BEFORE THE HONORABLE TRIBUNAL ESTABLISHED PURSUANT TO CHAPTER XI OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) AND THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES AND CANADA (USMCA)

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

V.

UNITED MEXICAN STATES,
(RESPONDENT)

(ICSID Case No. ARB/21/25)

COUNTER-MEMORIAL

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[Courtesy translation]

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GLOSSARY

Short name	Complete name
Direct amparo proceedings 425/2018 and 426/2018	Direct amparo proceeding filed by PEP and Drake-Finley against the Appeal Judgment 898/2017 issued by the Third Unitary Court in Civil and Administrative Matters of the First Circuit, before the 10th Collegiate Court in Civil Matters of the First Circuit.
Direct amparo proceeding 306/2019	Direct amparo proceeding filed by PEP against the Second Appeal Judgment 898/2017 issued by the Third Unitary Court in Civil and Administrative Matters of the First Circuit, before the 10th Collegiate Court in Civil Matters of the First Circuit.
Direct amparo proceeding 783/2019	Direct amparo proceeding filed by PEP against the Third Appellate Judgment 898/2017 issued by the Third Unitary Court in Civil and Administrative Matters of the First Circuit, before the 10th Collegiate Court in Civil Matters of the First Circuit.
Direct amparo proceeding 540/2020	Direct amparo proceeding filed by PEP against the Fourth Appellate Judgment 898/2017 issued by the Third Unitary Court in Civil and Administrative Matters of the First Circuit, filed before the 10th Collegiate Court in Civil Matters of the First Circuit.
Direct amparo proceeding 74/2019	Direct amparo proceeding filed by Drake-Finley against the Decision in the Annullment proceeding 2017, before the Fourteenth Collegiate Court in Administrative Matters of the First Circuit.
Indirect amparo proceeding 4/2017	Indirect amparo proceeding filed by PEP on February 20, 2017 against the Appeal Decision 36/2016, filed before the First Unitary Circuit Court of the Seventh Circuit.
Direct amparo proceeding 214/2016	Direct amparo proceeding filed by MWS and Bisell against the Appeal Decision 1/2016, filed before the First Collegiate Court in Civil Matters of the Seventh Circuit.
Appeals 898/2017 and 899/2017	Appeals filed by Drake-Finley and PEP against the Decision in Civil Suit 200/2016, filed before the Third Unitary Court in Civil and Administrative Matters of the First Circuit.
Appeal 35/2015	Appeal filed by MWS and Bisell on October 20, 2015 against the dismissal decision of the Eleventh District Judge in the State of Veracruz in Civil Suit 75/2015, filed before the 4th Unitary Circuit Court of the Seventh Circuit.

Appeal 30/2016	Appeal filed by MWS and Bisell on August 10, 2016 against the interlocutory judgment of July 14, 2016 in which the Eleventh District Judge in the State of Veracruz, in Civil Suit 75/2015, resolved as appropriate and grounded the motion for lack of jurisdiction on grounds of subject matter filed by PEP
Appeal 36/2016	Appeal filed by MWS and Bisell on October 14, 2016 against the interlocutory judgment of September 21, 2016 issued by the Eleventh District Judge in the State of Veracruz, in Civil Suit 75/2015, which confirmed the merits of the motion for lack of jurisdiction by reason of subject matter filed by PEP
Appeal 1/2020	Appeal filed by PEP on January 7, 2020 against a resolution of the Eleventh District Judge in the State of Veracruz in Civil Suit 75/2015, in which he dismissed PEP's documentary evidence.
Appeal 1/2016	Appeal filed by MWS and Bisell against the dismissal of the lawsuit issued by the Eleventh District Judge in Civil Suit 120/2015, filed before the Tird Unitary Circuit Court in Civil Matters in Veracruz.
ATG	Proyecto Aceite Terciario del Golfo Project or ATG, a project established by Pemex at the beginning of the 20th century to carry out exploration and exploitation of hydrocarbons in Chicontepec
Bisell	Bisell Construcciones e Ingeniería, S.A. de C.V.
CC	Code od Commerce
ICC	International Chamber of Commerce
CDMX	Mexico City
CFPC	Federal Code of Civil Procedures
CNH	National Hydrocarbons Commission
Chicontepec or Chicontepec Project	Oil field located in the state of Veracruz, Mexico, with a complex geology that throughout its history has presented technological and financial challenges for the extraction of oil.
Coapechaca 1240	Well subject of Work Order 028-2016 to perform drilling work by Finley, Drake-Mesa and Drake-Finley under Contract 821.
Constitution or CPEUM	Political Constitution of the United Mexican States
Contract 803	Contract No. 424042803 dated February 20, 2012 between MWS, Bisell and PEP.

Contract 804	Contract No. 424043804 dated March 20, 2013 between MWS, Bisell and PEP.
Contract 809	Contract No. 424043809 dated March 1, 2013 entered into between Integradora de Perforaciones y Servicios, Zapata and PEP.
Contract 821	Contract No. 421004821 dated February 28, 2014 entered into between Drake-Mesa, Finley, Drake-Finley and PEP.
Vienna Convention	Vienna Convention on the Law of Treaties of May 23, 1969
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Energy Crisis of 2014	A global phenomenon that in mid-2014 initiated a crisis in international oil prices that generated extremely negative effects for energy companies, including Pemex
DACs	Administrative regulations published on January 6, 2010 in the DOF establishing minimum requirements and provisions for all contracts of Pemex and its subsidiaries.
DGCJCI	General Office of Legal Consultancy for International Trade of the Ministry of the Economy
Drake-Finley	Drake-Finley, S. de R.L. de C.V.
Drake-Mesa Big Sky	Drake-Mesa Big Sky, LLC
Drake-Mesa	Drake-Mesa, S. de R.L. de C.V.
Respondent or Mexico	United Mexican States
Claimants	Finley Resources, Inc., MWS Management, Inc., and Prize Permanent Holdings, LLC
DOF	Federal Official Gazette (*Diario Oficial de la Federación*)
Dorama	Fianzas Dorama, S.A.
EPE	State Productive Enterprise (*Empresa Productiva del Estado*)
Finley	Finley Resources Inc.
Fianza Dorama	Performance bond for Contract 821 for the amount of $41.8 million (which equaled approximately 10% of the contract value) provided by Dorama on February 26, 2014 in favor of contractors Drake-Mesa and Finley
Integradora	Integradora de Perforaciones y Servicios, S.A. de C.V.
Civil Trial 200/2016	Ordinary Civil proceeding filed by Drake-Finley, Drake-Mesa and Finley against PEP before the Eighth District Court in Mexico City under file No. 200/2016-1, initiated on April 29, 2016 for PEP's alleged breach of Contract 821.
Civil Trial 75/2015	Ordinary Civil proceeding filed by MWS and Bisell against PEP before the Eleventh District Court in the State of Veracruz under file No. 75/2015 filed on October 13, 2015 for alleged breach by PEP of Contract 803

Civil Trial 120/2015	Ordinary Civil proceeding filed by MWS and Bisell against PEP, before the Eleventh District Court under file No. 120/2015, initiated on December 8, 2015 for PEP's alleged breach of Contract 804
Annulment Proceeding 2017	Administrative proceeding initiated by Drake-Finley, Drake-Mesa and Finley against PEP filed before the Superior Chamber of the TFJA under file No. 20356/17, initiated on September 4, 2017 against PEP's resolution No. PEP-DG-SSE-759-2017 dated August 28, 2017.
Annulment Proceeding 2019	Administrative proceeding initiated by MWS and Bisell against PEP filed before the Sixth Metropolitan Regional Chamber of the TFJA under file No. 5403/19-17-06-5 initiated on March 5, 2019 against the breach of Contract 804 and the minutes related to the conciliation hearing of January 21, 2019.
Pemex Law of 2008	Law of Petróleos Mexicanos published in the DOF on November 28, 2008.
Pemex Law of 2014	Law of Petróleos Mexicanos published in the DOF on August 11, 2014.
MWS	MWS Management Inc.
Claimants Memorial	Claimants Memorial submitted by Claimants on June 10, 2022
Work Order 028-2016	Drilling work order issued by PEP under Contract 821 for Finley, Drake-Mesa and Drake-Finley to perform drilling work on the Coapechaca 1240 well.
Yard	Claimant's land located in Poza Rica, Veracruz, known as the "Yard", where they stored and assembled the equipment purchased to develop the work under the contracts, and housed their workers.
Pemex	Petróleos Mexicanos
PEP	Pemex Exploration and Production
PJF	Judiciary of the Federation (*Poder Judicial de la Federación*)
Prize	Prize Permanent Holdings, LLC
Energy Reform	Energy Reform to the Mexican constitution of 2013 published in the DOF on December 20, 2013.
Appeal for Review 1685/2020	Motion for review filed by Drake-Finley on March 5, 2020 against Amparo Directo Ruling 74/2019 before the SCJN.
Appeal for Review 233/2017	Motion for review filed by PEP against Amparo Ruling 4/2017, on June 2, 2017, heard by the First Collegiate Circuit Court in Civil Matters in Veracruz.
Response to the Request for Provisional Measures	Brief submitted by Respondent on January 3, 2022 in response to the Request for Provisional Measures

Royal Shale Corporation	Royal Shale Corporation, S.A. de C.V.
Royal Shale Holdings	Royal Shale Holdings, S.A. de C.V.
SE	Secretaría de Economía
SCJN	Supreme Court of Justice of the Nation
Civil Judgment 200/2016	Judgment issued by the Eighth District Judge in Civil Matters in Mexico City under Civil Suit 200/2016, by which he determined that he lacked jurisdiction to hear the claims under Contract 821
Appeal Judgment 898/2017	Judgment dated April 19, 2018 issued by the Third Unitary Court in Civil and Administrative Matters of the First Circuit that resolved Appeals 898/2017 and 899/2017.
Second Appeal Judgment 898/2017	Judgment dated April 2, 2019 in which the Third Unitary Court in Civil and Administrative Matters of the First Circuit complied with the Amparo Directo 425/2018 Judgment
Third Appeal Judment 898/2017	Judgment dated September 9, 2019 in which the Third Unitary Court in Civil and Administrative Matters of the First Circuit complied with Amparo Directo Judgment 306/2019
Fourth Appeal Judgment 898/2017	Judgment dated October 23, 2020 in which the Third Unitary Court in Civil and Administrative Matters of the First Circuit complied with Amparo Directo Ruling 783/2019
Fifth Appeal Judgment	Judgment dated October 21, 2021 in which the Third Unitary Court in Civil and Administrative Matters of the First Circuit complied with Amparo Directo Ruling 540/2020.
Appeal Judgment 35/2015	Judgment dated December 30, 2015 issued by the Fourth Unitary Circuit Court of the Seventh Circuit that revoked the dismissal judgment of the 11th District Judge in the State of Veracruz in Civil Suit 75/2015.
Appeal Judgment 30/2016	Judgment issued on September 2, 2016 by the Fourth Unitary Circuit Court of the Seventh Circuit dismissing Appeal 30/2016.
Appeal Judgmen 36/2016	Judgment dated January 26, 2017 issued by the Fourth Unitary Circuit Court of the Seventh Circuit that revoked the interlocutory judgment of September 21, 2016 issued by the Eleventh District Judge in the State of Veracruz in Civil Suit 75/2015.
Appeal Judgment 1/2016	Judgment issued on February 12, 2016 by the Third Unitary Circuit Court of the Seventh Circuit that confirmed the dismissal sentence of the Eleventh District Judge in the State of Veracruz in Civil Suit 120/2015.

Annullment Proceeding 2017 Judgment	Judgment issued in the Annullment proceeding 2017 by the TFJA on October 4, 2018 in which it resolved the 2017 Annullment proceeding and confirmed the rescission of Contract 821.
Direct Amparo Judgment 425/2018	Amparo Judgment issued on February 8, 2019 by the Tenth Collegiate Court in Civil Matters of the First Circuit that resolved Amparos Directos 425/2018 and 426/2018
Direct Amparo Judgment 306/2019	Amparo Judgment issued by the Tenth Collegiate Court in Civil Matters of the First Circuit that resolved Amparo Directo 306/2019
Direct Amparo Judgment 783/2019	Amparo Judgment issued on June 22, 2020 by the Tenth Collegiate Court in Civil Matters of the First Circuit that resolved Amparo Directo 783/2019
Direct Amparo Judgment 540/2020	Amparo Judgment issued on September 28, 2021 by the Tenth Collegiate Court in Civil Matters of the First Circuit that resolved Amparo Directo 540/2020
Direct Amparo Judgment 74/2019	Amparo Judgment issued on January 30, 2020, by which the Fourteenth Collegiate Court in Administrative Matters of the First Circuit denied Amparo Directo 74/2019
Amparo Judgment 4/2017	Amparo Judgment issued on May 2, 2017 by the First Unitary Circuit Court of the Seventh Circuit denying Amparo Indirecto 4/2017.
Amparo Judgment 214/2016	Amparo Judgment issued on October 18, 2016 by the First Collegiate Court in Civil Matters of the Seventh Circuit that denied Amparo Directo 214/2016
Review Judgment 233/2017	Amparo Judgment issued on May 10, 2018 by the First Collegiate Circuit Court in Civil Matters in Veracruz that confirmed Amparo Ruling 4/2017.
Request for Provisional Measures	Brief of Request for Provisional Measures filed by the Claimants on December 14, 2021
Supplement to the Request for Provisional Measures	Supplemental Brief to the Request for Provisional Measures filed by the Claimants on December 18, 2021
TFJA	Federal Court of Administrative Justice
NAFTA	North American Free Trade Agreement

USMCA	The Agreement between the United States of America, the United Mexican States, and Canada
Zapata Internacional	Zapata Internacional, S.A. de C.V.

I. INTRODUCTION

1. To summarize, the Claimants allege to be American investors who, through Mexican subsidiaries, entered into three contracts (identified as Contract 803, Contract 804 and Contract 821) with PEP, a Productive Enterprise Subsidiary of Pemex. Contrary to what Claimants may allege, Contracts 803, 804 and 821 were simply legal instruments through which PEP required work related to drilling, repair and completion of oil wells, i.e., they were services contracts.

2. Claimants consider that Pemex -or PEP as the case may be- "repudiated" Contracts 803, 804 and 821 by not issuing sufficient work orders to Claimants as "contractors". Dissatisfied with this, Claimants filed several civil and administrative lawsuits against PEP in which they claimed millions of dollars. Claimants also allege that, due to the initiation of these proceedings, PEP terminated Contracts 803, 804 and rescinded Contract 821 as a "retaliation". Furthermore, the Claimants argue that PEP discriminated against them by providing more favorable treatment to another contractor that they considered to be in similar circumstances. Dissatisfied with the outcome of the civil and administrative litigation, the Claimants claim to be victims of a denial of justice by the Mexican judicial system.

3. As the Tribunal will note, the present arbitration is remarkable for the large number of jurisdictional deficiencies and flimsy argumetns on the merits. International investment treaties –such as the NAFTA and the USMCA–, customary international law, and various decisions and awards that emanated from arbitrations establish clear rules for a foreign investor to access the Investor-State dispute settlement mechanism. ICSID Arbitration ARB/21/25 is a clear example of a case that does not comply with these rules.

4. The Claimants seek to use the investment arbitration mechanism for the Tribunal to act as a domestic appellate court and analyze *de novo* contractual issues that have already been resolved by Mexican judges and courts, aiming to obtain financial compensation for their claims.

5. The Respondent submits this Counter-Memorial containing the Mexican State's first factual and legal response. As a starting point, the Counter-Memorial will respond to the facts in dispute in this arbitration. Given the serious allegations raised by the Claimants, the Respondent considers it necessary to discuss aspects related to Contracts 803, 804 and 821, despite the fact that this investment arbitration is not a contractual dispute. Similarly, Respondent will review issues

related to the civil and administrative proceedings arising out of Contracts 803, 804 and 821 in light of the serious allegations raised by Claimants against the Mexican judicial system, despite the fact that this Tribunal is not an appellate body, much less can it function as a "fourth judicial instance" to hear contractual claims already resolved by Mexican courts.

6. The Respondent will now explain its legal position on jurisdiction, attribution and merits.

A. Jurisdiction

7. The Claimants' NAFTA case faces at least eight jurisdictional deficiencies, and the USMCA case faces at least five jurisdictional deficiencies. Before describing them, Respondent warns the Tribunal of a grave strategy adopted by Claimants, either intentionally or by ignorance of the law. In essence, Claimants have improperly and unilaterally sought to consolidate claims under NAFTA Chapter 11 (through Annex 14-C of the USMCA) and under Article 14. However, the Parties to the USMCA did not authorize an investor-State tribunal –much less consent– to hear claims under Annex 14-C and Annex 14-D of the USMCA simultaneously. Accordingly, the Tribunal must conclude that it lacks jurisdiction to hear Case ARB/21/25 because the NAFTA and USMCA Parties did not consent to claimant investors to submit claims before a single investor-State tribunal under different international investment treaties.

8. If that is not enough, the Tribunal must consider the following eight NAFTA jurisdictional objections:

- The Tribunal lacks jurisdiction under NAFTA Annex 1120.1 because the Claimants brought their NAFTA violation claim before Mexican courts, through Direct amparo 74/2019 and Appeal Review 1685/2020, which extinguished their right to bring the same legal claims under NAFTA Chapter 11.
- The Claimants failed to comply with the precondition of submission of a claim to arbitration under NAFTA Article 1121 by not subtmitting a waiver for Drake-Finley, a situation that cannot be corrected in the course of Case ARB/21/25.
- The Tribunal lacks jurisdiction *rationae materiae* because Claimants failed to demonstrate an "investment" under NAFTA Article 1139, since, in particular, Contract 821 does not qualify as an investment under that treaty.
- The Tribunal lacks juridiction *rationae materiae* because the Dorama Bond (*i.e.*, a commercial bond) does not constitute an investment under Article 25 of the ICSID Convention, as it does not satisfy the conditions of the *Salini* test.
- The Tribunal lacks jurisdiction *rationae materiae* because Contract 821 was no longer in existence at the time of the date of entry into force of the USMCA and as a consequence cannot be considered an "legacy investment".

- The Tribunal lacks jurisdiction *ratione materiae* because Claimants have not demonstrated ownership or control in Drake-Mesa and Drake-Finley.
- The Tribunal lacks jurisdiction *ratione temporis* because Claimants' claims are time-barred under NAFTA, being based on events occurring prior to the "cut-off date" (*i.e.* prior to March 25, 2018).
- The Tribunal lacks jurisdiction *ratione materiae*, as the case concerns contractual claims.

9. The Case presented by Claimants under the USMCA does not fare any better, since it faces the following jurisdictional deficiencies:

- The Tribunal lacks jurisdiction *ratione materiae* because Claimants failed to demonstrate that Contracts 803 and 804 are investments pursuant to Article 14.1 of the USMCA.
- The Tribunal lacks jurisdiction *ratione materiae* because Claimants failed to demonstrate that they have a "covered investment". Contracts 803 and 804 were terminated prior to the USMCA's entry into force.
- The Tribunal lacks de jurisdiction *ratione voluntatis* because all the actions alleged by the Claimants took place before July 1, 2020, the date of entry into force of the USMCA, which is why they do not fall within the scope of the USMCA.
- In the absence of a "covered investment", the Tribunal lacks jurisdiction to resolve a qualified investment dispute under Annex 14-E of the USMCA.
- The Tribunal lacks jurisdiction *ratione temporis* because Claimant´s claims are time-barred under the USMCA, being based on events occurring before the "cut-off date".

B. Attribution

10. Notwithstanding all the jurisdictional deficiencies of Case ARB/21/25, if the Tribunal determines that it has the necessary jurisdiction to resolve Claimant's claims, the Tribunal must determine whether the acts performed by PEP are attributable to the Mexican State. The answer is no. As State Productive Enterprise, Pemex and its subsidiaries engage in commercial activities that do not fall within the definition of a "State organ" under public international law, or that can be considered attributable to the Mexican State under NAFTA and the USMCA, as Claimants wrongly assert. In clear terms, PEP's entering into contracts does not involve "regulatory, administrative or other governmental authority".

C. Merits

11. Like the jurisdictional aspects of the Claimants' case, the claims in Case ARB/21/25 are deeply flawed in law and lack merit.

12. *First*, Claimants have failed to establish a breach of the customary international law minimum standard of treatment under NAFTA Article 1105 and Article 14.6 of the USMCA.

13. In particular, it is surprising that Claimants allege a claim of discrimination under the Fair and Equitable Treatment standard. Moreover, the alleged violation of "legitimate expectations" cannot constitute the basis for a violation of Fair and Equitable Treatment under customary international law, under NAFTA or the USMCA. Neither Pemex and PEP, much less the Mexican State, made any assurances or representations to Claimants with respect to Contracts 803, 804 and 821. Moreover, a contractual dispute does not amount to a denial of Fair and Equitable Treatment. Adopting the opposite approach would bring any contract entered into by PEP under the protection of the Fair and Equitable Treatment standard, despite not being attributable to the Mexican State. This would create a dangerous precedent under NAFTA and the USMCA, a situation that the Tribunal must prevent. An umbrella clause that does not exist in the text of NAFTA and the USMCA cannot be created *ex profeso* in this arbitration, even though the Claimants initially attempted to do so, but apparently gave up this strategy themselves.[1]

14. *Second*, the denial of justice claims, on one hand, are time-barred, and on the other hand, Claimants did not even meet their burden of proving their claims. Similarly, the evidence demonstrates that Claimants had full access to the Mexican judicial system, and on several occasions made serious omissions, such as filing challenges out of time, failing to ratify dismissals, or consent to judicial decisions. Claimants' judicial "disappointments", and the complexity of litigation, do not amount to a denial of justice. The evidence provided by Respondent, particularly the witness statement of Mr. Rodrigo Loustaunau and the expert report of Mr. Jorge Asali, makes it clear that Claimants' claims are meritless.

15. *Third*, there was no violation of the National Treatment standard under NAFTA Article 1102 and USMCA Article 14.4 because these provisions do not apply to "procurement by a Party or a state enterprise" pursuant to Articles 1108(7) and 14.12(5) of NAFTA and USMCA, respectively. In any event, there is no violation of the National Treatment principle because the Claimants did not even comply with the requirements of this principle, *i.e.*, to demonstrate: *i)* that

[1] The Tribunal may recall that in the Request for Arbitration the Claimants attempted to import the "umbrella clause" of the Mexico-Denmark BIT through Article 1103 of NAFTA, a strategy that the Claimants themselves apparently considered improper by not asserting it in the Statement of Claim. *See* Request for Arbitration, ¶ 35.

the subjects or objects identified by the Claimants are "comparable"; *ii)* the existence of a discrimination based on nationality; and *iii)* the granting of a less favorable treatment to the Claimants.

16. On this basis, the case presented by the Claimants lacks merit, for which reason the claims should be dismissed, and the Claimants should be ordered to pay costs and expenses related to the arbitration.

II. COMMON FACTS TO THE NAFTA CASE AND THE USMCA CASE

A. Pemex as a State Productive Enterprise

17. Claimants have made a series of assertions regarding Pemex that only demonstrate their lack of knowledge of the company's legal and commercial regime.[2] For the Tribunal's clarity, Pemex is indeed an EPE and has a special legal nature and regime. The company is engaged in the exploration and extraction of oil and hydrocarbons, as well as their collection, sale and marketing.[3] Since its creation, Pemex has been the exclusive property of the Mexican State and is managed and administered by a Board of Directors and a Chief Executive Officer, and its objective, like any company, is to generate economic value and profitability.[4]

18. Contrary to the Claimants' assertion, Pemex does not have four subsidiaries and its Board of Directors is not composed of six governmental representatives or five union representatives.[5] In fact, Pemex's CEO is appointed by the Federal Executive Branch and its Board of Directors is comprised of five government officials and five independent directors. In addition, Pemex has three productive subsidiaries called Pemex Exploración y Producción ("PEP"), Pemex Logística and Pemex Transformación Industrial.

19. As an EPE, Pemex engages in commercial activities that do not fall within the definition of a "State organ" under public international law, or that can be considered attributable to the Mexican State under the NAFTA and the USMCA, as the Claimants wrongly assert.[6]

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2 Statement of Claim, ¶ 52.

3 Article 5 of Pemex Law of 2014, **R-0001**.

4 Article 5 of Pemex Law of 2014, **R-0001**.

5 *See* Statement of Claim, ¶ 54.

6 *See* Statement of Claim, ¶¶ 52, 64, 283, 287-303 and 306-312.

1. The Pemex regime prior to the Energy Reform

20. Pemex was indeed created in 1938 and was originally considered a parastatal entity. Pemex was a decentralized public agency with its own assets and legal personality, and was part of the federal public administration.

21. In 2008 the Mexican energy market began to open significantly to private initiative, which can be seen in the Pemex Law of 2008 that allowed Pemex to contract with greater flexibility various services to private companies.[7] However, Pemex was still considered a monopoly of the Mexican State and its responsibility was the central conduction and strategic direction of the oil industry, which means that it was the entity responsible for carrying out all the activities of the oil industry, as well as the central conduction and strategic direction of the oil industry.[8]

2. The Energy Reform and the changes to the Pemex regime

22. In 2013, a reform that modified the Mexican Constitution related to the energy sector was made, which is commonly referred to as the "Energy Reform", which in turn had several consequences:

- Allowing private investment in the energy sector.[9]
- The creation of autonomous constitutional bodies (National Hydrocarbons Commission and the Energy Regulatory Commission) in charge of energy regulation.[10]
- To empower the Secretariat of Energy to create, conduct and coordinate the national energy policy.
- The creation of a special regime for Pemex to participate in the energy market as a competitor.[11]

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[7] Article 60 of Pemex Law of 2008, **R-0002**. ("Petróleos Mexicanos and its subsidiaries may enter into contracts with individuals or legal entities for works and services required for the best performance of their activities […]").

[8] Article 3 of Pemex Law of 2008, **R-0002**.

[9] *See* Article 27 of the Mexican Constitution, **CL-0028**.

[10] Article 28 of the Mexican Constitution, **CL-0028**.

[11] Since the Energy Amendment/Reform, Pemex must participate and compete in the market in order to obtain contracts awarded by the Mexican State and may partner with private companies for such purpose. *See* Article 63 of the Pemex Law of 2014, **R-0001**.

23. The Energy Amendment also implied several modifications to secondary legislation and resulted, *inter alia*, in the issuance of the 2014 Pemex Law. Both the Energy Reform and the 2014 Pemex Law modified the legal nature of Pemex so that it is now considered a "State Productive Enterprise" (*Empresa Productiva del Estado*), with its own legal personality and assets, as well as technical, operational and management autonomy.[12] Accordingly, Pemex continues to be a *State-owned Enterprise* or a "*National Oil Company*", however, its way of acting in the Mexican and international markets is similar to a private company.

24. However, it should not be understood that it was only after the Energy Reform that Pemex began to act as a competitor in the energy sector, since long before Pemex had been carrying out activities as a subject of private law by maintaining contractual relationships with private companies to achieve its market goals.

25. As mentioned above, the 2014 Pemex Law provided Pemex with technical, operational and management autonomy. It was also provided with corporate governance so that it could compete effectively in the energy industry with the objective of making the company a key competitor in the energy market.[13] In addition to being governed by its own law and regulations, Pemex is governed by civil and commercial law, which allows it to compete with flexibility and autonomy in the energy market.

26. Also, the 2014 Pemex Law allowed Pemex to provide services to third parties at market prices.[14] As the Tribunal will observe, with the Energy Reform the legal nature of Pemex changed, it does not have regulatory powers, and it is just another participant in the Mexican and international energy market.

3. The contracting system of Pemex and its productive subsidiaries.

27. In order to generate economic value, profitability and achieve its goals, Pemex usually requires the services of a diverse range of suppliers. Although Pemex has materials, equipment

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12 Article 2 of Pemex Law of 2014, **R-0001**.

13 Article 3 of Pemex Law of 2014, **R-0001**.

14 Article 3 of Pemex Law of 2014, **R-0001**. (Likewise, Petróleos Mexicanos may carry out the following activities: … III. The development and execution of engineering projects, research, geological and geophysical activities, supervision, provision of services to third parties and all those related to exploration, extraction and other activities that are part of its object, at market prices…). [Emphasis added.]

and personnel, these are not sufficient for it to comply with its operating programs. As a result, Pemex often enters into services contracts with hundreds of private companies.

28. Prior to the Energy Reform, contracting by Pemex was made pursuant to the Pemex Law of 2008 and pursuant to the administrative provisions called DACs, which established minimum requirements and provisions that all contracts entered into by Pemex and its subsidiaries must contain.[15] Based on this, the contracts entered into by Pemex and its subsidiaries were considered administrative in nature and the relevant jurisdictional mean was the contentious-administrative one, unless Pemex and the service provider agreed on an arbitration clause in the contract.[16]

29. With the Energy Reform and the Pemex Law of 2014, greater clarity was sought, and it was established that any act issued within the contracting procedure would be of an administrative nature, but once such act is signed or executed (*e.g.*, a contract) its nature would be considered of a private nature and would be subject to commercial law.[17]

a. The contracting regime of Pemex under the Pemex Law of 2008.

30. As will be discussed below, Contracts 803, 804 and 821 were entered into under the legal regime prior to the Energy Reform, *i.e.*, under the Pemex Law of 2008. Based on that legal framework, it was usual for the contracts entered into by Pemex and its subsidiaries such as PEP to establish certain terms and conditions that allowed Pemex to unilaterally create, modify or terminate legal situations, without having to resort to jurisdictional or arbitral instances.[18]

31. Thus, the operations of Pemex –and in fact of several companies in the sector– depend on this type of clauses that allow it to unilaterally terminate, suspend or administratively rescind a

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15 *Ver* DACS publicadas el 6 de enero de 2010 en el DOF. **CL-0015**.

16 Article 72 of Pemex Law of 2008. **R-0002**.

17 Artículo 80 of Pemex Law of 2014. **R-0001**. ("All acts developed within the contracting procedure regulated in this Chapter, up to the time of the award, shall be of an administrative nature. Once the contract has been signed, it and all acts or aspects derived therefrom shall be of a private nature and shall be governed by the applicable commercial or common law.").

18 The 2008 Pemex Law itself established that the DACS to be issued must observe, "[l]as causas y procedimientos de suspensión, terminación anticipada y rescisión administrativa de los contratos". Article 53 (XV) of the 2008 Pemex Law. **R-0002**.

contract when certain circumstances arise, such as a fortuitous event or force majeure, the existence of causes that prevent the execution of the contract, among other circumstances.

32. As Mr. Asali explains, under the Pemex Law of 2008 the contracts of Pemex and/or its subsidiary entities were considered administrative in nature. Courts in Mexico have determined that the contractual regime to these contracts allows for the stipulation of clauses commonly known as "exit clauses" (*cláusulas de salida*).[19]

33. Mr. Asali also explains that, under this contractual regime, Pemex had the power to unilaterally terminate the administrative contracts it entered into since it must ensure the efficient use of public resources. Furthermore, Mr. Asali explains that the SCJN has considered these types of contractual provisions to be constitutional and legal.[20] The incorporation of these provisions was a common practice and well known by the participants in the sector.

b. The settlement procedure for contracts entered into by Pemex and its subsidiaries

34. In simple terms, the settlement is a procedure by which a contractor (*e.g., PEP*) and its service provider or contractor (*e.g.,* Drake-Finley or Bisell) record the fulfillment of the contractual obligations, as well as the agreements and disagreements in connection with the termination of the contract in question. In the case of contracts entered into by Pemex, the settlements record the adjustments, revisions, modifications and acknowledgments, balances in favor and against, and, if applicable, the agreements or conciliations agreed upon by the parties to finalize any controversy.[21]

35. The DACS empowered Pemex and PEP to unilaterally execute the settlements in the event that the contractors refused to execute them, which was expressly agreed in Contracts 803, 804 and 821, as well as the deadlines to formalize the settlements.[22]

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[19] Expert Report of Mr. Jorge Asali, ¶¶ 13, 22-24. Thesis "ADMINISTRATIVE CONTRACTS ARE DISTINGUISHED BY THEIR PUBLIC POLICY PURPOSE AND BY THE EXORBITANT CIVIL LAW REGIME TO WHICH THEY ARE SUBJECT.". **R-0018**.

[20] Expert Report of Mr. Jorge Asali, ¶¶ 23 and 24. Thesis contradiction 192/2016. "ACQUISITIONS, LEASING AND SERVICES OF THE PUBLIC SECTOR. DIFFERENCES BETWEEN ADMINISTRATIVE RESCISSION AND EARLY TERMINATION OF ADMINISTRATIVE CONTRACTS REGULATED BY THE RELATED LAW. **R-0019**.

[21] *See* Article 76 of the DACS, **CL-0015**.

[22] *See* Clause 17th of Contract 803. **C-0032**; Clause 18th of Contract 804. **C-0033**; and Clause 18th of Contract 821. **R-0003**.

c. The obligation of suppliers to offer performance guarantees to Pemex or its productive subsidiaries.

36. Throughout this arbitration, Claimants have made a series of allegations regarding the guarantees provided by Claimants in favor of PEP, particularly under Contract 821, which consisted of the Dorama Bond. Both the terms of the Contracts, as well as the applicable legislation, indicated the obligation of the contractor to guarantee the performance of its obligations.

37. In essence, the performance guarantees consisted of performance bonds equal to 10% of the total amount of the respective contract. The Claimants seem to suggest that it was the Claimants who provided US$ 52 in million in performance bonds.[23] However, the reality is that the Claimants granted in favor of PEP surety bond polices, which are similar to the contracting of insurance, *i.e.*, it involved the payment of a premium, for the surety company (*e.g.*, Dorama) to issue bonds which in turn the Claimants provided to PEP.[24]

38. Contrary to what the Claimants seem to suggest, for the granting of a bond, the person requesting its issuance (*i.e.*, the "debtor" (*fiado*)) must not pay the total amount of the obligation to be guaranteed, but only an amount as remuneration to the surety company (i.e., "surety" or "guarantor"), commonly referred to as "premium". On the other hand, the surety companies are obligated to pay the total guaranteed amount when an event of default occurs in favor of the beneficiary. According to the Contracts, PEP was the beneficiary.

39. In that sense, it is true that Claimants had to guarantee 10% of the Contracts through surety bonds, however, this does not imply that Claimants spent the nearly US$ 52 million referred to in their Statement of Claim .[25] In plain terms, obtaining "performance bonds" ("secured") for US$ 52 million is not the same as spending those amounts.[26]

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23 *See* Statement of Claim, ¶¶ 40, 66, 87.

24 A surety bond is a contract whereby a person agrees with a creditor to pay on behalf of a debtor if the debtor fails to do so. In Mexico, institutions engaged in the regular and onerous execution of surety contracts are commonly referred to as "afianzadoras", are considered commercial in nature and are subject to specific commercial regulations.

25 *See* Statement of Claim, ¶¶ 40, 66, 82.

26 *See* Statement of Claim, ¶ 87.

4. Jurisdictional and arbitration means to resolve contractual disputes between suppliers and Pemex

40. The 2008 Pemex Law expressly stated that the legal acts entered into by Pemex and its Subsidiaries would be governed by the relevant federal laws. This means that, regardless of the nature of the act entered into by Pemex, the federal courts would have jurisdiction to hear any dispute, except in those cases in which an arbitration agreement had been made.[27]

41. In the same sense, the 2010 DACS stated that the applicable jurisdiction should be established as one of the clauses that Pemex's contracts must contain.[28] Thus, Contracts 803 and 804 specifically established that the parties agreed to submit any dispute to the jurisdiction of the federal courts of the City of Poza Rica, Veracruz.[29]

42. On the other hand, and as will be explained below, in Contract 821 Finley, Drake-Finley and Drake Mesa expressly agreed with Pemex that any disagreement, discrepancy, difference or controversy arising from the interpretation or execution of Contract 821 would be resolved through arbitration, except for the case of administrative rescission and early termination, which would be resolved by the TFJA.[30]

5. The Contracts are not investment contracts but are simply service contracts tendered and awarded by PEP.

43. It is important to note that Contracts 803 and 821 were awarded to Claimants through international public bids, while Contract 804 was awarded to Bisell and MWS through a contracting procedure called "direct award". As will be seen below, Contract 803 was for the performance of production restoration work (*i.e.*, well workover), while Contracts 804 and 821 were for the performance of well drilling and completion activities.

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27 Article 72 of 2008 Pemex Law, **R-0002**.

28 Article 57 of the DACS. **CL-0015**.

29 An important issue to consider is that MWS and Bisell expressly agreed with PEP that they could not resort to any other jurisdiction that may correspond to them by reason of domicile. See Clause 33 of Contract 803. **C-0032**; Clause 45 of Contract 804. **C-0033.**

30 *See* Clause 47th of Contract 821, **R-0003**.

44. Under the Contracts, the Claimants had the obligation to supply the necessary equipment and personnel to provide services to PEP. In that sense, among the activities to be performed were repair works, well drilling, and well completion works, among other activities.[31]

45. It is important to point out that, although Contracts 803, 804 and 821 relied on the issuance of work orders by Pemex and implied the periodic performance of activities (*i.e.*, repair, drilling and completion of wells), as any administrative contract for the provision of services, they established an amount that PEP would pay to the service provider and did not generate rights in its favor, except for those expressly agreed by the parties in the Contracts. In that sense, the Contracts were merely services provisions contracts of an administrative nature.

46. The Contracts were not turnkey, construction contracts, or concessions, nor did their remuneration depend on the production, revenues or profits that PEP could obtain.[32] Therefore, it is important to emphasize that the Contracts were not —and are not— "covered government contracts" within the meaning of Annex 14-E of the USMCA, nor investment contracts as Claimants wrongly argue.

B. The Chicontepec Project

47. The Claimants submit that they made investments in Mexico to develop the Chicontepec project, an oil field that, according to the Claimants, contains complex geology and represents technological and financial challenges for oil extraction.[33]

48. Chicontepec was discovered in the 1920s, as a result of the first exploratory geophysical and well drilling works in the area of Poza Rica, in the State of Veracruz. [34] Based on certain

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[31] *See* Exhibit B del Contract 803. **R-0020**. Exhibit DT-2 of Contract 804. **R-0021**. Exhibit DT-2 of Contract 821. **R-0022**.

[32] In fact, the 2008 Pemex Law itself expressly established that "[…]The remuneration established in such contracts shall always be in cash, and in no case may a percentage of production or sales value be agreed upon as payment for services rendered or works performed". Article 60 of the 2008 Pemex Law. **R-0002**.

[33] *See* Statement of Claim, ¶ 2. Witness Statement of Mr. Jim D. Finley, ¶ 22.

[34] *See* CNH, Gulf Tertiary Oil Project First Review and Recommendations (2010), p. 3. **R-0023**.

studies, the Chicontepec field covers the states of Hidalgo, Puebla, Tamaulipas and Veracruz, and has an area of 11,300 km^2.[35]

49. In 1926, the existence of oil was discovered in the Chicontepec Basin, while drilling work was being carried out by private companies prior to the creation of Pemex. However, due to the high costs, the extraction and exploitation of this area was not feasible.[36]

50. As the Claimants acknowledge, exploiting Chicontepec was always postponed, not only because of the low productivity of its wells and the complex internal structure of its reservoirs, but also because of the technical and economic challenges it represented to extract the hydrocarbons.[37]

51. Later, in 2002, with the objective of achieving operational and technical advantages to achieve an optimal management of economic and material resources in terms of oil exploitation, Pemex established the Tertiary Oil of the Gulf (*Proyecto Aceite Terciario del Golfo*) or "ATG" project. Thus, since the beginning of 2006, the official name given to the hydrocarbon exploration and exploitation works in Chicontepec is "ATG Project".[38] The geographical area in which the Chicontepec Project is located initially included 29 producing fields and hundreds of reservoirs that were administratively subdivided into eight sectors:[39]

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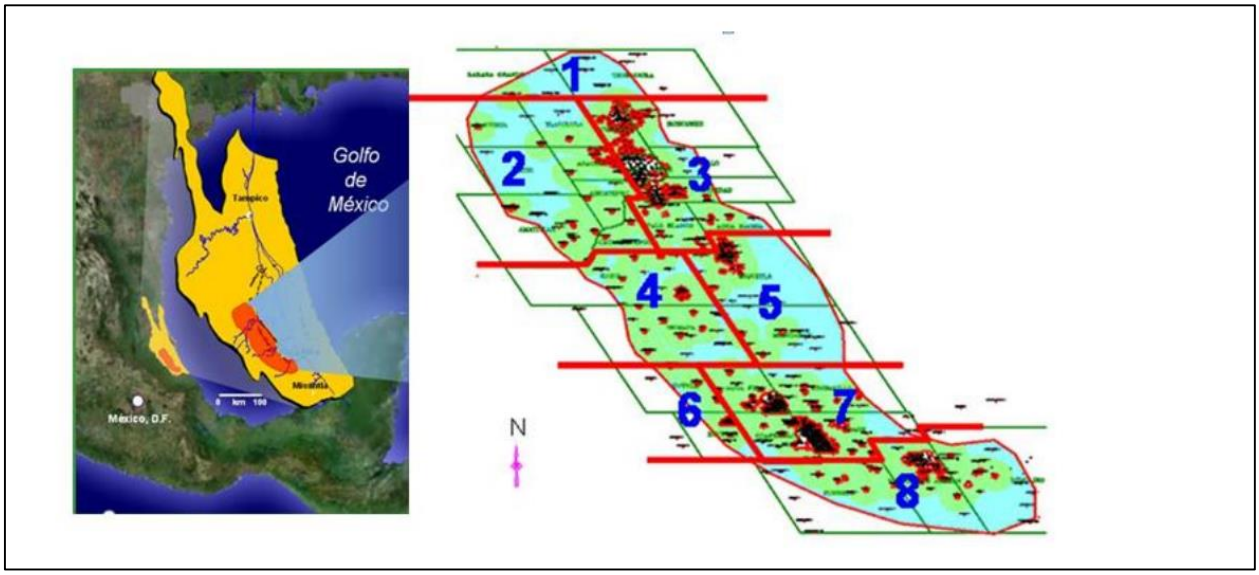
35 Magazine PetroQuiMex, "Perspectivas - ¿Hay Perspectivas en Chicontepec?", Dr. Abelardo Cantú Chapa, p.24. **R-0024**.

