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

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

Claimants

v.

THE UNITED MEXICAN STATES

Respondent

REQUEST FOR INTERIM MEASURES OF PROTECTION

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December 14, 2021

I. INTRODUCTION

1. This Request for Interim Measures of Protection seeks relief to protect the Tribunal's jurisdiction.

2. Since this arbitration began, Mexico has aggressively and improperly attacked two of Claimants' investments (a) the contract called the "821 Contract" and (b) the US$ 41.8 million performance guarantee securing the performance under that contract. Two weeks after the Tribunal was constituted, Mexico (through its state-owned oil company, Pemex Exploración y Producción) sought to initiate a "finiquito" process in connection with the 821 Contract.[1] In summary, the "finiquito" process is designed to allow parties to a contract to agree on an amicable, final settlement and termination of the contract. Claimants have no financial liability under the 821 Contract (or any other contract). As such, there is absolutely no foundation or legitimacy for Pemex to assert claims against the performance guarantee.

3. At the end of the First Session on December 3, 2021, Claimants raised concerns regarding Mexico's recent attacks against their investments. Mexico dismissed Claimants' concerns. Hours after the hearing, Claimants' bond company received the attached demand letter.[2] Apparently, Pemex issued a unilateral "finiquito" and proceeded to call on the performance bond. Pemex's refusal to request work under the 821 Contract — claiming that its budget was insufficient — ultimately gave rise to this arbitration. Now, Mexico is trying to call the US$ 41.8 million guarantee that Claimants provided to secure performance of work that Pemex never requested (claiming it did not have sufficient funds to pay for this work).

4. In addition to being wrongful, Mexico's latest actions are an overt attempt to buttress its argument that the Tribunal lacks jurisdiction. Mexico previously objected to ICSID's registration of Claimants' arbitration regarding Mexico's conduct surrounding the 821 Contract, arguing that there was no jurisdiction over Claimants' claims because they did not

[1] **C-0013**, Letter from Pemex to Claimants (received Nov. 8, 2021) at letter from Pemex to Claimants (Oct. 27, 2021) at p. 2 (PDF p. 6) ("In this context, based on Clause 18 Finiquito of the Contract, we ask that you present yourself on November 10, 2021 at 12:00 in the office located at . . . the basis of this meeting would be to formalize the **Act of Finiquito** of Contract number 421004821. Similarly, we make you aware that according to what is provided in the second to last paragraph of the Clause 18 Finiquito, in case you do not appear at this meeting, [Pemex] will proceed to achieve the Finiquito unilaterally.").

[2] **C-0014**, Letter from Pemex to Fianzas Dorma, S.A. (received Dec. 3, 2021) at p. 2 ("Based on the above, we have complied with the documentary requirements to effectuate the financing issued on behalf of your client for which the payment of USD$ 41,830,326.16 should be made to the account described below . . . ."). This letter claims that Pemex attached a "Finiquito dated November 10, 2021." However, Claimants have not received a copy of that document.

have an "existing investment" in Mexico. Eliminating these investments serves only to further Mexico's position.

5. Accordingly, Claimants Finley and Prize ask the Tribunal to order Mexico to cease any action that may deprive the Tribunal of jurisdiction to hear Finley and Prize's claims. Specifically, Claimants ask the Tribunal to order Mexico to curtail any further action related to the "finiquito" of the 821 Contract or the calling of the US$ 41.8 million performance guarantee. To the extent that Mexico's actions give rise to additional claims under NAFTA or the USMCA, Claimants reserve their right to assert them as part of these proceedings.

II. BACKGROUND

6. The following facts should not be in dispute:

- Mexico invited Claimants to participate in a bidding process for the 821 Contract.
- Claimants won that bid and were awarded the 821 Contract.
- The 821 Contract required Claimants to provide equipment, goods, and materials to drill oil and gas wells for Pemex.[3]
- Pemex agreed to request a minimum amount of work valued at US$ 169 million.
- Pemex agreed to request a maximum amount of work valued at US$ 418.3 million.
- Pemex promised that "It has allocated the resources to carry out the Works under this Contract."
- Pemex agreed to request such work through "work orders."
- To secure performance of these "work orders," Claimants provided a guarantee of approximately US$ 41.8 million.
- The 821 Contract permits Pemex to initiate an administrative process to rescind the contract once the Contractor accumulates 15 unfulfilled work orders.

