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)

RESPONSE TO CLAIMANT'S REQUEST FOR INTERIM MEASURES

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Courtesy translation

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I. INTRODUCTION

1. This submission is filed in response to the Claimant's Request for Interim Measures submitted on December 14, 2021 ("Request for Interim Measures") and the Claimant's supplement to the Request for Interim Measures submitted on December 18, 2021.

2. The Respondent understands that the Request for Interim Measures relates solely to claims submitted by Finley Resources, Inc. ("Finley") and Prize Permanent Holdings, LLC ("Prize") on their own behalf and on behalf of Drake-Mesa, S. de RL de C.V. ("Drake-Mesa") pursuant to NAFTA ("NAFTA Arbitration"), and is unrelated to the two other cases initiated by Prize and MWS Management, Inc. ("MWS") pursuant to the USMCA on its own behalf and on behalf of Bisell Construcciones e Ingeniería, SA de C.V. ("Bisell").[1]

3. The Respondent regrets the manner in which the Claimants have described some of the facts and arguments, the "victimization" they have presented before the Tribunal, and the mischaracterization of facts related to contract 421004821 ("Contract 821").

4. Below, the Respondent explains what actually happened: a contractual dispute between one of the Claimants and its subsidiaries against Pemex Exploración y Producción ("PEP"), a subsidiary of Petróleos Mexicanos ("Pemex").

II. FACTS

A. Pemex is a productive State Enterprise and its actions are not attributable to Mexico

5. The Respondent anticipates that a contested issue in the ICSID Case ARB/21/25 will be the nature of Pemex and its subsidiary productive enterprises, such as PEP.[2] However, contrary to what the Claimants may argue, the acts performed by Pemex and PEP do not emanate from the State as a sovereign entity, but rather result from PEP's commercial activities as an enterprise.

6. As a background, Pemex was created in 1938 and legally was a decentralized public agency, which means that it had its own assets and legal personality, but was part of the federal public administration.

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[1] The Claimants submitted three different notices of intent, one of them under NAFTA and two under the USMCA, as well as three supplements to each notice of intent, but only one Request for Arbitration.

[2] *See* Request for Interim Measures, fn. 3

7. Since the 1990s, the Mexican energy market has undergone adjustments and legal reforms that have allowed the private sector to participate in certain activities in the hydrocarbon sector through contracts with Pemex and its subsidiaries that allowed Pemex and PEP to contract the services of private companies with greater flexibility. In other words, although Pemex was a State monopoly, it began to participate in the energy market as a private entity and to enter into contractual relationships with a variety of private companies. This means that Pemex and PEP entered into these contracts as a "contracting party" and not as a governmental authority. Such contracts are not concluded by the Mexican State, nor are they concluded by a delegated authority of the State. Pemex, as any operator in the market, and in accordance with the applicable law, decides the goods and services it needs to contract to fulfill its functions.

8. In 2013, a constitutional amendment focused on the energy sector, known as the "Energy Reform", was carried out, which changed the legal and corporate nature of Pemex and its subsidiaries. As a result, Pemex and PEP changed their nature from decentralized public organizations to "productive State enterprises". Although they are State-owned enterprises as mandated by the Mexican Constitution, which means that they could continue to act as State-owned enterprises or National Oil Companies, the aim was to reinforce that their way of acting in the Mexican and international market would be similar to a private company in order to compete in the energy market, and more efficiently meet its commercial goals. As part of the Energy Reform the Pemex Law of 2014 was enacted, Pemex was endowed with a corporate governance, and it was again confirmed that Pemex and PEP had their own legal personality, assets, and technical and operational autonomy.

B. Contract 821

9. As any company in the energy sector, Pemex's objective is to create economic value, which is why it needs to contract for a wide range of services offered by different suppliers. The Pemex Law of 2014 established that the acts performed by Pemex and its subsidiary companies are governed by such law, by regulations arising from the Pemex Law of 2014, and by commercial and civil law.[3]

10. Prior to the Energy Reform and the Pemex Law of 2014, Pemex's contracts were concluded pursuant to the Pemex Law of 2008, the Public Sector Acquisitions, Leasing and Services Law,

[3] *See* Articles 3, 7, 80 and 115 of the Pemex Law of 2014. **R-0001.**

the Public Works and Related Services Law, and administrative provisions issued by Pemex known as "DACS". As a consequence, the nature of the contracts concluded by Pemex and PEP was considered administrative, and the way to challenge the acts related to them was through contentious-administrative litigation, unless Pemex or PEP and the service provider agreed to an arbitration agreement.[4] This is precisely the situation of Contract 821.

11. On February 12, 2014, PEP granted Contract 821 through an international public bidding process to Drake-Finley, S. de R.L. de C.V. ("Drake-Finley"), as contractor, and to Drake-Mesa and Finley, both as joint guarantors (collectively referred to as "Contractors").

12. On February 28, 2014, Drake-Finley, Drake-Mesa, Finley, and PEP entered the Contract 821 pursuant to the Pemex Law of 2008. There are five aspects related to Contract 821 that are relevant to respond to the Request for Interim Measures.[5]

13. *First,* the object of Contract 821 was the execution of integral drilling and completion of land wells, i.e., it was a services agreement.[6]

14. *Second,* as indicated *supra*, Contract 821 was granted and concluded pursuant to the Pemex Law of 2008. This means that Contract 821 had an administrative law nature and a contractual scheme favorable to PEP according to which PEP could unilaterally create, modify or extinguish legal situations without having to resort to judicial bodies, such as rescinding or terminating early Contract 821.[7]

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[4] Article 72 of the Pemex Law of 2008 ("The legal acts concluded by Petróleos Mexicanos and its subsidiary bodies shall be governed by the applicable federal laws and domestic disputes to which it is a party, whatever their nature, shall be within the jurisdiction of the courts of the Federation, except in the case of an arbitration agreement [...]"). **R-0002**.

[5] Mexico considers regrettable that the Request for Interim Measures and the Supplement were not accompanied by Contract 821, which was requested by the Tribunal on December 17, 2021 ("To the extent that, according to Claimants, the potential termination of Contract 821 is at the root of the request for interim measures, the Tribunal requests Claimants to submit this contract (or at least its relevant provisions) in their new submissions"). For the benefit of the Tribunal, Contract 821 is attached as Exhibit R-0003 and the Respondent will translate the relevant clauses into English.

[6] *See* Clauses 2nd and 4th of Contract 821, pp. 12-14. **R-0003**. Request for Arbitration, ¶ 21.

