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

CLAIMANTS' REPLY

Andrew B. Derman
Andrew Melsheimer
Gabriel Ruiz
Javan Porter
Cole Browndorf
Laura Yvonne Zielinski
Julia Segovia

Holland & Knight LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201
1.214.969.1700

ATTORNEYS FOR CLAIMANTS

April 14, 2023

TABLE OF CONTENTS

Page

I. INTRODUCTION

1. This arbitration presents the perfect case study for why investment treaties are important.

2. In the early 2000s, Mexico adopted an aggressive strategy to develop the giant oilfield called Chicontepec oilfield to reserve its declining oil production. Mexico's national oil and gas company, Pemex, did not have sufficient capital or expertise to fully exploit Chicontepec's potential. So Pemex conducted international public tenders to engage companies with expertise like MWS Management, Inc. and Finley Resources, Inc.

3. In February 2012, Claimants started their investment in Mexico with the 803 Contract with Pemex, valued at US$ 48 million. To conduct the contract work, Claimants purchased and imported equipment into Mexico, purchased related materials, purchased land, and leased a warehouse for storage. It also required the patriation of employees from the U.S. and hiring and training local laborers.

4. Claimants increased their exposure in Mexico by entering into the 804 Contract with Pemex, valued at US$ 55 million. Claimants purchased additional equipment and supplies, added warehouse storage space, and hired and trained more employees. Claimants continued their investment by participating in another international tender, winning the 821 Contract. This contract had an execution term of approximately four years and a value of US$ 418 million.

5. Starting in 2014, Pemex started to look for ways not to perform or to extricate itself altogether from its commitments. According to Mexico, "[o]il prices of the 'Mexican blend' began to collapse from the second half of 2014 . . . ."[1] As a result, Mexico explains that "[Pemex] was forced to stop operations in Chicontepec as of 2015."[2] In fact, Pemex's Board of Directors instructed the company to "formalize early termination of contracts" and "ensure that all contract terminations were achieved under the best possible conditions in accordance with Pemex's budget."[3] Mexico makes light of the impact on Pemex's counterparties, commenting "[u]nder such considerations, it was not reasonable to think that the Contracts would continue *ad perpetuam* or that they would be unalterable."[4]

[1] Counter-Memorial, ¶ 69.
[2] Counter-Memorial, ¶ 68.
[3] Counter-Memorial, ¶ 70.
[4] Counter-Memorial, ¶ 73.

6. Pemex was able to terminate its performance obligations under the 803 Contract and the 804 Contract by asking Claimants to enter into finiquitos. Pemex paid nothing to Claimants for the amounts owed. Instead, Pemex allowed them to reserve their rights to pursue such claims. Those claims remained unadjudicated before Mexican courts until Claimants initiated this arbitration.

7. Pemex did not approach Claimants to enter into a finiquito for the most recent of the contracts, the 821 Contract. That contract took a different path. The story that follows demonstrates that truth can be stranger than fiction.

8. By April 2016, Pemex had not asked for work under the 821 Contract for more than 100 days. Pemex repeatedly claimed that it had no money to perform, and approximately US$ 370 million of work was remaining. Because Pemex had effectively repudiated the contract, Claimant Finley, and its Mexican co-parties Drake-Mesa and Drake-Finley, were forced to relocate equipment and terminate employees, including their representative who worked in Pemex's offices and was responsible for receiving and coordinating work orders from Pemex. Because of their mounting losses, Finley, Drake-Mesa, and Drake-Finley sought relief from a Mexican court.

9. In November 2016, Work Order 028-2016 appeared, requesting the drilling of the Coapechaca 1240 Well. Pemex claimed that did not have the money to pay for this work. Pemex also did not have the permit required to drill the Coapechaca 1240 Well. It is patently obvious that Pemex issued this work order knowing it could not performed and to use it to support an administrative rescission of the contract, in furtherance of a scheme that sought to extricate itself from any further financial liability.

10. Mexico admits as much. Mexico explains that "since the end of 2014 it was very unlikely that Pemex would be able to maintain the pace of investment and production of hydrocarbons."[5] It claims that the 821 Contract had an "exit clause" that allowed Pemex "to adjust its activities", specifically referencing the authority Mexico gave Pemex to initiate administrative rescission. In fact, Mexico believes Pemex did nothing wrong. Mexico candidly justifies Pemex's rescission of its contracts as simply Pemex preserving "its own economic solvency."[6]

[5] Counter-Memorial, ¶ 70.
[6] Counter-Memorial, ¶ 555.

11. But Mexico's mistreatment did not end with the administrative rescission. Within approximately one year, Pemex was able to obtain a judgment from a Mexican court affirming Pemex's action. Without explanation, the court ignored Clause 15.1(r) of the 821 Contract that requires 15 unfulfilled work orders before any administrative rescission. While the lawsuit was pending, and days before the court issued its judgment, Luis Kernion attended a meeting where Pemex suggested that it was aware of how the judge would be ruling. He distinctly recalls Mexico's sole fact witness, Pemex's inhouse attorney Rodrigo Loustaunau telling him: "your companies are done."

12. After notifying Mexico of their intent to initiate this arbitration, Claimants obtained information about Pemex's payment to similarly-situated Mexican companies Integradora de Perforaciones y Servicios, S.A. de C.V. ("Integradora") and Zapata Internacional, S.A. de C.V. ("Zapata") and their contract, the 809 Contract. Mexico claims that from 2006 to 2016, "Pemex rescinded hundreds of contracts."[7] Yet, the 809 Contract was not one of them. In fact, Pemex paid Integradora and Zapata US$ 15 million, including for work that Pemex never requested.

13. After this arbitration commenced, Pemex continued its abuse. Pemex proceeded with a unilateral finiquito of the 821 Contract. Pemex claims that it is owed some US$ 41.8 million under the US$ 418 million contract and is pursuing the entirety Dorama bond for recovery. When Pemex was performing under the 821 Contract, it had only requested and paid for only US$ 48 million of work, which Pemex admits was only 11% of its commitment.

14. NAFTA Chapter 11 and the USMCA Article 14 were designed to protect Claimants and their investments from this abuse. Mexico agreed that Claimants' investments would be treated fairly and equitably. Mexico also agreed that it would treat Claimants and their investments at least as favorably as Integradora and Zapata and the 809 Contract, if not also countless other Mexican nationals and investments that Mexico has withheld from disclosure. The facts of this arbitration fall squarely within the protections Mexico promised to afford.

15. Yet, Mexico avoids addressing the facts. Moreover, Mexico has made it difficult for Claimants to present facts that are are relevant and material to the outcome of this arbitration. Mexico has withheld documents that it was ordered to disclose. Mexico has shielded fact witnesses

[7] Counter-Memorial, ¶ 555.

who have direct knowledge of the facts that are relevant and material to the outcome of this arbitration. The following list highlights the more glaring examples.

- Mexico does not provide any details about the origins of Work Order 028-2016, nor does Mexico justify Work Order 028-2016 by showing Pemex had the available funds to pay and the drilling permit to drill the Coapechaca 1240 Well.

- Mexico avoids any mention of Clause 15.1(r) of the 821 Contract, which does not allow a rescission for one unfulfilled work order.

- Mexico does not explain why a Mexican court cannot adjudicate a basic contract claim under a reservation of rights within five years. Notably, a Mexican court was able to adjudicate an administrative rescission of a US$ 418 million contract within 13 months.

- Mexico cannot find the budgets that Pemex received to enter into the 803 Contract, the 804 Contract, or the 821 Contract, any ledgers showing the outflows of funds for those budget, or any documents showing changes to the original budgets for the contracts.[8]

- Mexico cannot find the administrative files that Pemex maintains for every contract, including the 803 Contract, the 804 Contract, and the 821 Contract.[9]

- Mexico cannot disclose the 809 Contract, despite being ordered to do so, yet it can provide a copy to its expert.[10]

- Mexico cannot find any other compromises entered into with other Mexican nationals performing work in Chicontepec between 2012 and 2021.[11]

- Mexico does not disclose the "hundreds of contracts" that Pemex rescinded between 2006 and 2016 because of the "severe drop in oil prices."[12]

- Mexico cannot find Luiz Gomez (Pemex's manager for the 821 Contract) or Rodrigo Hernandez (the Subdirector of Services at Pemex Exploration and Production) to provide testimony on facts that are relevant to this arbitration. Both know that Work Order 028-2016 was designed to administrative rescind the contract.[13]

- Instead, Mexico limited its fact witness testimony to Rodrigo Loustaunau. In candor, Mr. Loustaunau's credibility is at issue. His testimony is in conflict with a Microsoft Teams video with Rob Keoseyan, a voicemail from Rob Keoseyan, and the Pemex's initial answer to the challenge to Pemex's administrative rescission of the 821 Contract.

[8] Procedural Order No. 4, Annex 1, Request 6.
[9] Procedural Order No. 4, Annex 1, Request 3.
[10] Procedural Order No. 4, Annex 1, Request 15; Report of J. Asali, ¶ 191.
[11] Procedural Order No. 4, Annex 1, Request 16.
[12] Counter-Memorial, ¶ 555.
[13] Witness Statement of L. Kernion, ¶¶ 97, 104.

16. Because of Mexico's conduct, the appropriate inferences should be drawn that the withheld documents and shielded witnesses are adverse to Mexico's position in this arbitration.

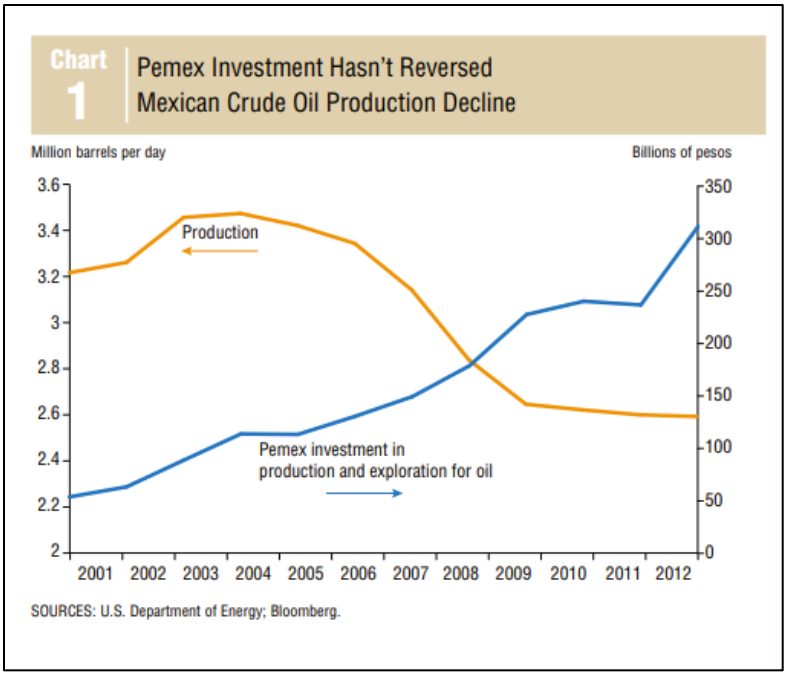
17. As explained further below, Mexico's numerous objections should be rejected. Moreover, Mexico should be found to have breached its obligations under NAFTA Article 1102 (National Treatment), USMCA Article 14.4 (National Treatment), NAFTA Article 1105 (Fair and Equitable Treatment under Minimum Standard of Treatment), and USMCA 14.6 (Fair and Equitable Treatment under Minimum Standard of Treatment). Finally, Claimants should be awarded their costs, and Mexico's conduct in this arbitration justifies imposing monetary sanctions against it. Claimants reserve their rights to respond to any new arguments that Mexico makes in its Rejoinder or new evidence that it submits in support thereof.

II. FACTS

A. CLAIMANTS' INVESTMENTS IN MEXICO

18. Mexico does not dispute the background facts of this arbitration about how and why Claimants invested in Mexico.

19. In 2006, Mexico was experiencing a decline in production despite Pemex increasing its investment in exploration and production:[14]



[14] Statement of Claim, ¶ 68.

20. Mexico viewed an area called the Chicontepec Basin as one possibility to offset its declining production.[15] In 2006, President Vicente Fox announced an investment plan to revitalize Chicontepec.[16] However, Pemex was not successful in developing the basin. After spending approximately US$ 11.1 billion, production from Chicontepec had not exceeded 32,000 barrels per day, let alone its expected target of one million barrels per day.

21. As part of its energy reform in 2008, Mexico created the CNH (*Comisión Nacional de Hidrocarburos*).[17] The CNH was charged with regulating all investment, exploration, drilling, and development plans for upstream operators in Mexico. This included Pemex, who was the only company that could hold a license at the relevant time. In turn, Pemex remained the sole entity that could exploit oil and gas.

22. The CNH reviewed Pemex's development of Chicontepec and recommended that Pemex implement technologies and operational techniques to yield better results.[18] Mexico does not dispute that Pemex could not develop Chicontepec alone, that Pemex developed an integrated service contract to engage third parties to assist, and that Pemex officials were promoting the opportunity to invest in Mexico and recruiting international oilfield services companies, including those in the United States, because of the parallels between Chicontepec and the unconventional resources in places like Texas.[19]

23. Mexico does not dispute that Jim Finley and Luis Kernion had multiple conversations with Pemex officials about investing in Mexico. Mexico also does not dispute that Pemex told Mr. Finley and Mr. Kernion that Pemex needed help increasing production in Chicontepec, that Pemex would treat them fairly, that Mexico's legal system would treat them fairly, and that "Pemex pays, Pemex pays."[20]

24. Claimants provided the names of various Pemex executives who encouraged their investment into Mexico: Juan José Suárez Coppel (Pemex's CEO from 2009 to late 2012), Emilio Lozoya (Pemex's CEO from late 2012 to 2016), Froylan Gracia (Mr. Lozoya's second-in-command), Sergio Guaso (Pemex's then President of Finance and Administration), and Carolos Morales

[15] Statement of Claim, ¶¶ 70-73.
[16] Statement of Claim, ¶ 74.
[17] Statement of Claim, ¶ 75.
[18] Statement of Claim, ¶ 76.
[19] Statement of Claim, ¶¶ 78-81.
[20] Statement of Claim, ¶ 82.

Gil (the then Director General of Pemex Exploration and Production ("PEP")).[21] These executives, among others, encouraged Claimants to make investments to help Mexico reverse its declining production and ensured Claimants they would be afforded an opportunity to earn a profit and be treated fairly.[22] Mexico submits no witness testimony from any Pemex or other government official to the contrary.

25. Despite Mexico's promotion of Chicontepec, Mexico argues that Claimants entered into Contract 803, Contract 804, and Contract 821 "knowing that the activities at Chicontepec might not be successful in the understanding that there were technical challenges."[23] Similarly, Mexico continues, "Claimants always recognized the complexity and challenges of Chicontepec, and the consequences that the fall in oil prices would have on various projects, which in turn generated high costs for the extraction of hydrocarbons."[24] In such statements, Mexico suggests that Claimants should have expected that Pemex would one day stop requesting work under the contracts because it ran out of money due to low oil prices and the geological complexity of Chicontepec. This is pure speculation. It is also inconsistent with Mexican law.

26. In each contract, Pemex declared, "[Pemex] has committed the resources to carry out the works that are the object of this contract."[25] Pemex made this declaration to comply with Mexican law. In brief, the 2008 Pemex Law required that any contracts such as the 803 Contract, the 804 Contract, and the 821 Contract are to be included in Pemex's authorized budget.[26] Mexico's Budget and Fiscal Responsibility Law requires Pemex's budget to have a

[21] Statement of Claim, ¶¶ 56, 89.
[22] Statement of Claim, ¶ 89.
[23] Counter-Memorial, ¶ 63.
[24] Counter-Memorial, ¶ 65.
[25] **C-0032**, 803 Contract at Clause 1.4; **C-0033**, 804 Contract at Clause 1.4; **C-0034**, 821 Contract at Clause 1.5.
[26] **CL-0013**, Ley de Petróleos Mexicanos, Diario Oficial de la Federación (2008) at Article 61(I) ("Remuneration of contracts for works and provision of services for Petróleos Mexicanos and its subsidiaries must be subject to the following conditions: (I) they must always be agreed in cash, be reasonable in terms of the standards and uses of the industry, and be included in the authorized Budget of Petróleos Mexicanos and its subsidiaries.")

specific chapter for multi-year contracts such as the 803 Contract, the 804 Contract, and the 821 Contract.[27] Mexico does not dispute these facts.

27. As a legal matter, Mexico knows that Pemex could not have entered into the 803 Contract, the 804 Contract, and the 821 Contract unless each of these contracts were included in its budget. Instead of addressing this point, Mexico deflects by suggesting that Claimants should have anticipated that Pemex might stop requesting and paying for work under these contracts as a consequence of Chicontepec's challenging geology and the possibility that oil prices would fall. It is rather absurd to suggest that Claimants should have anticipated that technical and/or economic challenges might impact Pemex, allowing it to default on its obligations without recourse to Claimants, particularly when Pemex affirmed in each contract that it had funds and had secured the budgeted funds from Mexico's treasury. This risk was not assumed contractually or legally by Claimants.

28. With respect to the 803 Contract, the 804 Contract, and the 821 Contract, Mexico organized its Counter-Memorial based on NAFTA claims and USMCA claims. This gives the impression that Claimants' investments were disjointed. They were not. Claimants entered into Mexico because of the 803 Contract and continued their investments in Mexico through the 804 Contract and the 821 Contract. Because this is the proper order, Claimants will address Mexico's factual assertions about the contracts accordingly.

1. 803 Contract

29. Mexico adds a new wrinkle in its description of the 803 Contract by claiming that the contract "established a maximum amount of US$ 48 million."[28] This is not accurate. Clause 4.1 of the 803 Contract provides that the total amount of the work is US$ 48 million. By qualifying such amount as a maximum, Mexico gives the false impression that Pemex's obligation was

[27] **CL-0089**, Mexico's Budget and Fiscal Responsibility Law at Article 32 ("In the project for the Expenditure Budget, there must be, in a specific chapter, the multi-year spending commitments authorized under Article 50 of this Law, which are derived from public works, acquisitions, leases, and services. In these cases, the excess commitments not covered will take precedence over other expense forecasts, being subject to annual budgetary availability."). Article 50 explains what a state entity such as Pemex must do before executing a multi-year contract that was authorized in the Mexico's Budget. Pemex must obtain approval from its Board of Directors, justify the term of the contract and that it does not negatively affect competition, identify the expense or corresponding investment, and break-down the expenditure based on current prices as well as in subsequent fiscal years.

[28] Counter-Memorial, ¶ 191.

optional. It was not. Pemex was required to request US$ 48 million of work from MWS and Bisell.[29]

30. Mexico also did not disclose the documents that would prove Pemex was required to request US$ 48 million of work under the 803 Contract. Mexico was ordered to disclose documents reflecting Pemex's original budget for the 803 Contract.[30] Mexico was also ordered to disclose the financial ledgers showing the funds that Pemex received in advance so it could execute the 803 Contract, the ledgers showing the outflows from the budgeted amount for the 803 Contract, and any document related to changes in the original budget for the 803 Contract.[31] Mexico did not disclose any of these documents. An inference should be drawn that these documents contain information that are adverse to Mexico's position in this arbitration, to wit, that Pemex obtained a budget for, and intended to spend, US$ 48 million under the 803 Contract.

31. Mexico refers to the "term" of the 803 Contract.[32] Careful attention should be paid to the difference between (a) the term of the validity of the 803 Contract and (b) the term during which the parties were obligated to perform under the contract. These are different concepts and have different implications.

32. Clause 2 (*Vigencia*) determines the term of the contract's validity. It began upon the contract's signature and concludes once the parties enter into a juridical act that extinguishes all of the rights and obligations of the parties.[33] Clause 3 (*Plazo de Ejecución*) is the term during which the Contractors (MWS and Bisell) were obligated to perform work. This term was from February 20, 2012 until June 30, 2014, as extended.

33. Despite this, Mexico argues that the 803 Contract "terminated" on February 10, 2015.[34] This is not true. February 10, 2015 is the date of the finiquito for the 803 Contract. This ended the parties' reciprocal obligations to perform work under the contract. But, it did not terminate

[29] "MWS" refers to Claimant MWS Management, Inc. and "Bisell" refers to Bisell Construcciones e Ingeniería, S.A. de C.V.
[30] Procedural Order No. 4, Annex 1, Request 5.
[31] Procedural Order No. 4, Annex 1, Request 6.
[32] Counter-Memorial, ¶ 194.
[33] **C-0032**, 803 Contract at Clause 2.
[34] Counter-Memorial, ¶ 399.

the contract. In short, the reciprocal obligations related to performing work terminated, but the payment obligations remain alive until extinguished.

34. Clause 2 is clear that the 803 Contract terminates when the parties enter into a juridical act that extinguishes all of the parties' rights and obligations. MWS, Bisell, and Pemex have not entered into such an agreement. Thus, the 803 Contract remains in effect.

35. As an example, Pemex entered into an *Acta Administrativa de Extinción de Dereches y Obligaciones* with respect to the 809 Contract.[35] According to this document, this is "the act that extinguishes all of the rights and obligations of the Parties, which derives from the conclusion of the term of the aforementioned contract."[36] Indeed, this Acta de Extinción concludes:

> All Parties acknowledge that there are no outstanding debts or claims of any nature under the contract, whether administrative, labor, civil, criminal, commercial and/or fiscal, therefore, the obligations under their contract are deemed to be extinguished, granting the broadest settlement that is legally possible for contract No. 424043809.

36. This Acta de Extinción is dated June 25, 2018. That is three years after the finiquito of the 809 Contract (August 21, 2015). It is also nearly three months after the Acta Circunstanciada for the 809 Contract, under which Pemex agreed to pay its Mexican national counterparties (April 9, 2018).[37] Mexico cannot dispute that the 809 Contract did not terminate until June 25, 2018, when those parties signed the Acta de Extinción.

37. Mexico takes issue with Claimants stating that the 803 Contract terminated early.[38] Some clarification is warranted. As the extended deadline of the execution period (p*lazo de ejecución*) under Clause 3 approached, Pemex had not requested US$ 48 million in work as it had agreed. US$ 22 million in work remained. Thus, the parties were entering into the finiquito, and terminating Pemex's obligation to request work, without it having fulfilled its obligation to request US$ 48 million of work. By doing so, the contract terminated "early."[39]

38. Mexico states that "Contract 803 was naturally terminated upon expiration of its term."[40] As noted above, this is not correct. The 803 Contract terminates once MWS, Bisell, and Pemex

[35] **JAH-0066**, Acta de Extinción, 809 Contract (June 25, 2018).
[36] **JAH-0066**, Acta de Extinción, 809 Contract (June 25, 2018), ¶ 4.
[37] **JAH-0063**, Acta de Finiquito, 809 Contract (Aug. 21, 2015); **C-0062**, Acta Circunstanciada (Apr. 9, 2018).
[38] Counter-Memorial, ¶¶ 202 et seq.; Statement of Claim, ¶ 123.
[39] Statement of Claim, ¶ 116.
[40] Counter-Memorial, ¶ 203.

enter into an Acta de Extinción that extinguishes all rights and obligations under the contract. That has never happened. Until the rights that MWS and Bisell reserved under the finiquito are extinguished, the 803 Contract remains in effect.

39. Mexico does not dispute the overtures that Pemex officials made to MWS and Bisell to further their investment in Mexico with additional equipment. In fact, Mexico does not dispute anything asserted in Claimants' Statement of Claim that transpired after Pemex stopped requesting work in October 2013. Instead, Mexico raises issues about MWS's and Bisell's performance under the 803 Contract.[41] These issues are irrelevant. The finiquito for the 803 Contract resolved any complaints Pemex might have had regarding this issue.

40. What is relevant to this arbitration is how Claimants were treated. Mexico admits that it stopped requesting work in October 2013 because of budgetary measures.[42] Under the terms of the 803 Contract, Pemex remained committed to requesting approximately US$ 22 million in work. Instead of requesting that work, Pemex proceeded with the finiquito process, which was finalized in February 2015, wherein Claimants reserved their right to seek payment for the work that Pemex committed to requesting and paying for, but failed to do so. Claimants then sought to adjudicate their reserved rights in Mexican courts until discontinuing such effort to pursue this arbitration.

41. Compare how Pemex treated Claimants with its treatment of the Mexican nationals that were counterparties to the 809 Contract. Mexico's expert Jorge Asali reports that the content of the 809 Contract is "similar to Contract 804" and "the clauses of the Contract 809 are identical to those of Contract 804" other than the date of execution and minimum/maximum budgets.[43]

42. Pemex's favorable treatment of the Mexican companies that signed contracts for works and provision of services like with respect to the 809 Contract is summarized as follows:

- Pemex entered into the 809 Contract with Mexican companies on March 1, 2013.[44]
- The work under the contract ended on December 31, 2013.[45]

[41] Counter-Memorial, ¶¶ 200-201.
[42] Counter-Memorial, ¶ 200 ("As of October 2013 PEP was affected by budgetary measures. As a result, PEP was prevented from issuing any more work orders.")
[43] Report of J. Asali, ¶ 192. Under Procedural Order No. 4, Annex 1, Request 15 Mexico was ordered to disclose the 809 Contract. It did not.
[44] **JAH-0063**, Acta de Finiquito, 809 Contract (Aug. 21, 2015).
[45] **JAH-0063**, Acta de Finiquito, 809 Contract (Aug. 21, 2015).

- Mexico entered into the finiquito for the 809 Contract on August 21, 2015.[46] Under the finiquito, the Mexican service companies reserved their rights because Pemex had not issued work orders and paid for the minimum budget of US$ 24 million, but instead for only US$ 8.4 million.[47]
- On April 9, 2018, Pemex and the Mexican nationals entered into the Acta Circunstanciada.[48] Among other things, Pemex agreed to pay US$ 42,167 per day when Pemex did not issue a work order. This amounted to US$ 13.5 million.
- On June 25, 2018, Pemex and the Mexican nationals signed the Acta Administrativa de Extinción de Derechos y Obligaciones del Contrato 424043809.[49] Pemex acknowledged that it paid US$ 15.054 million to the Mexican nationals.

43. Pemex stopped issuing work orders to the Mexican companies under the 809 Contract. Pemex had only requested US$ 8.4 million in work of the contract's minimum amount of US$ 24 million. The Mexican companies reserved their rights to pursue their claims against Pemex in their finiquito. This is the same situation as the 803 Contract.[50]

44. However, the Mexican service companies did not have to pursue litigation against Pemex. They also did not have to fight Pemex in domestic courts for over five years. They got paid. By definition, Mexico treated Mexican nationals very differently than Mexico treated Claimants.

2. The 804 Contract

45. Similar to the 803 Contract, Mexico attempts to downplay Pemex's expenditure commitment as required in the 804 Contract.[51] Mexico argues that Pemex did not have an obligation to expend US$ 55 million, the maximum budget. In support, Mexico relies upon a sentence in

---

[46] **JAH-0063**, Acta de Finiquito, 809 Contract (Aug. 21, 2015).
[47] **JAH-0063**, Acta de Finiquito, 809 Contract (Aug. 21, 2015).
[48] **C-0062**, Acta Circunstanciada (Apr. 9, 2018). Apparently, after executing the finiquito, the Mexican companies participated in an optional conciliation process under the 809 Contract. However, this conciliation was unsuccessful and required the Mexican service companies to maintain their reservation of rights against Pemex. *Id.*, p. 3 ("Regarding the recognition of the economic effects of time due to the lack of assignment of work by PEP for the PMX-761, PMX-762 and PMX-763 teams, derived from the fact that the teams remained in the location with the availability of carry out the work required by PEP, and other expenses, as established in the fourth conciliation hearing held on April 13, 2015 before the *Unidad de Responsabilidades*, from which no agreement was reached due to lack of conciliatory elements, based on which, the Contractor reiterated that its rights are protected so that it can assert them at a time that it deems appropriate.") Mexico did not disclose any of these documents as required under Procedural Order No. 4, Annex 1, Request 15.
[49] **JAH-0066**, Acta de Extinción, Contract 809 (June 25, 2018).
[50] Mexico notes that the 809 Contract was affected by Tropical Depression Ferdinand. *See* Counter-Memorial, ¶¶ 291-293. According to the Acta Circunstanciada for the 809 Contract, the storm affected the Mexican companies' drilling of one well. Pemex could have issued a modified work order and extended the period of time to drill the well. But Pemex did not. Instead, Pemex proceeded to a finiquito of the 809 Contract. Thus, the tropical storm is wholly irrelevant. *See* **C-0062**, Acta Circunstanciada (Apr. 9, 2018), p. 2 at §2 ¶¶ 3-4, §§ 3-4.
[51] Counter-Memorial, ¶ 236.

Clause 5: "The above mentioned budget will not represent in any way for PEP the obligation to disburse the maximum budget established in the contract."[52]

46. Mexico ignores the minimum budget under Clause 5 of the 804 Contract.[53] That amount was US$ 22 million. The definitions are clear that Pemex was obligated to request the US$ 22 million minimum budget:[54]

> "Minimum Amount of the Contract" means the amount in pesos and dollars provided in Clause 5 "Minimum and Maximum Budget of the Contract", not including IVA, comprised of the minimum budget that PEP shall execute to pay for the Works performed under the Contract.

47. Mexico does not dispute that there was an expectation that Pemex would request the maximum amount of US$ 55 million. Claimants would have reinforced this had Mexico complied with its disclosure obligations under Procedural Order No. 4. Mexico should have disclosed Pemex's original budget for the 804 Contract, the financial ledgers showing the funds that Pemex received in advance so it could execute the 804 Contract, the ledgers showing the outflows from the budgeted amount for the 804 Contract, and any document related to changes in the original budget for the 804 Contract.[55] But it did not. An inference should be drawn that these documents contain information that are adverse to Mexico's position in this arbitration, to wit, that Pemex obtained a budget for, and intended to spend, the maximum amount of the 804 Contract (US$ 55 million).

48. Indeed, the internal Pemex documents likely reflect that it considered US$ 55 million as the work that it would request under the contract. Claimants previously disclosed the following snapshot from Pemex's internal files with respect to the 821 Contract, which also has a minimum and maximum amount.

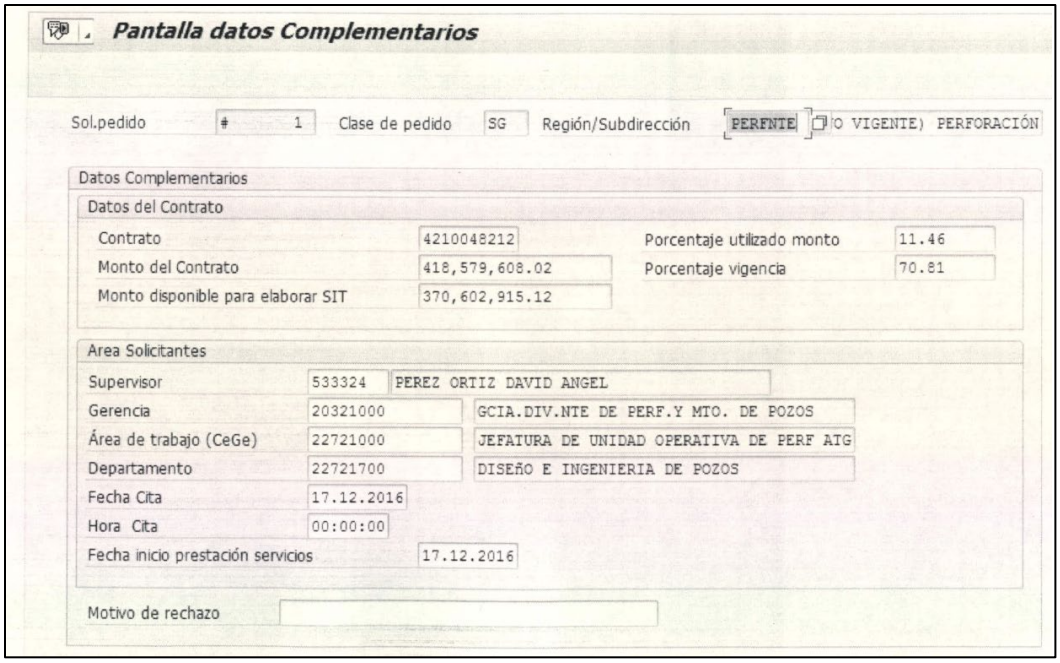
---

[52] **C-0033**, 804 Contract at Clause 5, ¶ 3.

[53] Clause 5 of the 804 Contract is poorly drafted. The index to the 804 Contract refers to Clause 5 as the "Minimum and Maximum Amount of the Contract" (*Importe Mínimo y Máximo del Contrato*). However, Clause 5 is titled "Minimum and Maximum Budget of the Contract" (*Presupuesto Mínimo y Máximo del Contrato*). The body of the contract does not use the term 'Minimum Amount', and it uses the term 'Maximum Amount' in only one provision when referring to Pemex authorizing additional work under a work order.

[54] **C-0121**, 804 Contract Definitions; **C-0033**, 804 Contract at Clause 13.2.

[55] Procedural Order No. 4, Annex 1, Requests 5 & 6.



Pantalla datos Complementarios

Sol.pedido # 1 Clase de pedido SG Región/Subdirección PERFNTE O VIGENTE) PERFORACIÓN

Datos Complementarios

Datos del Contrato

Contrato	4210048212	Porcentaje utilizado monto	11.46
Monto del Contrato	418,579,608.02	Porcentaje vigencia	70.81
Monto disponible para elaborar SIT	370,602,915.12		

Area Solicitantes

Supervisor	533324	PEREZ ORTIZ DAVID ANGEL
Gerencia	20321000	GCIA.DIV.NTE DE PERF.Y MTO. DE POZOS
Área de trabajo (CeGe)	22721000	JEFATURA DE UNIDAD OPERATIVA DE PERF AIG
Departamento	22721700	DISEÑO E INGENIERIA DE POZOS
Fecha Cita	17.12.2016	
Hora Cita	00:00:00	
Fecha inicio prestación servicios	17.12.2016	

Motivo de rechazo

49. Pemex's internal files acknowledge the amount of the 821 Contract was US$ 418.579 million or the maximum amount of the contract. The documents that Mexico failed to disclose under Procedural Order No. 4 would have reflected Pemex's similar understanding of its obligation to spend the maximum amount of US$ 55 million under the 804 Contract.[56]

50. Moreover, under Clause 10.1 of the 804 Contract, Bisell and MWS had to provide a performance guarantee based on the "Maximum budget of the Contract" (*Presupuesto máximo del Contrato*). Pemex expected Bisell and MWS to be prepared to perform US$ 55 million of work, and as such, Claimants were required to post a US$ 55 million bond. Pemex would not have required Bisell and MWS to provide a performance guarantee based on the contract's maximum budget if Pemex did not intend to request the maximum amount of work.