36 *See* CNH, Aceite Terciario del Golfo Project First Review and Recommendations (2010), p. 4. **R-0023**.

37 Statement of Claim, ¶ 72.

38 *See* CNH, Aceite Terciario del Golfo Project First Review and Recommendations (2010), p. 4. **R-0023**.

39 *See* CNH, Aceite Terciario del Golfo Project First Review and Recommendations, (2010), p. 6. **R-0023**.



R-0023

52. The oil activities carried out in that region were partial for several reasons, including the complex internal structure within the oilfields; the low productivity of the wells; the lack of technology for the extraction of crude oil; and the existence of other oilfields with greater possibilities of exploitation and discovery of new fields with greater reserves.[40]

53. In 2010 the CNH recognized that the Chicontepec Project was at a low stage of maturity in terms of soil knowledge and in the selection of technologies for oil extraction.[41] Despite this, new contracting schemes were developed under which three bidding rounds were held to exploit various oil fields, including Chicontepec.

54. However, the Claimants' arguments are aimed at pointing out that Mexico "turned its back" on Chicontepec; that Pemex refused to request and pay the Claimants for the work it had promised under the Contracts, and even argue that resources were transferred to other projects, which caused the Contracts and the Claimants' alleged investments to be damaged.[42] The foregoing, despite the fact that the Claimants themselves acknowledged that the exploitation of Chicontepec had always

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40 *See* CNH, Aceite Terciario del Golfo Project First Review and Recommendations, (2010), pp. 6-35. **R-0023**.

41 *See* CNH, Aceite Terciario del Golfo Project First Review and Recommendations, (2010), p. 51. **R-0023**.

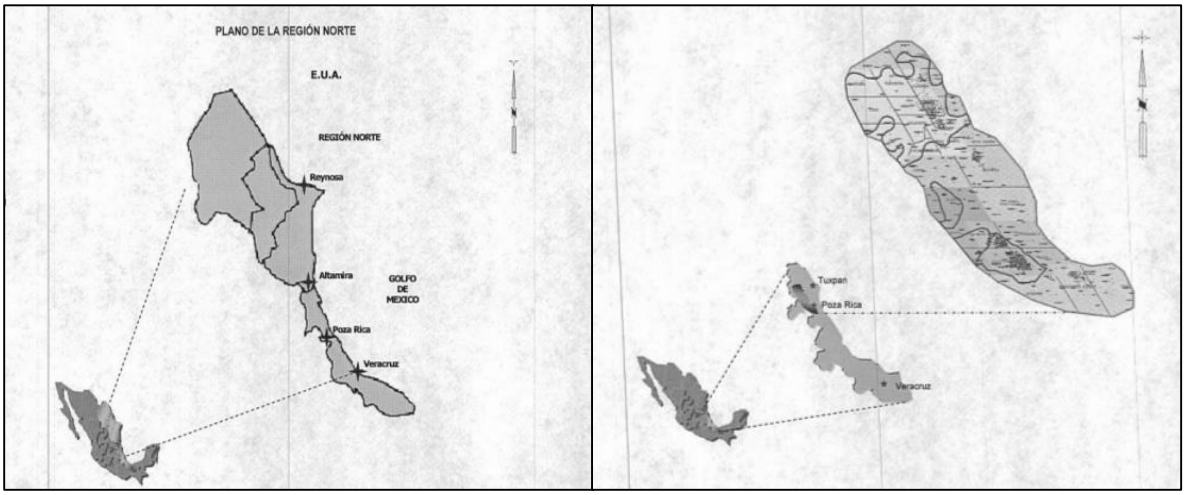
42 *See* Statement of Claim ¶¶ 9, 16.

been postponed due to the low productivity of its wells, its complex internal structure and the technical and economic challenges for the extraction of hydrocarbons.[43]

55. Under that scenario, Respondent considers it necessary to explain *i)* the type of works that Claimants would carry out through the Contracts in Chicontepec, and *ii)* the reasons why Pemex interrupted the Chicontepec developments, which cannot be translated into a breach of the Contracts entered into with Claimants.

1. Services under the Contracts for the Chicontepec Project

56. Again, the purpose of the Contracts was to provide drilling services, hydrocarbon extraction and restoration works of wells in Chicontepec.



R-0025

57. Contract 803 was awarded to MWS and Bisell through an international public bidding process to carry out work in the northern region and in the " Tertiary Oil of the Northern Region Integral Asset" ("*Activo Integral Aceite Terciario del Golfo de la Región Norte"*).[44]

58. The purpose of Contract 803 was that MWS and Bisell would execute the works consisting of "Production Restoration Works in the Northern Region Assets (Package III)". Said works contemplated that MWS and Bisell would perform repair and maintenance works of wells, with

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43 *See* Statement of Claim, ¶ 72. WS Mr. Jim D. Finley, ¶ 22.

44 Annex A (List of Maps and Plans) of Contract 803. **R-0025**.

the purpose of maintaining and/or increasing the production of hydrocarbons in the ATG fields and contribute to the compliance of annual operative programs.[45]

59. Therefore, within the obligations and responsibilities of MWS and Bisell, as contractors, were included, *inter alia*: (i) designing, directing and executing the oil well production restitution work in accordance with PEP's instructions and the obligations of the contract; (ii) providing the equipment to carry out the restitution work; (iii) transporting the equipment and its components; (iv) installing and dismantling the equipment and its components; (v) providing the materials and spare parts for its necessary equipment to perform the work; and (vi) supplying the necessary materials, tools and equipment to carry out the work under the contract.

60. Contract 804 was awarded to MWS and Bisell directly by Pemex under the contracting procedure for the "Integral Works for Interventions to Land Wells in the Northern Region (Package 1)", which included drilling, completion and major well interventions.[46] Therefore, as in the case of Contract 803, MWS and Bisell's obligations included the drilling and completion of wells, and dismantling, mobilizing and installing drilling equipment.

61. Finally, Contract 821 was awarded to Drake-Mesa and Finley through an international public bidding by PEP, for the execution of "Integral drilling and completion works of Pemex Exploration and Production land wells in the North and South Regions (Package 5)".[47] Among the obligations and services to be performed by Drake-Mesa and Finley it was established, *inter alia*, the following: i) drill the wells under the contract; ii) provide drilling equipment; iii) mobilize and demobilize equipment, materials and spare parts; iv) supply materials and works, and v) execute the instructions required by PEP.

62. As the Tribunal may observe, Contracts 803, 804 and 821 covered the the drilling and execution of works on wells located in areas within the Chicontepec Project.[48]

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45 Annex B (General and Particular Specifications) of Contract 803. **R-0020**.

46 *See* Annex DT-2 (General and Particular Specifications) of Contract 804. **R-0021**.

47 See Annex DT-2 (General and Particular Specifications) of Contract 821. **R-0022**.

48 *See* Statement of Claim, ¶¶ 92, 128 and 161. WS of Mr. Jim D. Finley, ¶ 31.

63. The Claimants have acknowledged that Chicontepec was an area with complex geology and that it "presents technological and financial challenges in extracting oil."[49] This means that the Claimants entered into the Contracts knowing that the activities at Chicontepec might not be successful in the understanding that there were technical challenges.[50] Moreover, Claimants themselves acknowledged that developing Chicontepec in a profitable manner "has been difficult and expensive compared to other areas in Mexico".[51]

64. According to the Claimants, Mexico decided to turn its back on Chicontepec and, with that, Pemex refused to request and pay Claimants for the work it had promised.[52] Regardless of the fact that PEP complied with the Contracts, the fact that Mexico allegedly changed its strategy to "move away from Chicontepec" in no way constituted a contractual or international breach by PEP under the Contracts, the Mexican legal framework and much less under the NAFTA and the USMCA. As will be explained in detail below, it was never agreed as an obligation of the parties to exhaust the total amount of the Contracts.

65. The reality is that Respondent considers unfortunate that the Claimants attempt to justify that the lack of expected production at Chicontepec constitutes a breach of their alleged investments.[53] Again, the Claimants always recognized the complexity and challenges of Chicontepec, and the consequences that the fall in oil prices would have on various projects, which in turn generated high costs for the extraction of hydrocarbons.[54]

2. The Chicontepec Project faced technical complexities

66. As Claimants have acknowledged, the geological complexity of the Chicontepec field has always made its development expensive. Naturally, Chicontepec's complexity was reflected in the decrease in oil barrel production.[55]

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49 *See* Statement of Claim, ¶¶ 2.

50 *See* Statement of Claim, ¶ 51.

51 *See* Statement of Claim, ¶ 72.

52 Statement of Claim, ¶ 13. *See* WS Mr. Jim D. Finley, ¶ 66.

53 *See* WS of Mr. Jim D. Finley, ¶ 63.

54 *See* Statement of Claim, ¶¶ 239, 244, 245, 246, 250, 251 and 252. *See* PEP's July 24, 2015 Official letter. **R-0026**.

55 CNH, "Informe de Labores 2014-2015", p. 42. **R-0027**. El Universal, "Evalúan que Pemex salga de Chicontepec", (2014). **R-0029**.

67. Based on Pemex reports, given the drop in production at Chicontepec, its projections and extraction goals were reduced by half between December 2013 and January 2014. In fact, PEP adjusted Chicontepec's production targets from 105 thousand barrels in December 2013, to 52 thousand barrels per day in January 2014, and to 48 thousand barrels per day in February 2014.[56]

68. Therefore, the decrease in the production of oil barrels in Chicontepec, generated by the high complexity to carry out extraction activities and the collapse of oil prices in 2014, naturally affected project activities, and PEP was forced to stop operations in Chicontepec as of 2015.

C. The 2014 Energy Crisis

69. In mid-2014, a crisis in international oil prices began, which generated extremely negative effects for energy companies, including Pemex. Oil prices of the "Mexican blend" began to collapse from the second half of 2014, i.e., they went from almost US$ 100 average per barrel in June 2014, to US$ 41 average per barrel in January 2015, continuing with the fall to US$ 23 average per barrel at the beginning of 2016:[57]

Gráfica 1
Precio Mensual del Petróleo Crudo Mezcla Mexicana

R-0031

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56 La Jornada, "Pemex excluiría a Chicontepec de sus proyectos de explotación" (2014). **R-0030**.

57 Information obtained from Banco de México, Graphic of "Precio Mensual del Petróleo Crudo Mezcla Mexicana". **R-0031**.

In general, the "Mexican blend" has an export price and is composed of three types of crude oil: Olmeca (extra light), Istmo (light crude) and Maya (heavy crude).

70. To mitigate these effects, in 2015 the Board of Directors of Pemex issued a minute (*acuerdo*) through which several measures were adopted, including:

- Adjustments to Pemex's 2015 budget of $62 billion pesos (above US $3 billion) which implied, *inter alia*, expenditure reduction on industrial transformation investments and hydrocarbon extractive activities.[58]
- Negotiate and agree on modifications to the terms, amounts, rates and in general any stipulation established in contracts entered into by Pemex and/or its subsidiaries that would reduce costs and promote efficiencies.
- Formalize early termination of contracts, and
- Ensure that all contract terminations were achieved under the best possible conditions in accordance with Pemex's budget.

71. Likewise, the drastic reduction in oil prices forced Pemex to i) prepare an adjustment plan that implied a cut of $100 billion pesos (more than US$ 5 billion); ii) adjust its investment portfolio; iii) stop the production of wells whose extraction cost was above US$ 25 per barrel; iv) cut for 2016 the investment in deep waters by $13 billion pesos (approximately US$ 258 million), among other measures.[59]

72. Thus, the period 2014-2016 was characterized by a significant drop in oil prices and most of the companies with operations in the exploration and production sector cut their expenses and investments, a situation that the Claimants themselves recognize.[60] Therefore, it is clear that the drop of the oil prices had a negative effect on investments since the end of 2014, and Pemex's investment and operating expenditures decreased. This chart shows that the total production of crude oil in Mexico has had a downward trend since 2004, accentuating as of 2014, going from producing 3.38 million barrels per day in 2004 to 1.95 million barrels per day in 2017.[61]

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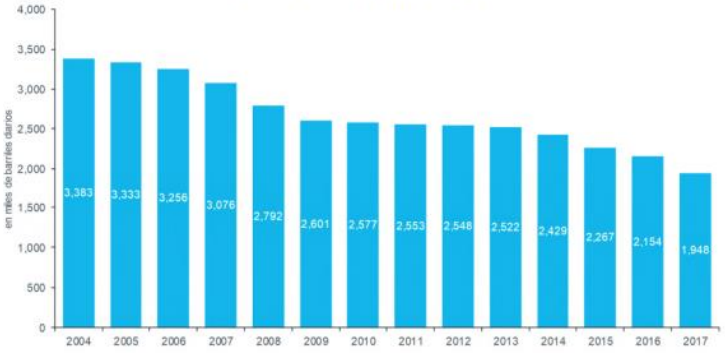
58 *See* Resolution of the Board of Directors dated February 13, 2015. **R-0032**.

59 Plan de Negocios Pemex 2017-2021, pp. 14-15. **R-0033**.

60 Claimants even provided as an example that companies such as Bronco Drilling, Calmena and Iberoamericana de Hidrocarburos closed their operations. Statement of Claim, ¶¶ 246-249.

61 El País, "La producción petrolera de México baja de dos millones de barriles por primera vez en casi 40 años", August 2017. **R-0034.**

Gráfica 5
Producción Total de Petróleo Crudo



Fuente: Sistema de Información Energética, Secretaría de Energía, Dirección General de Planeación e Información Energéticas http://sie.energia.gob.mx/bdiController.do?action=cuadro&cvecua=PMXB1C04

R-0034

73. Under such considerations, it was not reasonable to think that the Contracts would continue *ad perpetuam* or that they would be unalterable. On the contrary, logic and evidence, reflected in official data and applicable to the Mexican market, make it clear that since the end of 2014 it was very unlikely that Pemex would be able to maintain the pace of investment and production of hydrocarbons. The energy industry is exposed to various risks, including the drop in oil barrel prices, which is why energy companies (e.g., Pemex and its Subsidiaries) usually establish in the contracts it enters into, provisions that allow them to adjust their activities, such as the so-called "exit clauses" (i.e., early termination, suspension of activities and administrative rescision).

74. On the contrary, market conditions generated a decrease and cut of the budget allocated to Pemex derived from the 2014 Energy Crisis, which Claimants apparently understand.[62]

D. The Mexican judicial system and the contentious administrative proceeding

75. Although the Respondent invites the Tribunal to review in depth the expert report of Mr. Jorge Asali, which explains in detail the theoretical framework, instances and characteristics of federal civil and administrative proceedings, as well as the organic composition of the PJF and the TFJA, the Respondent will make a brief description of aspects related to the Mexican judicial system.

62 Statement of Claim, ¶ 238.

1. Federal civil proceedings before the Federal Judiciary

76. In general, the PJF is the body responsible for the administration of justice at the federal level. It is composed of the District Judges, the Circuit Courts (Collegiate and Unitary/Appeal Courts) and the SCJN.

77. The civil district judges –or courts of first instance– hear civil and commercial disputes arising from the enforcement and application of federal laws. The resolutions issued by the district judges may be challenged by means of an appeal, which are heard by the Unitary Circuit Courts/Collegiate Courts of Appeal.

2. The amparo proceeding in the Mexican legal system

78. Under the Mexican legal system, the amparo proceeding is a constitutional process that may be initiated by any individual or legal entity, referred to as the "quejoso", against acts of an authority that, in his opinion, violate the human and fundamental rights provided in the Mexican Constitution or the human rights provided in the international treaties to which Mexico is a Party.

79. As explained by Mr. Asali, the "amparo claim is a proceeding in which the constitutionality of any act of authority may be challenged".[63] There is the direct amparo (against final judgments) and the indirect amparo (against acts of authority other than final judgments).[64] Both types of amparo proceedings allow its final judgments to be challenged through an appeal for review, which in turn is resolved by the Collegiate Circuit Courts.[65]

80. For the Tribunal's ease, below is a chart of the integration of the Mexican judicial system.

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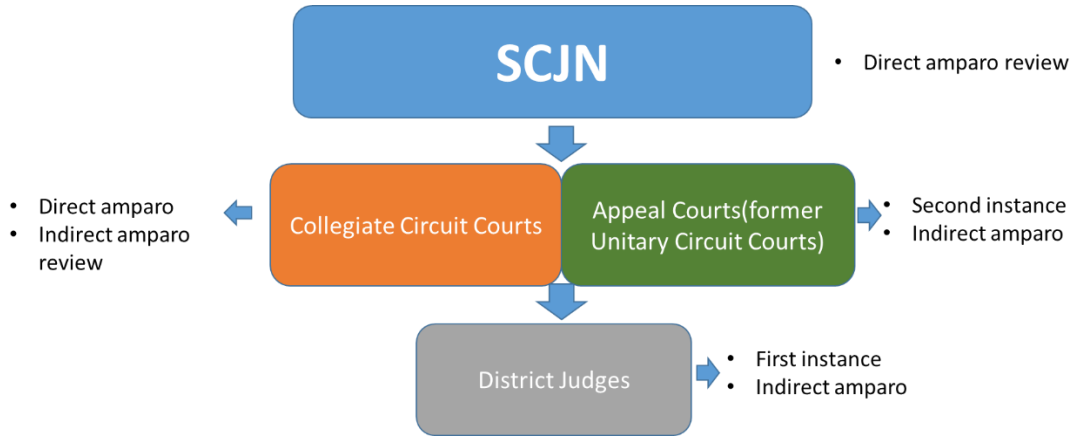
[63] As Mr. Asali explains, District Courts and Unitary Circuit Courts/College Courts of Appeal hear indirect amparo suits against decisions issued by other District Courts and Unitary Circuit Courts/College Courts of Appeal, while the Collegiate Circuit Courts will hear direct amparo suits. Expert Report of Mr. Jorge Asali, ¶ 77.

[64] Expert Report of Mr. Jorge Asali, ¶ 77.

[65] In case of the indirect amparo, the appeal for review will be heard by the Collegiate Circuit Courts. The appeal for review in a direct amparo review is considered an exceptional mean of challenge, since it is only applicable when, in the opinion of the SCJN –the highest Mexican court—– the dispute involves an exceptional interest in constitutional or human rights matters.



R-0037

81. In an amparo proceeding, the district judge may grant the suspension of the challenged act, similar to an injunction in countries with a common law legal system. There are two types of suspensions: provisional and definitive. The provisional suspension is granted or denied at the time of the admission of the amparo lawsuit (generally it is granted *ex parte*), the standard for its granting is less rigorous and its effects generally last until the granting of the definitive suspension is resolved. The definitive suspension is granted or denied in a subsequent act, called an incidental hearing, in which all parties to the amparo proceeding generally participate. The standard for its concession is more rigorous than the one applicable to the provisional suspension and its effects last until a final Judgment is issued in the amparo proceeding.

3. Administrative proceedings before the TFJA

82. The competent court to hear federal administrative contentious proceedings –also called annulment proceedings– against final resolutions, administrative acts and procedures provided for in the Organic Law of the Federal Court of Administrative Justice is the TFJA. As Mr. Asali points out, among the cases of competence provided by such law are the resolutions, acts and procedures related to the interpretation and compliance of public contracts, public works, acquisitions, leases and services entered into by the agencies and entities of the centralized and parastatal Federal Public Administration as Pemex was before the Energy Reform.[66]

66 Expert Report of Mr. Jorge Asali, ¶¶ 83.

83. The lawsuit that initiates the annulment proceeding must be filed before the TFJA and will be resolved by one of its regional chambers by reason of territory.[67] The annulment proceeding allows for the filing of appeals, which will be heard by the Chamber or Section of the TFJA or by a Collegiate Circuit Court.[68]

III. SPECIFIC FACTS OF THE NAFTA CASE

A. Contract 821

84. The Claimants have made serious allegations regarding Contract 821 concerning an alleged "repudiation" of this contract by Pemex, and an alleged denial of justice by the Mexican courts arising out of litigation related to Contract 821, which in their view gave rise to violations of NAFTA.[69] As will be explained in this Counter-Memorial, the Claimants' real pretension is that this Tribunal becomes a fourth judicial instance to analyze claims of a contractual nature, which is clearly not appropriate.

85. On February 28, 2014, Drake-Finley, Finley and Drake-Mesa entered into Contract 821 with PEP. As seen above, its object was the execution of integral drilling and completion works of land wells, i.e., it was a contract for the provision of services.[70] It is important to make this clarification because Contract 821 is not an "investment contract", as the Claimants apparently allege.[71] Another aspect that should be clarified is that Drake-Finley was the entity that entered into Contract 821 as contractor, and Drake-Mesa and Finley did so but as joint obligors of Drake-Finley.[72]

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67 Mr. Asali explains that the Plenary or the sections of the TFJA have the power to bring a matter to its attention when "(i) are considered of interest and transcendence due to the matter they correspond to, the merits of challenge or quantity, or (ii) if, in order to solve them, it is necessary to establish a new interpretation criteria". Expert Report of Mr. Jorge Asali, ¶ 87.

68 *See* Expert Report of Mr. Jorge Asali, ¶¶ 88-89.

69 *See* Statement of Claim, ¶ 161.

70 *See* Clauses 2 (Subject Matter of the Contract) and 4 (Period of Performance of the Contract and Time for Execution of the Work Orders) Contract 821, pp. 12-14, **R-0003**. Request for Arbitration, ¶ 21. Clause 2 of Contract 821, **R-0003**. Statement of Claim, ¶ 170.

71 *See* Statement of Claim, ¶ 63.

72 *See* Statement of Claim, ¶ 169. For the sake of efficiency, Respondent will refer to Drake-Finley, Finley and Drake-Mesa interchangeably as "Drake-Finley".

86. The Claimants have made a number of assertions regarding alleged meetings in April 2013 between Mr. Luis Oseguera Kernion and Mr. Emilio Lozoya and Mr. Froylan Garcia, in which, in their view, they encouraged Finley and Prize to invest in Mexico.[73] The reality is that the basis of Contract 821 was an international public bidding procedure initiated in August 2013 by PEP, in which Drake-Finley was the winner, and on February 12, 2014 it was awarded with Contract 821.[74]

87. The term established in Contract 821 was approximately three years and nine months, and was entered into in accordance with the Pemex Law of 2008 and the DACs.[75] This means that Contract 821 was of an administrative nature and had clauses under which Pemex could unilaterally create, modify or extinguish legal situations without having to resort to jurisdictional bodies, such as to rescind or early terminate Contract 821.

88. Indeed, the minimum amount established in Contract 821 was approximately US$ 168.9 million, and the maximum amount was US$ 418.3 million.[76] However, PEP was not required to exercise the maximum amount of Contract 821 as Claimants apparently infer.[77] Contract 821 also established that, when the needs of the project or the contract so required, PEP and Drake-Finley could agree on modifications.[78]

89. Clause 10 of Contract 821 established Drake-Finley's obligation to grant a guarantee in favor of PEP equivalent to 10% of the value of the maximum amount of the contract as a performance bond.[79] Based on this, on February 26, 2014 Fianzas Dorama, S.A. ("Dorama") issued in favor of Drake-Finley a bond guaranteeing an amount in excess of US$ 41 million ("Dorama

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73 Statement of Claim, ¶ 162.

74 Statement of Claim, ¶ 168. Bid' Invitation August 29, 2013, **C-0043**. Statement 1.6 of Contract 821, p. 7, **R-0003**.

75 See Clause 4.1 (Contract Performance Period) of Contract 821. **R-0003**. Contract 821 established some indispensable terms and conditions that all contracts entered into by Pemex and its subsidiaries must include, in accordance with Pemex's regulations. *See* Article 70 of the DACS. **CL-0015**. Statement of Claim, ¶ 178.

76 *See* Clause 5 (Minimum and Maximum Contract Amount) of Contract 821, p. 15. **R-0003**.

77 *See* Statement of Claim, ¶ 171.

78 *See* Clause 13 (Contract Modifications) of Contract 821, p. 37. **R-0003**.

79 *See* clause 10 (Guarantees) of Contract 821, p. 31. **R-0003**. Request for Arbitration, ¶ 21.

Bond"), pursuant to which the debtor (*fiado*) is Drake-Finley, Finley and Drake-Mesa, the beneficiary is PEP and the surety or guarantor is Dorama.[80]

90. Clause 15 of Contract 821 established the grounds under which it could be rescinded without having to obtain a judicial or arbitral declaration. This provision also established a procedure according to which, in the event that the Contractors incurred in any ground for rescission, they would have a period to try to cure the breach and could even provide arguments and evidence prior to the formal rescission of Contract 821.[81] The relevance of the rescission clause is such that Article 70 of the DACs establishes that such provisions, as well as the causes and consequences of rescission, must be established in the contracts.[82]

91. The Claimants have made a number of allegations regarding the grounds for rescission of Contract 821. Regardless of the fact that this arbitration cannot have as its subject matter a contractual dispute, the Tribunal must consider that PEP terminated Contract 821 on the following grounds.

> PEP may, at any time, administratively terminate the Contract, without the need of a judicial or arbitration declaration, through the procedure established in this Clause, in the event that the CONTRACTOR is located in any of the following situations:
>
> [...]
>
> b) If the CONTRACTOR does not execute the Works in accordance with the provisions of the Contract or without justified reason, it does not comply with the written orders given by the Construction Resident;
>
> [...]
>
> r) In the event that the CONTRACTOR accumulates 15 (fifteen) Unfulfilled Work Orders during the Contract Execution Period; and
>
> s) In the event that the CONTRACTOR fails to comply with its obligations under the terms established in the Contract.

92. In Claimants' and their legal experts view, the recsission of Contract 821 was unlawful because the only ground related to work orders that could be applicable was clause 15 r).[83] Notwithstanding the fact that these same arguments were raised before the Mexican courts and the

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80 Dorama Bond Policy dated February 26, 2014. **R-0005**.

81 *See* Clause 15 (Rescission of Contract) of Contract 821, pp. 49-51. **R-0003**.

82 *See* Statement of Claim, ¶ 178.

83 Clause 47.2 of Contract 821, pp. 58-60. **R-0003**. Judgment of October 4, 2018 of the Annulment Proceeding 2017, p. 234. **RZ-039**.

Tribunal has no jurisdiction to hear contractual issues, the reality is that Drake-Finley incurred in further breaches that resulted in the recission of Contract 821.

93. Clause 17 of Contract 821 established that PEP could temporarily suspend, in whole or in part, the contracted works "when the needs of the project or of the Contract so require", but this does not implied the termination of the contract.[84] In other words, if Contract 821 was suspended, its consequence was the modification of periods and operational processes, as well as the rescheduling of the termination date.[85] This situation is also reflected in Clause 4 of Contract 821, in which it was stated that PEP could suspend, totally or partially, the periods of execution of the contract and the deadlines for the execution of work orders, *inter alia*, when PEP so instructed.[86]

94. Another clause that becomes relevant, and that Claimants have tried to avoid mentioning, is Clause 48 of Contract 821 because they breached it. Based on it, Drake-Finley was obliged to allocate at least 2% of the 821 Contract to implement programs, works and actions in favor of the environment or communities near the project site.[87] The reason for this is that Pemex gives priority to the social and sustainable development of the communities in which it carries out its activities.[88]

95. Unlike Contracts 803 and 804, Contract 821 established an arbitration clause to settle any "disagreement, discrepancy, difference or controversy arising out from the interpretation or performance".[89] Based on this clause, the arbitration would be administered by the International Chamber of Commerce ("ICC"), the seat of arbitration would be Mexico City and the applicable law would be Mexican law, including the Pemex Law 2008. Notwithstanding this, the clause established an exception in the following sense:

> The procedures for administrative termination and early termination of the contract established bu PEP are of an administrative nature, so they will not be subject to arbitration.

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84 Clause 47.2 of Contract 821, pp. 58-60. **R-0003**. Judgment of October 4, 2018 of the Annulment proceeding 2017, p. 234. **RZ-039**.

85 Judgment of October 4, 2018 of the Annulment proceeding 2017, p. 234. **RZ-039**.

86 Clause 4 of Contract 821, pp. 14-15. **R-0003**.

87 Clause 48 of Contract 821, p. 87. **R-0003**. Official letter of the initiation of the administrative rescission proceeding dated July 31, 2017, p. 7. **C-0104**.

88 Official letter of the initiation of the administrative rescission proceeding dated July 31, 2017, p. 26. **C-0104**.

89 Clause 47.2 of Contract 821, p. 86. **R-0003**.

[...]

> In the event that PEP administratively terminates the Contract or terminates the Contract early, as well as in the event that 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 the right to submit to any other federal and/or non-jurisdictional instance.[90]

96. Based on the foregoing, PEP and Drake Finley agreed that any dispute arising under Contract 821, except those related to PEP's determinations –such as administrative rescission or early termination– would be subject to commercial arbitration administered by the ICC. What is questionable is that, despite this, Drake Finley chose to initiate the Civil Proceeding 200/2016 against PEP, instead of initiating arbitration under Contract 821, a decision that significantly hindered the judicial proceedings.

97. Finally, through clause 18 of Contract 821, the parties agreed to execute a settlement (*finiquito*) minute when all the work was received for the purpose of adjusting, reviewing and recognizing balances in favor of or against the parties.[91] The settlement was to be executed within 120 days of receipt of the totality of the work agreed in Contract 821 or the date when the contract was rescinded.[92] In addition, the parties also agreed that PEP could perform the settlement unilaterally:

> In the event that the CONTRACTOR does not appear at the Settlement, PEP will proceed to carry it out unilaterally and, in the event that the Settlement shows that there is a balance in favor of the CONTRACTOR and he refuses to collect it, PEP may deposit the payment before the corresponding jurisdictional authority.[93]

98. In 2017 Contract 821 was rescinded and since 2018 PEP has attempted to enforce the Dorama Bond pursuant to Contract 821 and based on the defaults incurred by Drake-Finley. Unfortunately, the Claimants have tried to avoid explaining these facts correctly.

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90 Clause 47 of Contract 821, pp. 86-87. **R-0003**.

91 Contract 821 establishes grounds for administrative rescission (clause 15) and the possibility for PEP to terminate the contract early (clause 16). For the analysis of Contract 821 only the administrative recsission is relevant, although in both cases it is required to formalize a settlement. **R-0003**.

92 Clause 15 of Contract 821, p. 48. **R-0003** ("In case the administrative termination of the Contract is determined, the corresponding Settlement shall be made within 120 (one hundred and twenty) Days following the date of the communication of the determination [...]").

93 Clause 18 of Contract 821, pp. 60-61. **R-0003**.

B. Work performed under Contract 821

99. The works under Contract 821 were performed through "work orders", which are defined by the contract itself as follows:

> "Work Order" means the document by means of which the Works Residence, following an internal work request from the operating area, in accordance with the technical needs of the well in question and the conditions prevailing at the time the work is required, issues to the contractor an instruction to proceed with the execution of the works in a given well, specifying its scope and execution term.[94]

100. With this in mind, work orders are technical documents pursuant to which PEP instructed Drake-Finley the services to be performed. In total, PEP issued 28 drilling work orders under Contract 821, of which 26 were executed, one was cancelled and one was breached by Drake-Finley.[95]

101. Indeed, for certain periods of time PEP requested the suspension of work due to lack of budgetary resources to continue drilling and completing wells.[96] The Tribunal must consider that these suspensions were not intended to affect Claimants, much less to terminate Contract 821. The reality is that PEP requested the suspension of work on Contract 821 and other contracts entered into with Claimants' competitors, such as Weatherford, Oilpatch, among others.[97]

102. From the text of PEP's own letters it is clear that the suspension of work was requested "to the service companies to conclude the current drilling operations (Coapechaca 560, 111 and 4178 wells) pending their completion".[98] In other words, drilling work was suspended for periods of time, but well completion work was to be completed. Likewise, clause 17 of Contract 821 made clear that the time that elapsed between each work order would not be considered as a suspension of the work or Contract 821.[99]

103. The procedures for the notification of the work orders under Contract 821 were the subject of litigation before the Mexican courts, particularly with respect to the notification of Work Order

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94 Contract 821, p. 94. **R-0003**.

95 Official communication of initiation of administrative rescission proceedings dated July 31, 2017, p. 6. **C-0104**.

96 *See* PEP's November 13, 2014 Official Letter. **C-0091**.

97 PEP' s December 31, 2015 Official communication. **R-0038**

98 PEP' s November 13, 2014 Official communication. **C-0091**.

99 Clause 17 of Contract 821, p. 58. **R-0003**. See PEP's January 22, 2016 Official communication. **C-0097**.

028-2016. As will be seen below, in each litigation it was concluded that the procedures followed by PEP to notify the work orders were legal and in accordance with the provisions of Contract 821.

104. As noted above, Pemex and its subsidiaries began to face liquidity problems due to the international oil price crisis. This caused Pemex to implement a series of actions to face this crisis, including the extension of the term to pay services of service providers, such as Drake-Finley. That is why, in January 2016, PEP proposed to Drake Finley to extend the term that PEP had to pay for the services performed under Contract 821 from 20 to 180 days.[100]

105. The Claimants state that PEP decided to make this modification unilaterally.[101] Claimants apparently forget that on February 2, 2016, Drake-Finley and PEP entered into an Amendment Agreement according to which the term that PEP had to pay for Drake-Finley's services was extended.[102] None of this can be mistaken as "retaliation".

C. Rescission of Contract 821

106. The Statement of Claim contains serious allegations regarding the causes that led PEP to administratively rescind Contract 821. Specifically, the Claimants and their witnesses argue that PEP pretended to request Work Order 028-2016 in order to cause Drake-Finley to incur a ground for rescission under Contract 821 and thereby terminate the contractual relationship, in retaliation for the fact that Drake-Finley initiated Civil proceeding 200/2016 against PEP.[103] None of this has been demonstrated.

107. Contrary to what Claimants may assert, Drake-Finley incurred several grounds set forth in Clause 15 of Contract 821. In light of this situation, on July 31, 2017, PEP notified Drake-Finley of the initiation of the administrative rescission proceeding, which concluded on August 28,

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100 See Clause 6.3 of Contract 821, p. 16. **R-0003**. Communication dated January 21, 2016 from PEP. **C-0096**.

101 Statement of Claim, ¶ 186.

102 *See* First Amendment Agreement of Contract 821. **R-0039**. Communication from Drake-Finley, January 20, 2016. **R-0040**.

103 Statement of Claim, ¶¶ 195, 204-214. WS Luis Oseguera Kernion, ¶¶ 97-98. Claimants allege that Exhibit C-0098 consists of Work Order 028-2016. In Respondent's view, the correct document is the one that Mexico submits as Exhibit **R-0041**. The Tribunal is requested to consider this document as Work Order 028-2016.

2017.[104] In other words, the contractual relationship between PEP and Drake-Finley ended almost three years before the Notice of Intent of the NAFTA Arbitration was filed.

108. PEP concluded that Drake-Finley committed five actions that breached the grounds b) and s) of clause 15 of Contract 821.[105] The actions were the following:

> Failure to comply with Work Order 028-2016, and verification tour orders. Drake-Finley did not even comply with minimum requirements such as attending meetings or calls in order to deliver the original documents of Work Order 028-2016.[106]
>
> Failure to comply with the object of Contract 821 by not executing work order 028-2016.
>
> Failure to comply with Annex DT-2 of Contract 821, which required Drake Finley to submit to PEP the drilling work program, perform verifications, and provide the necessary drilling equipment to perform the required work.
>
> Failure to inform PEP about Drake-Finley's change of conventional domicile. This situation is relevant because a continuing conduct of Drake-Finley and the Claimants has been to evade notifications made by PEP.[107]
>
> Failure to comply with clause 48 of Contract 821 related to community and environmental support. [108]

109. It is important to emphasize that, at the time of signing Contract 821, Drake-Finley was aware of PEP's power to suspend, early terminate and rescind Contract 821 through the procedures set forth in the contract itself.[109]

110. With regard to the obligations to perform community and environmental works, Drake-Finley committed more than six repeated non-compliances, which, *inter alia*, included the

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104 Official communication on the initiation of administrative rescission proceedings dated July 31, 2017. C-**0104**. Administrative rescission resolution of Contract 821 dated August 28, 2017. **R-0042**. Clause 15 of Contract 821. **R-0003**.

105 Official communication on the initiation of administrative rescission proceedings dated July 31, 2017, pp. 15-16. **C-0104**. Clause 15 of Contract 821 ("b) If the CONTRACTOR does not execute the Works in accordance with the provisions of the Contract or without justified reason, it does not comply with the written orders given by the Construction Resident [...] s) In the event that the CONTRACTOR fails to comply with its obligations under the terms established in the Contract."). **R-0003**.

106 Administrative rescission resolution of Contract 821 dated August 28, 2017, p. 17. **R-0042**. Official communication on the initiation of administrative rescission proceedings dated July 31, 2017, p. 11. **C-0104**. Anullment proceeding 2017 Judgment dated October 4, 2018, pp. 104-105, pp. 182. RZ-039.

107 Official communication on the initiation of administrative rescission proceedings dated July 31, 2017, p. 17. **C-0104**.

108 Administrative rescission resolution of Contract 821 dated August 28, 2017, pp. 20-21. **R-0042**. Anullment proceeding 2017 Judgment dated October 4, 2018, pp. 106-110. **RZ-039**.

109 *See* Declaration 2 of Drake Finley as contractor under Contract 821, pp. 9-10. **R-0003**.

construction of community kitchens in localities in Veracruz, the rehabilitation of cultural spaces (e.g., libraries, auditoriums and cultural houses for the community) and the rehabilitation of a school.[110] None of these were finished by Drake-Finley and are not minor issues as PEP considered that these breaches prevented the benefit of vulnerable communities and access to food for the population of these communities.[111]

111. The Respondent understands that there is currently no ongoing legal proceeding related to the termination of Contract 821, i.e., since 2017 Contract 821 was legally rescinded. However, it was not until June 2021 that PEP was in a position to formalize the settlement of Contract 821 due to the litigation initiated by Drake-Finley.[112]

D. Lawsuits related to Contract 821

1. Civil proceeding 200/2016 filed by Drake-Finley, Drake-Mesa and Finley against Pemex

112. On April 29, 2016, Drake-Finley filed a lawsuit against PEP, which was referred to the Eighth Civil District Judge in Mexico City, and was registered as Civil proceeding 200/2016.[113] In this lawsuit, Drake-Finley claimed: i) payment of more than US$ 120 million against PEP plus interest; ii) payment of non-recoverable expenses allegedly originated by work suspensions during the term of Contract 821, and iii) financial expenses and other items including damages apparently generated by the lack of payment to several Drake-Finley suppliers.[114] In turn, PEP raised several defenses and exceptions, including the lack of action and right to sue PEP since it did not breach Contract 821.[115]

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110 Official communication on the initiation of administrative rescission proceedings dated July 31, 2017, pp. 27-28. **C-0104**.

111 Official communication on the initiation of administrative rescission proceedings dated July 31, 2017, p. 17. **C-0104**. *See* Letter from Pemex to Finley and Drake-Mesa. **C-0023**.

112 Settlement of Contract 821, **R-0043**. At the time of filing the complaint that initiated the 2017 Nullity Suit, Claimants sought an injunction to, *inter alia*, suspend the August 28, 2017 official notice ordering the rescission of Contract 821, and in various amparo suits Drake-Finley sought a stay of the rescission of Contract 821. See Lawsuit in the 2017 Annulment proceeding, p. 57. **R-0044**.

113 The Claimants did not submit any evidence regarding Civil proceeding 200/2016. The Respondent exhibits as **R-0045** the Judgment of the Civil proceeding 200/2016, which is Exhibit **RZ-026**.

114 Drake-Finley's Civil proceeding 200/2016 Lawsuit, pp. 2-3. **R-0046**. Zamora-Amézquita Report, ¶ 106. Civil proceeding 200/2016 Judgment, pp. 2-3. **R-0045**.

