Coapechaca 1460" that Pemex scheduled Weatherford to drill.

204. All of the above casts serious doubts about the legitimacy of Pemex's alleged November 2016 work order. It also justified Finley and Drake-Mesa's belief that something was unusual. After

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393 **C-0098,** Pemex Work Order (Nov. 18, 2016).

394 **C-0100,** Guidelines for Drilling Wells, CNH (Oct. 4, 2016), https://www.dof.gob.mx/nota_detalle.php?codigo=5456836&fecha=14/10/2016#gsc.tab=0 (last checked June 6, 2022).

395 **C-0101,** Resolución No. CNH.UTEXP.038/2017 at Preamble, ¶ 4.

396 **C-0101,** Resolución No. CNH.UTEXP.038/2017 at Resolution 1, ¶ 2.

receiving the alleged work order, Luis Kernion called Luis Gomez of Pemex.[397] As explained above, Mr. Gomez oversaw operations under the 821 Contract and signed Pemex's work orders, including this one. Mr. Gomez explained to Mr. Kernion that Pemex was trying to cancel the 821 Contract because it lacked funds to request any more work:[398]

> Shortly after I learned about the supposed work order, I called my contacts at Pemex. One of them was Luis Gomez, the manager for the 821 Contract. Luis apologized. He said that Pemex was "a mess" and that many Pemex employees were not happy with what was transpiring within the company. He further explained that Pemex issued that work order in order to have a reason to administratively rescind the contract. I asked why Pemex needed to cancel the contract. He told me that he had received orders telling him that Pemex did not have the budget to continue asking us to perform work.
>
> According to Luis, there was an extensive effort internally to prepare and approve this work order. He told me that Pemex wanted the work order to appear legitimate if we attempted to challenge it during the rescission process. According to Luis, drafting the work order was a close collaboration between Pemex's commercial department and its legal department. He explained that Pemex's commercial department did something to make it appear that Pemex had the budget to perform work under this contract. This is in stark contrast to what Pemex was repeatedly telling us — that it lacked the budget — to request work under the 821 Contract.

205. Luis Gomez's concern reflects the seriousness of what Pemex was trying to do — use one US$ 1 million work order to rescind a four-year US$ 418 million contract. Pemex could not administratively rescind the 821 Contract unless Finley and Drake-Mesa accumulated <u>fifteen</u> unfulfilled work orders:

> 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:
>
> * * *
>
> In the event that the CONTRACTOR accumulates 15 (fifteen) Unfulfilled Orders during the Contract Execution Period.

Moreover, Mr. Gomez's comments reflect the rarity of the situation. According to Pemex, it has only rescinded five contracts between 2005 and 2016.[399] This aligns with Luis Kernion's

[397] Witness Statement of L. Kernion, ¶¶ 97-99.
[398] Witness Statement of L. Kernion, ¶¶ 97-98.
[399] **C-0102,** Pemex spreadsheet of rescissions between 2006 and 2016.

understanding of doing business in Mexico for decades. He has only heard of one instance of Pemex rescinding a contract.[400]

206. Luis Gomez's explanation turned out to be correct. Approximately six months after Pemex issued this alleged work order, it looked for additional ways to rescind the contract. In March 2017, Pemex accused Finley and Drake-Mesa of not supporting the local community and environment program, a provision of the 821 Contract that required them to provide funding valued at 2% of the amount of the contract.[401] Pemex had not been requesting work or paying Finley and Drake-Mesa, thus, they had no revenue to fund this program.[402]

207. Pemex's retaliation against Finley and Drake-Mesa for having initiated their lawsuit is shown in an internal communication from Pemex's legal department to its commercial area. On May 8, 2017, Pemex's legal department asked the commercial area (1) to proceed with notifying Finley and Drake-Mesa of the administrative rescission and (2) to share a copy of the acknowledgement of receipt.[403] Pemex intended to use the latter in the lawsuit to show that Finley and Drake-Mesa were in breach of the 821 Contract:

> I refer to the letter PEP-DG-SSE-GSIAP-541-2017 of May 3, 2017 (attached), by which, among other things, you are requested to proceed with the notification of the beginning of administrative rescission of contract number 421004821, formalized between Pemex Exploración and 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 "Integrated works of drilling and completion of terrestrial wells in the North and South regions of PEP".
>
> In this regard, I request that once the referenced administrative termination of the contract is notified, you immediately send a certified copy of it to the subscriber.
>
> The foregoing is due to the fact that an Ordinary Civil Trial brought by the Drake company against PEP is currently in process, in which Drake seeks from the State Productive Company an approximate value of 2.5 billion pesos, which is why the termination of the contract will be exhibited in the Trial in appointment, in order to impute breaches to the contractor.

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400 Witness Statement of L. Kernion, ¶ 100.

401 **C-0034,** 821 Contract at Clause 48; Witness Statement of L. Kernion; **C-0023,** Letter from Pemex to Finley and Drake-Mesa (March 14, 2017).

402 Witness Statement of L. Kernion, ¶ 102.

403 **C-0103,** Internal Pemex Letter (May 8, 2017).

208. In July 2017, Pemex notified Finley and Drake-Mesa that it was administratively rescinding the 821 Contract. It attached a draft finiquito.[404] Pemex made various allegations based on the alleged November 2016 work order to drill the Coapechaca 1240 well that seemed to have been designed with the sole purpose of creating a reason to rescind the contract. In doing this, Pemex ignored Clause 15.1(r) of the 821 Contract, an important protection that did not allow Pemex to administratively rescind a four-year, US$ 418 million contract unless Finley and Drake-Mesa accumulated 15 unfulfilled work orders. In addition, Pemex claimed that it could administratively rescind the 821 Contract because Finley and Drake-Mesa had not made certain payments towards its community and environmental program (based on 2% of the value of the contract), a provision that is premised on Pemex paying for work that it was supposed to request from Finley and Drake-Mesa but was not.

209. Finley and Drake-Mesa considered the rescission and the corresponding finiquito to be illegitimate.[405] Shortly after receiving the notice, Luis Kernion went to Pemex's headquarters in Mexico City to meet with Rodrigo Hernandez, who signed the notice. He was the Subdirector of Services at PEP.[406] Mr. Hernandez largely echoed Luis Gomez's sentiment: Pemex was trying to rescind the contract to avoid paying Finley and Drake-Mesa.

210. Rodrigo Hernandez added a new wrinkle. He mentioned that Pemex also was planning to go after the US$ 41.8 million bond that Finley and Drake-Mesa had provided. Luis Kernion explains:[407]

> After we received the rescission notice, I went to Mexico City to have an in-person meeting with Rodrigo Hernandez, who was a senior Pemex official (Subdirector of Services at Pemex Exploration and Production). Rodrigo's explanation to me was similar to that of Luis Gomez above: they sent the November 2016 work order so that they could cancel the contract. Rodrigo provided additional details about the effort. He explained that Pemex knew we had commenced a lawsuit, that Pemex had told us they would not be paying us, and that we had moved our equipment and laid off our employees. However, according to Rodrigo, they had to send us the work order to have a "legitimate reason" to terminate our contract and avoid paying us. He also said that Pemex

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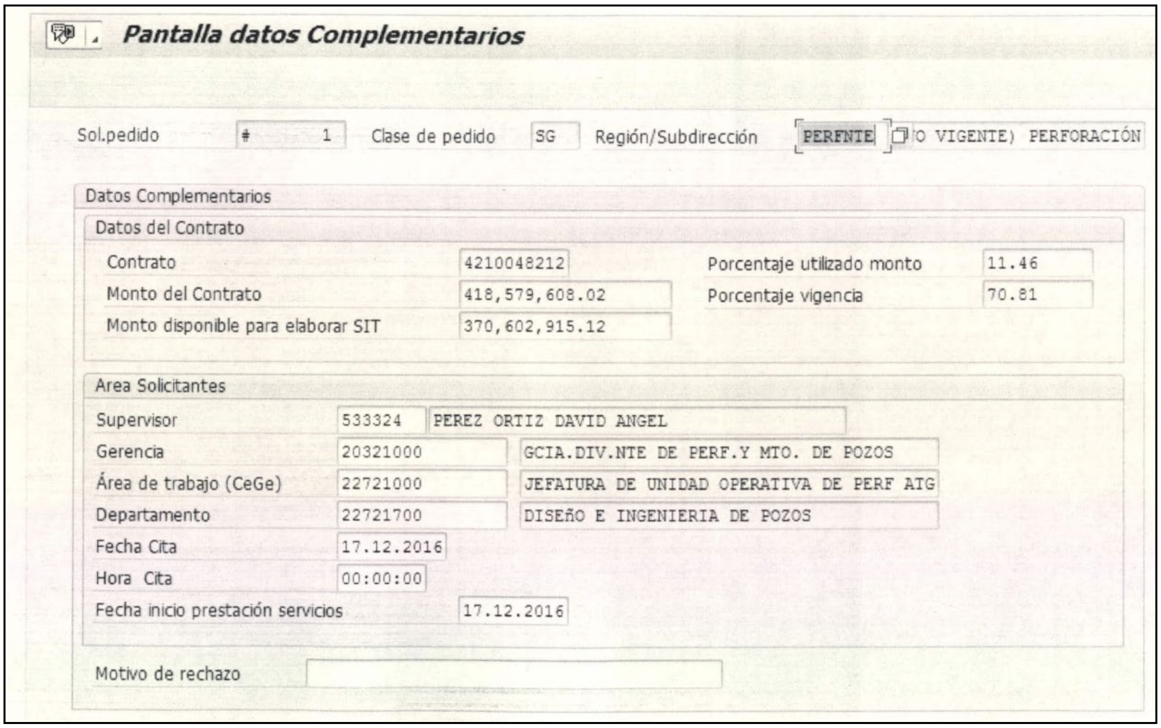
404 **C-0104,** Letter from Pemex to Finley and Drake-Mesa (July 31, 2017).
405 Witness Statement of J. Finley, ¶¶ 55-56; Witness Statement of L. Kernion, ¶ 103.
406 **C-0105,** Rodrigo Hernández Ordóñez, LinkedIn, https://www.linkedin.com/in/rodrigohern%C3%A1ndez-ord%C3%B3%C3%B1ez-a4073152/details/experience/ (last checked June 8, 2022).
407 Witness Statement of L. Kernion, ¶ 104.

wanted to get paid and that their ultimate objective was to go after our US$ 41.8 million bond (10% of the maximum contract value for the 821 Contract).

211. As will be further explained below, Pemex's efforts to call the US$ 41.8 million bond is truly remarkable. Pemex provided the following screen-shot to Finley and Drake-Mesa as part of the alleged work order:[408]



212. According to Pemex's financials above, US$ 370.6 million was available to be spent under the 821 Contract. Pemex had only used up 11.46% of "*Monto del Contrato*" or "Amount of the Contract", i.e. approximately US$ 48 million of US$ 418,579,608.02. Put simply, Pemex was planning to offset most of what it had paid Finley and Drake-Mesa with a claim against their performance bond. By definition, this is not acting based on principles of good faith or equity as Pemex had agreed under the contract, and it certainly is not what a foreign investor should expect as fair and equitable treatment. What is more, it is manifestly arbitrary behavior by Mexico (acting through Pemex).

213. On August 28, 2017, Pemex issued a final draft of its proposed finiquito.[409] One week later, Pemex claimed that the finiquito was completed and attempted to call upon the US$ 41.8

[408] **C-0098,** Pemex Work Order (Nov. 18, 2016).
[409] **C-0106,** Letter from Pemex to Finley and Drake-Mesa (Aug. 28, 2017).

million performance bond. Pemex did not explain why it was entitled to the performance bond. It could not. The two reasons it used to administratively rescind the contract a US$ 1 million work order and payments to a social fund — 2% of US$ 418 million or US$ 8.3 million — amounted to approximately US$ 9 million, far less than what Pemex was claiming.

214. Finley and Drake-Mesa were able to get Pemex to agree to stop its efforts to call the bond while Finley and Drake-Mesa challenged Pemex's actions judicially.[410] However, as explained later below, Pemex's retaliation against Claimants continued into this arbitration. To initiate this arbitration, Finley and Drake-Mesa asked the court to dismiss its pending challenges to Pemex's administrative rescission and finiquito. Once this tribunal was constituted, Pemex resumed its efforts to claim against the US$ 41.8 million performance bond, necessitating Claimants' request for interim relief. As explained later, Pemex's efforts to destroy Claimants' investments continue to this day.

c) Finley and Drake-Mesa's lawsuits against Pemex

215. Finley and Drake-Mesa had two lawsuits against Pemex with respect to the 821 Contract. The first was in a civil court.[411] Finley and Drake-Mesa initiated this lawsuit in March 2016 because Pemex had effectively repudiated the contract.[412] In November 2017, the court held that it did not have jurisdiction to decide the dispute because of the contract's arbitration clause.[413] Finley and Drake-Mesa spent years in the appeals process without success.[414]

216. In September 2017, Finley and Drake-Mesa commenced its second lawsuit. This involved a challenge to Pemex's purported administrative rescission.[415] By September 2018, the litigation had been pending for nearly one year, and Finley and Drake-Mesa were waiting for a decision. Luis Kernion recalls receiving a phone call from an attorney in Mexico named Rob Keoseyan. Mr. Keoseyan was a former attorney at Pemex and apparently had maintained contact with his

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[410] **C-0107,** Acta Circunstanciada (821 Contract).
[411] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita, ¶ 81 (citing District Court Judgment CP-821 [RZ-026], p. 1.).
[412] Witness Statement of L. Kernion, ¶¶ 83-84.
[413] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita, ¶ 88 (citing District Court Judgment CP-821 [RZ-026], p. 28.).
[414] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita, ¶¶ 88 et seq.
[415] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita, ¶ 102 (citing Administrative Court Judgment AP-821 [RZ-039], p. 1).

former colleagues, including a high-level attorney for Pemex named Rodrigo Loustaunau Martínez.[416]

217. Mr. Kernion explains his interactions with Mr. Keoseyan and Mr. Martínez:[417]

> Rob told me that our lawsuit against Pemex 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. Shortly 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.[418] The judge told Pemex's representative that he was going to decide in Pemex's favor.[419]

218. Weeks later, on October 4, 2018, the judge issued a decision in Pemex's favor — consistent with what Rob Keoseyan and Rodrigo Loustaunau Martínez had told Luis Kernion. The court decided that one unfulfilled work order sufficed for Pemex to administratively rescind the contract. To reach this result, the court ignored the plain language of Clause 15.1 of the 821 Contract, a unique provision that protects Finley and Drake-Mesa and limits Pemex's authority to administratively rescind the contract (only if Finley and Drake-Mesa have accumulated 15 unfulfilled work orders).[420] The court's decision is indefensible.

219. As an initial matter, the court engaged in improper *ex parte* communications with Pemex before rendering this judgment. According to Mexican legal experts Rodrigo Zamora Etcharren and Daniel Amézquita Díaz:[421]

> *Ex parte* communications (re the resolution that was pending to be issued) between Pemex and the Magistrates of the Superior Chamber of the Administrative Court violate the Ethics Code of the Administrative Court and Claimants' Due Process rights.

416 Witness Statement of L. Kernion, ¶ 106.
417 Witness Statement of L. Kernion, ¶ 106.
418 Witness Statement of L. Kernion, ¶¶ 106-07.
419 Witness Statement of L. Kernion, ¶ 107.
420 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 143.
421 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶¶ 167-70.

> Magistrates shall refrain from having ex parte communications where it may be influenced by such party, may be give advantage to such party and/or may appear to be giving preferential treatment to said party (such as providing such party with the resolution information that is not providing to the party with whom such magistrate is not communicating). If the communication referred by Mr. Kernion took place between the judge and Pemex, the Ethics Code and Claimants' Due Process rights were clearly violated.

220. As to the substance of the decision, Messrs. Zamora and Amézquita explain:[422]

> [T]he Administrative Court should have performed a thorough analysis of the termination clauses, which would have led it to conclude that the lack of performance of one work order was not sufficient to legally and validly terminate Agreement-821.

The experts found numerous issues with this decision:[423]

- The decision of the Administrative Court (in AP-821) failed to comply with several of the constitutional principles that guarantee the protection of Claimants' fundamental rights.
- The decision of the Administrative Court (in AP-821) failed to comply with the constitutional principle of exhaustivity (provided in Article 17 of the Constitution) by not considering material evidence submitted by Claimants.
- The decision of the Administrative Court (in AP-821) failed to comply with the constitutional principle of coherence.
- The decision of the Administrative Court (in AP-821) failed to comply with the constitutional principle of motivating (in law and fact) its judgment.

221. Finley and Drake-Mesa pursued their rights to challenge the administrative court's decision through an *amparo*.[424] This process was prolonged; it took over one year for the court to admit the *amparo*.[425] The Mexican legal experts explain:[426]

> The above-mentioned *amparo* judgment is not within the time limit established in judicial precedents of six months. The time that the Amparo Court (14CC) took to issue the dismissal judgment doubled the time limit provided for the amparo courts to issue a final and complete judgment re *amparo* claim.

[422] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 142.
[423] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶¶ 176-79.
[424] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 106 (citing Judgment dated 30 January 2020 [RZ-040], issued by the Fourteenth Administrative Collegiate Court (docket no. 74/2019).
[425] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 107 (citing Judgment dated 30 January 2020 [RZ-040], issued by the Fourteenth Administrative Collegiate Court (docket no. 74/2019).
[426] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 108 (internal citations omitted).