[7] On numerous occasions Mexican courts have analyzed the nature of Pemex and PEP prior to the Energy Reform concluding that they do not act as an authority. See PEMEX-REFINACIÓN. IT IS NOT AN AUTHORITY FOR PURPOSES OF THE AMPARO PROCEEDING WHEN IT TERMINATES FRANCHISE CONTRACTS CONCLUDED WITH INDIVIDUALS OR LEGAL ENTITIES FOR THE

15. *Third*, the Contractors undertook to submit a bond guarantee to PEP for the equivalent of 10% of the maximum amount of Contract 821 as a performance guarantee.[8] The following excerpt from clause 10th is relevant:

> The CONTRACTOR expressly states:
> A. […] it grants its express consent so that in the event of noncompliance with the obligations arising from this contract, the Performance Guarantee granted, as well as any other balance in favor of PEP, may be enforced.
>
> B. Its agreement that the bond will be paid regardless of the filing of any kind of appeals before administrative or non-judicial authorities.
>
> C. Its agreement that the bond guaranteeing performance of the contract shall remain in force during the substantiation of all judicial or arbitration proceedings and the respective appeals filed in relation to this contract, until a final and enforceable resolution is issued by the competent authority or court.
> […]
>
> E. Its acceptance for the performance bond to remain in force until the guaranteed obligations have been fully complied to PEP's satisfaction, in the understanding that the conformity for the release of such bond shall be granted by means of a written document by PEP.
>
> G. Its agreement that the claim filed with the surety for the breach of contract shall be duly integrated with the following documentation:
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> 1. Written complaint to the surety institution.
> 2. Copy of the surety bond and, if applicable, its amending documents.
> 3. Copy of the guaranteed Contract including its annexes, and if applicable, its Amending Agreements and/or Memorandums of Understanding.
> 4. Copy of the document notifying the guarantor of its default.
> 5. The termination of the Contract and its notification.
> 6. Copy of the *finiquito*
> 7. Quantification of the claimed amount.
>
> H. Its agreement for the surety institution to pay PEP the maximum guaranteed limit in the event that the works under this contract are not useful or usable by PEP [...][9]

16. In light of the foregoing, on February 26, 2014 Fianzas Dorama, S.A. ("Dorama") issued in favor of the Contractors a bond guaranteeing an amount over US$ 41 million ("Dorama Bond"),

SUPPLY OF FUEL AT SERVICE STATIONS. Case Decision 210/2009, November 18, 2009, Second Chamber SCJN. **R-0004**.

8 Request for Arbitration, ¶ 21.

9 Clause 10th of Contract 821, pp. 31-33. **R-0003.**

pursuant to which the Contractors are the *debtors*, the *beneficiary* is PEP and the *surety or guarantor* is Dorama.[10]

17. *Fourth,* clause 15th of Contract 821 established a list of causes for which PEP could terminate without having to obtain a judicial or arbitration declaration. This provision established a procedure according to which, in the event that the Contractors incurred in any of the grounds for termination, they would have a period to amend the infringement and even provide arguments and evidence prior to the formal termination of the contract. [11] The Contractors exercised these rights prior to the termination of Contract 821.

18. *Fifth,* in accordance with clause 18th of Contract 821, the parties agreed to execute a settlement minute ("*acta finiquito*") when the totality of the works were received, in order to adjust, review and recognize balances in favor or against the parties.[12] The settlement ("*finiquito*") had to be executed within 120 days of having received the totality of works agreed in Contract 821 or after it was rescinded.[13] PEP and the Contractors also agreed that PEP could execute the settlement unilaterally:

> In the event that the CONTRACTOR does not appear at the Settlement, PEP shall proceed to execute it unilaterally and, in the event that the Settlement shows that there is a balance in favor of the CONTRACTOR and the latter refuses to collect it, PEP may deposit the payment before the corresponding jurisdictional authority.[14]

19. As will be seen *infra,* since 2017 Contract 821 has been terminated, since 2018 PEP has claimed the enforcement of the Dorama Bond, and PEP has taken numerous actions to conclude the settlement with the Contractors in accordance with Contract 821. None of this is explained by the Claimants.

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[10] Based on the 821 Contract, if the 821 Contract was amended, the Dorama Bond had to be amended. Respondent understands that the 821 Contract was amended in 2016 and on January 26, 2016 the Dorama Bond was amended and reissued. Clause 10th of the 821 Contract, pp. 32-33. **R-0003**. Dorama bond policy. **R-0005.**

[11] *See* Clause 15th of Contract 821, pp. 49-51. **R-0003.**

[12] Contract 821 establishes grounds for administrative termination (clause 15th) and early termination (16th). In this case, only administrative termination is relevant, although in both cases it is required to formalize a settlement (*finiquito*).

[13] Clause 15th of Contract 821, p. 48. **R-0003** ("In the event of administrative termination of the Contract, the corresponding Settlement must be made within 120 (one hundred and twenty) Days following the date of the notification of the determination […]").

[14] Clause 18th of Contract 821, pp. 60-61. **R-0003.**

1. Termination of Contract 821

20. The Respondent will not provide any argument at this stage about the Claimants' allegations and the causes for which PEP terminated Contract 821. Notwithstanding, it is important for the Tribunal to be aware of some facts in this regard.

21. On July 31, 2017, PEP notified the Contractors of the commencement of the administrative termination procedure of Contract 821 in which the Contractors were able to submit arguments and evidence, as noted *supra*. Almost one month later, on August 29, 2017, PEP terminated the Contract 821 in accordance with clause 15th. In other words, the contractual relationship between PEP and the Contractors ended almost three years before the Notice of Intent of the NAFTA Arbitration was submitted.

2. Legal procedures against the termination of Contract 821

22. Pemex and the Contractors agreed that the law applicable to Contract 821 would be Mexican law and any dispute relating to the interpretation or execution of Contract 821 would be resolved by commercial arbitration in accordance with the International Chamber of Commerce (ICC) Rules of Arbitration, except for administrative and early termination proceedings.[15] This means that the administrative termination of Contract 821 had to be resolved through a nullity proceeding ("*juicio de nulidad*") before the Federal Court of Administrative Justice ("TFJA"), and any other dispute relating to the interpretation and performance of Contract 821 was to be resolved by an ICC arbitration.[16] The Contractors challenged the administrative termination of Contract 821 as follows:

- On September 4, 2017, Drake and Finley challenged the termination of Contract 821 before the TFJA.[17]

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15 *See* clause 47th of Contract 821, p. 86. **R-0003.**

16 In addition to the nullity proceeding initiated by the Contractors against the termination of Contract 821, in 2016 the Contractors initiated a civil litigation against PEP ("Civil Lawsuit 200/2016") despite the arbitration agreement established in Contract 821. The Respondent understands that these proceedings are concluded. The Respondent will explain Civil Proceeding 200/2016 in the Counter-Memorial if necessary.

17 Communication of October 27, 2021 addressed to the Contractors, p. 5. **C-0013.**

- On October 4, 2018, the TFJA issued a judgment in which the Contract 821 termination was confirmed.[18]

- On January 18, 2019, Drake and Finley filed the Direct Amparo 74/2019, which was referred to the 14th Collegiate Court in Administrative Matters of the 1st Circuit, but on January 30, 2020 it was denied.[19]

- On March 5, 2020, the Contractors filed the Appeal for Review 1685/2020 against the Judgement of the Direct Amparo 74/2019, but it was dismissed, which ended the amparo proceedings filed by the Contractors. PEP was noticed of this situation by June 2021.[20]

23. The Respondent understands that there is currently no ongoing proceeding related to the termination of Contract 821, which means that since 2017 Contract 821 was legally terminated, but until June 2021 PEP was in a position to formalize the *finiquito* of the Contract 821.

3. The enforcement of the Dorama Bond is a contractual issue

24. It is a concern that the Claimants allege in the Request for Interim Measures that the Dorama Bond is an investment under NAFTA.[21] Neither the NAFTA Notice of Intent, nor the supplement to the NAFTA Notice of Intent, much less the Request for Arbitration, identify the Dorama Bond as an investment. It is inappropriate and improper for the Claimants to make these allegations or characterize the bond as an investment through a Request for Interim Measures. If the Claimants' position is to hold that the Dorama Bond is an investment under NAFTA Article 1139 and the ICSID Convention, the Respondent reserves its rights to refute this allegation at the appropriate procedural time.