115 Civil proceeding 200/2016 Judgment, pp. 7-11. **R-0045**.

113. The mere fact that Drake-Finley claimed damages against PEP for alleged breaches incurred by PEP, means that since April 29, 2016, the Claimants had knowledge for the first time, or should have had knowledge, of the alleged breach of NAFTA and that they suffered losses or damages, as in Civil proceeding 200/2016 they claimed a multi-million payment against PEP for alleged breaches of Contract 821.[116]

114. On November 8, 2017, the Eighth Civil District Judge issued a Judgment determining that it lacked jurisdiction because Contract 821 established an arbitration clause "irrevocably waiving the contractor [Drake-Finley] to submit to any other federal and/or non-jurisdictional instance" with the exception of administrative rescission.[117] Within its reasoning, the Judgment emphasized that:

> Therefore, based on the aforementioned precepts and the agreement of the parties, it is concluded that the benefits claimed by the plaintiff in this lawsuit are those that will have to be resolved through arbitration and not through a controversy before the Federal Courts with jurisdiction in Mexico City.
>
> In sum of the foregoing and given that the parties may contractually agree on the manner in which they will resolve their disputes, it is deemed that this District Court in Civil Matters in Mexico City is not competent to hear and resolve this matter.

a. Appeals 898/2017 and 899/2017

115. Dissatisfied with the Civil proceeding 200/2016 Judgment, on November 16, 2017 Drake-Finley and PEP filed appeals that were registered as Appeals 898/2017 and 899/2017, respectively, before the Third Unitary Court.[118]

116. Respondent understands that Drake-Finley argued that "tactically" the contracting parties to Contract 821 submitted to the jurisdiction of the Eighth Civil District Judge and implicitly extinguished the arbitration clause.[119]

117. After analyzing the parties' grievances, on April 19, 2018, a Judgment was issued in which, *inter alia*, it confirmed that the Eighth Civil District Judge lacked jurisdiction to hear claims

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116 Statement of Claim, ¶ 215.

117 Civil proceeding 200/2016 Judgment, pp. 26-28. **R-0045**

118 Appeal Judgment 898/2017. **R-0047**.

119 Amparo 425/2018 Judgment, pp. 201-202. **RZ-031**.

between PEP and Drake-Finley due to the ICC arbitration clause set forth in Contract 821, to which there was no evidence that the parties had waived.[120]

b. The direct amparos 425/2018 and 426/2018

118. PEP and Drake-Finley filed amparo lawsuits against the Appeal Judgment 898/2017 of the Third Unitary Court. These challenges were registered as Direct Amparo 425/2018 (in the case of PEP) and Direct Amparo 426/2018 (in the case of Drake-Finley) before the Tenth Collegiate Court.

119. Both amparos were accumulated, and on February 8, 2019, the Tenth Collegiate Court issued the Amparo Directo 425/2018 Judgment, which has been referred to by Claimants experts as the "First Amparo Judgment CP-821"[121].

120. After conducting a dogmatic analysis on commercial arbitration, the Tenth Collegiate Court concluded that Drake-Finley and PEP could indeed tacitly waive the ICC arbitration clause and submit to the jurisdiction of the Eighth Civil District Judge.

> Contrary to what the unitary court held, it is indeed feasible to waive the right to arbitrate a dispute, as inferred by the complainant [PEP], by arguing that this derives from the filing of the claim and its counter memorial, without reserving the right to arbitrate, before a jurisdictional instance in order for it to hear and resolve an inter parties dispute.
>
> [...]
>
> In the aforementioned context, it is appropriate to grant the constitutional protection requested in order for the responsible court to render the challenged Judgment null and void and, in its place, to issue another one in which, upon ruling on the complaints of the plaintiff related to the waiver to arbitrate the controversy, following the guidelines set forth in the present decision, consider them as founded and, consequently, conclude that it was not correct for the judge to ruled that it lacked jurisdiction to hear the dispute derived from the existence of the arbitration agreement, given that, as has been justified, the parties tacitly waived that prerogative from the very moment in which the plaintiff filed its claim before a jurisdictional instance, and the defendant, now the plaintiff, file its counter memorial without requesting the referral to the arbitration agreement.[122]

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120 Appeal Judgments 898/2017 and 899/2017 issued on April 19, 2018 by the Third Unitary Court, pp. 33-42**. R-0047**. Claimants' experts referred to this ruling as "First Appeal Judgment CP-821". Zamora-Amézquita Report, ¶ 113.

121 Expert Report Zamora-Amézquita, ¶ 115. *See* Amparo Judgment 425/2018. **RZ-031**.

122 Amparo Judgment 425/2018, pp. 204-. **RZ-031**.

121. The Tenth Collegiate Court granted PEP and Drake-Finley an "amparo for effects", i.e., it remanded the matter to the Third Unitary Court to vacate the Appeal Judgment 898/2017 and to analyze the grievances expressed by PEP and Drake-Finley.[123]

c. Second Appeal Judgment 898/2017

122. On April 2, 2019, the Third Unitary Court issued the Second Appeal Judgment 898/2017 in compliance with the Amparo Judgment 425/2018 of the Tenth Collegiate Court.[124]

123. First, the Third Unitary Court determined that, indeed, Drake-Finley and PEP could tacitly waive the arbitration clause of Contract 821 and submit their dispute to the jurisdiction of a federal civil court.[125] In simple terms, the Third Unitary Court concluded that it was not correct for the Eighth Civil District Judge to declare that it lacked jurisdiction to hear the dispute raised in Civil Proceeding 200/2016.[126]

124. Second, the Third Unitary Court analyzed Drake-Finley's claims and the exceptions and defenses raised by PEP. The Third Unitary Court also assumed jurisdiction to resolve the merits of the dispute and considered PEP's objection related to the lack of action and entitlement to be founded.

125. The Third Unitary Court resolved that, indeed, in Contract 821 the parties agreed a minimum and a maximum budget to be exercised, but PEP "was not required to exercise the maximum amount of the contract".[127] Regarding the minimum budget, the Third Unitary Tribunal concluded the following:

> [...] the fact that a minimum and a maximum budget had been agreed did not mean that if the minimum amount was not exercised, the contractor had to be paid the difference, since this was not agreed in the contract.[128]

126. The Third Unitary Court also analyzed Drake-Finley's claims regarding the alleged work suspensions under Contract 821, but considered that Drake Finley only sought a generic

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123 *See* Amparo Judgment 425/2018, pp. 171-191. **RZ-031**.

124 Neither the Claimants nor their experts offered into evidence Second Appeal Judgment 898/2017. For the benefit of the Tribunal, Respondent offers the document as Exhibit **R-0048**.

125 Second Appeal Judgment 898/2017, pp. 101-103, 106. **R-0048**.

126 Second Appeal Judgment 898/2017, p. 106. **R-0048**.

127 Second Appeal Judgment 898/2017, p. 129. **R-0048**.

128 Second Appeal Judgment 898/2017, pp. 129-130. **R-0048**.

condemnation was sought without being properly demonstrated, and particularly without demonstrating "the concepts and amounts for which the condemnation for non-recoverable expenses for the work suspension that occurred during the contract should be made".[129]

127. Regarding Drake-Finley's claims about the proceeding against suppliers or subcontractors, the Third Unitary Court concluded that in Clause 25 of Contract 821 PEP and Drake-Finley agreed that "notwithstanding any subcontracting, the CONTRACTOR is and will be solely responsible for the obligations of the Contract".[130] In simple terms, under Contract 821 the parties agreed that Drake-Finley would be solely liable before subcontractors.

128. With respect to the financial expenses claims, the Third Unitary Court concluded that, having failed to prove the main claim against PEP, the ancillary claims, including those related to legal expenses and costs, could not succeed.[131]

129. Based on this, the Third Unitary Court revoked the Civil Proceeding 200/2016 Judgment, determined that the jurisdictional mean was the appropriate one, and acquitted Pemex of all the claims made by Drake-Finley, without having ordered it to pay the costs of Civil Proceeding 200/2016.[132] It is important to note that Drake Finley had the opportunity to challenge the Judgment of the Third Unitary Court through amparo, but did not do so.[133]

d. PEP's direct amparo 306/2019

130. Since Drake-Finley was not ordered to pay costs, on April 10, 2019 PEP filed the Direct Amparo 306/2019 against the Second Appeal Judgment 898/2017 of the Third Unitary Court, which was heard by the Tenth Collegiate Court.[134] In its amparo lawsuit, PEP requested that Drake-Finley be ordered to cover its legal costs.

131. PEP argued that the Second Appeal Judgment 898/2017 lacked consistency as, under Mexican law, it was appropriate for the Third Unitary Court to order Drake-Finley to pay legal

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129 Second Appeal Judgment 898/2017, pp. 135-136, 169. **R-0048**.

130 Second Appeal Judgment 898/2017, p. 169. **R-0048**.

131 Second Appeal Judgment 898/2017, p. 172. **R-0048**.

132 Second Appeal Judgment 898/2017, p. 173. **R-0048**.

133 *See* Expert Report of Mr. Jorge Asali, ¶ 124.

134 Amparo Directo Judgment 306/2019 . **RZ-032**. This Judgment is called "Second Amparo Judgment CP-821" by Claimants' experts. *See* Zamora-Amézquita Report, ¶ 116.

costs since its claim was dismissed.[135] It is important to note that Drake-Finley had the opportunity to participate in the Direct Amparo 306/2019 proceeding as an interested third party.[136]

132. Based on this, on August 22, 2019, the Tenth Collegiate Court granted the amparo requested by PEP in order for the Third Unitary Court to issue a decision addressing the matter of legal costs.[137]

e. The Third Appeal Judgment 898/2017

133. On September 9, 2019, the Third Unitary Court issued the Third Appeal Judgment 898/2017 in compliance with the Direct Amparo Judgment 306/2019 in which it refused to order Drake-Finley to pay legal costs.[138]

134. The Third Unitary Court held that, despite the fact that Drake-Finley initiated and lost Civil Proceeding 200/2016, its actions did not merit an award of payments and costs under the applicable law.[139]

f. PEP's Direct Amparo 783/2019 and Drake-Finley's Amparo 875/2019

135. Discontent with the decision of the Third Unitary Court, on September 24, 2019 PEP filed th Amparo Directo 783/2019 against the Third Appeal Judgment 898/2017.[140]

136. PEP' s arguments were only aimed at analyzing the award of legal costs. After analyzing PEP's arguments, on June 22, 2020, the Tenth Collegiate Court issued the Amparo Directo 783/2019 Judgment in which it considered that the applicable legislation to the case (i.e., the Federal Code of Civil Procedures) clearly established that the losing party must reimburse its opposing party for the costs of the proceeding.[141]

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135 Direct Amparo 306/2019 Judgment, pp. 158-159. RZ-032.

136 Direct Amparo 306/2019 Judgment, p. 26. **RZ-032**.

137 Direct Amparo 306/2019 Judgment, pp. 163-164. **RZ-032**.

138 *See* Zamora-Amézquita Report, ¶ 117. *See* Direct Amparo 783/2019 Judgment, pp. 166-172. **RZ-035**.

139 Direct Amparo 783/2019 Judgment, pp. 171-172. **RZ-035**.

140 Claimants' experts refer to the Direct Amparo 783/2019 Judgment as "Third Amparo Judgment CP-821". *See* Zamora-Amézquita Report, ¶ 118.

141 Third Appellate Judgment, pp. 176-183. **RZ-035**.

137. In that sense, the Tenth Collegiate Court granted the amparo to PEP for the purpose of the Third Unitary Court to issue a new decision in which it justified the reasons why Drake-Finley was exempted from being ordered to pay legal costs, in accordance with the provisions of the Federal Code of Civil Procedures.[142]

138. As PEP, Drake-Finley filed a direct amparo lawsuit against the Third Appeal Judgment 898/2017 on October 10, 2019, which was registered as Direct Amparo 875/2019 before the 10th Collegiate Court.[143] It is not surprising that Claimants have avoided mentioning Direct Amparo 875/2019 considering that on November 13, 2019 it was dismissed for being filed untimely.[144]

139. Within the reasoning of the Tenth Collegiate Court, it was stated that Drake-Finley did not file the Direct Amparo 875/2019 lawsuit within the corresponding period.[145] It is clear that this type of situation undermines the credibility of the Claimants' claim of denial of justice.

g. The Fourth Appeal Judgment 898/2017

140. In compliance with the Direct Amparo 306/2019 Judgment, on October 23, 2020, the Third Unitary Court issued the Fourth Appellate Judgment 898/2017 in which it ordered Drake-Finley to pay legal costs.[146]

141. Indeed, the Third Unitary Tribunal concluded that "the defendant was absolved of the claims, because the plaintiff [Drake Finley] did not prove its action, which implied the jurisdictional activity and, that the defendant [PEP] was forced to exercise its right of defense causing it inconveniences, contradictions, expenses and damages that harmed its wealth".[147] Based on the facts and applicable law, the Third Unitary Court ordered Drake-Finley to pay legal costs, but only in the second instance.[148]

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142 Third Appeal Judgment 898/2017, pp. 182-183. **RZ-035**.

143 *See* Zamora-Amézquita Report, ¶ 118.

144 Direct Amparo 875/2019 Resolution, p. 2, **R-0049**.

145 Third Appeal Judgment 898/2017, pp. 2-3, **R-0049**.

146 Zamora-Amézquita Report, ¶ 119. Fourth Appeal Judgment 898/2017, pp. 82-83. **RZ-035**.

147 Fourth Appeal Judgment 898/2017, pp. 81-82. **RZ-033**.

148 Fourth Appeal Judgment 898/2017, p. 82. **RZ-033**.

h. The Directo Amparo 540/2020

142. In November 2020, PEP filed the Direct Amparo 540/2020 against the Fourth Appeal Judgment 898/2017 of the Third Unitary Court for failing to order Drake-Finley to pay the costs and expenses of the proceeding, i.e., first and second instance.[149]

143. On September 28, 2021, the Tenth Collegiate Court issued the Direct Amparo 540/2020 Judgment in which it ruled that the Third Unitary Court should order Drake-Finley to pay costs in both instances.[150]

i. The Fifth Appeal Judgment 898/2017

144. In compliance with the Direct Amparo 540/2020 Judgment, on October 21, 2021, the Third Unitary Court issued the Fifth Appeal Judgment 898/2017 in which it ordered Drake-Finley to pay costs and expenses in both instances (i.e., for the Civil Proceeding 200/2016 and for the Appeal 898/2017) in favor of PEP as the defendant.[151]

145. Respondent is not aware that Drake-Finley has challenged the Fifth Appeal Judgment 898/2017.[152] That would mean that the Fifth Appeal Judgment 898/2017 is a final Judgment and PEP will be able to exercise its rights in the respective legal channel to claim the payment of legal costs.

j. Remarks on the Civil Proceeding 200/2016 and the challenges filed by PEP and Drake-Finley

146. The Claimants and their Experts have raised a series of disqualifications against PEP due to the time elapsed and challenges submitted in the Civil Proceeding 200/2016.[153] These arguments are meaningless. The Civil Proceeding 200/2016, the Judgments related to the Appeals 898/2017 and the various Amparo trials that derived from this judicial process were extremely complex, which cannot be equated to a NAFTA violation.

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149 Directo Amparo Judgment 540/2020, pp. 32,43. **RZ-036**.

150 Direct Amparo Judgment 540/2020, pp. 55-68. **RZ-036**. Claimants' experts refer to Direct Amparo Judgment 540/2020 as "Fourth Amparo Judgment CP-821". *See* Zamora-Amézquita Report, ¶ 119.

151 Fifth Appeal Judgment 898/2017, pp. 82-84. **RZ-038**.

152 *See* Zamora-Amézquita Report, ¶ 119.

153 Zamora-Amézquita Report ¶ 120 ("[...] The evidence shows that Pemex was employing deliberate efforts to use all resources available to Pemex, not only to obstruct, delay, derail or sabotage CP-821, but also to obtain more economic benefits from Claimants [...]").

147. Furthermore, the Tribunal must consider that the complexity of these disputes was increased by Drake-Finley's decision to sue PEP in court and "tacitly waive" the ICC arbitration clause.

148. In any event, several jurisdictional instances (i.e., the Eighth Civil District Judge, the Third Unitary Court and the Tenth Collegiate Court) determined that PEP did not breach Contract 821 and that the judicial resolutions regarding disputes related to Contract 821 were legal and constitutional. Furthermore, the fact that PEP has challenged on several occasions judicial resolutions only demonstrates that it exercised its procedural rights to claim damages and costs, which is provided for in Mexican law.

149. The arguments raised by Claimants on Contract 821 are virtually the same arguments that Drake-Finley raised before the Mexican courts, including claims aimed at interpreting NAFTA provisions. The Tribunal has no jurisdiction to act as a "fourth jurisdictional instance", much less does it have jurisdiction to resolve contractual claims.

150. Finally, the Claimants argue that in March 2021 they decided to withdraw from Civil Proceeding 200/2016 and from the challenges arising from this proceeding in order "to initiate this arbitration".[154] This argument is meaningless for three reasons.

151. *First*, since April 2, 2019, the Third Unitary Court issued the Second Appeal Judgment 898/2017 in which it resolved the merits of Civil Proceeding 200/2016. The following proceedings were solely focused on defining whether Drake-Finley should pay PEP the legal costs generated in both instances.

152. *Second*, the jurisdictional requirements set forth in NAFTA Article 1121 do not require the waiver of proceedings of a suspensive or declaratory nature, such as amparo proceedings. The fact that Claimants withdrew the Drake-Finley challenges only demonstrate that their objective is to have this Tribunal act as an appellate court.

153. *Third*, some challenges initiated by Drake-Finley were dismissed for being submitted untimely. For example, Respondent finds no logical reason for Drake-Finley to have withdrawn from the Direct Amparo 875/2019 in March 2021 if it had been resolved by the Tenth Collegiate

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154 Statement of Claim, ¶ 214.

Court since November 2019.[155] Even, as noted above, Drake Finley could have challenged the Second Appeal Judgment 898/2017 by which Pemex was acquitted, however, it chose not to do so.

2. The Anullment Proceeding 2017 and the amparo lawsuits related to Contract 821

154. In addition to the claims raised in Civil Proceeding 200/2016, on September 4, 2017, Drake-Finley filed an administrative lawsuit before the TFJA, against the August 2017 resolution through which PEP rescinded Contract 821, which initiated the Anullment Proceeding 2017.[156]

155. As part of the claims, Drake-Finley sought the nullity of Work Order 028-2016 on the grounds that it allegedly failed to comply with contractual formalities.[157] Likewise, Drake-Finley claimed the nullity of the rescission of Contract 821 because, in its opinion, compliance with clause 48 was subject to PEP exercising the minimum amount of Contract 821.[158]

156. The Tribunal may note that the claims raised by Drake-Finley in the Anullment Proceeding 2017 are virtually the same as those raised in this arbitration. For example, in the Anullment Proceeding 2017 Drake-Finley stated that the rescisison of Contract 821 "affects our business image with our customers and subcontractors domestically and internationally"[159]. In the arbitration, Claimants argue that "Claimants were unable to pay their subcontractors, among others, and were subjected to disparagement to their reputation with claims of fraud...".[160]

157. On October 4, 2018, the TFJA issued a Judgment by which it resolved the Anullment Proceeding 2017 and confirmed the rescission of Contract 821.[161] The TFJA stated that the

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155 Drake-Finley Direct Amparo 875/2019 Judgment, **R-0049**. Drake-Finley Dismissals, p. 2. **RZ-037**.

156 Communication of October 27, 2021 addressed to the Contractors, p. 5. **C-0013**. The lawsuit was registered under file number 20356/17-17-12-2/1599/18-S1-0404 before the Superior Chamber of the TFJA. See Anullment Proceeding 2017 Judgment of October 4, 2018. **RZ-039**.

157 *See* Anullment Proceeding 2017 Judgment of 4 October 2018, pp. 90-94. **RZ-039**.

158 Anullment Proceeding 2017 Judgment of 4 October 2018, p. 188. **RZ-039**.

159 Anullment Proceeding 2017 Lawsuit, p. 57. **R-0044**.

160 Statement of Claim, ¶ 9.

161 Request for Arbitration, ¶ 32. Pemex's communication to Dorama, December 2, 2021, p. 2. **C-0014**. Communication to the Contractors, October 27, 2021, p. 5. **C-0013**.

applicable law to Contract 821 allowed PEP to suspend, terminate and rescind the contracts it enters into without requiring a judicial or arbitral declaration.[162]

158. Regarding the notification of Work Order 028-2016, the TFJA determined that "it is clear that PEP acted in good faith by notifying the CONTRACTOR of the Drilling Work Order 028-2016 by three different means (email, Electronic Logbook and in person at the domicile of the Construction Superintendence, following the formalities of the CONTRACT and the applicable Laws) and that contrary to the meaning of Clause 3, the CONTRACTOR has acted in bad faith, pretending to mislead PEP by claiming that it has not received the aforementioned order [....]".[163]

159. Thus, the TFJA determined that the two causes that motivated the rescission of Contract 821 were related to Work Order 28-2016, which was correctly notified by PEP.[164] Likewise, the TFJA considered that the obligation set forth in clause 48 of Contract 821 (i.e., community and environmental support) was not conditioned to execution of the minimum amount of Contract 821 itself.[165] The following transcript is relevant:

> [...] there is no mention in any part of the contract that the assigned PROA's will be enforceable until the effective exercise of the minimum amount of the contract occurs.
>
> On the contrary, it is noted that the contractor is obliged to start its execution within 90 calendar days after its authorization and that even, as mentioned by the defendant authority, within 30 calendar days after the signature of the contract, PEP must deliver the assigned PROA's to the contractor, which convinces this Section (of the TFJA) that the plaintiff's arguments are unfounded.
>
> It should not go unnoticed that in Clause 48, under analysis, it is stated that the contribution required from the CONTRACTOR, in the case of this program, shall be at least 2% of the total amount of this contract; since such clause must be understood in the sense that the contractor is obligued to execute PROA'S to a value of 2% of the total amount of the contract, but not that it is required to execute it until the defendant authority exercises the total amount of the contract and the 2% can be determined.[166]

160. The TFJA concluded that there were indeed breaches of the obligation established in clause 48 of Contract 821 and therefore its recission had been carried out in accordance with the

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162 Anullment Proceeding 2017 Judgment of 4 October 2018, pp. 70-73. **RZ-039**.

163 Anullment Proceeding 2017 Judgment of 4 October 2018, p. 116. **RZ-039**.

164 Anullment Proceeding 2017 Judgment of 4 October 2018, pp. 116, 148-155. **RZ-039**.

165 Anullment Proceeding 2017 Judgment of 4 October 2018, p. 197. **RZ-039**.

166 Anullment Proceeding 2017 Judgment of 4 October 2018, p. 198. **RZ-039**. [emphasis added].

applicable law and its nullity was not appropriate.[167] Regarding the grounds for rescission of Contract 821, the following conclusion of the TFJA is relevant:

> [...] the breach of only one of the obligations stipulated in the contract, as is the case of the obligation set forth in clause 48, is sufficient for the rescission of the contract to be considered lawful and duly grounded. This means that even if the plaintiff were to demonstrate that the other alleged breaches did not exist, this would be insufficient to declare the nullity of the challenged decision.[168]

161. After analyzing the positions of the parties, the TFJA determined that it was not for it to rule on PEP's alleged breach of Contract 821, considering that the claims regarding the failure to exercise the minimum amount of the contract and work suspensions had been filed in Civil Proceeding 200/2016.[169]

162. The TFJA also emphazised that if Drake-Finley only received payment for the executed works and for an amount lower than the minimum amount of Contract 821, such event did not justified the breach of the execution of Work Order 28-2016 and obligations related to it, since Drake, at the time of participating in the bidding and at the time of signing Contract 821, declared to meet the economic conditions to be bound to the execution of the works.[170]

163. The Claimants and their witness, Mr. Oseguera Kernion, made serious allegations against Pemex and Mr. Loustaunau with respect to meetings and the Judgment that ended the Annulment Proceeding 2017.[171] In addition to this, the Claimants' legal experts took the facts as true in order to conclude that "[i]f the communication referred to by Mr. Oseguera Kernion took place between the judge and Pemex, the Code of Ethics and Claimants' Due Process rights were clearly violated."[172]

164. First, the alleged conversations between Mr. Oseguera Kernion and an individual named Rob Keoseyan are based on indirect testimony or "*de oídas*", usually known as "hearsay" in the

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167 Anullment Proceeding 2017 Judgment of 4 October 2018, p. 198-199. **RZ-039**.

168 Anullment Proceeding 2017 Judgment of 4 October 2018, p. 200. **RZ-039**.

169 Anullment Proceeding 2017 Judgment of 4 October 2018, pp. 206, 211. **RZ-039** ("[...] in this administrative contentious proceeding the challenged resolution is the rescission determined by PEP derived from the breach of the plaintiff to the clauses of the contract, it is clear that the *Litis* is exclusively about the plaintiff's breach to the contract, not about the breach of the entity to such contract.").

170 Anullment Proceeding 2017 Judgment of 4 October 2018, p. 235. **RZ-039**.

171 Statement of Claim, ¶¶ 216-220. WS Luis Oseguera Kernion, ¶¶ 106-107.

172 Zamora-Amézquita Expert Report, ¶192.

U.S. legal system. Basically, Mr. Oseguera Kernion claims that, based on alleged conversations, he was able to understand that a judge –without explaining which judge– would rule in favor of Pemex (i.e., not PEP) in the Annulment Proceeding 2017.[173] The evidence to support this serious accusation is nonexistent.

165. Second, Mr. Loustaunau himself testifies about the alleged meetings in which Mr. Oseguera Kernion and Mr. Rob Keoseyan participated:[174]

> I want to make it clear that I do not recall having held a meeting with Mr. Luis Oseguera Kernion and Mr. Rob Keoseyan since the issue was not a matter of my competence at that time. In fact, I am not aware that Mr. Keoseyan ever worked at Pemex, nor do I recall him ever contacting me. Due to the roles I have played within Pemex I have met with hundreds of people, and the reality is that I do not recall having met Mr. Oseguera Kernion.

166. With regard to the alleged *ex parte* communications, Mr. Rodrigo Loustaunau explains that in judicial practice in Mexico it is common for attorneys –for both parties in a trial– to go to the courts and tribunals to have communications with judicial branch officials, without this being "a matter of an extraordinary or undue character."[175] In this regard, Mr. Loustaunau states:

> [...] based on my experience, I have seen that litigants who have initiated lawsuits against Pemex have also exercised this right, and it is quite common for a litigant to seek a meeting with a judge or magistrate to orally explain his legal position. ...
>
> Pemex, its EPS and Subsidiaries act as any subject of law and have no influence whatsoever on the decisions of the Mexican jurisdictional authorities. In this sense, Mexican law is designed so that the decisions of the judicial authorities are duly grounded and motivated, that is to say, their decision must be in accordance with the law and cannot be arbitrary. So much so that, like any other legal entity, Pemex has also had lawsuits dismissed and has been the subject of judgments against it, which makes it clear that Pemex has no influence whatsoever over the decisions made by the authorities.
>
> I consider it totally false that Pemex had information regarding the sense of the judgment of the nullity proceeding of Contract 821 before it was made public and before the parties (i.e., the Contractors and PEP) had access to it. It is also false that I have participated in meetings with "the judge deciding whether to uphold Pemex's administrative rescission...".[176]

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173 WS Luis Oseguera Kernion, ¶ 107.

174 WS Rodrigo Loustaunau Martínez, ¶ 18.

175 WS Rodrigo Loustaunau Martínez, ¶ 20.

176 WS Rodrigo Loustaunau Martínez, ¶¶ 20-22.

167. In addition, Mr. Asali explains the following regarding the duration of the Annulment Proceeding 2017 and the alleged *ex parte* meetings between Pemex officials with TFJA magistrates:

> The first instance of this proceeding, as well as the direct amparo trial which derived thereof, lasted approximately 12 months. This is a reasonable period of time and in accordance with both the complexity of the controversy and the courts' workload.[177]
>
> Given the predominantly written and impersonal courts system in Mexico, these interviews are seen by litigants as an opportunity to present their cases orally and synthetically to judges and magistrates. However, in no way is the mere fact of having this type of communication interpreted in Mexico as an indication of misconduct or of the existence of biased treatment or influence peddling. On the contrary, in the forum it is considered that if a litigant does not attend to his matter personally through interviews with judges and magistrates, he is neglecting his cases and incurring in professional negligence.[178]

168. Mr. Asali even reports that this practice became widespread during the pandemic caused by COVID 19, when the possibility of scheduling electronically appointments was institutionalized.[179]

169. Based on the foregoing, the Tribunal may conclude that there is no evidence regarding the serious allegations raised by the Claimants against Pemex officials and the TFJA Magistrates. Disagreeing with the Annulment Proceeding 2017 Judgment does not legitimize or justify Claimants' serious and unfounded allegations.

a. Drake-Finley's Direct Amparo 74/2019

170. On January 18, 2019, Drake-Finley filed the Direct Amparo 74/2019 against the TFJA's ruling, which was referred to the Fourteenth Collegiate Court in Administrative Matters of the First Circuit. In Drake-Finley's view, the 2017 Nullity Judgment was unconstitutional and further stated that it violated NAFTA Articles 1101, 1104 and 1105.[180] Within its lawsuit, among other things, Drake-Finley alleged the following:[181]

> [...] the interpretation and analysis that should have been made by the First Section of the Superior Chamber of the Federal Court of Administrative Justice was the most favorable to the interests of my principals, for the protection of the investment (the

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177 Expert Report Jorge Asali, ¶ 151.

178 Expert Report Jorge Asali, ¶ 166.

179 Expert Report Jorge Asali, ¶ 167.

180 Direct Amparo Judgment 74/2019, pp. 33-34. **R-0050**.

181 Direct Amparo 74/2019 lawsuit, **R-0051**.

> Contract) and of Finley Resources, Inc, as a foreign investor, in terms of NAFTA and the Federal Constitution, This fact violates Article 1 of the Political Constitution of the United Mexican States in relation to Article 1105 of NAFTA, by not considering that the investments of my principals had to be treated in accordance with international law, including fair and equitable treatment, as well as full protection and security, facts that did not occur in the specific case.

171. After analyzing the arguments of the parties, on January 30, 2020, the Fourteenth Collegiate Court denied the Direct Amparo 74/2019.[182] The Fourteenth Collegiate Court concluded, inter alia, that Drake's arguments were unavailing because the NAFTA Articles invoked were commercial and not human rights in nature.[183] As the Tribunal will note, Claimants have not only asserted arguments based on NAFTA Chapter XI in this arbitration, but also before Mexican courts, which affects the Tribunal's jurisdiction as will be seen below.

172. Drake-Finley again argued that PEP breached Contract 821 by not providing work orders for more than 18 months.[184] However, the Fourteenth Collegiate Court confirmed that, as pointed out by PEP in the rescission proceeding of Contract 821, Drake-Finley did not comply with Work Order 28-2016, which motivated its rescission.[185] It is important to point out that the Fourteenth Collegiate Court considered the arguments raised by Drake-Finley to be extremely deficient, which is why it determined that they were inoperative. The following transcript reflects the conclusion of this amparo:

> [...] the complainants [Drake] limit themselves to making dogmatic statements that do not tend (sic) to evidence a real violation of any constitutional concept.[186]

173. Mr. Asali explains the following on the conclusions of the Fourteenth Collegiate Tribunal:

> [...] the 14th TCC ruled through a session held on January 30 of 2020 to deny the amparo, since it considered that their arguments, in addition to being novel, did not address the considerations set forth by the Superior Chamber in the challenged ruling.
>
> Although the plaintiffs alleged that the ruling of the Superior Chamber failed to interpret various articles of NAFTA in accordance with the pro homine principle, the 14th TCC

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182 The Claimants' legal experts submitted the Direct Amparo 74/2019 Judgment as Exhibit RZ-040, which is a public version prepared by the Federal Judiciary that has redacted/attested information. Respondent requests the Tribunal to consider Exhibit **R-0050**, which contains an unabridged version of the judgment.

183 Direct Amparo Judgment 74/2019, p. 34. **R-0050**.

184 Direct Amparo Judgment 74/2019, pp. 46-47. **R-0050**.

185 Direct Amparo Judgment 74/2019, p. 48. **R-0050**.

186 Direct Amparo Judgment 74/2019, pp. 20-21. **R-0050**.

> determined that these principles only apply in relation to international human rights treaties, and therefore were not applicable to the interpretation of NAFTA.[187]

174. The lenghth of the Direct Amparo 74/2019 has also been subject of criticism by Claimants and their legal experts.[188] However, given its complexity, the time it took to resolve Direct Amparo 74/2019 was entirely reasonable:

> 151. The first instance of this proceeding, as well as the direct amparo trial which derived thereof, lasted approximately 12 months. This is a reasonable period of time and in accordance with both the complexity of the controversy and the courts' workload.[189]

b. The Drake-Finley Appeal for Review 1685/2020

175. Still dissatisfied, on March 5, 2020, Drake-Finley filed an Appeal for Review1685/2020 against the Direct Amparo 74/2019 Judgment, which was referred to the SCJN.[190] The Claimants avoided describing in their Statement of Claim the aspects discussed in the Appeal for Review 1685/2020.

176. This remedy is limited to challenging rulings issued in amparo proceedings when they decide on the constitutionality of general rules that establish the interpretation of an article of the Mexican Constitution.[191] In other words, it is a remedy that will be appropriate if it seeks to analyze any transcendental constitutional aspect.[192]

177. Drake-Finley's claim through the Appeal for Review 1685/2020 was that the SCJN should interpret NAFTA Articles 1101, 1104 and 1105 and their application as applicable norms within the Mexican legal system.[193] In simple terms, Drake-Finley argued that the Annulment Proceeding 2017 should be resolved in its favor because it is a U.S. investor. The following transcript of the Appeal for Review 1685/2020 reflects Drake-Finley's claim:

> [...] any interpretation and analysis that the First Section of the Superior Chamber of the Federal Court of Administrative Justice had to make was the most favorable to the

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187 Expert Report of Mr. Jorge Asali, ¶¶ 132-133.

188 Statement of Claim ¶ 221. Zamora-Amézquita Expert Report, ¶ 221.

189 Expert Report of Mr. Jorge Asali, ¶ 151.

190 The appeal for review of amparo judgments is a mechanism provided for in the Amparo Law, but in strict respect for the rule of law.

191 *See* Articles 81 (II) y 83 of the Amparo Law, **R-0052**. Expert Report of Mr. Jorge Asali, ¶¶ 81 y 88.

192 Expert Report of Mr. Jorge Asali, ¶¶ 81 y 88.

193 Appeal for review 1685/2020, p. 7. **R-0053**.

> interests of my principals, especially to Finley Resources, Inc., since the business of Contract No. 421004821 is a foreign investment protected by the North American Free Trade Agreement, in terms of Chapters X and XI of said Agreement. This is so since the Contract was entered into under the North American Free Trade Agreement (hereinafter NAFTA) since it derives from NAFTA Public Bidding No. 18575088-542-13, based on Chapter X of the NAFTA Public Sector Procurement.
>
> [...]
>
> From what has been transcribed, it is clear that was applicable to my client, being an investor company with residence in the United States of America, who made such investments in the national territory of the United Mexican States, the provisions of the above-transcribed articles of the North American Free Trade Agreement, a situation that did not occur, but rather, in a totally illegal manner, the contract that at the time was executed in Mexican territory was rescinded.
>
> [...]
>
> Likewise, it is clear that in order to grant certainty and legal security to the investors coming from the signatory countries of the aforementioned trade agreement, the same must be applied as an integral norm of the Mexican legal system, and consequently it must have full effect on the contracts and acts entered into by the parties.[194]

178. Claimants assert that they withdrew from Appeal for Review 1685/2020 because they considered it futile to continue challenging judicial decisions before the Mexican courts.[195] The reality is that on March 17, 2020, the SCJN dismissed the Appeal for Review 1685/2020 as not applicable.[196] Basically, the SCJN considered that the case raised in Appeal for Review 1685/2020 did not have the character of importance and transcendence, notwithstanding that Drake Finley's claim to interpret NAFTA Articles 1101, 1104 and 1105 in its favor and thereby challenge the rescission of Contract 821 was analyzed by the Fourteenth Collegiate Court in Amparo Directo 74/2019.[197] With the issuance of this judgment, there is no challenge against the rescission of Contract 821, and clearly there is no judgment that has declared the rescission of Contract 821 illegal or unconstitutional.[198]

179. The Tribunal may note that Drake-Finley, basically, argued before domestic courts that the rescission of Contract 821 was in breach of the Minimum Standard of Treatment set forth in

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194 Appeal for Review 1685/2020, pp. 8, 20-21, 29. **R-0053**.

195 Statement of Claim, ¶ 222.

196 Determination of inadmissibility of Appeal for Review 1685/2020. **R-0054**.

197 Determination of inadmissibility of Appeal for Review 1685/2020, pp. 5-6. **R-0054**.

198 *See* Resolution published on June 8, 2021 within the file of Direct Amparo 74/2019. **R-0055**.

NAFTA Article 1105. On the other hand, the Claimants have made the following points in this arbitration:

> 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.[199]

180. As will be seen below, this Tribunal cannot act as an appellate court. The rescission of Contract 821 is a contractual situation that has already been resolved by the Mexican courts. Moreover, at the time of entering into the 821 Contract, Drake-Finley consented that the contract could be rescinded on various grounds. Drake-Finley had the opportunity to demonstrate to PEP that the rescission was not appropriate.

181. Drake-Finley also had the opportunity to challenge the rescission of Contract 821 before the Mexican courts. In three different instances (i.e., the Annulment Proceeding 2017, the Direct Amparo 74/2019 and in the Appeal for Review 1685/2020), Drake-Finley's arguments were dismissed as deficient. The fact that Claimants disagree with the outcome of these legal proceedings does not amount to a denial of justice under NAFTA Article 1105.

E. The settlement process of Contract 821 and the execution of the Dorama Bond

182. The Respondent does not consider it necessary to transcribe the same arguments it presented in its Reply to the Request for Provisional Measures with respect to Claimants' allegations concerning the termination of Contract 821 and the Dorama Bond, but unfortunately the Respondent finds it necessary to explain the facts surrounding these two aspects given the lack of clarity in the facts narrated by the Claimants in the Statement of Claim.[200]

183. Once Contract 821 was rescinded, PEP proceeded to execute the settlement of Contract 821 and to determine the possible conventional penalties that Drake-Finley should pay, in accordance with Clause 6 of Contract 821.[201] This situation cannot be mistaken for "retaliation"

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199 Statement of Claim, ¶ 368.

200 *Ver* Statement of Claim, ¶ 223.

201 Administrative Rescission resolution of Contract 821 dated August 28, 2017, pp. 44-46. **R-0042**.

or "misconduct" of Pemex as alleged by Claimants, but simply the exercise of a contractual right by PEP.[202]

184. Since 2017, PEP attempted to enter into the settlement of Contract 821 with Drake-Finley, which has not occurred due to the challenges promoted by Drake-Finley and its attempts to evade any act carried out by Pemex aimed at notifying the citations to enter into the settlement. The following facts are proof of this:

- On October 18, 2021, PEP notified Drake-Finley a letter in which they it summoned on October 27, 2021 to formalize the settlement of Contract 821. The notice was unsuccessfully attempted to be served at Drake-Finley's "conventional domicile", i.e., at the address indicated in Contract 821, located in Tampico, Tamaulipas, Mexico.[203]
- On October 19, 2021, PEP again attempted to notify Drake-Finley with a letter in which it was summoned on October 27, 2021 to formalize the settlement of Contract 821.[204] The notice was unsuccessfully attempted to be served at a second conventional address indicated in 2015 by Drake-Finley, located in Poza Rica, Veracruz, Mexico.[205]
- On November 5 and 8, 2021, PEP notified Drake-Finley a letter through which it was summoned on November 10, 2021 to attend a new meeting to formalize the settlement of Contract 821.[206] Since the previous summons could not be served at the Contractors' conventional addresses, PEP served the official notice at Drake-Finley's "procedural domicile", located in Mexico City. This domicile was indicated by Drake-Finley during the rescission proceeding of Contract 821 and in the Annulment Proceeding 2017.[207]

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202 Statement of Claim, ¶ 223.

203 Declaration 2.4 of Contract 821, p. 9. **R-0003**. Minute dated October 27, 2021, p. 2. **R-0008**.

204 PEP's official communication, October 19, 2021. **R-0009**. Minute dated October 27, 2021, p. 2. **R-0008**.

205 Contractors' communication, February 6, 2015. **R-0010.** PEP's official communication, October 19, 2021. **R-0009**.

206 *Ver* Notices dated November 5 and 8, 2021, pp. 1-2. **C-0013**.

207 Minute dated October 27, 2021, p. 2. **R-0008**. Notices dated November 5 and 8, 2021, pp. 1-2. **C-0013**. The possibility of notification at the "procedural domicile" is permitted by Mexican law. See Article 36 of the Federal Administrative Procedure Law ("Personal notifications will be made at the domicile of the interested party or at the last domicile that the person to be notified has indicated before the administrative bodies in the administrative proceeding in question"). **R-0017**.