51. Mexico also argues that the 804 Contract "terminated" on April 10, 2015.[57] Similarly, Mexico contends "Contract 804 terminated naturally when its validity expired."[58] This is not true. April 10, 2015 is the date of the finiquito for the 804 Contract. It is not the date of its termination because the 804 Contract remains valid to this day.

[56] Recall Pemex's internal communication about extending the execution term of the 804 Contract, noting the contract's value of US$ 55 million**. C-0079**, Pemex Internal Memo (Sept. 19, 2013).
[57] Counter-Memorial, ¶ 399.
[58] Counter-Memorial, ¶ 252.

52. The 804 Contract has a term for the contract and a term during which MWS and Bisell were obligated to perform (the *plazo de ejecución*).[59] The term during which MWS and Bisell were obligated to perform was until March 31, 2014.

53. The 804 Contract treats the effectiveness of the contract differently than the 803 Contract. Under the 804 Contract, the validity (*vigencia*) is addressed in Clause 18, the provision regarding the finiquito. The 821 Contract follows this concept provided in the 804 Contract.

54. Clause 18 of the 804 Contract provides, "The validity of the Contract ends once the Finiquito is formalized or, in the case such results in a balance in favor of one of the Parties, on the date that the corresponding amounts are paid in their entirety."[60] Under Clause 18, the contract terminates either when a finiquito is signed or, if an amount is owed, such amount is paid in full.

55. In the finiquito for the 804 Contract, MWS and Bisell reserved their rights for amounts owed.[61] As Pemex continues to owe money to MWS and Bisell, the 804 Contract remains valid.

56. Mexico is fully aware that the 804 Contract remains in effect because of Claimants' reservation under the finiquito. The resolution of the 809 Contract explains why.

57. As noted above, Mexico did not disclose the 809 Contract despite being ordered to do so under Procedural Order No. 4. Nevertheless, Mexico's expert testifies that the content of the 809 Contract is "similar to Contract 804" and "the clauses of the Contract 809 are identical to those of Contract 804."[62] For the 809 Contract, Pemex and the Mexican nationals entered into their finiquito on August 21, 2015. However, the contract did not terminate.

58. Instead, the Mexican nationals pursued conciliation under the 809 Contract to resolve the reservation of rights they made in the finiquito. That procedure is optional, not mandatory.[63] The Mexican nationals' effort was futile, causing them to reiterate their reservation of rights.[64] Thereafter, the Mexican nationals contacted Pemex to reach a compromise, which is reflected

[59] Counter-Memorial, ¶ 238.
[60] **C-0033**, 804 Contract at Clause 18, ¶ 6.
[61] **C-0024**, Finiquito Contract 804 (April 10, 2015).
[62] Report of J. Asali, ¶ 192.
[63] **C-0033**, 804 Contract. Clause 27 of the the 804 Contract provides, "Pursuant to the provisions of Articles 35 of the LPM and 67 of the RLPM, PEP or the CONTRACTOR may file before the Civil Service Secretariat or CONTRACTOR ***may file*** with the Civil Service Secretariat or, as the case may be, before the autonomous constitutional body that may be created . . . ." (emphasis added).
[64] **C-0062**, Acta Circunstanciada (April 9, 2018), p. 3 ¶ 4(3).

in the Acta Circunstanciada.[65] It was not until they executed the Acta Administrativa de Extinción de Derechos y Obligaciones del Contrato 424043809 that the contract terminated.[66] MWS and Bisell have not entered into such an agreement with Pemex, thus, the 804 Contract remains valid to this day.

59. Similar to the 803 Contract, Mexico takes issue with Claimants stating that the 804 Contract terminated early.[67] Some clarification is warranted. Mexico does not dispute that Pemex asked to terminate its obligations under the contract before Pemex had fulfilled its obligation to request US$ 55 million of work. This is what Claimants meant by the contract terminating "early."

60. Finally, it is important to compare how Pemex treated MWS and Bisell with its treatment of the Mexican service companies that were counterparties to the 809 Contract. As noted above for the 803 Contract, those Mexican service companies were in the same position as MWS and Bisell. Pemex stopped issuing work orders to the Mexican service companies and had not requested the minimum amount of US$ 24 million the 809 Contract. The Mexican service companies reserved their rights to pursue their claims against Pemex in their finiquito. This is the same situation as the 804 Contract.

61. However, the Mexican service companies did not have to pursue litigation against Pemex. They also did not have to fight Pemex in domestic courts for over five years to gain nothing. They got paid. By definition, that is treating Mexican nationals differently than Claimants.

3. The 821 Contract

62. Mexico also seeks to downplay the amount of its commitment under the 821 Contract.[68] Mexico acknowledges that its minimum commitment was US$ 168.9 million. This admission stems from the definition of "Minimum Amount of the Contract":[69]

> the amount in pesos and dollars provided in Clause 5 "Minimum and Maximum Amount of the Contract", not including IVA, comprised of the minimum budget that PEP shall execute to pay for the Works performed under the Contract.

[65] **C-0062**, Acta Circunstanciada (April 9, 2018).
[66] **JAH-0066**, Acta de Extinción, Contract 809 (June 25, 2018).
[67] Counter-Memorial, ¶¶ 251 et seq.; Statement of Claim, ¶ 123.
[68] Counter-Memorial, ¶ 88.
[69] **C-0034**, 821 Contract at Apéndice 1.

63. Mexico does not dispute that Claimants had a legitimate expectation that Pemex would expend the maximum amount and that Claimants were required to make investments to meet the Maximum Amount of the Contract. As noted above, Mexico did not comply with its obligations under Procedural Order No. 4 and disclose the budget and financial documents that would further prove as much.[70] An inference should be drawn that these documents contain information that are adverse to Mexico's position in this arbitration, to wit, that Pemex obtained a budget for, and intended to spend, the maximum amount of the 821 Contract (US$ 418.3 million).

64. Moreover, the snapshot in Paragraph 34 above shows that Pemex acknowledged internally that the amount of the 821 Contract (*Monto del Contrato)* was US$ 418 million.[71] Pemex admitted that it had only expended 11.46% of the total amount of the Contract when it issued Work Order 028-2016.

65. Mexico's attempts to downplay Pemex's US$ 418 million commitment are even more concerning in light of Pemex's recent actions. Shortly after this Tribunal was appointed, Pemex proceeded with the finiquito of the 821 Contract (evidencing the contract was still in effect).[72] On the same day of the First Session of this arbitration, Pemex made a claim against the entirety of the US$ 41.8 million Dorama bond.[73] The Dorama bond is based on 10% of Pemex's US$ 418 million commitment under the 821 Contract. By pursuing the entire amount, Pemex tacitly admits that the amount of its obligation under the 821 Contract is US$ 418 million.[74]

66. Unlike the 803 Contract and the 804 Contract, Mexico appears to accept that the 821 Contract has not terminated. The 821 Contract remains in effect. Clause 18 of the 821 Contract provides:[75]

---

[70] Under Procedural Order No. 4, Annex 1, Request 5, Mexico was ordered to disclose documents reflecting Pemex's original budget for the 804 Contract. Under Request 6, Mexico was ordered to disclose the financial ledgers showing the funds that Pemex received in advance so it could execute the 804 Contract, the ledgers showing the outflows from the budgeted amount for the 804 Contract, and any document related to changes in the original budget for the 804 Contract. Mexico did not disclose any of these documents.
[71] *Supra* ¶ 34.
[72] Statement of Claim, ¶ 223.
[73] Statement of Claim, ¶ 225. The Dorama bond is based on Pemex's US$ 418 million commitment under the 821 Contract.
[74] Counter-Memorial, ¶ 89.
[75] **C-0033**, 804 Contract at Clause 18, ¶ 6.

> The validity of the Contract ends once the Finiquito is formalized or, in the case such results in a balance in favor of one of the Parties, on the date that the corresponding amounts are paid in their entirety.

Under Pemex's unilateral finiquito, Pemex claims that it is owed US$ 41.8 million, and Pemex is pursuing the Dorama bond to satisfy that claim.[76] The 821 Contract will remain in effect until there is an Acta de Extinción, similar to what transpired with the 809 Contract.

67. Mexico avoids addressing key details with respect to the 821 Contract that are central to this arbitration: Work Order 028-2016 and the resulting fallout. As explained below, Mexico cannot defend the indefensible.

68. Finley, Drake-Mesa, and Drake-Finley commenced a lawsuit against Pemex in April 2016 as a result of Pemex's failure to fulfill its obligation to request work in January 2016.[77] Mexico does not dispute that after initiating this lawsuit, Pemex told Luis Kernion that it would not be requesting any more work as long as the lawsuit was pending. Mexico also does not dispute that Pemex knew that Finley, Drake-Mesa, and Drake-Finley had been laying off employees because of a lack of revenue under the 821 Contract (due to Pemex not requesting work), including Claimants' representative who attended Pemex's daily meetings about pending work. Likewise, Mexico does not dispute that Pemex knew that Finley and Drake-Mesa had been relocating its equipment because of Pemex's failure to issue work orders.

69. Most notably, Mexico does not provide any facts about the origins of Work Order 028-2016, which Pemex suddenly issued in November 2016. Mexico provides no evidence that Pemex had the funds to pay for the requested work. Mexico also provide no evidence that Pemex had obtained the required drilling permit to drill the Coapechaca 1240 Well. Instead, Mexico claims that Claimants have not demonstrated that Work Order 028-2016 was fabricated.[78] Not true.

70. When Pemex issued Work Order 028-2016, Mexico admits that Pemex was facing "liquidity problems due to the international oil price crisis."[79] Mexico also admits, "PEP was forced to stop operations in Chicontepec as of 2015."[80] In fact, Mexico acknowledges that Pemex's finances were so bad in January 2016 that it needed to extend the payment term under the 821

[76] **R-0043**, Finiquito for 821 Contract (Nov. 10, 2021).
[77] Statement of Claim, ¶¶ 189-192.
[78] Counter-Memorial, ¶ 106.
[79] Counter-Memorial, ¶ 104.
[80] Counter-Memorial, ¶ 68.

Contract from 20 to 180 days.[81] Despite these admissions, Mexico pretends that Pemex had the funds to pay for the work requested under Work Order 028-2016.

71. Mexico was ordered to disclose documents that would evidence Pemex had budgeted funds to pay for Work Order 028-2016. Specifically, Mexico was ordered to disclose Pemex's original budget for the 821 Contract, Pemex's financial ledgers showing the funds that it received in advance so it could execute the 821 Contract, the financial ledgers showing the outflows from the budgeted amount for the 821 Contract, and documents related to the changes to Pemex's original budget for the 821 Contract.[82] Mexico did not disclose any of these documents. Thus, an inference should be made that Pemex did not have the funds to pay for the work requested in Work Order 028-2016. Indeed, Mexico's admissions above support such an inference.

72. Similarly, Claimants highlighted the fact that Pemex did not have a permit to drill the Coapechaca 1240 Well when it issued Work Order 026-2018 in November 2016.[83] Mexico does not dispute that Pemex was required to obtain such permit from the CNH to drill such a well. In fact, Pemex did not apply for a permit to drill the Coapechaca 1240 Well until June 2017, a month before Pemex noticed the administrative rescission of the 821 Contract.

73. Put simply, Mexico cannot justify Pemex issuing Work Order 028-2016 to drill a well that Pemex advised it did not have sufficient funding to pay for or for which Pemex did not have permission to drill. The above facts show that Pemex retaliated against Finley, Drake-Mesa, and Drake-Finley for initiating their lawsuit because Pemex had not been performing. Moreover, the above facts show that Pemex sought to exploit a manufactured argument to escape its contractual obligations under the 821 Contract. Pemex knew that Finley, Drake-Mesa, and Drake-Finley had laid-off employees and relocated equipment as a direct consequence of Pemex's failure to issue work orders. Pemex issued a sham work order, knowing Finley, Drake-Mesa, and Drake-Finley could not perform, to maliciously further a scheme to administratively rescind the 821 Contract.

---

[81] Counter-Memorial, ¶ 104.
[82] Procedural Order No. 4, Annex 1, Request 5 (ordering Mexico to disclose Pemex's original budget for the 821 Contract); Request 6 (ordering Mexico to disclose Pemex's financial ledgers showing the funds that it received in advance so it could execute the 821 Contract, the financial ledgers showing the outflows from the budgeted amount for the 821 Contract, and documents related to the changes to Pemex's original budget for the 821 Contract).
[83] Statement of Claim, ¶¶ 202-203.

74. Claimants identified the person within Pemex with the best knowledge of Work Order 028-2016: Luis Gomez.[84] He oversaw operations under the 821 Contract and signed Pemex's work orders, including 028-2016. He told Luis Kernion that Pemex was trying to cancel the 821 Contract because it lacked funds to request any work.[85] He also told Mr. Kernion that the preparation of Work Order 028-2016 was a collaboration between Pemex's commercial department and its legal department. He also signed Pemex's unilateral finiquito of the contract in November 2021.[86] It is telling that Mexico did not submit a witness statement from Luis Gomez.

75. To avoid being transparent regarding Work Order 028-2016, Mexico argues that Pemex had other reasons to administratively rescind the 821 Contract.[87] Mexico points to works of the Community and Environment Program (called "PACMA") and the fact that the contractors did not previously notify PEP of the change of their domicile.[88] Once again, Mexico does not give the complete picture.

76. For context, in January 2016, Pemex stopped issuing work orders under the 821 Contract.[89] In fact, Luis Gomez wrote Finley and Drake-Mesa to advise that Pemex did not have to issue work orders.[90] Finley and Drake-Mesa filed a lawsuit against Pemex in April 2016, and Pemex issued Work Order 028-2016 in November 2016.

77. In May 2016, the Pemex area responsible for PACMA works began sending internal memos to Luis Gomez.[91] The first memo advises Mr. Gomez about seven PACMA works that had not been completed. These works were assigned to Finley and Drake-Mesa in December 2014.

78. Claimants do not know what prompted the May 2016 memo. However, there are several important observations. *First,* it was sent within a month after Claimants initiated their lawsuit against Pemex regarding its performance under the 821 Contract.[92]

---

[84] Statement of Claim, ¶¶ 204 et seq.
[85] Witness Statement of L. Kernion, ¶¶ 97-98.
[86] **R-0043**, Finiquito for 821 Contract (Nov. 10, 2021).
[87] Counter-Memorial, ¶¶ 107 et seq.
[88] Counter-Memorial, ¶ 108.
[89] Witness Statement of L. Kernion, ¶ 82.
[90] **C-0097**, Letter from Pemex to Finley and Drake-Mesa (Jan. 22, 2016).
[91] **C-0122**, Pemex Internal PACMA Memos (2016-2017).
[92] Statement of Claim, ¶ 191.

79. *Second*, Mexico argues the PACMA issue gave Pemex independent grounds to administratively rescind the 821 Contract. Pemex did not initiate an administrative rescission in December 2014 when Claimants allegedly did not comply. Pemex did not initiate an administrative rescission when Luis Gomez received this memo in May 2016.

80. Instead, Pemex proceeded to issue Work Order 028-2016 in November 2016. This was the first work order that Pemex issued since January 2016. If Claimants were in breach because of the PACMA issue in December 2014 or even May 2016, and that was a valid basis for Pemex to initiate an administrative rescission of the 821 Contract, Pemex would have initiated administrative rescission in 2014 or early 2015. It would not have suddenly issued a new work order after an eleven-month hiatus, particularly to Finley, Drake-Mesa, and Drake-Finley which Mexico now claims were in breach.

81. *Third*, the last sentence of the memo to Luis Gomez explains how the PACMA area understood the issue was to be resolved. Pemex was to deduct any outstanding amount from any upcoming payment to Finley/Drake-Mesa/Drake-Finley. Only Mexico can explain why Pemex did not deduct these amounts.

82. Luis Gomez's communications to Claimants are similar to what the PACMA Annex to the 821 Contract provides.[93] Clause VIII of the PACMA Annex addresses outstanding PACMA amounts. Pemex is to recover outstanding amounts associated with the PACMA in the finiquito of the contract.[94]

83. Mexico is well aware of this process. Pemex followed a similar process with respect to the 803 Contract. The finiquito for the 803 Contract shows how Pemex handles the PACMA amounts (by deducting the amounts from Pemex's payments or in the final settlement under the finiquito):[95]

[93] **C-0123**, PACMA Provision, 821 Contract.
[94] **C-0123**, PACMA Provision, 821 Contract, p. 3 § VIII, bullet 1 ("If the PROA's has not been done, 2% of the exercisable amount will be recovered in the finiquito, as provided in the Clause 'Community and Environmental Support' stipulated in the contract.")
[95] **C-0074**, Finiquito Contract 803 (Feb. 10, 2015).

El monto total de las retenciones que fueron aplicadas a la contratista por concepto del 2% destinado para obra PACMA es de $533,867.52 USD el cual se desglosa a continuación:

MONTO TOTAL COMPENSADO	2% DEL MONTO COMPENSADO	RETENIDO	EJECUTADO	PENDIENTE DE RETENER
26,693,376.42	533,867.52	533,867.52	0.00	0.00

MWS and Bisell owed US$ 533,867.52 for the PACMA. Pemex retained this amount from payments owed to Claimants ("*retenido*"). Thus, there was nothing further for Pemex to retain under the finiquito ("*pendiente de retener*").

84. Pemex's PACMA area issued several of these memos to Luiz Gomez from May 31, 2016 to March 6, 2017.[96] Pemex did not provide notice to Claimants of such breaches justifying administrative recission. Claimants cannot locate notices from Pemex during this period (or at any point beforehand). Pemex could have notified Claimants to remediate the situation. Indeed, Pemex's obligation of good faith under Clause 3 of the 821 Contract required as much.[97] Instead, Pemex waited three years and then used these PACMA issues as additional "breaches" to support its administrative rescission of the 821 Contract.

85. On March 24, 2017, Pemex's PACMA area emailed a former employee of Drake-Finley notices dated between March 7, 2014 and March 14, 2017.[98] The notices related to works that had been assigned under the 821 Contract in December 2014. Mexico claims that these PACMA works were "not minor issues as PEP considered that these breaches prevented the benefit of vulnerable communities and access to food for the population of these communities."[99] If that were true, Pemex would not have waited until March 2017 to notify Finley, Drake-Mesa, and Drake-Finley about works that had been assigned nearly three years before in December 2014.

86. Regardless, each notice concludes that the amount owed "will be recovered in the finiquito of the contract." In March 2017, there had been no finiquito. Pemex would not notify Finley and Drake-Mesa of the administrative rescission until July 31, 2017.[100] By referencing a finiquito that was yet to occur, Pemex apparently had decided by March 2017 to end the 821 Contract.

[96] **C-0122**, Pemex Internal PACMA Memos.
[97] **C-0034**, 821 Contract at Clause 3.
[98] **C-0124**, Email from Pemex to Finley and Drake-Mesa (Mar. 24, 2017).
[99] Counter-Memorial, ¶ 110.
[100] **C-0104**, Letter from Pemex to Finley and Drake-Mesa (July 31, 2017).

87. Two months later, Rodrigo Loustaunau of Pemex prepared a May 8, 2017 internal memo.[101] Mr. Loustaunau wanted Pemex to find breaches to include in the administrative rescission so he could portray Finley, Drake-Mesa, and Drake-Finley as negatively as possible in the lawsuit that they initiated against Pemex in April 2016:[102]

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

88. Mexico was ordered to disclose internal communications behind the July 2017 administrative rescission of the 821 Contract.[103] Mexico did not disclose the communications leading up to Pemex's email dated March 24, 2017 regarding the outstanding PACMA issues. Mexico also did not disclose the May 3, 2017 communication (PEP-DG-SSE-GSIAP-541-2017) referenced in Rodrigo Loustaunau's May 8, 2017 memo. An inference should be drawn that Pemex did not disclose the many internal communications relating to the rescission of the US$ 418 million contract, including the reasons why Pemex made such a determination, because they contain information that is adverse to Mexico's interests in this arbitration. These disclosures would have shown, for example, that Pemex followed Mr. Loustaunau's instruction to find issues such as PACMA issue to assert as "breaches" in its administrative rescission.

89. At bottom, it was egregious for Pemex to include the PACMA issue as a basis to administratively rescind the 821 Contract. Pemex had not been requesting work or paying

[101] **C-0103**, Internal Pemex Letter (May 8, 2017); **C-0104**, Letter from Pemex to Finley and Drake-Mesa (July 31, 2017).
[102] **C-0103**, Internal Pemex Letter (May 8, 2017) (emphasis added).
[103] Procedural Order No. 4, Annex 1, Requests 3 & 11.

Finley, Drake-Mesa, and Drake-Finley, a fact that Mexico does not dispute.[104] Pemex also could have exercised its remedy under the 821 Contract for a failure to pay and recover such amounts in the finiquito of the contract. Worse, Pemex waited until March 2017 to notify Finley and Drake-Mesa of this alleged issue when the PACMA works had been assigned in December 2014. Based on the above, it is clear that Pemex manufactured a scheme to seek to justify ending the 821 Contract, blaming Finley, Drake-Mesa, and Drake-Finley, and by doing so, allowing Pemex to escape its US$ 418 million contract obligation. This behavior is a textbook example of a violation of investment protections, including those embedded in the NAFTA, and necessarily, the USMCA.

90. Similarly, Mexico's defense of Pemex's final justification — a failure to notify Pemex of a change of address — is equally unserious. Mexico does not explain that this claim was apparently based on Pemex's inability to deliver the improper Work Order 028-2016. Notably, when Pemex wanted to find Finley, Drake-Mesa, and Drake-Finley concerning the PACMA issues in March 2017, it emailed such notices to a former employee. Mexico cannot credibly argue that a purported breach of the 821 Contract's notice provision, particularly when such relates to the delivery of the bogus Work Order 028-2016, was a sufficient, independent basis to administratively rescind the US$ 418 million contract.

91. Importantly, under Clause 15.1 of the 821 Contract, Finley, Drake-Mesa, and Drake-Finley had an opportunity to cure any alleged ground for an administrative rescission:[105]

> In the event that the CONTRACTOR is in any of the events set forth in this Clause, prior to the determination of the termination, PEP may grant it a period of time to cure such noncompliance, notwithstanding the penalties set forth in this Clause. PEP may grant it a period to cure such noncompliance, notwithstanding the conventional penalties, if any, that may be penalties that, if applicable, have been agreed. The period shall be determined by PEP taking into account the circumstances of the Contract. If at the end of such period, the the CONTRACTOR has not cured the noncompliance, PEP may determine the administrative termination according to the administrative termination according to the procedure set forth in this Clause.

92. Pemex never gave Finley and Drake-Mesa an opportunity to cure the alleged PACMA deficiencies. Instead, in March 2017, Pemex emailed notices about the PACMA issue from works assigned in December 2014. Then, Pemex stated that the deficiency would be addressed

[104] Statement of Claim, ¶ 206.
[105] **C-0034**, 821 Contact at Clause 15.

in a finiquito when Pemex would not initiate the administrative rescission process until July 2017.

93. Similarly, Finley, Drake-Mesa, and Drake-Finley never had an opportunity to cure the alleged breach of the notice provision under the 821 Contract. This is particularly notable because Pemex emailed a former employee in March 2017 about the PACMA issue. Pemex knew how to contact Finley, Drake-Mesa, and Drake-Finley.

94. Overarching the above is Pemex's good faith obligation under Clause 3 of the 821 Contract. In addition to its obligations under Mexican law, Pemex expressly agreed to engage in good faith and equity with respect to all obligations. Mexico does not explain Pemex's good faith obligation in light of any of the grounds for its administrative rescission. Moreover, Mexico does not explain how Pemex acted in good faith when it proceeded directly to an administrative rescission without first providing Finley, Drake-Mesa, and Drake-Finley an opportunity to cure the alleged breaches.

95. Finally, it is important to compare Pemex's treatment of Finley, Drake-Mesa, and Drake-Finley with that of the Mexican companies under the 809 Contract. As noted above, those Mexican companies were in the same position under the 809 Contract. Pemex stopped issuing work orders and had not requested the minimum amount of US$ 24 million.

96. Pemex entered into a finiquito with the Mexican companies for the 809 Contract. The Mexican companies reserved their rights to pursue their claims against Pemex, including for time that Pemex had not issued work orders. Within three years of their finiquito, Pemex entered into a settlement and paid the Mexican companies approximately US$ 15 million.

97. In stark contrast, Pemex did not seek to enter into a finiquito with Finley, Drake-Mesa, and Drake-Finley for the 821 Contract. Instead, Pemex litigated against them in the lawsuit they initiated in April 2016. Within months, in November 2016, Pemex suddenly issued Work Order 028-2016 to drill the Coapechaca 1240 Well. Pemex had not issued a work order in 11 months, repeatedly claiming that it had no funds to request work. Pemex also had not obtained the drilling permit from the CNH that was required for the Coapechaca 1240 Well.

98. Months later in March 2017, Pemex would notify Finley, Drake-Mesa, and Drake-Finley about the PACMA issue related to works in December 2014. In May 2017, Rodrigo Loustaunau would instruct the Pemex officials charged with the 821 Contract to find breaches to support

an administrative rescission that he could use in the pending litigation with Finley, Drake-Mesa, and Drake-Finley. In July 2017, Pemex would notify its intent to proceed with an administrative rescission. Pemex followed Mr. Loustaunau's instruction, claiming as many breaches that it could conjure, never having first given Finley, Drake-Mesa, and Drake-Finley an opportunity to cure. Since then, in spite of Claimants' investments in Mexico, Pemex has claimed against the entirety of the US$ 41.8 million Dorama bond, which is galling considering Pemex only requested and paid for US$ 48 million (11.4% of the US$ 418 million) provided in the 821 Contract.

99. The disparity is striking. Within three years, Pemex paid the Mexican companies for effectively the remaining minimum amount under the 809 Contract. Pemex used one bogus work order to administratively rescind the 821 Contract, paying nothing to Finley, Drake-Mesa, and Drake-Finley but instead making claims against the US$ 41.8 million Dorama bond. This is another textbook example of disregarding investment protections, including those under the NAFTA, and necessarily, the USMCA.

4. The domestic litigation

100. Mexico's factual assertions regarding Claimants' litigation against Pemex before domestic courts are designed more to inject irrelevant issues into this arbitration instead of assessing whether Claimants were denied justice and due process. To avoid Mexico arguing that Claimants have conceded to Mexico's assertions, Claimants respond accordingly below.

a) 803 Contract finiquito reservation-of-rights proceedings

101. There does not appear to be much dispute about the domestic proceedings with respect to MWS's and Bisell's reservations under the finiquito to the 803 Contract.

102. MWS and Bisell initiated litigation against Pemex on October 13, 2015.[106] On March 18, 2021, MWS and Bisell submitted a request to discontinue their domestic litigation.[107] Claimants did so as required under the USMCA. During the more than five-year span, there were various proceedings to determine the proper court (administrative or civil) to adjudicate MWS's and

[106] Statement of Claim, ¶ 125; Counter-Memorial, ¶ 205.
[107] Counter-Memorial, ¶ 231; **C-0125**, 803 Contract Case Dismissal (Mar. 18, 2021).

Bisell's claims.[108] Mexico does not dispute that when MWS and Bisell initiated this arbitration, their claims still had not been adjudicated on the merits before a Mexican court.

103. However, Mexico inserts a curious argument into its facts. Mexico notes that MWS and Bisell claimed damages in their initial lawsuit.[109] Thus, Mexico argues that MWS and Bisell had to have known (a) that Mexico breached its USMCA obligation in 2015 (before the USMCA came into effect) to provide justice and due process and (b) that they have incurred damage stemming from such a breach. This is nonsense.

104. As explained later, MWS and Bisell make a claim in this arbitration for denial of justice and due process under the USMCA. They did so because their litigation against Pemex had been pending without adjudication for more than five years. Mexico does not explain how MWS and Bisell were to know in 2015 when they initiated their lawsuit that the Mexican court would not render a judgment on the merits for more than five years. Likewise, Mexico does not explain how MWS and Bisell were to know in 2015 of their damages resulting from Mexico's breach of its USMCA obligations to provide justice and due process. They could only have known such once their lawsuit remained without adjudication for more than five years.

105. Similarly, Mexico asserts that MWS and Bisell are asking this Tribunal to sit in appeal of a jurisdictional decision that was made by one of the courts during the five-year procedural back-and-forth over the proper court (administrative or civil) to adjudicate their claim.[110] This is not true. MWS and Bisell are seeking a determination of whether Mexico (the court system and Pemex's conduct) denied them justice and due process by not adjudicating their claim for compensation under their reservation of rights for more than five years.

b) 804 Contract finiquito reservation-of-rights proceedings

106. There does not appear to be much dispute about the domestic proceedings with respect to MWS's and Bisell's reservations under the finiquito to the 804 Contract.

107. MWS and Bisell initiated litigation against Pemex on December 8, 2015.[111] However, Mexico appears confused on when MWS and Bisell submitted a request to discontinue their domestic litigation, specifically, the dismissal of what Mexico terms the "Annulment Proceeding

[108] Counter-Memorial, ¶¶ 205-234.
[109] Counter-Memorial, ¶ 207.
[110] Counter-Memorial. ¶¶ 209-211.
[111] Statement of Claim, ¶ 155; Counter-Memorial, ¶ 255.

2019."[112] MWS and Bisell asked that court to dismiss the action on March 18, 2021.[113] They submitted this dismissal so Claimants could pursue their claims against Mexico under the USMCA.

108. During the more than five-year span, there were various proceedings regarding procedural matters.[114] However, MWS's and Bisell's claims had still not been adjudicated when they were required to discontinue the domestic litigation. Mexico does not dispute that a Mexican court never adjudicated MWS's and Bisell's claims arising from the finiquito of the 804 Contract.

109. Instead, Mexico repeats the same argument in its facts as it did for the litigation related to the finiquito of the 803 Contract. Mexico notes that MWS and Bisell claimed damages in their initial lawsuit.[115] Thus, Mexico argues that MWS and Bisell had to have known (a) that Mexico breached its USMCA obligation in 2015 (before the USMCA came into effect) to provide justice and due process and (b) they had incurred damage stemming from such a breach. This is nonsense, and Claimants assert the same response as the 803 Contract above.[116]

110. Finally, Mexico's actions and justification highlight how poorly Pemex treated MWS and Bisell in comparison to the Mexican service companies and the resolution of the 809 Contract. Mexico justifies Pemex's actions, claiming Pemex "exercised its procedural rights and filed the legal remedies it had" to make various challenges. All MWS and Bisell wanted was an adjudication of their reserved rights under the finiquito, but Pemex made that impossible to do for more than five years. In contrast, Pemex paid the Mexican service companies for their reservation of rights under the finiquito to the 809 Contract, without the Mexican service companies having to fight unnecessarily with Pemex to resolve their claim.

5. 821 Contract litigation

111. There does not appear to be much dispute about the domestic proceedings with respect to Finley and Drake-Mesa's claims under the 821 Contract.

---

[112] Counter-Memorial, ¶ 281. This was an action filed before the Sixth Metropolitan Regional Chamber of the Federal Court of Administrative Justice with a file no. 5403/19-17-06-5.
[113] **C-0126**, 804 Contract Case Dismissal (Mar. 18, 2021). For the avoidance of doubt, on March 18, 2021, MWS and Bisell also asked the First Section of the Superior Chamber of the Federal Court of Administrative Justice to dismiss the action with a file no. 20356/17-17-12-2/1599/18-S1-04-04.
[114] Counter-Memorial, ¶¶ 255-282.
[115] Counter-Memorial, ¶ 258.
[116] *Supra* ¶ 90.

112. On April 29, 2016, Finley, Drake-Mesa, and Drake-Finley initiated litigation against Pemex.[117] As previously explained, this was a breach of contract claim because Pemex had stopped issuing work orders. It is also the lawsuit that prompted Pemex to suddenly issue Work Order 028-2016 in November 2016, despite claims that it had no budget to pay for the work, no drilling permit to drill the Coapechaca 1240 Well, and having not issued a work order since January 2016.

113. Again, Mexico inserts a curious argument into its facts. Mexico notes that Finley, Drake-Mesa, and Drake-Finley claimed damages in their April 2016 lawsuit.[118] Thus, Mexico argues that they had to have known in 2016 (a) that Mexico breached its NAFTA obligations in (b) that they have incurred damage stemming from such a breach. This is equally nonsensical.

114. For Mexico's argument to prove at all persuasive, Mexico would need to show that when Finley, Drake-Mesa, and Drake-Finley initiated their domestic lawsuit in April 2016 they knew:

- that Pemex would issue Work Order 028-2016 in November 2016;
- that Pemex would then use this work order to commence an administrative rescission of the 821 Contract in July 2017;
- that Pemex would obtain a court judgment in October 2018 that ignored contractual language and allowed Pemex to administratively rescind the 821 Contract with only one work order instead of 15 unfulfilled work orders as called for in the 821 Contract;
- that they would have to dismiss their challenge to this baseless judgment in order to pursue an ICSID arbitration under the NAFTA; and
- that once that challenge was dismissed, Pemex would subsequently pursue a claim against the US$ 41.8 million Dorama bond.

Put simply, Mexico cannot show that Finley, Drake-Mesa, and Drake-Finley knew in April 2016 of Mexico's breaches of its NAFTA obligations before such arose. Likewise, Mexico cannot show that they knew in April 2016 of damages resulting from breaches that had not yet occurred.