7. In addition to providing a US$ 41.8 million guarantee, Claimants invested significant amounts in Mexico to perform under the 821 Contract and to fulfill Pemex's work orders. Such investments included purchasing and importing into Mexico drilling equipment that met Pemex's specifications. They also included the specialized goods purchased for drilling

[3] As will be explained in Claimants' Statement of Claim, Pemex is an organ of Mexico. Thus, Pemex's actions are attributable to Mexico.

oil and gas wells such as sand and KCl fluids. They even included real estate purchased for Claimants' operations in Mexico.

8. Pemex requested and paid Claimants for approximately US$ 48 million in work. Thereafter, Pemex stopped issuing work orders. Pemex claimed that its obligation was optional. It also claimed that the Mexican government had not sufficiently funded Pemex's budget.[4] Simply put, Pemex did not satisfy its obligation to issue work orders for the balance of the agreed minimum work of approximately US$ 120.9 million. Beyond this, Claimants suffered lost opportunity costs as they were unable put their equipment to use elsewhere.

9. Meanwhile, Pemex was also telling Claimants that its deficient budget was causing it to consider cancelling the 821 Contract. It claimed that it did not have the funds to meet its outstanding obligations. As a result, Claimants sought judicial relief to have Pemex perform.

10. In retaliation, Pemex claimed that it properly issued a "new work order" to drill a well at a cost of nearly US$ 1 million. Pemex supposedly issued this "new work order" 10 months after it had suspended its performance for the third time because of a lack of funds and seven months after Claimants commenced legal action. Claimants did not receive this "new work order" and there is no evidence that this "new work order" was ever discussed with Claimants. Curiously, the "new work order" lacked the customary signature of their authorized representative acknowledging acceptance. Because Claimants did not receive the "new work order" (a phantom work order) nor did Pemex discuss the same with Claimants, they did not drill the new well.

11. The 821 Contract contains a provision that allows Pemex to rescind the contract administratively for specified reasons. One of those provisions allows Pemex to rescind the contract once the Claimants accumulate fifteen (15) unfulfilled work orders. Pemex invoked the administrative rescission process, claiming that it could rescind the 821 Contract because of one alleged unfulfilled work order.

12. Claimants challenged Pemex's administrative rescission before Mexico's Federal Court of Administrative Justice. This court failed to recognize that Pemex had no right to rescind the

[4] Claimants do not know where the funds Pemex had budgeted (which should have been paid and sequestered in a designated account to pay for such services) for the 821 Contract ultimately ended up. Claimants anticipate that this will be revealed in Mexico's disclosures during this arbitration. It is no secret that there was widespread corruption within Pemex during this time. *See, e.g.*, https://www.reuters.com/world/americas/mexican-judge-orders-ex-pemex-boss-lozoya-taken-into-custody-2021-11-03/.

821 Contract unless and until Claimants had accumulated fifteen (15) unfulfilled work orders. Instead, in an October 2018 decision, it rewrote the 821 Contract. It determined that one supposed unfulfilled work order sufficed.[5] In effect, Pemex used a phantom work order — Claimants had been waiting months to receive work orders, perform the work, and earn money — to extricate itself from the 821 Contract. All of these actions forced Claimants to initiate this arbitration and seek relief against Mexico under NAFTA.

13. Twelve days after Claimants submitted their Request for Arbitration, Mexico objected to ICSID's registration. Relevant here, Mexico argued, in part:[6]

- "In order to file a claim under Annex 14.C of the USMCA and Chapter XI of NAFTA, the claimant must demonstrate having an 'existing investment' ('legacy investment', i.e., an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994 and the termination date of the 1994 NAFTA, and in existence on the date of entry into force of the USMCA. Contract 421004821 was awarded and concluded before July 1, 2020, which is why it is not an existing investment."
- "Even if Contract 421004821 were an existing investment — which it is not —, Article 1139 of the NAFTA has an exclusion of what cannot be considered an investment, e.g., pecuniary claims derived exclusively from service contracts by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party."