- On November 10, 2021, Drake-Finley did not attend the meeting called by PEP. The settlement of Contract 821 was carried out unilaterally, in accordance with the terms and conditions of the contract. [208]
- On November 19, 22 and 23, 2021, despite PEP's authority to unilaterally settle Contract 821, it published three notices in the DOF (the official gazette of the Mexican government) and three edicts in La Jornada newspaper, in which it invited Drake-Finley to a meeting on November 26, 2021 to attempt to formalize by mutual agreement the settlement of Contract 821.[209]
- On November 26, 2021, the meeting called by PEP was held, but Drake-Finley also failed to attend the meeting.
- On December 15 and 16, 2021, PEP notified Drake-Finley of the settlement of Contract 821 at Claimants' procedural domicile.[210]

185. The Tribunal may observe that Drake-Finley has evaded PEP's attempts to enter into the settlement of Contract 821. On the contrary, PEP, in good faith and respecting due process, exhausted all contractual and legal means to enter into the settlement by mutual agreement. Furthermore, it is not an isolated fact that Drake-Finley evaded PEP's notifications. During the administrative rescission proceeding Drake-Finley adopted the same attitude.[211] It is worth noting that in the Annulment Proceeding 2017 the TFJA ruled that PEP acted in good faith by performing various actions to notify Drake-Finley, and instead Drake-Finley acted "in bad faith, intending to mislead PEP".[212]

186. The Claimants allege that Pemex failed to notify the Claimants' current counsel of the citations for settlement.[213] The reality is that neither Drake-Finley nor the Claimants have informed PEP that they are currently represented by Holland & Knight in aspects related to Contract 821 and in the procedures to formalize the settlement, which is why PEP cannot –and should not– deliver any documentation to members of such law firm if they are not yet formally appointed as representatives of Drake-Finley.

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208 Clause18th of Contract 821, pp. 60-61. **R-0003.**

209 PEP's Notice published in the DOF. **R-0011.** PEP's Edict published in La Jornada. **R-0012**.

210 Settlement of Contract 821. **R-0043**.

211 *See* Notices of August 16 and 17, 2017 regarding the Contractors' ability to file pleadings in the termination proceeding of Contract 821. **R-0013**. Notices of August 28 and 29, 2017 on the administrative rescission of Contract 821, pp. 1-2. **R-0014**.

212 Annulment Proceeding 2017 Judgment of October 4, 2018, p. 116. **RZ-039**.

213 Statement of Claim, ¶ 223.

187. All the actions carried out by PEP required human capital, the payment of edicts and the payment of notary public fees. PEP conducted itself in a transparent manner and in compliance with contractual and procedural formalities. Possibly the most serious aspect of this situation is that the Claimants and the Contractors are fully aware of the actions taken by PEP but have chosen to ignore them.[214]

188. The aspect to be considered by the Tribunal is that PEP's claim to enforce the Dorama Bond is only the exercise of a legal right it has and which arises from a contractual relationship, which is indeed the subject matter of a dispute before the Mexican courts.[215]

IV. SPECIFIC FACTS OF THE USMCA CASE

A. Contract 803

189. As is the case for Contract 821, Claimants make a series of allegations regarding Contract 803 and an alleged debt of Pemex for not having requested the amount of work necessary to reach the total amount set forth in Contract 803, as well as an alleged denial of justice by Mexican courts, in violation of the USMCA.

190. On February 20, 2012, PEP entered into Contract 803 with Bisell and MWS to carry out repair works of wells already drilled with the purpose of restoring their production.[216] As explained above, Contract 803 was also the result of an international public bidding procedure, which began on November 3, 2011. The bidding for Contract 803 provided for a pre-qualification phase, which consists of a prior analysis of the technical and financial capacity and experience of suppliers and contractors.[217] Finally, on January 27, 2012, PEP decided to award MWS and Bisell 60% of the total amount of the tendered works, and the remaining 40% was awarded to COSAFI del Noroeste, S.A. de C.V. ("COSAFI") and Progressive Well Service, LLC.[218]

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214 Claimants e-mail dated November 12, 2021 ("On November 9, 2021, our clients received a copy of the attached document. On November 8, apparently this document was presented to someone who was not authorized to receive it on behalf of Claimants […]"). **C-0017**.

215 *See* Statement of Claim, ¶ 226.

216 *See* Annex B.2 of Contract 803. **R-0056**.

217 *See* Article 55 (II) (e) of the Pemex Law of 2008. **R-0002**. *See* also Article 20 of the DACS. **CL-0015**.

218 *See* Award of Contract 803 Bidding. **R-0057**.

191. Contract 803 was also executed under the Pemex Law of 2008, and established a maximum amount of US$ 48 million. Likewise, Clause 4 of Contract 803 established that the remuneration would be:

> As part of the remuneration, the CONTRACTOR shall receive from "P.E.P." the amount resulting from the application of unit prices to the quantities of work carried out as total payment per unit of concept of work completed in accordance with the provisions of the contract and its annexes, those prices include the total payment to be covered to the CONTRACTOR for all direct and indirect costs arising from the work, financing, utility and additional charges.
>
> PEP shall pay the CONTRACTOR the amount of the services delivered and accepted in accordance with the conditions set forth in this contract…[219]

192. Additionally, Contract 803 had several clauses that are relevant to understand the Claimants' allegations, e.g., the clauses of national content (clause 6), completion and reception of the works (clause 11), settlement (clause 17), contractual recognition (clause 31), sources of financing (clause 38) and supply of equipment and materials (clause 39).

193. Contract 803 also specifically regulated the transportation of materials and equipment. Thus, Clause 40 of Contract 803 provided that MWS and Bisell were to transport all equipment and materials to the site where the work was to be carried out at their own expense. However, this does not mean that it was the Claimants who ultimately paid for the transportation of equipment and materials, as PEP did so.

194. Contract 803 originally foresaw a term until December 31, 2013. However, due to the expiration of such term and given that PEP sought to give continuity to the activities while a new bidding process was carried out, two amendment agreements were entered into in order to extend the execution term of Contract 803 until June 30, 2014.[220]

195. As the Tribunal can see, having gone through an international public bidding procedure, Contract 803 reflects the proposals made by MWS and Bisell during the bidding procedure. However, Claimants make a series of allegations with respect to Contract 803 that Respondent is obliged to clarify.

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219 Clause 4 of Contract 803. **C-0032**.

220 *See* clause 3 of Contract 803. Agreement 1 of Contract 803 dated February 28, 2014. R-0058. Agreement 2 of Contract 803 of June 5, 2014. **R-0059**.

196. The Claimants argue that in order to carry out the work that Pemex would request, Contract 803 required Bisell and MWS to acquire and use new equipment. Likewise, they point out that, in order to carry out the repairs, MWS and Bisell had to "acquire" a drilling rig, as well as equipment and materials.[221] For further reference, Clause 39 of Contract 803 is transcribed below:

> THIRTY-NINTH - SUPPLY OF EQUIPMENT AND MATERIALS
>
> The CONTRACTOR shall supply all Equipment and Materials, necessary during the execution of the contract in accordance with the specifications of the contract, and shall be responsible for the proper administration, handling and maintenance during the transport and storage of all equipment and materials. Likewise, 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.[222]

197. As can be seen, Clause 39 of Contract 803 only provides the obligation for the contractor (i.e., Bisell and MWS) to supply the equipment and materials necessary for the execution of the works, and established the responsibility for the delivery of materials and equipment at the place where the works were executed. This clause can in no way translate into Bisell and MWS being obliged to acquire and use new equipment to execute the works of Contract 803 as Claimants states.

198. Additionally, Contract 803 was the result of an international public bidding proceeding in which MWS and Bisell competed with other suppliers. Thus, it was MWS and Bisell themselves who proposed the equipment and stated to PEP that they had the ownership of such equipment.[223] In fact, Contract 803 itself establishes MWS and Bisell's recognition that they had the technical and financial capacity to fulfill its obligations.[224] It would be difficult to understand that the technical and financial capacity of MWS and Bisell depended precisely on Contract 803.

B. Works performed under Contract 803

199. During the term of Contract 803, PEP issued 444 work orders for MWS and Bisell to perform the repair work, and PEP paid more than US$26.5 million to MWS and Bisell. The parties

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221 *See* Statement of Claim ¶, 94.

222 Clause 39 of Contract 803. **C-0032**.

223 *See* Results of the evaluation in the prequalification stage., p. 2. **R-0060**.

224 Contract 803 ("[MWS and Bisell] [t]hey have the legal, technical and financial capacity to comply with their obligations under this contract, which they undertake to preserve during its validity"). **C-0032**.

agreed that PEP could request additional equipment.[225] Thus, on September 4, 2012, PEP requested to know if MWS and Bisell had the capacity to provide four additional drilling rigs to the three it already had.[226]

200. However, MWS and Bisell only provided six rigs.[227] This means that had the remaining equipment been provided, PEP could have issued more work orders. As of October 2013 PEP was affected by budgetary matters.[228] As a result, PEP was prevented from issuing any more work orders.

201. It is important to mention that, according to the settlement of Contract 803, during the execution of works of Contract 803, MWS and Bisell were sanctioned more than 60 times due to delays in the start of operations and for having exceeded the time foreseen for the execution of works.[229]

C. Termination of Contract 803

202. The Claimants state throughout their Statement of Claim that Contract 803 was early terminated; however, nothing could be further from the truth. Pursuant to Clause 15 of Contract 803, the parties could agree an early termination for any of the following reasons: i) unforeseen circumstances or force majeure; ii) in the event the time of a suspension could not be determined; iii) in the event there are causes that prevent the execution of Contract 803; iv) when PEP so determines; and v) when Contract 803 was not profitable or convenient for PEP.[230] However, this did not occur with Contract 803.

203. Again, Contract 803 provided for an initial term of performance until December 31, 2013, which was amended twice to extend its term until June 30, 2014. This means that, contrary to Claimants' argument, Contract 803 was naturally terminated upon expiration of its term.

204. Pursuant to Clause 11 of Contract 803, once the works were completed, PEP was to carry out a reception of works. Thus, on November 12, 2014, MWS and Bisell sent to PEP a notice of

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225 *See* Annex B (General and Particular Specifications), section C.3.8. **R-0020**.

226 PEP letter dated September 4, 2012. **C-0065**. Official communication dated July 25, 2013. **C-0067**.

227 Statement of Claim, ¶120.

228 Official communication dated October 3, 2013. **C-0068**.

229 Settlement of Contract 803. **R-0015**.

230 Clause 15 of Contract 803. **C-0032**.

termination of works under Contract 803.[231] Subsequently, on February 10, 2015, PEP, MWS and Bisell met at PEP's offices to formalize, by mutual agreement, the settlement agreement.[232] It is important to note that MWS and Bisell only intended to protect their rights to proceed under Mexican law for the payment of non-recoverable expenses.

D. Legal proceedings related to Contract 803

1. Civil Proceeding 75/2015 filed by MWS and Bisell against Pemex

205. On October 13, 2015, MWS and Bisell filed an ordinary civil lawsuit against PEP for the alleged "breach of its obligations under Contract 803", which gave rise to Civil Proceeding 75/2015 before the Eleventh District Judge in Veracruz.[233]

206. In general, MWS and Bisell claimed: i) the payment of US$ 13.7 million for expenses with respect to the equipment to execute work orders under Contract 803; ii) the payment of US$ 1.7 million for personnel expenses; iii) the payment of US$ 2.4 million for indirect construction costs; iv) US$ 2.5 million for contract profit; v) US$ 146,335.08 for construction financing costs; and vi) US$ 237,062.06 for additional charges. In addition, MWS and Bisell demanded payment of legal interest, indemnity for damages, indemnity for moral damages, and legal costs.[234]

207. The fact that MWS and Bisell claimed damages against PEP for alleged breaches incurred by PEP, means that since October 13, 2015 (i.e., the date of filing of the lawsuit in Civil Proceeding 75/2015), Claimants first became aware, or should have become aware, of the alleged breach of the USMCA and that they suffered losses or damages, since in Civil Proceeding 75/2015 they claimed more than US $21 million against PEP.[235]

208. As part of its defense, PEP asserted several exceptions and defenses, including, inter alia, (i) the exception of inadmissibility of the civil action filed by MWS and Bisell; ii) the objection of

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231 Bisell Official Letter No. BISELL-MWS-021-2014 dated November 12, 2014. **R-0061**.

232 Settlement of Contract 803. **R-0015**. The Claimants even accepted that they had mutually terminated Contract 803 with PEP. See Statement of Claim, ¶ 235.

233 *Ver* Statement of Claim, ¶ 125.

234 *Ver* Expert Report Zamora-Amézquita, ¶ 67. Lawsuit MWS and Bisell Civil Lawsuit 75/2015, pp.2-4. **R-0062**.

235 Statement of Claim, ¶ 125.

validity of the February 10, 2015 settlement agreed between MWS and Bisell with PEP, and its lack of challenge, iii) the objection of lack of action and right, since according to the stipulations agreed in Contract 803, the obligation of PEP to exhaust the total amount of Contract 803 was never agreed and iv) the objection to decline jurisdiction.[236]

209. As MWS and Bisell acknowledged in the Statement of Claim, the proceeding and the civil lawsuit "was dismissed on jurisdictional grounds".[237] This point is highly relevant for the Tribunal, the fact that Claimants have not received a favorable judgment to their interests does not mean that they can bring again their claims before this Tribunal, as decisions have already been rendered by Mexican judges under the applicable law. In other words, this Tribunal cannot be an "appeal court" to hear Claimants' claims on issues on which Mexican judges have already ruled definitively.

210. On October 15, 2015, the Eleventh District Judge dismissed the lawsuit arguing the lack of jurisdiction since the dispute was administrative in nature and not civil as pretended by MWS and Bisell. Within its reasoning, the Eleventh District Judge stated:

> Since the claims submitted by the plaintiffs through a civil ordinary procedure are related to the resolutions and interpretations of a public work contract, said claims and the matters related to their pretenses, i.e. the total payment of the benefits stated in the contract 424042803, must be submitted before the Federal Tax and Administrative Court […][238]

211. The Respondent reiterates which has been said above, this Tribunal cannot act as an appeal court on the contractual claims, particularly because Mexican courts issued decisions *(i)* by providing the access to justice, *(ii)* in accordance with deadlines provided in the applicable legislation, *(iii)* providing the right to be heard and defeated in a trial, and *(iv)* substantiating and motivating their decisions.[239]

2. MWS and Bisell's Appeal 35/2015

212. On October 20, 2015, Bisell and MWS filed the Appeal 35/2015, before the Fourth Unitary Tribunal.[240] Once MWS and Bisell's pleadings were studied, on December 30, 2015, the Appeal

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236 Answer to Civil Suit 75/2015, pp. 38-53. **R-0063**.

237 Statement of Claim, ¶ 125.

238 Appeal 35/2015 Resolution, p.5. **RZ-007**.

239 *See* Mr. Jorge Asali's Expert Report, ¶¶ 14, 144-146, 153, 158 and 162.

240 Zamora-Amézquita Report, ¶ 69.

35/2015 Judgment was issued,and the Fourth Unitary Tribunal revoked the dismissal of the Civil Proceeding 75/2015 since it deemed the nature of the action was not administrative but civil.[241]

213. Consequently, on January 6, 2016, MWS and Bisell's lawsuit was admitted by the Eleventh District Judge, which means that the Claimants had access and exercised the appropriate remedies through legal procedures so the appeal court revoked and corrected the resolution issued by the first instance court.[242] Claimants had access to judicial remedies to address the alleged deficiencies of a judicial resolution, a matter that clearly contravenes its own arguments regarding an alleged denial of justice.

3. The declinatory incident filed by PEP

214. Against the admission of the lawsuit, on January 22, 2016, PEP filed an incidental motion for the Court do decline jurisdiction due to the subject matter.[243] For this reason and according to the applicable legislation, the Eleventh District Civil Judge suspended the Proceeding 75/2015 in order to first resolve PEP's motion.[244]

215. In light of the decision of the Eleventh District Civil Judge regarding the admission of the incidental motion filed by PEP, on February 2, 2016, MWS and Bisell filed a reversal remedy. After analyzing MWS and Bisell's pleadings, on March 2, 2016, the Eleventh District Civil Judge determined that the motion for reversal was groundless.[245] Pemex's opportunity to question the Eleventh Judge's jurisdiction as well as the consequent suspension of the proceedings were explained within the reasoning of such resolution:

> That is the reason why the defendant *Pemex Exploración y Producción* is not being given a second chance to question the jurisdiction, rather it is using the legal procedure (exception) to assert its opinion regarding the jurisdiction, being thus unsuccessful the claim submitted by the appellant. (…)

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241 *See* Appeal 35/2015 Resolution, pp. 13-14. **RZ-007**.

242 Zamora-Amézquita Report, ¶ 70.

243 Under the Mexican legal system, an incidental motion (incidente) is a judicial proceeding subordinated to a main trial, addressed to resolve a matter that might interrupt or modify the main trial. This kind of motions are submitted before the judge that is deemed to have jurisdiction, requesting it to avoid studying the matter and to send the files to the competent court. All courts are obliged to suspend the proceedings when a declinatory incidental motion is filed. Mr. Jorge Asali's Expert Report, ¶ 74.

244 Mr. Jorge Asali's Expert Report, ¶¶ 74 and 94.

245 Interim Resolution of February 29, 2016, p. 3. **R-0064**.

> The former, as it is true that according to article 38 of the Federal Civil Procedures Code, all matters of inhibitory or declinatory jurisdiction suspend the proceeding.

216. In light of such scenario, the Eleventh District Civil Judge confirmed its decision of admitting PEP's incidental motion, and subsequently, it determined it lacked jurisdiction to resolve the lawsuit filed by MWS and Bisell, and ordered the files be sent to the TFJA, by issuing an interim resolution dated July 14, 2016.[246]

4. MWS and Bisell's Appeal 30/2016

217. Consequently, on August 10, 2016, MWS and Bisell filed an appeal against the Interim Resolution of July 14, 2016. Such appeal was addressed by the Fourth Unitary Court and was registered as Appeal 30/2016.[247]

218. Subsequently, the Fourth Unitary Court studied the claims submitted by MWS and Bisell, and on September 2, 2016, issued the Appeal 30/2016 Resolution ordering the dismissal of Appeal 30/2016, stating it was unable to determinate, *inter alia*, whether the appeal was filed within the applicable term.[248]

219. On September 21, 2016, the Eleventh Civil District Judge issued an interim resolution confirming the lack of jurisdiction to rule on the lawsuit filed by MWS and Bisell, and ordered the matter be sent to the TFJA, in accordance to the Appeal 30/2016 Resolution.[249]

220. Mr. Asali further addresses this matter in his report:

> Bisell and MWS Management filed an appeal against the ruling dated July 14, 2016, which was assigned to the 4th TUC. However, the 4th TUC noticed that there were certain aspects in the ruling process in the motion proceeding that made it impossible for it to

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246 Interim Resolution of July 14, 2016, p. 10. **R-0065**.

247 Zamora-Amézquita Report, ¶ 73. *See* Interim Resolution of September 21, 2016, p. 3. **R-0066**.

248 In summary, the Fourth Unitary Court concluded that it was not able to study whether the appeal was filed on time, even when it had already been admitted, as well as to evaluate the degree on which it was admitted. The former since the Interim Resolution of July 14, 2016 was issued by the secretary in charge of the office and not by the Eleventh Judge, who, in accordance to the applicable legislation did not had the legal power to issue a ruling like the Interim Resolution of July 14, 2016, unless it had the respective authorization of the Federal Judiciary Council. Consequently, such omission was a breach of the essential formalities of the proceedings, which led to declaring inadmissible the appeal submitted by Claimants. Zamora-Amézquita Report, ¶ 73. *See* Interim Resolution of September 21, 2016, p. 3. **R-0066.** Pleading of the Appeal 30/2016, **R-0067**. Interim Resolution of September 21, 2016, p. 3, **R-0066**. Mr. Jorge Asali's Expert Report, ¶ 96.

249 Zamora-Amézquita Report, ¶ 74, Interim Resolution of September 21, 2016, p. 18. **R-0066**.

> admit the appeal, so the file was returned to the 11th JD in order for it to order again the ruling of the motion proceedings. On September 21, 2016, the 11th JD again issued the ruling that solved the incompetence motion and that reproduced in all its terms the ruling dated July 14, 2016.[250]

5. MWS and Bisell's Appeal 36/2016

221. As MWS and Bisell disagreed with the Interim Resolution of September 21, 2016, they filed an appeal on October 14, 2016 before the Fourth Unitary Court, which was registered as Appeal 36/2016.[251] On January 26, 2017, the Fourth Unitary Court issued the Appeal 36/2016 Resolution which revoked the Interim Resolution of September 21, 2016.[252]

222. Claimants state, as a manner of criticism, that "[a]pproximately fifteen months had passed since Claimants had filed their claim, and its admission was still being discussed".[253] However, the lawsuit was already admitted and, in any case, the studied matter was the incompetence exception filed by PEP in use of its procedural rights.[254] It is important to clarify that the complexity of a litigation is not an equivalent to denial of justice, especially if it is considered that MWS and Bisell received favorable resolutions, and that the 11 months that had elapsed do not reflect any unjustified delay.[255] On the contrary, PEP as well as MWS and Bisell exercised the available legal remedies in order to challenge judicial resolutions. In this respect, Mr. Asali explains:

> From the analysis of evidence available to me, the delay in this trial was mainly due to the means of objection and recourses filed by the parties. In particular, PEP's motion regarding the court's lack of jurisdiction suspended the proceedings until it was ruled in the last instance by the 1st TCC. The substantiation of this motion was fully legal; I did not identify any atypical or improper conduct by the relevant courts, since Mexican law allows this type of motion to suspend the main proceedings as it pertains to an essential element of the procedure - jurisdiction of the judge - which requires a prior and special pronouncement. Crucially, the Claimants did not challenge the stay of proceedings, despite the existence of an appeal available to them to do so.[256]
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> Generally, there were several particularities during the first instance of the trial that delayed its processing, but I do not consider them to be violations of the Claimants'

250 Mr. Jorge Asali's Expert Report, ¶ 96.

251 Zamora-Amézquita Expert Report, ¶ 75.

252 Zamora-Amézquita Expert Report, ¶ 75.

253 Zamora-Amézquita Expert Report, ¶ 75.

254 *See* Mr. Jorge Asali's Expert Report, ¶ 92.

255 Mr. Jorge Asali's Expert Report, ¶¶ 14, 137, 144-146

256 Mr. Jorge Asali's Expert Report, ¶ 145.

> right to prompt justice, since these are ordinary factors that affect the vast majority of lawsuits heard by the Federal Judicial Branch. Among these factors are, in addition to the PEP's motion relating to the lack of jurisdiction, the extension of the claim by Bisell and MWS Management, the submission of expert evidence and recourses (appeals and revocations) filed by both parties.[257]

6. PEP's Indirect *Amparo* 4/2017

223. Non satisfied with the Appeal 36/2016 Judgment, on February 20, 2017, PEP filed an amparo lawsuit that was registered as Indirect Amparo 4/2017 before the First Unitary Court.[258] Once the Indirect Amparo 4/2017 was admitted, on March 9, 2017, the effects of the Appeal 36/2016 Judgment were suspended.[259] However, on May 2, 2017, the First Unitary Court issued the Amparo 4/2017 Judgment which denied the amparo to PEP. Within its reasoning the First Unitary Court stated that:

> As explained in advance, [PEP's] statements asserting that the claims, as related to an administrative contract entered into in accordance with the Law of Public Work and Related Services and its regulations, and that since it [PEP] has an administrative entity nature, the competent court to hear the claims is the Federal Tax and Administrative Court, now the Federal Court of Administrative Justice, are groundless.[260]

224. In summary, the First Unitary Court dismissed PEP's arguments since, regardless the administrative nature of the Contract 803, such situation did not impede the establishment of civil jurisdiction because what needed to be addressed was the nature of the claim, *i.e.* civil nature.[261] As the Tribunal may note, this determination was also issued in favor of MWS and Bisell.

7. PEP's Appeal for Review 233/2017

225. Not satisfied with the Amparo 4/2017 Judgment, on June 2, 2017, PEP filed an appeal for review, which was registered as Appeal for Review 233/2017 before the First Collegiate Court.[262] On May 10, 2018, the Appeal for Review 233/2017 Judgment was issued, where it was concluded that the actions originated by the Contract 803 are of private nature and were regulated by the

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257 Mr. Jorge Asali's Expert Report, ¶ 146.

258 Mr. Jorge Asali's Expert Report, ¶ 98. *See* Zamora-Amézquita Expert Report, ¶ 76.

259 Zamora-Amézquita Expert Report, ¶ 76.

260 *Amparo* 4/2017 Judgment, p. 10. **RZ-008**.

261 *See Amparo* 4/2017 Judgment, p. 12. **RZ-008**.

262 Zamora-Amézquita Expert Report, ¶ 77.

commercial legislation. In light of this, the disputes that arise from the Contract 803 could be heard by the PJF competent tribunals.[263] Mr. Asali explains such matter:

> […] PEP filed an appeal against the amparo ruling, which was heard and ruled by the First Collegiate Court in Civil Subject Matters of the Seventh Circuit ("1st TCC").108 During the substantiation of this appeal, the definitive suspension remained in effect, that is to say, the ordinary civil lawsuit remained suspended .[264]
>
> Finally, on May 10, 2018, the 1st TCC dismissed the appeal filed by PEP, thus confirming the denial of the *amparo*. With this ruling, it was firmly and definitively determined that the 11th JD was the competent judge to hear Bisell and MWS Management's claim and that it should be processed in the ordinary civil trial. As a result, on June 11, 2018, the 11th JD ordered the resumption of the trial, as the definitive suspension granted to PEP in the *amparo* trial ceased in its effects.[265]
>
> 49. It should be noted that, at the time of this proceeding, the SCJN had not yet confirmed that all disputes arising from an administrative contract –i.e., lack of payment– should be settled through administrative proceedings, regardless of the nature or type of action claimed. At this time, there were isolated discrepant criteria that still did not determined definitively and mandatorily the appropriate proceeding for such purpose.[266]

226. As it will be discussed *infra*, the fact that the Claimants had pointed out that "almost two and a half years had passed since the Claimants had filed their claim, and its admission was still being discussed", is not something that had created an unjustified delay that might constitute a denial of justice.[267] Again, both parties exercised the appropriate legal remedies to challenge the judicial decisions they deemed against their interests.

8. The resumption and expiration of the Proceeding 75/2015

227. On June 11, 2018, and once the jurisdictional matters related to Civil Proceeding 75/2015 were resolved, the Eleventh District Civil Judge ordered the resumption of the jurisdictional process and, therefore, MWS and Bisell, as well as PEP, exercised their procedural rights.[268] Two aspects are extremely relevant here.

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263 Appeal for Review 233/2017 Judgment, p. 40. **RZ-013**.

264 Mr. Jorge Asali's Expert Report, ¶ 99.

265 Mr. Jorge Asali's Expert Report, ¶ 100.

266 Mr. Jorge Asali's Expert Report, ¶ 101.

267 Zamora-Amézquita Expert Report, ¶ 77. Mr. Jorge Asali's Expert Report, ¶¶ 137, 144-146.

268 Zamora-Amézquita Expert Report, ¶ 78. Resumption order of Civil Proceeding 75/2015, p. 2. **R-0068**.

228. *First*, derived from a resolution issued on December 11, 2019 by the Eleventh District Civil Judge, some of the evidence provided by PEP was dismissed, for that reason, it filed the Appeal 1/2020 before the Fourth Unitary Court.[269] In parallel, the Eleventh District Civil Judge scheduled an evidentiary hearing. However, in accordance with the applicable legislation, since the Appeal 1/2020 was pending resolution, the hearing was deferred.[270]

229. *Second*, there were certain additional delays in the proceeding due to the Covid-19 pandemic.[271] This generated, largely, that the Appeal 1/2020 was resolved on September 23, 2020 by the Fourth Unitary Court, which ordered the admission of certain documentary evidence provided by PEP.[272]

230. As explained by Respondent's Expert, due to the world-wide pandemic occasioned by the COVID-19 virus, the Federal Judicial Branch suspended all works, halting the continuation of procedural deadlines and the filing of lawsuits in all the courts and tribunals from March 20, 2020:

> From the summary of the file that is available for public access, it is clear that the claimants well as PEP challenged several orders issued during the evidence phase. Particularly, in December 2019 PEP filed an appeal against a determination of the 11th JD that dismissed some documentary evidence previously admitted, which suspended the main proceeding until the appeal was ruled. The suspension of the proceeding prevented the evidentiary hearing scheduled for January 17, 2020 to be carried out.[273]
>
> 105. Subsequently, due to the pandemic caused by the SARS-CoV- 2 virus –known as COVID-19–, the Federal Judicial Power ("PJF" for its acronym in Spanish) suspended all of its duties, halting the continuation of procedural deadlines and trials heard by all courts and tribunals as of March 18, 2020. In September 2020, the 11th JD resumed proceedings, following the lifting of the pandemic-related general suspension of the PJF's operation.[274]
>
> 106. As a result of this circumstance, Bisell and MWS Management ceased to move forward with the proceeding, since there was no subsequent petition, brief or motion to continue the trial. This resulted that, in October 2021, the 11th JD decreed the expiration of the instance (caducidad de la instancia), which implies that, in the absence of requests

269 Appeal 1/2020. **R-0069**.

270 Judicial order of January 6, 2020. **R-0070**.

271 Judicial order of November 30, 2020. **R-0071**.

272 *See* Appeal 1/2020 Resolution, p. 16. **R-0072**.

273 Mr. Jorge Asali's Expert Report, ¶ 104.

274 Mr. Jorge Asali's Expert Report, ¶ 105.

> or substantive pleadings from the parties, the judge extinguishes the process in advance, so that all procedural acts that had been carried out are left without effect.[275]

231. On March 18, 2021, parallel to the Proceeding 75/2015, MWS and Bisell filed for the withdrawal of the trial so it could be discontinued.[276] However, MWS and Bisell's withdrawal did not have any effects since their legal representatives did not comply with the required formalities, *i.e.* to ratify the withdrawal.[277]

232. Regardless of the foregoing, the fact that the Claimants (unilaterally) decided to discontinue the Proceeding 75/2015 demonstrates that it is false that the Eleventh District Civil Judge "terminated the proceeding without deciding on the merits of the case".[278] The truth is that on October 1st, 2021, the Civil Proceeding 75/2015 expired due to procedural inactivity.[279]

233. As a result, it is evident that the Claimants: *i)* did not suffer of any lack of administration of justice nor of unjustified delays; *ii)* were not victims of denial of justice, including a lack of proper defense and due process; *iii)* there were no irregularities in the judgments, nor contradictions, regarding jurisdiction or competence matters; *iv)* the principle of *res judicata* was not breached in their detriment, and *v)* the Proceeding 75/2015 expired due to procedural inactivity from MWS and Bisell, in their role of complainants or plaintiffs.[280]

234. Again, the fact that the Claimants disagreed with the Mexican courts and tribunals' resolutions with respect to their claims regarding Contract 803 is not equivalent to a denial of justice, primarily if the fact that MWS and Bisell obtained favorable jurisdictional resolutions is considered.[281]

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275 Mr. Jorge Asali's Expert Report, ¶ 106.

276 MWS and Bisell's communication of March 18, 2021, submitted before the 11th Civil District Court, **R0073**.

277 *See* Decision of March 22, 2022, of the Eleventh Civil District Court. **R-0074**. Decision of April 5, 2021, of the 11th Civil District Court. **R-0075**.

278 Zamora-Amézquita Report, ¶ 79.

279 Expiration Resolution of the Civil Trial 75/2015, p. 3. **R-0076**. Mr. Jorge Asali's Expert Report, ¶ 106.

280 Mr. Jorge Asali's Expert Report, ¶¶ 106, 145-146, 153 and 158.

281 Mr. Jorge Asali's Expert Report, ¶ 92, 97, 99 and 100.

E. The Contract 804

235. On March 20, 2013, PEP, MWS and Bisell entered into the Contract 804. Unlike the Contract 803, Contract 804 was granted directly to MWS and Bisell due to PEP's need to have immediate response capacity to develop its production plans. The object of the Contract 804 was to carry out "integral works for intervention into land wells in the north region", *i.e.* to carry out well drilling.

236. The Claimants state that under the Contract 804, Pemex had the obligation to require at least US$ 55 million in works.[282] This assertion is inappropriate and only demonstrates the lack of understanding that the Claimants had in respect of their contractual obligations. In accordance to the 5th clause, the maximum budget of the Contract 804 was US$ 55 million, and even the 5th clause itself established that "the budged indicated above will not represent in any way for PEP the obligation to spend the maximum budged established in the contract ".[283]

237. The structure of the Contract 804 was very similar to Contract 803. For example, the Contract 804 had a clause for termination and reception of works (12th clause), settlement (18th clause), contractual recognition (33rd clause), financing sources (35th clause) as well as for equipment and materials supply (41st clause).

238. Originally, the Contract 804 provided an execution term until September 30, 2013. However, PEP and MWS and Bisell entered into two amending agreements in order to extend it until March 31, 2014.[284]

239. Similar to Contract 803, the Claimants argue that the Contract 804 required them, *inter alia,* to acquire new equipment.[285] The Claimants' assertions are mistaken. Clause 41 of Contract 804 stated that MWS and Bisell would supply all the equipment and materials necessary during the execution of the works.[286] This clause does not implies that Bisell and MWS were obliged to acquire and use new equipment to execute the works of the Contract 804.

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282 Statement of Claim, ¶ 134.

283 5th Clause (Minimum and Maximum Amount of the Contract) of the Contract 804. **C-0033**.

284 *See* 4th Clause (Term for the Execution of the Works and Term for the Execution of the Work Orders) of the Contract 804. **C-0033**. *See* also Amendment Agreement No. 2 of the Contract 804 of February 28, 2014. **R-0077**.

285 Statement of Claim, ¶ 136.

286 *See* 41st clause (Equipment and Materials Supply) of the Contract 804. **C-0033**.

240. It is important to remember that Contract 804 was granted through a direct award process to MWS and Bisell because at that moment they already were PEP's suppliers and, in theory, they already had the immediate response capacity to carry out the works of Contract 804.

241. Similar to Contract 803, during the procurement process of the Contract 804, MWS and Bisell proposed the necessary equipment for well drilling and submitted documents to allegedly demonstrate its availability, therefore, it is useless to try to make PEP –and the Respondent– responsible for the obligation of having the necessary equipment that the Claimants themselves should have had to fulfill their obligations as stated in Contract 804.

F. The works under Contract 804

242. The Claimants argue that Pemex did not act in accordance with what was agreed since it did not issue work orders during the first four months of the Contract 804 term. According to the Claimants, during this time MWS and Bisell had significant loses since they kept their equipment and employees ready and waiting to execute the works ordered by PEP.[287] The Claimants' arguments in respect to the execution of the Contract 804 are totally mistaken.

243. As mentioned *above*, Contract 804 was signed on March 20, 2013, but it was MWS and Bisell who, from the very first moment, delayed the execution of the works. MWS and Bisell even requested to postpone the the formalization of the Contract 804 to be able to submit compliance with their tax obligations to PEP.[288]

244. PEP was fully interested in receiving MWS and Bisell's services. In fact, since March 1, 2013, (*i.e.*, prior to the signing of Contract 804 and after it was notified to MWS and Bisell that they would be awarded with the Contract 804) PEP issued work orders to be executed from April 15, 2013 (*i.e.* after the formalization of the Contract 804 and during its validity).

245. Thus, it is false that PEP issued the first work order under the Contract 804 on July 12, 2013.[289] The evidence submitted by the Claimants supports the foregoing. [290]

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287 Statement of Claim, ¶ 144.

288 MWS and Bisell's request of extension, of February 28, 2013. **R-0078**.

289 Statement of Claim, ¶¶ 144 and 146.

290 The work orders issued by PEP are identified by a consecutive number of work order. Claimants mistakenly argue that the work orders "03/B3804/2013" and "04/B3804/2013" were the first two work orders issued by PEP under the Contract 804. The truth is that both orders 01/B304/2013 and 02/B304/2013

246. The following are some of the actions carried out by PEP to execute Contract 804:

- PEP tried for over four months to have MWS and Bisell present the platforms that they would use to carry out the works in order to confirm that they complied with all the necessary technical requirements ("check list").
- Starting March 8, 2013, PEP required MWS and Bisell to designate the person that would act as construction superintendent in accordance with Contract 804, as well as the location and address of their central and field offices, which was not addressed by MWS and Bisell until July 12, 2013, *i.e.*, more than four months after PEP made the request and almost four months after formalizing Contract 804.[291]
- On March 22, 2013, PEP carried out an inspection on the "PMX-642 (CPL-58)" equipment and found out that it was dismantled and in the process of maintenance.[292]
- On June 26, 2013, a meeting took place where it was agreed that on June 28, 2013, MWS and Bisell would inform the date when they would provide, among other things, the data sheets of the equipment. The Claimants did not provide such information on the agreed date.[293]
- On August 14, 2013, PEP carried out an inspection of the equipment proposed by MWS and Bisell and found the equipment dismantled and with missing pieces.[294]
- On August 19, 2013, PEP carried out an inspection on the "BISELL 1" equipment and concluded that such equipment was damaged and in the process to be repaired.[295]

247. On the other hand, in July 2013, MWS and Bisell received the work orders 03/B3804/2013 and 04/B3804/2013. The work order 03/B3804/2013 provided an execution term from July 19 to August 19, 2013, while the order 04/B3804/2013 provided an execution term from July 25, to August 25, 2013.[296]

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are the first two work orders issued in accordance to the Contract 804. Statement of Claim, ¶¶ 144 and 146, and footnotes 256 and 257. MWS and Bisell's communication of May 27, 2013, p. 2. **R-0079**.

291 *See* PEP's communication of March 8, 2013. **R-0080**. MWS and Bisell's communication of July 12, 2013. **R-0081**.

292 PEP's communication of March 25, 2013. **R-0082**.

293 PEP's communication of July 4, 2013. **R-0083**.

294 PEP's communication of August 14, 2013. **R-0084**.

295 PEP's communication of August 21, 2013. **R-0085**.

296 PEP's official communication (Residence of the Contract) No. 227-21000-21600-2010-2013 of July 12, 2013, **C-0076**. Work Order No. 004/B3804/2013. **C-0077**.

248. It was not until August 21, 2013 that MWS and Bisell intended to initiate the equipment allocation for the execution of the work order 03/B3804/2013, that is, beyond the execution term stated in the work order itself.[297]

249. After that, on September 2, 2013, PEP internally decided to suspend well drilling, giving priority to termination works in order to be able to comply with the operation schedule and PEP's production goals. In the same communication it was stated that, until that date, MWS and Bisell had not presented their drilling equipment.[298] PEP informed this situation to MWS and Bisell.[299]

250. As it may be observed, PEP's lack of issuance of work orders and their non-performance was due to MWS and Bisell's lack of response and inaction.

G. The termination of Contract 804

251. The Claimants argue that Contract 804 was early terminated.[300] It is important to clarify that the figure of "early termination" implies a series of procedures specifically stablished in the contract itself.[301]

252. Notwithstanding, Contract 804 was not early terminated, and like Contract 803, Contract 804 terminated naturally when its validity expired.

253. On April 10, 2015, PEP, MWS and Bisell met in PEP's offices in order to sign the settlement. Despite the fact that PEP issued four work orders during the term of Contract 804, none of them was executed. Therefore, the parties expressly stated in the settlement –by mutual

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297 As indicated before, PEP had carried out an inspection of the MWS and Bisell's equipment called "BISELL 1" on August 19, 2013, and found out that the equipment was damaged and in process to be repaired. PEP indicated that the equipment did not have the corresponding authorization and stated that, up to that date, the corresponding "check list" had not been carried out. Therefore, PEP notified MWS and Bisell that it would not be responsible for the decisions made in respect to the mobilization of the equipment. MWS and Bisell's communication of August 21, 2013. **R-0086**. PEP's communication of August 21, 2013, **R-0085**.

298 PEP's internal communication of September 2, 2013. **R-0087**.

299 *See* PEP's official communication (Residence of the Contracts) No. 227-21000-21600-2547-2013 of September 2, 2013. **C-0078**.

300 Statement of Claim, ¶ 153.

301 Particularly, Contract 804 considered the situations in which the contract might be early terminated: *i)* unforeseen circumstances or force majeure; *ii)* not to be able to determine the temporality of the total suspension of the works; *iii)* in the event there are causes that prevent the execution of the contract; *iv)* in the situations dully justified by PEP; and *v)* when the total or partial nullity of the actions that gave origin to the contract was determined. *See* 16th clause (Early Termination) of the Contract 804. **C-0033**.

agreement– that indeed the works were not carried out in accordance with Contract 804, and therefore, there were no estimations –a type of bill– to be reported.[302]

254. MWS and Bisell sought to reserve their rights to claim the payment of the 40% of the amount provided in Contract 804, non-recovered expenses and waiting timeouts.[303] Additionally, the lack of execution of the works in accordance to Contract 804 was caused by MWS and Bisell for the reasons expressed above.[304]

H. The legal proceedings related to Contract 804

1. The Civil Proceeding 120/2015 filed by MWS and Bisell against PEP

255. On December 8, 2015, as a result of the termination of Contract 804, MWS and Bisell filed a civil lawsuit against PEP for an alleged "breach of its obligations under the 804 Contract", which was registered as Civil Proceeding 120/2015 before the Eleventh District Judge.[305]

256. As in Civil Proceeding 75/2015, the Civil Proceeding 120/2015 reflects the full exercise of the parties' procedural rights and as recognized by the Claimants, it was "concluded that the lawsuit was administrative in nature".[306] Therefore, this Tribunal cannot allow the Claimants to use a denial of justice claim in order for the Tribunal to act as an "appellate body" on the resolutions of Mexican courts, simply because Claimants disagree with such resolutions.