25. Notwithstanding, for the benefit of the Tribunal and without further elaborating on this issue, under the Mexican legal system a bond is a commercial contract regulated by specific

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[18] Request for Arbitration, ¶32. Pemex communication of December 2, 2021 addressed to Dorama, p. 2. **C-0014**. Communication of October 27, 2021 addressed to the Contractors, p. 5. **C-0013.**

[19] Communication of October 27, 2021 addressed to the Contractors, p. 5. **C-0013.**

[20] Pemex communication of December 2, 2021 addressed to Dorama, p. 2. **C-0014**. Communication of October 27, 2021 addressed to the Contractors, pp. 5-6. **C-0013.**

[21] Request for Interim Measures, ¶ 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.").

mercantile laws, supplemented by the Commercial Code.[22] The bond is a type of guarantee, quite ancient and existing in different civil jurisdictions. Based on this contract, a surety or guarantor (Dorama) agrees with a beneficiary (PEP) to pay for the obligor or debtor (the Contractors) if the latter fails to do so. This means that the surety bond has a commercial and accessory nature, *i.e.*, it depends on a principal obligation, in this case Contract 821.

26. The Respondent will also not submit allegations about the Contractors' contractual performance. However, the Tribunal should note that on June 15, 2018, PEP claimed the enforcement of the Dorama Bond due to contractual breaches incurred by the Contractors. This happened two years, one month and two weeks before Claimants submitted the Notice of Intent of the NAFTA Arbitration.[23]

27. Despite this, on July 13, 2018, Dorama informed PEP that its claims were inadmissible because the *finiquito* of Contract 821 had not been concluded.

> Therefore, by not having attached to your letter dated June 15, 2018, the FINIQUITO, and instead sending us a Resolution by which it is granted a suspension to the obligors so that the summons for its elaboration is not made, it is understood that the claim is not integrated in accordance with the text of the claimed bond, making it impossible for this institution to issue an opinion.[24]

28. Since there is no ongoing proceeding against the termination of Contract 821, as of October 2021, PEP has tried to formalize the settlement of Contract 821 and on December 3, 2021 again filed a claim before Dorama.[25] The Tribunal should keep in mind that PEP's claims against Dorama are still in an early stage, since the surety institution could maintain its position of declaring the claim of the Dorama Bond inadmissible, which could result in the initiation of mercantile proceedings before the Mexican courts.

29. Likewise, the Tribunal must take into account that Contract 821, the Dorama Bond and the applicable mercantile law establish deadlines for PEP to claim the enforcement of the Dorama

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[22] Clause 4th of the Dorama Bond ("The bonds and all the contracts deriving from the issuance thereof shall be deemed to be mercantile for all the parties involved in them […]"). **R-0005.** The surety bond contract was regulated by the Federal Law on Surety Institutions, and in 2015 it was abrogated by the Law of Insurance and Surety Institutions. Both laws establish that the surety bond contract has a commercial nature.

[23] PEP communication of June 15, 2018. **R-0006.**

[24] Response from Fianzas Dorama, S.A. of July 13, 2018. **R-0007**.

[25] Communication of October 27, 2021 addressed to the Contractors, p. 5. **C-0013.** *See* Pemex communication of December 2, 2021 addressed to Dorama. **C-0014.**

Bond. In the event that PEP would refrain from exercising its contractual rights, that would imply the expiration of the Dorama Bond claim. This situation is extremely sensitive, since PEP's officials could incur administrative accountability and sanctions for not exercising PEP's contractual rights and provoke property damage to PEP.

4. Contractors have evaded all the notifications performed by PEP to execute the settlement of Contract 821

30. The Tribunal will be able to corroborate that PEP has only attempted to exercise its rights, including the elaboration of the settlement of Contract 821 and the claim against the Dorama Bond. All these situations have a contractual nature, and cannot be confused or equated with a "retaliation" by the Mexican State, much less with an attempt to affect the Tribunal's jurisdiction.[26]

31. PEP has conducted itself with the utmost transparency and in compliance with the procedures established in Contract 821 and in accordance with Mexican law. For the benefit of the Tribunal the Respondent details the actions performed by PEP to formalize the *finiquito* of the Contract 821:

- On October 18, 2021, PEP notified the Contractors by an official letter that they were summoned on October 27, 2021 to formalize the settlement of Contract 821. The official letter was unsuccessfully served at the "contractual domicile" of the Contractors, that is, at the address indicated in Contract 821 by the Contractors themselves, located in Tampico, Tamaulipas, Mexico.[27]
- On October 19, 2021, PEP again tried to notify the Contractors via an official letter by which they were summoned on October 27, 2021 to formalize the *finiquito* of Contract 821.[28] The official letter was unsuccessfully served at a second contractual domicile indicated in 2015 by the Contractors, located in Poza Rica, Veracruz, Mexico.[29]
- On November 5 and 8, 2021, PEP served the Contractors with an official letter summoning them to attend on November 10, 2021 to a new meeting to formalize the settlement of

[26] Request for Interim Measures, ¶¶ 2, 4.

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

[28] Official letter from PEP of October 19, 2021. **R-0009.** Minute of October 27, 2021, p. 2. **R-0008.**

[29] Communication of the Contractors of February 6, 2015. **R-0010.** Official letter from PEP of October 19, 2021. **R-0009.**

Contract 821.[30] Since the previous notifications could not be served at the Contractors' contractual domiciles, PEP served the notices at their "procedural domicile", located in Mexico City. Such domicile was indicated by the Contractors during the termination proceeding of Contract 821 and in the nullity proceeding.[31] This possibility is allowed by Mexican law.[32]

- On November 10, 2021, the Contractors did not attend the meeting convened by PEP. The *finiquito* of Contract 821 was performed unilaterally, in accordance with the terms and conditions of the contract.[33]
- On November 19, 22, and 23, 2021, despite PEP's authority to unilaterally terminate the Contract 821, it published three notices in the Official Gazette of the Federation ("DOF") and three *edictums* published in the newspaper La Jornada, in in which it summoned the Contractors to a meeting on November 26, 2021 to attempt to formalize by mutual agreement the *finiquito* of Contract 821.[34]
- On November 26, 2021, the meeting convened by PEP took place, unfortunately, the Contractors did not attend that meeting either.
- On December 15 and 16, 2021, PEP served the Contractors with the settlement of Contract 821 in the procedural domicile of the Claimants.

32. The Tribunal may observe that the Contractors have avoided any attempt by PEP to conclude the *finiquito* of Contract 821. On the contrary, PEP, in good faith and respecting due process, exhausted all the contractual and legal means to execute the *finiquito* with the Contractors by mutual agreement.

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30 *See* Notifications of November 5 and 8, 2021, pp. 1-2. **C-0013**.

31 Minute of October 27, 2021, p. 2. **R-0008.** Notifications of November 5 and 8, 2021, pp. 1-2. **C-0013**.

32 Article 36 of the Federal Law of Administrative Procedure ("Personal notifications shall be made at the address of the interested party or at the last address that the person to be notified has indicated before the administrative bodies in the administrative procedure in question."). **R-0017**.