14. Two weeks after the Tribunal was constituted, Pemex wrote Claimants to advise that it was proceeding to the "finiquito" of the 821 Contract.[7] Pemex did not properly notify Claimants of this action. Instead, it left this letter at the office of Claimants' former attorney. This behavior is strikingly similar to Pemex's purported work order that it used to administratively rescind the 821 Contract. Similar to the work order, it too lacks the signature of Claimants' authorized representative, evidencing that it was not properly received.

15. Preserving their objections, Claimants asked their attorneys with Holland & Knight to attend Pemex's meeting for the "finiquito" process and retrieve Pemex's proposal. Pemex declined to provide us with that information. Instead, Pemex sought to have the representative acknowledge the validity of the results of the Mexican litigation regarding Pemex's improper rescission of the 821 Contract. Pemex's request was a direct interference with Claimants'

[5] This decision was later upheld on appeal.
[6] Mexico's Objection to Registration of Claimants' Request for Arbitration (April 6, 2021) at 2. The excerpts above are the result of a computer translation from Spanish to English. Claimants disagree with Mexico's arguments and will address them should Mexico reassert them. *See* Claimants' Letter to ICSID (April 30, 2021) ¶¶ 4, 5, 34, 35.
[7] **C-0013**, Letter from Pemex to Claimants (received Nov. 8, 2021).

assertion in this arbitration that the Mexican judicial system denied them justice under NAFTA Article 1105(1).

16. The undersigned immediately brought this to Mexico's attention and advised Mexico that Pemex's actions were seriously prejudicing Claimants in this arbitration.[8] Following multiple requests from Claimants, after more than two weeks, Mexico finally responded in substance. Mexico advised that it was unwilling to cause its state-owned oil company to cease and desist all actions impacting Claimants' rights in this arbitration.[9]

17. Claimants raised this issue at the First Session. Pemex's initiation of the "finiquito" of the 821 Contract was intended to undermine Claimants' right to protect an existing "investment" (and buttress Mexico's April 6, 2021 objection). The record reflects that Mexico told the Tribunal that it had been communicating with Claimants about the issue and that any request for interim relief would be premature.[10] Hours later, the bond company that provided Claimants' performance guarantee received a demand letter from Pemex. Pemex has improperly claimed that Claimants owe it US$ 41.8 million in connection with the rescission of the 821 Contract.[11] Mexico's actions now threaten to further improperly deny Claimants the benefit from both the investment in the 821 Contract and the related performance guarantee. To protect Claimants' investments, Claimants seek the Tribunal's assistance to order Mexico to cease any action that may deprive the Tribunal of jurisdiction to hear Claimants' claims, specifically, that Mexico and Pemex immediately curtail any further action related to the "finiquito" of the 821 Contract or the calling of the US$ 41.8 million performance guarantee.

[8] *See generally* **C-0015**, Email from Claimants to Mexico (Nov. 12, 2021); **C-0016**, Email from Mexico to Claimants (Nov. 18, 2021).

[9] **C-0017**, Letter from Mexico to Claimants (Dec. 1, 2021) ("The Respondent understands that there are no ongoing litigation or judgments or awards against of the administrative termination of the Contract 821. In that sense, in accordance with the Clause 18 of Contract 821, [Pemex] is empowered to make the settlement unilaterally.").

[10] Specifically, Mexico stated, "I don't think it's the right time to ask for provisional decisions we have been in contact with the [Claimants] and hope we will be in contact to give them any information or [things that they would need]." Audio Recording (English), First Session (Dec. 3, 2021).

[11] **C-0014**, Letter from Pemex to Fianzas Dorma, S.A. (received Dec. 3, 2021).

III. ARGUMENT

18. NAFTA Article 1134 authorizes the Tribunal to order interim measures:[12]

> A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.

Similarly, ICSID Arbitration Rule 39 allows the Tribunal to recommend any provisional measure that may be necessary to protect a party's rights during the proceeding.[13]

19. Neither NAFTA or the ICSID Arbitration Rules specify the criteria that the Tribunal must apply when considering a request for interim measures. However, arbitral tribunals often consider up to six factors:[14]

1. Prima facie jurisdiction to order the requested measures;
2. Prima facie case on the merits;
3. A risk of serious or irreparable harm;
4. Urgency;
5. Balance of the hardships weighing in favor of interim measures; and
6. No prejudgment of the merits.