222. When Finley and Drake-Mesa initiated this arbitration, their appeal was pending before Mexico's Supreme Court. In light of the years of delay and unfair treatment in Mexico's court system, Claimants believed it was futile to continue proceeding in the Mexican courts. As such, they dismissed the appeal to pursue their investment-treaty claims.[427]

d) Pemex continues the finiquito and calling the bond

223. Pemex's retaliation and misconduct continues. Two weeks after the Tribunal was constituted, Pemex wrote to Finley and Drake-Mesa to advise that it was proceeding with the finiquito of the 821 Contract.[428] Pemex did not properly notify Finley and Drake-Mesa of this action. And despite knowing about this ongoing arbitration, Pemex did not notify Finley and Drake-Mesa's current attorneys. Instead, it left a letter at the office of Finley and Drake-Mesa's former attorney.[429] Pemex's letter is reminiscent of its November 2016 alleged work order; it too lacks the signature of Finley and Drake-Mesa's authorized representative, evidencing that it was not properly received.[430]

224. Preserving their objections, Finley and Drake-Mesa asked their attorneys with Holland & Knight to appear on their behalf at Pemex's meeting for the finiquito process and retrieve Pemex's proposal. Pemex declined to provide the undersigned with that information. Instead, Pemex sought to have the Holland & Knight attorneys acknowledge the validity of the Mexican court's decision regarding the rescission of the 821 Contract. Again, Pemex was acting arbitrarily and in bad faith.

225. Finley and Drake-Mesa promptly advised Mexico's Secretary of the Economy of the matter.[431] Yet, Pemex's conduct continued. On December 3, 2021, the same day as the First Session of this arbitration, Pemex made a claim against Finley and Drake-Mesa's US$ 41.8 million bond. Two weeks later, on December 15 and December 16, 2021, several men appeared at the law office of Finley and Drake-Mesa's former attorney in Mexico City (Cristina Vizcaino).[432] Ms.

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427 Pemex's misconduct began during the 821 Contract when it failed to provide Finley and Drake-Mesa a reasonable opportunity to achieve their legitimate expectations under the contract (i.e., failing to issue work orders). Pemex's misconduct continued with attempted administrative rescission. Pemex still engages in misconduct in its pursuit against the US$ 41.8 million bond. Thus, Pemex's misconduct is a series of actions designed to frustrate and then destroy Finley and Drake-Mesa's investments.

428 **C-0013,** Letter from Pemex to Finley to Drake-Mesa (received November 8, 2021).

429 Witness Statement of C. Vizcaiano.

430 **C-0013,** Letter from Pemex to Finley to Drake-Mesa (received November 8, 2021).

431 **C-0015,** Communication with Secretary of the Economy.

432 Ms. Vizcaino represented the parties to the 821 Contract in litigation in Mexico.

Vizcaino explains how these men tried to give her Pemex's proposed finiquito documents, but that she would not accept them because she was no longer Finley and Drake-Mesa's authorized representative.[433] Ultimately, the men taped the documents to the door of Ms. Vizcaino's office the following day and then left.

226. On January 12, 2022, Finley received a letter from Finley and Drake-Mesa's bond company, Dorama. The bond company stated that on December 2, 2021, Pemex made a formal claim of US$ 41.8 million.[434] Pemex and Dorama are disputing Pemex's claim.

5. Compromise(s) with Mexican oilfield services companies

227. In parallel to the facts narrated in the previous sections, Mexico entered into Contract No. 424043809 ("809 Contract") with Integradora de Perforaciones y Servicios, S.A. de C.V. and Zapata Internacional, S.A. de C.V.[435] At least one of these companies, Integradora, represents itself to be a company owned by Mexican nationals:[436]

> IPS was founded by a group of Mexican professionals in 2003 with the aim of providing quality services carried out by personnel with high experience in the industry and at competitive prices. We started as a company dedicated to directional drilling but the needs of the market have led us to offer drilling services in an integrated way including augers, motors, solids control, low balance, etc. At present we are a company that offers from the rental of a tool to the management of a comprehensive drilling project.

Zapata is also a Mexican company.[437]

228. Based on public information, it appears that the 809 Contract is very similar to Claimants' contracts with Pemex.[438] It is dated March 1, 2013, which is just 20 days before Claimants signed the 804 Contract.[439] Pemex was supposed to request US$ 24 million of work from Integradora and Zapata for them to perform oilfield services in Chicontepec.[440] Like with

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433 Witness Statement of C. Vizcaiano.
434 **C-0108,** Letter from Doroma to Finley (Jan. 12, 2022).
435 **C-0062,** Acta Circunstanciada (April 9, 2018).
436 **C-0109,** Grupo IPS, https://ips-mexico.com/Perfil%20de%20la%20compania.php.
437 According to the Internet, Zapata is domiciled in Reynosa, Mexico. See https://mexicoo.mx/zapata-internacional-s-a-de-c-v--6188800.
438 **C-0062,** Acta Circunstanciada (April 9, 2018).
439 **C-0033,** 804 Contract; **C-0062,** Acta Circunstanciada (April 9, 2018).
440 **C-0062,** Acta Circunstanciada (April 9, 2018).

Claimants' contracts, Pemex fell short of its obligation and requested only approximately US$ 9 million in work.[441]

229. However, this is where the similarities end. Pemex treated Claimants differently than Integradora and Zapata. As explained above, with respect to the 803 and 804 Contracts, MWS and Bisell had to litigate with Pemex for over five years in Mexico's court system, and they did not obtain a substantive decision. For the 821 Contract, Pemex employed a scheme to rescind the contract and then forced Finley and Drake-Mesa to litigate for years only to have Mexico's court system uphold the rescission on indefensible grounds.

230. By all indications, Integradora and Zapata did not have to endure such treatment. Instead, Pemex compromised with Integradora and Zapata and agreed to pay them at least US$ 15 million:[442]

> Therefore, the total amount to be paid by PEP to the Contractor adds up to total amount of $15,054,705.64 U.S.D. (fifteen million fifty-four thousand seven hundred five US dollars 64/100 U.S.D.).

231. This is discriminatory and disparate treatment against U.S. investors in favor of Mexican nationals. Finley and Prize anticipate that Mexico's disclosures in this arbitration will reveal additional examples of such conduct that violates Mexico's obligations under NAFTA and the USMCA.

6. Pemex's behavior

232. The facts above are largely indisputable. Mexico wanted to reverse its declining oil production. Part of this strategy was to develop a known hydrocarbon-rich but geologically complex area called Chicontepec. As part of Mexico's initiative, Pemex entered into three oilfield services contracts with Claimants. These contracts required Claimants to invest in Mexico by purchasing equipment, real estate, and performance bonds. They also required Claimants to hire and train hundreds of local employees.

233. Claimants went to Mexico in good faith to help Mexico.[443] They invested over US$ 30 million. Based on Mexico's unequivocal representations both personally to Claimants and expressly in

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[441] **C-0062,** Acta Circunstanciada (April 9, 2018). Claimants do not know if Pemex and Integradora and Zapata litigated or arbitrated under the 809 Contract.

[442] **C-0062,** Acta Circunstanciada (April 9, 2018).

[443] Witness Statement L. Kernion, ¶ 115; *see also* Witness Statement J. Finley, ¶¶ 22, 27, 40-43.

the contracts, Claimants reasonably expected Pemex to request work under the three contracts, totaling over US$ 521 million.[444] But Claimants were not given a reasonable opportunity to obtain the benefits from their contracts, including earning a profit, instead they saw their investments being frustrated as a consequence of a change in Mexico's national oil strategy that was caused by a change in the oil price.

234. Mexico did not treat Claimants fairly. Pemex did not uphold its promises to request work and to timely pay Claimants ("Pemex pays, Pemex pays"). Instead, Pemex, in order to implement Mexico's change in strategy to turn away from Chicontepec, found reasons not to do so. It told Claimants that it lacked the funds, i.e. no budget. It suspended issuing work orders for extended periods of time. It issued work orders only to cancel them. It extended the terms of the contract only not to request work. It extended the deadlines to pay the invoices for the limited times that it issued work orders. Overall, Pemex issued work orders for only approximately 14% of the amount of work that Claimants expected (US$ 75 million of US$ 521 million).

235. Nonetheless, Claimants did their best to make the project work and salvage their investments. When possible, Claimants accommodated Pemex's requests, and they agreed with Pemex to terminate two of the contracts to mitigate their mounting financial losses. For the third contract, Claimants fell victim to Mexico and Pemex's reputation for retaliation. Pemex attempted to administratively rescind the contract because Claimants did not fulfill one alleged work order that Pemex issued only after Claimants initiated a lawsuit following many months of Pemex not requesting work.

236. Claimants were then denied justice in Mexico's courts. Claimants' lawsuits for compensation under the two contracts did not get a hearing on the merits for over five years leading up to this arbitration. Another court issued an inexplicable decision that blessed Pemex's administrative rescission of a four-year, US$ 418 million contract for one unfulfilled work order when the contracts requires Claimants to have accumulated at least 15 unfulfilled work orders. Claimants watched as Pemex compromised with at least one similarly situated oilfield services company owned by Mexican nationals. Pemex sacrificed Claimants and their investments in order to implement Mexico's changed strategy. The Mexican courts protected

[444] At a minimum, Pemex was required to request approximately US$ 198 million under the three contracts.

Pemex and condoned its conduct in an egregious violation of the investment protections provided to Claimants and their investments under the NAFTA and the USMCA.

237. Mexico's treatment of Claimants' investments is inexcusable. However, it is explainable from a macro perspective. Production from Chicontepec was not achieving the results that Pemex targeted or that Mexico expected to reverse Mexico's overall declining oil production. Claimants fell victim to Mexico's decision to shift its focus and resources from Chicontepec elsewhere. If Mexico wished to change its strategy, it should have done so in a transparent, coherent, and legal manner that did not discriminate against foreign investors and that protected the foreign investors' legitimate expectations and treated them fair and equitably.

238. Chicontepec's geologically-complex field makes it expensive to develop. It is a more attractive target when oil prices are high. When Claimants invested in Mexico to develop Chicontepec, the average price of oil fluctuated for four years around US$ 90 to US$ 110. Specifically, the price of oil was between US$ 97 and US$ 107 when Claimants signed each of their contracts with Pemex:[445]

- 803 Contract (February 20, 2012): approximately **US$ 107**.
- 804 Contract (March 20, 2013): approximately **US$ 97**.
- 821 Contract (February 28, 2014): approximately **US$ 102**.

However, between June 2014 and January 2015, the price of oil decreased from US$ 103 to US$ 46. In February 2016, the price dropped further to US$ 26. Thus, when Pemex stopped issuing work orders under the 821 Contract for the third time (January 2016), the price of oil was nearing a quarter of what it was when Claimants entered into the contract. It was no secret that when prices fell, Mexico revised its strategy and Pemex curtailed drilling activities in Chicontepec.

239. In June 2013, Carlos Morales Gil, PEP's former Director General of PEP, gave an interview at a trade show. He explained the consequences of falling oil prices falling on projects targeting low permeability areas (like Chicontepec).[446] Pemex admitted the cost of such projects "are

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[445] **C-0110**, *Crude oil - 2022 Data - 1983-2021 Historical*, TRADING ECONOMICS, https://tradingeconomics.com/commodity/crude-oil (last checked June 7, 2022).

[446] **C-0018**, Mexico Oil and Gas Review (2012) at 31; **C-0035,** *PEMEX General Director Carlos Morales-Gil on PEMEX's E&P activities in Mexico* (June 10, 2013) YOUTUBE, https://www.youtube.com/watch?v=N7SZK11f2RI at 5:00 (last checked June 7, 2022).

very high" and the oil price needed for those projects had a floor of "about $80 dollars or so. . . ." below which they "don't work any longer," causing activity to stop:

> $80 is like a reasonable floor for the level of activity that the oil industry is taking on. Why we say so, that's because we think that most of the unconventional projects, and low permeability projects, and deepwater projects . . . the cost of those projects is very high . . . so if the price would come to below [US$ 80], then those projects don't work any longer, so let me put it that way, and that will reduce the supply of oil and that will bring prices up again . . .

240. By the end of 2013, Mr. Gil's successor at PEP, Gustavo Hernández, explained that Pemex stopped its drilling program in 2013 because it had to divert funds away to pay for off-budget items:[447]

> Last year, the drilling program was halted in both Chicontepec and Burgos. In Chicontepec we had a budget problem in one of the regions. In order to pay for operations that were done off budget, we had to reallocate financial resources that were originally destined to pay for drilling operations. As a result, we did not drill the planned number of wells in Chicontepec. Of the 90% of 1P reserves coming from existing fields, maybe 40% was destined to come from Chicontepec before we stopped drilling in this area in May 2013. This also explains why we could not reach a 1P reserves replacement rate of 100%. We are optimistic that if we are able to drill those wells in Chicontepec, we will reach a 100% 1P reserves replacement rates this year.

Mr. Hernández's public comments align with what Pemex repeatedly told Claimants about lacking a budget to issue work orders. His comments also help explain Pemex's failure to drill any wells under the 804 Contract ("we stopped drilling in this area in May 2013").

241. Pemex's decision in 2013 to divert budgeted funds from Chicontepec had consequences. Gustavo Hernández correctly stated that a lack of investment meant that Pemex was not able to increase production from the field. This created a significant divergence in Pemex's projections for production from Chicontepec. As shown below, Pemex expected 104,000 barrels of oil per day by the end of 2013, but its lack of investment resulted in only 60,000:[448]

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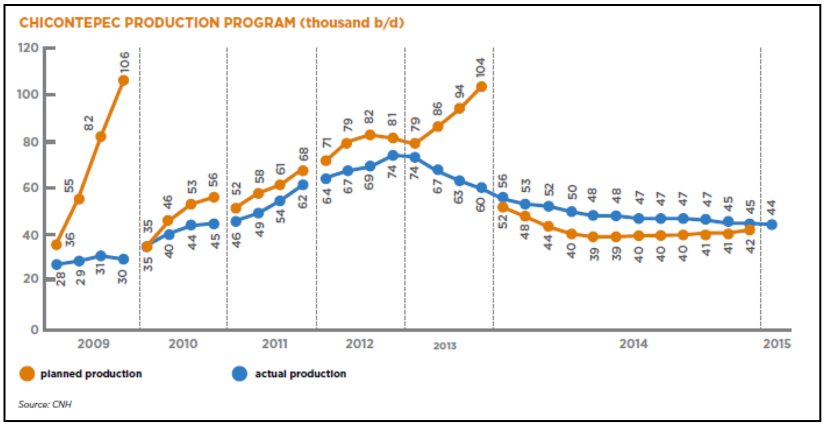
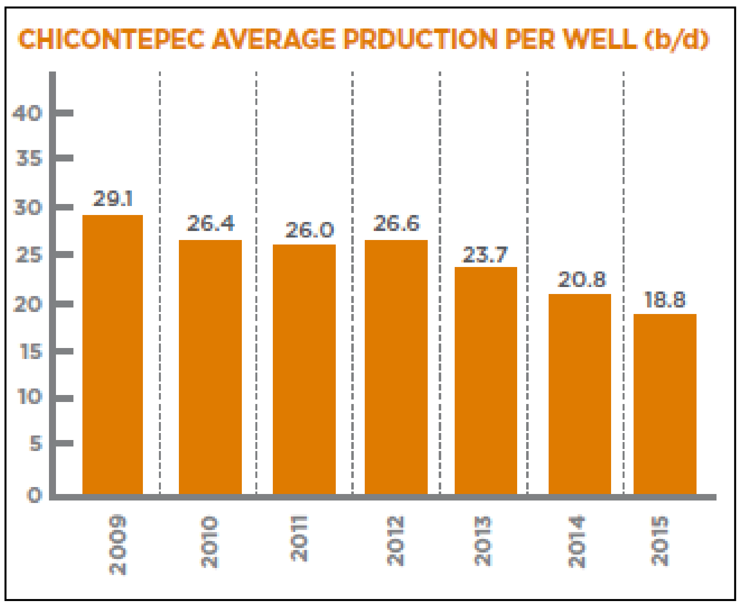
[447] **C-0111,** Mexico Oil and Gas Review (2014) at 73.
[448] **C-0112,** Mexico Oil and Gas Review (2015) at 247.



242. Relatedly, the wells that Pemex was drilling in Chicontepec were not very productive. As shown below, these wells were averaging 26.6 barrels of oil per day in 2012 to 23.7 in 2013 to 18.8 in 2015.[449]



Because these wells were not very productive, Pemex had to drill many of these wells if it wanted to increase Mexico's overall production of oil. However, Pemex could not drill more because, as Gustavo Hernández explains above, it had diverted the funds to make investments in other matters.

243. Overall, the above chart means that Pemex's return on its drilling campaign was decreasing. Pemex spent money to rework and drill wells but was getting fewer barrels per well on average

[449] **C-0112,** Mexico Oil and Gas Review (2015) at 247.

as the project continued. This is particularly significant when oil prices (Pemex's revenue) began to fall in June 2014 and then plummeted thereafter.[450]

244. In a 2015 publication, the former Undersecretary of Hydrocarbons at Mexico's Ministry of Energy explained how high oil prices (US$ 100 per barrel) are important to Mexico's investment in Chicontepec:[451]

> As for unconventional resources, when we originally defined Round One in August 2014, oil prices were around US$100 per barrel. That is why we included unconventionals, in particular share and tight oil in Chicontepec, which also has good access to infrastructure. In the current price environment, we need to re-evaluate the financial feasibility of these projects.