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

34 Notice of PEP published in the DOF. **R-0011.** Edict of PEP published in La Jornada. **R-0012**.

33. The Claimants have criticized that PEP has addressed the notices to Mr. Raúl López Gallegos, the "Claimants' former attorney".[35] The Claimants seem to forget that Mr. López Gallegos: *i)* is the Contractors' representative in accordance with Contract 821 [36]; *ii)* signed the Contract 821 and its amendments; *iii)* signed all Contractors' pleadings during the termination proceeding of Contract 821; *iv)* signed all the claims, appeals, and amparo lawsuits filed by the Contractors related to Contract 821, and *v)* signed the waivers of Bisell and Drake-Mesa, in accordance with NAFTA Article 1121.[37] Clearly, Mr. López Gallegos is not unaffiliated to the Contractors, the Contract 821, and the Claimants.

34. The Claimants have also criticized that PEP served notices at Ms. Vizcaíno's office. [38] The Claimants seem to forget that the Contractors indicated Ms. Vizcaíno's address as their procedural domicile during the termination proceedings of Contract 821, in the proceedings initiated by the Contractors against the termination of Contract 821 and authorized Ms. Vizcaíno to receive notices. The Claimants also ignore that Mexican law allows service to be made at procedural domiciles. What is worrying is that it is not an isolated fact for the Contractors to "hide" or "evade" PEP's notices. During the administrative termination proceeding, the Contractors adopted the same attitude until Ms. Vizcaíno Díaz and her collaborators received PEP's notices on behalf of the Contractors.[39]

35. The Claimants seem to suggest that Ms. Vizcaíno was treated improperly by PEP, which is totally incorrect. In Mexico's view Ms. Vizcaíno: *i)* does not participate in the NAFTA Arbitration nor in ICSID Case ARB/21/25, but *ii)* has acted on behalf of the Contractors in proceedings before PEP, during the nullity proceedings, civil proceedings, and amparo

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35 Request for Interim Measures, ¶ 14. Email from the Claimants of November 12, 2021 ("On November 8, apparently this document was presented to someone who was not authorized to receiveit on behalf of Claimants."). **C-0017**.

36 Declaration 2.2. of Contract 821, pp. 8-9 ("Drake-Mesa, S. de R.L. de C.V. accredits Mr. Raúl López Gallegos as Legal Representative […] Finley Resources, lnc. accredits Mr. Raúl López Gallegos, as Legal Representative, […] Drake-Finley, S. de R.L. de C.V. accredits Mr. Raúl López Gallegos, as Legal Representative").

37 *See* Claimants' Consent and Waivers, p. 5. **C-0007**.

38 *See* Supplement to the Request for Interim Measures, ¶¶ 3-8.

39 *See* Notices of August 16 and 17, 2017, related to the possibility of the Contractors to submit claims in the termination proceeding of Contract 821. **R-0013**. Notices of August 28 and 29, 2017, on the administrative termination of Contract 821, pp. 1-2. **R-0014.**

proceedings related to Contract 821. In addition, the Respondent does not understand why Ms. Vizcaíno alleges that an official from Pemex "[t]old me that he obtained my contact information from Secretaría de Economía", and that "Secretaría de Economía obtained my contact information or why they were providing it to Pemex".[40] Ms. Vizcaíno was officially designated as a representative of the Contractors in relation to Contract 821, and therefore, PEP had her contact information. The Respondent does not know the reasons why Ms. Vizcaíno states that the Secretaría de Economía was the agency that provided her information.

36. Notwithstanding, if the Contractors' new attorneys are members of the law firm Holland & Knight, it would be appropriate for the Contractors to notify PEP such situation, and establish a new domicile to receive notifications, so that they may receive documents on behalf of the Contractors. [41] Pursuant to Clause 19th of Contract 821, the parties undertook the obligation to communicate in writing all information related to the contract itself, including any modification of the domiciles or representatives.[42]

37. The fact is that all the steps taken by PEP require human capital, the payment of *edictums,* and the payment of public notaries' fees. PEP has conducted itself in a transparent manner and in compliance with contractual and procedural formalities. Probably the most serious aspect of this situation is that the Claimants and the Contractors have full knowledge of the actions taken by PEP but have decided to ignore them and have avoided PEP's actions.[43]

38. An investment arbitration under NAFTA is not the proper instance to hear ancillary proceedings against notices ("*indicentes de nulidad de notificaciones*") in the manner of a contentious administrative court, commercial proceedings in the manner of a Mexican court, or contractual matters.

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40 Witness Statement of Ms. Vizcaíno, ¶ 6.

41 *See* Request for Interim Measures, ¶ 15.

42 Clause 19th of Contract 821 ("The parties undertake to inform in writing all information arising from the performance of the Contract, including the change of the conventional address […]"). **R-0003**.

43 *See* Email from the Claimants of 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**.

C. Contracts 803 and 804 were terminated and settled

39. On February 20, 2012, Bisell, MWS and PEP concluded the Contract 424042803 ("Contract 803") for the execution of certain works. On June 30, 2014, Contract 803 was terminated and on February 10, 2015, Bisell, MWS and PEP formalized the *finiquito* of Contract 803.[44]

40. On March 20, 2013, Bisell, MWS and PEP concluded the Contract 424043804 ("Contract 804") for the execution of works for onshore well interventions. On March 31, 2014, Contract 804 was terminated and, on April 10, 2015, Bisell, MWS and PEP formalized the *finiquito* of Contract 804.[45]

41. The Tribunal may note that Contracts 803 and 804 were terminated and settled since 2015, in accordance with the terms agreed therein.

III. LEGAL ARGUMENT

42. The Respondent considers the Claimants' allegations to be entirely false and out of context and cannot -and should not- be the subject matter of a request for interim measures in an investment arbitration. The Respondent will refute all of these allegations at the appropriate procedural time. In the meantime, it is sufficient for the Tribunal to verify that the Request for Interim Measures is based on false premises, provides an incorrect characterization of the facts, and, in sum, the Claimant's request is defective.

43. *First,* the acts performed by PEP are not intended to "undermine Claimants' right to protect an existing "investment", nor to "deprive the Tribunal of jurisdiction to hear Claimants' claims".[46] The Tribunal is simply faced with a request by the Claimants to act as a Mexican court and recommend the suspension of the *finiquito* of Contract 821 and the enforcement of the Dorama Bond. As will be seen *infra*, the Tribunal has no jurisdiction to recommend such an interim measure.

44. *Second*, based on investment arbitration practice, five standards have to be fulfilled before a Tribunal orders interim measures: *i)* demonstrate *prima facie* the Tribunal's jurisdiction¸ *ii)*

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44 Settlement of Contract 803 dated February 10, 2015. **R-0015**.

45 Settlement of Contract 804 dated April 10, 2015. **R-0016**.

46 Request for Interim Measures, ¶ 17.

identification of a right capable of being affected and demonstrate *prima facie* the existence of a claim; and *iii)* demonstrate that interim measures are *necessary*; *iv) urgent*; and *v) proportional*.[47] The analysis of these standards or requirements in no way implies that the Tribunal should pre-judge legal issues, *e.g.*, the jurisdiction of the tribunal itself.[48]

45. *Third,* the Claimants have minimized that interim measures in investment disputes are an extraordinary measure and their request, analysis, and determination should not be taken lightly.[49] To grant it, an arbitral tribunal must carry out a careful analysis, in light of the applicable law, the procedural rules, and the facts of the case, to determine whether the requested measure is indeed necessary.[50] That is why, contrary to what the Claimants assert, the facts of the case must meet an extremely high threshold for a tribunal be able to issue an interim measure.[51]

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[47] Brigitte Stern, Interim Measures / Provisional Measures, in Meg Kinnear, et al., *Building International Investment Law: The First 50 Years of ICSID*, Kluwer (2015), pp. 628-629. **RL-0001**. *Ver* Institute de Droit International, Final Resolution Third Commission Provisional Measures, Rapporteur Lord Collins of Mapesbury, September 8, 2017, p. 2. **RL-0002**. *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, Order on Interim Measures, September 2, 2008, ¶ 45 ("It is internationally recognized that five standards have to be met before a tribunal will issue an order in support of interim measures. They are (1) prima facie jurisdiction, (2) prima facie establishment of the case, (3) urgency, (4) imminent danger of serious prejudice (necessity) and (5) proportionality."). **CL-0007**.