115. The April 2016 lawsuit resulted in appeals and amparos lasting into 2021.[119] It is worth noting that from April 2019, the action was mostly Pemex filing various appeals until it finally

[117] Statement of Claim, ¶ 191; Counter-Memorial, ¶ 112.
[118] Counter-Memorial, ¶ 207.
[119] Counter-Memorial, ¶¶ 112-145.

obtained an order in October 2021 to have Finley, Drake-Mesa, and Drake-Finley pay its legal costs.[120]

116. Mexico criticizes Finley, Drake-Mesa, and Drake-Finley for certain decisions taken during and subsequent to the April 2016 lawsuit.[121] Mexico does not explain why such is relevant to this arbitration. It is helpful to recall that during the course of this litigation, Pemex issued Work Order 028-2016 and then initiated the administrative rescission of the 821 Contract. Moreover, the administrative court issued its decision in October 2018, validating Pemex's rescission based on Work Order 028-2016 despite the 821 Contract requiring 15 unfilled ones. Once that occurred, the April 2016 lawsuit was effectively mooted.

117. Nevertheless, Pemex continued its pursuit against Finley, Drake-Mesa, and Drake-Finley in the April 2016 lawsuit. Pemex sought costs against them for initiating the lawsuit. In fact, Pemex appealed decisions until a court agreed to award costs against Finley, Drake-Mesa, and Drake-Finley in October 2021.[122] This was approximately seven months into this arbitration. It was also two months before Pemex would make a claim against the entirety of the US$ 41.8 million Dorama bond in December 2021.[123] Such behavior defines vindictiveness.

118. Meanwhile, in September 2017, Finley, Drake-Mesa, and Drake-Finley initiated an administrative action against Pemex regarding Pemex's administrative rescission of the 821 Contract. This resulted in an amparo proceeding against the October 2018 judgment of the administrative court and subsequent appeal of the amparo judgment.[124]

119. Mexico first argues that the claims asserted in the September 2017 administrative action in that proceeding "are virtually the same as those raised in this arbitration."[125] Not true. The administrative court did not examine Pemex designing a scheme to rescind the 821 Contract

[120] Counter-Memorial, ¶¶ 122-129. Relatedly, Mexico remarks about a conclusion from the Third Unitary Court regarding the minimum budget under the 821 Contract. Counter-Memorial, ¶ 125. Curiously, this court made a determination that is squarely at odds with the definition of "Minimum Amount of the Contract" under the 821 Contract. As noted above, this definition makes clear that paying this amount is mandatory: "comprised of the minimum budget that PEP shall execute to pay for the Works performed under the Contract." ("*constituido por el presupuesto mínimo que PEP ejercerá para el pago de los Trabajos ejecutados bajo el Contrato*.") It is unclear if the court in that case read the 821 Contract before making its erroneous determination.

[121] For example, Mexico notes that Finley and Drake-Mesa did not appeal a Second Appeal Judgement 898/2017 decision from the Third Unitary Court issued on April 2, 2019. Counter-Memorial, ¶ 129.

[122] Counter-Memorial, ¶ 144.

[123] **C-0108**, Letter from Dorama to Finley (Jan. 12, 2022).

[124] Counter-Memorial, ¶¶ 170 et seq.; ¶¶ 175 et seq.

[125] Counter-Memorial, ¶ 156.

with one fabricated work order. Moreover, the administrative action did not address — nor could it have — the resulting October 2018 judgment that validated Pemex's rescission of the US$ 418 million contract because of one unfulfilled US$ 1 million work order, particularly when the 821 Contract does not allow Pemex to so such unless and until Finley, Drake-Mesa, and Drake-Finley accumulate 15 of them.

120. Mexico's portrayal of the administrative court's October 2018 judgment makes a few things very clear. *First*, that court was focused on whether Pemex gave proper notice of Work Order 028-2016. It was not focused on the issue in this arbitration: whether Pemex fabricated the work order to administratively rescind the 821 Contract.

121. *Second*, the administrative court did not examine the facts giving rise to the PACMA issue. Apparently the court did not appreciate that Pemex waited over two years to notify Finley and Drake-Mesa of the issue, and after issuing Work Order 028-2016. The court also did not analyze how Pemex can rely on the PACMA issue to administratively rescind the 821 Contract when the contract expressly states that Pemex is to recover any outstanding PACMA amount through the finiquito. Finally, the court apparently did not appreciate that Pemex never gave Finley or Drake-Mesa an opportunity to cure.

122. *Third*, in this arbitration, Mexico does not want to defend Work Order 028-2016 and Pemex's administrative rescission in light of Clause 15(r) of the 821 Contract. Likewise, Mexico does not want to defend its court's failure to read and apply Clause 15(r) to recognize that Pemex could not administratively rescind the contract unless and until there are 15 unfulfilled work orders. There is no defense to the court ignoring the 15-unfulfilled-work-order threshold, particularly when Pemex had no funds to pay for Work Order 028-2016 or a permit to drill the Coapechaca 1240 Well.

123. Mexico also focuses on the amparo to the October 2018 judgment and subsequent appeal of such amparo.[126] Mexico claims that Finley, Drake-Mesa, and Drake-Finley previously asserted that Mexico breached the NAFTA before those courts. This is not true.

124. In the amparo action, Finley, Drake-Mesa, and Drake-Finley claimed that the October 2018 judgment violated their constitutional rights under Articles 1, 14, 16, and 17 of the Mexican Constitution, Articles 8, 10, and 17 of the *Declaración Universal de los Derechos Humanos*, and

[126] Counter-Memorial, ¶¶ 170 et seq.

Articles 8 and 25 of the *Convención Americana sobre Derechos Humanos*.[127] More specifically, they argued that the October 2018 judgment violated the provision of Article 1 of Mexico's Constitution regarding normative hierarchy.[128] Finley, Drake-Mesa, and Drake-Finley claimed that the 821 Contract was protected by NAFTA Article 1105, thus, the administrative court was required to interpret the 821 Contract in a matter most favorable to a U.S. investor. By failing to interpret Contract 821 favorably to them, the October 2018 judgment violated their rights under Article 1 of the Mexican Constitution.

125. Finley, Drake-Mesa, and Drake-Finley did not assert before the amparo court that Mexico breached any NAFTA obligation. Rather, their Mexican constitutional claims were merely tied to NAFTA protections. As Mexico notes, the Mexican amparo court summarily dismissed the human rights argument:[129]

> Consequently, the request made by the plaintiffs is invalid because articles 1101, 1104 and 1105 of the North American Free Trade Agreement do not establish human rights upon which the exercise of interpretation provided for in article 1st of the Magna Carta can be made.

As a result, the amparo court did not adjudicate any breach of the NAFTA.

126. Similarly, on appeal of the amparo court's decision, Finley, Drake-Mesa, and Drake-Finley did not assert any breach of the NAFTA (none had been made). Instead, they asked for review of the amparo court's decision that NAFTA Articles 1101, 1104, and 1105 do not provide human rights, as contemplated under Article 1 of the Mexican Constitution, which would afford favorable interpretation of Contract 821 under Mexico's normative hierarchy. It is misleading for Mexico to suggest that Claimants "basically[] argued before domestic courts that the recission of Contract 821 was in breach of the Minimum Standard of Treatment set forth in NAFTA Article 1105."[130]

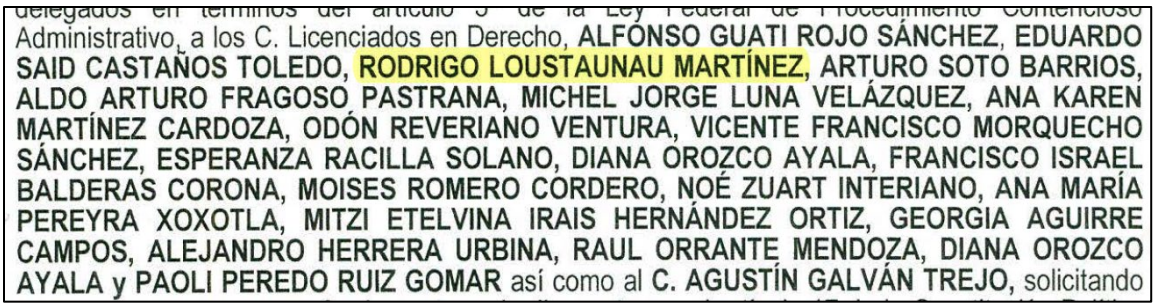
6. The September 26, 2018 meeting at La Aceituna

127. Claimants have described a meeting that took place in Mexico City shortly before the administrative court issued its October 2018 judgment.[131] Mexico does not dispute such a

[127] **R-0050**, Direct Amparo 74/2019 Judgment, p. 2.
[128] Under Article 1 of the Mexican Constitution, protections granted under international treaties on human-rights matters should be on the same level as those granted under the Mexican constitution.
[129] **R-0050**, Direct Amparo 74/2019 Judgment, p. 32.
[130] Counter-Memorial, ¶ 179.
[131] Statement of Claim, ¶ 217; Witness Statement of L. Kernion, ¶ 106.

meeting took place.[132] Instead, it relies on Pemex's in-house attorney Rodrigo Loustaunau, who testifies that he does not recall such meeting.[133] Mr. Loustaunau claims that "the issue was not a matter of my competence at that time."[134] Mexico and Mr. Loustaunau are not being forthright about this meeting.

128. As an initial matter, Rodrigo Loustaunau is unconvincing when he testifies that the 821 Contract dispute "was not a matter of my competence at the time." In fact, Mr. Loustaunau's name appears third in the list of Pemex's counsel on Pemex's initial answer to the 821 Contract's administrative proceeding:[135]


delegados en términos del artículo 5° de la Ley Federal de Procedimiento Contencioso Administrativo, a los C. Licenciados en Derecho, **ALFONSO GUATI ROJO SÁNCHEZ, EDUARDO SAID CASTAÑOS TOLEDO, RODRIGO LOUSTAUNAU MARTÍNEZ, ARTURO SOTO BARRIOS, ALDO ARTURO FRAGOSO PASTRANA, MICHEL JORGE LUNA VELÁZQUEZ, ANA KAREN MARTÍNEZ CARDOZA, ODÓN REVERIANO VENTURA, VICENTE FRANCISCO MORQUECHO SÁNCHEZ, ESPERANZA RACILLA SOLANO, DIANA OROZCO AYALA, FRANCISCO ISRAEL BALDERAS CORONA, MOISES ROMERO CORDERO, NOÉ ZUART INTERIANO, ANA MARÍA PEREYRA XOXOTLA, MITZI ETELVINA IRAIS HERNÁNDEZ ORTIZ, GEORGIA AGUIRRE CAMPOS, ALEJANDRO HERRERA URBINA, RAUL ORRANTE MENDOZA, DIANA OROZCO AYALA y PAOLI PEREDO RUIZ GOMAR** así como al **C. AGUSTÍN GALVÁN TREJO**, solicitando

Based on this alone, Mr. Loustaunau knows much more about the administrative rescission of the 821 Contract and the subsequent litigation than his current testimony suggests.

129. On May 8, 2017, Rodrigo Loustaunau authored a memo to the acting supervisor of Pemex's service contracts for drilling and production.[136] Presumably, this was Luis Gomez's manager, who was overseeing the 821 Contract. Mr. Loustaunau copied his manager, Alfonso Guati Rojo on this memo. This memo was more than a year before the September 26, 2018 meeting at La Aceituna.

130. In the May 8 memo, Rodrigo Loustaunau asked Pemex's acting supervisor to proceed with notifying Finley, Drake-Mesa, and Drake-Finley of the administrative rescission of the 821 Contract.[137] Mr. Loustaunau wanted the rescission to include as many breaches as possible

[132] Counter-Memorial, ¶ 165.
[133] Counter-Memorial, ¶ 165; Witness Statement of R. Loustaunau, ¶ 18.
[134] Witness Statement of R. Loustaunau, ¶ 18.
[135] **C-0127**, Pemex's Initial Answer to 821 Contract Administrative Proceeding. Note also that Alfonso Guati Rojo was listed as one of the attorneys involved in the lawsuit before the administrative court.
[136] **C-0103**, Internal Pemex Letter (May 8, 2017).
[137] **C-0103**, Internal Pemex Letter (May 8, 2017).

("*imputarle incumplimientos a la contratista*"), which he would use in the April 2016 lawsuit regarding Pemex's inaction. This was not Mr. Loustaunau's first communication on the matter.

131. Rodrigo Loustaunau's memo refers to an attached May 3, 2017 communication (PEP-DG-SSE-GSIAP-541-2017). Mexico did not comply with its disclosure obligations and disclose this document.[138] An inference should be drawn that Mr. Loustaunau was involved with the administrative rescission of the 821 Contract. Indeed, Mr. Loustaunau expresses urgency in his May 8 memo in having Pemex commence the administrative rescission.[139] Mr. Loustaunau apparently knew the contents of the administrative rescission beforehand. Otherwise, he would not be asking for it on a rushed basis to use against Finley and Drake-Mesa in their pending lawsuit.

132. Likewise, Rodrigo Loustaunau was copied on an internal Pemex communication dated May 16, 2018.[140] This memo was dated approximately four months before the meeting at La Aceituna. According to the May 2018 internal memo, Pemex met and decided to make a claim against the entirety of Claimants' US$ 41.8 million Dorama bond. At the time, the challenge to Pemex's administrative rescission was still before the administrative court, which would not issue a decision until October 2018. Pemex would not have decided to claim against the entirety of a US$ 41.8 million bond if it did not already know, or have good reason to believe, that the court would endorse its administrative rescission. Moreover, Mr. Loustaunau would not have been copied on a memo about making a claim against the entirety of the US$ 41.8 million Dorama bond if the 821 Contract was outside of his competence.

133. Mexico relies on testimony from Rodrigo Loustaunau to suggest that there was no meeting at La Aceituna on September 26, 2018 including himself, Rob Keoseyan, Luis Kernion, and Adolfo Hellmund. Notably, Mr. Loustaunau testifies, "In fact, I am not aware that Mr. Keoseyan ever worked at Pemex, nor do I recall him ever contacting me."[141] In light of Luis Kernion's recollection of the meeting, Mr. Loustaunau's statement prompted further investigation.

---

[138] Procedural Order No. 4, Annex 1, Request 11(A).
[139] **C-0103**, Internal Pemex Letter (May 8, 2017), ¶ 4 ("hence the urgency for you to send me the certified copy of the administrative rescission after its notification.")
[140] **C-0128**, Internal Pemex Memo (May 16, 2018).
[141] Witness Statement of R. Loustaunau, ¶ 18.

134. Claimants counsel organized a Microsoft Teams meeting with Rob Keoseyan on January 23, 2023.[142] The following is a summary of that meeting.

135. Mr. Keoseyan is a practicing lawyer in Mexico City and used to work in Pemex's legal department. According to Mr. Keoseyan, everyone in Pemex's legal department knows who Mr. Keoseyan is. Since he left Pemex, Mr. Keoseyan has maintained his relationship within Pemex's legal department and has represented Pemex as its outside counsel.

136. Rob Keoseyan first met Rodrigo Loustaunau in 2015 or 2016. Pemex had engaged Mr. Keoseyan to assist in the defense against claims from a U.S. company. Rodrigo Loustaunau was one of the Pemex lawyers on the case.

137. Thereafter, Rodrigo Loustaunau and Rob Keoseyan maintained a professional and personal relationship. They occasionally go to lunch and exchange Christmas presents. Mr. Keoseyan even met Mr. Loustaunau's wife at La Aceituna, the same restaurant where the September 2018 meeting took place. In fact, Mr. Keoseyan takes partial credit for Mr. Loustaunau's promotion within Pemex; he made a recommendation to the then-general counsel, Luz María Zara. Overall, Mr. Keoseyan considers Mr. Loustaunau a good friend.

138. Rob Keoseyan advised that he had discussed Claimants' litigation against Pemex with Rodrigo Loustaunau. According to Mr. Keoseyan, Mr. Loustaunau knew Claimants' case with Pemex.

139. Rob Keoseyan said that he approached Rodrigo Loustaunau because he was in Pemex's litigation department handling the dispute with Finley and Drake-Mesa. Mr. Keoseyan wanted to see if Mr. Loustaunau could help in settling the dispute. Mr. Loustaunau told Mr. Keoseyan that the technical area did not want to settle.

140. Rob Keoseyan recalled a meeting with Luis Kernion at La Aceituna in Mexico City. Mr. Keoseyan did not recall whether Mr. Loustaunau attended that meeting. However, if Mr. Loustaunau attended, it would have been because Mr. Keoseyan had invited him. At one point during the Teams meeting, Mr. Keoseyan suggested that Mr. Loustaunau could have stopped by the sports bar, but he could not remember.

141. Rob Keoseyan advised that if he communicated with Rodrigo Loustaunau about the September 2018 meeting, it would have been via WhatsApp messages. At one point during

[142] **C-0129**, Video Recording of Teams Meeting with R. Keoseyan (Jan. 23, 2023).

the Teams meeting, Mr. Keoseyan attempted to locate the relevant WhatsApp messages on his computer. He could see that the messages occurred, but he could not view them on his computer. Mr. Keoseyan said he would look for such messages on his phone after the call and advise if he found any. He agreed to share any WhatsApp messages that he was able to find. The Teams meeting ended at approximately 12:12 PM CST.

142. A few minutes after the Teams meeting, at 12:21 PM CST, Rob Keoseyan sent the following email to Claimants' counsel:[143]

> Andrew:
>
> I found some messagues [sic] from those days.
>
> Do you have time for a quick call. So I can explain.

143. Upon receiving this email, Claimants' counsel attempted to organize another Teams meeting. It was important to be able to record communications with Rob Keoseyan. Before he was able to organize the Teams call, at 12:27 PM CST, Mr. Keoseyan left the following voicemail on the mobile line of Claimants' counsel:

> Andrew, this is Roberto. I did find some messages where I requested, where Rodrigo confirmed to me [unclear: reservation] at La Aceituna during those days. I did find that. And we also found that we had a conversation with his boss, uh, with, uh, about a possible settlement, uh, with him, and with authorities at the court. There was a conversation to that effect. And, uh, his boss was the one who was the one negotiating that, Alfonso Guati. So if you can discuss that, tell me when. Bye.

144. In his voicemail, Rob Keoseyan mentioned Alfonso Guati. As noted above, at the time, Mr. Guati was Rodrigo Loustaunau's manager. Mr. Guati was copied to Mr. Loustaunau's May 8, 2017 internal memo instructing the notification of the administrative rescission of the 821 Contract. Mr. Guati was also involved in the subsequent litigation over the rescission of the 821 Contract. He was listed first among the Pemex attorneys in Pemex's answer to that administrative lawsuit. However, Mexico disclosed no documents to or from Mr. Guati in response to several different orders under Procedural Order No. 4. That is telling for a number of reasons.

[143] **C-0130**, Emails between R. Keoseyan and A. Melsheimer (Jan. 23, 2023).

145. After leaving his voicemail, Rob Keoseyan called the office number of Claimants' counsel. This was also at approximately 12:27 PM CST. Claimants' counsel answered.

146. During this call, Mr. Keoseyan advised that he found messages with Rodrigo Loustaunau about meeting at La Aceituna on September 26, 2018. Mr. Keoseyan mentioned some of the messages were about Rodrigo Loustaunau running late. Mr. Keoseyan also found messages around October 1, 2018 regarding a possible settlement of the 821 Contract domestic lawsuit. To avoid doubt, Claimants' counsel did not have these dates beforehand.

147. In addition, Rob Keoseyan advised that he went to visit the judge on behalf of Claimants after the September 26, 2018 meeting at La Aceituna. He was accompanied by Juan José Paullada. Mr. Paullada would become Claimants' appellate counsel on the matter but would later withdraw his representation because of his appointment to the Board of Pemex. Mr. Keoseyan shared this detail to explain why he was communicating with Rodrigo Loustaunau about a possible settlement on October 1, 2018. Mr. Keoseyan said that he must have visited with the administrative judge during the interim.

148. Rob Keoseyan's identification of September 26, 2018 as the meeting date caused Luis Kernion to review his correspondence to identify any corroborating evidence of a trip to Mexico for a meeting on that day. Mr. Kernion located his flight itinerary, leaving San Antonio, Texas to Mexico City on September 25, 2018 and returning home on September 27, 2018.[144] He also found his booking for a hotel room at the Grand Fiesta Americana Chapultepec for two nights (September 25 and 26).[145] Based on the dates of the reservations, Mr. Keoseyan appears to have arranged the meeting around September 21, 2018.

149. In the call with Claimants' counsel, Mr. Keoseyan changed his position about sharing his WhatsApp messages with Rodrigo Loustaunau. Mr. Keoseyan explained that he did not want to breach the personal trust he has with Mr. Loustaunau. So, he decided that would not share the messages.

150. After the Teams meeting, Rob Keoseyan called Luis Kernion around 7:00 PM CST. Mr. Kernion did not answer. Mr. Keoseyan sent the following three texts around 7:19 PM CST:[146]

[144] **C-0131**, L. Kernion flight itinerary.
[145] **C-0132**, L. Kernion hotel reservation.
[146] **C-0133**, Text messages from R. Keoseyan to L. Kernion (Jan. 23, 2023).

> Luis
>
> I urge you to tell your attorney not to ask me for information. I do not want to involve myself in this anymore.
>
> I do not want problems with anyone about this issue. Thank you.
>
> He is asking for information by email and I have told him twice already that I am not interested in participating.

151. Rob Keoseyan is referring to the emails that Claimants' counsel had exchanged with him.[147] At 5:17 PM CST, Claimants' counsel summarized the Teams meeting. He also reminded Mr. Keoseyan of his promise to share the WhatsApp exchanged he had located.

152. Rob Keoseyan responded at 6:30 PM CST. Hours earlier, he told Claimants' counsel about finding WhatsApp exchanges that he had with Rodrigo Loustaunau running late for the September 26, 2018 meeting at La Aceituna. By 6:30 PM, Mr. Keoseyan reverted back to his Teams meeting narrative about not recalling Mr. Loustaunau at the meeting. In addition, despite having told Claimants' counsel that he had found WhatsApp exchanges with Mr. Loustaunau about the settlement of Claimants' administrative lawsuit, he changed his story to deny such occurred.

153. After receiving the above texts, Luis Kernion called Rob Keoseyan at 7:36 PM CST.[148] The phone call lasted ten minutes. Mr. Keoseyan said that he had spoken with Rodrigo Loustaunau several times after the Teams meeting. Mr. Loustaunau was upset that Mr. Keoseyan had spoken with Claimants' counsel. Mr. Loustaunau wanted to "call off any conversations" with Claimants' counsel because of the arbitration.[149] Mr. Keoseyan did not want to be involved because he was concerned about jeopardizing his ongoing business relationship with Pemex.

154. Claimants sought the WhatsApp exchanges between Rob Keoseyan and Rodrigo Loustaunau between September 1, 2018 and October 15, 2018. Mr. Loustaunau claims that he could not find any exchanges with Mr. Keoseyan. In response, Mexico was ordered to ask Mr. Keoseyan to share the WhatsApp messages. To avoid doubt, Mr. Keoseyan identified these exchanges in his January 23, 2023 Teams meeting with Claimants' counsel, his subsequent email to

[147] **C-0130**, Emails between R. Keoseyan and A. Melsheimer (Jan. 23, 2023).
[148] Second Witness Statement of L. Kernion, ¶ 15; **C-0134**, L. Kernion call log from Jan. 23, 2023.
[149] **C-0130**, Emails between R. Keoseyan and A. Melsheimer (Jan. 23, 2023).

Claimants' counsel, his voicemail to Claimants' counsel, and his following telephone conversation with Claimants' counsel.

155. Rob Keoseyan's response to Mexico's request for these WhatsApp messages can only be described as bizarre. On March 22, 2023, Rob Keoseyan emailed Mexico:

> I HAVE NOT HAD ANY CONVERSATION, NEITHER ON THE DATES YOU INDICATE, NOR IN ANY OTHER, NEITHER PERSONALLY, NOR VIA ANY ELECTRONIC SYSTEM, INCLUDING WHATS APP, WITH MR. RODRIGO LOSTANAU; RELATED TO THE COMPANIES YOU INDICATE IN THE NAFTA- USMCA FINLEY V. MEXICO ARBITRATION.

156. Rob Keoseyan now claims that he has never spoken to Rodrigo Loustaunau about Claimants. Mr. Keoseyan said the exact opposite during the Teams meeting that occurred on January 23, 2023.[150] Claimants believe that Mr. Keoseyan was telling the truth in that Teams meeting and would welcome the opportunity for Mr. Keoseyan to testify at the hearing about why his story changed.

157. Finally, Luis Kernion testifies that he was given the impression from the September 26, 2018 meeting that someone from Pemex had met with the administrative judge and knew how the court would rule on Finley's and Drake-Mesa's challenge to Pemex's administrative rescission.[151] Critically, Mexico does not deny that someone from Pemex (or on behalf of Pemex) met with the administrative judge overseeing the lawsuit. Likewise, Rodrigo Loustaunau does not deny that someone from Pemex (or on behalf of Pemex) met with the judge before the court issued its October 2018 judgment. Instead, both state that it is routine practice for Pemex to meet with judges to present its cases.[152] Thus, it can be inferred that someone from Pemex met with the administrative judge before the court rendered its October 4, 2018 judgment.

158. In this regard, Rodrigo Loustaunau also testifies, "I consider it totally false that Pemex had information regarding the sense of the judgment of the nullity proceeding of Contract 821 . . . ."[153] Here, Mr. Loustaunau testifies that he has personal knowledge of the 821 Contract dispute. However, when arguing about not being at the September 2018 meeting regarding

[150] **C-0129**, Video Recording of Teams Meeting with R. Keoseyan (Jan. 23, 2023).
[151] Witness Statement of L Kernion, ¶¶ 106-107.
[152] Counter-Memorial, ¶ 166; Witness Statement of R. Loustaunau, ¶¶ 20-22.
[153] Witness Statement of R. Loustaunau, ¶ 22.

the pending administrative action over the 821 Contract, Mr. Loustaunau testifies that "the issue was not a matter of my competence at that time."[154] Mr. Loustaunau cannot have it both ways.

159. As noted above, Rob Keoseyan left a voicemail with Claimants' counsel on January 23, 2023. In it, Mr. Keoseyan mentioned that he has WhatsApp exchanges about Rodrigo Loustaunau's manager, Alfonso Guati Rojo, negotiating with the administrative court "about a possible settlement." Claimants do not know who Pemex appointed to "end" the administrative lawsuit so Pemex could call on the US$ 41.8 million Dorama bond.[155] Mr. Loustaunau's defensiveness about not being the "special representative" corroborates Rob Keoseyan's disclosure that Mr. Guati is likely who Pemex charged with the task.[156] Claimants do not know the current whereabouts of Mr. Guati but would welcome the opportunity to hear from him at the hearing.

7. Mexico's Witnesses

160. Claimants have identified several Pemex officials who have relevant knowledge that is material to the outcome of this arbitration. For example, Luis Gomez is the Pemex employee who signed Work Order 028-2016 and told Luis Kernion that Pemex had issued the work order so it could administratively rescind the 821 Contract.[157] As noted above, Luis Gomez is also the person who suddenly began collecting the PACMA information in March 2017 shortly before Pemex used it to support its administrative rescission. He also signed Pemex's unilateral finiquito in November 2021. Mexico does not provide testimony from this fact witness.

161. Likewise, Mexico does not provide testimony from Rodrigo Hernandez. He was a senior Pemex official over the 821 Contract (Subdirector of Services at Pemex Exploration and Production). When Luis Kernion confronted him about the administrative rescission, he told Luis Kernion that Pemex had sent Work Order 028-2016 so it could cancel the contract.[158] Mr. Hernandez explained that the work order provided Pemex with a "legitimate reason" to terminate the contract to avoid paying Finley and Drake-Mesa. He provided further insight about Pemex wanting to pursue the US$ 41.8 million Dorama bond.

[154] Witness Statement of R. Loustaunau, ¶ 18.
[155] Witness Statement of L. Kernion, ¶ 106.
[156] Witness Statement of R. Loustaunau, ¶ 19.
[157] Witness Statement of L. Kernion, ¶ 97.
[158] Witness Statement of L. Kernion, ¶ 104.

162. Instead, Mexico has chosen to limit itself to one witness statement from its in-house attorney, Rodrigo Loustaunau. Even then, Mr. Loustaunau claims that he does not have direct knowledge of many of the events in dispute in this arbitration. Moreover, Mr. Loustaunau does not testify about facts that are relevant to the outcome of this arbitration. Instead, he makes summary statements and provides opinion testimony. Nevertheless, Claimants offer their additional observations about Mr. Loustaunau's testimony further below.

163. Mexico's other witness is Jorge Asali Harfuch. As an initial observation, it is unclear what expertise Mr. Asali has in administrative law. This raises questions about his ability to hold himself out as an expert on the matter.

164. Moreover, Jorge Asali testifies about his interpretation of the clauses of the 803 Contract, the 804 Contract, and the 821 Contract. This invades the purview of the Tribunal, who are fully capable of interpreting and applying these contracts.

165. Likewise, it is unclear why Jorge Asali testifies about the 809 Contract. Mr. Asali was not employed by Pemex when the 809 Contract was signed, when work was conducted under the contract, or when Pemex finally entered into the formal document that terminated the contract. An actual employee from Pemex would provide the best testimony about the 809 Contract. Moreover, Ms. Asali does not appear to have any experience with respect to contracts such as the 809 Contract. Instead, Mr. Asali provides his personal view about select documents that Mexico shared with him. Again, this invades the purview of the Tribunal.

166. Finally, Mr. Asali also testifies about "economic consequences" of the termination of each contract (although none have been terminated), a topic that has been bifurcated for another day. Nevertheless, Claimants offer their observations about Mr. Asali's report below.

a) Witness Statement of Rodrigo Loustaunau

167. Rodrigo Loustaunau provides his opinion about whether Pemex was in breach of the 821 Contract.[159] It is unclear why Mr. Loustaunau is making arguments about Pemex's performance, particularly considering he testifies that the 821 Contract was not a matter within

[159] Witness Statement of R. Loustaunau, ¶ 9.

his competence at the time.[160] Regardless, Mr. Loustaunau is obfuscating when he states that Pemex had no obligation to issue any work order.[161]

168. As explained above, Mr. Loustaunau cannot dispute that the definition of "Minimum Amount under the Contract" under the 821 Contract required Pemex to expend the minimum budget. The minimum budget was US$ 168.91 million. Under Clause 2 (Object of the Contract), Pemex committed itself to perform under the contract, which was paying the "Minimum Amount under the Contract" and issuing work orders under Clause 44.

169. In fact, the only limitation was that Pemex could not exceed the "Maximum Amount of the Contract."[162] That was US$ 418.3 million.[163] This is why Claimants had to post a US$ 41.8 million performance bond. Claimants made this requisite investment to satisfy the US$ 418 million commitment included in the 821 Contract, anticipating that Pemex would request that amount of work.

170. The Acta Circunstanciada for the 809 Contract explains why Mr. Loustaunau's argument about Pemex's obligation to issue work orders is a red herring.[164] Mexico did not comply with its disclosure obligations and disclose the 809 Contract, thus, it should be inferred that it has the same terms and conditions as the 821 Contract.[165] The Acta Circunstanciada explains that Pemex had only requested US$ 8.432 million of the US$ 24 minimum amount under the 809 Contract. According to Mr. Loustaunau, Pemex has no obligation to issue work orders, thus, it should have paid nothing to the Mexican companies.

171. Instead, Pemex paid US$ 13.5 million to the Mexican companies for days that it did not request work. To arrive at this sum, Pemex used a rate of US$ 42,167/day. Whether Pemex had to issue work orders (which it did) was irrelevant to what Pemex owed (and paid) to the Mexican service companies under that contract. Notably, Pemex paid more than US$ 15 million to the Mexican companies, which when added to the US$ 8.4 million that Pemex paid under the 809 Contract, is very close to the US$ 24 minimum amount of the 809 Contract.

---

[160] Witness Statement of R. Loustaunau, ¶ 18.
[161] Witness Statement of R. Loustaunau, ¶ 9.
[162] **C-0034**, 821 Contract at Clause 44.
[163] **C-0034**, 821 Contract at Clause 5.
[164] **C-0062**, Acta Circunstanciada (Apr. 9, 2018), pp. 3-4 ¶¶ 7-8.
[165] Procedural Order No. 4, Annex 1, Request 15.

172. Rodrigo Loustaunau also defends Work Order 028-2016 for the Coapechaca 1240.[166] Mr. Loustaunau claims it "served as grounds for Pemex to 'justifiably' rescind the 821 Contract. Mr. Loustaunau provides no support that Pemex had the budgeted funds to pay for the work requested under Work Order 028-2016. Pemex had stopped issuing work orders some eleven months prior, in January 2016, claiming it did not have the funds to pay for the work.

173. Moreover, Rodrigo Loustaunau does not provide any support that Pemex had the drilling permit to drill the Coapechaca 1240 Well, which was requested under Work Order 028-2016.[167] Mr. Loustaunau cannot dispute that Pemex had to have such a permit before the well could be drilled.[168] There is no trace in the CNH's Annual Report for 2016 of Pemex seeking or obtaining permission to drill the Coapechaca 1240 Well in 2016.[169]

174. Relatedly, Claimants made a public records request to the CNH to provide a copy of any request made to the CNH to drill the Coapechaca 1240 Well.[170] The CNH responded that none exists. Claimants made the same request to Pemex, asking for all information about the Coapechaca 1240 Well, from its planning until its drilling. Pemex advised that such information is "confidential."[171]

175. In fact, Pemex did not seek permission to drill the Coapechaca 1240 Well until June 5, 2017.[172] Pemex advised that it would be drilling the well on June 19, 2018. Rodrigo Loustaunau cannot defend Pemex issuing Work Order 028-2016 to drill the Coapechaca 1240 Well for which Pemex did not have a permit to drill. Likewise, Mr. Loustaunau cannot explain how Pemex was "justified" in rescinding the 821 Contract because of Work Order 028-2016 when Pemex had no permit to drill the Coapechaca 1240 Well. The lack of candor from Mexico in this arbitration is notable.