257. In Civil Proceeding 120/2015, MWS and Bisell claimed the payment of US$ 22 million by concept of works that were supposed to be performed in accordance with the Contract 804, interest; compensation for damages; compensation for moral damages, and the payment of legal costs.[307]

258. The mere fact that MWS and Bisell claimed damages against PEP for alleged breaches means that since December 8, 2015, the Claimants first acquired, or should have first acquired,

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302 *See* Settlement of Contract 804, p. 3. **R-0016**.

303 *See* Settlement of Contract 804, p. 4. **R-0016.**

304 According to the 17th clause of Contract 804, MWS and Bisell had the possibility to require PEP the recognition of the suspension and even to request a payment for non-recoverable expenses. However, MWS and Bisell did not require the recognition of the suspension nor the payment of non-recoverable expenses to the works resident, therefore, according to what was agreed, such right was extinguished. *See* 17th clause of the Contract 804. **C-0033**.

305 *See* Statement of Claim, ¶ 155.

306 *See* Statement of Claim, ¶ 156.

307 *See* Civil Proceeding 120/2015 lawsuit, p. 2. **R-0088**.

knowledge of the alleged USMCA breach and that they had suffered from loses and damages, as they claimed more than US$22 million dollars against PEP in the Civil Proceeding 120/2015.[308]

259. On December 9, 2015, the Eleventh District Judge dismissed the lawsuit due to lack of jurisdiction in reason of the subject matter, asserting that the matter in litigation was not civil nature but administrative, as the claim was based in a public works contract, which in turn is based in administrative provisions.[309]

260. Mr. Asali explains the reasoning of the dismissal resolution as follows:

> On December 8, 2015, Bisell and MWS Management filed a lawsuit against PEP in an ordinary civil trial before the District Courts in the State of Veracruz, in which they claimed the payment of USD $22,000,000.00 as the minimum amount not exercised under Contract 804, together with the payment of other ancillary concepts. This claim was also assigned to the 11th DJ, who determined to dismiss it through the ruling dated December 9, 2015. Essentially, the 11th DJ considered that an ordinary civil trial was not the adequate forum for the plaintiffs' claims, and that the claim should have been filed before an administrative court, by virtue of the nature and object of Contract 804.[310]

2. MWS and Bisell's Appeal 1/2016

261. On December 16, 2015, Bisell and MWS challenged the Civil Proceeding 120/2015 dismissal, which was registered as Appeal 1/2016 before the Third Unitary Court. After examinng the Claimants' claims, on February 12, 2016, the Third Unitary Court issued the 1/2016 Judgment which confirmed the Eleventh District Judge's decision.[311]

262. Thus, the Third Unitary Court confirmed that the administrative procedure was the correct way to submit claims related to the Contract 804 against PEP.[312]

3. MWS and Bisell's Direct Amparo 214/2016

263. MWS and Bisell exercised their procedural rights and, therefore, on March 14, 2016, they filed the Direct Amparo 214/2016 which was addressed by the First Collegiate Court.[313]

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308 *See* Statement of Claim, ¶ 155.

309 Zamora-Amézquita Expert Report, ¶ 87. *See* Dismissal Judgment Civil Proceeding 120/2015, p. 20. **RZ-017**.

310 Mr. Jorge Asali's Expert Report, ¶ 107.

311 *See* Appeal 1/2016 Resolution, p. 22. **RZ-018**.

312 Mr. Jorge Asali's Expert Report, ¶ 108.

313 Zamora-Amézquita Expert Report, ¶ 89.

264. On October 18, 2016, once MWS and Bisell's claims were studied, the First Collegiate Court issued the Direct Amparo 214/2016 Judgment which denied the amparo to MWS and Bisell since their claims were not of civil nature and, therefore, the administrative instance was competent to address them.[314]

265. It is evident that the Claimants fully exercised their procedural rights before the diverse legal authorities that addressed the Civil Proceeding 120/2015, since it was determined in the amparo that the Eleventh District Judge as well as the Third Unitary Court did not breach MWS and Bisell's fundamental rights of legality, legal security and effective legl protection established in Mexico's Constitution.

266. The Mexican courts never refused to hear the Proceeding 120/2015. Likewise, the time in which justice was administered was reasonable, taking into account that Civil Proceeding 120/2015 reached a third instance. In clear terms, the 10-month term that Claimants recognized as the duration of the Proceeding 120/2015, is a reasonable period of time.

267. The Respondent urges the Tribunal to consider this point, since Claimants' disagreement with the resolutions of Mexican courts does not amount to a denial of justice. The foregoing considering that Claimants had the legal opportunity pursue their claims through the administrative channels, just as they did through the proceeding described below.

4. Annulment Proceeding 2019 filed by MWS and Bisell

268. On March 5, 2019, MWS and Bisell filed a nullity lawsuit against several authorities before the TFJA ("Annulment Proceeding 2019").[315] In this trial, MWS and Bisell claimed: *i)* the breach of Contract 804; and *ii)* the nullity of the minutes of a conciliatory hearing of January 21, 2019,

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314 *See* Amparo Judgment of the Civil Proceeding 120/2015, p. 29. **R-0089**.

315 Zamora-Amézquita Expert Report, ¶ 91. Annulment Proceeding 2019 filed before the Sixth Metropolitan Regional Chamber of the TFJA as file No. 5403/19-17-06-5. MWS and Bisell appointed as defendant authorities to: *i)* the Public Function Secretariat, *ii)* Pemex's Unit of Responsibilities, *iii)* PEP's Delegation of the Unit of Responsibilities, *iv)* the Responsibilities Area of PEP's Delegation of the Unit of Responsibilities, *v)* the General Director of Pemex and *vi)* the General Director of PEP. Lawsuit of the Administrative Trial 2019, p. 4. **R-0090**. *See* Mr. Jorge Asali's Expert Report, ¶ 110 and 147.

issued in the conciliatory proceedings before PEP's Unit of Responsibilities.[316] The trial was addressed by the TFJA Sixth Chamber.

269. As background, MWS and Bisell were dissatisfied with the agreement in the Settlement of Contract 804, therefore they initiated a conciliatory proceeding in order to obtain a favorable result with respect to the alleged lack of payment of the services provided to PEP derived from the Contract 804.[317] Under this conciliation proceeding, no agreement was reached between the parties, but their rights were safeguarded so that they could exercise them before the corresponding legal instances.[318]

270. Therefore, MWS and Bisell filed the Annulment Proceeding 2019, and on March 11, 2019, the Sixth Chamber of the TFJA issued a resolution dismissing MWS and Bisell's lawsuit since it did not comply with the admissibility requirements established in the applicable law (*i.e.*, the Federal Law of Contentious-Administrative Procedure).[319]

5. Complaint Appeal filed by MWS and Bisell

271. Naturally, MWS and Bisell challenged the decision through a complaint appeal, which was admitted and addressed by the Sixth Chamber of the TFJA on May 17, 2019.[320] However, on July 12, 2019, the Sixth Chamber of the TFJA issued an interim resolution which determined to partially revoke the Annulment Proceeding 2019 Judgment, admitting only the claim of MWS and Bisell regarding the breach of Contract 804.[321]

272. Consequently, on October 1, 2019, the Sixth Chamber of the TFJA admitted the lawsuit, only with respect to the breach of the Contract 804.[322] However, –since MWS and Bisell thus

316 Annulment Proceeding 2019 Lawsuit, pp. 3-4. **R-0090**. Conciliatory Act of January 21, 2019. **R-0091**.

317 Annulment Proceeding 2019 Lawsuit, p. 10. **R-0090**. The conciliatory proceeding was registered before Pemex's Unit of responsibilities as conciliatory authority.

318 Conciliatory Act of January 21, 2019, p. 3. **R-0091**.

319 Zamora-Amézquita Expert Report, ¶ 93. Annulment Proceeding 2019 Resolution of December 2, 2021 p. 2. **RZ-025**. LFPCA Article 2, **R-0092**. Organic Law of the TFJA Article 3, **R-0093**.

320 Nullity Lawsuit 2019 Decision of July 2, 2019, p. 1. **RZ-019**.

321 Annulment Proceeding 2019 Resolution of December 2, 2021, p. 2. **RZ-025**. Zamora-Amézquita Expert Report, ¶ 94.

322 Decision on the Admission of the Annulment Proceeding 2019, **RZ-020**.

designated it– PEP's Unit of Responsibilities –which does not belong to Pemex, but to the Public Function Secretariat– was the only authority served as defendant authority so it could submit certain documents in the Annulment Proceeding 2019.

6. Complaint Appeal filed by PEP's Unit of Responsibilities

273. Not satisfied with the former, on December 10, 2019, PEP's Unit of Responsibilities filed a complaint appeal in order to challenge de admission of the Annulment Proceeding 2019 Lawsuit.[323] On January 2, 2020, the Sixth Chamber of the TFJA addressed this appeal, where PEP's Unit of Responsibilities argued that it must not be served as defendant authority since it was not a party to the Contract 804, and therefore, PEP was the only one that had to be served.[324]

274. The Sixth Chamber of the TFJA, through an interm decision of August 20, 2020, determined that PEP's Unit of Responsibilities was not a party to the Contract 804, and ordered the admission of the Annulment Proceeding 2019 Lawsuit to be partially revoked.[325]

275. On December 1st, 2020, a second decision on the admission was issued and PEP was served as defendant authority and required to submit the administrative files with respect to the conciliatory proceeding, since it was offered and admitted as MWS and Bisell's evidence.[326]

7. Complaint Appeal filed by PEP

276. Not satisfied, on March 8, 2021, PEP filed a complaint appeal against the new decision on the Annulment Proceeding 2019 Lawsuit admission, addressed to the Sixth Chamber of the TFJA and which was admitted on August 18, 2021.[327] In summary, PEP argued that such file was not

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323 Zamora-Amézquita Expert Report, ¶ 96. Annulment Proceeding 2019 Resolution of December 2, 2021, p. 2. **RZ-025**.

324 Interim Decision of August 20, 2020 of the Annulment Proceeding 2019, **RZ-021**. It is important to mention that MWS as well as Bisell had the opportunity to express what they deemed convenient with respect to what PEP argued in the aforementioned appeal, however, they decided not to do it. Consequently, their right to make statements expired by the issuance of a decision in March 13, 2020.

325 Interim Decision of August 20, 2020 of the Annulment Proceeding 2019, pp.7-8 ("[…] it is appropriate to partially revoke the resolution of October 1, 2019, in order to issue another one in which PEMEX-Exploración y Producción will be considered as the defendant authority in this matter. […]). **RZ-021**.

326 Resolution of December 2, 2021in the Annulment Proceeding 2019, p. 2, **RZ-025**. Interim Decision of August 20, 2020 of the Annulment Proceeding 2019, pp.7-8, **RZ-021**.

327 Resolution of December 2, 2021, Nullity Lawsuit 2019, p. 3, **RZ-025**.

related to MWS and Bisell's lawsuit, and that the lawsuit was only admitted with respect to the breach of the Contract 804.[328]

277. Subsequently, the Sixth Chamber of the TFJA determined that the file in question could not be admitted as evidence in the Annulment Proceeding 2019:

> […] the administrative file corresponding to the conciliatory proceeding number UR-DPEP-R-CONC-23/2018 issued by the Unit of Responsibilities of *Petróleos Mexicanos* of the Public Function Secretariat, does not correspond to the claims argued in this litigation, since it is originated from a diverse (conciliatory) proceeding, and since the aforementioned file of the conciliatory proceeding number UR-DPEP-R-CONC-23/2018, is not within the scope of article 14, section V, of the Federal Law of Contentious-Administrative Procedure, the Instructor Magistrate in this litigation should have not required it.[329]

278. Consequently, the Sixth Chamber of the TFJA considered appropriate the admission of the complaint appeal filed by PEP and revoked the new decision on the admission only with respect to the admission of the administrative file of the conciliatory proceeding followed before the Unit of Responsibilities, as evidence.[330]

279. It is unfortunate that the Claimants insist that there were alleged efforts from PEP to "obstruct, delay, derail or sabotage" the Annulment Proceeding 2019.[331] The fact that PEP exercised its procedural rights and filed the legal remedies it had to: *i)* challenge the admission of the lawsuit, *ii)* challenge the claim of including someone as part of the lawsuit (*i.e.*, the Unit of Responsibilities) who was not party to the Contract 804, and *iii)* challenge the inadmissible evidence, in no way amount to denial of justice by the Mexican courts.[332]

280. As it is described by the Respondent's expert, Mr. Jorge Asali:

> This administrative trial does not present an excessive or prolonged duration as referred to in the Zamora-Amézquita Report. The time elapsed to rule the appeals filed in this proceeding was ordinary. In any case, the only delay I notice stemmed from the decision made by Bisell and MWS Management to sue authorities other than PEP (*i.e.*, the Ministry of Public Administration, the General Director of Pemex and the Head of the Responsibilities Area of the Delegation of the Responsibilities Unit in PEP), that resulted in multiple appeals aimed at determining which authority should be part of the

328 Complaint Appeal of March 5, 2021, Nullity Lawsuit 2019, **R-0097**.

329 Resolution of December 2, 2021, Nullity Lawsuit 2019, p. 5, **RZ-025**.

330 Resolution of December 2, 2021, Nullity Lawsuit 2019, p. 7, **RZ-025**.

331 Zamora-Amézquita Report, ¶ 101.

332 *See* Memorial, ¶ 159.

> proceeding. Thus, the delays alleged by the Experts are attributable to the controversial decision to include, as part of the lawsuit, authorities external the contract´s execution.[333]

281. It is important to mention that MWS and Bisell had the opportunity to express what they deemed convenient with respect to PEP's arguments in the motion for revocation, however, they decided not to do it. Additionally, it is false that "for over five years" the Claimants sought to resolve the dispute with Pemex through the Annulment Proceeding 2019, since it was initiated on March 5, 2019, and MWS and Bisell required the Chamber to dismiss it on June 3, 2022.[334] Therefore, the Respondent reserves its right to provide further details on this situation, since it also demonstrates the lack of jurisdiction of this Tribunal because MWS and Prize's waivers submitted on March 25, 2021, as Exhibit **C-0007** are not effective, as this means they were pursuing damages in a domestic court proceeding long after they submitted waivers claiming that they were not doing so.

282. The truth is that the TFJA provided justice in a prompt and expedite manner, as it is demonstrated in Mr. Jorge Asali's Expert Report, the average time to resolve litigations of this nature had not even elapsed.[335]

I. Aspects related to the Contract 809

283. In an attempt to expand their claims, the Claimants argue they received a less favorable treatment than the one accorded to Integradora and Zapata, who, they think, were in like circumstances.

284. Claimants argue that, based on public information, the Contract 809 is very similar to the Contracts they had with PEP.[336] However, the Claimants do not explain how is it that they and Integradora and Zapata are in "like circumstances", and only state that: *i)* the Contracts were signed in relatively similar dates to the date in which the Contract 809 was signed; *ii)* the Contracts practically share the same title than the Contract 809, *iii)* because of the shared title it appears to be for the same type of works than the Contract 809; *iv)* under both Contracts and the Contract 809 Pemex was obliged to require a certain amount of work in Chicontepec; *v)* the Contract 809

333 Mr. Jorge Asali's Expert Report, ¶ 147.

334 *See* Statement of Claim, ¶ 160. Mr. Jorge Asali's Expert Report, ¶ 115.

335 Mr. Jorge Asali's Expert Report, ¶¶ 14 and 147.

336 Statement of Claim, ¶¶ 228, 328.

established an amount of US$ 24 million, and *vi)* as it happened to the Claimants, Pemex apparently failed to act in accordance to what it was agreed since it did not require Integradora and Zapata the amounts of work to comply with the amount stated in the Contract 809.[337]

285. The truth is that, even when Integradora and Zapata signed the contract with PEP for service supply, the former and the Claimants were not in like circumstances. In order for the Tribunal to have a better understanding, the Respondent will now explain the main characteristics of the Contract 809.

286. On March 1st, 2013, PEP, Integradora and Zapata entered into the Contract 809. Unlike what happened with the Contracts 803 and 821 –which were granted through international public tender– Contract 809 was granted through a direct award process, that is, it was granted directly to Integradora and Zapata, since PEP needed to have immediate response capacity to develop its production plans.[338]

287. The object of Contract 809 was to carry out well drilling, which is different to the works in the Contract 803, *i.e.*, reparation of wells already drilled with the objective to restore their production.

288. Like any contract entered into by Pemex and its Subsidiary Productive Companies, the structure of the Contract 809 contained clauses for termination and reception of the works (12th clause), rescission (15th clause), early termination (16th clause), settlement (18th clause) and contractual recognition (33rd clause).

289. Originally, Contract 809 provided an execution term from March 1st to September 30, 2013.[339] However PEP, Integradora and Zapata entered into an amendment agreement in order to extend the validity of the Contract 809 to March 31, 2014.[340]

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337 Statement of Claim, ¶ 328.

338 *See* Declaration 1.5 (PEP's Declaration) of Contract 809. **R-0098**.

339 4th Clause (Execution term for the works and execution term for the Work Orders), Contract 809. **R-0098**.

340 *See* 4th clause (Execution term for the works and execution term for the Work Orders), Contract 809. **R-0098**. *See* also Settlement of the Contract 809, p. 2. **R-099**.

290. Six work orders were issue under the Contract 809. Integradora and Zapata received the first work order on March 1, 2013, and were required to have an inspection of their equipment on April 5, 2013.[341]

291. It is important to notice that the works under the Contract 809 were suspended due to unforeseen circumstancies or force majeure due to the flooding in one of the wells after a tropical storm.[342] It is evident that this situation is atypical to the circumstances of each of the Contracts 803, 804 and 821.

292. Additionally, unlike the Contract 821 –which was administratively rescinded due to breach of the Claimants themselves– Contract 809 terminated naturally because its validity expired. In light of this situation, on August 21, 2015, PEP, Zapata and Integradora had a meeting in PEP's offices to carry out the settlement of the Contract 809.[343]

293. The Claimants refer to the minute of April 9, 2018, signed by PEP, Zapata and Integradora to demonstrate an alleged less favorable treatment. Actually, such minute demonstrates that –unlike what happened to Contracts 803, 804 and 821– there was an unforeseen circumstance or force majeure in the execution of the works, since there was a flooding in the well where the works were carried out due to the tropical storm "Fernand".[344]

294. Likewise, it is important to note that Zapata and Integradora had the intention to conciliate their differences with PEP, which is evidenced by four conciliation hearings carried out.[345] Conversely, it appears that MWS and Bisell did not take advantage of that proces, emphasizing that, only under the Contract 803, MWS and Bisell initiated a conciliatory process but the Claimants did not even attend the conciliatory hearing.[346]

295. Unlike the Claimants' claims –who demanded the payment of the minimum amount of the contracts– Zapata and Integradora demonstrated they were economically affected and such effects

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341 *See* Minute of the Contract 809 of September 27, 2013, p. 4. **R-0100**.

342 *See* PEP's Communication of December 10, 2013. **R-0101.**

343 *See* Settlement of Contract 809, p. 2. **R-0099**.

344 Minute of April 9, 2018, p. 2. **C-0062.**

345 Minute of April 9, 2018, p. 3. **C-0062.**

346 *See* Conciliatory hearing minute of the Contract 803, p. 2. **R-0102**. Conciliatory hearing minute of the Contract 804. **R-0091**.

were covered by PEP.[347] This cannot be erroneously understood as if PEP would have paid Zapata and Integradora the amount provided for in the Contract 809.

296. As the Tribunal will be able to appreciate, Claimants and Zapata and Integradora were not in like circumstances and, in any case, the Claimants have the burden to prove that the Contracts 803, 804, 821 and 809 were in like circumstances.

V. THE TRIBUNAL LACKS JURISDICTION

297. The Claimants argue that the Tribunal has jurisdiction as they satisfy the procedural and jurisdictional requirements of the NAFTA and USMCA since, allegedly, *i)* they are investors from the United States of America, *ii)* they carried out an investment in Mexico and *iii)* they meet the procedural conditions established in the NAFTA articles 1118 to 1121 as well as in Annexes 14-D and 14-E of the USMCA.[348]

298. In order to reach those conclusions, the Claimants carried out an "analysis" of a few paragraphs to "demonstrate" that they are investors from the United States of America.[349] Similarly, they conclude in no more than three pages –and actually intend to demonstrate to the Tribunal– that they made investments in accordance with the NAFTA and USMCA.[350] There is no doubt that the Claimants have the burden to prove the Tribunal it has jurisdiction to address their claims, however, they simply have not done so.

299. Likewise, they intend to submit claims on behalf of a company without submitting its necessary waivers.[351] The Claimants have also tried to consolidate claims under different treaties, which is not even allowed in the treaties to which they refer. In clear words, Mexico did not give any consent to resolve an Investor-State dispute based under two different treaties.

300. As the Tribunal will observe, the Claimants' claims have severe defects that directly affect its jurisdiction, therefore, after carrying out an objective study, it will be able to determine that *i)* it does not have jurisdiction over the claims related to the Contract 821 under the NAFTA and the

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347 Minute of April 9, 2018, pp. 5-6. **C-0062**.

348 Statement of Claim, ¶ 253.

349 Statement of Claim, ¶¶ 254-258.

350 Statement of Claim, ¶¶ 259-264.

351 Statement of Claim, ¶ 258.

ICSID Convention and *ii)* it does not have jurisdiction over the claims related to the Contracts 803 and 804 under the USMCA.

A. The Claimants have improperly sought to consolidate claims under different treaties

301. Article 14.2(4) of the USMCA states that "an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts." Claimants have improperly and unilaterally sought to consolidate claims under the NAFTA Chapter XI (through USMCA Annex 14-C) and under USMCA Article 14. D.3. The Parties to the USMCA did not authorize –much less gave their consent to– a single Investor-State tribunal to hear claims under Annex 14-C and Annex 14-D simultaneously.

302. Article 31(1) of the Vienna Convention specifies that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In this instance, the existing consolidation provisions found in NAFTA and USMCA must be given meaning, *i.e.*, Articles 1126 and 14.D.12, respectively. Neither article provides for consolidation between both Treaties.

303. Under NAFTA Article 1126(2), a tribunal may only consolidate claims that "have been submitted to arbitration under [NAFTA] Article 1120." Read plainly, consolidation under the NAFTA is limited to claims under the NAFTA. Likewise, under USMCA Article 14.D.12(1), a tribunal may only consolidate claims that "have been submitted separately to arbitration under [USMCA] Article 14D.3.1." Here again, consolidation under Annex 14-D is limited to claims brought under Annex 14-D, which means that the alleged existing investments under Annex 14-C are not included.

304. In addition, USMCA Article14.2(4) states that "an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)." It lists the three annexes in a disjunctive manner, using the word "or" instead of "and." The article "or"

is used to indicate a choice between one or the other.[352] USMCA Article 14.2(4) uses the word "or" to indicate a choice between the three different dispute resolution options set out in Annexes 14-C, 14-D and 14-E. Had the treaty Parties wanted to permit consolidation of claims brought under different annexes, it would have used different wording.

305. The limitations written into NAFTA Article 1126 and USMCA Article 14.D.12 establish that the Parties to these Treaties addressed the subject of consolidation, and limited the possibility of consolidation by the terms expressed in those provisions. Consolidation is only available *ex post* the establishment of arbitration tribunals and does not encompass the self-consolidation attempted by the Claimants. Self-consolidation is beyond the scope of the Respondent's consent to arbitration and is outside this Tribunal's jurisdiction.

306. In summary, the treaties do not overlap with each other, except as expressly provided therein. There is no provision in either NAFTA Chapter XI or USMCA Chapter 14 that allows the Claimants to merge separate claims under separate Treaties into a single arbitration proceeding.

307. The Claimants' legal strategy —or severe lack of knowledge— has as a consequence that the Tribunal must conclude that it lacks jurisdiction to address the Case ARB/21/25 since the Parties to the NAFTA and the USMCA did not grant their consent to investor claimants submitting their claims before one investor-State tribunal under different international investment treaties.

B. The Tribunal lacks jurisdiction on the claims regarding Contract 821 under NAFTA and the ICSID Convention

308. The Claimants have brought their claims regarding Contract 821 under the NAFTA, as incorporated into the USMCA through Annex 14-C. There are several reasons why the Tribunal lacks jurisdiction over those claims, each of which provides an independent justification for their dismissal.

309. It is important to mention that the burden to prove that the facts and conditions to establish the Tribunal's jurisdiction *ratione voluntatis, ratione temporis, ratione personae* and *ratione materiae*, under NAFTA, is borne by the Claimants,[353] burden that the Claimants have not met.

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352 Merriam-Webster Dictionary, "Or" ("used as a function word to indicate an alternative: coffee or tea, sink or swim [….]") **R-0103**.

353 *Abaclat et al. v. República de Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, August 4, 2011, ¶ 678. ("it is Claimants who bear the burden to prove that all conditions for

310. As the Tribunal will find, the case presented by the Claimants under the NAFTA and the ICSID Convention has jurisdictional flaws. Specifically, the Tribunal will be able to corroborate that Claimants: *i)* have previously argued breaches to NAFTA provisions in judicial proceedings before Mexican courts, *ii)* did not submit the Drake-Finley waivers provided for in NAFTA Article 1121; *iii)* did not demonstrate they carried out an "investment" in the sense provided for in NAFTA; *iv)* did not demonstrate how one of their alleged investments complies with the elements of the ICSID Convention Article 25(1); *v)* did not demonstrate a "legacy investment" when the USMCA came into force; *vi)* did not demonstrate that they are actual owners or that they have control over the Mexican companies or the alleged investments in question; *vii)* the claims are prescribed under NAFTA Articles 1116(2) and 1117(2); and *viii)* they are filing contractual claims, which are outside the Tribunal's jurisdiction under NAFTA.

1. Claimants made claims under NAFTA in Mexican court proceedings that they cannot now raise in this arbitration

311. NAFTA Article 1120(1) provides:

> Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:
>
> (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
>
> (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
>
> (c) the UNCITRAL Arbitration Rules.
>
> [Emphasis added]

312. Likewise, NAFTA Annex 1120.1 establishes:

> Annex 1120.1: Submission of a Claim to Arbitration

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the Tribunal's jurisdiction and for the granting of the substantive claims are met."). **RL-0018**. *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014, ¶ 118. ("Although it is the Respondent which has here raised specific jurisdictional objections, it is not for the Respondent to disprove this Tribunal's jurisdiction. Under international law, as a matter of legal logic and the application of the principle traditionally expressed by the Latin maxim "actori incumbit probatio", it is for the Claimant to discharge the burden of proving all essential facts required to establish jurisdiction for its claims. Such jurisdictional facts are not here subject to any "prima facie" evidential test; and, in any event, that test would be inapplicable at this stage of the arbitration proceedings where the Claimant (as with the Respondent) had sufficient opportunity to adduce evidence in support of its case on the bifurcated jurisdictional issues and for the Tribunal to make final decisions on all relevant disputed facts".). **RL-0019**.

> Mexico
>
> With respect to the submission of a claim to arbitration:
>
> (a) an investor of another Party may not allege that Mexico has breached an obligation under:
>
> (i) Section A or Article 1503(2) (State Enterprises), or
>
> (ii) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,
>
> both in an arbitration under this Section and in proceedings before a Mexican court or administrative tribunal; and
>
> (b) Where an enterprise of Mexico that is a juridical person that an investor of another Party owns or controls directly or indirectly alleges in proceedings before a Mexican court or administrative tribunal that Mexico has breached an obligation under:
>
> (i) Section A or Article 1503(2) (State Enterprises), or
>
> (ii) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,
>
> The investor may not allege the breach in an arbitration under this Section.
>
> [Emphasis added]

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

> Because the NAFTA will give rise to private rights of action under Mexican law, Annex 1120.1 avoids subjecting the Mexican Government to possible "double exposure" by providing that a claim cannot be submitted to Chapter Eleven arbitration where the same claim has been made before a Mexican court or administrative tribunal.[354]

314. To be clear, the restriction established by Annex 1120.1 is completely distinct from the "conditions precedent" to submission of a claim to arbitration established by NAFTA Article 1121, including the requirement to waive the right to initiate or continue any proceedings with respect to measures that are the subject of the investment arbitration. Annex 1120.1 imposes a genuine "fork in the road" requirement: once the Claimants pursued their claim of NAFTA violations in the Mexican courts, they lost the right to bring the same legal claims under NAFTA Chapter Eleven.

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[354] The North American Free Trade Agreement Implementation Act, Statement of Administrative Action, November 3, 1993, p. 146. **R-0104**.

The fact that the Mexican legal proceedings are not currently active is irrelevant; the NAFTA does not allow the Claimants to have "two bites of the apple" in alleging violations of Section A of the NAFTA.

315. As discussed above, on January 18, 2019, Drake-Finley filed the Direct Amparo 74/2019, which was addressed by the Fourteenth Collegiate Court in Administrative Matters of the First Circuit. Drake-Finley argued that the Annulment Proceeding 2017 Resolution was unconstitutional and that it breached NAFTA Articles 1101, 1104 and 1105:[355]

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

316. In the Direct Amparo 74/2019 Judgment, the Fourteenth Collegiate Tribunal considered as ineffective Drake-Finley's arguments since:

> In its ninth concept of violation, the applicants for constitutional protection argue that the issuance of the controverted resolution breached, to their detriment, the Political Constitution of the United Mexican States article 1; articles 8, 10 and 17 of the Universal Declaration of Human Rights; articles 8 and 17 of the American Convention on Human Rights, and 50 of the Federal Law of Contentious-Administrative Procedure.
>
> The above, since no interpretation in accordance to the *pro homine* principle was made on their favor, with respect to articles 1101, 1104 and 1105 of the North American Free Trade Agreement.
>
> […] the rules of treatment in commercial matters are established in those three legal provisions, which have not been considered nor prioritized at a human rights level.
>
> Consequently, the request made by the plaintiffs is ineffective, since articles 1101, 1104 and 1105 of the North American Free Trade Agreement do not establish human rights

[355] *See* Direct Amparo 74/2019 Lawsuit, pp. 189-195. **R-0051**. Direct Amparo 74/2019 Resolution, pp. 33-34. **R-0050**.

> that can be subject to the exercise of interpretation provided for in article 1st of the Magna Carta.[356]

317. Not only that. Through Appeal for Review 1685/2020 Drake-Finley raised the same arguments again, but the SCJN dismissed this challenge as lacking constitutional importance and relevance.[357] This means that before two different judicial instances Claimants raised issues related to the NAFTA.

318. In a letter to ICSID dated April 30, 2021, the Claimants admitted that they "referenced NAFTA provisions in support of constitutional claims", but "did not invoke" the articles 1102, 1103 or 1105 "in the domestic courts as it does in this arbitration".[358] As can be seen above, Claimants did invoke the same NAFTA provisions in two legal proceedings before Mexican courts, as they did in this proceeding. As a consequence of this, the Tribunal lacks jurisdiction to hear the Case ARB/21/25 and the Claimants' right to bring claims under the NAFTA in relation to Contract 821 is precluded.

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

319. The consent to settle a dispute by arbitration, in accordance with Article 1122(1) of NAFTA, establishes that "[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.". This provision makes it clear that consent to arbitrate is not unconditional and requires that the claim for arbitration be submitted "in accordance with the procedures set out in this Agreement." As established in *Methanex*, "in accordance with the procedures set out in this Agreement" implies the following:

> In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.[359]

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356 Direct Amparo 74/2019 Judgment, pp. 29-32. **R-0050**.

357 Appeal for Review 1685/2020, pp. 8, 20-21, 29. **R-0053** Appeal for Review 1685/2020, p. 7. **R-0053**.

358 Claimant's response to ICSD's inquiries of April 19 ICSID, April 30, 2021, ¶ 17.

359 *Methanex Corporation v. United States*, UNCITRAL, Partial Award (Preliminary Award on Jurisdiction and Admissibility), 7 August 2002, ¶ 120. **RL-0020**.

320. Article 1121 of NAFTA establishes the conditions precedent to the submission of a claim to arbitration. Pursuant to Article 1121(1), where the claim under Article 1116 is for loss of or damage to an interest in an enterprise of another Party that is a legal person owned or controlled by the investor, the company must waive its right to initiate or continue before any administrative or judicial court any proceeding with respect to the allegedly infringing measure, except for procedures in which the application of precautionary measures of a suspensive, declaratory or extraordinary nature is requested, which do not imply the damage payment. Similarly, under NAFTA Article 1121(2), where a claim under Article 1117 is brought on behalf of an enterprise of another Party, the enterprise must both consent to arbitration and waive its right to initiate or continue before any administrative or judicial court any procedure with respect to the allegedly infringing measure, except for the procedures in which the application of precautionary measures of a suspensive, declaratory or extraordinary nature is requested, which do not imply the payment of damages.

321. Article 1121(3) specifically provides that the consent and waiver required by Article 1120 must be in writing and included in the submission of a request to arbitration.

322. The Claimants submitted the waivers and consents of some companies in Exhibit 7 to their request for arbitration, but did not include a consent or waiver by Drake-Finley. That is, Claimants did not comply with the conditions precedent and expressly set out in Article 1121 of NAFTA, and therefore cannot bring a claim on behalf of Drake-Finley under Article 1117, and cannot bring a claim for losses or damages to Drake-Finley under Section 1116.

323. This situation is not a minor formality. The Respondent emphasizes that the NAFTA Parties agreed that the required consents and waivers were required to be submitted with the request for arbitration. In clear terms, there is no flexibility to submit it later.

324. The Respondent anticipates that Claimants may seek to submit the missing consent and waiver for Drake-Finley with its Reply after reviewing this Counter-Memorial. NAFTA tribunals have already considered that possibility and rejected it, as summarized by the tribunal in *KBR v. Mexico*:

> In considering what is involved in filing a claim under Section 1121, the Tribunal in Waste Management II questioned whether the notice of arbitration "must be effective in bringing jurisdiction to the Tribunal under Chapter XI, at least in the sense that the

> preceding conditions for the presentation provided by Article 1121 have been satisfied." In response, the Tribunal answered in the affirmative because, among other reasons:
>
> […] In international litigation the withdrawal of a claim does not, unless otherwise agreed, amount to a waiver of any underlying rights of the withdrawing party. Neither does a claim which fails for want of jurisdiction prejudice underlying rights: if the jurisdictional flaw can be corrected, there is in principle no objection to the claimant State recommencing its action. This applies equally to claims which fail on (remediable) grounds of inadmissibility, such as failure to exhaust local remedies. [...].
>
> The tribunals in Waste Management I, Waste Management II, and Methanex decided that, if the conditions for the NAFTA Party's consent have not been met, there is no consent to arbitration, and without the NAFTA Party's consent, no of jurisdiction. Waste Management had to file the claim again. In the Methanex case the United States agreed that:
>
> [...] if this Tribunal were to dismiss Methanex's claim on jurisdictional grounds solely for failure to submit waivers in accordance with Article 1121, Methanex would be free to refile its claim upon the submission of complying waivers. If that were to occur, these proceedings would take longer to conclude [...] Recognizing this, in the interest of efficiency, if Methanex finally supplies the United States with waivers that fully comply with the requirements of Article 1121, the United States consents in advance to the reconstitution of this Tribunal to be composed of its current members – on the condition that this Tribunal issue an order deeming the arbitration to be duly commenced only as of the date that Methanex submits the effective waivers ."
>
> This means the date on which the submission of the claim to arbitration meets the conditions of the NAFTA Party's consent to arbitration.
>
> The Tribunal believes that it is not necessary to decide whether the filing of a qualifying waiver constitutes a question of admissibility or jurisdiction. The fact is that, whether taken as one or the other, the opinion of the NAFTA Parties and the practice of prior NAFTA tribunals adduced by the Parties in this case demonstrate that the waiver cannot be corrected in the course of the arbitration concerned unless that the NAFTA Party consent to such correction. Having concluded that the waiver submitted in these arbitration proceedings by Claimant and COMMISA is flawed and Respondent failing to consent to a correction, a determination as to the nature of jurisdiction or admissibility of the claim would not affect the outcome of the arbitration. case and can therefore be dispensed with.[360]

325. To be clear, Respondent will not consent to the submission of any consent or waiver by Drake-Finley now. If Claimants wish to include that entity in their case, they will need to resubmit their claim.

[360] *KBR v. México*, ICSID Case No. UNCT/14/1, Award, April 30, 2015, ¶¶ 146-148. **RL-0021**. [Emphasis added]

3. Claimants have not established that they have made an investment within the meaning of the NAFTA

326. To bring a claim under Chapter Eleven of NAFTA, the Claimants must show that they have made an "investment" within the meaning of NAFTA. They have failed to do so .

327. The 821 Contract was signed on February 28, 2014 by Drake-Finley, as contractor, and by Finley and Drake-Mesa as joint obligors. The three companies were the "contractors" under Contract 821. Finley is a US company.[361] Drake-Mesa is a Mexican commercial corporation registered on March 7, 2012.[362] Drake-Finley is a Mexican special purpose company created by Finley and Drake-Mesa on February 18, 2014.[363]

328. The Claimants mixed together the discussion of their purported investments under three separate claims under NAFTA and USMCA, seeking to cause confusion and overcome jurisdictional issues. In the Request for Arbitration, Contract 821 was identified as the investment.[364] In the Statement of Claim, Claimants added the following purported investments:

> "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 […] 821 Contracts".
>
> "acquired tangible personal property expecting it to be used for an economic benefit, including workover rigs, drilling rigs, and related drilling equipment and materials… Some of this personal property remains in Mexico today".
>
> "Finley, MWS, and Prize purchased real property and facilities in Mexico… Finley, MWS, and Prize continue to own this property today".
>
> "financial guarantee for US$ 4.8 million for the 821 Contract."[365]

329. Claimants also apparently claim that Prize's shares in Drake-Finley are part of the Contract 821 "investment".[366]

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361 Statement of Claim, ¶ 20.

362 Contract 821, Clause 2.1. **C-0034**.

363 Contract 821, Clause 2.1. **C-0034**. WS Luis Oseguera Kernion, ¶ 76.

364 Request of Arbitration, ¶ 18 ("Claimant's first investment that is subject of this arbitration is Contract No. 421004821 (the "821 Contract")".

365 Statement of Claim, ¶¶ 181, 263.

366 Statement of Claim, ¶ 263.

330. Mr. Finley, in his witness statement, says he "recalls" importing three rigs and purchasing equipment and materials, such as pumps and generators.[367] He also says "we"purchased land in Poza Rica for use for storage and assembling and disassembling equipment .[368] But, Mr. Oseguera Kernion clarifies that the land was actually leased/purchased in connection with Contract 803, not Contract 821.[369] In relation to Contract 821, Sr. Kernion only says that "We had to purchase additional equipment", with no other detail.[370] do not provide any direct evidence of their purported expenditures.[371] Messrs. Finley and Oseguera also state that they hired and trained employees,[372] and they reference acquiring performance bonds .[373]

331. The Claimants acknowledge that the NAFTA 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",[374] but they do not address the other exclusion, which is "any other claims to money …that do not involve the kinds of interests set out in subparagraphs (a) through (h)." Based on the quotations they provide,[375] the Claimants presumably intend to rely on the definition in NAFTA Article 1139(h), which includes:

> (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.

332. In this regard, several points are relevant. First, Contract 821 is not a turnkey or construction contract, or a concession, nor did the remuneration depend on the production,

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367 WS Jim Finley, ¶ 33.

368 WS Jim Finley, ¶ 34.

369 WS Luis Oseguera Kernion, ¶¶ 27-29.

370 WS Luis Oseguera Kernion, ¶ 76.

371 WS Luis Osegura Kernion, ¶¶ 64 y 84.

372 WS Luis Oseguera Kernion, ¶¶ 76 and 115. WS Jim Finley ¶¶ 19, 35 and 45.

373 WS Luis Oseguera Kernion, ¶ 76, and WS. Jim Finley ¶ 37 and 44.

374 Statement of Claim, ¶ 262.

375 Statement of Claim, ¶ 260.

revenues or profits of an enterprise. Contract 821 was a contract to provides services. Such a contract does not qualify as an investment for purposes of the NAFTA.

333. *Second,* U.S. companies, such as Finley and Prize, obviously are not "investments" in Mexico.

334. *Third,* the performance bond, *i.e.,* the Dorama Bond, is not an "investment." When previous investment tribunals have examined performance guarantees with characteristics similar to the Dorama Bond that guaranteed US$41.8 million under Contract 821, they have held that such guarantees do not constitute were not investments. For the Tribunal in *White Industries Australia Limited v. India* a guarantee was not an investment because "[t]he Bank Guarantees did not grant or create any substantive rights in favour of White [the investor] and, accordingly were not an 'asset' of White. In these circumstances, the Tribunal rejects White's argument that its rights under the Bank Guarantees constitute an 'investment'."[376] Similarly, the tribunal in *Joy Mining Machinery Limited v. The Arab Republic of Egypt* "examined this specific argument concerning the bank guarantees under the Contract in order to establish whether this is an ordinary feature of a sales contract or an investment subject to the protection of the Treaty." [377] The tribunal in *Joy Mining Machinery Limited* held:

> a bank guarantee is clearly a commercial element of the Contract. The Claimant's arguments to the effect that the non-release of the guarantee constitutes a violation of the Treaty are difficult to accept. In fact, the argument is not sustainable that a nationalization has taken place or that measures equivalent to an expropriation have been adopted by the Egyptian Government. Not only is there no taking of property involved in this matter, either directly or indirectly, but the guarantee is to be released as soon as the disputed performance under the Contract is settled. It is hardly possible to expropriate a contingent liability.[378]

335. *Fourth*, the Claimants have not provided evidence of ownership of the "equipment and materials" or "real estate" it purportedly purchased for use in Contract 821. Furthermore, the use of "tools of the trade" to fulfill a service contract it is not sufficient to be considered a commitment of capital. For example, the Tribunal in *Joy Mining Machinery Limited v. The Arab Republic of*

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376 *White Industries Australia Limited v. The Republic of India, Final Award,* UNCITRAL, Final Award, 30 November 2011, ¶ 7.57. **RL-0022**.