As further explained below, each factor supports the Tribunal ordering interim relief.

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[12] Similarly, USMCA Article 14.D.9 provides, "A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 14.D.3 (Submission of a Claim to Arbitration). For the purposes of this paragraph, an order includes a recommendation."

[13] ICISD Arbitration Rule 39 provides, in part, "At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures. . . The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations."

[14] **CL-0001**, Gary B. Born, *Chapter 17: Provisional Relief in International Arbitration*, *in* INTERNATIONAL COMMERCIAL ARBITRATION at 2650 (3rd ed. 2021).

A. The Tribunal has prima facie jurisdiction to order the requested measures

20. To establish jurisdiction in this case, Claimants must show that they: (a) are each U.S. investors; (b) have made an investment in Mexico; and (c) have satisfied the procedural conditions set out in NAFTA Articles 1118 to 1121. As detailed in Claimants' Request for Arbitration and letter to ICSID dated April 30, 2021, and evidenced by ICSID's May 12, 2021 registration of the dispute,[15] Finley and Prize have met each of these elements.

21. *First*, Finley and Prize are each U.S. investors. Finley is a U.S. company, incorporated in the State of Texas.[16] Prize is a U.S. company organized in the State of Texas.[17] Prize owns Drake-Mesa, which is an enterprise of Mexico.[18]

22. *Second*, Finley and Prize have made investments in Mexico.[19] These are further elaborated upon in Claimants' Request for Arbitration and April 30, 2021 letter to ICSID. As noted above, Finley and Prize's investments in Mexico include the 821 Contract and the US$ 41.8 million performance guarantee issued to Pemex.

23. *Finally*, Finley and Prize have satisfied the procedural requirements of Article 1118 to Article 1121.[20] They engaged in consultations under NAFTA Article 1118, submitted a notice of intent to submit a claim to arbitration under NAFTA Article 1119, complied with the six-month cooling off period before submitting the claim to arbitration under NAFTA Article 1120, and submitted the waivers and consents required under NAFTA Article 1121.

24. Additionally, the Tribunal has jurisdiction under NAFTA Article 1134 to order the requested measures. NAFTA Article 1134 specifically allows the Tribunal to issue interim measures "to ensure that the Tribunal's jurisdiction is made fully effective" and "to protect the Tribunal's jurisdiction." Finley and Prize ask the Tribunal to protect the integrity of the arbitration process by ordering Mexico to cease any conduct that may jeopardize the

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[15] **CL-0002**, *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, ¶ 50 (Nov. 19, 2007) ("[I]t is the Tribunal's view that, should such an objection be raised, the Tribunal has jurisdiction to make this decision. It should be noted that ICSID's Secretary-General registered City Oriente's request for arbitration, upon the required conclusion (pursuant to Article 36 (3) of the Convention) that the dispute is not manifestly outside of the Centre's jurisdiction.").
[16] Request for Arbitration ¶¶ 6, 9 (citing **C-0001**).
[17] Request for Arbitration ¶¶ 8-9 (citing **C-0001**).
[18] Request for Arbitration ¶ 8; Claimants' Letter to ICSID (April 30, 2021) ¶ 69 (citing **C-0012**).
[19] Request for Arbitration ¶¶ 18, 67; Claimants' Letter to ICSID (April 30, 2021) ¶¶ 4-6, 35-36, 66, 69.
[20] Request for Arbitration ¶¶ 69-73 (citing **C-0006**, **C-0007**, and **C-0008**).

Tribunal's jurisdiction. This includes stopping the "finiquito" process related to the 821 Contract and Pemex's efforts to call the performance guarantee.

25. As explained above, Mexico's strategy seeks to eliminate two of Finley and Prize's "investments." Mexico has a history of retaliating against Finley and Prize for exercising their legal rights (it was no coincidence that Pemex suddenly issued the phantom work order only after Claimants took legal action to have Pemex perform). Mexico's latest efforts are particularly egregious considering it has already raised what it characterizes as a "jurisdictional" objection, which during the First Session Mexico suggested it might re-urge.[21] By commencing the "finiquito" weeks after the Tribunal was constituted and making a claim against the US$ 41.8 performance bond hours after the First Session, Mexico has sought to improperly further its jurisdictional objections.