[48] The standards for establishing *prima facie* jurisdiction and the existence of a protectable right are very broad, which is why the Respondent should not be deemed to have conceded any fact or legal aspect of the dispute, *e.g.*, Tribunal's jurisdiction. *See Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, Order on Interim Measures, September 2, 2008, ¶ 46. **CL-0007**. This was precisely the situation determined by the tribunal in the case of *PNG v. Papúa Nueva Guinea*. *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, January 21, 2015, ¶¶ 108, 121, 124 ("[…] an order recommending provisional measures must not preclude the tribunal from ultimately deciding the issues in the arbitration in any particular way after the parties have fully presented their cases on disputed substantive issues (such as jurisdiction or the merits of the claims)."). **CL-0006**.

[49] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, October 28, 1999, ¶ 10 ("The imposition of provisional measures is an extraordinary measure which should not be granted lightly by the Arbitral Tribunal"). **RL-003**. *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case. No ARB/03/24, Order, September 5, 2005, ¶ 38 ("Provisional measures are extraordinary measures which should not be recommended lightly"). **CL-0009.**

[50] *See* Brigitte Stern, Interim Measures / Provisional Measures, in Meg Kinnear, et al., *Building International Investment Law: The First 50 Years of ICSID*, Kluwer (2015), p. 628. **RL-0001**.

[51] *See* Request for Interim Measures, ¶¶ 27, 33. *Hesham Talaat M. Al- Warraq v. Republic of Indonesia*, UNCITRAL, *Award*, 15 December 2014, ¶ 615 ("The Tribunal recognises that there is a general right to status quo ante and non-aggravation of disputes in investment arbitration law. Based on past

46. *Fourth*, the party requesting the interim measure has the burden of proof to demonstrate the urgency and necessity of the required measure.[52] This makes relevant the recognized decision of Judge Higgins in *Case Concerning Oil Platforms*, in which she explained that "[t]he graver the charge, the more confidence there must be in the evidence relied on".[53]

47. Special care should be taken when the interim measures requested are to "prevent an action which [the Claimants] are not even sure is being planned, or where granting an provisional measure involves 'a degree of speculation' and where there is insufficient evidence before the tribunal that the risk would be likely to materialize."[54] In this case, the Contractors have refused to participate in the *finiquito* of Contract 821 (even though the Claimants and their attorneys are fully aware of PEP's actions); the Dorama Bond has not yet been executed; the Dorama Bond claim is still in an early stage, and the Contractors have at their disposal mechanisms under the Mexican legal system to oppose the acts of PEP. This shows that it is speculative —and false— that the Respondent seeks to destroy the Claimants' investments and affect the jurisdiction of the Tribunal.

48. In light of the foregoing, the Tribunal may corroborate that the Claimants: *i)* have not complied with the standards required to obtain the requested interim measure; *ii)* have not met the burden of proof to demonstrate their claims, and *iii)* much less have they met the high threshold required for the Tribunal to issue an interim measure against a sovereign State.

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decisions of tribunals, the threshold to be satisfied for the imposition of sanctions for a breach of this right is extremely high […]"). **RL-0004**. *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Claimants' Request for Provisional Measures, December 4, 2021, ¶135. **RL-0005**. *Plama Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, September 6, 2005, ¶¶ 42-43. **CL-0009**.

[52] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, October 28, 1999, ¶ 10 ("There is no doubt that the applicant, in this case the Respondent, has the burden to demonstrate why the Tribunal should grant its application."). **RL-0003**. *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, January 21, 2015, ¶ 108 ("It is well-established that the requesting party has the burden of showing why the requested provisional measures are necessary and should be ordered by the Tribunal"). **CL-0006.**

[53] *The Case Concerning Oil Platforms* (Iran v. U.S.), Separate Opinion of Judge Rosalyn Higgins, 2003, ¶ 33. **RL-0006**.

[54] *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, January 21, 2015, ¶ 143. **CL-0006.**

A. The Claimants confuse the jurisdiction of the Tribunal with the competence to issue interim measures

49. Showing a clear lack of knowledge on the matter, the Claimants confuse the jurisdiction of the Tribunal to resolve the dispute raised by the Claimants in ICSID Case No. ARB / 21/25, with the competence to issue the interim measures required by the Claimants.

50. As a starting point, the Respondent is emphatic that it has not yet filed jurisdictional objections in ICSID Case No. ARB /21/25 and the Claimants cannot define any such objections on behalf of the Respondent.[55]

51. As the name suggests, a *prima facie* analysis of jurisdiction is not intended to pre-judge the merits of the controversy or the possible jurisdictional objections that the respondent State may assert.[56] In other words, if the Tribunal determines that it has jurisdiction to resolve the Request for Interim Measures, nothing prevents it from analyzing and resolving jurisdictional objections at a later stage, and as a result of that concludes that it lacks authority to hear the controversy raised by the Claimants.

52. The preliminary analysis of the Tribunal is limited to conducting a review to determine whether, based on the evidence provided by the requesting party, it is sufficient to recommend an interim measure. Although this analysis seems to be a simple task, the reality is that in this case it is not. The Claimants have confused the Tribunal's jurisdiction to resolve the controversy raised in the NAFTA Arbitration with the competence of the Tribunal to recommend interim measures based on the facts and evidence provided by the Claimants.

53. The Respondent requests the Tribunal to take into account that since the first investment arbitration faced by Mexico under NAFTA, as well as in the investment arbitrations faced by Canada or the United States under NAFTA, it has been consistently concluded that the dispute settlement mechanism was not created to resolve contractual disputes, much less intended to

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55 Request for Interim Measures, ¶¶ 25, 32, 38. Supplement to the Request for Interim Measures, ¶ 12.

56 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, Order on Interim Measures, September 2, 2008, ¶ 47. **CL-0007**. *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Claimants' Request for Provisional Measures, December 4, 2021, ¶¶ 105-106 ("at this time, the Tribunal has formed, and expresses, no opinion on its jurisdiction to entertain the Claimant's claims, on the facts so far as these are in dispute, or on the merits of the claims. These issues are not before it for decision at this stage"). **RL-0005.**

resolve "contractual disappointments" of foreign investors, nor can it serve as a substitute mechanism for existing judicial proceedings under the Mexican legal system to resolve disputes between parties. The following excerpt from the *Azinian v Mexico* award is illustrative:

> […] a foreign investor entitled in principle to protection under NAFTA may enter into contractual relations with a public authority, and may suffer a breach by that authority, and still not be in a position to state a claim under NAFTA. 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.[57]

54. As a simple example, Pemex and PEP carry out thousands of commercial operations per year with different private companies. The NAFTA investment arbitration mechanism was not created nor designed to allow private companies to seek economic compensation against the Mexican State for commercial disagreements arising from contracts with Pemex and PEP. In other words, contractual disputes with public companies or State-owned entities are not subject to investment arbitration provided for in NAFTA Chapter XI.