377 *Joy Mining Machinery Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, ¶ 44. **RL-0023**.

378 *Joy Mining Machinery Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, ¶ 78. **RL-0023**.

Egypt held that the existence of a capital commitment alone did not mean that the associated contract was automatically an "investment" subject to treaty protection. That Tribunal also held that the contract at issue could still be considered a sales contract even if it consisted of the complex "engineering and design, production and stocking of spare parts and maintenance tools and incidental services such as supervision of installation, section, testing and commissioning, training and technical assistance."[379] The Tribunal in *Joy Mining Machinery* also concluded that such complex tasks are:

> […] certainly a special feature of contracts relating to the supply of complex equipment. But it does not transform the Contract into an investment, any more than the procurement of highly sophisticated railway or aircraft equipment would, despite the fact that such equipment would require additional activities such as engineering and design, spare parts and incidental services.[380]

336. The same analysis applies to the of hiring employees. They are not "investments" but are resources that were temporarily necessary to carry out business activities.

337. Further, the Claimants have not provided any evidence of which enterprise made the purchases they describe. That information is crucial for the Tribunal's analysis. For example, if the items, instruments, or equipment at issue were property of Drake-Finley, they would be excluded from consideration because, as described above, Claimants did not submit a consent and waiver from Drake-Finley.

338. With regard to the Claimants' argument that their ownership interests in Drake-Finley and Drake-Mesa constitute investments, it must be noted that *i)* Drake-Finley is outside the scope of arbitration because it did not sumbit a consent and waiver; *ii)* Claimants have not submitted any evidence that they paid for their ownership interest, and *iii)* there is no evidence that the Mexican companies had any involvement, other than having their names used, or the ownership or control of those entities have been affected in any manner.

339. Accordingly, the Claimants have not established that they made a relevant "investment" within the meaning of NAFTA, which means that the Tribunal lacks jurisdiction *ratione materiae* to hear the Case ARB/21/25.

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379 *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, ¶ 44. **RL-0023**.

380 *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, ¶ 55. **RL-0023**.

4. The Dorama Bond is not an investment within the meaning of Article 25 of the ICSID Convention

340. As previously explained, the Claimants argue that they made various alleged investments in Mexico, including having provided a financial guarantee of US $41.8 million under Contract 821.[381]

341. Both the applicable legislation and the clauses of the Contracts established Drake-Finley's obligation to guarantee compliance of its obligations. Contract 821 was no exception, so Finley and Drake-Mesa provided the Dorama Bond. However, Claimants have not established that the Dorama Bond is an investment within the meaning of Article 25(1) of the ICSID Convention.

342. It should be noted that the Claimants themselves agree that the appropriate standard to analyze whether the Dorama Bond is an investment is through the Salini test, which means demonstrating: *i)* a contribution, *ii)* duration, *iii*) risk and *iv*) a contribution to the economic development of the host State.[382]

343. Respondent considers unfortunate that the Claimants fail to include the Dorama Bond in their "analysis" under the Salini test.[383] There is no doubt that the Claimants bear the burden of proving the Tribunal's jurisdiction under Article 25 of the ICSID Convention, and thus proving that they made an investment.[384] In conducting their analysis", the Claimants again mixed up their alleged investments in an attempt to justify their claims. The truth is that a performance guarantee such as the Dorama Bond is not an investment within the meaning of Article 25 of the ICSID Convention and, therefore, the Tribunal lacks jurisdiction *ratione materia*e regarding the aforementioned commercial guarantee.

344. *First,* the Dorama Bond did not generate a contribution to the Respondent. As certain Tribunals have established, for there to be a contribution, there must be a search for a value-

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381 Statement of Claim, ¶¶ 181 y 263.

382 Statement of Claim, ¶ 280.

383 Statement of Claim, ¶¶ 279-282.

384 *Churchill Mining v. Indonesia,* ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014, ¶ 96 ("At the jurisdictional stage, the Claimant must establish (i) that the jurisdictional requirements of Article 25 of the ICSID Convention and of the Treaty are met, which includes proving the facts necessary to meet these requirements […]"). **RL-0024**.

creating economic operation.[385] The Dorama Bond is a commercial bond whose purpose was to ensure compliance with obligations agreed upon in a contract, in this case, Contract 821 (applicable *mutatis mutandis* to the guarantees derived from Contracts 803 and 804). In other words, it is accessory to the main obligations to which the parties are subject in a certain legal relationship. For this reason, the intention of providing said guarantee is in no way to create economic value, but only to ensure a main obligation of a contractual nature. The Dorama Bond itself indicates that it will guarantee "the due fulfillment of contract number 4210004821."[386]

345. Accordingly, if the Dorama Bond by its very nature cannot be considered as a contribution because it does not have an economic value-creating purpose, it is clear that it cannot constitute an investment under the *Salini* test, and, consequently, under the meaning of the Article 25(1) of the ICSID Convention.

346. *Second*, the Claimants have not established that the performance guarantee had a risk for the purposes of the *Salini* test. As various investment tribunals have identified, the risk criteria refer to "investment risks" instead of commercial risks or sovereign risks. As detailed by the Tribunal in *Romak v. Uzbekistan*:

> All economic activity entails a certain degree of risk. As such, all contracts - including contracts that do not constitute an investment - carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction.
>
> An "investment risk" entails a different kind of alea, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations.[387]

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385 *MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, ¶ 196 ("[…] Thus, for purposes of the Convention, a loan in itself is not an investment. To be considered as an investment, it must contribute to an economic venture consisting of an investment. This has been recognized in the doctrine and in ICSID case law."). **RL-0025**.

386 Dorama Bond, p.1. **R-0005**.

387 *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award, 26 November 2009, ¶¶ 229 and 230. **RL-0026**.

347. Also, the tribunal in *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* explained that every economic transaction involves risk, just like any human activity.[388] It also carefully analyzed the difference between "operational risk" and "commercial risk", concluding that "risk is inherent in life and cannot per se qualify what is an investment … an investment risk would be an operational risk and not a commercial risk … The distinction here would be between a risk inherent in the investment operation in its surrounding – meaning that the profits are not certain but depend on the success or failure of the economic venture concerned – and all the other commercial and sovereign risk."[389]

348. In this sense, it is clear that the Dorama Bond does not entail an "investment risk", but instead, a commercial risk subject to the breach of a contract by one of the parties. Therefore, any apparent risk that led to providing the guarantee of contractual compliance *i)* does not qualify as an investment risk[390] and *ii)* is not a useful element to distinguish between an investment and a commercial transaction.

349. So much so that, at all times, the Claimants knew that, in case of breaching Contract 821, PEP could claim the amount of the performance guarantee for US$ 41.8 million. Therefore, the Dorama Bond does not comply with the meaning of investment risk, since the Claimants knew in advance the amount for which PEP could seek to execute the performance bond and that in no case would there be an "investment return" of said execution. In the same way, the Dorama Bond does not imply the generation of any profit for the Claimants. Accordingly, it is clear that there is no qualifying risk for purposes of constitute an investment within the meaning of Article 25(1) of the ICSID Convention.

350. *Third*, the Claimants have not established that the Dorama Bond implied a benefit for the State. As noted above, the Dorama Bond was only intended to guarantee compliance with Contract

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388 *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, ¶¶ 368-369. **RL-0027**.

389 *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, ¶¶ 367-370. **RL-0027**.

390 *See Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 5.43 ("[…] The expectation of profit and return which is sometimes viewed as a separate component of an investment must rather be considered as included in the element of risk, since every investment runs the risk of reaping no profit at all […]") **RL-0028**.

821. Accordingly, it is clear that there is no contribution to the development of the State's economy for purposes of constitute an investment within the meaning of Article 25 of the ICSID Convention.

351. If the Tribunal analyzes the above under an *objective test*, it may conclude that the Dorama Bond (and indeed any bond granted under Contracts 803 and 804) does not comply with the elements of Article 25(1) of the ICSID Convention. Therefore, the Tribunal lacks jurisdiction *ratione materiae* to hear aspects of the Dorama Bond since it cannot be considered an investment.

5. Even if Claimants made an investment, the Tribunal lacks jurisdiction *ratione materiae* because Contract 821 does not constitute an "legacy investment" ("legacy claim") pursuant to USMCA Annex 14-C.6(a).

352. In order for Finley and Prize to pursue a claim under USMCA Annex 14-C (*i.e.*, NAFTA as applicable law), the investment must be a "legacy investment", which is, "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994 and the date of the termination of the NAFTA 1994, and in existence on the date of entry into force of [the USCMA (i.e., 1 July 2020)]".[391] Contract 821 was signed on February 28, 2014 and ended on December 31, 2017. Thus, Contract 821 was not in existence on the date of the entry into force of the USMCA (July 1, 2020) and as a consequence of it cannot be considered as an "legacy investment".

353. Claimants argue that allegedly associated investments made to carry out Contract 821 (e.g., the creation of a Mexican company for the sole purpose of entering into a contract, the purchase or lease of equipment and real estate) were made during the NAFTA era and some assets remained in Mexico on the date of entry into force of the USMCA .[392]

354. However, if the investment is a "contract[] involving the presence of an investor's property in the territory of another Party, including turnkey or construction contracts, or concessions" within the meaning of paragraph (h)(i) of the NAFTA definition, then Contract 821 and the associated investments are inextricably linked and must be treated as a single investment for purposes of determining whether Finley had a "legacy investment". In other words, when Contract 821 expired, so did the association with the other alleged investments. This would have the

391 Articles 14.C.1 and 14.C.6.a of the USMCA.

392 Statement of Claim, ¶¶ 193 and 263.

consequence that treating investments in another way would undermine the "legacy investment" requirement of Annex 14-C of the USMCA.

355. Put another way, to the extent that the associated investments continued to exist in Mexico after the expiry date of the 821 Contract, they were not affected by the alleged measures concerning the termination of the 821 Contract and is no basis for claims in relation to them. More specifically, there was no reason for Claimants to continue to employ Mexican workers, or to maintain facilities or equipment (either leased or purchased by Claimants) in Mexico after Contract 821 terminated, unless they were being used for a different purpose. Indeed, Claimants have not described any aspect of their alleged investments that is permanent in nature.

356. This view is reinforced by past arbitral awards. For example, the tribunal in *LMC v. Mexico* elaborated upon the meaning of paragraph (h) as follows:

> The chapeau cannot be read by itself. The NAFTA does not extend protection to any "commitments of capital", but only to those which exhibit certain features so as to give rise to "interests". These features are defined through two illustrative examples in subparagraphs (h.i) and (h.ii). Both sub-paragraphs share a common feature: both refer to "contracts". Thus, it is safe to conclude that a minimum requirement of "commitments of capital" protected by paragraph (h) is to be formalized as contracts.[393]

357. For the above reasons, the Tribunal likewise lacks jurisdiction "*ratione materiae*", since there was no "legacy investment" as of the entry into force of the USMCA, and accordingly the Claimants cannot bring claims regarding Contract 821 under Annex 14-C of the USMCA.

6. The Tribunal lacks jurisdiction *ratione materiae* because Claimants have not established their ownership interests

358. The Claimants have not established that any particular one or all of them genuinely own or control the Mexican entities or the purported investments at issue. The Claimants bear the burden of demonstrating their ownership or control.

a. Finley and Prize

359. Finley's NAFTA claims refer to Contract 821. Finley brought claims on his own behalf under NAFTA Article 1116, and on behalf of Drake-Mesa and Drake-Finley under NAFTA Article

[393] *Lion Mexico Consolidated L.P. v. United Mexican States* ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction, 30 July 2018, ¶ 205. **RL-0029**.

1117(1). Finley asserts that it "owns and/or controls", and "(along with Prize) [it] has had control over Drake-Finley and Drake-Mesa for all relevant events in this arbitration".[394]

360. Prize is not a signatory/counterparty to Contract 821. However, Prize makes claims on its own behalf under NAFTA Article 1116 and on behalf of Drake-Mesa under NAFTA Article 1117(1). Prize asserts it owns shares of Drake-Mesa, and "for all relevant events in this arbitration, exercised managerial control over Drake-Mesa (along with Finley)"."[395]

361. Finley and Prize cannot both bring claims on behalf of Drake-Mesa under NAFTA Article 1117. Claimants must identify which of them is acting on behalf of Drake-Mesa and demonstrate its authority to do so.

b. Drake-Mesa

362. Drake-Mesa is a Mexican-registered corporation. Exhibit C-0012 indicates that three companies have ownership interests in Drake-Mesa: Prize, Royal Shale Holdings, and Drake-Mesa Big Sky.[396]

363. There is no evidence of ownership and control of Royal Shale Holdings or Drake-Mesa Big Sky. Although there is an unsubstantiated assertion in the Statement of Claim ("Mr. Finley owns a majority of Drake-Mesa Big Sky, LLC."), the reality is that there is no evidence to prove ownership of that company.[397]

c. Drake-Finley

364. Drake-Finley is a Mexican-registered corporation. Claimants have not filed proof of ownership of Drake-Finley. It is asserted in the Memorial that Sr. Finley owns or controls Drake-Finley.[398] In his witness statement Mr. Finley states without supporting documentation that "Finley owns shares of Drake-Finley and exercised managerial control over it during the events relevant to this arbitration (along with MWS and Luis's company)".[399] According to Claimants' Responses

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394 Statement of Claim, ¶ 19. WS Jim Finley, ¶ 36.

395 Statement of Claim, ¶ 36; WS Jim Finley, ¶ 36.

396 Drake-Mesa notarization testimony dated March 26, 2014. **C-0012**.

397 Statement of Claim, footnote 2.

398 Statement of Claim, ¶ 19.

399 WS Jim Finley, ¶ 36.

to ICSID Inquiries (April 30, 2021), Prize "owns or controls directly or indirectly Drake-Finley. Prize owns approximately 50% of the shares in the equity of Drake-Finley."[400] However, according to the witness statement of Mr. Luis Oseguera Kernion, "Prize owns 80% of the shares of this entity. Prize and Finley exercised managerial control over Drake-Finley at all relevant times in this arbitration."[401]

365. Based on all of the foregoing, since Claimants did not demonstrate that they had control in Drake-Finley and Drake-Mesa, it is appropriate for the Tribunal to determine that it lacks jurisdiction *ratione materiae*.

7. The Tribunal lacks jurisdiction *ratione temporis* to analyze claims based on facts prior to March 2018

366. Investors pursuing claims under NAFTAmay not submit a claim "if more than three years have elapsed from the date on which the [investor/enterprise] first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the [investor/enterprise] has incurred loss or damage."[402] The Request for Arbitration was filed on March 25, 2021, meaning that Claimants must have first acquired knowledge of the measures and losses underlying their NAFTA claims after March 25, 2018, which is known such as "critical date", "cut-off date" or dies a quo". If Claimants knew of the measures and losses before the critical date, their claims related to Contract 821 are barred.

367. The limitations period is "clear and rigid" and "not subject to any suspension, prolongation or other qualification".[403] An investor or enterprise first acquires knowledge of an alleged breach as of a particular "date.".[404] Such knowledge cannot "first" be acquired at multiple times or on a recurring basis. According to the Grand River tribunal, subsequent transgressions arising from a continuing course of conduct do not renew the limitations period once an investor or enterprise

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400 Response to ICSID questions of April 30, 2021 ¶ 35.

401 WS Luis Oseguera Kernion, ¶ 76.

402 Articles 1116(2) and 1117(2) of NAFTA, **C-0004**.

403 *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 29. **RL-0030**. *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 82-83. **RL-0031**.

404 NAFTA Articles 1116(2) and 1117(2). **C-0004**.

knows, or should have known, of the alleged breach and the loss incurred thereby.[405] Thus, where a "series of similar and related actions by a respondent state" is at issue, an investor cannot evade the limitations period by basing its claim on "the most recent transgression in that series."[406]

368. It is also not necessary to know the exact amount or full extent of the loss or damage. As noted by the *Mondev* Tribunal, "[A] claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear".[407] In this sense, knowledge is then acquired with the "first appreciation" of the damage.[408]

a. Claimants knew of the alleged breaches and damages before the critical date

369. The Memorial speaks for itself as to when Claimants learned of the alleged breaches and losses. According to the Claimants, Pemex began "corresponding internally about its lack of budget" as early as November 13, 2014, and did not issue work orders as expected.[409] They also states that from November 2014 to March 2015, "Finley and Drake-Mesa incurred significant losses because of the Pemex's inactions"[410]. They also added that, later, in September 2015, after the work orders were issued, Pemex allegedly sought to extend the period to pay each work order, which put Claimants in a "difficult position", as this allegedly caused disputes between Claimants

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405 *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 81 ("Moreover, this analysis seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries."). **RL-0030**. *Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 158 ("[W]hether a breach definitive occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant." **RL-0031**.

406 *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 81. **RL-0030**.

407 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 87. **RL-0032**. *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 165. **RL-0031**.

408 *Carlos Ríos and Francisco Ríos v. Chile*, *ICSID Case* No. ARB/17/1, Award, 11 January 2021, ¶ 175. **RL-0033**. *Spence International Investments et al v. Costa Rica*, ICSID Case No. UCT/13/2, Interim Award, May 30, 2017, ¶ 213. **RL-0034**.

409 Statement of Claim, ¶ 183.

410 Statement of Claim, ¶ 183.

and their subcontractors.[411] These disputes "required Finley and Drake-Mesa to devote significant resources to resolve them."[412]

370. Then, in January 2016, "Pemex devised a new excuse to avoid its obligations".[413] According to the Claimants, "on January 22, 2016, Pemex wrote to Finley and Drake-Mesa stating that it did not have to issue work orders under Contract 821."[414] "By April 2016, Pemex had not requested work for over 100 days."[415]

371. According to the Claimants, "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."[416]

372. On April 29, 2016, the Claimants initiated a lawsuit against Pemex "in light of [their] losses and Pemex effectively terminating the contract early, that is, Civil Proceeding 200/2016.[417] "Pemex also had a long history of failing to request work under the 803 and 804 Contracts",[418] meaning the claims under those contracts are also untimely.[419]

373. Mr. Oseguera Kernion describes the known losses that Claimants incurred as of mid-2016. He says:

> 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.[420]

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411 Statement of Claim, ¶¶ 186-87.

412 Statement of Claim, ¶ 187.

413 Statement of Claim, ¶ 189.

414 Statement of Claim, ¶189.

415 Statement of Claim, ¶ 190.

416 Statement of Claim, ¶ 190.

417 Statement of Claim, ¶ 191.

418 Statement of Claim, ¶ 192.

419 That is, Proceeding 75/2015 related to claims about Contract 803 and Proceeding 2/2016 related to claims about Contract 804. *See* Demand MWS and Bisell Civil Trial 75/2015, pp.2-4. **R-0062**. *See* Civil Proceeding 120/2015 Judgment, p. 2. **R-0088**.

420 Statement of Claim, ¶ 193. (Citing the WS of Luis Oseguera Kernion, ¶ 84.)

374. In November 2016, the Claimants claim to have received an "unusual" work order, which led Mr. Oseguera Kernion to call Mr. Gómez, who worked for Pemex.[421] According to the Claimants, "Mr. Gómez explained to Mr. Oseguera Kernion that Pemex was trying to cancel Contract 821 because it lacked funds to request any more work."[422]

375. "In July 2017, Pemex notified Finley and Drake-Mesa that it was administratively rescinding Contract 821."[423] The Contract was rescinded on August 28, 2017. Claimants "considered the rescission … to be illegitimate…"[424] Shortly thereafter, and still priorto the critical date, Claimants learned that Pemex was also "planning to go after the US$ 41.8 million bond that Finley and Drake-Mesa had provided.[425]

376. Claimants assert that in September 2017, Finley and Drake-Mesa commenced a second lawsuit against Pemex in order to "challenge…Pemex's purported administrative recission."[426] The court rejected the lawsuit in October 2018.[427] Claimants separately claim that in April 2018, Pemex comprised with other oil service providers in ways that discriminated against Claimants.

b. Claims related to Contract 821 are time-barred

377. According to the Claimants, the actions taken by Pemex above —all before the critical date— were part of a scheme employed to rescind Contract 821 in violation of NAFTA Article 1105.[428] To escape the three-year limitations period, Claimants assert that the "scheme" "is ongoing, with its recent efforts to call the US$ 41.8 million bond." But the claim is indisputably—and admittedly—based on acts that occurred prior to the critical date. As early as November 2016, the Claimants learned that Pemex was allegedly seeking to rescind the contract, which was formally rescinded—according to the Claimants—in August 2017. .

421 Statement of Claim, ¶ 204.
422 Statement of Claim, ¶ 204.
423 Statement of Claim, ¶ 208.
424 Statement of Claim, ¶ 209.
425 Statement of Claim, ¶ 210.
426 Statement of Claim, ¶ 216
427 Statement of Claim, ¶ 218.
428 Statement of Claim, ¶¶ 266, 368

378. Regarding the losses, the Claimants knew prior to the rescission that they were incurring alleged losses because of the measures taken by Pemex, which can be seen from the claims of Drake-Finley against PEP in the Civil Proceeding 200/2016.[429] This means that any subsequent transgressions arising from the same "scheme" do not renew the limitations period.[430]

379. The denial of justice claim under NAFTA Article 1105 is also barred because Claimants have not established when the denial of justice occurred. In other words, the Claimants have not carried their burden to establish jurisdiction. Instead, they contend that the claim accrued onon October 4, 2018 when an decision in the first instance was rendered on the second lawsuit initiated regarding Contract 821.[431] But that proceeding only lasted a year,[432] while Claimants argue a delay of three years, including proceedings that occurred *after* October 4, 2018.[433] To make their case, the Claimants have apparently combined a number of different proceedings (and lawsuits) into a single proceeding, only to argue that the claim accrued in the middle of that combined proceeding through various procedural phases. That is simply incomprehensible and inappropriate. Each segment of the proceedings must be considered individually such that any delay is specific to that part of the proceedings. The Claimants have not explained how their claim is timely.

380. Lastly, the claim for a violation of national treatment under NAFTA Article 1102 is also time-barred since the actions towards Claimants took place before the critical date. Claimants argue that the breach occurred in April 2018, when Pemex allegedly compromised with other oil service providers—nearly eight months after Contract 821 was rescinded. But Claimants are mistaken. Article 1102 focuses on the measures taken towards the claimant-investor; not third parties. As the tribunal in *Resolute Forest Products v. Canada* observed, breaches of NAFTA Articles 1102 and 1105 occur "when the governmental conduct complained of occurs".[434] Put in

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429 Civil Lawsuit 200/2016 of Drake-Finley, pp. 2-3. **R-0046**. Zamora-Amézquita Report, ¶ 106. Decision of Civil Lawsuit 200/2016, pp. 2-3. **R-0045**.

430 *See Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 81. **RL-0030**.

431 Statement of Claim, ¶ 266.

432 Statement of Claim, ¶ 216-18.

433 Statement of Claim, ¶ 374.

434 *Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility ¶ 154 (Jan. 30, 2018). **RL-0031**. *Carlos Ríos and Francisco Ríos v. Chile*, ICSID Case No. ARB/17/1, Award, 11 January 2021, ¶¶ 186-87, 223 (finding that an act of

context, the three-year period began to run in 2016, when the Claimants believed that Pemex had "repudiated the 821 Contract" and initiated a lawsuit against Pemex "in light of [their] losses and Pemex effectively terminating the contract early."[435]

381. Any other accrual date for purposes of NAFTA Article 1102 is untenable, as it would effectively extend the three-year limitations period indefinitely. Otherwise, an investor could, in theory, raise a discrimination claim by comparing treatment towards the investor that occurred more than three years prior and treatment towards a third party that occurred within the past three years.

382. In summary, Claimants have presented a litany of facts and measures that occurred prior to March 25, 2018. Any governmental measure that took place prior to March 2018 is beyond the Tribunal's jurisdiction.

8. This Tribunal lacks jurisdiction *ratione materiae* over contract claims

383. The Claimants' contractual claims are outside the jurisdiction *ratione materiae* of the tribunals adjudicating the NAFTA claims. As the *Waste Management II* tribunal explained:

> The Tribunal begins by observing that—unlike many bilateral and regional investment treaties—NAFTA Chapter 11 does not give jurisdiction in respect of breaches of investment contracts such as the Concession Agreement. Nor does it contain an "umbrella clause" committing the host State to comply with its contractual commitments. This does not mean that the Tribunal lacks jurisdiction to take note of or interpret the contract. But such jurisdiction is incidental in character, and it is always necessary for a claimant to assert as its cause of action a claim founded in one of the substantive provisions of NAFTA referred to in Articles 1116 and 1117.[436]

384. Another Tribunal has similarly concluded that, because the applicable investment treaty "not cover breaches of contract, it must follow that this Tribunal has no jurisdiction under the BIT to entertain [claimant]'s claims based on alleged breaches of Contracts."[437]

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discrimination is a "simple tort" that accrues "at the time the act is performed"). (quoting the articles of the ILC on the responsibility of the State, art. 14(1)). **RL-0033**.

435 Statement of Claim, ¶ 191.

436 *Waste Management Inc. v. México,* ICSID Case. No. ARB (AF)/00/3, Award, April 30, 2004, ¶ 73. **RL-0035**.

437 *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 216. **RL-0036**.

385. The Respondent further addresses the Claimants' arguments regarding the attribution of Pemex acts to the Government of Mexico, including the fact that enter into contracts does not imply "regulatory, administrative or other governmental authority", and therefore, in accordance with Article 1502(3)(a), they are not subject to Chapter XI. Instead, as addressed in this Counter Memorial, the Tribunal generally lacks jurisdiction over Claimants' contract claims.

C. The Tribunal does not have jurisdiction over the claims related to Contracts 803 and 804 under the USMCA

386. As discussed above, the burden of proof to demonstrate the facts and conditions to establish the Tribunal's jurisdiction ratione voluntatis, ratione temporis, ratione personae and ratione materiae under the NAFTA bear with Claimants. This same burden must be established under the USMCA, which was not done by the Claimants as seen below.

387. The Tribunal may observe that the Claimants' allegations related to Contracts 803 and 804 also suffer from jurisdictional flaws based on the following: i) Claimants did not demonstrate that they have an investment in accordance with Article 14.1 of the USMCA; ii) they also did not demonstrate having a "covered investment" as of the entry into force of the USMCA; iii) the claimed measures are not within the scope of application of the USMCA; iv) they also did not prove they had a "qualifying investment dispute" under Annex 14-E of the USMCA; and v) the claims are time-barred in accordance with Annex 14-E of the USMCA.

1. Claimants have not established that they made an investment within the meaning of the USMCA

388. As with claims related to Contract 821 under NAFTA, have similar problems 821 in showing that Contracts 803 and 804 are investments within the meaning of the applicable treaty, in this case the USMCA. USMCA Article 14.1 defines "investment" as follows:

> 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:
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> (a) an enterprise;
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> (b) shares, stock and other forms of equity participation in an enterprise;
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> (c) bonds, debentures, other debt instruments, and loans; 1
>
> (d) futures, options, and other derivatives;
>
> (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to a Party's law; 2 and (h) other tangible or intangible, movable or immovable property, and related property rights, such as liens, mortgages, pledges, and leases,

but investment does not mean:

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

(j) claims to money that arise solely from:

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

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

389. As discussed above, the Claimants vaguely merge their claims about investments for all three contracts, asserting that they purchased and imported equipment, hired workers, and purchased real estate. They also claim that providing financial guarantees ($4.8 million for Contract 803 and $5.5 million for Contract 804) constitutes an investment.

390. With regard to Contracts 803 and 804, the signatories were MWS and Bisell. MWS is a U.S. company, while Bisell is a Mexican entity. According to the evidence submitted by the Claimants, three companies have ownership in Bisell: Prize (50%), Royal Shale Holdings (25%) and Royal Shale Corporation (25%).[438] There is no evidence of ownership and control of Royal Shale Holdings or Royal Shale Corporation.[439]

391. Mr. Oseguera Kernion testifies that in relation to Contract 803, "we" purchased rigs and imported them into Mexico, that "we" leased and then purchased an empty field in Poza Rica in which to store, assemble and disassemble equipment, leased a warehouse, and also purchased land in Tomos to store some equipment, but he also mentions (in a footnote) that the Tomas property was needed as security for performance bonds.[440] However, it does not explain who "we" are. He

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438 Deed of protocolization of Bisell dated April 22, 2014. C-0011.

439 Note that neither Royal Shale Holdings nor Royal Shale Corporation submitted the consents and waivers required by Article 14.D. 5 of the USMCA. Accordingly, Respondent has not consented to their participation and Claimants may not make claims for purported damages or losses of those entities or otherwise make claims on their behalf during the course of this arbitration.

440 WS Luis Oseguera Kernion, ¶ 26 and footnote 2.

also discusses establishing Drake-Mesa.[441] Nonetheless, the Claimants provide no detail regarding who (which entity or individual) made the alleged purchases of equipment and real estate.

392. In relation to Contract 804, Mr. Oseguera Kernion simply says "[w]e had to purchase additional equipment and hire and drains dozens of new employees. We also had to expand the warehouse on our yard in Poza Rica"[442] It is apparent that no additional land was leased or purchased in connection with Contract 804, and there are no details regarding the alleged purchases of equipment.

393. In relation to their claims under the USMCA, based on the quotations they provide,[443] the Claimants appear to be arguing that their shares in Drake-Mesa and Drake-Finley are "investments" and that Contracts 803 and 804 are "turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts". But their shareholdings in Drake-Mesa and Drake-Finley are not at issue in their claims. And again, no detail is provided on what, if anything, they may have purchased and by whom.

394. As discussed above in connection with Contract 821 and NAFTA claims, a performance guarantee (e.g., a performance bond) is not an investment. Relatedly, collateral put up to support the bond –whether real estate cash deposit– is also not an investment.

395. In summary, the Claimants have not established that they had any genuine investment in Mexico under the USMCA.

2. The Tribunal lacks jurisdiction *ratione materiae* because Claimants did not had a "covered investment" under the USMCA

396. USMCA Chapter 14 applies only to a "covered investment",[444] which is defined to mean "an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter".[445] The USMCA entered into force on July 1, 2020. Accordingly, this definition raises two questions: i) did the

441 WS Luis Oseguera Kernion, ¶ 26.

442 WS Luis Oseguera Kernion, ¶ 57.

443 Statement of Claim, ¶ 261.

444 Article 14.2.1 (b)

445 Article 14.1.

Claimants have investments in Mexico in existence as of July 1, 2020 and ii) which, if any of their claims relate to an act that took place after the entry into force of the UMSCA?

397. The Claimants argue that the investments allegedly associated with the contracts were made while the NAFTA was in force and continued to exist in Mexico as of the date of entry into force of the USMCA.[446] However, the allegedly associated investments cannot be considered in isolation from Contracts 803 and 804 because the contracts and any related investments are inextricably linked, as explained in the context of Contract 821. They must be treated as a single investment for purposes of determining whether MWS and Prize had "covered investments." When t Contracts 803 and 804 expired, so did the investments associated with Contracts 803 and 804. Alternatively, to the extent that the associated investments continued to exist in Mexico after the expiry of the contracts, they were not affected by the alleged measures (*i.e*. judicial actions) related to the contracts and there is no basis for claims in relation to them.

398. Both Contract 803 and 804 expired under their own terms and ceased to exist before the date of entry into force of the USMCA, and nothing prevented the Claimants from disposing of the equipment and land they acquired, or from using it for other purposes.

399. For greater clarity, on February 10, 2015, Contract 803 was terminated and on April 10, 2015, Contract 804 was also terminated.[447] Likewise, on October 13, 2015, MWS and Bisell filed Civil Lawsuit 75/2015 in which they claimed approximately US$21 million against PEP.[448] On the other hand, on December 8, 2015, MWS and Bisell initiated the Proceeding 120/2015 against PEP, in which they claimed US$22 million against PEP.[449] Clearly, Claimants did not have a covered investment under the USMCA –nor an established, acquired, or expanded covered investment– as of July 1, 2020.

400. Therefore, even if the Claimants could establish that Contracts 803 and 804 fall within section I of the definition of "investment", they would still not be "covered investments" within

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446 Statement of Claim, ¶ 259-264.

447 Settlement of Contract 803. **R-0015**. Settlement of Contract 804, p. 3. **R-0016**.

448 *See* Zamora-Amézquita Expert Report, ¶ 67. MWS and Bisell's Lawsuit in Civil Proceeding 75/2015, pp.2-4. **R-0062**.

449 Civil Proceeding 120/2015 Lawsuit, p. 2. **R-0088**.

the meaning of the USMCA. This means that the Tribunal lacks jurisdiction *ratione materiae*, in accordance with the USMCA.

3. The Tribunal lacks jurisdiction *ratione voluntatis* because most of the measures do not fall within the scope of the USMCA

401. Article 14.2(3) of the USMCA states: "this Chapter, except as provided for in Annex 14-C (Legacy Investment Claims and Pending Claims) does not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement". Virtually all of the actions claimed by the Claimants took place before July 1, 2020.

402. These actions do not fall within the scope of the USMCA, although some could be within the three-year limitation period. In clear words, the investment chapter of the USMCA does not apply to actions that took place before the entry into force of the USMCA. This situation is clear from the USMCA text itself and does not merit interpretative exercises.

4. The Tribunal lacks jurisdiction *ratione materiae* because Claimants do not have a Qualifying Investment Dispute that permits claims under Annex 14-E

403. Only disputes qualified under Annex 14-E can include claims of violation of the Minimum Level of Treatment standard. Other disputes that do not meet these conditions are limited to claims about violations of the National Treatment principle and those relating to expropriations.

404. For MWS and Prize to bring claims under Annex 14-E, they and/or their Mexican enterprises must have a "qualifying investment dispute." One of the conditions for a qualifying investment dispute is that the claimant or an enterprise of the respondent that it owns or controls must be "a party to a covered government contract." The term "covered government contract" is defined as follows:

> means a written agreement between a national authority of an Annex Party and a covered investment or investor of the other Annex Party, on which the covered investment or investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor in a covered sector....[450]

[450] Annex 14-E(6)(a).

405. Accordingly, to qualify there must be a "covered investment" other than the written agreement itself – meaning an investment that is independent of the covered government contract.

406. As discussed above, Claimants argue that each of Contracts 803 and 804, in combination with other purported investments, constitute investments.[451] However, the Claimants have not identified any covered investment that is independent of Contracts 803 and 804 and that meets the definition of a covered investment. Accordingly, their claims are not "qualified investment disputes" and cannot rely on Annex 14-E.

5. The Tribunal lacks jurisdiction *ratione temporis* to analyze claims based on events prior to March 2018

407. Like the NAFTA, the USMCA bars claims filed beyond certain limitations periods. For claims filed under Annex 14-E, the limitation period is three years.[452]. The Request for Arbitration was filed on March 25, 2021, meaning that the "critical date" for the claims related to Contracts 803 and 804 is March 25, 2018. Here again, the Claimants have failed to establish that their claims are not untimely.

408. As if that were not enough and as explained above, on October 13, 2015, MWS and Bisell filed Civil Proceeding 75/2015 in which they claimed approximately US$ 21 million against PEP, and in December 2015 they filed the Proceeding 120/2015 in which they claimed US$ 22 million against PEP.[453] By claiming millions in amounts against PEP, the Claimants clearly had knowledge of the alleged violation or damage prior to the cut-off date under the USMCA.

409. The National Treatment claims here are untimely for the same reason as the other National Treatment claim in connection with Contract 821 and brought under the NAFTA is untimely. That is, the measures towards the Claimants took place years before the critical date. The Claimants argue that the breach occurred in April 2018, when Pemex allegedly compromised with other service providers.[454] But, like Article 1102 of the NAFTA, Article 14.4 of the USMCA focuses on

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451 Statement of Claim, ¶ 263.

452 Art. 14.E.2(4)(b) of the USMCA.

453 *See* Zamora-Amézquita ExpertReport, ¶ 67. MWS and Bisell's Lawsuit in Civil Proceeding 75/2015, pp.2-4. **R-0062**. Civil Proceeding 120/2015 Lawsuit, p. 2. **R-0088**.

454 Statement of Claim, ¶ 266.

the measures adopted towards the claimant-investor, not towards third parties.[455] Claimants even agree that USMCA Article 14.4 is "nearly identical" to NAFTA Article 1102.[456]

410. The measures taken by Pemex relate to Contracts 803 and 804 occurred even earlier than the actions related to Contract 821. Claimants knew that Pemex was allegedly suspending Contract 803 in December 2013, causing Claimants to "bleed money", according to Mr. Oseguera Kernion.[457] Contract 803 ended, according to the Claimants, in February 2015,[458] more than two years before the critical date, and three years before the alleged agreement with other oil service providers.

411. The same is true of Contract 804. Pemex allegedly sought multiple extensions on Contract 804 in late 2013 and early 2014.[459] At that time, the Claimants were "bleeding money" and could "have sued Pemex or continued with the contract" according to Luis Oseguera Kernion.[460] Later in 2014, Pemex allegedly asked to terminate Contract 804.[461] Contract 804 ended, according to the Claimants, in April 2015,[462] two years before the critical date, and three years before the alleged compromises with other oil service providers. Therefore, the national treatment claims are thus untimely.

412. The denial of justice claims fares no better because, like the other NAFTA denial of justice claims, Claimants have not established when the denial of justice occurred. Once again, the Claimants combined a series of proceedings (and claims) into a single proceeding for each contract that allegedly lasted "more than five years",[463] only to later argue that their claims arose in the

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455 *See Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 154 ("Breaches of Articles 1102(3) and 1105(1) occur when the governmental conduct complained of occurs."). **RL-0031**. *Carlos Ríos and Francisco Ríos v. Chile*, ICSID Case No. ARB/17/1, Award, January 11, 2021. ¶ 186-87, 223. **RL-0033**.

456 Statement of Claim, ¶ 325.

457 Statement of Claim, ¶¶ 121-22.

458 Statement of Claim, ¶ 124.

459 Statement of Claim, ¶¶ 149-52.

460 Statement of Claim, ¶ 150.

461 Statement of Claim, ¶ 153.

462 Statement of Claim, ¶ 154.

463 Statement of Claim, ¶¶ 127, 160.

middle of that five-year period (April 2018 and June 2018).[464] Claimants do not even identify a decision that was rendered in April or June 2018.[465] They simply say that the "litigation" (in general) was pending for 30 months as of those dates. Such general statements do not satisfy the Claimants' burden. In short, the dates chosen by the Claimants are entirely arbitrary and are intended only to artificially create jurisdiction where there simply is none.[466]

VI. THE ACTS OF PEMEX AND ITS SUBSIDIARY PRODUCTION ENTERPRISES CANNOT BE ATTRIBUTED TO MEXICO

413. Claimants argue that the Tribunal must attribute Pemex's acts to Mexico under NAFTA Article 1503(2) and international law.[467] That is incorrect.

414. The Claimants acknowledge that NAFTA Article 1502(3)(a) contains an exception regarding the attribution of acts by public and private monopolies, but they seek to interpret it in a way that makes it meaningless, arguing that entering into contracts is, somehow, an exercise of regulatory power.[468]

415. The actions of Pemex, and particularly PEP, in connection with the Contracts entered into with Claimants were not "regulatory, administrative or other governmental authorities" under NAFTA and/or the USMCA.

A. NAFTA and USMCA establish a *lex specialis* for the attribution of acts to the NAFTA Parties, which displaces international law

416. As two of the most recognized treatises have stated: "In general, matters of state responsibility, including attribution, are regulated in customary international law. [But, e]xceptionally, there are provisions in treaties that provide for the responsibility of states for action of their entities."[469] This is precisely the case with the NAFTA and the USCMA.

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464 Statement of Claim, ¶ 266.

465 Statement of Claim, ¶ 378.

466 As noted above, it appears that the Claimants continued to seek damages in a national proceeding long after they filed a waiver of their right to do so. Consequently, they did not meet the requirements of Article 14.D.5 of the USMCA.

467 Statement of Claim, ¶ 306 *et seq*.

468 Statement of Claim, ¶ 292.

469 Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law.* OUP(2012), p. 219. **RL-0037**.