26. NAFTA Article 1134 expressly allows the Tribunal to protect its jurisdiction and stay Mexico's conduct until the arbitration concludes. Thus, Finley and Prize's requested relief is firmly within the jurisdiction of the Tribunal.

B. Prima facie case on the merits

27. Some tribunals have required the party seeking interim measures to demonstrate a prima facie case on the merits.[22] Others have not out of caution to avoid the risk of prejudging the case.[23] For tribunals that have required a prima facie showing, they ordinarily apply a low standard:[24]

> In practice, the requirement to demonstrate the *prima facie* success on the merits will ordinarily lead to a rejection of a request for provisional measures only in rare circumstances, where the requesting party has failed to advance any credible basis for its claims.

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[21] **CL-0003**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶ 123 (Feb. 26, 2010) (commenting that the government must exercise its sovereign powers in good faith while respecting the investor's prima facie right to pursue international arbitration).

[22] *See* **CL-0004**, Régis Bismuth, *Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration*, 26 JOURNAL OF INTERNATIONAL ARBITRATION 773, 812, 814-15 (2009).

[23] *See* **CL-0001**, Gary B. Born, *Chapter 17: Provisional Relief in International Arbitration*, *in* INTERNATIONAL COMMERCIAL ARBITRATION at 2650 (3rd ed. 2021); *see also* **CL-0005**, *Tanzania Elec. Supply Co. v. Independent Power Tanzania Ltd*, ICSID Case No. ARB/98/8, Decision on the Respondent's Request for Provisional Measures, ¶ 6 (Dec. 20, 1999) (declining to address the merits).

[24] **CL-0006**, *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures, ¶ 120 (Jan. 21, 2015).

Similarly, in *Sergei Paushok v. Mongolia*, the tribunal explained, "[a]t this stage, the Tribunal need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of Claimants."[25]

28. As explained in Claimants' Request for Arbitration, their letter to ICSID dated April 30, 2021, and above, Claimants asserted claims under three NAFTA provisions.[26] *First*, Mexico breached NAFTA Article 1102 because Mexico afforded similarly-situated Mexican oilfield services companies better treatment than Finley and Prize. In particular, Mexico chose to compromise with these domestic companies instead of subjecting them to what Claimants have had to endure with rescission and now a "finiquito" and attack on the performance guarantee.

29. *Second*, Mexico breached NAFTA Article 1105(1) by, *inter alia*, unjustifiably repudiating the 821 Contract, engaging in arbitrary conduct, discriminating against Claimants, and denying them justice through the conduct of Mexico's court system.

30. *Third*, Mexico breached its obligation to respect its contractual obligations under the 821 Contract with Finley, Prize, and Drake-Mesa, an obligation under the Mexico-Denmark bilateral investment treaty that Mexico incorporated under NAFTA Article 1103. Accordingly, to the extent necessary, Finley and Prize have alleged facts that "might possibly" lead to an award in their favor.

C. Risk of serious injury or irreparable harm

31. The requesting party must show a risk of "serious," "substantial," or "grave" harm in the absence of interim measures to satisfy this element.[27] Commentators have described harm that may affect the tribunal's jurisdiction as likely to warrant issuing interim measures:[28]

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[25] **CL-0007**, *Sergei Paushok v. Mongolia*, UNCITRAL, Order on Interim Measures (Sept. 2, 2008) ¶ 55; **CL-0004**, Régis Bismuth, *Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration*, 26 JOURNAL OF INTERNATIONAL ARBITRATION 773, 814 (2009) ("Therefore, and contrary to domestic courts, the tribunal does not have to assess the possibility of success on the underlying merits when it grants interim measures.").

[26] Request for Arbitration ¶ 35.

[27] **CL-0001**, Gary B. Born, *Chapter 17: Provisional Relief in International Arbitration*, *in* INTERNATIONAL COMMERCIAL ARBITRATION at 2653 (3rd ed. 2021); *see also* **CL-0008**, *Perenco Ecuador Ltd v. Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6, Decision on Provisional Measures, ¶ 43 (May 8, 2009) ("Article [47 of the ICSID Convention] does not lay down a test of irreparable loss and the authorities do not warrant so narrow a construction").