55. The Respondent does not deny that the Tribunal has the power to recommend interim measures under NAFTA, the ICSID Convention and the ICSID Rules. The situation to be considered is that the Tribunal does not have competence to recommend the interim measures required by the Claimants because: *i)* the facts in dispute arise from a merely contractual relationship (Contract 821); *ii)* the parties related to these events are not acting in this arbitration (PEP, the Contractors and Dorama), and *iii)* there are legal procedures that these parties can initiate to enforce their contractual rights, such as nullity of notices through ancillary proceedings and commercial lawsuits, among others.

56. The interim measures required by the Claimants would create a dangerous and disruptive precedent, under which an attempt is made to empower investor-State tribunals established under NAFTA, the USMCA, and the ICSID Convention to resolve contractual disputes and to issue

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[57] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, November 1st., 1999, ¶ 83 [Emphasis Added]. **RL-0007**.

suspensions or injunctions as national courts. Therefore, the Tribunal should confirm that it is not competent to issue the measures required by the Claimants.

B. The Claimants have not demonstrated a right susceptible to being affected

57. A tribunal may only grant interim measures in an investment arbitration if there are substantive and procedural rights that must be protected during the arbitration and that must be preserved before the tribunal resolves jurisdictional aspects or the merits of the claim.

58. There can indeed be a wide range of rights that a party can invoke as potentially affected or that could be affected, such as the need to maintain the *status quo* of a situation; avoid aggravating a dispute; security for cost; preserve the integrity of the arbitration process; prevent measures that affect the issuance of the award, among others.[58] However, tribunals have also been emphatic that to grant an interim measure is not intended to grant greater rights than the requesting party already had.[59]

59. Through the Request for Interim Measures, the Claimants only seek that the Contractors (*i.e.*, not even the Claimants) obtain an advantage over PEP (a company not related to the NAFTA Arbitration), which is evidenced by the lack of consistency in their allegations. On the one hand, the Claimants point out that the interim measures are necessary to "protect the Tribunal's jurisdiction" and "the integrity of the arbitration".[60] On the other hand, the Claimants state that the PEP notices are "absolutely void" and request that PEP cease any attempt to formalize the *finiquito* of Contract 821 and to claim the Dorama Bond.[61] The Claimants' position is untenable because

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[58] *See Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, February 26, 2010, ¶¶ 113-114, **CL-0003**. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order 1, March 31, de 2006, ¶ 71. **CL-0011**. *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order, September 2, 2008, ¶ 55. **CL-0007**. Brigitte Stern, Interim Measures / Provisional Measures, in Meg Kinnear, et al., *Building International Investment Law: The First 50 Years of ICSID*, Kluwer (2015), pp. 629-630. **RL-0001**.

[59] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, *Decision on Provisional Measures*, 7 April 2007, ¶ 37 ("Provisional measures are indeed not deemed to give to the party requesting them more rights than it ever possessed and has title to claim […] The Tribunal considers that, far from seeking to maintain the status quo, the recommendations sought by the Claimant are plainly directed to affect a fundamental change to it, by improving the Claimant's situation."). **RL-0008.**

[60] Request for Interim Measures, ¶¶ 1, 17, 24, 33.

[61] Request for Interim Measures, ¶¶ 24 and 36. Supplement to the Request for Interim Measures, ¶ 10.

there is no causal link between *a)* the execution of the *finiquito* of Contract 821 and the claim to enforce the Dorama Bond and *b)* the alleged impact on the jurisdiction of the Tribunal.

60. In *Plama v. Bulgaria* a similar situation occurred where the tribunal determined that certain insolvency proceedings before the Bulgarian courts did not affect the arbitration and the powers of the tribunal to make a final award. The following quotations are relevant:

> [t]the issues involved in this arbitration or the outcome of this arbitration […] and the outcome of the proceedings in Bulgaria will have no foreseeable effect on the Arbitral Tribunal's ability to make a determination of the issues in the arbitration.
>
> Moreover, at least with respect to the bankruptcy proceedings, it is significant that the parties to those proceedings and the parties to this arbitration are different. The bankruptcy proceedings are brought by private parties who are not involved in the present arbitration. The Tribunal is reluctant to recommend to a State that it order its courts to deny third parties the right to pursue their judicial remedies and is not satisfied that if it did so in this case, Respondent would have the power to impose its will on an independent judiciary.[62]

61. The Respondent is emphatic that the settlement of Contract 821, the enforcement of the Dorama Bond, and any legal proceedings that may arise from them are contractual issues, and the Claimants have not been able to explain and demonstrate that they are relevant for the jurisdiction of the Tribunal and the possibility that it may issue an award. It should be remembered that Contract 821 was terminated in August 2017 and since July 2018 PEP has tried to enforce the Dorama Bond, all of this long before the commencement of the NAFTA Arbitration.[63]

62. In Mexico's view, if the Tribunal conducts a *prima facie* analysis of the claims, it may conclude that the Claimants have not been able to clearly explain what right (substantive or procedural) relevant for the NAFTA Arbitration is being affected. In support of the foregoing, the Respondent refers to Contracts 803 and 804, which despite of being terminated and settled since 2015, the Claimants have included those contracts as part of their claims in the Request for Arbitration as well as the Contract 821, which was definitively terminated in 2017 without the possibility for restoring it. In this regard, the Claimants has not explained why the settlement procedure, specifically the one of Contract 821 and the enforcement of its Bond, is relevant to this Arbitration.

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62 *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case. No ARB/03/24, Order, 5 de septiembre de 2005, ¶¶ 42-43. **CL-0009.**

63 *See* PEP communication of June 15, 2018. **R-0006**.

C. The measures requested by the Claimants are not necessary

63. A measure is "necessary" if its purpose is to prevent the rights of a party from being affected by an "irreparable harm", *i.e.*, there must be a clear and substantial threat that endangers the ability of a party to be able to continue with the arbitration process.[64] It is precisely for this reason that it is essential that the party requesting the interim measure accurately identify the right that is necessary to protect as explained *supra*.[65]

64. Investment tribunals have consistently analyzed the jurisprudence of the International Court of Justice ("ICJ") and have adopted the term "*irreparable prejudice*" when analyzing the existence of alleged "irreparable harm" in requests for interim measures, which requires the meeting of a high threshold.[66] In *Occidental v Ecuador,* the claimant investor claimed against measures related to an energy concession. Adopting the criterion of "*irreparable prejudice*", the tribunal explained that an interim measure is an extraordinary measure, which cannot be recommended lightly, being necessary when the acts of a party "may cause or threaten to cause

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64 *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case. No.ARB / 03/24, Order, September 5, 2005, ¶¶ 45-46. **CL-0009**. *See PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB / 13/33, Decision on Claimant's Request for Provisional Measures, January 21, 2015, ¶ 109 ("[T] he party requesting provisional measures must demonstrate that, if the requested measures are not granted, there is a material risk of serious or irreparable harm. "). **CL-0006**. Cameron Miles, "*Provisional Measures before International Courts and Tribunals*", CUP (2017), p. 257. **RL-0013**.

65 *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, February 26, 2010, ¶ 113. **CL-0003**.