176. Work Order No. 028-2016 is more involved than just the budget and drilling permit issues. As previously explained, drilling a well is a complex process that entails a technical advice and

---

[166] Witness Statement of R. Loustaunau, ¶ 10.
[167] Claimants previously explained how Pemex apparently did not have such a permit. Statement of Claim, ¶¶ 202-203.
[168] The CNH is the entity responsible for issuing such permits. The CNH issues an annual report that indicates the permits issued during that year. Its 2016 Annual Report explains that Article 36 of the Hydrocarbons Law requires the CNH to authorize the drilling of any well, and that on October 14, 2016, the CNH issued its regulations requiring a contractor to obtain a permit. **C-0135**, CNH Informe Annual 2016, pp. 78-84.
[169] **C-0135**, CNH Informe Annual 2016.
[170] **C-0136**, Pemex Response Coapechaca 1240 (June 6, 2022).
[171] **C-0137**, Pemex public records request (May 10, 2022).
[172] **C-0138**, Letter from Pemex to CNH (June 5, 2017); **C-0139**, Letter from Pemex to CNH (June 11, 2018).

feedback before settling on a plan program.[173] Mexico was ordered to produce several categories of documents with respect to Work Order 028-2016 leading up to its issuance.[174] For example, Mexico was ordered to disclose the studies conducted leading up to its issuance, the meeting notes leading up to its issuance, the budget to request the work, the rescheduling of the work from Weatherford to Claimants, and permits obtained to drill the Coapechaca 1240 Well.

177. Mexico advised that Pemex conducted an exhaustive search for responsive documents.[175] But, Mexico only disclosed 15 documents. This is a trivial amount for such a complicated operation, and it strains credibility to believe that this is the complete universe of relevant documents.

178. Claimants also made a public records request to Pemex to obtain information about Work Order 028-2016.[176] Claimants requested "all information related to Work Order 028-2016 made under Contract 421004821 . . . including all studies, communications, and decisions made to emit the work order, as well as the internal requests and communications (including emails), acts and any other order related to its execution." Pemex refused to comply, citing this arbitration as its excuse. Given his position within Pemex's legal department, Rodrigo Loustaunau undoubtedly played a role in Pemex's responses inside and outside this arbitration. Claimants and the Tribunal will be able to clarify these and other issues when Rodrigo Loustaunau testifies under oath at the hearing in December.

179. Mexico's secrecy behind Work Order 028-2016 is notable. Pemex used this work order to administratively rescind the 821 Contract. If Mexico were confident about this work order, it would have readily disclosed every detail about it. Yet Mexico refuses to be fully transparent.

180. Relatedly, Rodrigo Loustaunau also testifies that "PEP was in a position to issue work orders and the supplier was obligated to comply with them, therefore there was no justification for not complying with the service order 028-2016."[177] There are two implied facts in Mr. Loustaunau's statement. *First*, he assumes that the Coapechaca 1240 Well could actually be drilled. As explained above, the Coapechaca 1240 Well could not have been drilled without a permit.

---

[173] Statement of Claim, ¶ 105.
[174] Procedural Order No. 4, Annex 1, Request 9.
[175] **C-0140**, Letter from Mexico to Claimants accompanying document disclosures (Feb. 24, 2023), p. 4.
[176] **C-0141**, Letter from Pemex (March 7, 2022).
[177] Witness Statement of R. Loustaunau, ¶ 10.

181. *Second*, Rodrigo Loustaunau implies that Pemex had the funds to pay for Work Order 028-2016. Claimants attempted to obtain information about Pemex's funds to pay for such work. Mexico did not comply with three separate disclosure obligations to disclose Pemex's budget for the 821 Contracts.[178] An inference should be drawn that Pemex had obtained a budget for the maximum amount of the 821 Contract (US$ 418.3 million) but, by the time it issued Work Order 028-2016, it no longer had available funding.

182. Indeed, Mexico's Counter-Memorial supports such an inference. Mexico admits:

- "for certain periods of time PEP requested the suspension of work due to lack of budgetary resources to continue drilling and completing wells."[179]
- "Pemex and its subsidiaries began to face liquidity problems due to the international oil price crisis."[180]
- "PEP was forced to stop operations in Chicontepec as of 2015."[181]

Mexico explains that in 2015, Pemex's Board of Directors issued an *acuerdo* requiring a downward adjustment to its budget, modification of existing contracts to reduce costs, and early termination of contracts.[182] Pemex's Board instructed management to immediately begin implementing actions, including modifying projects and contracts to reduce costs, and to report back monthly on the advances made.[183] Mexico admits that the 821 Contract was subject to these measures. Thus, Pemex has documents reflecting what happened to the budget allocated to the 821 Contract, but Mexico did not disclose them.

183. Rodrigo Loustaunau further testifies about Pemex's other supposed reasons to administratively rescind the 821 Contract. Mr. Loustaunau cites "other causes such as the non-compliance with the works of the Community and Environment Program (called "PACMA"), as well as the fact that the contractors did not previously notify PEP of the change of their

[178] Procedural Order No. 2, Annex 1, Requests 3, 5 & 6. Under Request 3, Mexico was ordered to disclose the administrative file for the 821 Contract, which would contain documents related to Pemex's budget to continue requesting work under the contract. Mexico did not disclose these documents. Under Request 5, Mexico was ordered to disclose documents reflecting Pemex's original budget for the 821 Contract. Under Request 6, Mexico was ordered to disclose the financial ledgers showing the funds that Pemex received in advance so it could execute the 821 Contract, the ledgers showing the outflows from the budgeted amount for the 821 Contract, and any document related to changes in the original budget for the 821 Contract.
[179] Counter-Memorial, ¶ 101.
[180] Counter-Memorial, ¶ 104.
[181] Counter-Memorial, ¶ 68.
[182] Counter-Memorial, ¶ 70.
[183] **R-0032**, Resolution of the Board of Directors (Feb. 13, 2015).

domicile, in accordance with the provisions of Contract 821."[184] Here too, Mr. Loustaunau is arguing and not reciting the relevant facts, as required by a fact witness.

184. Rodrigo Loustaunau does not explain that Pemex emailed Claimants regarding the PACMA works on March 24, 2017.[185] He does not explain that these notices relate to works assigned in December 2014, yet Pemex was notifying Finley, Drake-Mesa, and Drake-Finley of the issue more than two years later. Mr. Loustaunau also does not explain why these notices refer to Pemex recovering these amounts in the finiquito — meaning they were not an independent basis to rescind the 821 Contract — when there was no finiquito in sight. In fact, if the PACMA issue was a sufficient basis to administratively rescind the contract, Mr. Loustaunau does not explain why Pemex did not do so in 2015 or even 2016 before it issued Work Order 028-2016 that November. Mr. Loustaunau must admit that it is odd that Pemex waited until March 2017 to raise the issue only to rely upon it in its July 2017 administrative rescission.

185. Rodrigo Loustaunau does not focus on what each PACMA notice actually provides. Each concludes, "It is worth noting that if the contribution under request [] is not recognized, and based on part VI.2 of Annex PACMA, the difference will be recovered in the finiquito of the contract." Although it is unclear why the notice was already referencing a finiquito in March 2017, if Finley, Drake-Mesa, and Drake-Finley owed any amounts regarding the PACMA, Pemex would recover such amounts in the finiquito of Contract 821. Had Mr. Loustaunau focused on the language, he would have to admit that Pemex had no legitimate basis to rescind the 821 Contract because of the PACMA issue.

186. Rodrigo Loustaunau's argument about the notice provision under the 821 Contract is equally unconvincing. Apparently, the basis for this allegation was the delivery of Work Order 028-2016. Mr. Loustaunau cannot credibly argue that failing to update an address for notices is a sufficient, independent basis to administratively rescind a US$ 418 million contract. Tellingly, nearly four months later, Pemex was able to deliver the PACMA notices to one of Drake-Finley's former employees.

187. Indeed, Rodrigo Loustaunau knows that neither of these gives a "justifiable" reason for an administrative rescission. As previously noted, Mr. Loustaunau prepared a May 8, 2017

[184] Witness Statement of R. Loustaunau, ¶ 10.
[185] **C-0124**, Email from Pemex to Finley and Drake-Mesa (March 24, 2017). The amount of the PACMA funding is based on a percentage of the amount of the contract.

internal memo, following up on a still-unseen May 3 memo, regarding the forthcoming administrative rescission of the 821 Contract in July 2017.[186] Mr. Loustaunau's memo explains that he wanted Pemex to find breaches to include in the administrative rescission so he could portray Claimants as negatively as possible in their domestic litigation with Pemex.

188. In fact, Rodrigo Loustaunau's May 8, 2017 memo reads as if Pemex was not convinced that Work Order 028-2016 alone was sufficient to administratively rescind the 821 Contract. Clause 15(r) expressly prevents that. Mexico failed to comply with its disclosure obligations to disclose all communications and documents behind its decision to administratively rescind the contract.[187] At a minimum, Pemex should have disclosed document PEP-DG-SSE-GSIAP-541-2017 of May 3, 2017, which is referenced in Rodrigo Loustaunau's May 2017 memo. Apparently this May 3 internal document requested Pemex "to proceed with the notification of the beginning of administrative rescission of contract number 421004821." The necessary inference (and logical one based on the facts) from Mexico's failure to disclose these documents is that Pemex looked for additional reasons to support an administrative rescission because it knew of the problems associated with Work Order 028-2016, both factually and legally under the contract.

189. Finally, Luis Kernion testifies that Luis Gomez of Pemex told him that the legal department had been involved in the preparation of Work Order 028-2016.[188] Mexico has not refuted that fact. Indeed, Rodrigo Loustaunau's testimony gives an air of pride about what transpired. Mr. Loustaunau's involvement in the administrative rescission of the 821 Contract appears to have been more extensive than he has been willing to admit.

b) Report of Jorge Asali

190. As an initial matter, Claimants' experts have reviewed Jorge Asali's report. In summary, his report does not cause Rodrigo Zamora or Daniel Amézquita to change their opinions about the Mexican judicial system's failure to provide justice and due process with respect to the litigation related to the 803 Contract, the 804 Contract, and the 821 Contract.[189] For example, they continue to believe that the claims arising from the reservation of rights under the

[186] **C-0103**, Internal Pemex Letter (May 8, 2017); **C-0104**, Letter from Pemex to Finley and Drake-Mesa (July 31, 2017).
[187] Procedural Order No. 4, Annex 1, Request 11(A).
[188] Witness Statement of L. Kernion, ¶ 98.
[189] Second Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 6.

finiquitos for the 803 Contract and the 804 Contract remained unadjudicated for an excessive period of time.[190] They also continue to believe that administrative court adjudicating the challenge to Pemex's administrative rescission of the 821 Contract committed violated Claimants' rights by failing to consider Clause 15.1(r) of the 821 Contract, which protected against Pemex initiating such a rescission unless and until 15 unfulfilled work orders had been accumulated.[191] Further detail of Mr. Zamora's and Mr. Amézquita's response to Mr. Asali's report is contained in their Second Expert Report.

191. Jorge Asali explains that his report examines the "termination" of the 803 Contract, the 804 Contract, and the 821 Contract and the domestic legal actions related to those contracts.[192] There are several observations about Mr. Asali's report.

192. Jorge Asali argues that "Contract 803 terminated at the end of its natural term."[193] Mr. Asali similarly claims that the 804 Contract terminated "naturally" and "at the end of its natural term."[194] Likewise, Mr. Asali appears to argue that the 821 Contract somehow terminated because of Pemex's administrative rescission.[195]

193. Jorge Asali is not correct. As explained above, MWS and Bisell reserved their rights in the finiquitos to the 803 Contract and the 804 Contract. Pemex claims that it is owed amounts under its unilateral finiquito to the 821 Contract. As a result, all rights have not been extinguished under the contracts. Thus, all three contracts remain in effect to this day.

194. Jorge Asali should understand this. Although Mexico did not comply with its disclosure obligation and disclose the 809 Contract, Mr. Asali reviewed it and documents related to its "termination."[196] The execution term under the 809 Contract ended on December 31, 2013.[197] Nearly two years later, Pemex and the Mexican service companies entered into a finiquito on

[190] Second Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶¶ 6, 57.
[191] Second Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶¶ 6, 40-42.
[192] Report of J. Asali, ¶ 8.
[193] Report of J. Asali, ¶ 35.
[194] Report of J. Asali, ¶¶ 47, 61.
[195] Report of J. Asali, ¶¶ 61 et seq.
[196] Report of J. Asali, ¶¶ 191 et seq.; **JAH-0063**, Acta de Finiquito, 809 Contract (Aug. 21, 2015); **JAH-0064**, Acta de Reanudación, 809 Contract (Dec. 10, 2013); **JAH-0066**, Acta de Extinción, 809 Contact (June 25, 2018). Claimants assume that Jorge Asali also reviewed the Acta Circunstanciada for the 809 Contract that Claimants submitted into evidence. **C-0062**, Acta Circunstanciada (Apr. 9, 2018).
[197] **JAH-0063**, Acta de Finiquito, 809 Contract (Aug. 21, 2015), § I.1 ("*Plazo con convenios*").

August 21, 2015.[198] The Mexican service companies reserved their rights because Pemex had not expended the US$ 24 million minimum budget required under the contract.[199]

195. Nearly three years later, on April 9, 2018, Pemex and the Mexican service companies entered into the Acta Circunstanciada. Apparently this was a settlement regarding the Mexican service companies' reservation of rights. In the Acta Circunstanciada, Pemex agreed to pay US$ 42,167 for each day that Pemex did not request work for a total of US$ 13.5 million.[200] After Pemex paid, Pemex and the Mexican service companies executed the Acta de Extinción on June 25, 2018.[201] This Acta concludes,[202]

> Both Parties acknowledge that no amounts are owed nor are there any outstanding debts or claims of any kind, whether administrative, labor, civil, criminal, commercial and/or tax, and thus, the obligations generated by the contract are deemed extinguished, granting the most amply settlement that the law provides with respect to contract no. 424043809.

The 809 Contract did not terminate until the parties signed this Act.

196. Moreover, Pemex's unilateral finiquito for the 821 Contract acknowledges the contract remains valid to this day.[203] Using Mexico's translation, the finiquito clearly states,[204]

> especially since the Contract is in force, since the last paragraph of clause 18 of the Contract, establishes that the validity of the Contract will end until the Settlement is formalized or, in the event balances result from this in favor of any of the Parties, up to the date on which the corresponding amounts are paid.

Thus, Jorge Asali is incorrect to suggest that the 821 Contract terminated. It did not.

197. Jorge Asali also argues about MWS's and Bisell's reservation of rights under the finiquito for the 803 Contract.[205] He interprets the reservation not to include the "unexercised amount" of the contract, or the approximately US$ 23 million of work that Pemex failed to request under

[198] **JAH-0063**, Acta de Finiquito, 809 Contract (Aug. 21, 2015).
[199] **JAH-0063**, Acta de Finiquito, 809 Contract (Aug. 21, 2015).
[200] **C-0062**, Acta Circunstanciada (Apr. 9, 2018).
[201] **JAH-0066**, Acta de Extinción, 809 Contact (June 25, 2018).
[202] **JAH-0066**, Acta de Extinción, 809 Contact (June 25, 2018).
[203] **R-0043**, Finiquito for the 821 Contract (Dec. 2021).
[204] **R-0043-ENG**, Finiquito for the 821 Contract (Dec. 2021).
[205] Report of J. Asali, ¶ 37.

the contract.[206] To the extent their reservation is relevant for this phase of the arbitration, Mr. Asali is incorrect.

198. MWS's and Bisell's reservation refers to a letter Bisell-MWS-004-2015. They sent this letter on February 2, 2015, approximately a week before the finiquito.[207] This letter is clear what they were reserving: "our rights, for the recognition, authorization, and payment of unrecoverable costs because of the many suspensions, standby rates, as well as costs of services (mobilization, etc.) and cost of capital." This letter references a prior communication (Bisell-MWS-021-2104, dated December 19, 2014), which explained in detail what Claimants were owed at that time.[208]

199. Ultimately, MWS and Bisell tried to have a Mexican court adjudicate their claim for approximately US$ 23 million. After more than five years, however, the domestic court did not adjudicate their claim. As a result, Claimants had to seek to discontinue that effort and initiate this arbitration.

200. Jorge Asali also provides his interpretation of several provisions of the 804 Contract. Relevant here, he argues that "the parties did not agree on a total amount for the works to be performed by MWS and Bisell."[209] This is not correct.

201. As explained above, the definition of "Minimum Amount of the Contract" under the 804 Contract is clear that Pemex was obligated to expend the minimum budget. As such, Pemex was required to spend at least US$ 22 million.

202. However, this was a minimum expenditure. Jorge Asali avoids MWS's and Bisell's requirement to provide a performance guarantee, which was based on the US$ 55 million maximum budget amount.[210] Mr. Asali must concede that this requirement evidences the parties' expectations that Pemex would request US$ 55 million of work from MWS and Bisell.

203. Likewise, Jorge Asali argues about Pemex's financial obligation under the 821 Contract.[211] As explained above, the definition of "Minimum Amount of the Contract" is clear that Pemex was obligated to expend the minimum budget of US$ 168.9 million. Mr. Asali avoids

[206] In making this argument, Mr. Asali concedes that Pemex agreed to pay Claimants a total of US$ 48 million under the contract.
[207] **C-0142**, Letter from Claimants to Pemex (Feb. 2, 2015).
[208] **C-0143**, Letter from Claimants to Pemex (Nov. 12, 2014).
[209] Report of J. Asali, ¶ 42.
[210] **C-0033**, 804 Contract at Clause 10.1.
[211] Report of J. Asali, ¶¶ 53 et seq.

addressing the requirement for Finley, Drake-Mesa, and Drake-Finley to provide a performance guarantee based on the US$ 418.3 million maximum budget amount.[212] This requirement evidences the parties' expectations that Pemex would request that amount of work under the contract and Claimants' obligation to make the requisite investment to meet such expectation.

204. Jorge Asali correctly notes that Clause 3 of the 821 Contract requires Pemex engage in good faith and equity:[213]

> In the fulfillment of their obligations under the Contract, PEP and the CONTRACTOR will act in accordance with the provisions of the LPM, the RLPM, the DAC and other applicable Federal Mexican Legal Provisions, as well as based on the principles of good faith and equity. The provisions of the Contract as well as any statement made by PEP or the CONTRACTOR in relation to it, shall be interpreted in accordance with the provisions of the LPM, the RLPM, the DAC and other applicable Mexican Legal Provisions of a federal nature.
>
> Good faith and fairness in this context includes, without limitation, the duty to cooperate, not to intentionally mislead and to perform the Contract for the mutual benefit of PEP and the CONTRACTOR, agreeing that each has the right to achieve its reasonable objectives, and requires PEP and the CONTRACTOR:
>
> I. Sharing relevant information with the other party, subject only to confidentiality obligations;
>
> II. Cooperate and consult each other in the manner necessary to achieve the completion of all the Work;
>
> III. Warn of potential consequences, including those of costs of proposed actions;
>
> IV. Avoid unnecessary interference in the activity of the other party; and
>
> V. Answer the questions of the other party in a timely manner, which, if possible, will not prevent the progress of the Work.

205. Jorge Asali provides no analysis or opinion about Pemex's conduct under the 821 Contract in light of its good faith obligation required under Clause 3 and in general under Mexican law.[214] Specifically, Mr. Asali does not opine if Pemex complied with its duty to cooperate, its duty

[212] **C-0033**, 804 Contract at Clause 10.1.
[213] Report of J. Asali, ¶ 57; **C-0034**, 821 Contract at Clause 3.
[214] Report of J. Asali, ¶¶ 45, 57.

not to intentionally mislead, and its duty to perform the 821 Contract for the mutual benefit of both Pemex and Finley/Drake-Mesa/Drake-Finley. This is telling.

206. Jorge Asali must know that Pemex did not act in good faith when it issued Work Order 028-2016 to drill the Coapechaca 1240 Well. Mexico admits that Pemex claimed that it did not have the funds to pay for such work. Pemex also did not have a drilling permit from the CNH required to drill the well. Mr. Asali cannot now allege that Pemex was acting in good faith in issuing Work Order 028-2016 then using it as a basis to initiate an administrative rescission of the 821 Contract.

207. Similarly, Jorge Asali argues about Pemex's other grounds for administratively rescinding the 821 Contract (PACMA and change of address), claiming each was a sufficient basis to rescind the US$ 418 million contract.[215] Mr. Asali avoids addressing Pemex's good faith obligation and the ability for Finley, Drake-Mesa, and Drake-Finley to cure any cause for rescission.

208. As noted above, on March 24, 2017, Pemex emailed notices about the PACMA issue to one of Claimants' former employees. The PACMA issue related to work assigned in December 2014. Pemex's internal memos noted the PACMA issue was to be resolved either through deductions to payments in upcoming invoices or in the finiquito.[216] Instead, Pemex claimed the PACMA issue was a "breach" to support its administrative rescission. That is not acting in good faith.

209. Moreover, Jorge Asali ignores Clause 15.1 of the 821 Contract, which provides an opportunity to cure.[217] Pemex did not give Finley, Drake-Mesa, or Drake-Finley an opportunity to cure any of the alleged "breaches", including the PACMA issue. Instead, Pemex used the PACMA issue, dating back to work assigned in 2014 to administratively rescind the contract in 2017. This is not good faith.

210. Likewise, Jorge Asali avoids opining about Pemex's good faith and cure obligations regarding the final basis that Pemex used to administratively rescind the 821 Contract: the notice provision. As an initial matter, it is not credible to argue that a US$ 418 million contract should be rescinded because a party does not update its address for notice purposes. It is also not good faith to raise such an argument, particularly when Pemex notified Finley, Drake-Mesa,

[215] Report of J. Asali, ¶¶ 61-62.
[216] **C-0122**, Pemex Internal PACMA Memos.
[217] **C-0034**, 821 Contract at Clause 15.1.

and Drake-Finley about the PACMA issue through an email to a former employee. Nor is it good faith to pursue such a claim without giving the party an opportunity to cure the alleged "breach." Worse, this alleged breach apparently stemmed from Pemex's claim that it was not able to deliver Work Order 028-2016.

211. Finally, Jorge Asali argues that Pemex had the right to administratively rescind the 821 Contract for "*any* of the situations provided for in clause 15.1 of Contract 821."[218] Mr. Asali continues, "In fact, all the grounds invoked by PEP are expressly based on clause 15.1 of Contract 821."[219] Notably, Mr. Asali avoids explaining Clause 15.1(r).

212. As previously explained, Clause 15.1(r) prevents Pemex from administratively rescinding the contract unless and until there are 15 unfulfilled work orders. It would be difficult for Mr. Asali to reconcile the administrative decision of the 821 Contract because of Work Order 028-2016 with the protection afforded under Clause 15.1(r). Thus, similar to the administrative court's October 2018 judgment, Mr. Asali avoids addressing Clause 15.1(r) altogether. That is telling.

III. ARGUMENT

213. Mexico bifurcates its arguments into two sections. *First*, Mexico raises a myriad of objections that it labels as "jurisdictional." *Second*, Mexico provides its response to the merits of Claimants' claims under the NAFTA and USMCA. As explained below, Mexico's objections should be rejected, and its merits arguments are meritless.

A. MEXICO'S OBJECTIONS

214. Most of Mexico's objections repeat the same argument that it made to ICSID on April 6, 2021.[220] Mexico tried to persuade ICSID not to register this arbitration with most of the same frivolous arguments it now characterizes as objections. To no avail.

215. Moreover, ICSID Rule 41(1) required Mexico to make its objections "as early as possible." Section 14.1 of Procedural Order No. 1 afforded Mexico the ability to timely raise its objections. It did not.

[218] Report of J. Asali, ¶ 59.
[219] Report of J. Asali, ¶ 62.
[220] **C-0145**, Letter to ICSID from Mexico (Apr. 6, 2021).

216. Regardless, there are a few general observations about Mexico's objections. *First*, by labelling its objections as "jurisdictional," Mexico interjects murkiness between matters of jurisdiction (the Tribunal's ability or power to hear a claim) and admissibility (the characteristics of a particular claim). Mexico cannot simply call its objections "jurisdictional" to make them so. It is Mexico's burden to explain why each is a jurisdictional objection (as opposed to one of admissibility). But Mexico failed to do this. For this reason alone, Mexico's objections should be rejected.[221]

217. *Second*, for several objections, Mexico does not explain what relief it requests as a result. For example, Mexico argues that the Tribunal lacks jurisdiction to hear claims under the NAFTA and the USMCA as part of the same arbitration.[222] For this objection, Mexico does not state what relief should apply if this "jurisdictional" objection were successful. For this reason alone, Mexico's objections that do not plainly state what relief it seeks for its objection should be rejected.[223]

218. *Third*, many of Mexico's objections highlight an important issue for this Tribunal to resolve: the transition from the NAFTA into its predecessor, the USMCA. In this arbitration, Mexico's acts towards Claimants and other relevant facts occurred when the NAFTA was in effect and continued once the USMCA came into force. In addition, claims arose under both the NAFTA and the USMCA. Complicating this, a footnote in the USMCA encourages investors to bring claims under the USMCA that otherwise could have been brought under the NAFTA.

219. Further compounding matters, neither the United States nor Mexico has issued any public guidance about how an investor should navigate the transition between the NAFTA and the USMCA. This is particularly true for an arbitration like this one, when there are acts occurring and claims arising under both treaties. As best Claimants were able to decipher the treaties, nothing changed from the NAFTA to the USMCA for a U.S. investor with investments in Mexico's oil and gas sector.

220. Consequently, Claimants asserted claims under the NAFTA and the USMCA based on logic. MWS's and Bisell's lawsuits over the finiquitos to the 803 Contract and 804 Contract still had

[221] Claimants reserve their rights if Mexico later justifies its objections as jurisdictional as opposed to being those of admissibility.
[222] Counter-Memorial, ¶¶ 308 et seq.
[223] Claimants reserve their rights if Mexico supplements its objections.

not been adjudicated in March 2021 when Claimants decided to pursue investment arbitration against Mexico. Because the USMCA was in force, Claimants asserted claims under that treaty.

221. Likewise, the Mexican administrative court endorsed Pemex's wrongful administrative rescission of the 821 Contract in October 2018. Because the NAFTA was in force at the time, Claimants asserted claims under that treaty (via the USMCA's legacy claim annex).

222. Admittedly, Mexico could argue that Claimants' claims related to their disparate treatment compared to Mexican nationals with respect to the 821 Contract arose under the USMCA. They did not learn of that treatment until September 2020.[224] However, for consistency, Claimants made the claim under the NAFTA, even though asserting it under the USMCA would render the same outcome. There is no material difference between the protections afforded under the two successive treaties.

223. Mexico's actions toward Finley, Drake-Mesa, and Drake-Finley continued into this arbitration. After this arbitration commenced, Pemex starting pursuing the US$ 41.8 million Dorama bond tied to the 821 Contract. Arguably, the USMCA would apply for these acts, although again, the outcome would be no different than the NAFTA. There is no appreciable difference between the protections under the two successive treaties.

224. Claimants should not be prejudiced because the acts relevant to this arbitration and the resulting claims against Mexico span two treaties. It is particularly telling that Mexico avoids explaining how a U.S. investor is supposed to navigate the two treaties when the acts began under the former and continued into the latter. To the extent Mexico claims that Claimants should have brought claims under the NAFTA instead of the USMCA, or vice versa, Claimants reserve their rights.

1. Consolidation Argument

225. Mexico argues that an investor cannot bring a single arbitration to address claims arising under both the NAFTA and the USMCA.[225] Mexico objects to having one arbitration for claims involving the same parties and the same/similar operative facts simply because the claims span the two successive treaties. Mexico's argument is nonsense.

[224] Second Witness Statement of L. Kernion, ¶ 17.
[225] Counter-Memorial, ¶¶ 301 et seq.

226. Mexico's argument is based on a false premise: that the NAFTA and the USMCA are different treaties with respect to the investment protections that Mexico affords U.S. investors in the oil and gas sector. They are not. The USMCA carries forward the same protections that the NAFTA afforded to U.S. investors in the oil and gas sector without interruption.[226]

227. In support, Mexico cites NAFTA Article 1126 and USMCA Article 14.D.12.[227] Mexico argues the text of these consolidation provisions allow the consolidation of only NAFTA claims in a single arbitration and USMCA claims in another arbitration. This argument is misplaced.

228. NAFTA Article 1126 and USMCA Article 14.D.12 address claims that different United States investors assert against Mexico in different arbitrations that present common questions of law or fact and arise out of the same events or circumstances. Under those circumstances, a tribunal might consolidate the various claims into one arbitration. However, these provisions do not apply when the same U.S. investors have claims based on the same/similar operative facts arising under both the NAFTA and its successor the USMCA.

229. Mexico knows this. In 2004, Mexico invoked NAFTA Article 1126 to consolidate two NAFTA arbitrations initiated by different United States investors.[228] Mexico argued that it risked inconsistent awards, even though the claimants in the separate proceedings were competitors and did not want to be forced to share commercially sensitive information. NAFTA Article 1126 (and similarly USMCA Article 14.D.12) simply has no bearing on the facts presented here: Claimants have asserted claims against Mexico based on relevant facts occurring when the NAFTA was in effect and continuing through when the USMCA superseded it.

---

[226] In The Protocol Replacing The North American Free Trade Agreement with the Agreement Between The United States of America, The United Mexican States, and Canada, Mexico recognized that the USMCA is the result of Mexico's undertaking to amend the NAFTA. Indeed, Mexico expressly admitted that the USMCA was superseding the NAFTA, meaning the latter treaty was continuing the former, as amended. *See* https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/USMCA_Protocol.pdf, preamble ("Having undertaken the negotiations to amend the NAFTA pursuant to Article 2202 of the NAFTA that resulted in the Agreement between the United States of America, the United Mexican States, and Canada (the 'USMCA')"); para 1 ("Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA.").

[227] Counter-Memorial, ¶¶ 303-305.

[228] **CL-0090**, Corn Products International, Inc. v. The United Mexican States, ICSID Case No. ARB(AF)/04/1 and Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB(AF)/04/5, Order of the Consolidation Tribunal (May 20, 2005).

230. Notably, USMCA Annex 14-C explains how a U.S. investor is to make a NAFTA claim against Mexico. This annex allows United States investors to bring "legacy investment claims" — NAFTA claims — against Mexico up to three years after the NAFTA's sunset. In fact, Paragraph 1 of Annex 14-C makes clear that a U.S. investor brings its NAFTA claim by virtue of USMCA Annex 14-C:[229]

> Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under . . . .

In fact, Mexico concedes that Claimants can only bring their NAFTA claims via USMCA Annex 14-C.[230]

231. Mexico also argues that USMCA Article 14.2(4) somehow relates to consolidation of claims. It does not.

232. USMCA Article 14.2(4) explains the three options for a United States investor to bring a claim against Mexico:

> For greater certainty, an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

233. *First*, a U.S. investor can bring any "legacy investment claim" that it has against Mexico via USMCA Annex 14-C. These are related investment claims made under the NAFTA that were in existence when the USMCA came into force on July 1, 2020.[231] This option allows the U.S. investor to use the USMCA to bring any NAFTA claims it might have against Mexico.

234. *Second*, a U.S. investor that is a party to a "covered government contract" can bring its USMCA claim under USMCA Annex 14-E. A "covered government contract" is a written agreement between a national authority of Mexico and a U.S. investor, on which the investor relies in establishing or acquiring a "covered investment" other than the written agreement itself, that

---

[229] Emphasis added.

[230] Counter-Memorial, ¶ 308 ("The Claimants have brought their claims regarding Contract 821 under the NAFTA, as incorporated into the USMCA through Annex 14-C.")

[231] Paragraph 6(a) of Appendix 14-C of the USMCA defines "legacy investment" as "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement." The USMCA entered into force on July 1, 2020.

grants rights to the U.S. investor in a "covered sector."[232] Activities in Mexico's oil and gas sector are among the covered sectors.[233] For these claims, a U.S. investor can proceed directly to arbitration against Mexico.

235. *Finally*, and not applicable here, a U.S. investor that is not a party to a "covered government contract" might have a claim against Mexico. That claim falls under USMCA Annex 14-D. In that case, the U.S. investor must first initiate domestic litigation and cannot initiate arbitration against Mexico until 30 months pass without receiving a final decision.[234]

236. At bottom, USMCA Article 14.2(4) has nothing to do with consolidation of claims. It simply explains the different ways a U.S. investor can bring an investment claim against Mexico depending on when the claim arose or the type of claim.

237. As noted above, Mexico does not provide a coherent argument about the relief it seeks for its objection about consolidating NAFTA claims with those under its successor, the USMCA. Mexico simply demands that the Tribunal find that it lacks jurisdiction. It is telling that Mexico does not recommend the natural consequence of its argument: splitting apart this arbitration.

238. There is no prohibition against consolidating NAFTA claims brought under USMCA Annex 14-C and USMCA claims. It is also cost-effective and efficient to resolve all claims between the Claimants and Mexico in one proceeding, particularly when they involve the same operative facts. As such, this objection should be rejected.

2. Mexico's Objections Regarding the 821 Contract

239. Mexico makes eight objections related to the 821 Contract. As explained below, each of these objections should be rejected.

[232] Article 14.1 of the USMCA defines "covered investment" as "with respect to a Party, an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter." The USMCA entered into force on July 1, 2020.
[233] *See* USMCA at Annex 14-E ¶ 6(b)(i)("covered sector" means: (1) activities with respect to oil and natural gas that a national authority of an Annex Party controls, such as exploration, extraction, refining, transportation, distribution, or sale . . . .")
[234] *See* USMCA at Annex 14-D; Article 14.D.5.

a) Finley and Drake-Mesa Did Not Assert NAFTA Claims Before a Mexican Court

240. Mexico claims that Finley and Drake-Mesa asserted NAFTA claims against Mexico before a domestic Mexican court.[235] Specifically, Mexico claims that in the "Direct Amparo 74.2019," Finley, Drake-Mesa, and Drake-Finley asserted the same breaches of the NAFTA as in this arbitration.[236] This is not true.

241. For context, an amparo action is "a proceeding in which the constitutionality of any act of authority may be challenged."[237] Direct Amparo 74.2019 challenged the constitutionality of the October 2018 administrative court judgment that affirmed Pemex's administrative rescission of the 821 Contract.[238] The claim was that this judgment violated the constitutional rights under Articles 1, 14, 16, and 17 of the Mexican Constitution, Articles 8, 10, and 17 of the *Declaración Universal de los Derechos Humanos*, and Articles 8 and 25 of the *Convención Americana sobre Derechos Humanos*.[239]

242. One argument was that the October 2018 judgment violates the provision regarding normative hierarchy under Article 1 of Mexico's Constitution. Under Article 1, protections granted under international treaties on human rights matters are to be treated on the same level as those granted under the Mexican Constitution.

