

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

v.

United Mexican States

(ICSID Case No. ARB/21/25)

PROCEDURAL ORDER NO. 12

(On Post-Hearing Briefs and Courtesy Translations)

Members of the Tribunal

Mr. Manuel Conthe Gutiérrez, President of the Tribunal

Dr. Franz X. Stirnimann Fuentes, Arbitrator

Prof. Alain Pellet, Arbitrator

Secretary of the Tribunal

Ms. Anneliese Fleckenstein

February 26, 2024

I. BACKGROUND

1. During the evidentiary hearing held in Washington D.C. from December 4 to December 8, 2023, the Tribunal asked the Parties and their legal experts some questions which the Parties had not, at least directly, addressed in their pleadings.
2. As a follow-up to those exchanges, the Tribunal announced during the hearing that it was likely to send to the Parties an indicative list of questions, which the Parties would be invited to address in their Post-Hearing Briefs (“PHBs”, henceforth).
3. The Tribunal further indicated that, to the extent that some exhibits and legal provisions relevant to the decision on the issues in dispute in this arbitration were only available in Spanish, it might need to request the Parties to prepare courtesy translations into English of a selected number of documents. During the hearing, the Parties declared themselves ready to provide those translations, at the request of the Tribunal.
4. Furthermore, on January 2, 2024, the Parties jointly declared themselves ready to address any of the Tribunal’s questions in their PHBs; they agreed the deadline for the submission of their PHBs to be 45 days after the hearing transcripts had been agreed between the Parties or the Tribunal had sent its questions to the Parties, whichever date was later; and they further agreed that the submissions of costs be presented two weeks after the PHBs.
5. On February 16 and 20, 2024, the ICSID Secretariat distributed the agreed final versions, in Spanish and English, of the hearing transcripts.

II. TRIBUNAL’S CONSIDERATIONS

6. The Tribunal includes as Annex 1 of this Procedural Order a list of indicative questions which the Parties may want to address in their PHBs.
7. The Tribunal wishes to stress that most of the questions in the list are related to legal questions asked by the Tribunal during the hearing and that they are *not* the only issues, either legal or factual, that the Tribunal may consider relevant for deciding the case.

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8. Additionally, the list of questions is in no way indicative that the Tribunal is pre-disposed towards certain issues nor that it has pre-judged any. It goes without saying that the Parties remain free, and indeed are invited, to include in their PHBs, in support of their case, any other arguments unrelated to the list of questions.
9. The Tribunal has further decided that it will need to be provided with courtesy translations into English of some exhibits or legal provisions which have been filed, or are only available so far, in Spanish. For that request to be as little burdensome as possible, and so that it does not interfere with the Parties' preparation of their PHBs, the Tribunal:
 - Is limiting its request, for the time being, to the documents indicated in Annex 2 to this Procedural Order. In the case of some very long documents, the Tribunal has attempted to limit the request to those sections which it considered relevant.
 - For burden-sharing purposes, the Tribunal expects that each courtesy translation is submitted by the Party which filed the original document in Spanish, or by Mexico, in the case of the Mexican laws mentioned in Annex 2.
 - Has decided that the submission of the courtesy translations and, consequently, the submission on costs be postponed by around one month after the submission of the PHBs.
10. The Tribunal reserves the right to supplement at any time the list of documents contained in Annex 2, if need be.
11. The Tribunal wishes to express in advance its gratitude to the Parties for the preparation of these courtesy translations.

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DECISION

In light of the above, the Tribunal decides:

1. To invite the Parties to address in their Post-Hearing Briefs the list of indicative questions set out in Annex 1.
2. To order the Parties to submit their Post- Hearing Briefs by Friday, April 12, 2024.
3. To order the Parties to file, at the latest by Friday, May 17, 2024,
 - a) The courtesy translations of the documents listed in Annex 2; and
 - b) Their submission on costs.

For and on behalf of the Tribunal,

[Signed]

Mr. Manuel Conthe Gutiérrez
President of the Tribunal
Date: February 26, 2024

ANNEX 1

Questions to the Parties

On jurisdiction

1. When an investor (e.g. Drake-Finley, in this arbitration) withdraws its claims in local litigation and/or does not challenge any unfavourable local court decisions, may that conduct have any bearing on the ‘waiver’ requirement under Article 1121.1 of NAFTA?

2. Under Article 14.2 (3) of the USMCA, an arbitral tribunal may have jurisdiction in a NAFTA case over acts or facts that took place before the date of entry into force of the USMCA, but only to the extent, as required in Annex 14-C.6 (a), that they relate to a legacy investment which « was in existence on the date of entry into force » of the USMCA. Concerning the 821 Contract, what specific facts should the Tribunal look at in order to determine whether or not that was the case?

3. Under Articles 1116.2 and 1117.2 of NAFTA « an investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage ».

a) In order to assess whether any alleged post-cut off breaches took place, could the Arbitral Tribunal analyse facts which took place before the ‘cut-off’ date (i.e. March 25, 2018)?

b) In the case of national treatment claims, what should be the « *dies a quo* » for computing the 3-year time limit?