245. Similarly, the CNH had previously described Pemex's Chicontepec projects as "the least profitab[le]" and with the "highest uncertainty when they are compared to every other project."[452] In the same 2015 publication, the President Commissioner of the CNH commented how a drop in oil prices makes Chicontepec unprofitable:[453]

> Chicontepec and Unconventionals will be the final bidding in July, in which we will include tight oil, shale oil, and shale gas. In this last category, we have announced that as a consequence of the price drop, we are going to make adjustments to the original number of blocks that we are going to offer. Last summer, we announced nearly 70 blocks in unconventionals, but now we are picking the blocks that we believe could lead to a profitable opportunity on these current prices.

246. The crash in oil prices in 2014 affected Pemex's investment decisions into 2015. Mexico's Minister of Energy explained Pemex's pace of investment in Chicontepec due to its extraction costs:[454]

> For Mexico, this situation has entailed implications in the public expenditure and could slow down the expansion rhythm of sectors with more onerous extraction costs, such as shale fields or the Chicontepec area.

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450 **C-0112,** Mexico Oil and Gas Review (2015) at 8.

451 **C-0112,** Mexico Oil and Gas Review (2015) at 67. Round One was an international tender that Mexico conducted in 2014 to award acreage or "blocks" to explore for and exploit hydrocarbon.

452 **C-0113,** Classification of Hydrocarbons' Exploration and Exploitation Projects: Profitability and uncertainty statistics, Technical Paper - 3, CNH (2012) at 34.

453 **C-0112,** Mexico Oil and Gas Review (2015) at 68.

454 **C-0112,** Mexico Oil and Gas Review (2015) at 6.

247. Pemex's CEO Emilio Lozoya echoed the same.[455] He explained that Pemex's drastic budget cut in 2015 because of the price of oil required Pemex to change the timing of the investments it had planned for 2015:

> We are facing a severe budget cut but we have found creative solutions to this problem. One of the solutions we found was to diminish the rhythm of investment we already had planned for projects in 2015.

248. PEP's former General Director Gustavo Hernández explained why Pemex changed its strategy with respect to Chicontepec in 2015.[456] He noted too much CAPEX had been spent with too little to show for it, that Chicontepec returned to a long-term project requiring further study, and that budget cuts required Pemex to focus efforts elsewhere:

> Q: How do you view the future of the North region?
>
> A: Given current gas prices, the North region has shown that it is not attractive to allocate CAPEX to areas where the production cost will be higher than the sale price. Chicontepec also showed that too much CAPEX was spent there for small returns. We now view it as a long-term project that needs to be thoroughly studied before production. Furthermore, much of the North was removed from PEMEX's portfolio during Round Zero, so we only need to keep working on limited areas of Burgos, Poza Rica, and Chicontepec. Finally, this was all before the budget cuts, which only confirmed that PEMEX will emphasize on areas where there is a higher bet of finding oil.

To provide context to Mr. Hernández's comment about high production costs, a 2014 newspaper article reported that the cost of producing a barrel of oil in Chicontepec was one of the highest in Pemex's portfolio of assets.[457] Its reported cost of US$ 28 per barrel was compared unfavorably to other assets such as shallow water with a cost of US$ 7 per barrel.

249. Pemex's budget cuts in Chictontepec were impactful. One report explained the consequences of Pemex's budget cuts to Poza Rica, where Claimants had their base of operations.[458] According to this report, at least 210 companies had left Poza Rica, leaving high rates of unemployment and crime. Pemex left contractors and providers indebted with approximately

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455 **C-0112,** Mexico Oil and Gas Review (2015) at 79.
456 **C-0112,** Mexico Oil and Gas Review (2015) at 394.
457 **C-0114,** La Jornada article (Feb. 18, 2014), https://www.jornada.com.mx/2014/02/18/economia/021n1eco (last checked June 7, 2022).
458 **C-0115,** Numeros y Firmas article (Mar. 3, 2014), http://inversionesentampico.blogspot.com/2014/03/hunden-derroches-pemex.html (last checked June 7, 2022).

30 billion pesos.[459] Companies such as Bronco Drilling, Calmena, and Iberoamericana de Hidrocarburos (IHSA) closed their operations because Pemex lacked a budget to pay them. Referring to those in charge of Pemex's operations in Chicontepec, the President of the Mexican Chamber of the Construction Industry explained "they spent money in advance that they did not have in their budget, it was wasted, in the end they only managed to leave Pemex in debt." According to an employee at Grupo Vordcab, the exodus of companies was because of a big problem: "In general, all the production companies left and only 3 remained and I am in one of them, Poza Rica's problem was with expenses that were made for a project that did not give what was expected."

250. Grupo Merco is a company that acted as a supervisor for Pemex for all its contracts with service companies.[460] In 2015, Group Merco's CEO had similar comments about Pemex's "lack of budget": "[t]he Burgos and Chicontepec were the regions most affected by the budget cuts and reallocation. Today, these regions are largely desolate as many companies went bankrupt."

251. In addition to Pemex financially draining companies, its conduct also damaged their reputations. For example, in July 2016, El Heraldo ran articles about Finley and Drake-Mesa being accused of fraud for not paying its subcontractors for work performed for Pemex (Pemex was not paying).[461] As explained above, Pemex retaliated against Finley and Drake-Mesa for initiating their lawsuit against it by stating it would not be issuing any more work orders and not paying anything to them. Pemex's conduct resulted in Finley and Drake-Mesa's subcontractors filing claims for payment against them and newspaper articles alleging them of fraud. Pemex's arbitrary and unreasonable behavior not only damaged Finley and Drake-Mesa financially, it damaged their reputation as well.

[459] Many of these companies did not have guaranteed contracts like Claimants' three contracts. These companies suffered financially when Mexico changed its strategy and Pemex reallocated funds away from Chicontepec. Companies without guaranteed contracts would not have a claim against Pemex because of Mexico/Pemex's change in strategy.

[460] **C-0112,** Mexico Oil and Gas Review (2015) at 257.

[461] **C-0116,** El Heraldo de Poza Rica article (June 15, 2016), https://elheraldodepozarica.com.mx/estado/poza-rica/36237-denuncian-15-empresas-a-drake-mesa-por-fraude.html (last checked June 7, 2022); **C-0118,** El Heraldo de Poza Rica article (Jul. 21, 2016), https://elheraldodepozarica.com.mx/estado/poza-rica/37828-que-pemex-encubre-a-empresas-del-fraude.html (last checked June 7, 2022).

252. According to a 2016 article in *El Heraldo de Poza Rica*, "After 8 years of operations, ATG resulted in a failure that has begun to generate losses for [Pemex], because of the cost to drill is high in comparison to the barrels obtained."[462] At some point, Pemex apparently decided that Claimants' project in Chicontepec "[didn't] work."[463] Although simple, that is the only rational explanation for Pemex's behavior of "pulling the plug" on Claimants and their investments in such an arbitrary and unfair way. The investment protections under the NAFTA and the USMCA are designed to protect Claimants and their investments from such conduct.

III. ARGUMENT

A. The Tribunal has jurisdiction over Claimants' claims

253. Claimants satisfy the NAFTA's and the USMCA's procedural and jurisdictional requirements.[464] To establish the Tribunal's jurisdiction, Claimants must show that:

1. They are U.S. investors;
2. They made an investment in Mexico; and
3. They satisfied the procedural conditions set out in NAFTA Articles 1118 to 1121 and USMCA Annexes 14-D and 14-E.

As explained in the following paragraphs, Claimants satisfy each of these elements. Thus, the Tribunal has jurisdiction over Claimants' claims.

1. Finley, MWS, and Prize are U.S. investors

254. The NAFTA and the USMCA authorize "investor(s) of a Party" to submit a claim to arbitration.[465] Investor includes an "enterprise of a Party," meaning "an enterprise constituted

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462 **C-0117,** El Heraldo de Poza Rica article (Feb. 24, 2016).

463 **C-0018**, Mexico Oil and Gas Review (2012) at 31; **C-0035,** *PEMEX General Director Carlos Morales-Gil on PEMEX's E&P activities in Mexico* (June 10, 2013) YOUTUBE, https://www.youtube.com/watch?v=N7SZK11f2RI at 5:00 et seq. (last checked June 7, 2022).

464 Finley and Prize's claims related to the 821 Contract have been asserted under the NAFTA. Prize and MWS's claims related to the 803 and 804 Contracts have been asserted under the USMCA.

465 **C-0004,** NAFTA Articles 1116(1) and 1117(1); **C-0005,** USMCA, Articles 14.E.2(a) and (b); *see also* **C-0004,** NAFTA Article 1139 (providing that an "investor of a Party" means "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment."); **C-0005,** USMCA Article 14.1 (defines an "investor of a Party" as "a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party.").

or organized under the law of a Party. . ."[466] Finley, MWS, and Prize are all constituted in and organized under the laws of the United States.[467] Thus, they are U.S. investors authorized to submit claims against Mexico under the NAFTA and the USMCA.

255. The NAFTA and the USMCA also allow a U.S. investor to make a claim on behalf of a Mexican enterprise that the U.S. investor owns or controls.[468] Claimants assert claims on behalf of two enterprises of Mexico that they own or control.

256. *First*, MWS and Prize assert claims on behalf of Drake-Mesa. Prize owns shares of Drake-Mesa.[469] MWS and Prize also have managerial control over Drake-Mesa.[470]

257. *Second*, Prize asserts claims on behalf of Bisell. Prize owns 50% of the shares of Bisell and exercises complete managerial control over it.[471]

258. *Third*, Finley and Prize assert claims on behalf of Drake-Finley. Prize owns shares of Drake-Finley.[472] Finley also owns shares of Drake-Mesa.[473] Finley and Prize also have managerial control over Drake-Finley.[474]

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466 **C-0004,** NAFTA Article 1139; **C-0005,** USMCA Article 14.1.
467 **C-0001**, Claimants' Proof of U.S. Nationality.
468 **C-0004**, NAFTA Article 1116(1) (investors may make claims on their own behalf for a breach of Chapter 11 of the NAFTA); **C-0004,** NAFTA Article 1117(1) (investors may make claims on behalf of an enterprise of the other party that they own and/or control for a breach of Chapter 11 of the NAFTA); **C-0005,** USMCA Article 14.E.2(a) (investors may make claims on their own behalf for a breach of Chapter 14 of the USMCA); **C-0005,** USMCA Article 14.E.2(b) (investors may make claims on behalf of an enterprise of the other party that they own and/or control for a breach of Chapter 14 of the USMCA).
469 **CL-0016,** Canadian Statement on Implementation of the NAFTA, Canada Gazette, Part I, Jan. 1, 1994, at 147 ("[t]he NAFTA definition of investment includes minority interests, portfolio investment, and real property as well as majority-owned or controlled investments from the NAFTA countries.").
470 Witness Statement of J. Finley, ¶ 36; Witness Statement of L. Kernion, ¶ 26; **CL-0017,** *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award (Jan. 26, 2006), ¶¶ 107 (explaining "Thunderbird had the ability to exercise a significant influence on the decision-making of EDM and was, through its actions, officers, resources, and expertise, the consistent driving force behind EDM's business endeavour in México").
471 Witness Statement of L. Kernion, ¶ 7.
472 Witness Statement of L. Kernion, ¶ 76; **CL-0016,** Canadian Statement on Implementation of the NAFTA, Canada Gazette, Part I, Jan. 1, 1994, at 147 ("[t]he NAFTA definition of investment includes minority interests, portfolio investment, and real property as well as majority-owned or controlled investments from the NAFTA countries.").
473 Witness Statement of J. Finley, ¶ 36.
474 Witness Statement of J. Finley, ¶ 36; Witness Statement of L. Kernion, ¶ 76; **CL-0017,** *International Thunderbird Gaming Corporation*, Award, ¶ 107. Finley and Prize understand that Footnote 21 in USMCA Annex 14-C required them to submit their claims related to the 821 Contract as "legacy investment claims" under NAFTA instead of submitting a claim directly under the USMCA. Although it has not been interpreted, Footnote 21 apparently does not allow Finley and Prize to assert a claim under the USMCA, unless it was eligible to submit a claim under USMCA Annex 14-E. At the time they submitted the Request for Arbitration, Finley and Prize

2. Claimants made protected "investments" in Mexico under the NAFTA and the USMCA

259. Claimants made protected investments in Mexico under both the NAFTA and the USMCA. Both treaties have broad definitions of investment.[475] A NAFTA tribunal in *Feldman v. Mexico*, explained, "[t]he term investment is defined in [NAFTA] Article 1139, in exceedingly broad terms. It covers almost every type of financial interest, direct or indirect, except certain claims to money."[476]

260. For the NAFTA, "investment" includes, among other interests,[477]

> (a) an enterprise;
>
> (b) an equity security of an enterprise;
>
> * * *
>
> (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
>
> (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. . .

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understood that they were not allowed to submit a claim under USMCA Annex 14-E because their claims were based entirely on conduct that took place before the USMCA came into force. However, since Finley and Prize commenced this arbitration, Mexico's breach (i.e., Pemex's effort to rescind the 821 Contract and call upon the US$ 41.8 million bond) have continued into this arbitration, arguably bringing their claims under the USMCA as well.

[475] **CL-0050,** *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Final Award (Dec. 16, 2002), ¶ 96 (explaining, "[t]he term investment is defined in [NAFTA] Article 1139, in exceedingly broad terms. It covers almost every type of financial interest, direct or indirect, except certain claims to money.").

[476] **CL-0050,** *Feldman*, Final Award, ¶ 96.

[477] **C-0004,** NAFTA Art. 1139.

261. Mexico confirmed the broad scope of "investment" when it agreed to the NAFTA's successor, the USCMA:[478]

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

262. Under both the NAFTA and the USMCA, "investment" does not include "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."[479] This exclusion prevents, for example, a U.S. investor from bringing a monetary claim arising from a sale of services from the U.S. into Mexico. The facts of this arbitration are very different. Claimants went to Mexico and, among other things, established a physical presence in Mexico and performed physical oil and gas services for Pemex in Mexico. As explained above, Claimants' work for Pemex also required significant investments in Mexico. Thus, this exclusion does not apply.

263. Claimants made investments in Mexico according to several provisions of the NAFTA and the USMCA:[480]

- Finley, MWS, and Prize established enterprises of Mexico.
  - Prize owns 50% of the shares of Bisell.[481]
  - Prize owns shares of Drake-Mesa; Mr. Finley also owns shares of Drake-Mesa.[482]

478 **C-0005,** USMCA Art. 14.1.
479 **C-0004,** NAFTA Art. 1139.
480 **C-0004,** NAFTA Article 1139; **C-0005,** USMCA Article 14.1.
481 Witness Statement of L. Kernion, ¶ 7.
482 Witness Statement of J. Finley, ¶ 36; Witness Statement of L. Kernion, ¶ 26.

    - Finley and Prize owns shares of Drake-Finley.[483]

- As owners, Finley, MWS, and Prize can share in the income or profits of Drake-Finley, Bisell, and Drake-Mesa.

- As owners, Finley, MWS, and Prize can share in the assets of Drake-Finley, Bisell, and Drake-Mesa upon their dissolution.

- Finley, MWS, and Prize (and/or Bisell, Drake-Finley, and Drake-Mesa) committed significant capital and other resources in the territory of Mexico, including purchasing and importing equipment and materials into Mexico and hiring and training employees in order to perform under the 803, 804, and 821 Contracts.

- Finley, MWS, and Prize (and/or Bisell, Drake-Finley, and Drake-Mesa) acquired tangible personal property expecting it to be used for an economic benefit, including workover rigs, drilling rigs, and related drilling equipment and materials.[484]
    - Some of this personal property remains in Mexico today.[485]

- Finley, MWS, and Prize purchased real property and facilities in Mexico.
    - Finley, MWS, and Prize continue to own this property today.

- Finley, MWS, Bisell, and Drake-Mesa delivered financial guarantees to Pemex to secure their performance of work under the 803, 804, and 821 Contracts.
    - MWS and Bisell provided financial guarantees for US$ 4.8 million and US$ 5.5 million for the 803 and 804 Contracts, respectively.
    - Finley and Drake-Mesa provided a financial guarantee of US$ 41.8 million under the 821 Contract. As this arbitration advances, Pemex continues its pursuit against the US$ 41.8 million guarantee.

264. Claimants owned investments at all relevant times. Claimants therefore hold protected investments under the NAFTA and the USMCA.