243. Finley, Drake-Mesa, and Drake-Finley claimed that the 821 Contract was protected by NAFTA Article 1105. Because the NAFTA is an international treaty, they contended that the administrative court was required to interpret the 821 Contract in a matter most favorable to a U.S. investor. They argued that administrative court failed to interpret Contract 821 favorably, thus, the October 2018 judgment violated their rights under Article 1 of the Mexican Constitution.

---

[235] Counter-Memorial, ¶¶ 311 et seq.
[236] Counter-Memorial, ¶¶ 315-316.
[237] Counter-Memorial, ¶ 79 (quoting Report of J. Asali, ¶ 77).
[238] **R-0050**, Direct Amparo 74/2019 Judgment, p. 2. Claimant Finley Resources, Inc. and Drake-Mesa S. de R.L. de C.V. were the other parties that initiated Direct Amparo 74.2019. With respect to Claimant Finley, as noted above, NAFTA Annex 1120.1(a) precludes a United States investor from prosecuting a NAFTA claim before a Mexican court and in an investment arbitration at the same time, hence, the requirement under NAFTA Article 1121 for a United States investor to provide a waiver to continue any litigation before a Mexican court when it initiates an investment arbitration. Mexico does not mention Drake-Mesa. Because Drake-Mesa is a Mexican enterprise owned/controlled by a United States investor, it is on equal footing as Drake-Finley with respect to NAFTA claims.
[239] **R-0050**, Direct Amparo 74/2019 Judgment, p. 2.

244. The amparo court summarily dismissed the argument because it found that no human rights were involved.[240] The amparo court stated, "Consequently, the request made by the plaintiffs is invalid because articles 1101, 1104 and 1105 of the North American Free Trade Agreement do not establish human rights upon which the exercise of interpretation provided for in article 1st of the Magna Carta can be made."[241]

245. Important here, Finley, Drake-Mesa, and Drake-Finley did not assert a breach of the NAFTA before the amparo court that is asserted in this arbitration. Moreover, they did not assert any breach of the NAFTA at all. The amparo court did not adjudicate any breach of the NAFTA because none were asserted. Put simply, asking an amparo court to determine whether the administrative court's actions violated constitutional rights by not favorably interpreting the 821 Contract because of its NAFTA protection is not making a claim for breach of a NAFTA obligation.

246. Mexico makes the same argument about the appeal of the amparo court's decision ("Appeal for Review 1685/2020").[242] Once again, Finley, Drake-Mesa, and Drake-Finley did not assert that Mexico breached its NAFTA obligations. In this appeal, they simply asked for a review of the amparo court's decision that the administrative court did not violate their constitutional rights under Article 1 of the Mexican Constitution.

247. Thus, it is misleading to imply that Finley, Drake-Mesa, and Drake-Finley asserted breaches of NAFTA obligations before a Mexican court. They did not. This objection should be rejected.

b) Drake-Finley's Waiver Under NAFTA Article 1121

248. Mexico objects because Claimants did not submit a consent and waiver on behalf of Drake-Finley with the Request for Arbitration. As noted above, Mexico did not promptly raise this objection, nor did Mexico seek to raise it as a preliminary matter as contemplated under Procedural Order No. 1. Regardless, other tribunals have allowed a missing consent and waiver to be cured, and the same result should apply here.

[240] Counter-Memorial, ¶ 316.
[241] **R-0050**, Direct Amparo 74/2019 Judgment, p. 32.
[242] Counter-Memorial, ¶ 317.

249. Finley and Drake-Mesa won the bid for the 821 Contract. For the resulting contract, Finley and Drake-Mesa formed a special purpose entity called Drake-Finley to act as Contractor. In Exhibit 7 to the Request for Arbitration, Claimants submitted consents and waivers from Finley and Drake-Mesa. However, a consent and waiver was not submitted on behalf of Drake-Finley. Claimants submit such consent and waiver now as Exhibit C-0146.

250. Three years ago, Mexico made the same argument before the tribunal in *B-Mex, LLC and others v. The United Mexican States.*[243] After examining the issue, that tribunal concluded such a defect could be cured.[244]

251. Moreover, two other awards, not mentioned by Mexico, are the closest comparators to the facts in this case: *Pope & Talbot Inc. v. the Government of Canada* and *International Thunderbird Gaming Corporation v. The United Mexican States*.

252. In *Pope & Talbot*, the claimant brought a claim against Canada on behalf of its Canadian investment enterprise.[245] Canada argued that the investor failed to comply with NAFTA Article 1121 because it did not submit a waiver from the Canadian investment enterprise.[246] The claimant later submitted such a waiver, specifically referencing NAFTA Article 1121(1)(b).[247] Canada challenged the waiver.[248] Canada argued that it was time-barred and that accepting the waiver would prejudice Canada's interests.

253. The tribunal disagreed and found no reason to make executing the investor's waiver as a precondition for a valid claim for arbitration.[249] It found that nothing in NAFTA Article 1121 prevented a waiver from having retroactive effect to validate a claim commenced

---

[243] **CL-0091**, *B-Mex, LLC and others v. The United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award (July 19, 2019).
[244] **CL-0091**, *B-Mex, LLC and others v. The United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award (July 19, 2019), ¶ 60 (citing *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 (Jan. 26, 2006), ¶ 117 ("The Tribunal considers indeed that the requirement to include the waivers in the submission of the claim is purely formal, and that a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings.")).
[245] **CL-0097**, *Pope & Talbot Inv. v. The Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada (Feb. 24, 2000), ¶ 1.
[246] **CL-0097**, *Pope & Talbot Inv. v. The Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada (Feb. 24, 2000), ¶ 2.
[247] **CL-0097**, *Pope & Talbot Inv. v. The Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada (Feb. 24, 2000), ¶ 5.
[248] **CL-0097**, *Pope & Talbot Inv. v. The Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada (Feb. 24, 2000), ¶ 6.
[249] **CL-0097**, *Pope & Talbot Inv. v. The Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada (Feb. 24, 2000), ¶ 16.

beforehand.[250] The tribunal found that Article 1121's requirement of submitting a waiver along with the submission of a claim does not mean that such requirement is a necessary prerequisite before a claim can be competently made. Rather, it is a requirement that must be met before a tribunal can entertain the claim. Because the investor submitted the waiver, the tribunal found that it could entertain the claim.

254. Additionally, the tribunal found that Canada was not prejudiced by the delayed submission of the waiver.[251] The Canadian investment enterprise had not attempted to initiate any proceeding in relation to the measures being adjudicated in the NAFTA arbitration.

255. The tribunal in *Pope* relied, in part, upon a determination by the tribunal in *Ethyl Corp. v. Canada*. The tribunal in *Ethyl* examined NAFTA Article 1121 and determined,[252]

> The Tribunal has little trouble deciding that Claimant's unexpected delay in complying with Article 1121 is not of significance for jurisdiction in this case. While Article 1121's title characterizes its requirements as "Conditions Precedent," it does not say to what they are precedent. Canada's contention that they are a precondition to jurisdiction, as opposed to a prerequisite to admissibility, is not borne out by the text of Article 1121 . . . .

The tribunal in *Pope* further commented in a footnote:[253]

> It must be remembered in considering the positions taken by the State Parties, that if their arguments prevailed, it would still be open to the Investor to institute a new claim to be handled by a new tribunal. It is *difficult* co (sic) see how the aims of Article 1115 would be furthered by resort to this duplication of effort.

256. Likewise, in *International Thunderbird Gaming Corporation v. The United Mexican States*, Mexico complained that the U.S. investor did not submit waivers on behalf of its Mexican investment enterprises when it presented its Notice of Arbitration.[254] Mexico argued that the investor did not comply with NAFTA Article 1121, thus, those claims should be discarded.

---

[250] **CL-0097**, *Pope & Talbot Inv. v. The Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada (Feb. 24, 2000), ¶ 18.
[251] **CL-0097**, *Pope & Talbot Inv. v. The Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada (Feb. 24, 2000), ¶ 18.
[252] **CL-0098**, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award Concerning the Motion by Government of Canada Respecting the Claim Based Upon Imposition of the "Super Fee" (Aug. 7, 2000), ¶ 26 n. 3; **CL-0099**, *Ethyl Corp. v. Canada*, Award on Jurisdiction (June 24, 1998), ¶ 91.
[253] **CL-0098**, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award Concerning the Motion by Government of Canada Respecting the Claim Based Upon Imposition of the "Super Fee" (Aug. 7, 2000), ¶ 26 n. 4.
[254] **CL-0017**, International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award (Jan. 26, 2006), ¶ 112.

257. In that arbitration, the U.S. investor inadvertently omitted these waivers from its earlier filings.[255] Relying on decisions from prior NAFTA tribunals, the investor argued that a delayed submission of the waiver was a minor procedural defect, particularly when none of the Mexican investment enterprises had commenced actions in breach of the waiver.

258. The tribunal noted that the issue was one of "(un-)timeliness of the filings in question." The tribunal rejected Mexico's argument, finding that to disregard the waivers would amount to "an over-formalistic reading of Article 1121 of the NAFTA."[256] The tribunal reasoned,[257]

> the requirement to include the waivers in the submission of the claim is purely formal, and that a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings. The Tribunal joins the view of other NAFTA Tribunals that have found that Chapter Eleven provisions should not be construed in an excessively technical manner

259. The tribunal explained that due consideration of the rationale and purpose of NAFTA Article 1221 has to be taken into account.[258] The consent and waiver provisions were designed to prevent conflicting outcomes or double recovery for the same conduct or manner. Because the Mexican investment enterprises did not initiate or continue any remedies in Mexico while taking part in the NAFTA arbitration, the claimant effectively complied with Article 1121 by submitting waivers during the arbitration.

260. Relatedly, Mexico relies upon *KBR v. Mexico* to claim that its consent is required to accept Drake-Finley's delayed consent and waiver. [259] This is not correct.

261. In *KBR*, the claimant had obtained a favorable ICC award against Pemex and refused to waive their right to continue enforcement of the favorable ICC award. The tribunal in *KBR* found that the waiver requirement was intended to prevent exactly the situation before it: concurrent proceedings with respect to the same measures.[260]

---

[255] **CL-0017**, International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award (Jan. 26, 2006), ¶ 116.
[256] **CL-0017**, International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award (Jan. 26, 2006), ¶ 117.
[257] **CL-0017**, International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award (Jan. 26, 2006), ¶ 117.
[258] **CL-0017**, International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award (Jan. 26, 2006), ¶ 18.
[259] Counter-Memorial, ¶ 324.
[260] **RL-0021**, *KBR, Inc. v. The United Mexican States*, UNCITRAL Case No. UNCT/14/1, Award (Apr. 30, 2015), ¶ 141.

262. Notably, the *KBR* tribunal's decision was founded in the CAFTA decision in *Railroad Development Corporation v. Republic of Guatemala.*[261] There, the tribunal examined the adequacy of the claimant's waiver that it submitted on behalf of its Guatemalan investment enterprise.[262] Despite this waiver, the Guatemalan investment enterprise continued to pursue claims in domestic arbitration that overlapped with those being pursuing in the CAFTA arbitration.[263] In light of the ongoing arbitration, the tribunal also noted that it was for Guatemala, not the tribunal, to waive a deficiency or to allow a defective waiver to be remedied.[264]

263. Importantly, the tribunal in *Railroad Development* provided its reasoning in a footnote.[265] The tribunal noted that a prior NAFTA tribunal in *International Thunderbird Gaming Corporation v. The United Mexican States* had held that an untimely waiver was "merely a formal defect." In contrast, the claimant in *Railroad Development Corporation* "has maintained the domestic arbitrations over the Respondent's objection, and there is no question of a merely formal defect at the outset of the international arbitral procedure."[266]

264. In sum, prior tribunals have repeatedly rejected Mexico's argument. Tribunals have allowed a U.S. investor to cure initial non-compliance of a consent and waiver without requiring Mexico's consent to do so. This is particularly true when, as the case here, there is no prejudice because Drake-Finley has not commenced or continued any domestic legal action concerning the same measures in dispute in this arbitration.

265. For the reasons above, Mexico's objection should be rejected. In addition, Drake-Finley's belated consent and waiver should be accepted.

c) Mexico's Objection Regarding Claimants Having Made an Investment

266. Mexico argues that Finley and Prize did not make investments with respect to the 821 Contract.[267] As best Claimants understand Mexico's argument, Mexico primarily contends that

---

[261] **RL-0021**, *KBR, Inc. v. The United Mexican States*, UNCITRAL Case No. UNCT/14/1, Award (Apr. 30, 2015), ¶ 148.
[262] **CL-0095**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. 07/23, Decision on Objection to Jurisdiction, ¶¶ 46 et seq.
[263] **CL-0095**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. 07/23, Decision on Objection to Jurisdiction, ¶¶ 51 et seq.
[264] **CL-0095**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. 07/23, Decision on Objection to Jurisdiction, ¶ 61.
[265] **CL-0095**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. 07/23, Decision on Objection to Jurisdiction, ¶ 61 n. 36.
[266] Counter-Memorial, ¶ 324, citing **RL-0021**, *KBR v. Mexico*, UNCITRAL Case No. UNCT/14/1, Award (Apr. 30, 2015), ¶¶ 146-148.
[267] Counter-Memorial, ¶¶ 326 et seq.

the 821 Contract does not qualify as an investment, the US$ 41.8 million Dorama bond does not qualify as an investment, and that Claimants did not actually purchase equipment and materials and real estate to perform the approximately US$ 48 million of work actually performed and the US$ 418 million of work that was expected to be performed under the contract. Mexico is incorrect on all counts.

267. There are two steps to qualify as an investment.[268] *First*, the thing must qualify as an "investment" under NAFTA Article 1139. *Second*, the thing must be consistent with the meaning of "investment" under ICSID Article 25.

268. NAFTA Article 1139 defines investment in "exceedingly broad terms. It covers almost every type of financial interest, direct or indirect, except certain claims to money."[269] Under ICSID Article 25(1), tribunals have applied the "*Salini*" test to determine if there is an investment.[270] This test examines the following elements: (1) a contribution, (2) a certain duration of performance of the contract, (3) participation in the risks of the transaction, and (4) contribution to the economic development of the host state.[271] As explained below, the 821 Contract and the Dorama bond satisfy both requirements.

269. Mexico argues that 821 Contract "was a contract to provide services."[272] As such, Mexico claims that the contract does not qualify as an investment under NAFTA Article 1139. This is not correct.

270. An investment under NAFTA Article 1139(h) includes,

> interests arising from the commitment of capital or other resources in the territory of a Party to the economic activity in such territory, such as:
>
> (i) contracts involving the presence of an investor's property in the territory of a Party, including turnkey or construction contracts, or concessions. . . .

271. As an initial matter, Mexico does not dispute that there was a commitment of capital under the 821 Contract. Mexico also does not dispute that reworking oil wells and drilling new oil

---

[268] Statement of Claim, ¶¶ 273-280.
[269] **CL-0050**, *Feldman v. The United Mexican States*, ARB(AF)/99/1, Final Award (Dec. 16, 2002), ¶ 96.
[270] ICSID Article 25(1) provides, in part, "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of **an investment**, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." (emphasis added).
[271] **CL-0021**, *Salini Costruttori S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 16, 2001), ¶ 52.
[272] Counter-Memorial, ¶ 332.

wells contributed to economic activity in Mexico. The overwhelming evidence shows that significant capital was contributed to Mexico in connection with the 821 Contract.[273]

272. Instead, Mexico argues that the 821 Contract "is not a turnkey or construction contract, or a concession."[274] Mexico cites to no authority or evidence on why this is the case. The 821 Contract clearly called for the "construction" of wells. Moreover, Mexico misreads NAFTA Article 1139(h). The plain text "such as under" means that these are examples of what can qualify as an interest arising from the commitment of capital or other resources.

273. Similarly, Mexico misreads the example that follows. The operative clause of Article 1139(h)(i) is "contracts involving the presence of an investor's property in the territory of a Party." It is then followed by examples turnkey or construction contracts and concessions. The word "including" makes this clear. These examples are not exhaustive either. At bottom, what matters is whether under the 821 Contract there was a commitment of capital or other resources in Mexico to Mexico's economic activity.

274. Relatedly, Mexico asserts, "Contract 821 was a contract to provides [sic] services."[275] Mexico appears to be arguing that the 821 Contract falls under the following exception to NAFTA 1139:[276]

> claims to money that arise solely from: (i) commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to an enterprise in the territory of another Party.

This is not correct either.

275. This exclusion is straightforward. A monetary claim by a U.S. investor who provides services from the U.S. to a Mexican company in Mexico is not an investment in Mexico. The U.S. investor did not commit any capital or other resources in Mexico.[277] But, a U.S. investor that commits capital or other resources in Mexico to conduct work for a Mexican company would be an investment.[278] The fact that a contract is to conduct work or may be referred to as a

---

[273] Claimants submit photos evidencing their investments in Mexico such as rigs and related equipment and real property. *See* **C-0156**, Investment Photos.
[274] Counter-Memorial, ¶ 252.
[275] Counter-Memorial, ¶ 332.
[276] NAFTA Article 1139; USMCA Article 14.1.
[277] **CL-0100**, *Canadian Cattlemen for Fair Trade v United States of America*, UNCITRAL, Award on Jurisdiction (Jan. 28, 2008), ¶ 144.
[278] **CL-0100**, *Canadian Cattlemen for Fair Trade v United States of America*, UNCITRAL, Award on Jurisdiction (Jan. 28, 2008), ¶ 144.

"service contract" has no bearing on whether the limited exception under NAFTA 1139 applies. In any event, the 821 Contract is not a "service contract," but instead, one for integrated works.[279]

276. Moreover, when confronted with similar language under other treaties, tribunals applied the *Salini* factors to reach the same result. Their analysis was not whether a contract involves services. Rather, the focus was on whether a contribution was made in the host state.

277. *Joy Mining v. Egypt* is a good example. That arbitration involved a sales contract to replace and provide new equipment at a phosphate mining site.[280] The investor provided bank guarantees connected to the performance of the equipment and achievement of certain levels of production.[281]

278. Disagreements arose about the technical aspects related to the commissioning and performance tests of the equipment.[282] However, the investor was paid in full for the equipment. The investor wanted its guarantees related, but the State refused because of the ongoing differences.[283]

279. The issue in *Joy Mining* was whether the guarantees qualified as an investment.[284] The tribunal applied the same elements of *Salini* test.[285] In finding that the guarantees were not investments, the tribunal compared the guarantees to *Salini*:[286]

> In [*Salini*] a major project for the construction of a highway was involved and this indeed ***required not only heavy capital investment*** but ***also services and other long-term commitments***. The risk, as noted by the tribunal in that case, was quite evident, as were the elements of duration, regularity of profit and contribution to development. This is not the case here.

---

[279] **C-0034**, 821 Contract at Clause 2.
[280] **RL-0023**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004), ¶ 16.
[281] **RL-0023**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004), ¶ 17.
[282] **RL-0023**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004), ¶ 19.
[283] **RL-0023**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004), ¶ 19.
[284] **RL-0023**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004), ¶ 42.
[285] **RL-0023**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004), ¶ 53.
[286] **RL-0023**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004), ¶ 62 (emphasis added).

280. Thus, the tribunal in *Joy Mining* viewed capital investment and providing services as important factors when qualifying an investment. A bank guarantee that acted as a product warranty, alone, was not enough.

281. Relatedly, Mexico cites *Joy Mining* to argue that a service contract does not qualify as an investment even if there has been a "capital commitment."[287] *Joy Mining* does not make such a determination. Moreover, Mexico omits the most important part of *Joy Mining*. The tribunal was clear that the State never effected a drawdown of the bank guarantees nor benefitted from them.[288] In short, an undrawn bank guarantee did not contribute to the host state.[289] Thus, the tribunal in *Joy Mining* determined that a bank guarantee securing a sales contract, without more such as commitment of capital or resources to the host state, would not be an investment under its analysis.

282. Indeed, the tribunal in *Salini* described a straightforward and common sense approach to analyzing the type of conduct surrounding a contract that would qualify it as an investment:[290]

> It is not disputed that [the claimants] used their know-how, that they provided the necessary equipment and qualified personnel for the accomplishment of the works, that they set up the production tool on the building site, that they obtained loans enabling them to finance the purchases necessary to carry out the works and to pay the salaries of the workforce, and finally that they agreed to the issuing of bank guarantees . . . .

283. This is exactly what Finley, Drake-Mesa, and Drake-Finley did with respect to the 821 Contract. The 821 Contract called for a significant, risky investment to be made for a long term commitment in Mexico. Finley, Drake-Mesa, and Drake-Finley met their obligations by offering their expertise, equipment, personnel, and financial resources. As explained below, the 821 Contract qualifies as an investment under the *Salini* test.

284. *First*, Finley and Drake-Mesa were able to obtain the 821 Contract because of their expertise in reworking wells and drilling new wells, including using horizontal drilling and fracking techniques.[291] Finley had "know-how," as the tribunal in *Salini* would say, and it committed

---

[287] Counter Memorial, ¶ 335.
[288] **RL-0023**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004), ¶ 61.
[289] **RL-0023**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004), ¶ 61.
[290] **CL-0021**, *Salini Costruttori S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 16, 2001), ¶ 53.
[291] Second Witness Statement of J. Finley, ¶ 4.

that knowledge to exploit hydrocarbons in Mexico. This alone constitutes a contribution to the economic development of the host state.

285. *Second*, starting in 2012, Claimants made investments that would later benefit the 821 Contract.[292] Claimants purchased real and personal property over time for work to be performed under a series of contracts with Pemex, beginning with the 803 Contract. Claimants expected a long-term relationship with Pemex, even beyond the 821 Contract.[293] It is axiomatic that a company would acquire and maintain real estate and equipment for use in multiple contracts with Pemex.[294]

286. *Third*, Claimants made investments in Mexico specifically for the 821 Contract. In fact, Claimants provided an exact list of the equipment that would be committed under the 821 Contract.[295] The 821 Contract was much larger in scale than the prior contracts and called for drilling new wells in the region using Claimants' expertise on fraccing.[296] To accomplish this task, Claimants sent more equipment to Mexico, including a 1000 horsepower rig, two 1000 horsepower drilling pumps, tanks, mixing units, shakers, generators, turntable, wellhead control, light towers, fuel tanks, drill pipe, numerous portable office trailers, and housing trailers to Mexico.[297] Claimants had to mobilize employees from the U.S. as well as hire and train local employees.[298] Clearly, Claimants were providing the "necessary equipment and qualified personnel for the accomplishment of the works…," as described in *Salini*.

287. *Fourth*, as in *Salini*, Finley, Drake-Mesa, and Drake-Finley "agreed to the issuing of . . . guarantees." They provided a financial guarantee for 10% of the US$ 418 million contract value, a/k/a the Dorama bond. This assured Pemex that they would invest at least US$ 41.8 million in reworking and drilling new wells.[299] The direct beneficiary of this was Mexico with increased oil production resulting from their work.

---

[292] Second Witness Statement of J. Finley, ¶ 5.
[293] Witness Statement of J. Finley, ¶ 4.
[294] If this were incorrect, then to qualify as an "investment," a company would have to purchase separate equipment for each specific project. That is both uneconomic and nonsensical.
[295] **C-0147**, DT-6, 821 Contract.
[296] Second Witness Statement of J. Finley, ¶ 8.
[297] Witness Statement of J. Finley, ¶ 45.
[298] Witness Statement of J. Finley, ¶ 45.
[299] This should not be confused with Pemex's commitment under the 821 Contract to request at least US$ 168.9 million with an expectation of requesting US$ 418.3 million.

288. *Fifth*, similar to *Salini*, the 821 Contract had a set duration of performance. Under Clause 4.1, the 821 Contract had a start date of March 1, 2014, and performance termination date of December 31, 2017.[300]

289. *Finally*, Claimants took on significant risk under the 821 Contract. Mexico provides the following definition of risk from *Romak v. Uzbekistan*:[301]

> An 'investment risk' entails a different kind of *alea*, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is 'risk' of this sort, the investor simply cannot predict the outcome of the transaction.

290. Claimants' investments in and through the 821 Contract fit this definition. Drake-Mesa, and Drake-Finley were unsure of a return on their investment, though they were hopeful.[302] They had agreed prices under the contract to charge for the work that Pemex might request, but they had no way of knowing the amount they would actually spend to perform such work. In fact, there was significant risk of unforeseen expenditures to support their operations if Pemex refused to issue work orders.[303] Indeed, Mexico acknowledges Claimants' risk was more than Pemex's non-performance under the 821 Contract:[304]

> Claimants always recognized the complexity and challenges of Chicontepec, and the consequences that the fall in oil prices would have on various projects, which in turn generated high costs for the extraction of hydrocarbons.

291. Based on the above, it is clear that the 821 Contract was an investment under NAFTA Article 1139 and under the *Salini* test. As such, Mexico's objection should be rejected.

292. Next, Mexico argues that the US$ 41.8 million Dorama bond does not qualify as an investment under ICSID Article 25.[305] Mexico does not argue that the bond is not an investment under NAFTA Article 1139. Regardless, the bond meets the *Salini* test and qualifies as an investment.

---

[300] *See* **C-0034**, 821 Contract at Clause 4.1 ("The CONTRACTOR undertakes to execute the Works object of this Contract in accordance with the Work Orders that PEP issues to it, within a period of execution of 1402 [days](one thousand four hundred and two calendar days), counted from March 1, 2014, and with a completion date of December 31, 2017.").
[301] **RL-0026**, *Romak S.A. v. The Republic of Uzebkistan*, Award (Nov. 26, 2009), ¶ 230; Counter-Memorial, ¶ 346.
[302] Second Witness Statement of J. Finley, ¶ 10.
[303] Statement of Claim, ¶ 234.
[304] Counter-Memorial, ¶ 65.
[305] Counter-Memorial, ¶¶ 340 et seq.

293. Prior tribunals have analyzed whether under ICSID Article 25 financial instruments such as the Dorama bond constitute an investment when integrated into a corresponding contract. The tribunal in *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* tribunal explained,[306]

> The same approach has been adopted by ICSID tribunals, in *Fedax v. Venezuela*, where promissory notes were considered as investments because they were issued by the Republic of Venezuela ***in connection with a contract for the provision of services***, in *CSOB v. Slovakia*, where a loan was considered as an investment, only ***because it was part of an overall economic operation of restructuring of CSOB and development of the bank***.

294. Tribunals have distinguished between a loan, bond, or guarantee standing alone with one that is interlinked with an economic venture consisting of an investment. For example, the tribunal in *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montengro* noted,[307]

> for purposes of the [ICSID] Convention, a loan itself is not an investment. To be considered an investment, it must contribute to an economic venture consisting of an investment.

295. The *MNSS* tribunal then stated that for an instrument like a loan, bond, or guarantee to be part of an indivisible, whole investment, it must (i) have an integral function in the investment required to implement it; and (ii) be provided in the transaction documentation forming the basis of the relevant investment.[308]

296. Here, the Dorama bond was an integral function to the implementation of the 821 Contract. In fact, the Dorama bond clearly provides its purpose:[309]

> **OBLIGATION:** COMPREHENSIVE WORK OF DRILLING AND COMPLETION OF INLAND WELLS IN THE NORTH AND SOUTHERN REGIONS OF PEMEX EXPLORATION AND PRODUCTION, PACKAGE 5.

297. Mexico cannot dispute that the Dorama bond was to ensure that Finley, Drake-Mesa, and Drake-Finley invested at least US$ 41.8 million in work for the exploitation of Mexico's hydrocarbons. The Dorama bond and the 821 Contract form an integrated whole because Mexico required Finley, Drake-Mesa, and Drake-Finley to provide the bond before the

---

[306] **RL-0027**, *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award (Apr. 9, 2015), ¶ 365 (emphasis added).
[307] **RL-0025**, *MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (May 4, 2016), ¶ 196.
[308] **RL-0025**, *MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (May 4, 2016), ¶¶ 200-202.
[309] **R-0005**, Dorama Bond.

investment could proceed. Thus, the Dorama bond was a key instrument to ensure the overall investment under the 821 Contract moved forward.

298. The close link is further evidenced by the fact that the 821 Contract obligated Finley, Drake-Mesa, and Drake-Finley to provide the Dorama bond. Clause 10 of the 821 Contract provides,[310]

> In order to guarantee the fulfillment of the obligations derived from this Contract, the CONTRACTOR delivered to PEP, in original, prior to the signing of the same, bond policy before, in favor and at the disposal of PEP, for the value equivalent to 10% (ten percent) of the maximum amount of the contract (Guarantee of Compliance), issued by a guarantor institution legally constituted in the Mexican Republic, in terms of the Federal Law on Bonding Institutions and in favor of PEP.

This makes clear that the Dorama bond is provided for in the "transaction documentation forming the basis of the relevant investment."

299. In fact, both the 821 Contract and the Dorama bond remain in effect today. As noted above, Pemex executed a unilateral finiquito of the 821 Contract claiming that it is owed the entirety of the US$ 41.8 Dorama bond.[311] Indeed, Mexico's calling on the Dorama bond during this arbitration — as an "exercise of a legal right it has and which arises from a contractual relationship" — recognizes that the Dorama bond arises from the 821 Contract.[312]

300. Accordingly, the Dorama bond and the 821 Contract should be viewed as a whole. The Dorama bond was a part of the fulfillment of obligations under the 821 Contract, which itself was an investment in Mexico. As a result, because the 821 Contract meets the *Salini* test, so does the Dorama bond. As such, Mexico's objection that the Dorama bond is not an investment should be rejected.

301. Next, Mexico argues about the ownership of the real and personal property that Claimants purchased and leased with respect to the 821 Contract.[313] Mexico does not dispute the

---

[310] **C-0034**, 821 Contract at Clause 10.
[311] Counter-Memorial, ¶ 184.
[312] Counter-Memorial, ¶ 188.
[313] Mexico makes a similar argument regarding the 803 and 804 Contracts. Mexico does not allege that the 803 and 804 Contracts are merely service contracts, like the 821 Contract, but contend that "no detail is provided on what, if anything, [Claimants] may have purchased and by whom" to support these contracts. This statement clearly ignores the detailed description of the investments made by Claimants in the Statement of Claim. *See* Statement of Claim, ¶¶ 259-264. Moreover, the 803 Contract and the 804 Contract are similar to the 821 Contract in that they are to provide "works." *See* **C-0032**, 803 Contract at Clause 1; **C-0033**, 804 Contract at Clause 2.

measures that Claimants took to contribute such assets.[314] Mexico does not dispute how these assets fit squarely within the definition of investment under NAFTA Article 1139. Instead, Mexico argues that Claimants are required to submit proof of ownership or other rights to such assets in order for them to qualify as investments. This is absurd.

302. Claimants submitted testimony that these assets were purchased or leased to conduct work under the 821 Contract.[315] That is sufficient. Claimants are not required to provide receipts or title transfer documents to prove ownership or other rights. In fact, NAFTA Article 1139 only requires such property "be used for the purpose of economic benefit or other business purposes."[316] This can be established with testimony, which Claimants have done.

303. Moreover, Mexico does not provide any authority to support its suggestion that witness testimony cannot show ownership or other interests in property.[317] Mexico also does not identify what "evidence" it believes is required. Claimants were required to conduct work on behalf of Pemex over the course of four years. It is nonsensical to suggest that Claimants did not own or control the assets that were used to contribute under all three contracts, including the 821 Contract.

304. Despite this, Claimants have no issue with proving their ownership. For example, the workover/drilling rigs were the largest investment with respect to equipment. Finley committed significant capital and other resources by importing workover rigs, drilling rigs, and related drilling equipment and materials into Mexico.[318] For equipment originating from U.S., Finley used a special purpose company called Drake-Mesa, LLC to purchase the rigs, and transferred ownership of them to its affiliated Mexican company Drake-Mesa upon their import into Mexico.[319] In total, Finley purchased nine rigs, along with related equipment, transportation, and tools.[320] The rigs and associated equipment cost over US$ 22 million.[321]

305. Prize also made an investment by leasing and ultimately purchasing real property in Mexico. Prize purchased the property though a subsidiary named Baku Exploración y Producción, S.A.

---

[314] Statement of Claim, ¶¶ 259-264.
[315] Second Witness Statement of J. Finley, ¶¶ 5-10.
[316] NAFTA Article 1139(h) states that the definition of investment includes "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes."
[317] Claimants are not aware such authority exists.
[318] Second Witness Statement of J. Finley, ¶ 6.
[319] Second Witness Statement of J. Finley, ¶ 6.
[320] **C-0148**, Assets List.
[321] **C-0148**, Assets List.

de C.V. The price of that investment was US$ 3,622,745.08.[322] Prize provided all of the capital for the purchase and the property contributed to the exploration of hydrocarbons in Mexico in multiple ways.[323]

306. Claimants have shown that they "acquired or used" personal and real property or interests in such properties for an economic benefit in Mexico. That is what is required under NAFTA Article 1139. As such, Mexico's objection should be rejected.

307. Finally, Mexico makes several observations about Claimants' ownership interests in Drake-Mesa and Drake-Finley. Mexico provides no authority or explanation on why its observations would disqualify the two companies from being investments. Moreover, Mexico provides no meaningful argument why these ownership interests are not investments under NAFTA Article 1139. It cannot.

308. NAFTA Article 1139(a) defines investment to include "an enterprise." Under NAFTA Article 1139(e), an investment includes an interest in an enterprise that entitles the owner to a share in income or profits. Mexico cannot dispute that Drake-Finley and Drake-Mesa fall under both categories.

309. Regardless, Claimants note that Finley financed the purchase of equipment and materials through intermediaries on behalf of Drake-Mesa.[324] Drake-Mesa owned the equipment that was used to accomplish the work through the contracts. Drake-Mesa was a party to the 821 Contract and owned part of Drake-Finley, the contractor under the contract. Both Finley and Prize had an expectation that they would share in the income or profit in Drake-Mesa and Drake-Finley under the 821 Contract.