66 *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. United States)*, CIJ, Order, October 3, 2018, ¶¶ 77 and 91 ("The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when there is a risk that irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences [... The Court is of the view that a prejudice can be considered as irreparable when the persons concerned are exposed to danger to health and life. "). **RL-0009**. *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB / 98/2, Decision on the adoption of provisional measures requested by the parties, September 25, 2001, ¶¶ 2, 18¬19, 20-6 ("The provisions of article previous [Article 47 of the ICSID Convention] does not constitute any way an innovation in the history of international jurisdiction; It is the direct inspiration of Article 41 of the Statute of the International Court of Justice, which is why it is of special interest to examine the decisions that both said Court and its predecessor, the Permanent Court of International Justice, have adopted in the past on the matter of provisional measures "). **RL-0010**. *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB / 06/5, Decision on Provisional Measures, 7 April 2007, ¶37. **RL-0008**. Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador, ICSID Case No. ARB / 06/11, August 17, 2007, ¶ 59. **RL-0011**.

an" irreparable damage "to the rights that are invoked ".[67] In *CEMEX v Venezuela*, the tribunal also adopted the criterion of "*irreparable prejudice*" in accordance with the jurisprudence of the ICJ to conclude that an interim measure will be necessary when seeking to avoid an irreparable risk that cannot be compensated by other means.[68]

65. Some tribunals such as *PNG v Papua New Guinea* have found that the level of the severity of a serious risk or irreparable damage depends in part on the circumstances of the case, the nature of the measures requested and the impact that each party could suffer.[69] In the present case, the Claimants have not demonstrated either irreparable damage or a serious risk considering the following:

- The Contractors have evaded all the notifications made by PEP to formalize the *finiquito* of Contract 821, notwithstanding that the Claimants themselves are informed of the actions carried out by PEP.
- The Contractors have at their disposal defense mechanisms in accordance with the Mexican legal system to challenge the notifications of PEP (nullity of notifications ancillary proceedings) and oppose the enforcement of the Dorama Bond, notwithstanding that the procedures for claiming the bond in question are in an early stage.
- The Respondent understands that, as of today, Dorama has not declared the claim of the Dorama Bond as admissible, a situation that could lead to commercial litigation before the Mexican courts.

66. The essential aspect of the necessity requirement is that the party requesting the interim measure has the burden of proof to demonstrate the necessity of the measure in question, and in particular, whether there is a material risk of serious or irreparable harm. The Request for Interim Measures fails to meet this burden of proof and the required threshold. In other words, the fact that

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[67] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB / 06/11, August 17, 2007, ¶ 59**. RL-0011**.

[68] *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants' Request for Provisional Measures, March 3, 2010, ¶¶ 38-43, 55-56. **RL-0012**.

[69] *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB / 13/33, Decision on Claimant's Request for Provisional Measures, January 21, 2015, ¶ 109**. CL-006**.

PEP seeks to exercise its contractual rights simultaneous to with this investment arbitration does not constitute an imminent risk, much less irreparable damage against the substantive and procedural rights of the Claimants, which the Claimants have not even been able to clearly identify in the Request for Interim Measures.

D. The measures requested by the Claimants are not urgent

67. The fourth requirement or precondition for obtaining an interim measure consists of demonstrating its urgency, due to the risk that an action or omission of a disputing party can cause (or threaten to cause) an irreparable damage to the rights of the other party.[70] An essential aspect of the urgency requirement is that the tribunal cannot wait until the award is made to prevent an irreparable damage from occurring. In the words of Dr. Schreuer, "it is clear that provisional measures will only be appropriate where a question cannot await the outcome of the award on the merits".[71]

68. The requirements of *necessity and urgency* are closely related, and are often analyzed together. The jurisprudence of the ICJ is once again important since it has frequently analyzed situations in which damage could be considered irreparable and imminent.[72]

69. Recently, the ICJ issued interim measures in *Gambia v. Myanmar*. In general terms, Gambia, on behalf of the "Organization of Islamic Cooperation", initiated a process against the Asian country for probable violations of the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") due to an ethnic cleansing campaign launched

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70 *See* Brigitte Stern, Interim Measures / Provisional Measures, in Meg Kinnear, et al., *Building International Investment Law: The First 50 Years of ICSID*, Kluwer (2015), p. 630**. RL-0001**. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB / 05/22, Procedural Order 1, March 31, 2006, ¶ 76. **CL-0011**. Cameron Miles, "*Provisional Measures before International Courts and Tribunals*", CUP (2017), pp. 266-67. **RL-0013**.

71 Schreuer C., The ICSID Convention, 2nd ed. CUP (2009), pp. 775-776. **RL-0014**. Cameron Miles, "*Provisional Measures before International Courts and Tribunals*", CUP (2017), pp. 266-67. **RL-0013**. *Occidental Petroleum Corporation y Occidental Exploration and Production Company v República del Ecuador*, ICSID Case No. ARB/06/11, August 17, 2007, ¶ 59. **RLXX.** *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, *Procedural Order 1*, March 31, 2006, ¶ 76. **CL-0011.**

72 *See Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Iran v. Estados Unidos), CIJ, Order, October 3, 2018, ¶¶ 91-93. **RL-0009** and *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria), CIJ, Order, March 15, 1996, ¶¶ 35 y 42. **RL-0015**. Cameron Miles, "*Provisional Measures before International Courts and Tribunals*", CUP (2017), pp. 266-67. **RL-0013**.

against the minority and Muslim community known as "roshingas". Gambia's request included the cessation of illegal acts by Myanmar in contravention of the Genocide Convention; to ensure that those responsible for the genocide in question were brought to justice; to preserve evidence, and that Myanmar did not conduct acts that aggravate the process followed before the ICJ. The ICJ stated the following regarding the *urgency* and *necessity* of the interim measures required by the African country:

> […] the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court makes a final decision on the case […] The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of the Genocide Convention, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument.[73]

70. The ICJ's jurisprudence and various awards of investor-State tribunals show that obtaining interim measures in international dispute settlement procedures requires exceptional circumstances, while it is false that the urgency requirement is a "low threshold".[74] When attempting to justify the urgency requirement, the Claimants argued that the requesting party must only demonstrate that its right will be impaired at some point prior to the issuance of the award,

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[73] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Decision(s) of the Court, International Court of Justice, January 23, 2020, ¶¶ 65-66. **RL-0016** (emphasis added).

[74] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB / 06/5, *Decision on Provisional Measures*, 7 April 2007, ¶ 32 ("provisional measures should only be granted in situations of absolute necessity and urgency, in order to protect rights that could, absent these measures, be definitely lost. "). **RL-0008.** *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB / 06/11, August 17, 2007, ¶ 43. **RL-0011**.

Request for Interim Measures, ¶ 33. Even the cases cited by the Claimants themselves show the high threshold of the urgency requirement. *Tanzania Elec. Supply Co. v. Independent Power Tanzania Ltd*., ICSID Case No. ARB / 98/8, Decision on the Respondent's Request for Provisional Measures, December 20, 1999, ¶ 18 ("Nor are we persuaded that IPTL has demonstrated an urgent need for the relief sought). **CL-0005**. *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case. No.ARB / 03/24, Order, September 5, 2005, ¶ 38. CL-0009. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB / 05/22, Procedural Order 1, March 31, 2006, ¶ 76. CL-0011.

and "[i]f a material right that affects the integrity of the proceeding is implicated (*e.g.*, jurisdiction), the matter is by definition urgent."[75] This assertion is also false.