3. Claimants have satisfied the procedural conditions under the NAFTA and the USMCA

a) Claimants' claims are timely

265. The NAFTA and the USCMA require an investor to make a claim within three years of the date on which it acquired, or should have first acquired, knowledge of the alleged breach and

483 Witness Statement of L. Kernion, ¶ 76; Witness Statement of J. Finley, ¶ 36.
484 Other equipment included pumps, tanks generators, power swivels (turns the pipe in a well bore), wellhead control, electrical/light towers, fishing tools, wireline, and numerous trucks and trailers. Witness Statement of J. Finley, ¶ 33.
485 Witness Statement of L. Kernion, ¶ 87.

knowledge that the investor has incurred loss or damage.[486] This three-year period begins to run when the investor acquires knowledge of both (a) the breach of the investment treaty obligation and (b) the ensuing damage. If these two conditions do not occur simultaneously, the three-year period runs from the later of the two.[487]

266. Claimants submitted their claims to arbitration on March 25, 2021. The earliest date these claims arose are as follows:

- Finley, MWS, and Prize have claims under NAFTA Articles 1102 and 1105 and USMCA Articles 14.4 and 14.6 because Mexico treated similarly-situated oilfield service companies owned by Mexican nationals more favorably than Claimants.
  - Based on the facts currently known, Pemex compromised with these two similarly-situated oilfield services companies on April 9, 2018. However, Claimants did not learn about this compromise until years later. Thus, April 9, 2018 is the earliest possible day that these claims arose.[488]

- Finley and Prize raise claims under NAFTA Article 1105 arising from (a) Pemex's scheme to rescind the 821 Contract and call the US$ 41 million bond and (b) Mexico's court system denying them justice.
  - October 4, 2018 was when a Mexican court issued the indefensible, outcome-oriented decision that blessed Pemex's administrative rescission of the 821 Contract. Pemex's scheme with respect to the 821 Contract is ongoing, with its recent efforts to call the US$ 41.8 million bond.

- MWS and Prize raise claims for denial of justice under USMCA Article 14.6 because of the delays in Mexico's court system in issuing a merits decision on their claims arising from the 803 Contract and 804 Contract.[489]
  - The litigation regarding the 803 Contract and the 804 Contract was ongoing when Claimants decided to pursue their investment claims. They sought dismissal of those lawsuits to submit their investment claims under the USMCA.

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486 **C-0005**, USMCA Article 14-E-2(4)(b); **C-0004**, NAFTA Article 1116(2); **C-0004**, NAFTA Article 1117(2).

487 **CL-0018**, *Pope & Talbot, Inc. (U.S.) v. Canada*, UNCITRAL, Award (May 31, 2002) ("The critical requirement is that the loss has occurred and was known or should have been known by the Investor, not that it was or should have been known that loss could or would occur."). According to the *Pope & Talbot* tribunal, knowledge of actual damage, rather than predicted future damage, was required to trigger the three-year limitations period. *Id.*

488 **C-0062,** Acta Circunstancia (April 9, 2018).

489 The tribunal in *Lion Mexico Consolidated v. Mexico* recently determined that Mexico was liable for denial of justice based on the conduct of its courts. **CL-0019**, *Lion Mexico Consolidated L.P*, Award.

- The USMCA deems that litigation pending before local courts for 30 months is too long.[490] The 803 Contract litigation had been pending for 30 months in April 2018. For the 804 Contract, this was June 2018.

Accordingly, Claimants submitted their investment claims within the applicable three-year period, and all of their claims are timely under the NAFTA and the USMCA.

b) Claimants complied with the procedural requirements under the NAFTA and the USMCA

(1) The NAFTA (Finley and Prize)

267. All jurisdictional requirements of the NAFTA (via USMCA Chapter 14, Annex C) are met. Finley and Prize have complied with all procedural requirements of the NAFTA to submit their claims to arbitration.

268. NAFTA Article 1119 requires an investor to deliver to the disputing party a written Notice of Intent to Submit a Claim to Arbitration more than 90 days before commencing arbitration. Finley and Prize delivered their Notice of Intent to Mexico on July 29, 2020. They supplemented this notice on September 18, 2020.[491] Both are more than 90 days prior to the date of their March 25, 2021 Request for Arbitration.

269. Additionally, under NAFTA Article 1120(1), an investor may only submit a claim to arbitration once six months have elapsed since the events giving rise to the claim. Finley and Prize's NAFTA claims arise out of Pemex's scheme to rescind the 821 Contract and call the US$ 41.8 million bond, Mexico's court system upholding that rescission, and Pemex's decision to uphold its obligations with similarly-situated oilfield services companies owned by Mexican nationals. All of these events took place more than six months before Finley and Prize submitted their Request for Arbitration on March 25, 2021.

270. Finley and Prize have also satisfied the conditions precedent to submit a claim to arbitration under the NAFTA. Finley, Prize, and Drake-Mesa consent to arbitration under NAFTA Article 1121(1) and (2). Finley, Prize, and Drake-Mesa also waived their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other

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[490] *See* USMCA Article 14.D.5 (stating that no claim can be submitted to international arbitration unless "the claimant or the enterprise obtained a final decision from a court of last resort of the respondent or 30 months have elapsed from the date the domestic court proceedings were initiated").

[491] **C-0006**, Finley and Prize's Notice of Intent.

dispute settlement procedures, any proceedings with respect to the measures that are alleged to be a breach of NAFTA Articles 1116 or 1117.[492]

271. Furthermore, ICSID has jurisdiction under NAFTA Article 1120(1)(a), which allows a disputing investor to submit a claim to arbitration under the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the ICSID Convention. The United States and Mexico are both Contracting States to the ICSID Convention. Accordingly, under NAFTA Article 1120(1)(a), Finley and Prize may submit their claims to arbitration under the ICSID Convention.

272. Finally, Finley and Prize attempted to settle their claims by consultation or negotiation under NAFTA Article 1118.[493] Their efforts proved futile. They have repeatedly indicated to Mexico that they would be willing to negotiate a settlement, but Mexico has ignored their settlement overtures.

(2) The USMCA (MWS and Prize)

273. All jurisdictional requirements of the USMCA are met. MWS and Prize have complied with all procedural requirements of the USMCA to submit a claim to arbitration.

274. USMCA Articles 14.E.2(a) and (b) permit an investor of a Party to submit to arbitration a claim that another Party has breached an obligation under, *inter alia*, Chapter 14 of the USCMA, and that the investor (Article 14.E.2(a)) or an enterprise (Article 14.E.2(b)) "has incurred loss or damage by reason of, or arising out of, that breach." MWS and Prize's claims concern breaches of Mexico's obligations under USMCA Chapter 14. Furthermore, Prize's Mexican enterprise (Bisell) has incurred loss or damage by reason of those breaches.

275. Under USMCA Article 14.D.3.2, an investor must deliver to the disputing Party a written Notice of Intent to Submit a Claim to Arbitration more than 90 days before submitting the claim to arbitration. MWS and Prize delivered their Notices of Intent to Mexico on July 30, 2020. They supplemented these notices on August 14, 2020 and on September 18, 2020. All are more than 90 days prior to the date of their March 25, 2021 Request for Arbitration.[494]

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[492] Claimants submitted these written consents and waivers with their Request for Arbitration. **C-0007**, Claimants' Written Consents and Waivers.

[493] **C-0008,** Parties' Consultations.

[494] **C-0009,** MWS and Prize Notice of Intent 803 Contract**; C-0010,** MWS and Prize Notice of Intent 804 Contract.

276. Under USMCA Articles 14.D.4 and 14.D.5, MWS, Prize, and Bisell consent to arbitration in accordance with the procedures set out in the USMCA. MWS, Prize, and Bisell also waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to Mexico's measures that are alleged to be a breach referred to in USMCA Articles 14.D.3.1(a) and 14.D.3.1(b), as modified by Article 14.E.[495]

277. Furthermore, the exercise of the ICSID's jurisdiction is proper under USMCA Article 14.D.4, which allows a disputing investor to submit a claim to arbitration under the ICSID Convention, provided that both the disputing party and the party of the investor are parties to the ICSID Convention. The United States and Mexico are both Contracting States to the ICSID Convention. Accordingly, under USMCA Article 14.D.4, MWS and Prize's claims are proper under the ICSID Convention.

278. Finally, MWS and Prize have sought to settle their claims by consultation or negotiation, as directed by USMCA Article 14.D.2.[496] Their efforts proved futile. They have repeatedly indicated to Mexico that they would be willing to negotiate a settlement, but Mexico has ignored their settlement overtures.

4. The Tribunal has jurisdiction over Claimants' claims under the ICSID Convention

279. According to Article 25 of the ICSID Convention, the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment. The dispute that arose between Claimants and Mexico clearly falls under this definition. In addition to being "investments" under both the NAFTA and the USMCA, Claimants also have "investments" under the ICSID Convention. Although the ICSID Convention does not have a definition of "investment," past tribunals such as the tribunal in *Orascom v. Algeria* noted that contracting states intended to apply Article 31(1) of the 1969 Vienna Convention on the Law of Treaties to give the term its ordinary meaning.[497]

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495 **C-0007,** Claimants' Consents and Waivers. Claimants submitted these written consents and waivers with their Request for Arbitration.
496 **C-0008,** Parties' Consultations.
497 **CL-0020**, *Orascom TMT Investments S.a.r.l. v People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award (May 31, 2017), ¶ 370.

280. In order to determine the ordinary meaning of an investment under the ICSID Convention, tribunals often turn to the *Salini* criteria.[498] Under this criteria, the elements of an "investment" under the ICSID Convention are: (1) a contribution, (2) a certain duration of performance of the contract, (3) a participation in the risks of the transaction, and (4) a contribution to the economic development of the host state of the investment. As explained below, Claimants' investments meet the *Salini* criteria.

281. Claimants invested over US$ 30 million in Mexico between late 2011 and 2014.[499] This clearly constitutes a contribution. The term of the 803 Contract was approximately 28 months (with Pemex's extensions); the 804 Contract was approximately 12 months (with Pemex's extensions); and the 821 Contract was approximately 46 months. Claimants bore the risk of their investments by purchasing equipment and materials for use in the projects during the term of the contracts.[500] Claimants also purchased and leased real property and hired and trained employees and subcontractors in Mexico. Finally, Mexico cannot dispute that Claimants contributed to Mexico's economic development by performing services for its national oil company (Pemex) to recover oil from Chicontepec[501] and by hiring and training numerous Mexican workers as further explained above.

282. Thus, the dispute directly arises out of an investment in accordance with Article 25 of the ICSID Convention.

B. Pemex's actions are attributable to Mexico

283. Mexico is liable under the NAFTA, the USMCA, and customary international law for Pemex's acts. Before explaining why, Claimants first explain why Mexico should be estopped from arguing otherwise.

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[498] The *Salini* criteria stem from the jurisdictional decision in *Salini v. Morocco*. **CL-0021,** *Salini Costruttori S.P.A. and Italstrade S.P.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 16, 2001), ¶ 52.

[499] Witness Statement J. Finley, ¶ 46; Witness Statement L. Kernion, ¶ 115.

[500] *See* Witness Statement J. Finley, ¶¶ 30, 54; Witness Statement L. Kernion, ¶¶ 17-18. The tribunal in *AMF v. Czech Republic* found that placing an income-generating asset in the territory of another state for an extended period of time constituted an investment, not a business risk. During this period of time, the asset risked a greater number of events and contingencies, including governmental actions. **CL-0022,** *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co, KG v Czech Republic*, PCA Case No. 2017-15, Final Award (May 11, 2020), ¶¶ 475-76.

[501] *See, e.g.*, **C-0057,** Email from F. Gracia to J. Finley (May 5, 2013).

1. Pemex's repeated admissions about being part of and controlled by Mexico

284. Pemex has consistently stated publicly that it is a part of the Mexican government.[502] For example, when making public offerings for its debt to U.S. investors, Pemex has represented to the U.S. Securities and Exchange Commission that it is "the state oil and gas company of the United Mexican States" and a "decentralized public entity of the Federal Government of Mexico":[503]

> Petróleos Mexicanos and its four subsidiary entities, *Pemex-Exploración y Producción* (Pemex-Exploration and Production), *Pemex-Refinación* (Pemex-Refining), *Pemex-Gas y Petroquímica Básica* (Pemex-Gas and Basic Petrochemicals) and *Pemex-Petroquímica* (Pemex-Petrochemicals and together with Pemex-Exploration and Production, Pemex-Refining and Pemex-Gas and Basic Petrochemicals, collectively referred to as the subsidiary entities), comprise the state oil and gas company of the United Mexican States, which we refer to as Mexico. Each of Petróleos Mexicanos and the subsidiary entities is a decentralized public entity of the Federal Government of Mexico, which we refer to as the Mexican Government, and is a legal entity empowered to own property and carry on business in its own name. In addition, a number of subsidiary companies that are defined in Note 2 and listed in

U.S. law requires Pemex's CEO and CFO to certify filings containing such statements because U.S. investors will rely upon them when deciding whether to purchase Pemex's bonds that it is offering.

285. As another example, Pemex has claimed under oath in its attempt to avoid jurisdiction of U.S. courts that its function is to "explore and develop Mexico's hydrocarbons for the benefit of its people in conformity with Article 27 of the Mexican Constitution, which states that all hydrocarbons in Mexico are owned by the Mexican People . . . ."[504]

286. Pemex's representations to the U.S. Securities Exchange Commission (and U.S. investors) and U.S. courts are unequivocal admissions that Pemex is an organ of the Mexican State under the International Law Commission's Articles on Responsibility of State for Internationally Wrongful Acts ("ILC Articles"). Thus, under the principles of issue estoppel, Mexico and Pemex are precluded from making assertions to the contrary in this arbitration.

2. Pemex's acts are attributable to Mexico under the NAFTA

287. The NAFTA imposes obligations on all organs (executive, legislative, and judicial) and emanations of the Mexican State, including Pemex and its subsidiaries such as PEP. The acts

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502 *See* Section II.A.2(a) above.
503 **C-0025,** Pemex Form 20-F, United States Securities and Exchange Commission at 1 (Dec. 31, 2010), https://sec.report/lux/doc/1321455.
504 **CL-0023**, Declaration of Juan Carlos Gonzales Magallanes, *Castillo, et al. v. P.M.I. Holdings, N.S., Inc., et al.*, No. 4:14-cv-03435, ECF 160-2, at ¶ 4 (S.D. Tex. Feb. 16, 2016).

of Pemex and its subsidiaries, as state organs exercising governmental authority, are attributable to Mexico under NAFTA 1503(2).

288. NAFTA Article 1503(2) provides,[505]

> 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.

289. According to this provision, Mexico violates its obligations if: (1) Pemex is a state enterprise; (2) Pemex acts under delegated authority; (3) the delegated authority is of a governmental nature (e.g., the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges); and (4) Mexico fails to ensure through regulatory control, administrative supervision, or the application of other measures that Pemex acts in a manner that is consistent with the Mexico's NAFTA obligations under Chapters 11. Each of these elements is explained in more detail below.

a) Pemex (and PEP) are state enterprises

290. Pemex are state enterprises under NAFTA Articles 1505 and 201(1) and, as discussed later, acted in a manner inconsistent with Mexico's NAFTA obligations. NAFTA Article 1505 defines "state enterprise" as "an enterprise owned, or controlled through ownership interests, by a Party." NAFTA Article 201(1) provides a similar definition.[506]

291. Mexican law expressly provides that Mexico owns Pemex and its subsidiaries. Specifically, the Petróleos Mexicanos Law ("Pemex Law")[507] and Pemex's Bylaws (Estatuto Orgánico de

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[505] **C-0004**, NAFTA Article 1503(2).

[506] NAFTA Article 201(1) is a general application definition and defines "state enterprise" as "an enterprise that it owned, or controlled through ownership interests, by a Party."

[507] **CL-0014,** Pemex Law 2014, Art. 2 ("Petróleos Mexicanos is a productive state enterprise, exclusive property of the Federal Government, with its own legal personality and its own assets, and it is endowed with technical, operational, and management autonomy, in accordance with what is provided under this Law"); Art. 6 ("[t]he subsidiary productive enterprises are productive state enterprises, with their own legal personality and their own assets. They will be organized and will operate in accordance with the provisions of this Law and the provisions that derive from it and will be subject to the management, direction and coordination of Petróleos Mexicanos . . . ."); *see also* **CL-0013,** Pemex Law 2008. Although the Pemex Law was enacted in 2014, Pemex's ownership was not affected by this law.

Petróleos Mexicanos)[508] are clear that Mexico owns Pemex. Pemex has been and are currently owned by Mexico.

(1) Pemex acted under delegated authority

292. Pemex acted under delegated authority of the Mexican government. NAFTA Note 45 states that "a 'delegation' includes a legislative grant, and a government order, directive or other act transferring to the monopoly, or authorizing the exercise by the monopoly of, governmental authority." Although this Note applies to Article 1503(3), both it and Article 503(2) refer to the delegation of "regulatory, administrative or other governmental authority." Consequently, the definition of the delegation of authority in Note 45 should be understood to extend to Article 1503(2). Therefore, Article 1503(2) does not require that Mexico delegate its authority to Pemex in any specific or particular matter, but instead, it provides for a broad interpretation of how Mexico can delegate it.