On the merits

4. What would be the legal basis, if any, which could allow the Tribunal to draw adverse inferences from the Parties’ behaviour in this arbitration (e.g. Respondent’s failure to produce communication PEP-DG-SSE-GSIAP dated May 3, 2017?). Were such legal basis forthcoming, what specific adverse inferences, if any, could or should the Tribunal draw in this arbitration?

5. Is there case law or doctrine in Mexico relating to Article 51.V of the *Ley Federal de Procedimiento Contencioso Administrativo* and Article 3.III of the *Ley de Procedimiento Administrativo*, as reflective of the concept of «*détournement de pouvoir*» (i.e. “desviación” o “desvío” de poder” in Spanish)? If there is any such case law or doctrine, would the existence of «desviación de poder», for example, in an administrative decision be a public order issue which Mexican tribunals should or can analyze at their own initiative?

6. What is the scope of the principle of «*estricto derecho*» as applicable to the TFJA's procedures? To what extent are Articles 41 and 50 of the *Ley Federal de Procedimiento Contencioso Administrativo* relevant in this regard?
7. Under Mexican law for administrative contracts, can contractors invoke the «*exceptio non-adimpleti contractus*» against public entities? Or is the application of such *exceptio* excluded *a priori*, because of the «exorbitant regime» applicable to administrative contracts?
8. Could the fact that the TFJA is part of the Executive Power, not of Mexico's judiciary, have any bearing on the degree of deference the Arbitral Tribunal should pay to its rulings?
9. Should the calling of the Dorama Bond by PEP and the determination of the amount to be called under the Bond be considered (a) a purely contractual matter subject to the relevant provisions of the Contract, particularly Clause 6.6.3 of Contract 821; or, alternatively, (b) an administrative act, potentially attributable to Mexico? Under case (a) above, would Clause 10, letter H of the Contract have any bearing on such determination? Under case (b), would the principles contained in the *Ley de Procedimiento Administrativo* on sanctions (including, specifically, Article 73) have any bearing on such determination?

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ANNEX 2

Tribunal’s requests of courtesy translations

Document	Description	No. of Pages	Pages to be translated into English¹
RZ-037	Withdrawal writs (“desistimiento”) submitted by Drake-Finley et al.	4	
R-099	“Acta de Finiquito“ of 809 Contract	8	
C-62	“Acta circunstanciada” of 809 Contract (April 9, 2018)	7	
JAH-0066	“Acta de extinción de derechos y obligaciones” of 809 Contract (June 25, 2018)	3	
R-108	Drake-Finley <i>et al</i> ’s observations on PEP’s notification of start of rescission procedure (August 14, 2017)	31	
R-109	PEP’s notifications to Drake-Finley of lack of compliance with PACMA obligations	4	
R-48 and JAH-32	Sentence of the Appeal Court in the Juicio Civil Ordinario 200/2016 concerning the 821 Contract, dismissing Claimants’ civil claim (April 2, 2019)	176	Pages 119 ² -137 and 167-172
C-97	PEP’s letter to Finley of January 22, 2016	1	
RZ-39	TFJA’s sentence of October 4, 2018, concerning the administrative rescission of the 821 Contract	250	Pages 1-8, 165-170, 178-185, 188-238 and 249-250
R-43	Unilateral Finiquito of 821 Contract, of November 10, 2021	35	
R-41	Work Order 28-2016	1	

¹ The translation should cover the entire document, except when indicated otherwise in this column.

² The numbers are those at the bottom of the sentence, NOT those of the pdf. The translation of page 119 should start with the sentence “las prestaciones reclamadas en el escrito inicial son las siguientes” and end on page 137 with the sentence “Además, que con las pruebas que aportó la actora no se aprecia tal circunstancia”.

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C-99	PEP’s 2015 drilling program	3	Page 1
C-104	PEP’s communication of initiation of rescission procedure (July 31, 2017)	28	
C-138	PEP’s request to CNH for authorization to drill well Coapechaca 1040, of June 5, 2017	1	
C-101	CNH’s authorization to PEP to drill well Coapechaca-1040 DES, of August 10, 2017	10	
C-122	Internal PEP memo on failure by Finley to meet PACMA obligations (May 31, 2016)	16	
C-103	Mr. Loustaunus’ internal memo on administrative rescission of the 821 Contract (May 8, 2017)	1	
R-44	Finley’s statement of claim in TFJA’s proceeding on PEP’s administrative rescission of the 821 Contract	58	
	Ley de Procedimiento Contencioso Administrativo https://www.diputados.gob.mx/LeyesBiblio/pdf/LFPCA_270117.pdf	68	Articles 40-56 (except arts. 48 and 50-A)
	Ley Federal de Procedimiento Administrativo https://www.diputados.gob.mx/LeyesBiblio/pdf/112_180518.pdf	32	Articles 1-7 and 70-84 (excluding art. 70 A)
C-128	Internal PEP’s memo on meeting in Villahermosa dealing with the Dorama bond (May 16, 2018)	1	