310. For the above reasons, Mexico's objection that Claimants' ownership interests in Drake-Mesa and Drake-Finley are not investments should be rejected.

d) Mexico's "Legacy Investment" Objection

311. As explained above, USMCA Annex 14-C allows a U.S. investor to bring NAFTA claims against Mexico with respect to a "legacy investment."[325] Mexico argues that the 821 Contract is not a "legacy investment" because it was not in existence on the date of entry into force of

[322] Second Witness Statement of L. Kernion, ¶ 9.
[323] Statement of Claim, ¶ 36.
[324] Second Witness Statement of J. Finley, ¶ 6.
[325] Counter-Memorial, ¶¶ 352 et seq.

the USMCA (July 1, 2020). Mexico further argues that Claimants' other investments (e.g., equipment, land, Drake-Finley) are "inextricably linked" with the 821 Contract, and thus, lost their status as investments when the 821 Contract purportedly expired. Mexico is wrong on the facts, and this objection should be rejected.

312. Mexico's objection is based on a false premise. Mexico argues that the 821 Contract "ended on December 31, 2017."[326] It did not.

313. As explained above, the "execution period" or *plazo de ejecución* under Clause 4.1 of the 821 Contract ended on December 31, 2017. But this has nothing to do with the term of the contract itself.

314. Clause 18 of the 821 Contract makes clear that the validity (*vigencia*) of the contract continues until either a finiquito is formalized or once any balance owed under such finiquito is paid in full:[327]

> The *vigencia* will end once the Finiquito is formalized or, in the event the Finiquito results in a balance favoring either of the Parties, on the date on which such amount is paid in full.

315. Mexico notes that it notified Finley and Drake-Mesa of the finiquito process on October 18, 2021.[328] Thus, the 821 Contract was in effect when Claimants asserted their NAFTA claims under USMCA Annex 14-C.

316. In fact, the 821 Contract remains in effect to this day. Pemex claims that amounts are owed under the unilateral finiquito that it executed in December 2021.[329] This is why Pemex is attempting to claim Claimants' US$ 41.8 million Dorama bond.

317. Consequently, the 821 Contract is a "legacy investment" under USMCA Annex 14-C.6(a).[330] The 821 Contract was executed between January 1, 1994, and the date of NAFTA's

---

[326] Counter-Memorial, ¶ 352.
[327] **C-0034**, 821 Contract at Clause 18, ¶ 6 ("La vigencia del Contrato conciliar hasta que se formalice el Finiquito o, en el caso de que de éste resulten saldos a favor de cualquiera de las Partes, hasta la fecha en que se paguen en su totalidad las cantidades correspondientes.").
[328] Counter-Memorial, ¶ 184.
[329] Counter-Memorial, ¶ 184; **R-0043**, Finiquito for the 821 Contract (Dec. 2021).
[330] "Legacy investment" is defined as "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement."

termination. The 821 Contract was in existence on the date of the USMCA' s entry into force on July 1, 2020. Thus, Mexico's objection should be rejected.

318. Mexico second argument about Claimants' equipment and land is equally flawed.[331] As best Claimants understand, Mexico claims that when the 821 Contract "terminated" Claimants' equipment and land, etc., these assets automatically lost their investment status under NAFTA Article 1139(h). The 821 Contract never terminated, thus, this should end the analysis. Moreover, Mexico's argument ignores the independent nature of these assets as investments themselves.

319. NAFTA Article 1139(g) defines investment to include, for example, "real estate or other property, tangible or intangible, acquired in the expectation or used for the in purpose of economic benefit or other business purposes."[332] There is no question that Claimants' land and equipment satisfy this definition. It is irrelevant whether they also qualify as investments under NAFTA Article 1139(h) — "interests arising from the commitment of capital or other such resources in the territory of a Party to the economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, ..."

320. Relatedly, Mexico cites to *Lion Mexico v. Mexico* to claim that "past arbitral awards" have found that all investments that Claimants made must fall under NAFTA 1139(h). That case was wholly different. There, the investor made loans, formalized by non-negotiable promissory notes and secured by mortgages. That tribunal found that the loans were not protected investments because they did not meet the requirements of NAFTA Article 1139(h): a mortgage securing a loan does not imply the presence of an investor's property in Mexico and has no relationship with the examples under Article 1139(h) of turnkey contracts, construction contracts, or concessions.[333]

321. The tribunal in *Lion Mexico* noted that "it is safe to conclude that a minimum requirement of 'commitments of capital' protected by paragraph (h) is to be formalized as contracts."[334]

---

[331] Counter-Memorial, ¶¶ 354-355.
[332] NAFTA Article 1139(g).
[333] **RL-0029**, *Lion Mexico Consolidated L.P. c. los Estados Unidos Mexicanos*, CIADI No. ARB(AF)/15/2, Decisión sobre Jurisdicción, 30 de julio de 2018. ¶ 198.
[334] **RL-0029**, *Lion Mexico Consolidated L.P. c. los Estados Unidos Mexicanos*, CIADI No. ARB(AF)/15/2, Decisión sobre Jurisdicción, 30 de julio de 2018. ¶ 205.

Because the loans failed to show some additional, defining feature beyond being a loan, the tribunal determined that they did not fit within NAFTA 1139(h).[335] Instead, they were governed under Article 1139(d)(a loan to an enterprise with a maturity of greater than three years). At bottom, the analysis made in *Lion Mexico* regarding loan agreements has no bearing on whether Claimants' equipment and land qualify as an "investment" under Article 1139.

322. As such, Mexico's objection that Claimants' property (land and equipment) are not a "legacy investment" because the 821 Contract purportedly terminated should be rejected.

e) Mexico's Objections Regarding Claimants' Ownership of Drake-Mesa and Drake-Finley

323. Mexico argues that Claimants have not demonstrated their ownership or control of Drake-Mesa and Drake-Finley.[336]

324. From October 4, 2018 through March 25, 2021 (the date Claimants submitted their claims to arbitration), Drake-Finley, S. de R.L. de C.V. and Drake-Mesa, S. de R.L. de C.V. had the following ownership structure:

Drake-Finley, S. de R.L. de C.V.[337]	80% Prize Permanent Holdings, LLC 10% Finley Resources, Inc. 10% Drake Mesa S. de R.L.
Drake-Mesa, S. de R.L. de C.V.[338]	50% Prize Permanent Holdings, LLC 25% Royal Shale Holdings S.A. de C.V. 25% Drake Mesa Big Sky, LLC

325. Prize Permanent Holdings, LLC owns 50% of the interests in Royal Shale Holdings S.A. de C.V.[339] Prize also has a 50% ownership of Royal Shale Holdings S.A. de C.V. Because Drake-

[335] **RL-0029**, *Lion Mexico Consolidated L.P. c. los Estados Unidos Mexicanos*, CIADI No. ARB(AF)/15/2, Decisión sobre Jurisdicción, 30 de julio de 2018. ¶ 207.
[336] Counter-Memorial, ¶¶ 358 et seq.
[337] **C-0149**, Ownership of Drake-Finley; Second Witness Statement of L. Kernion, ¶ 6.
[338] **C-0012**, Prize Ownership of Drake-Mesa; Second Witness Statement of L. Kernion, ¶ 4.
[339] **C-0150**, Ownership of Royal Shale; Second Witness Statement of L. Kernion, ¶ 5.

Mesa is a Mexican entity owned by U.S. investors, Prize can bring a claim on behalf of Drake-Mesa under NAFTA Article 1117.[340]

326. Prize Permanent Holdings, LLC and Finley Resources, Inc. are entities organized under the laws of the State of Texas.[341] Because Drake-Finley is Mexican entity owned by U.S. investors, Prize and Finley can bring a claim on behalf of Drake-Finley under NAFTA Article 1117.

327. With respect to Drake-Finley, Mexico should already know its ownership structure. Declaration 2.1 of the 821 Contract provides,[342]

> Drake-Mesa, S. de R.L. de C.V. and Finley Resources, Inc., derived from the private agreement dated October 3 (three), 2013 (two thousand and thirteen) where they expressed their intention to constitute a new company to comply with their obligations, they constituted a company of specific purpose called Drake-Finley, S. de R.L. de C.V., as accredited by Public Deed 7,087 (seven thousand eighty-seven), dated February 18 (eighteen) 2014 (two thousand fourteen), granted before the faith of the Holder of the Notary Public No. 55, of Monterrey, Nuevo León, Mr. Jorge Maldonado Montemayor, whose first testimony was duly registered in the Public Registry of Property and Commerce of Monterrey, Nuevo León, with folio 144180-1.

328. Additionally, Drake-Mesa and Drake-Finley were at all relevant times controlled by U.S. investors.[343] NAFTA tribunals have consistently held that "control" under NAFTA Article 1117 is not limited to legal control.[344] It includes any ability to exercise restraining or directing influence over or to have power over a company.

329. Notably, Mexico does not dispute that at all relevant times U.S. investors controlled Drake-Mesa and Drake-Finley.[345] Prize and Finley have exercised all forms of control over Drake-Finley at all relevant times.[346] Likewise, Prize has exercised all forms of control over Drake-Mesa at all relevant times.[347]

---

[340] Mexico notes that Finley and Prize cannot both bring claims on behalf of Drake-Mesa. Counter-Memorial, ¶ 361. To clarify, Prize is bringing a claim on behalf of Drake-Mesa; Finley is not.
[341] **C-0151**, Organization of Finley; **C-0152**, Organization of Prize.
[342] **C-0034**, 821 Contract.
[343] Second Witness Statement of L. Kernion, ¶ 7.
[344] **CL-0091**, *B-Mex, LLC and others v. The United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award (July 19, 2019),
¶ 212 ("In the context of Article 1117, any ability to 'exercise restraining or directing influence over' or to 'have power over' a company would satisfy the ordinary meaning of control. There is no specific manner or form that 'control' must take.")
[345] Second Witness Statement of L. Kernion, ¶ 7.
[346] Second Witness Statement of L. Kernion, ¶ 7; Witness Statement of J. Finley, ¶ 36.
[347] Second Witness Statement of L. Kernion, ¶ 7.

330. For the above reasons, Mexico's objection regarding the ownership of Drake-Mesa and Drake-Finley should be rejected.

f) Mexico's Time-Bar Objection Related to Contract 821

331. Under NAFTA Articles 1116(2) and 1117(2), Finley and Prize had to bring a claim within three years from the date on which they first acquired or should have first acquired knowledge of the alleged NAFTA breach and knowledge that they incurred a loss or damage from such breach.[348] Finley and Prize filed their Request for Arbitration on March 25, 2021. Thus, March 25, 2018 is the "critical date" or "cut-off" date.

332. Mexico objects because it claims that Finley and Prize first knew about Mexico's NAFTA breaches and the resulting loss or damage therefrom before March 25, 2018.[349] Notably, Mexico makes this argument even though it is continuing its scheme against the 821 Contract to this day. Regardless, Mexico is both factually and legally incorrect. For the reasons below, this objection should be rejected.

333. Mexico supports it argument that the NAFTA's three-year limitations is "clear and rigid" with dicta in *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*.[350] In that arbitration, most of the U.S. states and territories entered into a Master Settlement Agreement ("MSA") with major U.S. tobacco producers. Under the MSA, the participants made payments into a fund from which the states and territories shared proportionately. The MSA allowed other cigarette manufacturers to join the regime, and it required the U.S. states and territories to enact escrow legislation that would affect non-participating manufacturers. The U.S. states and territories enacted such escrow legislation and later modified and strengthened them to maintain their intended effect.

334. The NAFTA claimants were affected by the escrow measures, including being sued successfully by one U.S. state for not contributing. Initially, the claimants focused their claims

---

[348] NAFTA Article 1116(2) provides that "an investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." NAFTA Article 1117(2) tracks this provision as applied to enterprises that the investor owns or controls. Mexico contends these provisions are hard-fast and set the three-year limitations period from Mexico's very first transgression regardless if it commits further violations of NAFTA thereafter.

[349] Counter-Memorial, ¶¶ 366 et seq.

[350] **RL-0030**, *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Decision of Objections to Jurisdiction (July 20, 2006), ¶ 29.

on the MSA.[351] Later, the claimants emphasized the state actions taken pursuant to the MSA, including adopting their escrow statutes, amendments to those statutes, and other measures taken towards the non-participating manufacturers.[352] At the hearing, the claimants also cited later amendments to the escrow statutes.

335. The claimants argued that the three-year limitations period applied separately to each contested measure taken by each state implementing the MSA.[353] Factually, the tribunal noted that all of the concerned U.S. states had adopted legislation by 2000 and created a duty to escrow funds by January 1, 2001. The claimants asserted claims based on these actions on March 12, 2004.

336. The tribunal found these claims were barred. The tribunal explained that applying limitations separately to each contested measure implementing the MSA would render the three-year limitations period meaningless in a situation "involving a series of similar and related actions by a respondent state [with respect to implementing the MSA]."

337. The rationale in *Grand River* is logical. The U.S. took an action (entered into the MSA) which was the basis of the investor's claim. The subsequent escrow legislation was further implementation of the MSA. Moreover, the duty to escrow funds (which was the grievance underlying the claim) had been established before the three-year limitations, even though states were amending their laws subsequently to strengthen that duty.

338. Similarly, Mexico cites *Resolute Forest Products, Inc. v. Government of Canada* to claim that the three-year limitations period begins to run from the very first adverse act Mexico committed against Finley and Drake-Mesa, regardless of what transpired thereafter.[354] *Resolute Forest* does not stand for that proposition.

339. In *Resolute Forest*, the claimants had a paper mill in Canada.[355] They claimed that they had to close the mill because it could not compete with another Canadian mill, which had benefitted

---

[351] **RL-0030**, *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Decision of Objections to Jurisdiction (July 20, 2006), ¶ 23.
[352] **RL-0030**, *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Decision of Objections to Jurisdiction (July 20, 2006), ¶ 24.
[353] **RL-0030**, *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Decision of Objections to Jurisdiction (July 20, 2006), ¶ 80.
[354] Counter-Memorial, ¶ 367.
[355] **RL-0031**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (Jan. 30, 2018), ¶ 4.

from a series of measures by a local province. The local province provided the other mill with electricity at a discounted price and provided financial assistance, which the claimants argued created a competitive advantage.[356] According to Canada, the local province took these measures to improve the chances that the mill would be purchased as a going concern.[357]

340. Ultimately, the mill's sale completed on September 28, 2012.[358] The claimants submitted their dispute to arbitration on December 30, 2015.[359] The tribunal noted, "the essential acts alleged to constitute breaches . . . were completed by September 2012, three months before the critical date."[360]

341. The tribunal noted that the claimants had briefly argued that the measures were "continuing breaches" that were ongoing after December 30, 2012.[361] The tribunal explained that "in the present case, the [governmental] measures were taken within a short space of time and were effectively complete when taken."[362] The tribunal concluded that the government decisions were taken and implemented in September 2012 and did not call for further measures to be taken. In that context, the facts did not support the contention of a continuing breach.

342. The tribunal explained its reasoning:[363]

> The core point is that in the present case, the Nova Scotia measures were taken within a short space of time and were effectively complete when taken. It is true that they eventually had a continuing effect on the Claimant (from what date is disputed), but that does not sufficient to qualify them as continuing wrongful acts. There is a distinction between a continuing breach of an obligation and a perfected breach which continues to have injurious effects.

---

[356] **RL-0031**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (Jan. 30, 2018), ¶¶ 4, 50-62.
[357] **RL-0031**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (Jan. 30, 2018), ¶ 54.
[358] **RL-0031**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (Jan. 30, 2018), ¶ 60.
[359] **RL-0031**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (Jan. 30, 2018), ¶ 89.
[360] **RL-0031**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (Jan. 30, 2018), ¶ 155.
[361] **RL-0031**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (Jan. 30, 2018), ¶ 156. The tribunal also noted that the claimants did not press the argument at the hearing ("rightly not", according to the tribunal).
[362] **RL-0031**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (Jan. 30, 2018), ¶ 157.
[363] **RL-0031**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (Jan. 30, 2018), ¶ 157.

Because the government's actions supporting the competing domestic mill "were taken and implemented" within one month, with one possible exception, the tribunal noted they did not call for further measures to be taken. As such, they were not continuing wrongful acts.

343. *Grand River* and *Resolute Forest* do not stand for the proposition that Mexico promotes regarding whether a continuing course of conduct renews the three-year limitations period once the investor knows of the alleged breach and resulting losses.[364] At best, they support the argument that (a) when a state takes a measure, the resulting implementations of that measure should not be treated separately (*Grand River*) and (b) when a state takes a series of measures during a short period of time that are effectively complete when taken, such measures should not be treated separately (*Resolute Forest*).

344. In fact, Mexico cites an award that cautions against what Mexico is doing here: taking decisions out of context.[365] In *Spence International Investments, LLC et al. v. Republic of Costa Rica* (referred to as "*Berkowitz*"), the tribunal warned against applying its jurisdictional determination without due consideration of the underlying facts:[366]

> The jurisdictional aspects of this case are heavily fact-specific. Although interpretations of law, notably of CAFTA Article 10.1.3 and 10.18.1, are necessary, the Tribunal's assessment ultimately turns on appreciations of fact. The Tribunal thus cautions any reading of this Award that would give it wider "precedential" effects.

345. Notably, Mexico avoids *United Parcel Service of America Inc. v. Government of Canada*.[367] This award is directly on point. In that arbitration, UPS brought various NAFTA claims against Canada because of its treatment of UPS vis-à-vis the Canada Post, a state entity that has the exclusive role over regular postal service and also operates in the courier services. Of its many objections, Canada claimed that UPS's claimed were time-barred.[368]

346. Similar to Mexico here, Canada argued that all of UPS's claims were time-barred because UPS either knew or should have known of Canada's conduct underlying each asserted breach and

---

[364] Counter-Memorial, ¶ 367.
[365] Counter-Memorial, ¶ 368 n. 408.
[366] **RL-0034**, *Spence International Investments, LLC et al. v. Republic of Costa Rica*, ICSID Case No. UCT/13/2, Interim Award (May 30, 2017), ¶ 166.
[367] **RL-0038**, United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1, Award (May 24, 2007).
[368] **RL-0038**, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award (May 24, 2007), ¶¶ 20 et seq.

of the information relevant to its losses more than three years before UPS initiated arbitration.[369] Some of the measures that allegedly violated Canada's NAFTA obligations were implemented well before the three-year cutoff.[370]

347. Relying on precedent under international law generally and prior NAFTA decisions, UPS argued that continuing acts are treated as continuing violations of international law obligations (and of NAFTA obligations) such that limitations does not begin until the conduct has concluded.[371]

348. The tribunal agreed and found,[372]

> The generally applicable ground for our decision is that, as UPS urges, continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly. This is true generally in the law, and Canada has provided no special reason to adopt a different rule here. The use of the term "first acquired" is not to the contrary, as that logically would mean that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the investor later acquires further information confirming the conduct or allowing more precise computation of loss.

349. The tribunal also rejected Canada's argument based on *Mondev International Ltd v. United States of America*. Similar to Mexico here, Canada argued that *Mondev* determined that continuing acts do not extend the time bar if a claimant first knew (or should have known) about the acts more than three years before the claim was filed.[373] The tribunal found that Canada was relying on dicta, and even then, it did not relate to continuing course of conduct that began before and extended past three years before UPS filed its claim.[374]

---

[369] **RL-0038**, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award (May 24, 2007), ¶ 20.
[370] **RL-0038**, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award (May 24, 2007), ¶ 22.
[371] **RL-0038**, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award (May 24, 2007), ¶ 26.
[372] **RL-0038**, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award (May 24, 2007), ¶ 28.
[373] Counter-Memorial, ¶ 368; **CL-0059**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶ 84.
[374] **RL-0038**, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award (May 24, 2007), ¶ 29.

350. Although there was no time bar for UPS to bring its claims, the tribunal found that the limitation still served a purpose to a continuing course of conduct.[375] For continuing conduct, it would be incumbent on the investor to show damages not from the inception of the course of conduct, but only from the conduct occurring within the three-year period under NAFTA Articles 1116 and 1117.[376]

351. Here, Mexico took a series of disjointed acts with respect to the 821 Contract beginning in November 2016 and continuing to this day. Pemex issued Work Order 028-2016 claiming that it did not have the requisite funds to pay or the required drilling permit to drill the Coapechaca 1240 Well. Pemex proceeded to use the US$ 1 million work order to administratively rescind the 821 Contract in July 2017 even though the 821 Contract expressly prohibits Pemex from doing so. Then, in October 2018, the Mexican administrative court condoned the rescission without respecting Finley's and MWS's contractual protection. It was not until that decision that Mexico's actions had materialized into a breach of its NAFTA obligations — a Mexican court had endorsed Pemex's fabrication of a work order so Pemex could administratively rescind the 821 Contract. Then, Pemex continued its quest against Finley and Drake-Mesa into this arbitration by proceeding with a unilateral finiquito and claiming against the US$ 41.8 million Dorama bond. Indeed, the continuing conduct is particularly egregious because Pemex only requested approximately US$ 48 million of work under US$ 413.8 million 821 Contract.

352. No reasonable person could have known that Mexico was breaching its NAFTA obligations when Pemex issued Work Order 028-2016 or even when it proceeded with the administrative rescission. A reasonable person would not have appreciated Mexico's behavior had risen to a breach until the administrative court issued its egregious judgment Mexican court decision in October 2018, condoning Pemex's administrative rescission of a US$ 418 million contract based on a dubious US$ 1 million work order. In fact, a reasonable person might not have appreciated such until its challenge to the October 2018 was rejected by the amparo court in January 2020.

353. Both October 2018 and January 2020 are well within the "cut-off date" of March 25, 2018. Indeed, Mexico appears to recognize this fact. The amparo filing in 2019 is when Claimants

[375] **RL-0038**, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award (May 24, 2007), ¶ 30.
[376] **RL-0038**, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award (May 24, 2007), ¶ 30.

first raised the word NAFTA, albeit to assert human rights issues under the Mexican constitution. Mexico repeatedly refers to this filing for other purposes. Tellingly, Mexico shies away from it when arguing about when Claimants should have first known about a possible breach of Mexico's NAFTA obligations.

354. More concerning, Mexico attempts to find discrete acts before the "cut-off" date to suggest that Claimants somehow knew that Pemex was breaching its NAFTA obligations. For example, Mexico points to November 13, 2014 — the very first date it could find in Claimants' Statement of Claim with respect to conduct under the 821 Contract.[377] That is an internal Pemex communication about its lack of budgeted funds for the 821 Contract.[378] Claimants could not have known they had NAFTA claims, let alone what claim that might have been.

355. Similarly, Mexico points to a comment that one of Pemex's employees told Luis Kernion in November 2016 about Pemex trying to cancel the 821 Contract due to a lack of funds.[379] Because Pemex ultimately administratively rescinded the 821 Contract in November 2017, Mexico implies that Claimants must have known of a NAFTA breach back in November 2016. This would set the trigger date based on speculation rather than actualities. NAFTA Articles 1116 and 1117 require the latter.

356. Indeed, Mexico's approach serves only to prejudice Claimants and every other U.S. investor that has been subjected to a series of acts it committed over a period of time. Mexico finds the earliest possible act and speculates that Claimants must have had knowledge of a NAFTA breach from that one act. Mexico then claims that all subsequent acts cannot be considered, including those that clearly fall within the "cut-off" date. Mexico must admit that its approach grants it *carte blanche* to continue to engage in adverse acts even into the "cut-off" date because those acts would be immunized by any that Mexico committed three years beforehand.

357. At bottom, Mexico promotes an approach taken under *Grand River* and *Resolute Forest* which applies when there is a discrete act. For example, an investor knows of a treaty violation when there is an expropriation. The investor also knows when the state passes an adverse law. However, when a state commits a series of acts over a period of time an investor may not know of a treaty violation until a sufficient number of those acts have occurred to "put the

[377] Counter-Memorial, ¶ 369.
[378] **C-0091**, Pemex Internal Email (Nov. 13, 2014).
[379] Counter-Memorial, ¶ 374.

pieces of the puzzle together." Thus, relying on *Grand River* and *Resolute Forest,* decisions made under entirely different facts, would be a great injustice.

358. Mexico makes a similar argument about the Claimants' knowledge of their loss of damage as a result of Mexico's breaches of its NAFTA obligations.[380] Citing the award in *Mondev International Ltd. v. United States*, Mexico contends that mere knowledge of a loss or damage suffices to trigger the three-year limitations, even if the extent of the loss or quantification is unclear. Mexico further cites non-NAFTA awards to argue that Claimants' "first appreciation" of any loss suffices to trigger the three-year limitations. Again, Mexico takes these decisions out of context.

359. In *Mondev*, the investor entered into a contract to develop a dilapidated area in downtown Boston.[381] Ultimately, the project failed, and the investor's mortgagor foreclosed in February 1991.[382] In March 1992, the investor sued Boston and its redevelopment authority for breach of the agreement.[383] In 1994, a jury decided in favor of the investor against both defendants, but ultimately, its decision was reversed.

360. On September 1, 1999, the investor submitted its NAFTA claims to arbitration.[384] The investor alleged violations of national treatment, minimum standard of treatment, and expropriation.[385] The United States made a series of objections to the tribunal's competence.[386] The objections centered on the circumstance that the dispute arose in the period from 1985 to 1991, before the NAFTA came into force, with the judicial decisions denying the investor's claims occurring after the NAFTA came into effect in 1994.

361. The investor argued that its NAFTA claims were not perfected until the courts had addressed the legal action that the investor had brought.[387] The investor claimed that the pre-1994 conduct violated the international minimum standard that created a continuing situation that the United States had an obligation to remedy. After 1994, and as a result of the court decisions, the United States failed to provide any remedy, which itself was a breach of the

[380] Counter-Memorial, ¶ 368.
[381] **RL-0033**, *Carlos Ríos y Francisco Ríos v. Chile*, Caso CIADI No. ARB/17/1 (Jan. 11, 2021), ¶ 37.
[382] **RL-0033**, *Carlos Ríos y Francisco Ríos v. Chile*, Caso CIADI No. ARB/17/1 (Jan. 11, 2021), ¶ 39.
[383] **RL-0033**, *Carlos Ríos y Francisco Ríos v. Chile*, Caso CIADI No. ARB/17/1 (Jan. 11, 2021), ¶ 1.
[384] **RL-0033**, *Carlos Ríos y Francisco Ríos v. Chile*, Caso CIADI No. ARB/17/1 (Jan. 11, 2021), ¶ 12.
[385] **RL-0033**, *Carlos Ríos y Francisco Ríos v. Chile*, Caso CIADI No. ARB/17/1 (Jan. 11, 2021), ¶ 2.
[386] **RL-0033**, *Carlos Ríos y Francisco Ríos v. Chile*, Caso CIADI No. ARB/17/1 (Jan. 11, 2021), ¶ 45.
[387] **RL-0033**, *Carlos Ríos y Francisco Ríos v. Chile*, Caso CIADI No. ARB/17/1 (Jan. 11, 2021), ¶ 48.

NAFTA that encompassed the whole dispute between the parties. The investor further argued that it was not in a position to be certain whether it had suffered a loss until the courts issued decisions that failed to give the investor any redress.[388]

362. The tribunal noted that the investor's rights in the project "as a whole" occurred "on the date of foreclosure."[389] As noted above, this occurred in 1991. Ultimately, the tribunal found that the only arguable basis for a claim under the NAFTA was conduct of the United States after the NAFTA's enactment in 1994. As such, the tribunal concluded that the only possibly viable claim was based on the local court decisions that were rendered after the NAFTA's enactment.[390]

363. The tribunal then commented about how it would have ruled if claimants' claims concerning the conduct of Boston and its redevelopment district had been continuing NAFTA claims as of January 1, 1994 (when NAFTA went into effect).[391] The tribunal noted that it would not have accepted the argument that the investor could not have known its losses for these claims prior to the court decisions. As noted above, in 1991 (before NAFTA went into effect), the investor's mortgagor had foreclosed on the project as a result of the actions that Boston and its redevelopment district had taken. Given this fact, the tribunal commented that the investor must have known that not all of its losses would not have been recovered in its domestic lawsuits.

364. In this context, the tribunal stated, "[a] claimant may know it has suffered a loss or damage even if the extent or quantification of such is unclear." The investor had lost its entire investment because of a foreclosure. It would have been impossible for the investor to argue that it could not know of its loss until the conclusion of its domestic legal actions.

365. The facts under *Mondev* are very different than those in this arbitration. Claimants did not know that there was a loss or damage until, at the earliest, the administrative court rendered its decision in October 2018. Up until that point, Pemex's administrative recission was suspended and no further action could be taken under the contract. Surely, Mexico is not

[388] **RL-0033**, *Carlos Ríos y Francisco Ríos v. Chile*, Caso CIADI No. ARB/17/1 (Jan. 11, 2021), ¶ 52.
[389] **RL-0033**, *Carlos Ríos y Francisco Ríos v. Chile*, Caso CIADI No. ARB/17/1 (Jan. 11, 2021), ¶ 61.
[390] **RL-0033**, *Carlos Ríos y Francisco Ríos v. Chile*, Caso CIADI No. ARB/17/1 (Jan. 11, 2021), ¶¶ 70, 75.
[391] **RL-0033**, *Carlos Ríos y Francisco Ríos v. Chile*, Caso CIADI No. ARB/17/1 (Jan. 11, 2021), ¶ 87.

contesting that Pemex's administrative rescission was not effective until the administrative court rendered its judgment in October 2018.

366. Moreover, Mexico argues that the date when Claimants first acquired knowledge of their loss or damage resulting from Mexico's NAFTA breach means the date when they "first appreciated" the loss of damage.[392] Mexico borrows this term from non-NAFTA awards.[393] Because it has no bearing on the language under the NAFTA, use of this term should be rejected.

367. Regardless, the term "first appreciated" appears to have originated in one of Mexico's cited awards, the interim award in *Berkowitz* referenced above.[394] In *Berkowitz*, the tribunal examined whether the CAFTA required the investor to have full knowledge of the loss or damage in order to trigger the limitations period.[395] The tribunal stated that the requirement to point to the date on which the investor first acquired actual or constructive knowledge *implies* that such knowledge is triggered "by the first appreciation that loss or damage will be (or has been) incurred." The tribunal continued, "[i]t is the first appreciation of loss or damage in consequence of a breach that starts the limitation clock ticking." The context of these statements is important.

368. In *Berkowitz*, Costa Rica expropriated the claimants' property. The claimants brought claims under the CAFTA, noting that their case was about "the Respondent's failure to provide prompt and adequate compensation for its *de facto* and *de jure* takings of valuable residential real estate."[396] The claimants argued that Costa Rica's delayed compensation for the expropriation were discrete, self-standing violations of the CAFTA, and such delays formed part of a composite act that took place into the three-year limitations period.[397]

369. In examining when the claimants first acquired knowledge of the breach, the tribunal noted that the knowledge "must rest on a breach that gives rise to a self-standing cause of action in respect of which the claimant first acquired knowledge within the limitation period."[398] The

[392] Counter-Memorial, ¶ 368.
[393] Counter-Memorial, ¶ 368.
[394] The other cited award is **RL-0033**, *Carlos Ríos and Francisco Ríos v. Chile*, ICSID Case No. ARB/17/1, Award (Jan. 11, 2001). This tribunal cited *Berkowitz* for use of the term "first appreciation." *Id.*, ¶ 175 n. 299.
[395] **RL-0034**, *Spence International Investments et al c. Costa Rica*, Caso CIADI No. UCT/13/2, (May 30, 2017), ¶ 213.
[396] **RL-0034**, *Spence International Investments et al c. Costa Rica*, Caso CIADI No. UCT/13/2, (May 30, 2017), ¶ 49.
[397] **RL-0034**, *Spence International Investments et al c. Costa Rica*, Caso CIADI No. UCT/13/2, (May 30, 2017), ¶ 146.
[398] **RL-0034**, *Spence International Investments et al c. Costa Rica*, Caso CIADI No. UCT/13/2, (May 30, 2017), ¶ 210.

tribunal further noted that with respect to knowledge of the investor having incurred loss or damage, the loss or damage necessarily must be as a consequence of the breach that is alleged.[399]

370. The tribunal continued that the claimant does not have to have a "concrete appreciation of the quantum of that loss or damage"[400] Instead, the test is when the investor first acquires knowledge of the loss or damage incurred as a consequence of the breach. The tribunal believed that a claimant was not allowed "to wait and see the full extent of the loss or damage that will or may result."

371. As noted above, the tribunal noted that the jurisdictional aspects of the case were heavily fact-specific. [401] It advised, "the Tribunal's assessment ultimately turns on appreciations of fact." Indeed, the tribunal noted that had reviewed other awards relating to time-bar issues, commenting that "they each turn on their facts."[402]

372. Taking into account the tribunal warning, *Berkowitz* dealt with Costa Rica's expropriation and its failure to provide prompt and adequate compensation for such. The discrete expropriation actions were evident, and consequently the loss readily appreciable. That is not the case here.

373. Mexico claims that Claimants' Statement of Claim "speaks for itself as to when Claimants learned of the alleged breaches and losses."[403] Mexico cherry-picks statements dating as far back as November 2014 to suggest that Claimants somehow knew of their losses (just not the extent of such) as a result of Mexico's breaches of its NAFTA obligations that had not yet occurred. Ultimately, it appears Mexico lands on Claimants' lawsuit against Pemex in April 2016 for breach of the 821 Contract and resulting damages.[404] Mexico suggests that Claimants must have known at that point they had incurred damages as a result of Mexico's breaches of its NAFTA obligations. This is not true.

374. When Claimants initiated that lawsuit in April 2016, the 821 Contract was still in effect. In fact, approximately seven months later in November 2016, Pemex would begin its retaliation against Claimants for initiating the lawsuit with its dubious Work Order 028-2016 to drill the

---

[399] **RL-0034**, *Spence International Investments et al c. Costa Rica*, Caso CIADI No. UCT/13/2, (May 30, 2017), ¶ 211.
[400] **RL-0034**, *Spence International Investments et al c. Costa Rica*, Caso CIADI No. UCT/13/2, (May 30, 2017), ¶ 213.
[401] **RL-0034**, *Spence International Investments et al c. Costa Rica*, Caso CIADI No. UCT/13/2, (May 30, 2017), ¶ 166.
[402] **RL-0034**, *Spence International Investments et al c. Costa Rica*, Caso CIADI No. UCT/13/2, (May 30, 2017), ¶ 167.
[403] Counter-Memorial, ¶ 369.
[404] Counter-Memorial, ¶¶ 113, 378.