[28] **CL-0001**, Gary B. Born, *Chapter 17: Provisional Relief in International Arbitration*, *in* INTERNATIONAL COMMERCIAL ARBITRATION at 2656 (3rd ed. 2021) (emphasis added); **CL-0009**, *Plama Consortium Ltd v. Bulgaria*, ICSID Case No.

> Parties sometimes take steps that will, and may be **designed to, frustrate the tribunal's jurisdiction** and remedial authority. The classic examples of such conduct are **disposing of the subject matter of the arbitration** (e.g., intellectual property, disputed shares in a company) or fundamentally altering circumstances so that requested relief cannot be granted or would be meaningless or ineffectual (e.g., removing assets from a company whose ownership is in dispute, terminating contractual relations with other parties in a multi-party context). Tribunals are particularly likely to consider such conduct as causing sufficient harm to warrant the issuance of provisional measures.

Tribunals are particularly likely to order interim measures when such harm cannot be adequately compensated.[29]

32. Here, Claimants face irreparable harm. As explained above, Mexico has already objected to this Tribunal's jurisdiction and claimed that Claimants do not have existing investments. In response, Claimants explained that their investments include the 821 Contract and the US$ 41.8 million performance guarantee. Now, Mexico is trying to eliminate both of these investments with the "finiquito" process. This is an apparent attempt to bolster Mexico's jurisdictional arguments that it apparently plans to re-raise with the Tribunal. If Mexico is allowed to deprive the Tribunal of jurisdiction over Claimants' claims, they will be deprived of the ability to obtain compensation because of Mexico's NAFTA breaches. Accordingly, Claimants face irreparable harm in the absence of interim measures.

D. Urgency

33. The requirement of urgency has been described as "a low threshold."[30] A party need only show that its rights will be prejudiced at some point before a final award is issued.[31] If a material right that affects the integrity of the proceeding is implicated (e.g., jurisdiction), the

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ARB/03/24, Order, ¶¶ 38 et seq. (Sept. 6, 2005) ("Provisional measures are appropriate. . . to prevent parties from taking measures capable of having a prejudicial effect on the rendering or implementation of an eventual award or which might … render its resolution more difficult").

[29] *See, e.g.*, **CL-0008**, *Perenco Ecuador Ltd v. Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6, Decision on Provisional Measures, ¶ 46 (May 8, 2009) ("[i]f Perenco's business in Ecuador were effectively brought to an end in this way, such injury could not, in the Tribunal's judgment, be adequately compensated by an award of damages should its claim ultimately be upheld.").

[30] **CL-0010**, Dan Sarooshi, *Provisional Measures and Investment Treaty Arbitration*, *in* ARBITRATION INTERNATIONAL at 366 (William W. Park ed. 2013) ("In terms of the requirement of urgency, ICSID Tribunals have employed a low threshold to allow this requirement to be satisfied easily in practice.").

[31] *See* **CL-0010**, Dan Sarooshi, *Provisional Measures and Investment Treaty Arbitration*, *in* ARBITRATION INTERNATIONAL at 367 (William W. Park ed. 2013) ("If they can be considered as being necessary in advance of the final award then there is a good argument that they will be considered as being 'urgent.'").

matter is by definition urgent.[32] Commentators have explained that, when a tribunal is in doubt as to whether to issue interim measures to protect a material right, "the safest course at [an] early stage of the proceedings is to ensure that no adverse step is taken to the same."[33]

34. Here, Pemex sent improper notice to Claimants about the "finiquito" process for the 821 Contract. According to the demand Pemex made against the performance guarantee, Pemex has already finalized the "finiquito" to claim that Claimants somehow owe US$ 41.8 million. Indeed, on December 3, 2021, hours after the First Session, Pemex made such a claim against the performance guarantor. By definition, Claimants' request is urgent.

E. Balance of hardships weighing in favor of interim measures

35. Tribunals analyze "the relative hardship to each of the parties if provisional measures are or are not granted."[34] Here, the analysis is not complicated. As explained above, if interim measures are not granted, Claimants could lose the ability to assert their claims and obtain relief. This is clearly significant harm.