293. Mexico cannot dispute that it has delegated its governmental authority to Pemex and it has acted under this authority. Claimants executed their contracts with Pemex in February 2012 (803 Contract), March 2013 (804 Contract), and February 2014 (821 Contract). During that time, Pemex was a decentralized entity (*organismo descentralizado*) that was carrying out Mexico's activities that belong exclusively to it in the strategic area of petroleum.[509] As a decentralized entity, Pemex was part of the administration branch of the Mexican federal government.[510]

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508 **CL-0024,** Estatuto Orgánico de Petróleos Mexicanos, Diario Oficial de la Federación [DOF] 05-12-2017.
509 **CL-0013,** Pemex Law 2008 at Art. 1 ("This Law is in the public interest, it is based on articles 25, 27 and 28 of the Constitution of the United Mexican States. The purpose of this regulation is to regulate the organization, operation, control and accountability of Petróleos Mexicanos, created by Decree published on June 7, 1938, as well as to establish the general bases applicable to its subsidiary organizations. Petróleos Mexicanos and the subsidiary bodies that are constituted will be subject, in the first place, to the provisions of this Law, its Regulations and, only in what is not foreseen to the legal provisions that correspond by matter. The subsidiary bodies shall also be subject to the provisions of the respective decrees of the Federal Executive."); Art. 2 ("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 constitutional in the Petroleum Sector and its regulations."); Art. 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.").
510 **CL-0025,** Organic Law of the Federal Public Administration at Art. 1 ("Decentralized agencies, state-owned enterprises, national credit institutions, national credit auxiliaries, national insurance and surety institutions and

294. The 821 Contract explains that Pemex was authorized to execute the contract because of powers that the Mexican government gave it.[511] For example, Article 5 of the 2008 Pemex Law delegates contracting authority to Pemex with respect to Mexico's hydrocarbons:

> Pemex and its subsidiary organizations, in accordance with their respective objects, may enter into with natural or legal persons all kinds of acts, agreements, contracts and subscribe credit titles, maintaining exclusive ownership and control of the Mexican State over hydrocarbons, subject to the applicable legal provisions.

295. Moreover, the August 2014 change to the Pemex Law did not affect the powers that Mexico had delegated to Pemex. Although this change made structural reforms to Pemex, it continued to act under authority delegated to it. Article 4 of the amended law explains,[512]

> Petróleos Mexicanos' objective is the development of business, economic, industrial and commercial activities in terms of its purpose, generating economic value and profitability for the Mexican State as its owner, as well as acting in a transparent, honest, efficient manner, with a sense of equity and social and environmental responsibility, and seeking to improve productivity to maximize the State's oil income and thus contribute to national development.

296. An example of how Pemex continued to act under delegated authority is demonstrated in its attempted administrative rescission of the 821 Contract.[513] In Pemex's letter, it referred to Article 70 of the Administrative Provisions for Contracting in Acquisitions, Leases, Works, and Services of Substantive Activities of Pemex and its Subsidiaries:[514]

> Por lo anterior y con fundamento en los artículos 70 incisos a) y j), y 73 fracción I, de las Disposiciones administrativas de contratación en materia de adquisiciones, arrendamientos, obras y servicios de las actividades sustantivas de carácter productivo de Petróleos Mexicanos y Organismos Subsidiarios, y en el punto **15.2 "Procedimiento de Rescisión Administrativa"** de la Cláusula 15 **"RESCISION DEL CONTRATO"** del **CONTRATO**, por medio del presente se le comunica la determinación de la rescisión administrativa del **CONTRATO** por los incumplimientos imputables a su representada.

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trusts make up the parastatal public administration."), https://www.diputados.gob.mx/LeyesBiblio/pdf/LOAPF.pdf.

[511] **C-0034,** 821 Contract at Declaration 1.2 ("PEP declares, through its legal representative, that is it empowered to enter into this Contract, in terms of the provisions of Articles 6 of the Regulatory Law of Article 27 of the Constitution in the Oil Industry, Article 5 of the Mexican Petroleum Law and Article 5 of the 'Decree that aims to establish the structure, operation and control of the Subsidiaries of Mexican Petroleum'").

[512] **CL-0013,** Pemex Law 2008 at Art. 4.

[513] **C-0104,** Letter from Pemex to Finley and Drake-Mesa (July 31, 2017).

[514] **CL-0015,** Disposiciones Administrativas de Contratacion ("In light of the above and based on articles 70 a) and j), and 73 subpart I of the Administrative Provisions for Contracting in Acquisitions, Leases, Works, and Services of Substantive Activities of Pemex and its Subsidiaries . . . .").

297. The Provisions cited in Pemex's letter are of a juridical nature, and Pemex must follow them when contracting.[515] Article 70 delegates to Pemex the authority to administratively rescind contracts upon notice to the counterparty and without any judicial or arbitral determination under certain circumstances:

> In the contracts, the causes and consequences of the termination must be agreed.
>
> [Pemex and PEP] may administratively terminate any contract, in such instance it will not require any judicial or arbitral declaration to fully take effect once it has been determined and notified to the Supplier or Contractor. Such termination may be determined in the event that the Supplier or Contractor is located in any of the following cases:

298. The Mexican government delegated authority to terminate contracts upon giving notice and without due process. Pemex continued to use this delegated power into 2017 when it attempted to administratively rescind the 821 Contract. Thus, at all times, Pemex has acted under delegated authority.

(2) The authority delegated to Pemex was of a governmental nature

299. NAFTA Article 1503(2) requires Pemex to exercise "regulatory, administrative or other governmental authority that Mexico has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges."[516] This is not an exhaustive list. Tribunals have held the term of "governmental authority" to be fact-specific.[517] Some factors that tribunals have considered in determining if a state enterprise such as Pemex has been delegated authority are: whether a state ministry or minister has the authority to issue directions to the State enterprise,[518] and whether the State enterprise has authority to enter into contracts.[519] It is also important to analyze how a company was characterized at the time of its creation. As explained below, Pemex satisfies all of these factors.

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515 **CL-0015,** Disposiciones Administrativas de Contratacion at Art. 1 ("These Provisions are the legal framework of mandatory observance for Petróleos Mexicanos and its Subsidiary Organizations, and are intended to regulate procurement, leases, works and services that require contracting in the case of the Substantive Activities of Productive Character, provided for in article 51 of the Law and will be the guide for the procedures of contracting and for the preparation, assignment and execution of contracts.").
516 **C-0004,** NAFTA Art. 1503(2).
517 **CL-0027,** *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award (Sept. 27, 2016), ¶ 234.
518 **CL-0026,** *Mesa Power Group LLC v. Canada*, PCA Case No. 2012-17, Award (March 24, 2016), ¶ 441, n.172.
519 **CL-0026,** *Mesa Power Group LLC*, Award, ¶¶ 372-75.

300. The first factor is whether a state ministry or minister has authority to issue directions to the State enterprise. Pemex's Board and Mexico's Minister of Energy have the authority to, and regularly do, issue directions to Pemex. Pemex's Board of Directors (its *Consejo de Administración*) is its highest management body and is "responsible for establishing the policies, guidelines and strategic vision of *Petróleos Mexicanos*."[520] This board is comprised of 10 members, all of whom the Mexican government selects.[521] Importantly, the President of Pemex's Board is Mexico's Minister of Energy. As explained above, Mexico's President appoints the Minister of Energy.[522] In addition, the Pemex Law authorizes the Minister of Energy (through the Board of Directors), among other things, to set Pemex's policies, guidelines, and strategic vision.[523]

301. The second factor is the State enterprise's authority to enter into contracts. As explained above, the Pemex Law provides Pemex with broad powers, including entering into contracts.[524] Thus, this second factor is satisfied.

302. The third factor is how Pemex was characterized at its formation. Pemex was created by decree in 1938.[525] Pemex was created as a "public institution" and a "public corporation."[526] The

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520 **CL-0014,** Pemex Law 2014 at Art. 13.
521 **CL-0014,** Pemex Law 2014 at Art. 15.
522 **CL-0028,** Constitución Política de los Estados Unidos Mexicanos (Mexican Constitution) Diario Oficial de la Federación [DOF] 06-06-2019, at Art. 89.
523 **CL-0014,** Pemex Law 2014 at Art. 13 (II) ("Establish guidelines, priorities and general policies related to production, productivity, marketing, technological development, research, general administration, safety, health and environmental protection, finances, budget and others related to the activities of Petróleos Mexicanos"); Art. 13(IV) ("Approve the guidelines, priorities and general policies related to the investments of Petróleos Mexicanos, its subsidiary productive companies and affiliated companies, and with the conclusion of strategic alliances and partnerships with natural or legal persons, and must indicate, in both cases, those that due to their importance or transcendence must be authorized by the Council itself"); Art. 13(V)("Approve, at the proposal of the Director General, the guidelines, provisions and general policies for the contracts made by Petróleos Mexicanos, its subsidiary productive companies and affiliated companies, and must indicate those that due to their importance or transcendence must be authorized by the Council itself.").
524 **CL-0014,** Pemex Law 2014 at Art. 6 ("[Pemex] can engage in activities, operations or services necessary to carry out its purpose; with the help of its productive company subsidiaries and affiliated companies, or by entering into contracts, agreements, partnerships or associations or any other legal act . . . ."); **CL-0013,** Pemex Law (2008) at Art. 5 ("[Pemex] and its subsidiaries, in accordance with their respective objects, may enter into with natural or legal persons all kinds of acts, agreements, contracts and sign credit agreements, reserving the exclusivity of the ownership and control of the Mexican State over hydrocarbons, subject to the applicable legal provisions.").
525 **CL-0029,** Decree that creates the institution Petroleos Mexicanos (Decreto que crea la institución Petróleos Mexicanos), Diario Oficial de la Federación [DOF] 20-07-1938.
526 **CL-0029,** Decree that creates the institution Petroleos Mexicanos (Decreto que crea la institución Petróleos Mexicanos), Diario Oficial de la Federación [DOF] 20-07-1938 at Art. 1, Art. 4.

decree also required presidential approval of Pemex's annual expenditure budget.[527] Thus, since its creation, Mexico has characterized Pemex as a juridical person that Mexico controls and to which it delegates authority.

303. Moreover, the role of Pemex's board of directors indicates that the authority delegated to it was of a governmental nature. Pemex's Board of Directors is its highest management body and government appointees control the Board. Article 13 of the 2014 Pemex Law lists 29 broad powers that the Mexican government legislated to the Board. These include providing the central management and strategic direction of Pemex's activities; reviewing and approving Pemex's five-year Business Plan and its annual operational and financial program; approving the general guidelines, priorities, and policies related to Pemex's investments; and approving the general guidelines, provisions, and policies for contracts that Pemex makes.[528]

(3) Mexico failed to ensure through regulatory control, administrative supervision, or the application of other measures that Pemex acted in a manner that was consistent with Mexico's NAFTA obligations

304. Mexico's obligation under Article 1503(2) is to ensure that Pemex acts in a manner consistent with Chapter 11 of the NAFTA. The tribunal in *UPS v. Canada* explained as follows:[529]

> The obligations accepted by the Parties are obligations of result and not simply obligations of conduct. They must "ensure" by one measure or another that in the prescribed circumstances [the State enterprise] does not act inconsistently with the Parties' own obligations under the identified provisions of NAFTA.

305. Mexico failed to ensure that Pemex acted in a manner consistent with Chapter 11 of the NAFTA. As explained later, Pemex violated Chapter 11 by failing to comply with Article 1102 (National Treatment) and Article 1105 (Minimum Standard of Treatment). Thus, the actions of Pemex are attributable to Mexico.

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[527] **CL-00029,** Decree that creates the institution Petroleos Mexicanos (Decreto que crea la institución Petróleos Mexicanos), Diario Oficial de la Federación [DOF] 20-07-1938 at Art. 7.
[528] **CL-0014,** Pemex Law 2014, Art. 2.
[529] **CL-0030,** *United Parcel Service of America Inc. v. Canada*, UNCITRAL, Award (May 24, 2007), ¶ 69.

3. Pemex's acts are attributable to Mexico under the USMCA

306. As the successor to the NAFTA, the USCMA has a provision similar to NAFTA 1503(2). USMCA Article 22.3 provides,[530]

> 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 the Party's obligations under this Agreement.

The corresponding footnote specifies that "[e]xamples of regulatory, administrative or other governmental authority include the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges."

307. Claimants were unable to locate any publicly-available authority that has interpreted USMCA Article 22.3. Because USMCA Article 22.3 follows the same concepts as NAFTA Article 1503(2), it is reasonable to assume that similar elements apply: (1) Pemex is a state enterprise; (2) Pemex acts under delegated authority; (3) the delegated authority is of a regulatory, administrative, or other governmental nature (e.g., the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges); and (4) Mexico fails to ensure that Pemex acts in a manner that is consistent with the Mexico's USMCA obligations.

308. The same analysis above, therefore, would apply to the analysis under USMCA Article 22.3. As explained later, Pemex violated USMCA Article 14 by failing to comply with Article 14.4 (National Treatment) and Article 14.6 (Minimum Standard of Treatment). Thus, the actions of Pemex are attributable to Mexico under the USMCA.

4. Under customary international law

309. NAFTA Article 1503(2)'s framework (and by extension USMCA Article 22.3) regarding state-owned enterprises is consistent with customary international law. Tribunals have recognized the 2001 International Law Commission's Draft Articles on Responsibility of States for

[530] USMCA Article 22.3 has a typographical error in referring to Article 1.3. Persons Exercising Delegated Government Authority is Article 1.4 and provides, "Each Party shall ensure that a person that has been delegated regulatory, administrative, or other governmental authority by a Party acts in accordance with the Party's obligations as set out under this Agreement in the exercise of that authority."

Internationally Wrongful Acts ("ILC Articles") as reflecting the customary international law on attribution.[531] As explained below, the result under customary international law reflected in the ILC Articles is the same as NAFTA Article 1503(2) and USMCA Article 22.3. Pemex's actions are attributable to Mexico.

a) Pemex is a State organ

310. First, Pemex is an organ of the Mexican State under ILC Article 4.[532] The ILC Articles construe "state organ" broadly to include "all the individual or collective entities which make up the organization of the State and act on its behalf,"[533] and "to organs of government of whatever kind of classification, exercising whatever function, and at whatever level in the hierarchy . . . ."[534] One tribunal has determined that a state enterprise under close control of a ministry was a *de facto* state organ.[535]

311. As provided above, Pemex falls squarely within the ILC Articles' definition of state organ. Mexico created Pemex as a state-owned monopoly with exclusive rights over the exploration, extraction, refining, and commercialization of oil in Mexico. Pemex has the nearly exclusive right to extract oil and gas in Mexico and relies on contractors to explore for and produce them.[536] Although the 2013 energy reforms (enacted in 2014) ended Pemex's monopoly in the petroleum sector, Pemex has continued to act as a wholly state-owned enterprise (now termed

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531 **CL-0031,** *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001 Y.B. INT'L L. COMM'N 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1; accessible in English at: https://legal. un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; *see also* **CL-0032,** *Cargill Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 381 (recognizing the ILC Articles as a codification of custom); **CL-0033,** *F-W Oil Interests v Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award (March 3, 2006), ¶ 202 (finding that the ILC Articles, together with the commentaries, reflect the underlying general principles of customary international law).

532 *See* **CL-0031,** ILC Articles, at Art. 4 ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the Central Government or of a territorial unit of the State.").

533 **CL-0031**, Commentary on the ILC Article 4, Art. 4, § 1.

534 **CL-0031**, Commentary on the ILC Article 4, Art. 4, § 6.

535 **CL-0034,** *Flemingo DutyFree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award (Aug. 12, 2006), ¶¶ 430 et seq. Attila Tanzi, in his Dissenting Opinion in *Italy v. Cuba* found that the scope of Article 4 of the ILC Articles extends to all state entities, including state enterprises and entities that belong to the State that carry out economic and/or commercial activities, especially if such activities relate to the development of a key sector of the economy. **CL-0035,** *Republic of Italy v. Republic of Cuba*, Dissenting Opinion of Attila Tanzi, (July 15, 2008), ¶¶ 7 and 9 [French].