Coapechaca 1240 Well, resulting in Pemex's administrative rescission of the 821 Contract.[405] At the earliest, Claimants would not have known that they had NAFTA claims based on what had transpired until the administrative court condoned Pemex's actions in October 2018. Because Claimants could not have known they had such NAFTA claims, they could not have known they had a loss or damage resulting from breaches of those claims. This was well within the March 2018 "cut-off" date.

375. Mexico's objection with respect to the 821 Contract includes an argument that Claimants' denial of justice claim under NAFTA Article 1105 is barred.[406] Mexico asserts, "Claimants have not established when the denial of justice occurred." The earliest date this claim arose was on October 4, 2018, when the administrative court issued its indefensible, outcome-oriented decision regarding the rescission of the 821 Contract.[407] That is well within the March 2018 "cut-off" date.

376. Finally, Mexico argues that Claimants' claim for a violation of national treatment under NAFTA Article 1102 is also time-barred.[408] This claim relates to how Mexico treated similarly-situated oilfield service companies owned by Mexican nationals more favorably than Claimants. According to Mexico, Claimants had a constant duty to monitor similarly-situated Mexican nationals to make sure they were not being treated more favorably than Claimants.[409] If Claimants were unable to discover such favorable treatment, Mexico contends that Claimants' claim of national treatment nevertheless expired three years thereafter.

377. Claimants did not learn about Pemex's more favorable treatment of the Mexican service companies under the 809 Contract until late 2020/early 2021. This is well within the March 25, 2018 cut-off date.

378. For the reasons above, Mexico's time-bar objections related to the 821 Contract should be rejected in their entirety.

[405] **C-0098**, Pemex Work Order 028-2016 and related documents, Contract 821.
[406] Counter-Memorial, ¶ 379.
[407] Statement of Claim, ¶ 266.
[408] Counter-Memorial, ¶ 380.
[409] Counter-Memorial, ¶ 380.

g) Mexico's "Contract Claims" Objection

379. Mexico objects to "contract claims" being part of this arbitration.[410] In the three paragraphs devoted to this objection, Mexico fails to explain how any of Claimants' claims are "contract claims." That is because Claimants have not raised contract claims. With respect to the 821 Contract, Claimants have raised claims arising from the conduct of Pemex and the Mexican judiciary. Pemex issuing a phony work order so it could later administratively rescind the 821 Contract is not a contract claim. A Mexican court validating Pemex's rescission by wholly ignoring an important protection under the 821 Contract (no rescission unless and until 15 unfulfilled work orders) is not a contract claim.

380. Mexico supports its argument with a quote from the award in *Waste Management II*. Notably, Mexico omits the most relevant part of the paragraph (Mexico's omission emphasized):[411]

> The Tribunal begins by observing that—unlike many bilateral and regional investment treaties—NAFTA Chapter 11 does not give jurisdiction in respect of breaches of investment contracts such as the Concession Agreement. Nor does it contain an "umbrella clause" committing the host State to comply with its contractual commitments. This does not mean that the Tribunal lacks jurisdiction to take note of or interpret the contract. But such jurisdiction is incidental in character, and it is always necessary for a claimant to assert as its cause of action a claim founded in one of the substantive provisions of NAFTA referred to in Articles 1116 and 1117. Furthermore, while conduct (e.g. an expropriation) may at the same time involve a breach of NAFTA standards and a breach of contract, the two categories are distinct. Even as to Article 1105, while it will be relevant to show that particular conduct of the host State contradicted agreements or understandings reached at the time of the entry of the investment, it is still necessary to prove that this conduct was a breach of the substantive standards embodied in Article 1105. Showing that it was a breach of contract is not enough.

The tribunal in *Waste Management II* acknowledged that for a claim under NAFTA Article 1105, it may be relevant to show that Mexico contradicted its agreements. However, the investor has to show more than a breach of contract to support a claim for a breach of Mexico's NAFTA obligations. That is what Claimants have done here.

---

[410] Counter-Memorial, ¶ 383; **CL-0054**, *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 73.

[411] Counter-Memorial, ¶ 383; **CL-0054**, *Waste Management, Inc. v. The United Mexican States*, ICSID Case No .ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 73 (emphasis added).

381. For example, Mexico admits "[Pemex] was forced to stop operations in Chicontepec as of 2015."[412] Mexico continues to explain how Pemex took significant measures to trim its budget in 2015, including negotiating modifications to existing contracts to reduce costs, formalizing early termination of contracts, and ensuring such early terminations were in line with Pemex's budget.[413] Mexico further states, "logic and evidence, reflected in official data and applicable to the Mexican market, make it clear that since the end of 2014 it was very unlikely that Pemex would be able to maintain the pace of investment and production of hydrocarbons."[414]

382. In April 2016, Claimants had been waiting for Pemex to request work under the 821 Contract for over 100 days.[415] At that point, Pemex had only requested 11% of the maximum contract value (US$ 370 million was remaining). After Claimants took legal action for their contract claims and were laying off their employees, including their representative who served as their representative in Pemex's offices, a new work order suddenly appeared in November 2016. When Claimants did not perform the work, Pemex used this one work order to administratively rescind the 821 Contract. In light of Mexico's admissions in this arbitration, serious questions surrounding this work order arise: How did Pemex obtain the money, particularly considering it had told Claimants that it did not have any more funds in its budget? When did Pemex obtain the permit from the CNH to drill the Coapechaca 1240 Well, a mandatory prerequisite to drill any well?

383. Pemex's conduct rises beyond breach of the 821 Contract and clearly into the protections under NAFTA Article 1105. Consequently, in light of the facts presented in this arbitration, Mexico's argument about "contract claims" should be rejected in its entirety.

3. Mexico's Objections Regarding Contract 803 and Contract 804

384. Mexico makes five objections related to the 803 and 804 Contracts investment. As explained below, each of these objections should be rejected.

[412] Counter-Memorial, ¶ 68.
[413] Counter-Memorial, ¶ 70.
[414] Counter-Memorial, ¶ 73.
[415] Statement of Claim, ¶ 190.

a) Mexico's Objection Regarding Investments Under the USMCA

385. Mexico argues that Claimants have not established that they made an investment as defined by the USMCA.[416] Notably, Mexico does not contest that the 803 Contract and the 804 Contract are investments. Mexico also does not dispute that the listed assets in the Statement of Claim qualify as investments (outside of the guarantees).[417]

386. Instead, Mexico's arguments track those made with respect to Claimants' claims under the NAFTA:

- Claimants' investment must be apportioned to a particular contract and cannot benefit multiple contracts;
- Claimants have not provided evidence of ownership of the investments;
- Claimants must provide ownership details about companies that are not bringing any claims; and
- Performance guarantees can never be investments.[418]

For the same reasons stated there, this tribunal should refuse to endorse Mexico's attempt to compute additional requirements to qualify an investment that are not supported by the USMCA.[419]

387. As an initial matter, Mexico cites the definition of "investment" under USMCA Article 14.1. This definition is similar to that under the NAFTA. It is broadly written to include almost every asset that an investor owns or controls outside of two limited exceptions. Based on the plain language of USMCA Article 14.1, Claimants only need to show that they own or control assets that have the characteristics of an investment. They do not need to show anything more, and Mexico's attempt to impose such requirements should be rejected.

388. For example, Mexico is wrong to suggest that Claimants are required to associate a particular piece of equipment with a particular contract. It would be illogical to do so. Mexico knows that a rig — costing upwards of US$ 4 million dollars — can be used in operations that are governed by different contracts. The point is that Claimants made investments in Mexico over a period of time because of three contracts, starting with the 803 Contract. Those investments

[416] Counter-Memorial, ¶¶ 388 et seq.
[417] Statement of Claim, ¶¶ 263-264.
[418] Counter-Memorial, ¶¶ 388-395.
[419] Mexico cites to no authority for its allegations that Claimants' investments are disqualified under the 803 Contract and the 804 Contract for the reasons given.

include the contracts themselves and the other assets required to perform under those contracts, such as workover/drilling rigs and other equipment and materials.[420] To the extent that Mexico requires a list of the equipment that Claimants were required to commit to Mexico, those are listed in the contracts themselves.[421]

389. Mexico is also wrong to suggest that Claimants cannot show they own or control assets through witness testimony.[422] Mexico provides no authority otherwise. In this regard, Mexico does not identify what "evidence" it believes is required.

390. Moreover, Mexico does not contest Claimants' ownership or control of the rigs and other assets obtained to conduct work under the 803 Contract and the 804 Contract. Instead, it takes objection to Luis Kernion's use of "we" in his testimony in relation to the ownership or control of assets used to conduct work.[423] Mexico is not serious when it suggests that it does not know that "we" means the companies that were the counterparties to the three contracts. To the extent documentary evidence is required, Claimants have no issue with proving such ownership or control of the land, equipment, and materials that qualify as investments under the USMCA.[424]

391. Mexico is also incorrect to argue that Claimants must provide evidence of ownership and control of two owners of Bisell, one of the counterparties to Pemex under the 803 Contract.[425] Specifically, and without any authority, Mexico claims that it is entitled to know the ownership of Royal Shale Holdings, S.A. de C.V., and Royal Shale Corporation, S.A. de C.V. It is not.

392. Mexico does not dispute that Prize is a company organized under the laws of the United States. The USMCA allows an enterprise organized in the U.S. to bring a claim on behalf of an

[420] Claimants submit photos evidencing their investments in Mexico such as rigs and related equipment and real property. See **C-0156**, Investment Photos.
[421] **C-0153**, 803 Contract, DT-3; **C-0154**, 804 Contract, DT-9.
[422] Claimants are not aware such authority exists.
[423] Counter-Memorial, ¶ 391.
[424] *Supra* ¶ 304. For example, Claimants have evidenced that Drake-Mesa owned the rigs that were used under the 803 Contract and to be used under the 804 Contract. For this reason, Claimant Prize Permanent Holdings brought a claim on Drake-Mesa's behalf under the 803 Contract and the 804 Contract.
[425] Counter-Memorial, ¶ 390.

enterprise organized in Mexico that it owns or controls.[426] Moreover, Prize owns or controls indirectly the assets of Bisell under the definition of "investment." Accordingly, Prize being a U.S. investor is the relevant factor. The other owners of Bisell (and their respective owners) are irrelevant.

393. Relatedly, Mexico argues about the "shareholdings" Drake-Mesa and Drake-Finley with respect to Claimants' claims under the USMCA.[427] Drake-Finley is only relevant to the 821 Contract, not the 803 Contract and the 804 Contract. Claimants have not pursued the loss of their "shareholdings" in Drake-Mesa with respect to the 803 Contract and the 804 Contract. With respect to the 803 Contract and the 804 Contract, Drake-Mesa is relevant due to its ownership of investments (rigs and related equipment) that benefitted the operations under the contracts.

394. Next, Mexico devotes a half-sentence about the 803 Contract and 804 Contract being "turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts."[428] Mexico's argument is unclear. USMCA Article 14.1 defines "investment" as:

> every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. An investment may include . . . .

Article 14.1 continues with a list of things ("may include") that are considered investment. By using "may include," Article 14.1 is clear that this is not exhaustive.

395. As a result, whether the 803 Contract and the 804 Contract fit within an example under USMCA Article 14.1 is irrelevant. The relevant inquiry is whether these contracts had the characteristics of an investment, to wit, (1) there was a commitment of capital or other resources, (2) there was an expectation of gain or profit, or (3) there was an assumption of risk. Even then, the contract must meet only one of these qualities to qualify as an

---

[426] USMCA Article 14-E (2)(b) states that a claimant may bring a claim "on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly. . . ." USMCA Article 14.D.1 states that the term "claimant" means an "investor of an Annex Party that is a party to a qualifying investment dispute." The USMCA Article 14.1 states that "investor of a Party means a Party, or a national or ***an enterprise of a Party***." The USMCA Article 1.5 states that "enterprise of a Party" means an "enterprise constituted or organized under the law of a Party" (emphasis added).
[427] Counter-Memorial, ¶ 393.
[428] Counter-Memorial, ¶ 393.

"investment." Mexico cannot dispute that the 803 Contract and the 804 Contract satisfy all three options.

396. Finally, a performance guarantee can be an investment when it contributes to an economic venture consisting of an investment.[429] As described above, tribunals have distinguished between a loan, bond, or guarantee standing alone with one that is interlinked with an economic venture consisting of an investment such as the 803 Contract and the 804 Contract. Mexico ignores this conclusion.

397. Here, the performance guarantees were explicitly called for under the 803 Contract and the 804 Contract.[430] Accordingly, the guarantees were interlinked with the 803 Contract and the 804 Contract as part of the fulfillment of obligations under both contracts, which themselves are investments in Mexico. Due to this relationship, the US$ 4.8 million and US$ 5.5 million guarantees are investments.

398. For the above reasons, Mexico's objection that Claimants have not made an investment should be rejected.

b) Mexico's "Covered Investment" Objection

399. Mexico argues that the 803 Contract and the 804 Contract are not "covered investments" under USMCA Article 14.1.[431] Article 14.1 of the USMCA defines "covered investment" as "an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter." Mexico argues that the 803 Contract and the 804 Contract were not in existence as of July 1, 2020, thus they are not "covered investments" under USMCA.

400. Mexico's objection is based on a false premise: "on February 10, 2015, Contract 803 was terminated and on April 10, 2015, Contract 804 was also terminated."[432] This is not true.

---

[429] **RL-0025**, *MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (May 4, 2016), ¶ 196.

[430] **C-0032**, 803 Contract at Clause 9, ("The CONTRACTOR, in order to guarantee the fulfillment of the obligations derived from this contract, delivered to 'P.E.P.' prior to the signing of the contract, bond policy for 10% (ten percent) of the amount of the contract issued by an authorized bonding institution, in favor of 'P.E.P.'"); **C-0033**, 804 Contract at Clause 10.1, ("In order to guarantee the fulfillment of the obligations derived from the Contract, the **CONTRACTOR** delivered **PEP**, in original and a copy, prior to the signing of the contract, bond policy(s), for 10% (ten percent) of the Maximum Budget of the Contract, issued by a guarantor institution legally constituted in Mexico and duly authorized to issue bond(s), in favor of PEP, (Guarantee of Compliance), containing the data and adjusting to Annex TX-1.").

[431] Counter-Memorial, ¶¶ 396 et seq.

[432] Counter-Memorial, ¶ 399.

401. MWS and Bisell entered into finiquitos for the 803 Contract and the 804 Contract on these dates. As a result, the "execution period" or *plazo de ejecución* to perform the work under the contracts terminated. But the contracts did not terminate.

402. Clause 3 of the 803 Contract makes clear that the validity (*vigencia*) of the contract continues until the parties sign an act that extinguishes all of the parties' rights and obligations. Likewise, Clause 18 of the 804 Contract is clear that the contract remains in effect until the finiquito is formalized, or in the case the finiquito has amounts owed, until such amounts are paid in full.

403. MWS and Bisell reserved their rights under each finiquito. As a result, neither the 803 Contract nor the 804 Contract terminated. Mexico knows as much. The Mexican companies holding the 809 Contract also entered into a finiquito reserving their rights, and the 809 Contract did not terminate until years later when Pemex finally paid and the parties entered into an Acta de Extinción. Until there is a resolution of the reservations, the 803 Contract and the 804 Contract remain in effect. In fact, they remain in effect to this day.

404. Moreover, at the time the USMCA went into effect, MWS and Bisell had reservation of rights under the finiquitos for the 803 Contract and the 804 Contract, as well as pending claims before domestic courts to adjudicate such claims. These fit squarely within the definition of "investment" and "covered investment" under the USMCA.

405. Relatedly, Mexico repeats its arguments about Claimants other investments (property and equipment). As best Claimants understand, Mexico claims that because the 803 Contract and 804 Contract "terminated," Claimants' equipment and land, etc., automatically lost their investment status as "covered investments" under USMCA Article 14.1. The 803 Contract and the 804 Contract never terminated, thus, this should end the analysis. Moreover, Mexico's argument ignores the independent nature of these assets as investments themselves.

406. USMCA Article 14.1 broadly defines "investment" to include almost every asset. There is no question that Claimants' land and equipment satisfy this definition. It is irrelevant whether they are associated with another asset (the contracts themselves) that also qualifies as an investment. Moreover, they existed at the time the USMCA came into force, thus, they qualify as "covered investments."

407. For the foregoing reasons, Mexico's objection should be rejected in its entirety.

c) Mexico's Scope Objection

408. Mexico notes that USMCA Article 14.2(3) does not bind it to any act or fact that took place before July 1, 2020.[433] Mexico argues that "virtually all of the actions claimed by the Claimants took place before July 1, 2020", thus, the USMCA does not apply. This is not true either.

409. MWS and Bisell claim that they were denied justice and due process in the Mexican court system. This was ongoing when they asserted their USMCA claims. Thus, Mexico's objection does not apply to this claim.

410. MWS and Bisell also claim that Mexico discriminated against them and treated the Mexican service companies holding the 809 Contract more favorably. Luis Kernion explains that he did not receive written confirmation about the Acta Circunstanciada for the 809 Contract, indicting disparate treatment, until September 2020. Thus, Mexico's objection does not apply to these claims either.

411. Relatedly, Mexico argues that no interpretive exercises are necessary regarding this provision.[434] Claimants disagree.

412. As noted above, the domestic lawsuits with respect to the 803 Contract and the 804 Contract were ongoing when Claimants submitted the Request for Arbitration. Claimants made all their claims under the USMCA instead of splitting claims between it and the NAFTA. Indeed, because there are no material differences in the protections under the treaties, doing so would have been putting form over substance.

413. Furthermore, Claimants would have had to bring NAFTA claims associated with the 803 Contract and the 804 Contract under USMCA Annex 14-C(1). As noted above, Annex 14-C allows an investor to bring a NAFTA claim for a "legacy investment" (made during the effectiveness of the NAFTA and in existence upon the USMCA's entry into force). However, Footnote 21 to USMCA Annex 14-C(1) states,

> Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

[433] Counter-Memorial, ¶ 401.
[434] Counter-Memorial, ¶ 402.

414. Thus, even if these were NAFTA claims, footnote 21 required Claimants to bring them under the USMCA if they relate to "covered government government contracts." As explained below, the 803 Contract and the 804 Contract are such contracts.

415. There is a conflict between Footnote 21 and USMCA Article 14.2(3). Under Footnote 21, Mexico required Claimants to bring claims under the USMCA that otherwise could have been brought under the NAFTA. However, USMCA Article 14.2(3) does not allow consideration of facts relevant to a NAFTA claim, to wit, before July 1, 2020. This is an irreconcilable conflict. It would be unjust for Mexico to suggest that acts or facts that would have been examined under the NAFTA no longer pertain to the USMCA claim that Mexico forced under Footnote 21.

416. For the above reasons, Mexico's objection should be rejected in its entirety.

d) Mexico's Objection About "Qualifying Investment Disputes" Under the USMCA

417. Mexico claims that the 803 Contract and the 804 Contract are not "covered investments contracts," as defined under the USMCA.[435] As such, Mexico argues that MWS and Prize do not have a "Qualifying Investment Dispute" under USMCA Article 14-E. This is not correct.

418. As noted above, USMCA Annex 14-E allows a U.S. investor to bring a "Qualifying Investment Dispute" against Mexico directly to arbitration instead of having to first pursue litigation before Mexican courts for 30 months. Notably, Claimants' lawsuits with respect to the 803 Contract and the 804 Contract had been pending before Mexican courts for more than 30 months when they initiated this arbitration, thus, it is unclear why Mexico is arguing about them having a "Qualified Investment Dispute."

419. Moreover, MWS and Bissel have a "Qualifying Investment Dispute." To have a "Qualifying Investment Dispute," MWS and Bissel have to be a party to a "covered government contract." They are.

420. USMCA Annex 14-E(6) defines a "covered government contract" as,

> a written agreement between a national of an Annex Party and a covered investment or investor of the other Annex Party, on which the covered investment or investor relies in establishing or acquiring a covered investment

[435] Counter-Memorial, ¶¶ 403 et seq.

> other than the written agreement itself, that grants rights to the covered investment or investor in a covered sector."

421. A "covered sector" includes "activities with respect to oil and natural gas that a national authority of an Annex Party controls, such as exploration, extraction, refining, transportation, distribution, or sale."

422. There is no debate that under the 803 Contract and the 804 Contract, Pemex granted MWS and Bisell rights to perform oilfield work in Mexico's oil and gas sector. As previously explained, MWS and Bisell relied on these contracts to establish and acquire "covered investments." For example, they purchased land and equipment and leased warehouses to perform under the contracts.

423. MWS's and Bisell's claims fall squarely within the definition of "Qualified Investment Dispute." As such, Mexico's objection should be rejected in its entirety.

424. Claimants assets other than the 803 Contract and 804 Contract are in and of themselves "covered investments" under USMCA Article 14.1. For example, Claimants' equipment and land are clearly "movable or immovable property", and they continue to be so regardless if the 803 Contract and 804 Contract or the pending legal actions arising from them are also "covered investments." Mexico's argument is nothing more than a veiled attempt to create qualifications where none exist. As such, Mexico's attempt to rewrite Article 14.1 should be rejected.

e) Mexico's Time-Bar Objection

425. Similar to the claims related to the 821 Contract, Mexico argues that Claimants' claims related to the 803 Contract and the 804 Contract are time-barred.[436] Once again, Mexico's arguments are without merit.

426. Under USMCA Annex 14-E(4)(b), MWS and Bisell have three years from which they first acquired or should have acquired knowledge of the alleged USMCA breach and resulting damages:[437]

> No claim shall be submitted to arbitration under paragraph 2 if:

[436] Counter-Memorial, ¶¶ 407 et seq.
[437] USMCA Annex 14-E(2)(a)(ii) and (b)(ii) (explaining that the loss or damage is that arising out of that breach).

* * *

> (b) more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under paragraph 2 and knowledge that the claimant (for claims brought under paragraph 2(a)) or the enterprise (for claims brought under paragraph 2(b)) has incurred loss or damage.

427. MWS's and Prize's claims related to the 803 Contract and the 804 Contract are two-fold. *First*, Mexico failed to afford Claimants Fair and Equitable Treatment under USMCA 14.6 by denying them justice and due process with respect to their domestic litigation. These lawsuits were pending when Claimants had to seek their discontinuance to initiate this arbitration. Claimants knowledge of Mexico's breach of its USMCA obligation occurred well after the March 25, 2018 "cut-off" date.

428. *Second*, MWS and Prize claim that Mexico treated at least one Mexican oilfield company more favorably, and that Mexico discriminated against them in its treatment, breaching its obligations under the USMCA. As explained above, MWS and Prize did not know about this disparate treatment until they actually obtained the finiquito in late 2020. This is well within the March 25, 2018 "cut-off" date.

429. With respect to MWS's and Prize's loss or damage arising from these breaches, Mexico is also incorrect as to the timing of when they knew of such. In effect, Mexico argues that MWS and Prize must have known of their loss or damage arising from Mexico's disparate treatment before they even knew of Mexico's breaches of its USMCA obligations.[438] It is axiomatic that MWS and Prize could not have known they had incurred a loss or damage "by reason of, or arising out of" Mexico's breach of its USMCA obligations until they knew, or had reason to know, of such breach.

430. Similarly, MWS and Prize could not have known of their loss or damage arising out of Mexico's failure to provide due process and justice until they had knowledge of such a claim. When MWS's and Bisell's domestic lawsuits regarding their reservation of rights under their finiquitos for the 803 Contract and the 804 Contract had not been adjudicated for more than five years, MWS and Prize realized that the Mexican courts were not interested in rendering

[438] Counter-Memorial, ¶¶ 410-411.

justice. At that point, MWS and Prize realized they had a loss or damage as a result of Mexico's failure to render justice and initiated this arbitration.

431. For the reasons explained above, Mexico's time-bar objection should be rejected.

B. PEMEX'S ACTIONS ARE ATTRIBUTABLE TO MEXICO

432. Mexico argues that Pemex's acts should not be attributed to it under NAFTA Article 1503(2) and USMCA Article 22.3.[439] Mexico does not contest three of the four attribution elements: (1) that Pemex is a state enterprise; (2) that Pemex acted under delegated authority; and (3) that Mexico failed to ensure Pemex acted in manner consistent with Mexico's NAFTA/USMCA obligations.[440] Instead, Mexico disputes the last attribution element: that Pemex was not exercising "regulatory, administrative, or other government authority that [Mexico] has delegated to it . . . ."[441] Mexico is wrong. As explained below, Pemex exercised state authority when it entered into and conducted itself under the 803 Contract, the 804 Contract, and the 821 Contract.

433. As an initial matter, Mexico repeatedly admits in its Counter-Memorial that the contracts were administrative in nature. Mexico labels them as an "administrative contract for the provision of services."[442] Mexico explains how contracts that Pemex entered into under the Pemex Law of 2008, such as the 803 Contract, the 804 Contract, and the 821 Contract, "were considered administrative in nature."[443] Mexico's expert agrees, explaining "all hold an administrative nature."[444]

434. Mexico emphasizes how these contracts are different because they give Pemex a special power to "unilaterally terminate the administrative contracts it entered into since it must ensure the efficient use of public resources."[445] When explaining how the disputes were to be resolved under these contracts, Mexico explains that such contracts entered into under the Pemex Law of 2008, are "considered administrative in nature and the relevant jurisdictional mean was the contentious-administrative one . . . ."[446]

---

[439] Counter-Memorial, ¶¶ 413 et seq.
[440] Counter-Memorial, ¶¶ 10, 424.
[441] Counter-Memorial, ¶ 415.
[442] Counter-Memorial, ¶ 45.
[443] Counter-Memorial, ¶ 32 (citing Report of J. Asali, ¶¶ 13, 22-24).
[444] Report of J. Asali, ¶ 30.
[445] Counter-Memorial, ¶ 33 (citing Report of J. Asali. ¶¶ 23, 24).
[446] Counter-Memorial, ¶ 28.

435. Mexico further claims that Pemex could "unilaterally create, modify or terminate legal situations, without having to resort to jurisdictional or arbitral instances," and that Pemex could "unilaterally terminate, suspend or administratively rescind [the] contract[s]."[447] In fact, Pemex argued in the Mexican lawsuits regarding the reservation-of-rights under the finiquitos for the 803 Contract and the 804 Contract that the 803 Contract and 804 Contract are "administrative in nature."[448] Most striking, Mexico's expert explains, "in consistency with the applicable administrative contractual regime, Contract 821 provides PEP the right to terminate it administratively, unilaterally and without the need of a prior judicial declaration."[449] By definition, Pemex was exercising state authority.

436. To avoid attribution, Mexico argues that Pemex's actions were not administrative in nature. Conversely, Mexico argues that Pemex's actions were administrative in nature to justify Pemex's actions towards Claimants (administratively rescinding the 821 Contract and prolonging the domestic litigation regarding the 803 and 804 Contracts). Mexico cannot have it both ways. If Mexico insists that Pemex's actions towards Claimants were administrative in nature, Mexico must concede that Pemex's actions were administrative with respect to attribution under the NAFTA and the USMCA.

437. Moreover, Mexico misrepresents Claimant's position on why Pemex's acts are attributable to Mexico. Claimants do not contend that Mexico's sole ownership of Pemex by itself is sufficient to attribute Pemex's actions to Mexico.[450] Claimants also do not contend that Pemex simply entering into a contract is "an act of regulatory, administrative or other government authority under the NAFTA and the USMCA."[451]

438. Claimants contend there is no better example of Pemex exercising the regulatory, administrative, or other government authority that Mexico delegated to it than the 803 Contract, the 804 Contract, and the 821 Contract. Mexico does not dispute that Mexico charged Pemex with with conducting and implementing Mexico's oil industry when the

[447] Counter-Memorial, ¶¶ 29, 30.
[448] Counter-Memorial, ¶¶ 210, 256.
[449] Report of J. Asali, ¶ 59.
[450] Counter-Memorial, ¶¶ 420 et seq.
[451] Counter-Memorial, ¶ 435.

contracts were entered into.[452] This included exploring for and extracting Mexico's hydrocarbons.

439. Because Pemex has restricted capacity, Pemex enters into contracts with third parties to help Pemex conduct its exploration and extraction activities.[453] Pemex cannot enter into contracts such as the 803 Contract, the 804 Contract, and the 821 Contract without having first obtained budgetary approval from Mexico's Treasury (*Secretaría de la Hacienda y Crédito Público*). Mexico cannot dispute this.

440. Put simply, when Pemex entered into each of the 803 Contract, the 804 Contract, and the 821 Contract, Pemex was carrying out its charge from the Mexican central government to exploit hydrocarbons on behalf of the State. Mexico does not dispute that the activities under these contracts were part of Mexico's national strategy to further develop the Chicontepec basin in order to offset Mexico's decreasing oil production.[454] By definition, Pemex was exercising government authority delegated to it, as required under NAFTA Article 1503(2) and USMCA Article 22.3.[455] Tellingly, Mexico avoids applying these pertinent facts when arguing why it believes that Pemex's acts are not attributable to it.

441. Instead, Mexico attempts to deflect by raising arguments about whether the NAFTA displaced the ILC Articles regarding state attribution and whether Pemex's "commercial activities" are attributable to Mexico.[456] Even then, Mexico misrepresents what other tribunals have determined regarding the ILC Articles. Mexico also mischaracterizes Claimants' argument by using the cliché "commercial activities."

442. *First*, Pemex's actions are attributable to Mexico under the ILC Articles. Tribunals have applied NAFTA in addition to the ILC Articles in determining attribution. Indeed, the ILC Articles retain a "residual character" even in the presence of a *lex specialis*.[457] Under ILC Article 4, Pemex's conduct is attributable to Mexico because Pemex is a "State organ."[458] Mexico argues

---

[452] Counter-Memorial, ¶ 21.
[453] Counter-Memorial, ¶ 27.
[454] **C-0020**, Proyecto Aceite Terciario Del Golfo Primera Revisión Y Recomendaciones, CNH (2010) at 6.
[455] Tribunals have held that the meaning of "governmental authority" requires a fact-specific inquiry. **CL-0027**, *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award (Sept. 27, 2016), ¶ 234.
[456] Counter-Memorial, ¶¶ 416 et seq.
[457] **CL-0030**, United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1, Award (May 24, 2007).
[458] ILC Articles at Art. 4 ("An organ includes any person or entity which has that status in accordance with the internal law of the State.").

that Pemex is not a State organ because "government ownership of a commercial enterprise does not mean that the enterprise is an organ of the State per se."[459] But this misconstrues Claimants' position. Pemex is a State organ because Pemex has the status of the state "in accordance with the internal law."[460] Mexico cannot dispute this fact. Mexico even concedes that Pemex exercises judicial authority,[461] which the ILC Articles calls "an act of the State."[462]

443. Moreover, Pemex's conduct is also attributable to Mexico under ILC Article 5 and 8. Mexico empowered Pemex to use governmental authority and because Mexico directed Pemex's conduct.[463] Mexico does not contest these points.[464]

444. *Second*, Claimants are not asserting that all of Pemex's "commercial activities" are attributable to Mexico. Pemex purchasing a new computer, for example, would be commercial activity that, without more, would not be attributable to Mexico. However, Pemex using the authority delegated from Mexico to exploit Mexico's hydrocarbons and entering into contracts with third parties to fulfill that objective is most definitely attributable to Mexico. Even Mexico's expert agrees that these contracts were designed to allow Pemex to "guarantee the fulfillment of the state powers conferred to it, as well as the satisfaction of collective needs."[465]

445. Relatedly, Claimants are not arguing that Pemex entering into contracts per se constitutes attribution to Mexico. That would be absurd. The tribunal in *Mesa Power Group, LLC v. Government of Canada*, correctly found that a Canadian state enterprise's actions were attributable to Canada because it acted with government authority by, among other things, offering and awarding contracts.[466] This is what happened with the 803 Contract, the 804 Contract, and the 821 Contract. Mexico delegated broad authority to Pemex to exploit

---

[459] Counter-Memorial, ¶ 427.
[460] ILC Articles at Art. 4(2); **CL-0067**, Declaration of Julio Mora Salas, *Castillo, et al. v. P.M.I. Holdings, N.S., Inc., et al.*, No. 4:14-cv-03435, (S.D. Tex. Apr. 25, 2016), ECF 174-1, ¶¶ 2-5 ("Petróleos Mexicanos (a government-owned productive company) and its Government-Owned Subsidiary Productive Companies (among them Pemex Exploración y Producción and Pemex Transformación Industrial), are under the total control and exclusive ownership of the Mexican government." (emphasis in original)).
[461] Report of J. Asali, ¶ 59; Counter-Memorial, ¶ 30.
[462] ILC Articles at Art. 4(1) (The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.").
[463] ILC Articles at Arts. 5, 8.
[464] Counter-Memorial, ¶ 413 et seq.
[465] Report of J. Asali, ¶ 23.
[466] **CL-0096**, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Concurring and Dissenting Opinion of Judge Charles N. Brower (Mar. 25, 2016).

hydrocarbons for the benefit of Mexico, including entering into contracts to do so. Pemex executed contracts with Claimants to achieve that very goal. Entering into this type of contract squarely fits within the attribution principles under NAFTA Article 1503(2) and USMCA Article 22.3.

446. For the above reasons, Mexico's argument that Pemex's actions should not be attributed to it should be rejected. Pemex's contracts with Claimants were pursuant to a delegation from Mexico to exploit its hydrocarbons for the benefit of the State. As such, Pemex's conduct should be attributed to Mexico.

C. REPLY TO MEXICO'S LEGAL ARGUMENTS ON THE MERITS

447. Claimants explained why Mexico breached its NAFTA and USMCA obligations with respect to their investments by and through the 803 Contract, the 804 Contract, and the 821 Contract.[467]

448. Claimants explained how Mexico violated the National Treatment standard under NAFTA Article 1102 and USMCA Article 14.4 by treating the Mexican nationals holding the 809 Contract more favorably than Claimants.[468]

449. Claimants explained how Mexico breached its obligation to provide Fair and Equitable Treatment under NAFTA Article 1105 and USMCA Article 14.6(1).[469] Claimants applied the facts to explain that Mexico breached NAFTA 1105 when Pemex devised and implemented scheme to terminate the 821 Contract and call upon the US$ 41.8 million Dorama bond. Claimants also applied the facts to explain how Mexico breached both the NAFTA and the USMCA, respectfully when its judicial system failed to provide due process and justice by: (a) not adjudicating Claimants' prosecution of their reservation of rights under the finiquitos for the 803 Contract and the 804 Contract for more than five years, (b) failing to adjudicate the challenge to Pemex's administrative rescission within a reasonable period of time, and (c) by rendering an outcome-oriented decision with respect to the administrative rescission of the 821 Contract, wholly ignoring a specific provision that prevents Pemex from proceeding as it did unless and until fifteen unfulfilled work orders had accumulated.