417. By including specific definitions of monopolies and state-owned enterprises in Chapter Fifteen, NAFTA, according to the *UPS* tribunal, created a *lex specialis* with respect to those entities, and the tribunal thereby displaced the rules of customary international law.[470] The tribunal in *Mesa Power Group, LLC v. Government of Canada* reached the same conclusion by stating the following:

> The NAFTA thus establishes a special regime which distinguishes between a NAFTA Party and its enterprises, specifies what control obligations the former has over the latter, and thus organizes the NAFTA Party's responsibility for acts of its enterprises. This regime cannot be displaced by the ILC Articles, which, [...] are residual in nature. Indeed, if the ILC Articles were to apply, then the conduct of a state enterprise discriminating in the sale of its goods or services would be attributable to that NAFTA Party. This would mean that a NAFTA Chapter 11 tribunal would have to consider such conduct, although Article 1116(1) restricts its jurisdiction to claims of breach of Article 1503(2). As a result, the Tribunal concludes that Article 1503(2) constitutes a *lex specialis* that excludes the application of Article 5 of the ILC Articles.[471]

418. The findings of the above-mentioned tribunals are consistent with the Articles prepared by the International Law Commission on Responsibility of States for Internationally Wrongful Acts (*ILC's articles on Responsibility of States for Internationally Wrongful Acts)* or ("ILC Articles"),[472] which establish more specific rules that displace the default rules of customary international law.[473]

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[470] *United Parcel Services of America Inc. v. Canada*, ICSID Case No. UNCT/02/1, Award, 24 May 2007, ¶ 59**. RL-0038**.

[471] *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 361. **RL-0039.** The tribunal in *Adel A Hamadi Al Tamimi v. Sultanate of Oman* referred to the following principle in this way:

> [The tribunal] accepts the Respondent's submission that contracting parties to a treaty may, by specific provision (lex specialis), limit the circumstances under which the acts of an entity will be attributed to the State. To the extent that the parties have elected to do so, any broader principles of State responsibility under customary international law or as represented in the ILC Articles cannot be directly relevant.

Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award, 3 November 2015, ¶ 321. **RL-0040.**

[472] Int'l Law Comm., Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001. **RL-0041**.

[473] *United Parcel Services of America Inc. v. Canada*, ICSID Case No. UNCT/02/1, Award, 24 May 2007, ¶ 59**. RL-038**.

419. For this reason, Claimants err by citing to tribunal awards that arose from other treaties lacking the *lex specialis* of NAFTA and the USMCA.[474]

B. The fact that Pemex is a State productive enterprise is not sufficient to establish attribution

420. The Claimants' arguments on attribution are confusing and inconsistent. The Claimants appear to believe that the mere fact that the Government of Mexico owns Pemex is sufficient to attribute Pemex's acts to Respondent under the NAFTA and the USMCA. This is obviously incorrect.

421. NAFTA Article 1503(2) provides that:

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

422. Article 22.3 of the USMCA provides:

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

423. A footnote to Article 22.3 of the USMCA further explains: "Examples of regulatory, administrative, or other governmental authority include the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges."

424. Obviously, under both agreements, the obligations for a government-owned state enterprise such as PEMEX are limited to situations where it exercises "regulatory, administrative, or other governmental authority".

425. This approach is reflected in the ILC Articles as well. ILC Article 5 extends "to the conduct of a person or entity which is not an organ of a State under Article 4, but which is empowered by the law of that State to exercise elements of governmental authority… *provided the person or*

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474 Statement of Claim, ¶ 315.

entity is acting in that capacity."[475] An example of the distinction made by Article 5 is "the conduct of a railroad company which has been vested with certain police functions ..... "[476] The exercise of such powers will be considered an act of the State under international law, but other activities such as ticket sales will not.[477] Thus, customary international law analyzes conduct to identify and categorize each specific act.[478]

426. Similarly, ILC Article 8 covers only "the conduct of a person or group of persons [...] if that 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 that conduct."[479] Thus, "attribution to the state of conduct under the 'direction or control' of the state requires not only that the entity is generally controlled by the state but that the individual operation in questions was effectively controlled and that the act was a genuine part of that operation."[480]

427. To avoid these limitations, the Claimants argue that Pemex is a State organ under Article 4 of the ILC, and therefore Mexico is responsible for all of Pemex's actions. But there is no convincing argument for the proposition that Pemex is an organ of the State as defined in ILC Article 4. The Claimants cite to statements from Pemex, such as in a PEMEX filing to the U.S. Securities and Exchange Commission, that PEMEX is government-owned.[481] But government ownership of a commercial enterprise does not mean that the enterprise is an organ of the state per se. Thus, it also does not resolve the issue of attribution under the NAFTA and the USMCA.

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475 Int'l Law Comm., Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001 (emphasis added). **RL-0041**.

476 James Crawford, *The Articles of the International Law Commission on the International Responsibility of States Introduction, text and commentary* (2004), p.140. **RL-0042**.

477 James Crawford, *The Articles of the International Law Commission on the International Responsibility of States Introduction, text and commentary* (2004), p.140. **RL-0042**.

478 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, ¶¶ 163-71. **RL-0043**. *Gustav Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶¶ 202 *et seq*. **RL-0044**.

479 Int'l Law Comm., Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001. **RL-0041**.

480 Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford 2012). p. 222. **RL-0037**.

481 Statement of Claim, ¶ 284.

428. Similarly, the Claimants' citation to a U.S. court case in which Pemex argued it was government-owned and therefore protected/covered by the U.S. Foreign Sovereign Immunities Act (FSIA) does not assist the Tribunal.[482] As background, the FSIA incorporates the customary international law standard of restrictive immunity, as well as some additional exceptions. In that regard, the FSIA sets forth several exceptions to sovereign immunity, including in part the following case:

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States....[483]

429. The definition of "commercial activity" in this law emphasizes that "[t]he commercial character of the activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[484] This definition has been further explained by the U.S. Supreme Court as follows:

> [W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce.[485]

430. In that sense, for example, under the "commercial activity" exception, foreign governments can be sued in the United States for breaching a contract. [486]

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482 Statement of Claim, ¶¶ 285 and 312.

483 28 U.S.C. § 1605. **R-0105**.

484 28 U.S.C. § 1608(d). **R-0105**.

485 *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992). **RL-0045**.

486 *See, e.*g., *Republic of Argentina v. Weltover*, 504 U.S. at 614-615 ("a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods"). **RL-0045**. *Globe Nuclear Services and Supply GNSS, Ltd. v. AO Techsnabexport*, 376 F.3d 282 (4th Cir. 2004) (Russian government-owned company not entitled to immunity in relation to contract to supply U.S. company with uranium hexafluoride extracted from dismantled nuclear warheads). **RL-0046**.

431. The FSIA applies to "foreign States" including an "agency or body" of a foreign State. The definition of "agency or body" encompasses any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.[487]

432. Thus, it is sufficient for an entity to have majority government ownership to be within the scope of the FSIA, and it is not necessary to establish that the entity is involved in governmental functions.

433. Pemex is an "agency or body" under the provisions of the FSIA. But, as discussed above, that does not imply that it is automatically immune from civil liability under the U.S. legal system, and in particular, it does not imply that all of its activities are considered "governmental" in nature.

434. In summary, as Judge Crawford noted, "the mere fact that a corporation is owned, partially or even entirely, by a state does not automatically permit the piercing of the corporate veil and the attribution of the conduct of the corporation to the state".[488]

C. Entering into contracts is not an act of regulatory, administrative or other governmental authority.

435. Fundamentally, the Claimants' argument is that the entering into service contracts is an act of regulatory, administrative or other governmental authority under the NAFTA and the USMCA. This argument is untenable.

436. The tribunal in *UPS v. Canada* concluded that the decisions on the purchase of services were commercial acts and therefore not subject to NAFTA Chapter XV liability.[489]

437. The *Mesa* tribunal did not raise whether the state enterprise has the authority to enter into contracts to the status of a "factor" sufficient to establish attributable conduct. Instead, the tribunal found that the Ontario Power Authority, in preparing a renewable energy supply program, and in

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487 28 U.S.C. § 1603(b). **R-0105**.

488 James Crawford, *"State Responsibility: The General Part"*, CUP (2013) p. 161. **RL-0047**.

489 *United Parcel Services of America Inc. v. Canada*, ICSID Case No. UNCT/02/1, Award, 24 May 2007, ¶ 78**. RL-0038**.

determining, cataloguing and evaluating criteria for the implementation of the program, was also authorized to enter into supply contracts and capacity contracts, which involved the exercise of delegated governmental authority in particular instances.[490] Thus, the *Mesa* award hardly supports the notion that entering into contracts *per se* constitutes a State attribution.

438. Claimants insist on arguing that "whether a state ministry or minister has authority to issue directions to the State enterprise" is a relevant factor in the attribution analysis..."[491] However, the Tribunal in *Adel A Hamadi Al Tamimi* determined that "the mere fact that a number of [the state-owned entity's] board members also served as government ministers does not by itself demonstrate that [the entity] exercised regulatory, administrative or governmental powers."[492] Similarly, the manner in which Pemex was characterized in 1938 is not pertinent to whether the entering into contracts is a regulatory or administrative function, and even still, Claimants acknowledge more recent statements made by Pemex that it is a "decentralized" entity, meaning that it is not under the exclusive control of the Mexican government.[493]

439. The Claimants also argue that it is relevant that Pemex has broad powers to enter into contracts.[494] However, all three NAFTA (and USMCA) Parties have agreed that such powers are not a type of regulatory authority. Their positions were summarized in *Mercer v. Canada as* follows:

> In brief, as to BC Hydro's determination of Celgar's GBL, the Respondent submits that the negotiation of a GBL by BC Hydro is a commercial act and not an exercise of delegated governmental authority, since these words have a "limited scope" that do not apply to the rights and powers of state enterprises "to enter into contracts for purchase or sale and to arrange and manage their own commercial activities."….
>
> * * *
>
> In its submission under NAFTA Article 1128, Mexico contends that wide discretion is at best uncorrelated with the delegation of governmental authority. Mexico agrees with the Respondent and the NAFTA tribunal in *UPS v Canada* that acts of a commercial character fall outside the scope of NAFTA Article 1503(2) and that, in identifying

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490 *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 374-75. **RL-0039**.

491 Statement of Claim, ¶ 300.

492 *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, ¶ 325. **RL-0040**.

493 Statement of Claim, ¶¶ 284, 293.

494 Statement of Claim, ¶ 301.

> whether acts are of a commercial character, it is helpful to consider whether they are within the powers of other businesses.
>
> In its submission under NAFTA Article 1128, the USA draws the Tribunal's attention to NAFTA Note 45, which explains that delegation "includes a … government order, directive or other act …, transferring to the monopoly [or state enterprise], or authorizing the exercise by the monopoly [or state enterprise] of governmental authority". The USA submits that these examples confirm that the term "other governmental authority" means the authority of the NAFTA Party in its sovereign capacity; and that a state enterprise is not exercising "governmental authority" merely because it acts as a commercial participant in the marketplace. [495]

440. The Claimants' approach in arguing that commercial activities of state enterprises are regulatory and administrative functions would, in effect, make NAFTA Article 1503(2) and Article 22.3 of the USMCA meaningless, in violation of the interpretative principle of *effet utile*, as discussed by the *UPS* tribunal in this same context:

> The careful construction of distinctions between the State and the identified entities and the precise placing of limits on investor arbitration when it is the actions of the monopoly or the enterprise that are principally being questioned would be put at naught on the facts of this case were the submissions of UPS to be accepted. It is well established that the process of interpretation should not render futile provisions of a treaty to which the parties have agreed unless the text, context or purpose clearly so demand [...].[496]

441. The plain language of the NAFTA and the USMCA indicates that commercial activities, such as entering into contracts, terminating contracts and engaging in contract-related litigation, are not attributable to the State.

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[495] *Mercer International Inc. v. Government of Canada* ICSID Case No. ARB(AF)/12/3, Award, 5 March 2018, ¶¶ 6.54, 6.56, and 6.57. **RL-0048**. The *Mercer* tribunal engaged in an exercise of judicial economy and did not set out its majority opinion on this issue, as it resolved the case on the merits.

[496] *United Parcel Services of America Inc. v. Canada*, ICSID Case No. UNCT/02/1, Award, 24 May 2007, ¶ 60. *See also Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America, UNCITRAL (formerly Canfor Corporation v. United States of America; Tembec et al. v. United States of America; Terminal Forest Products Ltd. v. United States,* UNCITRAL, Decision of Preliminary Question, 6 June 2006, ¶ 324 ("[...] the Tribunal wishes to emphasize that, under well-known principles of international law, every provision of an international agreement must have meaning, because it is presumed that the State Parties that negotiated and concluded that agreement intended each of its provisions to have an effect."). **RL-0049**.

VII. LEGAL ARGUMENT ON THE MERITS OF THE CASE

A. Claimants have not described a violation of the Minimum Standard of Treatment under international law

442. The Claimants have not described a violation of the Minimum Standard of Treatment. Instead, the Claimants have attempted to confuse the Tribunal by mingling their three claims. However, as the claims are not, in fact, consolidated, it is necessary to address each of them independently.

443. Although the Stament of Claim presents the legal arguments in a confusing manner, it is possible to discern that, with respect to Contract 803 and Contract 804 (claims brought under the USMCA), Claimants have alleged a breach of the Minimum Standard of Treatment based on: *(i)* a an assertion of denial of justice and due process by the Mexican courts based on alleged delays; *(ii)* assertions that the Mexican courts rendered incorrect decisions on Mexican law; and *(iii)* an allegation of discrimination because an unrelated party was able to reach an agreement with Pemex regarding a completely different contract.

444. With respect to Contract 821 (brought under the NAFTA), the Claimants generally allege a violation of the Minimum Standard of Treatment because: *(i)* Pemex did not "safeguard" Finley and Drake-Mesa's legitimate expectations; *(ii)* Pemex purportedly "retaliate[d]" by refusing to request further work from them after they initiated Civil Proceeding 200/2016 against PEP; and *(iii)* because Pemex engaged in arbitrary and discriminatory measures and did not act in good faith in administering Contract 821.[497]

445. Below, the Respondent first responds to the Claimants' incorrct descriptions of the relevant legal standards, and then addresses the claims with respect to each of the three contracts.

1. The Claimants incorrectly describe the relevant legal standards

446. The Claimants set out incorrect summaries of the legal standards applicable to determinating whether there has been a denial of the Minimum Standard of Treatment within the meaning of the NAFTA and the USMCA. Accordingly, the Respondent will first respond to those summaries.

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[497] Statement of Claim, ¶ 367. Claimants included in their list of alleged violations a series of overlapping and repetitive claims of arbitrary treatment, retaliation, and failure to safeguard legitimate expectations.

447. First, it is important to note that NAFTA Article 1105(1) and Article 14.6 of the USMCA differ from other substantive obligations of NAFTA and the USMCA, such as those relating to discrimination, as they grant the minimum standard of treatment only to *investments*, and not to investors: The first paragraph of Article 1105 is limited to treatment of investments, unlike the second paragraph of Article 1105, and indeed other provisions such as Article 1102 and 1103, which refer to treatment accorded to both investments and investors. This limitation was present even in the earliest drafts of what became Article 1105(1)".[498]

448. Similarly, Article 14.6 of the USMCA refers to the treatment accorded to "covered investments", with no mention of investors. Accordingly, there is no obligation under Article 1105 or Article 14.6 owed to Finley, MWS or Prize, only to the Mexican entities in which they invested.

449. Moreover, NAFTA Article 1105 Minimum Standard of Treatment, as interpreted by the Free Trade Commission ("FTC"), and as set forth in Article 14.6 of the USMCA, is that of customary international law.[499] Specifically, "there is no confirmation that States when referencing FET in treaties meant anything other than the minimum standard of treatment, as classically understood." [500]

450. Thus, therefore, it is for the Claimants to establish the existence and applicability of customary international law in the first place. In the words of the Cargill tribunal:

> [T]he proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If Claimant does not provide the Tribunal with the proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted..[501]

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498 Meg N. Kinnear et al., *Article 1105 - Minimum Standard of Treatment*, in "Investment Disputes Under NAFTA, An Annotated Guide", Kluwer (2006), pp. 1105-17. **RL-0050**.

499 Campbell McLachlan, Laurence Shore & Matt Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2017), ¶ 7.07. **RL-0051**.

500 Christophe Bondy, *Fair and Equitable Treatment - Ten Years On*, in Evolution and Adaptation: The Future of International Arbitration (Kluwer 2019), p. 216. **RL-0052.**

501 *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 273. **RL-0053**.

451. Other NAFTA tribunals concur.[502] As such, it is widely accepted that "the identification of rules of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice and whether such general practice is accepted as law (that is, accompanied by *opinio juris*)."[503]

452. Notably, "[p]roving advances to existing customary norms is difficult. This has put a natural breaking effect on the expansion of the FET standard, understood as a customary minimum norm [in the context of NAFTA]".[504] In this regard, arbitral awards themselves are not state

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[502] *See, e.g., ADF Group Inc. v. United States,* ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 185 ("The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts."). **RL-0054**. *Glamis Gold, Ltd. v. The United States of America, UNCITRAL*, Award. 8 June 2009, ¶ 601 ("[A]s a threshold issue, the Tribunal notes that it is Claimant's burden to sufficiently" show the content of the customary international law minimum standard of treatment."). **RL-0055**.

[503] Charles Chernor Jalloh, *Statement of the Chair of the Drafting Committee on Identification of Customary International Law*, International Law Commission, May 25, 2018, p. 3. **RL-0056**. In a recent case, Professor Sands clearly explained the differences between the Minimum Standard of Treatment and the FET by emphasizing the following: "As acknowledged by both the ICJ and the ILC, the fact that the FET provision can be found in a number of treaties is not enough to affect the content of customary international law. Indeed, the widespread inclusion of FET provisions supports the opposite conclusion, as states which include such provisions in their treaties may be understood as expressing a desire to depart from the standard in customary international law. As with all rules of customary international law, the crucial issue is whether there is sufficient evidence of state practice and opinio juris to support the conclusion of the existence of a rule of customary law". *Eco Oro Minerals Corp. v. The Republic of Colombia, ICSID Case. No. ARB/16/41, Partial dissent opinion Prof. Philippe Sands, 9 September 2021*, ¶ 6. **RL-0057**.

[504] Christophe Bondy, *Fair and Equitable Treatment - Ten Years On*, in Evolution and Adaptation: The Future of International Arbitration (Kluwer 2019), p. 214. **RL-0052.**

practice.[505] In contrast, "[S]tate endorsement of a particular articulation of an international rule by an arbitral tribunal is itself evidence of State practice and of *opinion juris.*" [506]

453. Relatedly, the Claimants err in seeking to cite indiscriminately to NAFTA and non-NAFTA awards in discussing the Minimum Standard of Treatment.[507] As should be plain, "[t]he manner in which the notion of fairness and equity to be granted to the investor is represented a treaty may vary," and "[t]he manner in which a treaty structures the standard and its association with other standards will be decisive in defining its meaning"[508] Whereas NAFTA tribunals must "apply the minimum standard of treatment existing under custom,"[509] the same, of course, is not true of all multi- or bilateral investment treaties.[510] As one practitioner has noted, "[T]he result [under the NAFTA] has been a standard that includes a more limited range of obligations than FET as a treaty standard open to arbitral interpretation, and one with a relatively higher threshold for breach."[511]

454. To illustrate the point, and as discussed further below, "[t]he conclusion reached by NAFTA tribunals that Article 1105 does not include any obligation of transparency is in sharp

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505 See *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Canada's Response to Non-Disputing Party Submissions, 26 June 2015, ¶ 12 ("the Claimant cannot turn to the decisions of international tribunals as evidence of State practice that the protection of an investor's expectations is required by the customary international law minimum standard of treatment"). **RL-0058**. *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, United States Non-Disputing Party Submission, 26 July 2014, ¶ 6 ("[a]rbitral decisions interpreting 'autonomous' fair and equitable treatment and full protection and security provisions in other treaties, outside of the context of customary international law, do not constitute evidence of the content of the customary international law standard"). **RL-0059**.

506 Christophe Bondy, *Fair and Equitable Treatment - Ten Years On*, in Evolution and Adaptation: The Future of International Arbitration (Kluwer 2019), p. 215. **RL-0052.**

507 *See* Statement of Claim, ¶¶ 340-341.

508 Marcela Klein Bronfman, *Fair and Equitable Treatment: An Evolving Standard*, 10 Max Planck Yearbook of United Nations Law (2006), pp. 625-26. **RL-0060**.

509 Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer 2009), p. 128**. RL-0061**.

510 *Eco Oro Minerals Corp. v. The Repubic of Colombia*, ICSID Case. No. ARB/16/41, Partial dissent opinion Prof. Philippe Sands, 9 September 2021, ¶ 7 ("certain tribunals have accidentally or deliberately sought to equate or meld the MST and FET standards. The two standards may share a common aim of imposing restrictions on the manner and extent to which a state is required to treat a foreign investor in its territory, but they do so in different ways. A breach of the customary MST standard would invariably give rise to a breach of the FET standards, but the reverse is generally not the case. This is because the MST standard sets a much higher bar. [...] "). **RL-0057**.

511 Christophe Bondy, *Fair and Equitable Treatment - Ten Years On*, in Evolution and Adaptation: The Future of International Arbitration (Kluwer 2019), p. 214. **RL-0052.**

contrast with that prevailing under BITs outside of the NAFTA context where tribunals have recognized that transparency is an element of the FET standard."[512] Likewise, unlike the NAFTA, "a great number of BITs that include an FET clause contain additional substantive content, such as specific prohibition of arbitrary, unreasonable and discriminatory measures."[513]

455. For these reasons, the *Glamis* tribunal rejected the notion that "BIT jurisprudence has converged with customary international law."[514] The *Glamis* tribunal explained:

> Certainly, it is possible that some BITs converge with the requirements established by customary international law; there are, however, numerous BITs that have been interpreted as going beyond customary international law, and thereby requiring more than that to which the NAFTA State Parties have agreed.[515]

456. Accordingly, awards from cases arising under investment treaties with different FET provisions are not necessarily relevant for interpreting NAFTA or the USMCA.

2. Claimants do not correctly describe the meaning of "arbitrary" conduct.

457. As discussed above, the Claimants rely on cases that did not arise under the NAFTA or the USMCA, but rather arose under treaties with an autonomous Fair and Equitable Treatment standard. NAFTA Article 1105 is supplemented by the binding interpretation of the NAFTA FTC issued on July 31, 2001, which states that Article 1105 "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party" and that "[t]he concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[516]

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[512] Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer 2013), p. 180. **RL-0062.**

[513] Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer 2013), p. 201. **RL-0062**.

[514] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 609. **RL-0055.**

[515] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 609. **RL-0055**.

[516] Interpretative Notes on Certain Provisions of Chapter 11, NAFTA Free Trade Commission, July 31, 2001. **RL-0063**.

458. Importantly, the standard for concluding that government conduct is inconsistent with the minimum standard of treatment is high. The Tribunal in *Waste Management v. United Mexican States* established that:

> Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.[517]

459. The *Cargill v. United Mexican States* tribunal also elaborated on this issue as follows:

> As outlined in the Waste Management II award quote above, the violation may arise in many forms. It may relate to a lack of due process, discrimination, a lack of transparency, a denial of justice, or an unfair outcome. But in all of these various forms, the "lack" or "denial" of a quality or right is sufficiently at the margin of acceptable conduct and thus we find-in the words of the 1128 submissions and previous NAFTA awards-that the lack or denial must be "gross," "manifest," "complete," or such as to "offend judicial propriety." The Tribunal grants that these words are imprecise and thus leave a measure of discretion to tribunals. But this is not unusual. The Tribunal simultaneously emphasizes, however, that this standard is significantly narrower than that present in the *Tecmed* award where the same requirement of severity is not present.
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> The Tribunal thus holds that Claimant has failed to establish that the standard present for example in the Tecmed award reflects the content of customary international law. The Tribunal holds that the current customary international law standard of "fair and equitable treatment" at least reflects the adaptation of the agreed Neer standard to current conditions, as outlined in the Article 1128 submissions of Mexico and Canada. If the conduct of the government toward the investment amounts to gross misconduct, manifest injustice or, in the classic words of the Neer claim, bad faith or the willful neglect of duty, whatever the particular context the actions take in regard to the investment, then such conduct will be a violation of the customary obligation of fair and equitable treatment.[518]
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> * * *
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> In summation, the Tribunal finds that the obligations in Article 1105(1) of the NAFTA are to be understood by reference to the customary international law minimum standard of treatment of aliens. The requirement of fair and equitable treatment is one aspect of this minimum standard. To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a

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517 *Waste Management Inc. v. United Mexican States*, ICSID Case. No. ARB (AF)/00/3, Award, April 30, 2004, ¶ 98. **RL-0035**.

518 *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶¶ 285-286. **RL-0053**.

> merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.[519]

460. Claimants cite *Pope & Talbot* as precedent for the FET standard,[520] apparently without realizing that it was that very tribunal that the NAFTA Parties overrode when the NAFTA FTC issued its interpretation on July 31, 2001. In any event, it is clear that the violation of the Minimum Standard of Treatment is not conduct that is simply "improper and discreditable", as Claimants allege.[521] The full *Mondev* award paragraph that they cite actually states:

> The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.[522]

461. Accordingly, more is required than a superficial allegation that a decision was "improper and discreditable".

462. In conclusion, the minimum standard of customary international law prohibits an action that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety."[523] Allegations of violations of a national law, general claims of unfairness, and self-defined "expectations" are not sufficient to argue a violation of the Fair and

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519 *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 296. **RL-0053**.

520 Statement of Claim, ¶ 336.

521 Statement of Claim, ¶ 337.

522 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 127**. RL-0032**.

523 *Waste Management Inc. v. Mexico,* ICSID Case. No. ARB (AF)/00/3, Award, April 30, 2004, ¶ 98. **RL-0035**.

Equitable Treatment standard under the Minimum Standard of Treatment under customary international law.

3. Discrimination is governed by national treatment and most-favored-nation treatment, not by the FET standard.

463. Claimants made a shallow attempt to assert that discriminatory treatment of any kind violates the FET obligation.[524] But as discussed above, Pemex - and specifically PEP - did not give any contractor overall "better treatment", rather Pemex negotiated with each contractor based on the circumstances applicable to each, regardless of whether the contracts might have similar terms and conditions, such as those relating to early termination, suspension, and administrative rescission. Importantly, the Minimum Standard of Treatment does not encompass discrimination in the manner alleged by the Claimants. As stated by the tribunal in *Mercer v. Canada*:

> So far as concerns the Claimant's claims of "discriminatory treatment" contrary to NAFTA Article 1105(1), the Tribunal's agrees with the non-disputing NAFTA Parties' submissions that such protections are addressed in NAFTA Articles 1102 and 1103, rather than NAFTA Article 1105(1).
>
> The Tribunal also notes the approach taken in the Final Award in *Methanex v USA*. There, the NAFTA tribunal decided that, even without the FTC Interpretation:
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> "…the plain and natural meaning of the text of Article 1105 does not support the contention that the 'minimum standard of treatment' precludes governmental differentiations as between nationals and aliens. Article 1105(1) does not mention discrimination; and Article 1105(2), which does mention it, makes clear that discrimination is not included in the previous paragraph. By prohibiting discrimination between nationals and aliens with respect to measures relating to losses suffered by investments owing to armed conflict or civil strife, the second paragraph imports that the preceding paragraph did not prohibit – in all other circumstances – differentiations between nationals and aliens that might otherwise be deemed legally discriminatory – inclusion unius est exclusion alterius. The textual meaning is reinforced by Article 1105(3), which makes clear that the exception in paragraph 2 is, indeed, an exception."
>
> In the circumstances, the Tribunal decides that the Claimant's claims for "discriminatory treatment" under NAFTA Article 1105(1) can add nothing to the Claimant's claims under NAFTA Articles 1102 and 1103, which the Tribunal has already dismissed.[525]

464. Similarly, in this case the Claimants' argument on the purported different treatment granted to other companies (Integradora and Zapata) is not relevant to determining whether the Minimum Standard of Treatment has been accorded to their Mexican companies. Thus, the Tribunal may

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524 *See* Statement of Claim, ¶¶ 367(c), 371, 379-380.

525 *Mercer International Inc. v. Government of Canada* ICSID Case No. ARB(AF)/12/3, Award, 5 March 2018, ¶¶ 7.58-7.60. **RL-0048**.

conclude that the allegations raised by the Claimants regarding discrimination in light of the Minimum Standard of Treatment are completely deficient.

4. There is no free-standing obligation to protect an investor's "expectations".

465. The Claimants incorrectly argue that the Minimum Standard of Treatment includes a free-standing obligation to "safeguard" an investor's expectations.[526] The truth is that a breach of an investor's "legitimate expectations" cannot constitute an independent basis for a breach of FET under customary international law and NAFTA Article 1105(1).[527] Rather, expectations, to the extent that they are *legitimate*, can, at most, constitute a factor to be considered in assessing an alleged FET violation.[528]

466. NAFTA tribunals have repeatedly delimited the concept of "legitimate expectations" in order to significantly narrow its scope. For example, the expectations must "arise through targeted representations or assurances made explicitly or implicitly by a state party".[529] Such assurances must be so "definite, unambiguous and repeated" as to constitute a quasi-contractual

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526 Statement of Claim, ¶¶ 349-354.

527 Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer 2013), pp. 265-266 ("[...] there is indeed little evidence to support the assertion that there exists under custom an obligation for host States to protect investors' legitimate expectations. Scholars have also interpreted the concept of legitimate expectations as a general principle of law based on its recognition in many domestic legal systems. This argument is of limited relevance in the specific context of Article 1105. This is because the binding FTC Note is clear to the effect that NAFTA tribunals should look solely to custom as a source of international law in their interpretation of Article 1105, and not at general principles of law" [...] [T]his situation contrasts with that of non-NAFTA tribunals that have held that legitimate expectations can be protected without any specific representations made by the host State"). **RL-0062**.

528 McLachlan, Shore & Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2017), ¶ 7.179 (legitimate expectations are "a relevant factor in the application of the investment treaty's guarantee of fair and equitable treatment and does not supply an independent treaty standard of its own"). **RL-0064**. For example, the tribunals in *Mobil* and *Cargill* confirmed that a breach of an investor's legitimate expectations could not constitute a breach of the Minimum Standard of Treatment standard, but is instead a mere "factor" to be taken into account. *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, ¶¶ 152-153. **RL-0065**. *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶¶ 273, 290. **RL-0053**.

529 *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL*, Award, 12 January 2011, ¶¶ 141-42. **RL-0066**.

relationship.[530] The formulation of the tribunal in *Glamis* - endorsed by the tribunals in *Cargill*, *Mobil*, and *Grand River* -[531] "suggests the adoption of an even narrower interpretation of the concept of legitimate expectations",[532] and the qualification that the assurances must also have been given "purposely and specifically"[533], further narrows the scope of legitimate expectations under NAFTA Article 1105. Recently, Professor Sands explained this situation as follows:

> […] if legitimate expectations are to have any place in the context of MST, the concept will have a more limited role than in relation to FET. Unlike in a FET inquiry, there is no authority for the proposition that it will be sufficient for a claimant to point to reliance on legislative provisions or broad statements. Rather, the limited jurisprudence that exists (in the NAFTA context) indicates inter alia that a claimant must be able to establish a "quasi-contractual" relationship or expectation, in the sense that the state must have made "explicit" or "specific" encouragements or representations on which the investor has placed reliance.[534]

467. Likewise, Article 14.6 of the USMCA reflects the intent of Mexico, the United States and Canada to provide additional clarity. 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." This language is part of the governing law of this proceeding, and cannot be ignored.[535]

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530 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 802 (citing Metalclad). **RL-0055**.

531 *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 273, ¶ 290. **RL-0053**. *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, ¶¶ 152, 170. **RL-0065**. *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL*, Award, 12 January 2011, ¶ 141. **RL-0066**.

532 Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer 2013), p. 166. **RL-0062.**

533 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 766. **RL-0055**.

534 *See also Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 502 ("Further, the Tribunal shares the view held by a majority of NAFTA tribunals that the failure to respect an investor's legitimate expectations in and of itself does not constitute a breach of Article 1105, but is an element to take into account when assessing whether other components of the standard are breached."). **RL-0039**.

535 The Claimants' argument that "serious violations of legitimate expectations" and "violating Claimants legitimate expectations in bad faith" could somehow still be a violation of Article 14.6 (Statement of Claim, footnote 605) would require the Tribunal to disregard the plain language of the treaty.

468. Claimants' citations to *Tecmed v. Mexico* and *Saluka v. Czech Republic*,[536] which arose under treaties with entirely different FET provisions than NAFTA and the USMCA are not useful to the Tribunal. It is also unclear why Claimants cited the award in *Mondev v. United States*, in which the tribunal made no reference to legitimate expectations, and determined that domestic court decisions that applied domestic law did not violate NAFTA Article 1105.[537]

469. Not only are the arguments and awards used by the Claimants deficient, but also NAFTA and mainly the USMCA's own texts make it clear that there is no "legitimate expectations" factor or element to claim a violation of the principle of Fair and Equitable Treatment.

5. Transparency is not a freestanding obligation

470. The NAFTA Parties have agreed that Article 1105 does not include a transparency obligation.[538] Moreover, the NAFTA tribunals have concurred with this agreement, which can be seen in the Cargill v. Mexico award:

> The Tribunal holds that Claimant has not established that a general duty of transparency is included in the customary international law minimum standard of treatment owed to foreign investors per Article 1105's requirement to afford fair and equitable treatment. The principal authority relied on by the Claimant-*Tecmed*- involved the interpretation of a treaty-based autonomous standard for fair and equitable treatment and treated transparency as an element of the "basic expectations" of an investor rather than as an independent duty under customary international law.[539]

471. The Tribunal in *Feldman v. Mexico* commented:

> While the transparency in some of the actions of SHCP may be questioned, it is doubtful that lack of transparency alone rises to the level of violation of NAFTA and international law, particularly given the complexities not only of Mexican but most other tax laws. The British Columbia Supreme Court held in its review of the Metalclad decision that Section A of Chapter 11, which establishes the obligations of host governments to foreign investors, nowhere mentions an obligation of transparency to such investors,

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536 Statement of Claim, ¶ 350.

537 Claimants cite an *orbiter dictum* of that award commenting on a U.S. court's reference to the *dictum* of a U.S. Supreme Court decision from a 1920 case. *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 134. **RL-0032**.

538 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 580 ("all three States Parties to the NAFTA have agreed that there is no general transparency requirement in Article 1105 and have expressly rejected the notion that transparency forms part of customary international law"). **RL-0055**.

539 *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 294. **RL-0053**.

> and that a denial of transparency alone thus does not constitute a violation of Chapter 11 (United Mexican States v. Metalclad, Supreme Court of British Columbia, Reasons for Judgment of the Honorable Mr. Justice Tysoe, May 2, 2001, paras. 70-74, http://www.naftalaw.org.; transparency is a general NAFTA obligation of the NAFTA Parties under Chapter 18). While this Tribunal is not required to reach the same result as the British Columbia Supreme Court, it finds this aspect of their decision instructive..[540]

472. Recently, the tribunal in *Mercer International v. Canada* noted:

> As to transparency, it suffices to cite the Cargill Award cited above, in which the tribunal decided that the customary international law standard had not yet been shown to embrace a claim to transparency. The Tribunal also notes that the tribunal in Merill & Ring decided that transparency was not part of the customary international law standard.[541]

473. Accordingly, there is consistent and clear agreement that there is no customary international law standard on transparency, much less under NAFTA and the USMCA.

6. Good faith is not a freestanding obligation

474. Claimants do not bother to discuss the specific role of good faith within the Fair and Equitable Treatment standard, its specific definition, or what facts, supported by legal authorities, would "violate" this alleged principle.

475. Indeed, according to a leading NAFTA scholar, citing abundant studies on the subject, he notes that "[w]hat is clear is that good faith is not an autonomous stand-alone obligation under the FET standard (like arbitrariness or denial of justice)."[542] The NAFTA Parties have consistently held that Article 1105 does not impose any substantive, stand-alone obligation of good faith, and the NAFTA tribunals have concurred.[543]

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[540] *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶ 133, **RL-0067.**

[541] *Mercer International Inc. v. Government of Canada* ICSID Case No. ARB(AF)/12/3, Award, 5 March 2018, ¶¶ 7.77. **RL-0048**.

[542] Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105 (Kluwer 2013), pp. 222-23. **RL-0062**.

[543] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, United States Counter-Memorial, 22 December 2008, ¶ 94. **RL-0068**. *Methanex Corporation v. United States*, UNCITRAL, United States Rejoinder, 23 April 2004, ¶¶ 25-26. **RL-0069**. *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Canada's Rejoinder, 27 March 2009, ¶¶ 186-87. **RL-0070**. *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Canada's Counter-Memorial, 22 June 2005, ¶¶ 915, 921. **RL-0071**.

476. Good faith, then, "adds only negligible assistance in the task of determining or giving content to a standard of fair and equitable treatment."[544] Whereas in Waste Management II, the tribunal clearly did not refer to good faith as an independent obligation under Article 1105 when it noted in *dicta*, in the context of unproven conspiracy allegations, and in denying a claim under Article 1105(1), that "[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."[545] Even outside NAFTA, "[t]he ICJ [for instance] has also come to the conclusion that the principle of good faith is 'not in itself a source of obligation where none would otherwise exist.'"[546]

477. In fact, academics[547] and tribunals[548] have likewise concluded that the FET standard is simply an expression of the principle of good faith.[549] Newcombe and Paradell, for example, find that "[t]he commitment to fair and equitable treatment is an expression of the principle of good faith," and that "the various elements of fair and equitable treatment, including due process, due diligence and the protection of legitimate expectations, are manifestations of the more general principle of good faith."[550]

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544 *See, e.g., ADF Group Inc. v. United States,* ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 191**. RL-0054**.

545 *Waste Management Inc. v. Mexico,* ICSID Case. No. ARB (AF)/00/3, Award, April 30, 2004, ¶ 138, **RL-0035**.

546 *Border and Transborder Armed Actions (Nicaragua v. Honduras),* Judgment, Jurisdiction and Admissibility, 20 December 1998, ICJ Rep. 1988, ¶¶ 105-06. **RL-0073**.

547 Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties. Standards of Treatment* (Kluwer 2009), p. 276, n. 206. **RL-0061**. Roland Kläger, *Fair and Equitable Treatment in International Investment Law (*Cambridge 2011), p. 132. **RL-0074**.

548 *Técnicas Medioambientales Tecmed, S.A. v. Mexico,* ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, ¶ 153. **RL-0075**. *Sempra Energy International v. Argentina,* ICSID Case No. ARB/02/16, Award, September 28, 2007, ¶ 298. **RL-0076**. *Siemens AG v. Argentina,* ICSID Case No. ARB/02/8, Award and Separate Opinion, 17 January 2007, ¶ 308. **RL-0077**.

549 Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer 2013), p. 223. **RL-0062.**

550 Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties. Standards of Treatment* (Kluwer 2009), p. 277. **RL-0061**.

478. The Claimants cite *Frontier Petroleum v. Czech Republic*,[551] a case arising under the Canada-Czech Republic BIT, which itself relied on precedents involving other BITs with autonomous fair and equitable treatment standards, but without acknowledging that distinction.[552] *Frontier Petroleum* is not a persuasive authority for interpreting the NAFTA or the USMCA.

479. Again, the legal authorities cited by Claimants are not applicable to Case ARB/21/25 and it is clear that Claimants are unable to demonstrate that good faith is a freestanding principle under the NAFTA and the USMCA.

7. Other vague claims of "harassment, coercion, abuse and disparagement"

480. Freedom from "harassment, coercion, abuse and disparagement" is not part of the NAFTA Article 1105 Minimum Standard of Treatment. The Newcombe and Paradell treatise relied on by the Claimants distinguishes between the two when it says: "[f]air and equitable treatment is a broad, overarching standard that contains various elements of protection, including *those elements commonly associated with the minimum standard of treatment*, the protection of legitimate expectations, non-discrimination, transparency and *protections against bad faith, coercion, threats and harassment*."[553] In other words, the elements commonly associated with the minimum standard of treatment are separate from the other elements listed, including coercion and harassment.

481. Despite this clear distinction, Claimants essentially copy Newcombe and Paradell's analysis of the FET protections against harassment and coercion in their Statement of Claim, citing the same cases without applying them to the circumstances of Case ARB/21/25. The cases cited by Newcombe and Paradell (and the Claimants), in the context of harassment and coercion, have nothing to do with the NAFTA Article 1105 Minimum Standard of Treatment as interpreted by the FTC or Article 14.6 of the USMCA.

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551 *Frontier Petroleum Services Ltd. v. The Czech Republic*, Final Award, 12 November 2010. **RL-0078**.

552 *Frontier Petroleum Services Ltd. v. The Czech Republic*, Final Award, 12 November 2010, ¶¶ 297-300 (relying on *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, March 17, 2006). **RL-0078**.

553 Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties. Standards of Treatment* (Kluwer 2009), p. 279. **RL-0061**. [Emphasis added]

482. For instance, the fair and equitable treatment claim in *Desert Line v. Yemen* was based on an automous FET clause in the Oman-Yemen BIT. The tribunal's decision in that case made no mention of customary international law. The FET standard in *Tecmed* "do not bear on the customary international law minimum standard of treatment, but rather reflect an autonomous standard based on an interpretation of the text".[554] On this point, the Cargill tribunal explained that the *Tecmed* case "is not instructive [...] as to the scope and bounds of the fair and equitable treatment required by Article 1105 of the NAFTA." [555]

483. In a footnote, the Claimants also cite the decisions in *Tokios Tokelés v. Ukraine* and *Vivendi v. Argentina*,[556] but the standards applied in those cases, again, have nothing to do with NAFTA Article 1105 or customary international law.[557] Finally, Claimants cite the decision in *Pope & Talbot v. Canada*, but as explained above, the tribunal in that case applied a standard that went beyond customary international law, which led the FTC to issue a binding interpretation of NAFTA Article 1105 confirming its interpretation under customary international law.