536 **CL-0036,** Pemex Form F-4 (2018), http://www.pemex.com/ri/reguladores/Documents/F-,%20filed%2 0201809 25.pdf; *see also* **CL-0023,** Declaration of Juan Carlos Gonzales Magallanes, *Castillo, et al. v. P.M.I. Holdings, N.S., Inc., et al.* No. 4:14-cv-03435, ECF 160-2, at 1 (S.D. Tex. Feb. 16, 2016).

a "productive state enterprise" under the 2014 Pemex Law).[537] Article 4 of the 2014 Pemex Law confirms Pemex's status as a state organ: "[Pemex] has as its objective the development of business, economic, industrial and commercial activities in terms of its purpose, generating economic value and profitability <u>for the Mexican State as its owner</u>. . . ."[538]

312. As explained above, Pemex has also argued its status as a state organ before U.S. federal courts to avoid their jurisdiction. In one case, Pemex stated that it is a "productive State enterprise" that remains the "exclusive property of the [Mexican] Federal Government."[539] Pemex further noted that its subsidiaries are also "all organs of the federal government of Mexico."[540] In support, Pemex submitted statements made under penalty of perjury that "**Petróleos Mexicanos** (a government-owned productive company) **and its Government-Owned Subsidiary Productive Companies** (among them Pemex Exploración y Producción and Pemex Transformación Industrial), <u>**are under the total control and exclusive ownership of the Mexican government**</u>."[541] Thus, it is not controversial that Pemex has always been an organ of the Mexican State.

b) Pemex was empowered to use governmental authority and exercised it in violating the applicable treaties

313. Should Mexico claim that Pemex is not a state organ, Pemex's conduct is still attributable to Mexico under ILC Article 5. Under Article 5, the acts of an entity can be attributed to the State if the entity is empowered to exercise elements of governmental authority.[542]

314. In addition to being a state organ, Pemex also qualifies as a parastatal entity. Article 5 provides that the conduct of a parastatal entity is attributable to the State if it is empowered by the law

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537 **CL-0014,** 2014 Pemex Law at Arts. 4, 96. Article 2 of the 2014 Pemex Law recognizes that Pemex remains owned by only the Mexican state ("Petróleos Mexicanos is a productive State company, exclusively owned by the Federal Government, with legal personality and its own assets and will enjoy technical, operational and management autonomy, in accordance with the provisions of this Law.").
538 **CL-0014,** 2014 Pemex Law at Art. 4 (emphasis provided).
539 **CL-0038,** *Alvarez del Castillo et al. v. P.M.I. Comercio Internacional, S.A. de C.V.*, Motion to Dismiss (Feb. 16, 2016), at 8.
540 **CL-0038,** *Alvarez del Castillo et al. v. P.M.I. Comercio Internacional, S.A. de C.V.*, Motion to Dismiss (Feb. 16, 2016), at 9.
541 **CL-0067,** Declaration of Julio Mora Salas, *Castillo, et al. v. P.M.I. Holdings, N.S., Inc., et al.*, No. 4:14-cv-03435, (S.D. Tex. Apr. 25, 2016), ECF 174-1 at ¶¶ 2-5 (emphasis in original).
542 Article 5 of the ILC Articles provides, "The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

of the State to exercise governmental authority.[543] As explained above, the Pemex Law empowers Pemex to "exercise elements of governmental authority" and it was "acting in that capacity in the particular instance."[544] The Mexican government delegated specific authority to Pemex to enter into contracts, to conduct drilling and extraction of oil, and even to administratively rescind contracts. In all instances, Pemex acted under governmental authority. Indeed, as noted above, Article 4 of the 2014 Pemex Law states that Pemex's objective is to conduct activities to generate economic value and profitability for the Mexican State, to maximize the State's oil income, and contribute to national development.[545] As such Pemex's actions are attributable to Mexico.

c) Pemex's conduct was directed and controlled by Mexico

315. Finally, to the extent Mexico contends that Pemex is not an organ of the State, Pemex's actions can be attributed to Mexico under ILC Article 8 if Pemex's conduct was directed or controlled by Mexico.[546] Numerous tribunals have addressed this concept, for example:

- The tribunal in *Ampal-American Israel v. Egypt* considered that acts are attributable to a state if there is overwhelming evidence that a decision to conclude and terminate certain contracts was taken with the blessing of the highest levels of that state.[547]

- The tribunal in *Karkey Karadeniz v. Pakistan* noted that prior investment tribunals had recognized that sovereign instructions, directions, or control in contractual relations with an investor constituted cogent evidence of sovereign interference.[548]

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543 The tribunal in *Garanti Koza v. Turkmenistan* held that road and bridge construction was a core function of government and that, consequently, an entity empowered by a state to exercise elements of governmental authority is for that purpose acting as an organ of the State. **CL-0039,** *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award (Dec. 19, 2016), ¶ 335. The tribunal in *Saint Gobain Plastics v. Venezuela* considered that a State-owned company was vested with governmental authority both in its function as caretaker and as supervisor and promoter of the nationalization of a plant. **CL-0040,** *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and Principles of Quantum (Dec. 30, 2016), ¶ 458.

544 **CL-0031,** ILC Articles at Art. 5.

545 **CL-0014,** Pemex Law 2014 at Art. 4.

546 **CL-0031,** ILC Articles at Art. 8 ("The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.").

547 **CL-0041,** *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (Feb. 21, 2017), ¶ 146.

548 **CL-00042,** *Karkey Karadeniz Electrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, (Aug. 22, 2017), ¶ 570.

- The tribunal in *EnCana v. Ecuador* found that the acts of a state-owned oil company were attributable to the State due to its supervision and control by the president and attorney-general of the host state.[549]

316. Pemex is unquestionably controlled by the Mexican government. Pemex is regulated by public law in Mexico, and its organizations and structure derive from legislation. Pemex is also constitutionally charged with working and exploiting strategic sectors reserved to the Mexican state. Furthermore, no private party can own a part of Pemex, and it is entirely controlled by the Federal government. As noted above, Pemex's CEO is selected by Mexico's President, and its Board of Directors is comprised of entirely political appointees. Mexico's Minister of Energy and Minister of the Finance and Public Credit sit on the Board, three directors are direct political appointees, and the five "independent" directors are appointed by the executive branch and ratified by Mexico's Senate.[550] As noted above, one of these "independent" directors properly commented that his role was superficial with the important decisions continuing to be made at a governmental level.[551] To him, "Pemex is still largely ruled by the government."[552]

317. Consequently, ILC Articles 4, 5, and 8 each provide a basis under customary international law to find that Pemex's actions amount to actions of the Government of Mexico.

5. The Mexican courts' actions are attributable to Mexico

318. The NAFTA and the USMCA do not contain specific rules on the attribution of court conduct to Mexico. Thus, the ILC Articles are useful in providing customary international law on the matter. Under ILC Article 4, domestic courts are considered organs of the State. Tribunals have confirmed this obvious conclusion in *Azinian v. Mexico*,[553] *Loewen v. United States*,[554] *Siag v.*

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549 **CL-00043,** *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Award (Feb. 3, 2006), ¶ 154.
550 *See* **CL-00014,** Pemex Law 2014 at Art. 15.
551 **C-0018**, Mexico Oil and Gas Review (2012) at 9.
552 **C-0018**, Mexico Oil and Gas Review (2012) at 18.
553 **CL-0044,** *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (Nov. 1, 1999), ¶ 98.
554 **CL-0045,** *The Lowen Group, Inc. v. United States of America*, ICSID Case No, ARB(AF)/98/3, Decision on Jurisdiction (Jan. 5, 2001), ¶ 47.

Egypt,[555] *Sistem v. Kyrgystan*,[556] and *Dan Cake v. Hungary*.[557] Thus, the acts of the Mexican courts that violate the NAFTA and the USMCA are attributable to Mexico under customary international law.

C. Mexico breached its NAFTA and USMCA obligations to afford Claimants with National Treatment

319. Acting through Pemex, Mexico violated the National Treatment standard under the NAFTA (821 Contract) and the USMCA (803 and 804 Contracts).

1. Under the NAFTA

320. NAFTA Article 1102 defines the National Treatment standard:[558]

> 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.
>
> 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.

321. Under NAFTA Article 1102, Mexico violates the National Treatment standard with regard to a U.S. investor or its investment if Mexico treats such investor or investment, in like circumstances, less favorably than that it treats Mexican investors or their investments with regard to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of the investments. The beneficiaries of NAFTA Article 1102 are both investors and their investments.[559]

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555 **CL-0046,** *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009), ¶¶ 195-96.
556 **CL-0047,** *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)06/1, Award (Sept. 9, 2009), ¶¶ 117-18.
557 **CL-0048,** *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability (Aug. 24, 2015), ¶ 143.
558 **C-0004,** NAFTA Article 1102.
559 **CL-0049,** *ADF Group Inc v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), ¶¶ 152-53.

322. Past tribunals have found that NAFTA Article 1102 prohibits treatment that makes unreasonable and arbitrary distinctions between foreign investors and domestic investors.[560] Mexico does not have to facially discriminate against a U.S. investor or its investments.[561] *De facto* discrimination is sufficient. A tribunal interpreting another treaty similarly concluded that an investor does not have to prove the existence of discriminatory intent to prove a violation of the National Treatment standard.[562]

323. Finally, Mexico has to have treated Claimants or their investments less favorably than a Mexican national or its investments in "like circumstances."[563] One NAFTA tribunal noted that "like circumstances" is open to a wide variety of interpretations.[564] It found that "like circumstances" invites an examination of whether a non-national investor complaining of less favorable treatment is in the same "sector" as the national investor.[565] "Sector" can have a wide connotation that includes "economic sector" and "business sector."[566] In short, it is a "totality of the circumstances" analysis.

324. In summary, Mexico violates NAFTA Article 1102 when: (1) it affords a Mexican national or its investment a more favorable treatment than Claimants or their investments; (2) Mexico's treatment relates to the establishment, acquisition, expansion, management, conduct, operation, sale, or other disposition of the investment; and (3) Claimants or their investments are in "like circumstances" as the Mexican national or its investment that experienced the more favorable treatment.

2. Under the USMCA

325. USMCA Article 14.4 is nearly identical to NAFTA Article 1102:[567]

> 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

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560 **CL-0050,** *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Final Award (Dec. 16, 2002), ¶ 170.
561 **CL-0075,** *Pope & Talbot Inc. v Government of Canada*, Award on the Merits Phase 2 (April 10, 2001), ¶ 43; **CL-0051,** *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility (Jan. 15, 2008), ¶ 115.
562 **CL-0052,** *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award (Nov. 8, 2010), ¶ 427.
563 **CL-0075,** *Pope & Talbot Inc.*, Award on the Merits Phase 2, ¶¶ 75-78.
564 **CL-0053,** *SD Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award (Nov. 13, 2000) ¶¶ 243, 245, and 250.
565 **CL-0053,** *SD Myers Inc.*, Partial Award, ¶ 250.
566 **CL-0053,** *SD Myers Inc.*, Partial Award, ¶ 250.
567 **C-0005,** USMCA Article 14.4.

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 favorable 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 circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

326. USMCA Article 14.4 includes one additional factor when analyzing "like circumstances." Article 14.4 takes into consideration whether Mexico's disparate treatment of a U.S. investor or its investment was based on legitimate public welfare objectives.[568] As such, the determination of a National Treatment violation under USMCA Article 14.4 is as follows: (1) Mexico affords a more favorable treatment to a Mexican national or its investment than to Claimants or their investments; (2) Mexico's treatment is with respect to the establishment, acquisition, expansion, management, conduct, operation, sale, or other disposition of the investment; (3) Claimants or their investments are in "like circumstances" compared to a Mexican national or its investment that experienced the more favorable treatment; and (4) Mexico's treatment was not based on a legitimate public welfare objective.[569]

3. Mexico violated the NAFTA and the USMCA by treating domestic oilfield services companies more favorably than Claimants

327. Claimants currently know of one Mexican national with investments that were in "like circumstances." Around the same time Pemex entered into its contracts with Claimants, Pemex entered into Contract No. 424043809 with Integradora de Perforaciones y Servicios, S.A. de C.V. and Zapata Internacional, S.A. de C.V. Upon information and belief, Mexican

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[568] This concept appears to have been codified into the USMCA based on reasoning in prior NAFTA arbitration awards. *E.g.*, **CL-0053,** *SD Myers Inc.*, Partial Award, ¶ 250. Claimants have not seen any indication that Mexico's conduct was related to any public welfare objective.

[569] Although not relevant to this arbitration, a tribunal analyzing "like circumstances" would take into account whether the differentiated treatment was justifiable on the basis of legitimate public welfare objectives.

nationals owned these two oilfield services companies. At least one of these companies, Integradora, represents itself to be a company owned by Mexican nationals:[570]

> IPS was founded by a group of Mexican professionals in 2003 with the aim of providing quality services carried out by personnel with high experience in the industry and at competitive prices. We started as a company dedicated to directional drilling but the needs of the market have led us to offer drilling services in an integrated way including augers, motors, solids control, low balance, etc. At present we are a company that offers from the rental of a tool to the management of a comprehensive drilling project.

328. Based on public information, the 809 Contract is very similar to Claimants' contracts with Pemex.[571]

- It is dated March 1, 2013, which is just 20 days before Claimants signed the 804 Contract.[572]
- It shared the same title as the 804 Contract, except it is Package VI: "*Trabajos Integrales Para Intervenciones a Pozos Terrestres en la Región Norte (Paquete VI)*."
- Because of its shared title, it appears to be for the same type of work in the same area as the 804 Contract (Chicontepec).
- Like with Claimants, Pemex was supposed to request a certain amount of work from Integradora and Zapata for them to perform oilfield services in Chicontepec.[573]
- The amount was US$ 24 million under the 809 Contract (compared to US$ 48 million under the 803 Contract, US$ 22 million under the 804 Contract, and US$ 168 million under the 821 Contract).[574]
- Like with Claimants, Pemex apparently failed to meet its minimum work obligation. Pemex requested approximately US$ 9 million in work from Integradora and Zapata.[575] This is well less than half of what Pemex had agreed.

329. Pemex treated these Mexican nationals and their investment more favorably than Claimants. As explained above, with respect to the 803 and 804 Contracts, Pemex paid nothing to MWS and Bisell related to the work that Pemex never requested or the investments they had made to perform such work. Instead, MWS and Bisell had to litigate with Pemex for over five years in Mexico's court system without receiving a substantive decision. With respect to the 821

570 **C-0109,** Grupo IPS, https://ips-mexico.com/Perfil%20de%20la%20compania.php.
571 **C-0062**, Acta Circunstanciada (April 9, 2018).
572 **C-0033,** 804 Contract; **C-0062**, Acta Circunstanciada (April 9, 2018).
573 **C-0062**, Acta Circunstanciada (April 9, 2018).
574 **C-0033**, 804 Contract; **C-0062**, Acta Circunstanciada (April 9, 2018).
575 **C-0062**, Acta Circunstanciada (April 9, 2018).

Contract, Pemex employed a scheme to administratively rescind the contract, paying Finley and Drake-Mesa nothing, then Pemex forced Finley and Drake-Mesa to litigate for years only to have Mexico's court system uphold the rescission. Now, Pemex is unjustifiably making claims against their US$ 41.8 million performance bond.[576]

330. By all indications, Intergradora and Zapata were not treated the same way as Claimants. Instead, Pemex compromised with Intergradora and Zapata and agreed to pay them at least US$ 15 million:[577]

> Therefore, the total amount to be paid by PEP to the Contractor adds up to total amount of $15,054,705.64 U.S.D. (fifteen million fifty-four thousand seven hundred five US dollars 64/100 U.S.D.).

Notably, Pemex recognized the financial impact of not issuing work orders to these Mexican nationals, and it agreed to pay them for the days that it never requested work at US$ 42,167.14 per day totaling US$ 13.5 million:

SEGUNDO: *Que derivado de la falta de asignacion de trabajos por PEP durante el ejercicio del Contrato 424043809; PEP reconoce las afectaciones economicas para la Contratista, hasta por el monto de $13'493,484.80 USD (trece millones cuatrocientos noventa y tres mil cuatrocientos ochenta y cuatro dolares americanos 80/100 USD), el cual se integra de la siguiente manera:*	SECOND: That due to the lack of PEP assigning work during the period of the 424043809 Contract; PEP recognizes the financial effects on the Contractor, up to the amount of $13'493,484.80 USD (thirteen million four hundred and ninety-three thousand four hundred and eighty-four US dollars 80/100 USD), which is reflected as follows:

331. Unlike these Mexican nationals, Claimants were paid nothing. Moreover, Pemex is currently harassing Finley and Drake-Mesa by making claims against their US$ 41.8 million performance bond. These Mexican nationals and their investments were in "like circumstances," and Pemex treated Claimants unfavorably in comparison. Accordingly, Mexico breached its obligations under NAFTA Article 1102 and USMCA Article 14.2 to afford Claimants with National Treatment.

576 As noted above, Finley and Prize assert claims under the NAFTA for Mexico's conduct related to the 821 Contract and MWS and Prize assert claims under the USMCA for Mexico's conduct related to the 803 and 804 Contracts.

577 **C-0062**, Acta Circunstanciada (April 9, 2018).

D. Mexico breached its obligation to provide Claimants' investment Fair and Equitable Treatment under Article 1105 of the NAFTA and Article 14.6(1) of the USMCA

332. Through Pemex and its courts, Mexico failed to treat Claimants "fair and equitably" under the Minimum Standard of Treatment under the NAFTA (821 Contract) and the USMCA (803 and 804 Contracts). In particular, Mexico violated the Fair and Equitable Treatment standard with its arbitrary and unreasonable treatment of Claimants and their investments, by its lack of good faith in satisfying the promises it made to induce Claimants' investment, and by denying the Claimants and their investments justice in the Mexican courts.

1. The applicable treaty provisions

333. NAFTA Article 1105 and USMCA Article 14.6 guarantee U.S. investors in Mexico and their investments Fair and Equitable Treatment ("FET") under the Minimum Standard of Treatment.

334. NAFTA Article 1105 provides:[578]

> 1. 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.
>
> 2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
>
> 3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

335. USMCA Article 14.6 provides:[579]

> 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

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[578] **C-0004,** NAFTA Article 1105.
[579] **C-0005,** USMCA Article 14.6.

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 police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

4. For greater certainty, the mere fact that a Party takes or fails to take an 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.

Footnote 6 to Article 14.6 states that it should be interpreted in accordance with Annex 14-A (Customary International Law). Annex A provides,

> The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 14.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens.

336. The tribunal in *Pope & Talbot v. Canada* 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.[580] Subsequently, the tribunal in *Waste Management v. Mexico II* 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."[581] In applying this standard, that tribunal considered it relevant to analyze whether

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580 **CL-0075,** *Pope & Talbot Inc.*, UNCITRAL, Award on the Merits of Phase 2, ¶ 118.
581 **CL-0054,** *Waste Management, Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 98.

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 to the case at hand.[582] Thereafter, the tribunal in *Gami Investments v. Mexico* further explained, "the record as a whole — not isolated events — determines whether there has been a breach of international law."[583]

337. Even more recently, the NAFTA tribunal in *Merrill & Ring Forestry v. Canada* took note of the evolution of the FET standard and found,[584]

> 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 difficult to define, may still be regarded as unfair, inequitable, or unreasonable.