36. Mexico, on the other hand, would be prevented from continuing the "finiquito" process and calling on the US$ 41.8 million performance guarantee for the duration of this arbitration. This would not be significant to Mexico or to its state-owned company Pemex, which has a multi-billion-Dollar valuation. As such, Mexico will not face harm if it is prevented from finalizing the "finiquito" process and calling on the guarantee for the duration of this arbitration.

F. No prejudgment of the merits

37. Commentators have explained this factor as follows:[35]

> Properly analyzed, the "no prejudgment" requirement stands for the fairly basic, but nonetheless important, propositions that (a) a grant of provisional measures

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[32] **CL-0002**, *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, ¶ 69 (Nov. 19, 2007) ("Furthermore, where, as is the case here, the issue is to protect the jurisdictional powers of the tribunal and the integrity of the arbitration and the final award, then the urgency requirement is met by the very own nature of the issue.").

[33] *See* **CL-0001**, Gary B. Born, *Chapter 17: Provisional Relief in International Arbitration*, *in* INTERNATIONAL COMMERCIAL ARBITRATION at 2659 (3rd ed. 2021) (quoting **CL-0011**, *Biwater Gauff (Tanzania) Ltd v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, ¶ 86 (Mar. 31, 2006)).

[34] **CL-0001**, Gary B. Born, *Chapter 17: Provisional Relief in International Arbitration*, *in* INTERNATIONAL COMMERCIAL ARBITRATION at 2654 (3rd ed. 2021).

[35] **CL-0001**, Gary B. Born, *Chapter 17: Provisional Relief in International Arbitration*, *in* INTERNATIONAL COMMERCIAL ARBITRATION at 2660 (3rd ed. 2021); **CL-0012**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1, ¶ 6

> may not preclude the tribunal from ultimately deciding the arbitration in any particular manner after the parties have presented their cases (*e.g.*, provisional measures should not prevent nor make it more difficult for the tribunal to render a decision in favor of one party or the other); (b) provisional measures have no *res judicata* or similar preclusive effect with regard to a decision on the merits; (c) a tribunal must take care to ensure that it does not, in considering and deciding an application for provisional measures, prejudge the outcome of the arbitration or even partially close its mind to one party's submissions or deny one party an opportunity to be heard in subsequent proceedings; and (d) the same relief that is sought as final relief may ordinarily be issued on a provisional basis, subject to later revision (although that relief might in some cases also be issued as partial final relief prior to a final award).

38. Here, Claimants stipulate that any decision on this application is not binding on future issues either with respect to jurisdiction or the merits. In light of Mexico's April 6, 2021 objection, and its intimation at the first procedural hearing that it would re-assert its jurisdictional arguments, the relief sought here is simply to prohibit Mexico from taking any actions that might deprive the Tribunal of jurisdiction. Claimants do not ask the Tribunal to interpret NAFTA Articles 1102, 1103, or 1105 or to make any affirmative decisions on jurisdiction. As such, there is virtually no risk that the merits of the case will be prejudged.

IV. REQUESTED RELIEF

39. Claimants request that the Tribunal order:[36]

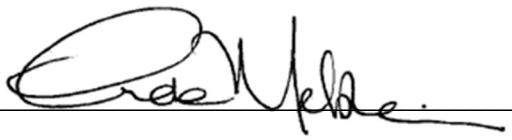
1. Mexico to cease any action that may deprive the Tribunal of jurisdiction to hear Claimants' claims, including any action related to concluding the 821 Contract or calling on the US$ 41 million performance guarantee, until this arbitration concludes; and

2. Any other relief to which the Tribunal believes Finley and Prize should be entitled. Finley and Prize reserve their rights to amend or supplement this application should Mexico take any further action to prejudice their rights.

(July 1, 2003) ("It is finally to be recalled that, as ICSID tribunals have repeatedly stated, the 'recommendation' of provisional measures does not in any way prejudge the question of jurisdiction.").

[36] To the extent that it would assist the Tribunal, Claimants can make themselves available for a virtual oral hearing on this matter.

Respectfully submitted on behalf of Claimants,

BY: 

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