71. The Claimants are unable to demonstrate that the settlement (finiquito) of Contract 821 is a situation that requires the application of an urgent measure, unless the Claimants themselves are, in fact, admitting that the Tribunal lacks jurisdiction over their claims related to the termination of Contracts 803 and 804. In addition, as explained above, PEP's claims aimed at enforcing the Dorama Bond are in an early stage, the surety institution has not decided whether PEP's claims are admissible, and probably it will be necessary for PEP to initiate commercial litigation against Dorama. This makes it clear that there is a high degree of speculation in the Claimants' allegations.

72. Based on the foregoing, the urgency of an interim measure requires meeting a high threshold and will only be appropriate in extraordinary circumstances.[76]

E. The requested measures are not proportional

73. The Request for Interim Measures does not explain the fifth requirement widely recognized by investor-State tribunals: the *proportionality* of the required measure. Notwithstanding, the proportionality analysis requires the Tribunal to balance the damage caused or imminent to the party requesting the interim measure and the possible impact that the interim measure requested may cause to the counterparty, *i.e.*, to Mexico.[77]

74. In *Caratube II v Kazakstán*, the tribunal considered that a proportional measure must be "appropriate", which implies taking stock of the interests at stake of the parties, and taking into consideration that the defendant is a State.

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[75] Request for Interim Measures, ¶ 33.

[76] *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, October 28, 1999, ¶ 10. **RL-0003**. *Plama Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, September 6, 2005, ¶ 38. **CL-0009**. *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, *Decision on Provisional Measures*, 7 April 2007, ¶33. **RL-008**. *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants' Request for Provisional Measures, March 3, 2010, ¶ 41. **RL-0012**.

[77] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, Order on Interim Measures, September 2, 2008, ¶ 79. **CL-0007**. *See Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, February 26, 2010, ¶¶ 158-165. **CL-0003**. Cameron Miles, "*Provisional Measures before International Courts and Tribunals*", CUP (2017), p. 304. **RL-0013**.

> For the Tribunal, this implies that the requested measures be "appropriate" in the circumstances of the individual case to achieve their purpose. This includes a balancing of the Parties' respective interests at stake. The fact that the Respondent is a State is relevant in this regard. Indeed, any party to an arbitration should adhere to some procedural duties, including to conduct itself in good faith; moreover, one can expect from a State to adhere in that very capacity, to at least the same principles and standards, in particular to desist from any conduct in this Arbitration that would be incompatible with the Parties' duty of good faith, to respect equality and not to aggravate the dispute. But this Tribunal must be mindful when issuing provisional measures not to unduly encroach on the State's sovereignty and activities serving public interests.[78]

75. Once again, an interim measure is an extraordinary remedy and the arbitral tribunals must show special care in its analysis and award in order to not affect the rights (substantive and procedural) of a claimant, and at the same time the sovereign rights of a State.[79] Allowing the granting of interim measures against a sovereign State will put the State at a disadvantage *vis-à-vis* the investor, at least for a specified time, a situation for which a decision of this nature should be issued only under exceptional reasons.

76. The Respondent considers the interim measure required by the Claimants are completely disproportionate for three reasons:

- There is a deadline for PEP to claim the enforcement of the Dorama Bond, and the fact of not doing so could cause it to expire. If this occurs, PEP officials could be sanctioned and could be subject to administrative accountability for not exercising PEP's contractual rights and thereby generating property damage to the company.
- The only goal of the interim measures requested by the Claimants is to give the Contractors an advantage over PEP's contractual rights.
- The Contractors, PEP and Dorama are not parties in the NAFTA Arbitration or the ICSID Case ARB/21/25 and there would not exist a genuine balance between the alleged rights that the Claimants claim to be preserved and PEP's contractual rights.

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[78] *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Claimants' Request for Provisional Measures, 4 de diciembre de 2021, ¶121. **RL-0005**.

[79] Brigitte Stern, Interim Measures / Provisional Measures, in Meg Kinnear, et al., Building International Investment Law: The First 50 Years of ICSID, Kluwer (2015), pp. 630-631 ("But the Tribunal must be mindful when issuing provisional measures not to unduly encroach on the State's sovereignty and activities serving public interests"). RL-0001.

77. The measures requested by the Claimants are disproportionate and the Tribunal lacks jurisdiction to act as a Mexican court of "third instance" to order the injunction of PEP's notifications and the injunction of contractual claims pursuant to Contract 821 and the Dorama Bond in prejudice to PEP. The findings of the tribunal in *Occidental v. Ecuador* are relevant, since interim measures cannot be issued "for the protection of the rights of one party if they are to cause irreparable damage to the rights of the other party; in this case for the rights of a sovereign State".[80]

F. The Tribunal may not pre-judge the merits

78. As an additional issue, NAFTA Article 1134 establishes that "[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." By seeking to prohibit PEP from enforcing the rights under the Dorama Bond, the Claimants' request asks the Tribunal to pre-judge whether it has jurisdiction and whether the termination of Contract 821 was invalid, which is prohibited by NAFTA Article 1134.[81]

IV. RELIEF

79. For the reasons set forth in this Response to the Request for Interim Measures, the Respondent respectfully requests that the Tribunal:

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[80] *Occidental Petroleum Corporation y Occidental Exploration and Production Company v República del Ecuador*, ICSID Case No. ARB/06/11, August 17, 2007, ¶ 93. **RL-0011**.

[81] The following passage from Kaufmann-Kohler, taking into account P.O. No. 2 of *Feldman v México*, is relevant. G. Kaufmann-Kohler et. al, "Interim Relief in Investment Treaty Arbitration, en K. Yannaca-Small, *Arbitration Under International Investment Agreements*, OUP (2018), ¶24.28 ("NAFTA Article 1134, quoted above, provides for interim relief to preserve the rights of a disputing party. However, in contrast to the ICSID system, it makes clear that the rights in dispute cannot be the subject matter of the provisional measures. The reason for this appears to be that 'Articles 1134 and 1135 permit a state to implement and maintain a measure even if it breaches substantive rights contained in Chapter 11A. Thereafter, even if restitution is ordered, a State Party may choose to pay monetary damages instead'. In proceedings conducted in accordance with the AF Arbitration Rules as modified by the provisions of NAFTA, Chapter 11, Section B, a tribunal rejected a request to order the respondent to cease and desist from any interference with the claimant's property whether by embargo or any other means. The tribunal considered that an order in the terms requested by the claimant would not be consistent with the limitations imposed by Article 1134 'since such an order would entail an injunction of the application of the measures which in this case are alleged to constitute a breach referred to in NAFTA Article 1117"). **RL-0017**.

i. Dismiss the Request for Interim Measures because it lacks competence to order interim measures against parties not involved in the ICSID Case No. ARB/21/25 and due to the fact that they have a contractual nature.

ii. Dismiss the Request for Interim Measures in its entirety, since the Claimants did not demonstrate their *necessity*, *urgency*, and *proportionality*.

iii. Safeguard Respondent's rights to refute various factual and legal allegations expressed by the Claimants in the Request for Interim Measures.

iv. Order the Claimants to reimburse the Respondent for the costs and fees incurred in this procedural phase.

80. The Respondent understands that this Response concludes the round of briefs related to the Request for Interim Measures. The Respondent is prepared to participate in a virtual hearing regarding this matter, although Mexico do not consider such a hearing to be necessary.

Respectfully submitted,

The General Counsel for International Trade

Illegible

Orlando Pérez Gárate