It concluded,[585]

> 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.

Other NAFTA tribunals have also included the general standard of conduct that is "improper and discreditable."[586]

338. With respect to USMCA Article 14.6, Claimants were unable to locate a publicly-available award that could provide guidance on its interpretation. The 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.

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582 **CL-0054,** *Waste Management Inc.*, Award, ¶ 99.
583 **CL-0055,** *GAMI Investments Inc. v. United Mexican States*, UNCITRAL, Final Award (Nov. 15, 2004), at ¶ 103.
584 **CL-0056,** *Merrill and Ring Forestry, L.P. v. The Government of Canada*, UNCITRAL, Award (Mar. 31, 2010), at ¶ 210.
585 **CL-0056,** *Merrill and Ring Forestry, L.P.*, Award, ¶ 213.
586 **CL-0059,** *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶ 127; **CL-0060,** *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), ¶ 133.

339. As noted above, 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 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.[587] Each element is further elaborated upon below.

a) Avoiding unreasonable, arbitrary, and discriminatory measures

340. States must treat investments reasonably, non-arbitrarily, and in a non-discriminatory manner.[588] In *Saluka v. Czech Republic*, the tribunal explained that under the FET, the State:[589]

> assumed an obligation to treat a foreign investor's investment in a way that does not frustrate the investor's underlying legitimate and reasonable expectations. A foreign investor whose interests are protected under the Treaty is entitled to expect that the [host State] will not act in a way that is manifestly inconsistent, non-transparent, and unreasonable.

341. In determining whether the State has engaged in arbitrary, unreasonable, or discriminatory conduct, all of the circumstances of the case should be considered. According to the tribunal in *CME v. Czech Republic*,[590]

> [t]he determination of reasonableness is in its essence a matter for the arbitrator's judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behavior in light of the goals of the Treaty.

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587 *See, e.g.*, **CL-0046,** *Waguih Elie George Siag et al.*, Award, ¶ 450; *see also* **CL-0058,** *MTD Equity Sdn. Bhd. & Anor. v. Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004), ¶ 113; **CL-0059,** *Mondev International Ltd.*, Award, ¶ 127; **CL-0060,** *Loewen Group, Inc.*, Award, ¶ 133.

588 **CL-0085,** Andrew Newcombe and Lluís Paradell, *Chapter 6 - Minimum Standards of Treatment*, in, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, KLUWER LAW INTERNATIONAL (2009), at 301 ("Where an IIA accords fair and equitable treatment (expressly or where the treatment guarantee is conferred based on an MFN clause), a separate prohibition on impairment by unreasonable, unjustifiable or arbitrary measures appears to be superfluous. A measure that involves impairment of this kind will breach fair and equitable treatment."); **CL-0057,** *Saluka Investments B.V.*, Partial Award, ¶ 309.

589 **CL-0057,** *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (Mar. 17. 2006), ¶¶ 297, 309.

590 **CL-0072,** *CME, Czech Republic B.V. v. The Czech Republic,* UNCITRAL, Partial Award (Sept. 13, 2001), ¶ 158.

342. In sum, arbitrary measures typically fall within a few broad categories: (i) measures that harm the investor without serving any apparent or legitimate purpose; (ii) measures that are not based on legal standards but on discretion, prejudice, or personal preference; (iii) measures that are taken for reasons that are different from those put forward by the decision maker; and (iv) the disregard of due process.[591]

b) Ensuring transparency, due process, and justice

343. States are obligated to ensure that they act with transparency and that investors are afforded due process and justice. Tribunals interpreting the FET under various BITs and other instruments have concluded that measures that lack transparency violate the customary international law obligation to provide fair and equitable treatment.[592] Commentators have explained,[593]

> The concept of transparency overlaps with fair and equitable treatment in at least two significant ways. First, transparency may be required, as a matter of course, by the concept of fair and equitable treatment. If laws, administrative decisions and other binding decisions are to be imposed upon a foreign investor by a host State, then fairness requires that the investor is informed about such decisions before they are imposed. This interpretation suggests that where an investment treaty does not expressly provide for transparency, but does for fair and equitable treatment, then transparency is implicitly included in the treaty. Secondly, where a foreign investor wishes to establish whether or not a particular State action is fair and equitable, as a practical matter, the investor will need to ascertain the pertinent rules concerning the State action; the degree of transparency in the regulatory environment will therefore affect the ability of the investor to assess whether or not fair and equitable treatment has been made available in any given case.

344. As to due process and justice, various NAFTA tribunals have determined that they fall within the FET standard. For example, the tribunal in *Waste Management II* explained that FET requires the State to afford due process to the investor:[594]

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[591] *See* **CL-0074,** *EDF v. Romania*, ICSID Case No. ARB/05/13, Award (Oct. 8, 2009), ¶ 303. **CL-0085,** Newcombe and Paradell, at 303 ("A measure is likely to be found arbitrary when motivated by inappropriate considerations, as was the case in *Lauder*, or not based on reason, as the tribunal found in *Siemens*.") (internal citations omitted).

[592] *See, e.g.*, **CL-0064**, *Tecmed*, Award, ¶ 154; **CL-0063**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16 (Oct. 2, 2006), ¶ 424.

[593] **CL-0037**, UNCTAD, Fair and Equitable Treatment (UNCTAD Series on International Investment Agreements, 1999), at 51, https://unctad.org/system/files/official-document/psiteiitd11v3.en.pdf.

[594] **CL-0054,** *Waste Management Inc.*, Final Award, ¶ 98.

> 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 . . . 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.

Another NAFTA tribunal in *Loewen* explained, "manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough."[595]

345. Finally, the tribunal in *Azinian* elaborated on the international law concept of denial of justice. According to the *Azinian* tribunal, serious departures from due process may result in a violation of FET in the form of denial of justice. That tribunal did not examine denial of justice in detail; however, it suggested that undue delay, administering justice in a seriously inadequate way, or clearly and maliciously misapplying the law could constitute a denial of justice:[596]

> A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. . . . There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of 'pretence of form' to mask a violation of international law.

The NAFTA tribunal in *Lion Mexico Consolidated L.P* recently reaffirmed these concepts in finding that the Mexican legal system denied a U.S. investor justice. Following a detailed review of the relevant jurisprudence, the *Lion Mexico* tribunal explained:[597]

> A review of case law and scholarly writings reveal that procedural denial of justice can be classified in subtypes: the right to access justice (A.); the right to be heard and to present one's case (B.); and the right to obtain a decision without undue delay (C.). These are some of the separate manifestations of denial of justice and, if committed against an alien, constitute international wrongs which can be imputed against the State.

c) Avoiding harassment, coercion, abuse, and disparagement

346. A state's FET obligation also forbids it from harassing, coercing, disparaging, or abusing an investor. Such conduct is "likely to result in a breach of fair and equitable treatment."[598] As

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595 **CL-0045,** *Loewen Group, Inc. et al.*, Award, ¶ 132.
596 **CL-0044,** *Robert Azinian*, Award, ¶¶ 102-03.
597 **CL-0019,** *Lion Mexico Consolidated L.P*, Award, ¶ 239; **CL-0044,** *Robert Azinian et al.*, Award, ¶ 220.
598 **CL-0085**, Newcombe and Paradell, at 294.

commentators have explained, ". . . coercion, threats, public denunciation and harassment of an investment by a host state are in most situations likely to result in a breach of fair and equitable treatment. . . ." This notion was exemplified in *Pope & Talbot v. Canada*, where the NAFTA tribunal found a breach of fair and equitable treatment. In that case, the State subjected the investor to inappropriate treatment during an administrative review, including threats and misrepresentation. The *Pope & Talbot* tribunal explained that the State:[599]

> changed its previous relationship with the Investor and the Investment from one of cooperation . . . to one of threats and misrepresentation. Figuring in this new attitude were assertions of non-existent policy reasons for forcing them to comply with very burdensome demands for documents, refusals to provide them with promised information, threats of reductions and even termination of the Investment's export quotas, serious misrepresentations of fact in memoranda to the Minister concerning the Investor's and the Investment's actions and even suggestions of criminal investigation of the investment's conduct.

347. Similarly, in *Tecmed v. Mexico*, the tribunal found that the denial of a permit renewal — causing the investor significant losses — was inconsistent with fair and equitable treatment because it was done in a coercive manner. The tribunal explained,[600]

> Under such circumstances, such pressure involves forms of coercion that may be considered inconsistent with the fair and equitable treatment to be given to international investments under Article 4(1) of the Agreement and objectionable from the perspective of international law.

348. Finally, in *Desert Line v. Yemen*, the tribunal found a FET violation when the investor was subjected to financial duress in connection with their investment to build asphalt roads.[601] In that case, the investor reluctantly agreed to settle litigation with the government of Yemen. The *Desert Line* tribunal found that, because the State had a history of withholding payments owed to the investor, the investor had "no realistic choice" but to accept the settlement agreement:[602]

> The Claimant found itself in severe financial difficulties due to the Respondent's conduct when Yemeni officials were denying the Claimant's legitimate requests

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[599] **CL-0018,** *Pope & Talbot Inc.*, Award, ¶ 68; *see also* **CL-0076,** *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award (Jul. 26, 2007), ¶ 123 (explaining that a state's actions to punish an investor "must surely be the clearest infringement one could find of the provisions and aims of the Treaty."); **CL-0077,** *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶¶ 7.4.18-7.4.45.

[600] **CL-0064,** *Tecmed*, Award, ¶ 163.

[601] **CL-0078,** *Desert Line* Projects *LLC v. The Republic of Yemen*, Award (Feb. 6, 2008), ¶¶ 148-209.

[602] **CL-0078,** *Desert Line* Projects *LLC*, Award, ¶ 181.

> for due payments, thereby starving the Claimant for cash and being the proximate cause of the discomfit of the subcontractors. The Arbitral Tribunal finds that the Claimant therefore had no realistic choice but to enter into the Settlement Agreement.

The tribunal concluded that Yemen's conduct "falls well short of minimum standards of international law and cannot be the result of fair and equitable negotiation."[603]

d) Protecting an investor's legitimate expectations

349. It is clear that the FET standard under NAFTA and the USMCA is designed to safeguard an investor's legitimate expectations. Indeed, the Preambles of each Treaty indicate that it affords this central protection:

- **NAFTA Preamble**: A primary purpose of NAFTA is to "ensure a predictable commercial framework for business planning and investment."[604]
- **USMCA Preamble**: A primary purpose of the USMCA is to establish "a clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment" and promoting "transparency, good governance and the rule of law, and eliminate bribery and corruption in trade and investment."[605]

350. Tribunals have described this obligation as one "to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations."[606] In *Tecmed v. Mexico*, the Tribunal explained that a foreign investor can reasonably expect (a) the State to act with transparency and (b) the State to act consistently with its prior representations:[607]

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern

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[603] **CL-0078,** *Desert Line* Projects *LLC*, Award, ¶ 179.
[604] NAFTA Preamble.
[605] USMCA Preamble. As noted above, USMCA Article 14.6(4) states, "For greater certainty, the mere fact that a Party takes or fails to take an 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." Claimants do not interpret this to mean that legitimate expectations are not considered under the USMCA or that serious violations of legitimate expectations would not violate the USMCA. To the extent that the Tribunal determines that "a mere" violation of MWS and Prize's legitimate expectations is not a breach under the USMCA, violating Claimants legitimate expectations in bad faith — as Mexico has done here — is a breach of USMCA Article 14.6.
[606] **CL-0057,** *Saluka*, Partial Award, ¶ 302; *see also* **CL-0054,** *Waste Management Inc.,* Award, ¶ 98 (explaining that when applying the FET standard, "it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.").
[607] **CL-0064,** *Tecmed*, Award, ¶¶ 88, 150, 154 (holding that Tecmed's expectation that the purchase price of the landfill included the permits required to operate it).

> its investments. . . The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions . . . that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.

351. Several NAFTA tribunals have considered the role of an investor's legitimate expectations under the FET standard. In *Thunderbird v. Mexico*, the tribunal explained,[608]

> Having considered recent investment case law and the good faith principle of international customary law, the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA party to honour those expectations could cause the investor (or investment) to suffer damages.

352. Similarly, the NAFTA tribunal in *Glamis Gold v. United States* agreed with the *Thunderbird v. Mexico* tribunal that legitimate expectations are relevant when the State's conduct creates "reasonable and justified" expectations on the part of the investor and the investor relies on such conduct.[609] The *Glamis Gold* tribunal added "a State may be tied to the objective expectations that it creates *in order to induce* investment."[610] It further explained that a state is more likely to create legitimate expectations with the investor when it has made assurances and those assurances have been repeated.[611] The *Glamis Gold* tribunal describes this as the "active inducement of a quasi-contractual expectation."[612]

353. Moreover, NAFTA tribunals have determined that a state's duty to protect an investor's legitimate expectations can extend to those deriving from contracts between the investor and the State (or a state enterprise). In *Mondev v. United States*, the tribunal explained that the FET protection under NAFTA Article 1105(1) can extend to claims in connection with the State's breach of contract:[613]

> A governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1105 and with contemporary standards of national and international law concerning governmental liability for contractual performance.

608 **CL-0017,** *International Thunderbird Gaming Corporation*, Award, ¶ 147.
609 **CL-0062**, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (June 8, 2009), ¶¶ 620-21.
610 **CL-0062**, *Glamis Gold, Ltd.*, Award, ¶ 799 (emphasis in original).
611 **CL-0062**, *Glamis Gold, Ltd.*, Award, ¶¶ 802, 809.
612 **CL-0062**, *Glamis Gold, Ltd.*, Award, ¶ 799.
613 **CL-0059,** *Mondev*, Award, ¶ 134.

Finally, the NAFTA tribunal in *Waste Management II* properly noted that an outright and unjustified repudiation of a transaction can amount to an FET breach.[614]

354. Other tribunals have found that a breach of contract can amount to a violation of an investor's legitimate expectations. For example, in *SGS v. Paraguay*, the tribunal explained:[615]

> a State's non-payment of a contract is . . . capable of giving rise to a breach of fair and equitable treatment requirement, such as, perhaps, where the non-payment amounts to a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of its value.

Similarly, the tribunal in *Rumeli v. Kazakhstan* determined that the State breached the FET standard because the State's organ terminated the investor's contract to support the development of Kazakhstan's telecom industry.[616] The tribunal explained that the termination decision was "arbitrary, unfair, unjust, lacked in due process and did not respect the investor's reasonable and legitimate expectations."[617] Finally, the tribunal in *Impregilo v. Pakistan* held that a State's misuse of its sovereign power — like Pemex's sovereign power to administratively rescind the 821 Contract — in breaching a contract can constitute a FET violation.[618] Thus, when the State's action results in a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of value, the State has committed a FET violation.

e) Acting in good faith

355. Finally, and most importantly, arbitral tribunals regularly consider good faith as fundamental to the FET.[619] According to the tribunal in *Sempra Energy International v. The Argentine Republic*, "[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."[620] Other tribunals have shared a similar sentiment. For example, the tribunal in *Waguih Elie George Siag et al. v. Egypt* stated, "[t]he general, if not cardinal principle of customary international law

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614 **CL-0054,** *Waste Management Inc.*, Final Award, ¶ 115.
615 **CL-0071,** *SGS Société Générale de Surveillance S.A.*, Decision on Jurisdiction, ¶ 146.
616 **CL-0066,** *Rumeli Telekom A.S. et al.*, Award, ¶¶ 102, 615.
617 **CL-0066,** *Rumeli Telekom A.S. et al.*, Award, ¶ 615.
618 **CL-0070,** *Impregilo*, Decision on Jurisdiction, ¶¶ 260, 266-70. As explained above, here, Pemex's act of rescinding the 821 Contract and proceeding to call upon the US$ 41.8 million performance bond was a sovereign act.
619 **CL-0061,** *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), ¶¶ 291, 298.
620 **CL-0061,** *Sempra Energy International*, Award, ¶ 291.

that States must act in good faith is thus a useful yardstick by which to measure the Fair and Equitable standard."[621] Some tribunals have noted that the FET standard is generally objective,[622] but other tribunals have confirmed that state conduct carried out with a demonstrable lack of good faith can constitute a breach of the obligation to afford FET.[623]

356. Indeed, the FET standard may be violated without bad faith.[624] The NAFTA tribunal in *Loewen v. United States* 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."[625] Similarly, the NAFTA tribunal in *Mondev v. United States* 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."[626]

357. However, the presence of bad faith "will certainly suffice" to establishe a violation of the FET standard.[627] According to the tribunal in *Frontier Petroleum Services Ltd v. Czech Republic,* bad faith can include:[628]

- 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.

621 **CL-0046,** *Waguih Elie George Siag et al.*, Award, ¶ 450.
622 *See, e.g.,* **CL-0073,** *CMS*, Award, ¶ 280; **CL-0069,** *Duke Energy*, Award, ¶ 341.
623 *See*, *e.g.*, **CL-0066,** *Rumeli Telekom A.S. et al.*, Award, ¶ 609; **CL-0079,** *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award (July 24, 2008), ¶ 602.
624 *See, e.g.*, **CL-0080,** *Occidental Petroleum Corporation and Occidental Exploration and Production Company*, Award (Oct. 5. 2012), ¶ 186 ("[T]his is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not"); **CL-0073,** *CMS*, Award, ¶ 280 ("The Tribunal believes this is an objective requirement unrelated to whether the Respondent has had any deliberate intension 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."); **CL-0081,** *El Paso Energy International Company v. The Argentine Republic,* ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), ¶ 357 ("[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 that such a violation does not requires subjective bad faith on the part of the State.").
625 **CL-0045,** *Loewen*, Award, ¶ 132.
626 **CL-0059,** *Mondev*, Award, ¶ 116.
627 **CL-0032,** *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 209) at ¶ 296.
628 **CL-0082,** *Frontier Petroleum Services Ltd v. Czech Republic*, UNCITRAL, Final Award (Nov. 12, 2010), ¶ 300.