[467] Statement of Claim, ¶¶ 319 et seq.
[468] Statement of Claim, ¶¶ 319-331.
[469] Statement of Claim, ¶¶ 369 et seq.

450. Finally, Claimants explained how Mexico breached its obligation to provide Fair and Equitable Treatment under NAFTA Article 1105 and USMCA 14.6 because of discriminatory treatment.[470] Claimants applied the facts to explain how Mexico breached its obligation by discriminating against Claimants and their investments in comparison to Mexican nationals and their investments. Based on the facts available at the time, Claimants explained how Pemex ultimately paid Mexican nationals for the resolution of the 809 Contract. In comparison, Claimants had to initiate lawsuits with respect the 803 Contract and the 804 Contract, which endured for more than five years. With respect to the 821 Contract, they received the bogus Work Order 028-2016 which Pemex used to initiate an administrative rescission that a Mexican administrative court would later condone.

451. In response, Mexico begins its legal argument by contending different legal standards for Minimum Standard of Treatment (Fair and Equitable Treatment) apply to its conduct. Mexico devotes nearly fifteen pages of its Counter-Memorial to argue that the NAFTA and the USMCA apply a different legal standard as to what constitutes an FET violation.[471] As best Claimants can discern, Mexico's arguments appear to be as follows: (1) non-NAFTA authorities should be ignored in analyzing the fair and equitable or "FET" standard;[472] (2) the National Treatment standard more properly addresses alleged discriminatory treatment than the Minimum Standard of Treatment standard ("MST");[473] and (3) the FET standard does not encompass free-standing obligations to protect investor expectations, transparency, good faith, and other "vague claims of 'harassment, coercion, abuse, and disparagement.'"[474] Mexico's assertions are misguided.

452. *First*, Mexico argues that non-NAFTA authorities should be ignored when evaluating the FET standard. They should not. Decisions from prior tribunals provide comparisons, and thus, provide contours for "customary international law" on what conduct might violate the FET standard.[475]

[470] Statement of Claim, ¶¶ 379 et seq.
[471] Counter-Memorial, ¶¶ 446-484.
[472] Counter-Memorial, ¶¶ 453-456.
[473] Counter-Memorial, ¶¶ 463-464.
[474] Counter-Memorial, ¶ 465-484.
[475] **CL-0102**, Karol Wolfke, *Custom in Present International Law*, p. 73 (2nd ed., Dordrecht: Nijhoff 1993).

453. Indeed, Mexico agrees that the FET standard under the NAFTA and the USMCA should be determined by "customary international law."[476] Mexico even quotes the tribunal in *Waste Management II* to argue that "customary international law" prohibits Mexico from acting in a way that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial property."[477] Notably, that tribunal continued, "In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant. Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case."[478] Although non-NAFTA awards are not dispositive, they nonetheless serve as helpful guidance on what constitutes "customary international law" and the minimum standard of treatment that it incorporates, which are constantly in a process of development.[479]

454. *Second*, Mexico's argues that the NAFTA's Minimum Standard of Treatment does not encompass discriminatory treatment. According to Mexico, "customary international law" allows it to treat an investment made by a U.S. investor differently than it treats a similarly-situated investment of a Mexican investor. That cannot be the case.

455. Notably, Mexico relies on *Mercer v. Canada* to argue there is a set rule that the Minimum Standard of Treatment does not encompass discriminatory claims.[480] Not true. That tribunal was clear that its decision was "in the circumstances", i.e., based on the facts before it.[481] There, the claimant made the same claim under both National Treatment and MST, to wit, that Canada had discriminated against the claimant itself. In those circumstances, a nationality-based discrimination claim was more proper under NAFTA Article 1102 (National Treatment) than NAFTA 1105(1) (Minimum Standard of Treatment).

456. Claimants agree with Mexico that NAFTA Article 1102 allows them to bring a claim against Mexico for disparate treatment both to them and their investments with respect to Pemex's

---

[476] Counter-Memorial, ¶ 449.
[477] Counter-Memorial, ¶ 462.
[478] **CL-0054**, *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶¶ 98-99.
[479] **CL-0054**, *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 92 (quoting **CL-0049**, *ADF Group Inc. v. United States of America*, Award (Jan. 9, 2003), ¶ 179).
[480] Counter-Memorial, ¶ 463 (citing **RL-0048**, *Mercer International, Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award (Mar. 5, 2018), ¶¶ 7.58-7.60).
[481] **RL-0048**, *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3. Award (Mar. 5, 2018), ¶ 7.60.

treatment of the Mexican nationals and their investment in the 809 Contract. But that is not the only provision under the NAFTA that protects against discrimination. NAFTA Article 1105(1) also allows Claimants to bring a claim for discrimination with respect to their investment. This is why discriminatory treatment has been analyzed so often under the MST standard that it has emerged as one of the key elements to be considered.[482] That is what Claimants have done under NAFTA Article 1105(1) with Mexico's discriminatory treatment of the resolution of the 809 Contract vis-à-vis those of the 803 Contract, the 804 Contract, and the 821 Contract. By definition, Claimants' investments were treated completely differently, which is not acceptable under customary international law.

457. *Third*, Mexico devotes pages to argue about what it calls "free-standing" obligations under the FET standard.[483] As an initial matter, Mexico misstates Claimants' argument. Claimants provided a few elements of the FET under customary international law: (a) avoiding unreasonably arbitrary, and discriminatory measures; (b) ensuring transparency, due process, and justice; (c) avoiding harassment, coercion, and abusive treatment; (d) protecting an investor's legitimate expectations; and (e) acting in good faith.[484] Claimants did not argue that each of these necessarily, by themselves, give rise to a FET breach. Instead, they are elements considered in whether a State's conduct gives rise to such.

458. Indeed, as Mexico argues elsewhere, customary international law is the guiding principle for the FET standard under the NAFTA and the USMCA. As each of the above elements develop, they will gain importance in the FET analysis to determine if a breach has occurred.

459. Nevertheless, Mexico's argument about its FET obligation to protect an investor's reasonable expectations warrants a brief response. Mexico argues adamantly that this is not a "stand-alone" FET obligation.[485] Mexico relies upon an excerpt from a summary about a law professor's views on NAFTA Article 1105 to assert that "'legitimate expectations' cannot

---

[482] **CL-0054**, *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 98 ("Taken together, the *S.D. Myers, Mondev, ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.")

[483] Counter-Memorial, ¶¶ 465 et seq.

[484] Statement of Claim, ¶ 339.

[485] Counter-Memorial, ¶¶ 465 et seq.

constitute an independent basis for a breach of FET under customary law and NAFTA Article 1105(1).[486] Notably, the cited law professor does not make such a blanket statement.

460. Mexico's cited authority proceeds to explain how such a concept exists although some tribunals have tried to qualify its scope of protection.[487] The professor continues to explain that tribunals have applied factors from *International Thunderbird Gaming Corporation*: (a) conduct or representations have been made by the host State; (b) the claimant has relied on such conduct or representations to make its investment; (c) such reliance by the claimant on these representations was 'reasonable'; and (d) the host State subsequently repudiated these representations. This may explain why Mexico continues to argue about the scope of "reasonable expectations" under NAFTA Article 1105(1) immediately after disavowing such exists.

461. With these general observations, Claimants first respond to Mexico's arguments about their claims under the USMCA with respect to the investments made by and under the 803 Contract and the 804 Contract. Then, Claimants respond to Mexico's arguments about their claims under the NAFTA with respect to the investments made by and under the 821 Contract.

1. Mexico Failed to Afford Claimants with National Treatment

462. Mexico breached its National Treatment obligations under USMCA Article 14.4. Mexico treated MWS and Bisell and the 803 Contract and the 804 Contract less favorably than Mexican nationals and the 809 Contract under similar circumstances. Mexico argues that it did not violate the National Treatment standard because (1) public procurement is exempt from the National Treatment obligation, and (2) Claimants have failed to make a prima facie showing of discriminatory treatment.[488] Both of these arguments are without merit and must be rejected.

463. *First*, Mexico argues that the 803 Contract and the 804 Contract are procurement contracts.[489] As such, Mexico contends that USMCA Article 14.12(5) applies and precludes application of Article 14.4 (National Treatment). As an initial matter, Claimants do not agree with Mexico

[486] **RL-0062**, Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105 (Kluwer 2013).
[487] **RL-0062**, Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105 (Kluwer 2013), pp. 265-66.
[488] Counter-Memorial, ¶ 541.
[489] Counter-Memorial, ¶ 544.

that their contracts are "government procurement." USMCA Article 1.5 defines "government procurement" as:

> government procurement means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale or use in the production or supply of goods or services for commercial sale or resale

Mexico does not argue that the 803 Contract and the 804 Contract were entered into for governmental purposes. They were not. These contracts were for the provision of work with a view for the commercial sale of crude oil, once extracted.

464. Moreover, Mexico incorrectly applies the public procurement exemption. The tribunal in *ADF Group Inc. v. United States of America* explained that this exemption applies to when the government is in the act of obtaining or seeking out goods or services:[490]

> In its ordinary or dictionary connotation, "procurement" refers to the act of ***obtaining***, "as by effort, labor or purchase." To procure means "to get; to gain; to come into possession of." In the world of commerce and industry, "procurement" may be seen to refer ordinarily to the activity of obtaining by purchase goods, supplies, services and so forth. Thus, ***governmental procurement refers to the obtaining by purchase by a governmental agency or entity of title to or possession of, for instance, goods, supplies, materials and machinery***.

465. Claimants are not claiming that Mexico violated USMCA 14.4 when Mexico was entering into the contracts. Mexico's actions against Claimants in violation of the National Treatment standard do not pertain to any governmental purchase or obtaining of any goods or services whatsoever. Rather, the unequal treatment is how Pemex resolved the 809 Contract with the Mexican nationals *vis-à-vis* MWS and Bisell and the 803 Contract and the 804 Contract. These actions are not "government procurement."

466. *Next*, Mexico argues that Claimants have failed to demonstrate a prima facie violation of the National Treatment standard. Mexico takes issue with the Claimants' comparison with their treatment and that of the 803 Contract and the 804 Contract with how Pemex treated the Mexican nationals and the 809 Contract.[491] Claimants provided the information available to them when they submitted their Statement of Claim.

---

[490] **RL-0054**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), ¶ 161 (emphasis added).
[491] Counter-Memorial, ¶¶ 552-555.

467. As noted above, Mexico did not comply with its disclosure obligations and disclose the 809 Contract.[492] Nevertheless, Mexico apparently provided a copy to its expert for his review.[493] According to Jorge Asali, the 809 Contract and the 804 Contract are identical except for the date of execution and the budget amounts.[494] As noted above, an inference should be drawn that its terms are identical to the 803 Contract with the same limited exceptions.[495]

468. Pemex's treatment of the Mexican nationals under the 809 Contract is summarized as follows:

- Pemex entered into the 809 Contract with Mexican nationals on March 1, 2013.[496]
- The work under the contract ended on December 31, 2013.[497]
- Pemex and the Mexican nationals entered into the finiquito for the 809 Contract on August 21, 2015.[498]
- Under the finiquito, the Mexican nationals reserved their rights because Pemex had not issued work orders and paid for the minimum budget of US$ 24 million. Mexico had only requested and paid for US$ 8.4 million.[499]
- On April 9, 2018, Pemex and the Mexican nationals entered into the Acta Circunstanciada. Among other things, Pemex agreed to pay US$ 42,167 per day when Pemex did not issue a work order. This amounted to US$ 13.5 million.[500]
- On June 25, 2018, Pemex and the Mexican nationals signed the Acta de Extinción. Pemex acknowledged that it paid US$ 15.054 million to the Mexican nationals.[501]

469. The Mexican nationals and the 809 Contract were similarly situated to MWS and Bisell and the 803 Contract and the 804 Contract. Pemex stopped issuing work orders. Pemex did not meet its expenditure obligations under the contract, not even the minimum amount. Pemex entered into a finiquito. The Mexican nationals reserved their rights to pursue claims against Pemex for the unrequested work.

---

[492] Procedural Order No. 4, Annex 1, Request 15.
[493] Report of J. Asali, ¶¶ 191-192.
[494] Report of J. Asali, ¶ 192.
[495] A similar inference should be drawn with respect to the 821 Contract discussed further below.
[496] **JAH-0063**, Acta de Finiquito, 809 Contract (Aug. 21, 2015).
[497] **JAH-0063**, Acta de Finiquito, 809 Contract (Aug. 21, 2015).
[498] **JAH-0063**, Acta de Finiquito, 809 Contract (Aug. 21, 2015).
[499] **JAH-0063**, Acta de Finiquito, 809 Contract (Aug. 21, 2015).
[500] **JAH-0062**, Acta Circunstanciada (Apr. 9, 2018).
[501] **JAH-0066**, Acta de Extinción, Contract 809 (June 25, 2018).

470. After that, Pemex treated the Mexican nationals and the 809 Contract much more favorably than MWS and Bisell and their two contracts. The Mexican nationals did not have to pursue litigation against Pemex. They also did not have to fight Pemex in domestic courts for more than five years. They got paid nearly US$ 15 million. By definition, Pemex treated the Mexican nationals and their investment much more favorably than MWS and Bisell and their investments.

471. Meanwhile, Pemex paid nothing to MWS and Bisell. Instead, they were forced to litigate with Pemex over their reservation of rights under the finiquitos for the 803 Contract and the 804 Contract. After more than five years, their lawsuits did not get adjudicated. The Mexican nationals and their investment were paid within three years of signing their finiquito with Pemex.

472. Mexico attempts to create distinctions. Mexico points to the direct award of the 809 Contract,[502] the type of work envisioned,[503] the circumstances surrounding the suspension of some of the work,[504] and failed conciliation hearings surrounding settlement as alleged points of differentiation.[505] These are irrelevant.

473. The award process of the contracts has no bearing on the unequal treatment Pemex showed towards MWS and Bisell *after* the it entered into the respective finiquitos. Similarly, the specific type of work being done is also irrelevant. MWS, Bisell, and the Mexican nationals were all engaged by Pemex to assist in the production of hydrocarbons, either by reworking existing wells or drilling new wells. In fact, there was no difference between the work that MWS and Bisell were to perform under the 804 Contract and the Mexican nationals performed under the 809 Contract.

474. Further, Mexico argues that a flooded well because of a tropical storm somehow created a distinction. It does not. In fact, the Acta Circunstanciada shows that Pemex disclaimed paying for that work and that it could have issued a revised work order and given the Mexican national additional time to perform the work, but it chose not to.[506] In that sense, Pemex used the force majeure to stop requesting work altogether, similar to the 803 Contract and the 804 Contract.

---

[502] Counter-Memorial, ¶ 286.
[503] Counter-Memorial, ¶ 287.
[504] Counter-Memorial, ¶ 291.
[505] Counter-Memorial, ¶ 294.
[506] **C-0062**, Acta Circunstanciada (Apr. 9, 2018), p. 2 ¶¶ 3-4.

475. Mexico also claims that Pemex carried out four conciliation hearings with the Mexican nationals concerning the 809 Contract.[507] Mexico did not comply with its disclosure obligations and disclose such information.[508] Regardless, conciliation is an optional process that is not binding unless Pemex agrees.[509] The Acta Circunstanciada for the 809 Contract demonstrates that Pemex never agreed to any compromise after four attempts. Pemex ultimately paid at least US$ 15 million, making the conciliation efforts irrelevant.[510]

476. *Finally*, Mexico claims that "Pemex rescinded hundreds of contracts" from 2006 to 2016.[511] Mexico provides no documentary support of this allegation. Claimants made a public records request for all drilling contracts that Pemex rescinded between 2013 to present.[512] Pemex responded that it had none. If Claimants were treated equally, as similarly-situated Mexican nationals, Claimants would have obtained rescissions of those contracts. It is telling that none exist.

477. Relatedly, Mexico was ordered to disclose all compromises that Pemex had entered into with Mexican nationals performing work in Chicontepec between 2012 and 2021.[513] Mexico disclosed no documents. Mexico's failure to disclose these documents suggests that Pemex entered into more settlements with similarly-situated Mexican nationals than just Integradora and Zapata for the 809 Contract.

478. Claimants have demonstrated the "like circumstances" as required by USMCA Article 14.4. There was a wildly disparate treatment afforded Mexican-owned oilfield services companies and their 809 Contract following the finiquito of the 809 Contract, as compared to the treatment provided to Claimants and the 803 Contract and the 804 Contract following their finiquitos. This is a clear breach of Mexico's National Treatment obligations towards Claimants.

---

[507] Counter-Memorial, ¶ 294.
[508] Procedural Order No. 4, Annex 1, Request 15.
[509] **C-0033**, 804 Contract at Clause 31.
[510] **C-0062**, Acta Circunstanciada (Apr. 9, 2018).
[511] Counter-Memorial, ¶ 555.
[512] **C-0155**, Pemex Response to Public Records Request (June 6, 2022).
[513] Procedural Order No. 4, Annex 1, Request 16.

2. Mexico Failed to Provide Claimants' Investments Fair and Equitable Treatment

a) Mexico Failed to Provide Justice and Due Process to Claimants

479. Mexico does not dispute that its FET obligation under USMCA Article 14.6 includes a protection of providing justice and due process. Mexico also agrees that under the USMCA that not having a final decision from a domestic court within 30 months is too long, allowing an investor to initiate investment arbitration.[514] However, Mexico disagrees that 30 months should be used as a benchmark to determine if there has been a denial of justice and due process when a Mexican court has not rendered a final decision. Mexico also disagrees that the Mexican courts overseeing MWS's and Bisell's claims under their finiquitos for the 803 Contract and the 804 Contract rendered incorrect rulings under Mexican law, further elongating resolution of their straight-forward contract claims. Mexico is incorrect on both counts.

480. *First*, Mexico argues that 30-month period under USMCA 14.6 is irrelevant when analyzing the period of time that Mexican lawsuit must remain unresolved before Mexico has breached its obligation to provide adequate justice and due process. Tellingly, Mexico does not explain why it agreed to this benchmark. Presumably the signatories to the USMCA, including Mexico, deliberated about this issue to agree that 30 months was too long for an investor's lawsuit to remain unadjudicated, allowing the investor to proceed to investment arbitration (and necessarily discontinuing the domestic lawsuit).

481. Instead, Mexico refers to statistics from U.S. federal courts and New York state court guideline (one of 50 state court systems).[515] This data is irrelevant. This is for the United States to argue should a Mexican investor bring a denial of justice claim for its lawsuits that have been pending for more than five years, which is what happened to Claimants.

482. Moreover, Mexico avoids addressing why MWS's and Bisell's remained unadjudicated for more than five years. These lawsuits were for the reservation of rights under the 803 Contract and the 804 Contract. Mexico describes the former as, "MWS and Bisell only intended to protect their rights to process under Mexican law for the payment of non-recoverable

[514] Counter-Memorial, ¶ 486.
[515] Counter-Memorial, ¶¶ 488-490.

expenses."[516] Mexico describes the latter as, "Mexico and Bisell sought to reserve their rights to claim the payment of the 40% of the amount provided in Contract 804, non-recovered expenses and waiting timeouts."[517] Respectfully, these are not complicated claims and should have been adjudicated well within 30 months.

483. As a comparison, consider Finley's, Drake-Mesa's, and Drake-Finley's challenge to Pemex's administrative rescission of the 821 Contract. They filed their administrative lawsuit in August 2017. By October 2018, the court issued its ruling affirming the rescission of the US$ 418 million contract because of one unfulfilled work order. Mexico must admit that the issues in the administrative action were far more complex than the reservation of rights under the finiquitos. The administrative court was able to issue a 250-page opinion in about one year whereas the courts overseeing the reservation-of-rights claims were not able to do so for more than five years.

484. Claimants' experts address in greater detail why these lawsuits remained unresolved for so long. These lawsuits were marred by years of conflicting rulings on the basic issue of whether jurisdiction was proper in Mexico's administrative or civil courts. To illustrate, the 803 Contract civil lawsuit began on October 13, 2015, but the jurisdictional component of the lawsuit was not finally decided until May 10, 2018, nearly two and a half years later.[518] Once that issue was resolved, nearly two more years passed with Pemex arguing evidentiary issues .[519] At bottom, Claimants' experts conclude that the Mexican courts overseeing these domestic lawsuits did not adjudicate in an expeditious or prompt manner.[520]

485. Predictably, Mexico injects COVID-19 into its excuse about why the Mexican courts did not adjudicate these claims for over five years.[521] That accounts for five months of the five-year delay.[522] Notably, the delays addressed above with respect to the 803 Contract civil lawsuit, those delays largely occurred before the COVID-19 pandemic outbreak in March 2020.

[516] Counter-Memorial, ¶ 204.
[517] Counter-Memorial, ¶ 254.
[518] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 77.
[519] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶¶ 78-79.
[520] Statement of Claim, ¶ 373.
[521] Counter-Memorial, ¶ 492.
[522] Counter-Memorial, ¶ 492 (citing Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz, ¶ 82).

486. Mexico also devotes several pages arguing about whether incorrect or unfavorable court rulings, constitute arbitrariness in violation of the FET standard.[523] Indeed, the courts overseeing these lawsuits committed many errors according to Claimants' experts. But Mexico misstates Claimants' argument. With respect to lawsuit related to the 803 and 804 Contracts, the series of contradictory rulings contributed to the excessive amount of time that those lawsuits remained without any adjudication on the merits. Such irregular decisions and judgments, along with the contradictory decisions counter to the principle of res judicata by various Mexican courts, are indicative of an FET violation stemming from unreasonable and inexplicable delays.[524]

b) Mexico Violated the FET Standard by Engaging in Discriminatory Treatment Towards Claimants and Their Investments

487. As discussed in greater detail above, Pemex discriminated against MWS and Bisell and the 803 Contract and the 804 Contract. Mexico cannot dispute that Pemex treated the Mexican nationals holding the 809 Contract completely differently. Based on the limited documents that Mexico actually disclosed, the Mexican nationals were drilling a well under the 809 when a tropical storm hit the region.[525] The well flooded, stopping the work. Pemex refused to revise its work order or extend the period of time to do the work. Pemex also refused to pay for that work.

488. Thereafter, Pemex apparently did not request any additional work from the Mexican nationals. Instead, Pemex entered into a finiquito with them, allowing them to reserve their rights. Less than three years later, Pemex compensated the Mexican nationals for their investment under their reservation of rights, in excess of US$ 15 million. In contrast, MWS and Bisell and their claims under their reservations of rights sat unadjudicated before Mexican courts for over five years.

489. Claimants would have likely been able to show more acts of discrimination. Mexico was ordered to disclose compromises with other Mexican nationals similar to the one Pemex reached with respect to the 809 Contract.[526] Mexico disclosed nothing. An inference should

[523] Counter-Memorial, ¶¶ 494-511.
[524] Statement of Claim, ¶ 378.
[525] **C-0062**, Acta Circunstanciada (Apr. 19, 2018).
[526] Procedural Order No. 4, Annex 1, Request 16.

be drawn that many other examples exist, and Mexico does not want to disclose them because they are adverse to its position in this arbitration.

490. Thus, Pemex's discriminatory treatment of Claimants also constitutes a violation of the FET standard.[527]

3. Mexico Violated its Obligation to Afford Claimants National Treatment under NAFTA Article 1102

491. Mexico makes the same arguments with respect to the 821 Contract as those above regarding the 803 Contract and the 804 Contract.[528] Mexico contends that the 821 Contract is a procurement contract and thus NAFTA Article 1102 (National Treatment) does not apply[529] Mexico then argues that Claimants have failed to show "similar circumstances," and thus, have not properly brought a claim under NAFTA Article 1102. For the same reasons as above, and in furtherance below, Mexico's arguments are unpersuasive and should be rejected.

492. Mexico argues that the 821 Contract was entered into for governmental purposes. It was not. These contracts were for the provision of work with a view for the commercial sale of crude oil, once extracted. Moreover, the public procurement exemption applies to when the government is in the act of obtaining or seeking out goods or services.[530] Claimants' claim under NAFTA Article 1102 has nothing to do with Pemex's procurement of goods or services. It is about Pemex's disparate treatment of Mexican nationals and their investment in the 809 Contract vis-à-vis Claimants and their investment in the 821 Contract.[531]

---

[527] Statement of Claim, ¶ 381.
[528] Counter-Memorial, ¶¶ 541 et seq.
[529] Counter-Memorial, ¶¶ 542 et seq.
[530] **RL-0054**, *ADF Group Inc. v. United States of America,* ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), ¶ 161 ("In its ordinary or dictionary connotation, 'procurement' refers to the act of obtaining, "as by effort, labor or purchase." To procure means "to get; to gain; to come into possession of." In the world of commerce and industry, 'procurement' may be seen to refer ordinarily to the activity of obtaining by purchase goods, supplies, services and so forth. Thus, governmental procurement refers to the obtaining by purchase by a governmental agency or entity of title to or possession of, for instance, goods, supplies, materials and machinery.").
[531] In *Mercer International Inc. v. Government of Canada*, Mexico made a Rule 1128 submission stating: "all of the contractual terms and conditions associated with the procurement of a good by a NAFTA Party or state enterprise fall within the ambit of the term 'procurement' and thus are exempted from the application of Articles 1102 and 1103." **CL-0101**, *Mercer International, Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Mexico NAFTA Article 1128 Submission, (May 8, 2015), ¶ 6. The *Mercer* tribunal went out of their way to disassociate from such an interpretation: "Nor, conversely, does the Tribunal accept Mexico's submission under NAFTA Article 1128 that 'all' of the contractual terms and conditions of a procurement contract fall within the definition of 'procurement.'" **RL-0048**, *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award (Mar. 5, 2018), ¶ 6.43.

493. Mexico's arguments about Finley, Drake-Mesa, and Drake-Finley and the 821 Contract not being in "like circumstances" as the Mexican nationals and the 809 Contract are equally flawed. As an initial matter, as previously noted, Mexico did not comply with its disclosure obligations and disclose the 809 Contract.[532] Moreover, Mexico did not disclose other settlements that it reached with other Mexican nationals performing work in Chicontepec between 2012 and 2021.[533] An inference should be drawn that Mexico does not want to disclose the documents because they contain information that is adverse to Mexico's position in this arbitration.[534]

494. Moreover, Mexico should be precluded from making arguments about "distinctions" between the 821 Contract and the 809 Contract. For example, Mexico should be precluded from arguing that the contracts involved different types of drilling operations. Regardless, Mexico attempts to make a distinction without a difference. The works conducted under both contracts were to extract hydrocarbons from the ground.

495. How Pemex treated the Mexican nationals and the 809 Contract is remarkable compared to Finley, Drake-Mesa, and Drake-Finley and the 821 Contract. After stopping requesting work under the 809 Contract, Pemex proceeded to a finiquito with the Mexican nationals. It agreed to allow the Mexican nationals to reserve their rights to claim amounts for work that Pemex never requested. It then settled with the Mexican nationals, paying them for days that Pemex did not request work at a rate of US$ 42,167/day and a total in excess of US$ 15 million.

496. In contrast, Claimants had to initiate a lawsuit because Pemex had all but repudiated the 821 Contract. In response, Pemex issued a work order to drill a well even though it claimed that it did not have the budgeted funds to pay for it or a drilling permit to drill it. When Finley, Drake-Mesa, and Drake-Finley did not drill the well, Pemex initiated an administrative rescission of the contract.

497. Within a year, Pemex was able to obtain a judgment from an administrative court validating the rescission of the US$ 418 million contract because of one work order, even though the 821 Contract requires an accumulation of 15 unfulfilled work orders for a rescission. But Pemex did not stop there. Now, Pemex is proceeding against the US$ 41.8 million Dorama

[532] Procedural Order No. 4, Annex 1, Request 15.
[533] Procedural Order No. 4, Annex 1, Request 16.
[534] This is in addition to an inference that the terms of the 821 Contract and the 809 Contract are identical except for the budgets and effective dates.

bond, which is particularly disturbing when Pemex only requested approximately US$ 48 million under the contract.

498. Although Finley, Drake-Mesa, and Drake-Finley and the 821 Contract were in similar circumstances as the Mexican nationals and the 809 Contract (and more likely than not in other similar contracts that Mexico has not disclosed) they were treated less favorably. By definition, the Mexican nationals receiving money for the 809 Contract is more favorable than Finley, Drake-Mesa, and Drake-Finley being subjected to an administrative rescission and claims against the entirety of their US$ 41.8 million Dorama bond. Mexico breached its obligations to provide Claimants with National Treatment under NAFTA Article 1102.

4. Mexico Breached its Obligations to Provide Claimants' Investments with Fair and Equitable Treatment

499. Mexico's actions with regards to the 821 Contract warrant specific consideration, as they demonstrate an especially flagrant violation of its FET obligations under NAFTA Article 1105.

500. Mexico first argues that there were no unjustified delays in resolving the litigation over the 821 contract.[535] The one conclusion that can be reached from Mexico's analysis is that when a court wants to rule in favor of Pemex, it does so at a much more rapid pace than it does against it. Mexico notes the speed at which the administrative judge affirmed Pemex's administrative rescission of the 821 Contract: thirteen months.[536] Yet, when arguing about the litigation regarding the 803 Contract and the 804 Contract, Mexico contends that more than five years is a customary wait to have a claim adjudicated. Regardless, Claimants' experts have analyzed the delays with respect to the 821 Contract and have opined that they were unjustified.[537]

501. Next, Pemex argues that a disagreement with judicial rulings do not give rise to an FET claim for denial of justice.[538] Mexico claims that the October 2017 administrative court judgment affirming Pemex's rescission was not "flagrant or serious violations that imply a complete lack of completeness, coherence, and reasoning."[539] This is unserious.

502. Noticeably missing from Mexico's argument regarding the October 2017 judgment is one of the key issues: Article 15.1(r) of the 821 Contract. That provision does not allow an

[535] Counter-Memorial, ¶¶ 523 et seq.
[536] Counter-Memorial, ¶ 524.
[537] Expert Report of Rodrigo Zamora Etcharren and Daniel Amézquita Díaz.
[538] Counter-Memorial, ¶¶ 527 et seq.
[539] Counter-Memorial, ¶ 528 (citing Report of J. Asali, ¶ 187).

administrative rescission because of one work order but instead 15: "in case the Contractor accumulates 15 (fifteen) unfulfilled Work Orders during the Period of Execution of the Contract."[540] It is inexcusable for a court to ignore this provision and confirm Pemex's administrative rescission because of Work Order 028-2016.

503. Pemex also argues that breach of contract claims do not give rise to a denial of the Minimum Standard of Treatment. Mexico again deflects from what Claimants are arguing. Claimants contend that Pemex knew it had promised "Pemex pays, Pemex pays" to entice Finley and Drake-Mesa to submit a bid for and win the 821 Contract. Pemex memorialized that promise in the 821 Contract: "Pemex has secured the resources to carry out the Works that are the object of this Contract."[541] Mexico admits that Pemex ran out of money and could not continue performing under the contracts that it had entered into. In fact, Mexico brazenly justifies Pemex's actions as "preserv[ing] its own economic activity."[542]

504. Claimants contend that Pemex designed a scheme to extricate itself from the 821 Contract using a phony work order. Mexico does not dispute that Pemex did not have the budgeted funds to pay for or the necessary permit to drill the Coapechaca 1240 Well. When Finley, Drake-Mesa, Drake-Finley did not perform, Pemex proceeded to administratively rescind the contract. Curiously, Pemex also did not ask them to perform any more work.

505. Instead, Pemex forced them into litigation for years to protect their interests. More concerning, Pemex somehow knew how an administrative court was going to rule on their challenge to Pemex's administrative rescission. Once it obtained a favorable ruling, Pemex then proceeded against their US$ 41.8 million bond, which as noted above, is very close to the total amount of work that Pemex actually requested under the 821 Contract.

506. Claimants succinctly listed the numerous FET violations in Paragraph 367 of their Statement of Claim. Taken as a whole, Mexico (through Pemex) engaged in acts, in isolation and together with others, that failed to safeguard Claimants' legitimate expectations, were unreasonable and arbitrary, were harassing and coercive, and not in good faith. When considered as a whole, these acts constitute a breach of Mexico's obligations under NAFTA Article 1105 to provide Claimants and their investments with fair and equitable treatment.

---

[540] **C-0034**, 821 Contract at Article 15.1(r).
[541] **C-0034**, 821 Contract at Declaration 1.5.
[542] Counter-Memorial, ¶ 555.

IV. CONCLUSION

507. For the foregoing reasons, Claimants respectfully request that the Tribunal find that:

- The Tribunal has jurisdiction over this arbitration and reject all of Mexico's objections regarding the 803 Contract, the 804 Contract, and the 821 Contract;
- Pemex's actions are attributable to Mexico;
- Mexico breached the National Treatment standard under USMCA Article 14.4 and NAFTA Article 1102 by treating Mexican nationals and their investment more favorably than Claimants and their investments;
- Mexico breached its obligations to provide Fair and Equitable Treatment under USMCA Article 14.6(1) and NAFTA Article 1105 by failing to provide due process and justice to Claimants and their investments;
- Mexico breached its obligation to provide Fair and Equitable Treatment under USMCA Article 14.6(1) and NAFTA Article 1105 by discriminating against Claimants and their investments;
- Claimants are entitled to an award for their costs and expenses incurred because of this arbitration, including the fees and expenses of Claimants' external counsel, the fees and expenses of Claimants' expert witnesses, Claimants' potion of the Tribunal's fees and expense, Claimants portion of the administrative fees and expenses, and Claimants' expenses and fees associated with the hearing on the merits; and
- Claimants are entitled to an award for sanctions against Mexico for its conduct in this arbitration and denying Claimants the ability to submit facts to the Tribunal for the proper adjudication of this dispute, *inter alia*, by withholding documents that it was ordered to disclose that would contradict Mexico's position in this arbitration, using withheld documents such as the 809 Contract affirmatively against Claimants, and shielding testimony from witnesses who have direct knowledge of the facts at issue in dispute.