484. Even assuming these protections are part of NAFTA Article 1105, which they are not, the Claimants would still be required to meet the high threshold that has been consistently applied by tribunals under the NAFTA. In other words, it must be demonstrated that the acts that asserted by the Claimants are "gross, manifest, complete, or such as to offend judicial propriety."[558] Claimants simply do not meet that high threshold contained in both NAFTA and the USMCA.

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554 *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 280, **RL-0053.**

555 *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 280, **RL-0053.**

556 Statement of Claim, ¶ 346 n. 599.

557 *See Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, ¶ 85 (citing the fair and equitable treatment language of the applicable investment treaty without reference to customary international law), **RL-0080**. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Republic of Argentina*, ICSID Case ARB/97/3, Award, 20 August 2007, ¶¶ 7.4.5-7.4.9 (distinguishing between the treaty standard of fair and equitable treatment and the minimum standard of treatment). **RL-0081**.

558 *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 285**.** *See Glamis Gold v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 22 ("[T]o violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking-a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons-so as to fall below accepted international standards and constitute a breach of Article 1105(1)."). **RL-0055**.

B. Claims related to Contract 803 filed under the USMCA

485. As stated by the Claimants, with respect to Contract 803, their claim of denial of Fair and Equitable Treatment is based on: *i)* an assertion of a denial of justice and due process by the Mexican courts based on delay, *ii)* assertions that the Mexican courts made incorrect rulings on Mexican law; and *iii)* an allegation of discrimination because an unrelated party was able to reach an agreement with Pemex with respect to a contract completely different from Contracts 803, 804 and 821. All of these allegations are untenable for the reasons explained below.

1. The alleged unjustified delay in proceedings related to Contract 803 does not give rise to a denial of justice under the USMCA.

486. The Claimants improperly cite a condition precedent for initiating arbitration under Chapter 14 of the USMCA as somehow being a definition of a denial of justice. Specifically, the Claimants assert that the requirement of Article 14.D.5 – that the claimant have obtained a final decision from a court of last resort or 30 months have elapsed from the date on which it initiated a domestic proceeding – should be interpreted to mean that if a court proceeding has not been finalized within 30 months there has automatically been a denial of justice under international law[559] The Claimants' argument is nonsensical.

487. Article 14.D.5 of the USMCA sets out conditions precedent for initiating an investment arbitration. Among other conditions, it encourages the use of domestic courts to resolve disputes and seeks to discourage claimants from treating investment arbitrations as a first resort. Article 14.D.5 in no manner purports to define the minimum standard of treatment required by Article 14.6; rather, that article contains its own definitions. Article 14.6 does not define the minimum standard of treatment as requiring that all court cases be resolved within 30 months.

488. The ludicrous nature of Claimant's argument can easily be illustrated by examining statistics published by U.S. courts. Exhibit R-0109 contains information on the "caseloads" of U.S. federal district courts. It can be seen that, during the 12 month period ending June 30, 2022, there were 84,477 civil cases pending that were over three years (36 months) old, representing 13.9% of

559 Statement of Claim, ¶¶ 266, 370.

total cases.[560] It can also be seen that for civil cases with trials, the median number of months from initiation to the beginning of the trial was 33.8 months – meaning that one half of the cases took longer than that to reach the trial stage.[561] Note that these statistics are for district courts – the lowest level of federal courts – and do not include appeals to higher level courts.

489. Another example is a report on the New York State judiciary, which states that the State's "standards and goals" for resolving civil cases in the "Supreme Court" – which is New York's name for its lowest level courts – is 23 months for expedited cases, 27 months for standard cases, and 30 months for complex cases.[562] Again, this does not include appeals.

490. Thus, according to the Claimants, the United States in the USMCA intended to declare that thousands of cases in the U.S. courts – and indeed New York's goal for resolution of complex civil cases – should automatically be considered a denial of justice under customary international law. That is obviously ridiculous.

491. As to the Claimants' assertions about the litigation with respect to Contract 803, Claimant's expert states that Bisell and MWS Management themselves filed a number of appeals and a supplementary claim, and later withdrew their complaint in April 2021.[563] Claimants apparently also complain that an eight month delay caused by the COVID-19 pandemic should be treated as inconsistent with customary international law.[564] This aspect of Claimants' arguments is obviously frivolous. There was no unreasonable delay of the court proceedings in relation to Contract 803.

492. As pointed out by Respondent's Expert, the duration of the civil and administrative proceedings filed by Claimants was normal, considering the delays caused by the global pandemic derived from the COVID-19 virus, as well as the means of challenge to which both parties resorted:

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560 U.S. District Courts. Combined Federal Civil and Criminal Court Management Statistics (June 30, 2022), available at https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2022/06/30-2, p. 1. **R-0106**.

561 U.S. District Courts. Combined Federal Civil and Criminal Court Management Statistics (June 30, 2022), available at https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2022/06/30-2, p. 1. **R-0106**.

562 State of New York Unified Court System, The State of Our Judiciary 2019, Excellence Initiative: Year Three, available at https://ww2.nycourts.gov/sites/default/files/document/files/2019-02/19_SOJ-Report.pdf, p. i. **R-0107**.

563 Zamora-Amézquita Expert Report, ¶¶ 69, 72, 73, 75, and 78.

564 Zamora-Amézquita Expert Report, ¶ 82.

> [...] the duration of the civil and administrative lawsuits filed by the Claimants was not excessive, extraordinary or unusual.177 On the contrary, these proceedings were conducted in an ordinary time frame according to their nature and complexity, as well as the workload faced by the Mexican courts, in addition to a pandemic caused by COVID-19.
>
> [...] the term of the proceedings is also influenced by the ruling of the recourses available to the parties throughout a trial, which sometimes even suspend the main proceeding, which leads to a prolongation of the procedure […]
>
> [...] four of the five proceedings initiated by the Claimants were still ongoing at the time of the COVID-19 pandemic, forcing all judicial authorities to suspend activities. This led to a halt in the processing of all lawsuits not identified as urgent for more than 5 months, until the courts and tribunals were able to resume their activities. Proceedings even faced delays after the general suspension was lifted, as the courts had to modify their modus operandi, which, until before the pandemic, operated entirely on a face-to-face basis.
>
> All these factors, together with the complexity of the existing disputes between PEP and the Claimants and the ongoing discussion on the appropriate remedy for claims of this nature, contributed to the lengthy term of the civil and administrative trials [...][565]

493. The Tribunal will be able to find that the Claimants did not suffer from a lack of administration of justice or unjustified delays and that the proceeding related to Contract 803 was terminated because MWS and Bisell failed to exercise their procedural rights.

2. Claim based on allegations on purported incorrect court rulings under Mexican law

494. Messrs. Zamora and Amezquita criticize several technical aspects of the Mexican court decisions regarding Contract 803, basically arguing that any decision against the Claimants was in error.

495. The Claimants argue that numerous facts were "arbitrary", and in particular, allege that the purported violations of Mexican domestic law constitute a breach of the obligation of fair and equitable treatment.[566] Respondent strongly disagrees with the allegation that the tribunals' decisions are arbitrary, even under Mexican domestic law. In any event, international law strictly defines the concept of arbitrariness. This was held in the *ELSI* decision of the International Court of Justice ("ICJ"), both in majority and dissenting opinions:

> It must be born in mind that the fact that an act of the public authority may have been unlawful in municipal law does not necessarily mean that the act was unlawful in international law, as breach of treaty or otherwise. A finding of the local courts that an

565 Expert Report of Mr. Jorge Asali, ¶¶ 137, 142-144.

566 Statement of Claim, ¶ 368.

> act was unlawful may well be relevant to an argument that was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. It would be absurd if measures later quashed by higher authority or a superior court could, for that reason, be said to have been arbitrary in the sense of international law. To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.[567]

496. The ICJ added:

> Arbitrariness is not something so much opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of "arbitrary action" being "substituted for the rule of law" … It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety. Nothing in the decision of the Prefect, or in the judgment of the Court of Appeal of Palermo, conveys any indication that the requisition order of the Mayor was to be regarded in that light.[568]

497. These ICJ findings have been invoked by NAFTA tribunals.[569] Moreover, beyond the scope of rhetoric, the Claimants have not established that the conduct of the Mexican authorities arose to the level of arbitrariness in violation of international law. There was no "wilful disregard of due process", nor "act which shocks, or at least surprises, a sense of juridical propriety".[570]

498. Tribunals have consistently held that even an admission of inadequate administration of government programs (which Respondent points out is not an issue in this case) does not amount to a breach of the Minimum Standard of Treatment under customary international law. The tribunal in S.D. Myers, for example, concluded the following:

> When interpreting and applying the "minimum standard", a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they

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567 *Elettronica Sicula, S.p.A.* (United States v. Italy), 1989 ICJ Reports, ¶ 124. **RL-0082**.

568 *Elettronica Sicula, S.p.A.* (United States v. Italy), 1989 ICJ Reports, p. 15, **RL-0082**.

569 *See, for example, Mondev v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 108 ("The key point is that the Chamber accorded deference to the Respondent's legal system in applying the standard, finding that even though the mayor's act of requisitioning the factory at issue in the case was unlawful at Italian law as an excess of power, mere illegality did not equate to arbitrariness at international law."). **RL-0032**. *See* also *ADF Group Inc. v. United States,* ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 190 ("The Tribunal would emphasize, too, that even if the U.S. measures were somehow shown or admitted to be ultra vires under the national law of the United States, that by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment embodied in Article 1105(1)."). **RL-0054**.

570 *Elettronica Sicula, S.p.A.* (United States v. Italy), 1989 ICJ Reports, p. 76, **RL-0082**.

> may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections....[571]

499. The tribunal in *Azinian v. United Mexican States* emphasized that NAFTA does not provide unlimited protection against foreign investor disappointments:

> It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. It may safely be assumed that many Mexican parties can be found who had business dealings with governmental entities which were not to their satisfaction; Mexico is unlikely to be different from other countries in this respect. NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.[572]

500. Likewise, the tribunal in *Feldman v. United Mexican States* cited the *Azinian* award with approval and added:

> To paraphrase Azinian, not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation under Article 1110. Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue.[573]

501. The tribunal in *Thunderbird v. United Mexican States* noted:

> [I]t is not up to the Tribunal to determine how [the regulatory authority] should have interpreted or responded to the Solicitud, as by doing so, the Tribunal would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters (which may vary from country to country).[574]

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571 *S.D. Myers, Inc. v. Canada*, UNCITRAL, First Partial Award, 13 November 2000, ¶ 261. **RL-0083**.

572 *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, November 1, 1999, ¶¶ 83-84 **RL-0007.** [Emphasis added]

573 *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶ 112. **RL-0067**. *See also Saluka Investments BV v. Czech Republic,* PCA Case No. 2001- 04, Partial Award, 17 March 2006, ¶ 442, **RL-0079** ("The unlawfulness of a host State's measures under its own legislation or under another international agreement by which the host State may be bound, is neither necessary nor sufficient for a breach of Article 3.1 of the Treaty. The Treaty cannot be interpreted so as to penalise each and every breach by the Government of the rules or regulations to which it is subject and for which the investor may normally seek redress before the courts of the host State.*"*).

574 *International Thunderbird Gaming Corp. v. United Mexican States, UNCITRAL, Award, January 26, 2006, ¶ 160. United Mexican States*, UNCITRAL, Award, January 26, 2006, ¶ 160, **RL-0084**.

502. The tribunal in *Glamis Gold v. United States* applied *Thunderbird*, noting with respect to a NAFTA Article 1105 claim that:

> [T]his [standard] is not [met] with a mere appearance of arbitrariness—a tribunal's determination that an agency acted in [a] way with which the tribunal disagrees or a State passed legislation that the tribunal does not find curative of all the ills presented; rather, this is a level of arbitrariness that, as *International Thunderbird* put it, amounts to a "gross denial of justice or manifest arbitrariness falling below acceptable international standards." . . . It is Claimant's burden to prove a manifest lack of reasons . . . , and the Tribunal holds that it has not met this burden.
>
> (. . .)Tribunal agrees with Respondent's assertion that governments must compromise between the interests of competing parties and, if they were bound to please every constituent and address every harm with each piece of legislation, they would be bound and useless.[575]

503. Dolzer and Schreuer agree when they add that "a violation by the host State of its own law will not automatically amount to a breach of the TJE standard".[576] So does McLachlan when he points out that "[a] finding that the host State is in breach of its own law will not breach the standard".[577]

504. Perhaps the most important element to consider is that "[i]nternational tribunals . . . do not sit as appellate courts with authority to review the legality of domestic measures under a Party's own domestic law."[578] This is just one more expression of what has been described in the NAFTA context as the "general reluctance to substitute arbitral for governmental decision-making on matters within the purview of each NAFTA Party"[579]

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575 *Glamis Gold, Ltd. v. The United States of America,* UNCITRAL, Award, 8 June 2009, ¶¶ 803-804. **RL-0055**.

576 Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford 2012), p. 152. **RL-0037**.

577 Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2017), ¶ 7.17. **RL-0051**.

578 Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2017), ¶ 7.198. **RL-0051**.

579 *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Separate Statement of Dean Ronald A. Cass, 24 May 2007, ¶ 125**.**

505. Nor does an error amount to arbitrary conduct,[580] or the action of an agency "in a way with which the tribunal disagrees".[581] On the contrary, as UNCTAD noted, NAFTA's high threshold "provides assurance to host States that they will not be exposed to international responsibility for minor malfunctioning of their agencies and that only manifest and flagrant acts of maladministration will be punished".[582] This same principle applies to the USMCA with respect to the claims surrounding the proceedings related to Contract 803.

506. Claimants point to "serious problems" with respect to the treatment of Claimants in the judicial proceedings before Mexican courts, including the issuance of irregular competition decisions and judgments and the issuance of rulings and/or the admission of Pemex's requests in contradiction to principle of res judicata.[583] As explained by Mr. Jorge Asali, no such alleged irregularities occurred.

507. First, Mr. Asali explains that a decision may be subject to challenge upon presentation of new evidence or arguments:

> [...] the determination of the 4th TUC was a decision made before PEP was summoned and could challenge the court's jurisdiction. Hence, such decision could be challenged by those who were affected by it and still had not been given a chance tu rebut it. Particularly, this decision could be challenged upon the submission of new evidence or arguments, like those provided by PEP. This is so because, according to the precedents of Mexican courts, as a general rule, it is understood that the initial decisions regarding a lawsuit are made without hearing the other party and are thus prima facie and, therefore, may be subject to modification in light of new evidence or arguments presented at lawsuit by the affected party upon learning of the decision.[584]

508. Therefore, there is no violation of the principle of res judicata as stated by the Claimants. Mr. Asali himself states:

> there is no violation of the res judicata principle. Thus, even if it is true that the 4th TUC had revoked the initial determination of the 11th JD denying the jurisdiction, this was a prima facie decision that was made without evaluating the arguments of PEP, and which

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580 *S.D. Myers, Inc. v. Canada*, UNCITRAL, First Partial Award, 13 November 2000, ¶ 261. **RL-0083**.

581 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 625. **RL-0055**.

582 United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, UNCTAD/DIAE/IA/2011/5 (2012), p. 88. **RL-0086**.

583 Statement of Claim, ¶ 378.

584 Expert Report of Mr. Jorge Asali, ¶¶ 153.

> was thus solely based on the arguments and evidence provided by MWS and Bisell with their initial claim.
>
> [...] the 11th JD was not bound to follow the criteria of the 4th TUC. There was no violation of the res judicata principle because, we insist, the existence of new evidence and arguments provided by PEP in the motion for absence of jurisdiction implied a change of scenario with respect to the one presented by MWS and Bisell in their claim.[585]

509. Second, with respect to the Claimants' allegations that the decisions in the civil proceeding of Contracts 803 and 804 are inconsistent with each other, Mr. Jorge Asali points out that there is no alarm or surprise in the fact that two judges reached different determinations.[586]

510. Likewise, he explains that in Mexico, several requirements must be met in order for the courts to be obliged to use the same criterion when resolving different lawsuits:

> In Mexico, several requirements must be met for a court to be bound by the criteria when ruling different lawsuits, as the lawsuits relating to Contracts 803 and 804, which are not met in relation to two courts of the same hierarchy, such as the 4th TUC and the 3rd TUC. Even if there is a hierarchical relationship, the superior's criteria must have acquired the character of jurisprudence, which is the name given in Mexico to binding judicial criteria. Unlike a Common Law system, Mexico has a Civil Law system in which the binding nature of precedents are subject to their compliance with meeting the formal requirements needed to be considered jurisprudence. The Unitary Courts do not have the power to issue jurisprudence, so there is no scenario in which the criteria of a unitary court are binding in a different lawsuit before its hierarchical inferiors and, much less, before another unitary court with which it shares the same hierarchical level.[587]

511. Again, the fact that the Claimants did not agree with the decisions of the Mexican judges and courts that heard their claims on Contract 803 cannot in any way be amounted to a denial of justice.[588]

3. Claim of alleged discrimination on the basis of national treatment

512. The Claimants weakly argue that the settlement related to Contract 809 between PEP and Zapata and Integradora constitutes a breach of the FET standard.[589] However, as noted above in section VII.A.3, there is no freestanding obligation to evade discrimination under Minimum Standard of Treatment of the customary international law as the issue of discrimination is

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585 Expert Report of Mr. Jorge Asali, ¶¶ 158 y 160

586 Expert Report of Mr. Jorge Asali, ¶ 162.

587 Expert Report of Mr. Jorge Asali, ¶ 162.

588 Expert Report of Mr. Jorge Asali, ¶¶ 152-153, 162.

589 Statement of Claim. ¶¶ 379-381.

addressed in Article 14.4 of the USMCA (explained below). Moreover, the Respondent has established that, in connection with Contract 809, Pemex reached a settlement after the contractors demonstrated that they had suffered damages.[590] There is no aspect of that settlement that can be alleged to constitute arbitrary or unjustified discrimination against the Claimants.

513. Finally, as addressed below, including a discrimination argument as part of the FET claim cannot be allowed as a way to elude the explicit decision of the Treaty Parties that government procurement is not subject to non-discrimination obligations.

C. Claims regarding Contract 804under the USMCA

1. The alleged unjustified delay of litigation related to Contract 804 does not give rise to a denial of justice under the USMCA.

514. Similar to the situation with Contract 803, Bisell and MWS Management filed appeals and an amparo in relation to their civil claim,[591] which was resolved (unfavorably for them) in 10 months.[592] Several years later, in March 2019, they initiated a new proceeding, i.e., the Annulment Proceeding 2019.[593] As described by the Claimants, while an appeal relating to admissible evidence was pending in March 2021, Bisell and MWS Management withdrew their administrative claim.[594] The truth is that "the only delay [...] stemmed from the decision made by Bisell and MWS Management to sue authorities other than PEP."[595] It is clear that there was no unreasonable delay in the legal proceedings involving Contract 804. Rather, Claimants have sought to blur the lines between completely different court proceedings, but their own expert's report does not support that view.

515. As Mr. Asali states:

> 137. In consideration of what has been analyzed, the duration of the civil and administrative lawsuits filed by the Claimants was not excessive, extraordinary or unusual.177 On the contrary, these proceedings were conducted in an ordinary time

590 Minute dated April 9, 2018, pp. 2, 5-6. **C-0062**.

591 Zamora-Amézquita Expert Report, ¶¶ 88, 89.

592 Zamora-Amézquita Expert Report, ¶¶ 90.

593 Zamora-Amézquita Expert Report, ¶¶ 91.

594 Zamora-Amézquita Expert Report, ¶¶ 101.

595 Expert Report of Mr. Jorge Asali, ¶ 147.

> frame according to their nature and complexity, as well as the workload faced by the Mexican courts, in addition to a pandemic caused by COVID-19.[596]

516. In any case, the Annulment Procceding 2019 related to Contract 804 suffered a delay since Bisell and MWS indicated other authorities than PEP that were not relevant authorities for the purposes of such proceeding, which gave rise to several objections. [597]

517. It is important for the Tribunal to keep in mind that the proceedings related to Contracts 803 and 804 were sophisticated proceedings with multiple challenges, and are a reflection of the full exercise of the parties' procedural rights.

2. Claim based on allegations of purorted incorrect decisions of courts under Mexican law

518. The Claimants argue that their disagreement with judgments issued by Mexican courts should be considered as evidence of a violation of customary international law. As discussed in detail above in connection with Contract 803, that argument is not convincing and should be rejected.

519. As discussed above, there is no inconsistency in the fact that two judges – in different proceedings – reached different determinations, since they were not bound by binding criteria.[598]

520. With respect to the alleged violation of the principle of the supplementation of the claim (suplencia de la queja), Mr. Asali explains that this "constitutes an exception to the general rule" that imposes the argumentative burden of demonstrating the unconstitutionality of the challenged act to the party filing an amparo proceeding. However, such principle does not imply that the arguments of the claimant can be remedied, since it "only allows the judge to analyze violations not alleged [...] and to correct this ommision, but it does not exempt him from complying with the essential formalities of the appeal filed".[599]

521. The Respondent reiterates that the fact that the Claimants did not agree with the decisions of the Mexican judges and courts does not amount to a denial of justice.

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596 Expert Report of Mr. Jorge Asali, ¶ 137.

597 Expert Report of Mr. Jorge Asali, ¶ 147.

598 *See* Section VII.B.2

599 Expert Report of Mr. Jorge Asali, ¶¶ 181 y 185.

3. Claim of alleged discrimination

522. With respect to discrimination, for Contract 803 the Claimants raised exactly the same argument that was raised for Contract 804, citing the same settlement by the parties to Contract 809.[600] The Respondent reiterates that avoiding discrimination is not a freestanding obligation of the Minimum Standard of Treatment; discrimination is addressed in Article 14.4 of the USMCA (described below); and that there is no aspect of the settlement related to Contract 809 that can be alleged to arbitrarily or unjustifiably discriminate against the Claimants. Moreover, as also discussed below, the inclusion of a discrimination argument as part of the FET claim cannot be allowed as a way to elude the Treaty Parties' explicit decision that government procurement is not subject to non-discrimination obligations.

D. NAFTA Claims related to the 821 Contract

1. The alleged unjustified delay of Contract 821 litigation does not amount to a denial of justice under NAFTA.

523. As described by the Claimants, Drake-Finley initiated a claim against PEP in March 2016. Finley/Drake-Mesa appealed the tribunal's decision in November 2017.[601] The appellate court ruled in April 2018.[602] Amparo claims were theninitiated in June 2018, and the amparo was granted in February 2019.[603] This proceeding, like the others, had no significant delays.

524. In September 2017, Finley and Drake-Mesa initiated a different proceeding, i.e., the Annulment Proceeding 2017 before the TFJA.[604] That court ruled in PEPs favor in October 2018.[605] In January 2019, Finley and Drake-Mesa filed an Amparo proceeding, and the court ruled against them in January 2020.[606]

525. In analyzing the duration of the Civil Proceeding 200/2016, Mr. Asali notes:

> 148. The period of approximately 18 months that elapsed for the substantiation of the first instance of the proceeding is an ordinary and adequate duration for the processing of

600 Statement of Claim, ¶ 380.

601 Zamora-Amézquita Expert Report, ¶¶ 112.

602 Zamora-Amézquita Expert Report, ¶¶ 113.

603 Zamora-Amézquita Expert Report, ¶¶ 115.

604 Zamora-Amézquita Expert Report, ¶¶ 124.

605 Zamora-Amézquita Expert Report, ¶¶ 127.

606 Zamora-Amézquita Expert Report, ¶¶ 129.

> a first instance in a federal trial, mainly considering that the plaintiffs filed an extension to their original claim. The second and third instances were substantiated in a period of approximately 6 and 8 months, respectively, from the admission of the recourses, which again is circumscribed to the ordinary duration for the substantiation of those instances.[607]

526. Again, there were no extraordinary delays in the judicial system. The Claimants seek to treat several different court proceedings, initiated in different years, as part of a single lawsuit, but their evidence does not support that approach.

2. Claim of denial of justice based on disagreement with judicial rulings issued by Mexican courts.

527. Again, the Claimants argue with decisions of Mexican courts on various technical issues of domestic law, complaining about "Issuing decisions on and/or admission of Pemex's requests in contradiction of the res judicata principle"; "Issuing decisions contradicting the suplencia de la queja principle"; "Issuing decisions in contradiction of the exhaustiveness principle"; and "Issuing decisions that violate the duty to motivate".[608] None of these issues are part of customary international law, and Claimants make no effort to show that they are. Instead, they simply ask the Tribunal to act as a court of appeal.

528. However, Mr. Asali has analyzed the alleged violations to the principle of exhaustiveness and duty to motivate related to the Annulment Proceedings 2017, and explains that the purported irregularities alleged by the Claimants cannot be considered as violations as argued by the Claimants since they do not violate the fundamental rights provided for in the Mexican Constitution, as " they are not flagrant or serious violations that imply a complete lack of completeness, coherence, and reasoning." [609]

529. Additionally, Mr. Asali points out that the Claimants had the possibility to challenge the judgment of the Annulment Proceeding 2017, however, they did not do so.[610] The fact that the Claimants disagreed with the decisions of the authority that resolved the Annulment Proceeding 2017 does not amount to a denial of justice.

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607 Expert Report of Mr. Jorge Asali, ¶¶ 148.

608 Statement of Claim, ¶ 378.

609 Expert Report of Mr. Jorge Asali, ¶¶ 187.

610 Expert Report of Mr. Jorge Asali, ¶¶ 188-190

3. The allegations of a breach of contract do not rise to the level of a denial of the Minimum Standard of Treatment

530. The Claimants argue that Pemex should have allocated more funds to be spent on Contract 821; that it issued an improper work order; that it should not have administratively rescinded Contract 821; and that it should not have attempted to enforce the Dorama Bond provided by Drake-Finley, Drake-Mesa and Finley as performance guarantee under Contract 821.[611] These are all, in essence, claims on contractual issues.

531. The tribunal in *Hamester v. Ghana* concluded that "it is not sufficient for a claimant to invoke contractual rights that have allegedly been infringed to sustain a claim for a violation of the FET standard."[612] Moreover, in *Parkerings v. Lithuania*, the Tribunal held that "not every hope amounts to an expectation under international law [...] [C]ontracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law."[613]

532. As Schreuer explains, the opposite approach would all investor-state contracts under the protection of the FET standard, and the latter would effectively constitute a broadly interpreted umbrella clause which the NAFTA does not contain.[614] Moreover, Contract 821 was not even entered into by the Mexican State, but by PEP, a subsidiary of Pemex, which in turn is an EPE. Therefore, "[m]erely not living up to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA. Instead, Article 1105(1) requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations." [615]

533. In fact, it is the Claimants that seek to ignore the express terms of their contractual commitments, including PEP's rights to decide whether to issue work orders, whether to rescind Contract 821 for contractual violations committed by Drake-Finley, and whether to execute the

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611 Statement of Claim, ¶ 367.

612 *Gustav Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 337. **RL-0044**.

613 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 344. **RL-0087**.

614 United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II, 2012, p. 70. **RL-0086**.

615 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 620. **RL-0055**.

Dorama Bond. In any event, none of these issues arise ro obligations under customary international law.

4. The claim of denial of Fair and Equitable Treatment based on alleged discrimination is without merit

534. With respect to discrimination, Claimants make exactly the same argument raised in the arguments relating to Contracts 803, 804 and also 821, citing the settlement by the parties to Contract 809.[616] The Respondent reiterates that avoiding discrimination is not a freestanding obligation iof the Minimum Standard of Treatment; that discrimination is addressed in NAFTA Article 1102 (discussed below), and that there is no aspect of the settlement in light of Contract 809 that can be alleged to be arbitrary or unjustified discrimination against the Claimants. Moreover, as also discussed below, the inclusion of a discrimination argument as part of the TJE claim cannot be allowed as a way of eluding the Treaty Parties' explicit decision that government procurement is not subject to non-discrimination obligations.

5. Other vague claims

535. As previously explained, NAFTA and the USMCA do not prohibit "harassment" or "coercion" as part of the Minimum Standard of Treatment. Nor is there a stand-alone obligation to act in good faith under that minimum standard. Even if there were, the claims raised by the Claimants are overly vague, confusing and duplicative.[617] Notably, the Claimants have the burden to show, with evidence, that Pemex acted in a gross or egregious manner. No such showing has been made.

536. The Claimants raise several overlapping FET claims related to the issuance of a work order to drill the Coapechaca 1240 well.[618] But there is nothing egregious, serious, retaliatory or arbitrary about PEP issuing a work order under a contract that called for the issuance of work orders, especially when the recipient was requesting more work .[619] The Claimants describe several alleged irregularities about the work order, but those purported irregularities are neither gross nor

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616 Statement of Claim, ¶ 380.

617 Statement of Claim, ¶ 367.

618 Statement of Claim, ¶ 367 (b), (c), (d) and (h).

619 Statement of Claim, ¶¶ 195-204.

egregious. Nor are they retaliatory or coercive. They certainly do not rise to the level of an FET violation.

537. The crux of Claimants' argument is that this work order was a pretext to rescinding Contract 821.[620] However, there is no evidence to support that allegation except for the hearsay statement made by Mr. Oseguera Kernion about what a Pemex official told him on the phone.

538. Claimants also claim that Pemex harassed them generally for pursuing their legal rights against Pemex, "including by issuing the work order for the Coapechaca 1240 well."[621] But aside from the work order, which is addressed above, they do not say what specific act rises to the level of harassment. This type of vague and unsupported allegations does not satisfy Claimants' burden.

539. Next, the Claimants allege that Pemex did not act in good faith by allegedly communicating with the magistrate in charge of the Annulment Proceeding 2017 initiated by Claimants.[622] But, again, there is no evidence to support such allegation. The only evidence presented is another statement by Mr. Oseguera Kernion, saying: "I understand from my conversations with Rob and Rodrigo that Pemex's representative apparently met with the judge deciding whether to uphold Pemex's administrative rescission. Based on their conversations, the judge had told Pemex that he was going to decide in Pemex's favor".[623] That is simply insufficient. It is unclear whether "Rob and Rodrigo" made this assertion, or whether Mr. Oseguera Kernion made the assumption. Either way, Mr. Oseguera Kernion's hearsay statements do not satisfy Claimants' burden.

540. The Claimants raise several overlapping claims about the Dorama Bond.[624] But the fact is that PEP was entitled to enforce that bond. There is nothing egregious or flagrant about PEP exercising its contractual rights, which is an aspect that is not within the jurisdiction of this Tribunal as it is commercial and contractual in nature.

620 Statement of Claim, ¶ 363.

621 *See* Statement of Claim, ¶ 363 (e).

622 Statement of Claim, ¶ 219.

623 WS Luis Oseguera Kernion, ¶ 107.

624 *See* Statement of Claim, ¶ 367(f) – (g).

E. Claims based on the alleged denial of national treatment are without merit

541. With respect to Contracts 803, 804 and 821, Claimants make the same weak argument that Respondent denied national treatment to Claimants because PEP settled with Integradora and Zapata in relation to Contract 809. The Claimants' national treatment claims must be rejected because i) public procurement is exempt from the national treatment obligation and ii) Claimants have not even made a *prima facie* demosntration of discriminatory treatment.

1. National treatment and most-favored-nation obligations do not apply to government procurement

542. Both the NAFTA and the USMCA exempt procurement by a Party or by a state enterprise from National Treatment and Most-Favored-Nation obligations. According to NAFTA Article 1108(7)(a), "Articles 1102, 1103 and 1107 do not apply to ... procurement by a Party or a state enterprise". Similarly, Article 14.12(5) of the USMCA states that "Article 14.4 (National Treatment), Article 14.5 (Most-Favored-Nation Treatment) and Article 14.11 (Senior Executives and Boards of Directors) do not apply with respect to ... government procurement".

543. The tribunal in *Mercer International v. Canada* held:

> As to its ordinary meaning in NAFTA Article 1108(7)(a), the Tribunal decides that the phrase "procurement by a Party or a state enterprise", in its context and in the light of NAFTA's object and purpose, signifies the buying of goods or services for or by a State or a state enterprise (as defined in NAFTA Annex 1505) owned or controlled through ownership interests by that State.[625]

544. Based on this, the Tribunal may conclude that the purchases of services by Pemex, and its subsidiaries such as PEP, under the 803, 804 and 821 Contracts perfectly meet this definition. In *UPS v. Canada*, the tribunal concluded that Canada's acts did not violate Article 1102, but that even if they had, the procurement would have been exempt from liability under Article 1108(7)(a).[626] The *Mercer* tribunal similarly concluded that it lacked jurisdiction over the claims of Article 1102 violations in connection with the procurement activities. The ADF tribunal reached

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625 *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March, 2008, ¶¶ 6.35. **RL-0048.**

626 *United Parcel Services of Am. Inc. v. Canada*, UNCITRAL, Award, 24 May 2007, ¶ 131. **RL-0038.**

the same conclusion.[627] The *Mesa Power Group v. Canada* tribunal found that an allegation that a contract award program for the supply of renewable energy was administered in a discriminatory manner could not be challenged under NAFTA Articles 1102 or 1103 because the program constituted government procurement within the meaning of NAFTA Article 1108(7)(a). [628]

545. Most recently, the tribunal in *Resolute Forest Products v. Canada* agreed with the broad interpretation of "procurement" of the Mesa tribunal, and on that basis declined to consider allegations that several measures violated NAFTA Article 1102. [629]

546. As discussed below, the Claimants have not shown that there was any discrimination, let alone discrimination within the meaning of the NAFTA or USMCA. But even if, in theory, such discrimination was properly alleged, such a claim is precluded by Article 1108(7)(a) of NAFTA and Article 14.12(5) of the USMCA. The administration of the contracts, including decisions on whether to settle claims by the contractor and for how much are an integral element of the procurement process.

2. Claimants failed to demonstrate any violation of NAFTA Article 1102 or USMCA Article 14.4

547. Article 1102 of the NAFTA establishes the principle of non-discriminatory treatment, both in relation to domestic investors and to investments made by such domestic investors. The relevant part of this provision states:

> Article 1102: National Treatment
>
> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the

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627 *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, 9 January 2003, ¶ 199(3) ("Assuming, however, arguendo, that the U.S. measures are inconsistent with the provisions of Article 1102, the Respondent is, in any event, entitled to the benefit of NAFTA Article 1108(7) (a) which renders inapplicable the provisions of, inter alia, Article 1102 in case of procurement by a Party. Procurement by the Commonwealth of Virginia for, or in connection with, the Springfield Interchange Project, constitutes procurement by a Party within the meaning of Article 1108(7) (a). The Investor's claim concerning Article 1102 is, accordingly, denied."). **RL-0054.**

628 *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 465 ("In summary, the Tribunal holds that the FIT Program constitutes procurement by the Government of Ontario under Article 1108(7)(a) of the NAFTA. The Program is implemented by the Government through the OPA, which is a state enterprise. Consequently, the acts of the Government of Ontario cannot be challenged under Articles 1102 or 1103 of the NAFTA."). **RL-0039**.

629 *Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-13, Final Award, 25 July 2022, ¶¶ 370-410. **RL-0088**.

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.

548. Article 14.4 of the USMCA states:

Article 14.4: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a government other than at the central level, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that government to investors, and to investments of investors, of the Party of which it forms a par.

4. For greater certainty, whether treatment is accorded in "like circumstances" under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

549. According to various NAFTA tribunal decisions, there are three elements that must be met in order to successfully claim a national treatment violation:

First, it must be shown that the Respondent State has accorded to the foreign investor or its investment "treatment ... with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition" of the relevant investments.

Secondly, the foreign investor or investments must be "in like circumstances" to an investor or investment of the Respondent State ("the comparator").

Lastly, the treatment must have been less favourable than that accorded to the comparator.[630]

630 *See, for example*, *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Liability, January 15, 2008, ¶ 117. **RL-0089**. *United Parcel Services of Am. Inc. v. Canada*, UNCITRAL, Award, 24 May 2007, ¶ 83. **RL-0038**.

550. The objective of NAFTA Article 1102 and USMCA Article 14.4 is to protect against discrimination based on nationality.[631] Claimants have the bear the burden of proving these three elements and must establish more than a *prima facie* case.[632]

551. The three elements are cumulative, however, if it so happens that from the outset the alleged investor or investment is not in like circumstances to its "comparable subjects/objects", there is no reason why the treatment should be compared and therefore the claim would fail as a matter of law. The tribunal in *Archer Daniels v. Mexico* put it this way:

> The logic of Articles 1102.1 and 1102.2 thus suggests that the Arbitral Tribunal does not need to compare the treatment accorded to ALMEX and the Mexican sugar producers unless the treatment is being accorded "in like circumstances." Therefore, it is necessary to consider the question of "like circumstances" before the question of "no less favorable treatment" because if the circumstances are not "like," no obligation arose for the Respondent State to accord Claimants' HFCS investment the best treatment accorded to Mexican cane sugar investments.[633]

552. The Claimants' discrimination claim is flawed because it fails to take into consideration the fundamental principle under which a discrimination analysis must be conducted; the treatment at issue must be analyzed between situations that are "comparable" in order for a comparison to be made. This is the basis of the term "comparator", which refers to the points of comparison that are used in a discrimination analysis. In the investment context, there is a wide range of comparability factors that may be relevant. These factors will be specific to the facts and circumstances of the investments being compared. If a relevant factor is omitted at the time of comparison, the construction of the comparative analysis will be flawed and a fair comparison will

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631 *Archer Daniels Midland y Tate & Lyle Ingredients Americas, Inc. v. United Mexican States,* ICSID Case, Award, November 21, 2007, ¶¶193, 205 **RL-0090**. *Cargill, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/05/2, Award, september 18, 2009, ¶¶ 217, 220. **RL-0053**. *Mercer International Inc. v. Government of Canada,* ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, at paras 7.7-7.9 **RL-0048**. *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶ 181 **RL-0067**. *Loewen Group Inc. et al. v. The United States of America*, ICSID Case No. UNCT/02/1, Award, 26 June 2003, ¶ 139 **RL-0091**.

632 *Mercer International Inc. v. Government of Canada*, Caso CIADI No. ARB(AF)/12/3, Award, 5 March 2018, ¶¶ 7.11-7.14. **RL-0048**.

633 *Archer Daniels Midland y Tate & Lyle Ingredients Americas, Inc. v. United Mexican States,* ICSID Case, Award, November 21, 2007, ¶ 196. **RL-0090**.

not be possible. In that sense, Claimants are wrong to suggest that it is sufficient to show that an investor is in the same "sector" as a comparator;[634] much more is actually required.

553. Claimants incorrectly apply the "like circumstances" requirement by omitting comparative factors. As a result, the comparable used by the Claimants are flawed and a proper discrimination analysis cannot be performed with them.

554. In this case, the only thing that the Claimants argue is that PEP settled regarding Contract 809, which PEP did not agree to do for their Contracts.[635] The Claimants do not identify any policy, regulation or other governmental activity that is linked to decisions about when to settle; rather, they criticize Pemex's business decisions. But as described above, the Contract 809 contractors demonstrated, inter alia, that they had suffered damages and also participated in four conciliation sessions with Pemex.[636] It is clear that the Claimants are not in "like circumstances" to the Contract 809 contractors, indeed, they have not even demonstrated different "treatment" within the meaning of the NAFTA and the USMCA.

555. The background is important to know that from 2006 to 2016, including the severe drop in oil prices, Pemex rescinded hundreds of contracts. With this in mind, it is demonstrated that there was nothing discriminatory in Pemex's efforts to try to preserve its own economic solvency.

VIII. REQUEST FOR COSTS

556. The Respondent requests the Tribunal to order the Claimants to pay the costs and expenses incurred by Mexico as a result of the arbitration, including: the portion of the Tribunal's expenses that correspond to Mexico; the portion of the expenses of administration of the procedure before the ICSID that correspond to Mexico; the fees of Mexico's external legal advisors; the payment of experts retained by Mexico; and any additional expenses incurred by the Respondent.

557. The Respondent is entitled to an award of costs in its favor for the following reasons:

i. The Tribunal lacks jurisdiction;
ii. The Respondent did not breach any of its obligations under the NAFTA;
iii. The Respondent did not breach any of its obligations under the USMCA; and

634 Counter Memorial, ¶ 323.
635 Counter Memorial, ¶ 329-331.
636 *See infra*, section IV.I.

iv. The Claimants have brought meritless claims with the sole intention of obtaining an undue benefit.

558. The Respondent considers that, in making its decision on costs, the Tribunal must bear in mind the evidence provided by the Respondent and the serious and unfounded allegations raised against the Mexican State.

IX. CONCLUSION

559. By virtue of the foregoing, the Respondent requests this Tribunal to dismiss Claimants' claims in their entirety, with a corresponding award of costs in favor of the Respondent, in accordance with the request for costs referred to above.

Respectfully submitted,

General Counsel for International Trade

Sergio Roberto Huerta Patoni