- 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.

358. Finally, the tribunal in *Waste Management II* explained,[629]

> 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.

359. 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.

2. Mexico's scheme to terminate the 821 Contract and call Claimants' US$ 41.8 million bond violates the FET standard under the NAFTA

360. As explained in more detail above, Finley and Drake-Mesa entered into the 821 Contract based on promises that Mexico wanted to do more work to increase its oil production from Chicontepec and that "Pemex pays, Pemex pays." Moreover, the 821 Contract provides assurance that Pemex had already secured the funds to request work from Finley and Drake-Mesa.

361. After entering into the contract, it is indisputable that Pemex's behavior was erratic, at best. Over two years into the four-year contract, Pemex had only requested approximately US$ 48 million of work (11% of the value of the contract) and had interrupted issuing work orders three times. Pemex blamed the lack of a budget for its over 300 days of inactivity under the contract. Because Pemex had repudiated the contract, Finley and Drake-Mesa sought judicial relief.

362. Pemex retaliated. It told Finley and Drake-Mesa that it would not be issuing any more work orders or paying them as long as they pursued their judicial relief. Pemex had not requested any work for over three months when Finley and Drake-Mesa initiated their legal action. As a

[629] **CL-0054,** *Waste Management Inc.*, Award, ¶ 138.

result, Finley and Drake-Mesa were forced to lay off much of their work force and no longer maintained a representative at Pemex's offices.

363. Months after Finley and Drake-Mesa's lawsuit, Pemex claimed that it had issued a work order to drill the Coapechaca 1240 well. There are serious questions about that work order. For example, Pemex had already assigned another contractor (Weatherford) to drill that well. It is also unclear if Pemex even had a permit to drill that well when it issued the work order. Notably, Pemex's officials told Luis Kernion that they had fabricated the work order to try to rescind the contract. Pemex then proceeded as these officials threatened. It used this one purported work order to administratively rescind the contract, forcing Finley and Drake-Mesa into years of litigation to protect their interests. More troubling, Pemex communicated with the domestic court deciding Finley and Drake-Mesa's challenge to Pemex's attempted rescission and knew in advance that the court would rule in Pemex's favor.

364. Pemex's inexcusable behavior continued into this arbitration. Shortly after the Tribunal was constituted, Pemex continued retaliating against Finley and Drake-Mesa. It harassed their former attorney in connection with the finiquito process for the contract. Pemex then refused attempts by the undersigned's colleagues to obtain Pemex's proposed finiquito and instead proceeded with that process unilaterally. To make matters worse, Pemex claimed that Finley and Drake-Mesa somehow owed Pemex in approximately the same amount as their performance bond, or US$ 41.8 million.

365. Pemex did not stop with its retaliation. The afternoon of the First Session of this arbitration, Pemex began calling the US$ 41.8 million performance bond. Pemex's efforts against their performance bond continue to this day. In addition, in the domestic litigation that Finley and Drake-Mesa discontinued for this arbitration, Pemex then took all measures to have that court award it costs.

366. In all instances, Pemex was acting as a branch of the Mexican Government. Mexico asked Claimants for help when it needed them. Thereafter, it discarded them in an arbitrary, discriminatory, and unjust fashion when its national objectives changed. Mexico ignored the consequences to Claimants who had invested in Mexico in good faith and stood ready to fulfil their commitments.

367. Consequently, Mexico (through Pemex) violated the FET obligation as follows.[630]

a. Pemex violated NAFTA by failing to safeguard Finley and Drake-Mesa's legitimate expectations in establishing and expanding their investments in Mexico, based on numerous representations from Pemex officials ("Pemex pays, Pemex pays") and an express contractual provision assuring that Pemex had received funds for the 821 Contract. Mexico did not comply with its guarantee that Pemex had the budget to request work under the 821 Contract. Moreover, Mexico violated its guarantee that Pemex would not expend its budget allocated for the 821 Contract elsewhere.

b. Pemex violated NAFTA by retaliating against Finley and Drake-Mesa for filing a lawsuit against Pemex for repudiating the 821 Contract. Following Finley and Drake-Mesa's lawsuit, Pemex refused to request work or pay them. Pemex further retaliated against Finley and Drake-Mesa by issuing a purported work order to drill the Coapechaca 1240 Well. This work order was clearly in response to Finley and Drake-Mesa's domestic lawsuit.

c. Pemex violated NAFTA by engaging in arbitrary and discriminatory measures and did not act in good faith when it issued a work order under the 821 Contract to drill the Coapechaca 1240 Well because, among other reasons, that well had already been assigned to another contractor (Weatherford), Pemex apparently did not have a permit to drill that well, and at a time that Pemex had stopped requesting work because it lacked any funds to do so.[631]

d. Pemex violated NAFTA by engaging in harassment, coercion, and abusive conduct towards Finley and Drake-Mesa for pursuing their legal rights against Pemex, including by issuing the work order for the Coapechaca 1240 Well.

e. Pemex violated NAFTA by failing to act in good faith by communicating with the domestic court overseeing Finley and Drake-Mesa's challenge to Pemex's attempted rescission of the 821 Contract, knowing in advance how that court would rule.

f. Pemex violated NAFTA by engaging in harassment, coercion, and abusive treatment towards Finley and Drake-Mesa, not acting in good faith, and engaging in unreasonable conduct by continuing to pursue claims against the US$ 41.8

[630] *See* Sections II.B.4(b)-(d) and II.B.6 above.

[631] The term arbitrary has been defined as "depending on individual discretion; […] founded on prejudice or preference rather than on reason or fact," as willful disregard of due process of law that shocks or at least surprises a sense of juridical propriety, and as conduct that is not governed by law, justice or reason but is based only on capriciousness. **CL-0081,** *El Paso*, Award (Oct. 31, 2011), ¶ 319. The tribunal in *EDF v. Romania* suggested the following test for arbitrariness: a measure should be qualified as arbitrary if: (1) it inflicts damage on the investor without serving any apparent legitimate purpose; (2) it is not based on legal standards but on discretion, prejudice or personal preference; (3) it was taken for reasons that are different from those put forward by the decision-maker; or (4) it was taken in willful disregard of due process and proper procedure. **CL-0074,** *EDF*, Award, ¶ 303.

million performance bond to secure Claimants performance under the 821 Contract, when Claimants always wanted to perform but Pemex refused to do so.

g. Pemex violated NAFTA by retaliating against Finley and Drake-Mesa for pursuing this arbitration by making claims against their US$ 41.8 million performance bond.

h. In addition to being retaliatory, Pemex violated NAFTA by failing to safeguard Finley and Drake-Mesa's legitimate expectations, acting unreasonably and arbitrarily, engaging in abusive conduct, and not acting in good faith when it pursued administrative rescission of the 821 Contract based on the one work order for the Coapechaca 1240 Well when the contract required 15 unfulfilled work orders to do so.

368. In conclusion, Mexico failed to comply with its FET obligation to Finley and Drake-Mesa by designing a scheme to terminate the 821 Contract and ultimately pursue the US$ 41.8 million bond. Mexico (acting through Pemex) engaged in acts, in isolation and together with others, that failed to safeguard their legitimate expectations, were unreasonable and arbitrary, were harassing and coercive and abusive, and not in good faith.[632] These acts constitute a breach of Mexico's obligations under NAFTA Article 1105 to provide Claimants and their investments with fair and equitable treatment.[633]

3. Mexican courts denied Claimants justice and due process

369. The prohibition of denial of justice constitutes an inherent element of the FET standard under customary international law.[634] As such, denial of justice is part of the FET standard under both NAFTA Article 1105 (821 Contract) and USMCA Article 14.6 (803 and 804 Contracts).

370. Two NAFTA tribunals have explained the contours of a claim of denial of justice and due process under the FET standard that are relevant to this arbitration. *First*, the tribunal in *Lion Mexico v. Mexico* noted that undue delay in the exercise of justice is a separate type of denial of

[632] Past tribunals have stated what needs to be considered is the cumulative effect of a State's act and not each act at a time. **CL-0081,** *El Paso*, Award, ¶ 518; **CL-0083,** *OAO Taftneft v. Ukraine*, OCA, UNCITRAL, Award (July 29, 2014), ¶ 413; **CL-0034,** *Flemingo DutyFree*, Award, ¶ 536.

[633] Relatedly, Pemex violated the USMCA by failing to protect MWS and Bisell's legitimate interests with respect to the finiquitos under the 803 Contract and the 804 Contract, engaged in abusive treatment and unreasonable conduct, and did not act in good faith when it forced Claimants to initiate legal action with respect to the 803 Contract and the 804 Contract and then obstructed resolution in the litigation to avoid fulfilling its financial commitments.

[634] **CL-0084,** *Manolium Processing v. Belarus*, PCA Case No. 2018-06, Final Award (June 22, 2001), ¶ 534.

justice.[635] That tribunal noted three factors when determining if the delay was unreasonable: (1) the complexity of the matter, (2) the procedural diligence of the interested parties, and (3) whether celerity is especially warranted to avoid harm to the person involved in the process.[636] Since then, however, Mexico acknowledged in the USMCA that not having a final decision from a domestic court within 30 months — and thus allowing certain investors to initiate international arbitration — is too long.[637]

371. *Second*, the tribunal in *Azinian v. Mexico* noted that a denial of justice/due process occurs when there is a misapplication of law that was "clear and malicious."[638] Claimants were unable to locate a NAFTA award that explains what constitutes a "clear and malicious" misapplication of law. However, some awards suggest that an outcome-oriented approach that discriminates against investors could constitute "clear and malicious" misapplication of law.[639]

372. With respect to Claimants domestic litigation, Mexico cannot dispute that Claimants initiated their legal action with respect to the 803 Contract in September 2015 and that they initiated their legal action with respect to the 804 Contract in December 2015. At the time Claimants commenced this arbitration in March 2021, no domestic court had made a decision on the merits of Claimants' claims. Not having a decision on the merits of a legal action is an undue delay. This is particularly true now that the USCMA has set a 30-month benchmark.

373. Claimants experts on Mexican law, Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, reviewed the available records of Claimants' domestic litigation with respect to the 803 Contract, the 804 Contract, and the 821 Contract. They conclude that the Mexican courts adjudicating Claimants' claims with respect to the 803 Contract and the 804 Contract did not do so in an expeditious or prompt manner.[640]

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635 **CL-0019,** *Lion Mexico Consolidated L.P*, Award, ¶ 239; **CL-0044,** *Robert Azinian et al.*, Award (Nov. 1, 1999), ¶ 102 ("A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay…").

636 **CL-0019,** *Lion Mexico Consolidated L.P*, Award, ¶ 316.

637 **C-0005**, USMCA Article 14.D.5; **CL-0086,** Georgia Haley, "How long is too long? When justice delayed is justice denied," WORLD BANK BLOGS (March 25, 2015), https://blogs.worldbank.org/europeandcentralasia/how-long-too-long-when-justice-delayed-justice-denied.

638 **CL-0044,** *Robert Azinian et al.*, Award, ¶ 103.

639 **CL-0045,** *Loewen*, Award, ¶¶ 135-37*; see also* **CL-0017,** *Thunderbird*, Award, ¶ 198 (suggesting that not taking into account the evidence before it could be a misapplication of law); *see also* **CL-0087,** *Krederi Ltd. v Ukraine*, ICSID Case No. ARB/14/17 (July 2, 2018), ¶ 449 (noting an irrational or abusive outcome beyond mere misapplication of the law may constitute a denial of justice).

640 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶¶ 158, 166.

374. Similarly, Claimants experienced undue delays in the legal action relating to the 821 Contract. The Expert Report on Mexican Law notes that it took almost three years to render a decision on the merits.[641] The legal experts conclude that this too was not expeditious or prompt.[642]

375. In addition to denying Claimants FET with undue delays, Claimants also were denied justice with a legal decision that was a clear and malicious misapplication of law. Claimants challenged Pemex's attempt to administratively rescind the 821 Contract. That contract is very clear that Pemex cannot administratively rescind the contract unless Claimants accumulate 15 unfulfilled work orders.[643] The court ignored this specific protection (Clause 15.1(r)). Instead, it relied on the immediately following provision (Clause 15.1(s)), which is a general provision regarding breaches of obligations. In almost every legal system, including Mexico's, it is a fundamental axiom that a specific provision supersedes a general one.[644] The only rational explanation for the court's decision was that it was outcome-oriented in favor of Pemex.

376. Pemex revealed why. Weeks before the court issued its decision, Luis Kernion met with Rob Keosayan, a former attorney at Pemex, and a high-level attorney for Pemex named Rodrigo Loustaunau Martínez.[645] During this conversation, Mr. Kernion learned two things: (1) that Pemex had appointed someone to meet with the judge overseeing Claimants' lawsuit and (2) the judge told this person that the judge would be ruling in Pemex's favor.[646] This conduct alone shows that Mexico failed to uphold its FET obligation regarding the fair administration of justice and due process.

377. Indeed, the Expert Report on Mexican Law explains the egregious nature of Pemex's conduct:[647]

> *Ex parte* communications (re the resolution that was pending to be issued) between Pemex and the Magistrates of the Superior Chamber of the Administrative Court violate the Ethics Code of the Administrative Court and Claimants' Due Process rights.

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641 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 157.
642 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 158.
643 **C-0034,** 821 Contract at Clause 15.1(r).
644 Claimants are not aware of any conduct that could give rise to grounds for Pemex to rescind the contract based on this general provision.
645 Witness of L. Kernion, ¶¶ 105-06.
646 Witness of L. Kernion, ¶ 107.
647 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶¶ 167-70.

> Magistrates shall refrain from having ex parte communications where it may be influenced by such party, may be give advantage to such party and/or may appear to be giving preferential treatment to said party (such as providing such party with the resolution information that is not providing to the party with whom such magistrate is not communicating). If the communication referred by Mr. Kernion took place between the judge and Pemex, the Ethics Code and Claimants' Due Process rights were clearly violated.

378. The Expert Report on Mexican Law lists other serious issues with how Claimants' lawsuits were handled by the Mexican courts. In addition to the irregular and excessive delays and the questionable, if not illegal, conduct between Pemex and the judge who issued the inexplicable decision to rescind the 821 Contract because of one work order. They note the following ways how justice was not administered or granted promptly, completely, and impartially to Claimants in their various legal actions:[648]

- Issuing irregular decisions and judgments regarding jurisdiction;
- Issuing decisions on and/or admission of Pemex's requests in contradiction of the *res judicata* principle in violation of Claimants' constitutional rights;
- Issuing decisions contradicting the *suplencia de la queja* principle in violation of Claimants' constitutional rights;
- Issuing decisions in contradiction of the exhaustiveness principle in violation of Claimants' constitutional rights; and
- Issuing decisions that violate the duty to motivate in violation of Claimants' constitutional rights.

At bottom, Claimants never had a fair chance against Pemex before the Mexican courts. Pemex agreed in the finiquitos to the 803 Contract and the 804 Contract that Claimants could pursue their claims, but for over five years the Mexican courts never gave them a fair opportunity to present their case. Worse, the court in the 821 Contract issued an indefensible decision that condoned Pemex's unilateral termination of a four-year, US$ 418 million contract because of one most questionable work order (for approximately US$ 1 million of work), ignoring a clear contractual requirement that only sanctioned rescission in the event of 15 or more unfulfilled work orders. This conduct exemplifies a denial of justice.

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648 Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶¶ 171, et seq.

4. Mexico discriminated against Claimants and their investments

379. As explained above, the FET standard under NAFTA Article 1105 and USMCA Article 14.6 prohibits discriminatory treatment. Claimants have explained how Mexico violated the National Treatment standard under both the NAFTA and the USMCA when it discriminated against Claimants and their investments in comparison to Mexican nationals and their investments.

380. Specifically, Pemex agreed to terminate a contract similar to the 804 Contract (for work in Chicontepec and executed 20 days after the 809 Contract) and agreed to pay Mexican nationals over US$ 15 million for Pemex not having issued work orders under that contract. In contrast, Pemex paid nothing to Claimants. Worse, Pemex forced Claimants to endure years of litigation for the 803 Contract and the 804 Contract — without any resolution. Pemex also designed a scheme to terminate the 821 Contract and has since proceeded to claim against the US$ 41.8 million performance bond, an amount that is just shy of the amount of work that Pemex actually requested from Finley and Drake-Mesa under the contract (US$ 48 million)

381. This constitutes a violation of the FET standard under both the NAFTA and the USMCA. These acts — done in bad faith — should be taken into account as an individual violation of the FET standard and to assess the cumulative effect of Mexico's acts in reviewing the existence of an FET breach.

IV. DAMAGES

382. As demonstrated in Section III above, 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.

383. In 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.[649]

[649] Claimants reserve their rights to amend and/or supplement their claims for damages in all respects at the appropriate time.