INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

v.

United Mexican States

(ICSID Case No. ARB/21/25)

PROCEDURAL ORDER NO. 10
(Additional evidence)

Members of the Tribunal
Mr. Manuel Conthe Gutiérrez, President of the Tribunal
Dr. Franz X. Stirnimann Fuentes, Arbitrator
Prof. Alain Pellet, Arbitrator

Secretary of the Tribunal
Ms. Anneliese Fleckenstein

November 22, 2023

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I. BACKGROUND

1. On November 3, 2023, the Claimants indicated that they wished to include in the Electronic Hearing Bundle four additional exhibits and sought the Tribunal's guidance on whether that required that they make an application under paragraph 16.3 of Procedural Order No.1 (PO1, henceforth).

2. At the invitation of the Tribunal, on November 6, 2023, the Respondent stated that the submission of additional evidence could only be made under paragraph 16.3 of PO1 and that the "exceptional circumstances" required by that paragraph were not forthcoming.

3. On November 13, 2023, the Tribunal communicated to the Parties that the submission of new evidence by any Party after the Reply and Rejoinder was subject to article 16.3 of PO1 and, hence, if the Claimants intended to file the new evidence they had described in their November 3, 2023 letter, they should explain the exceptional circumstances on which they were basing their request. Consequently, the Tribunal invited the Claimants to explain those exceptional circumstances as soon as possible, if possible that same day or, at the latest, by Tuesday, November 14, 2023. The Respondent was also invited to comment on the Claimants' communication within the following two days after the Claimants sent it.

4. On November 13, 2023, the Claimants filed a reasoned request stating that they wished to file as additional exhibits the following evidence:

   A. Invoices, receipts, and other materials that corroborate C-0148 (Claimants' Asset List);

   B. Documents evidencing the importation of investments;

   C. Documents evidencing ownership of subsidiary companies that held title to certain investments; and

   D. Documents in response to the "detailed program" that Mexico first raised in its Rejoinder.

5. The Claimants indicated that they no longer sought to submit, as originally announced in their November 3, 2023 letter, certain requests under Mexico's transparency laws and the responses received.

6. On November 15, 2023, the Respondent filed a reasoned objection to the Claimants' application.

II. THE PARTIES' POSITIONS

7. As a general point, in support of their request the Claimants argue that the exceptional circumstances envisaged in paragraph 16.3 of PO1 are present, because Mexico failed to comply with paragraph 14.5 of PO1, to the extent that it did not raise all of its arguments in its Counter-Memorial and, instead, raised new arguments in its Rejoinder. Had Mexico raised these issues in its Counter-Memorial, this would have allowed the Claimants to address them and file the evidence in question in their Reply.

8. The Claimants also note that, with a few exceptions, the Claimants had produced to the Respondent the documents it is now seeking to file on record.

9. On its part, the Respondent notes in its November 6 and November 15 submissions that paragraph 16.3 of PO1 provides that no party may submit additional or responsive documents subsequent to the filing of its last written submission, unless the Tribunal determines that exceptional circumstances exist on the basis of a written and reasoned request. However, despite the Claimants' attempts, the categories of documents identified in the Claimants' November 13 communication clearly do not meet the requirement to demonstrate the existence of "exceptional circumstances" as provided for in PO1.

10. The Respondent recalls that, according to decisions of other investor-State arbitration tribunals, "if a Party chose not to submit evidence that was available to it at the time of filing its written submissions, that situation would, in and of itself, not be exceptional".

11. In the following paragraphs the Tribunal will analyse the specific comments made by the Parties on each group of documents that the Claimants seek to introduce into the record.

A. INVOICES, RECEIPTS AND OTHER MATERIALS ALLEGEDLY CORROBORATING EXHIBIT C-0148

12. The Claimants start by pointing out that they already produced these documents to the Respondent on February 24, 2023, in response to the Respondent's argument in its Counter-Memorial that they had not provided any direct evidence of their purported expenditures.

13. In spite of that production, the Claimants contend that the Respondent insist in its Rejoinder that "the Claimants have not submitted a single purchase receipts or other documents evidencing the purchase (s)" and attack the credibility of the statements of the Claimants' witnesses Jim Finley and Luis Kernion in that regard. Thus, for Claimants "at best Mexico feigns ignorance about the existence of this evidence. At worst, Mexico has not been candid to the Tribunal in its Rejoinder".

14. On its side, the Respondent argues that "the mere exchange of documents in the production of documents phase is not sufficient to support the Claimants' allegations because they do not form part of the arbitration file until they are submitted by a party together with one of its pleadings in accordance with the procedural calendar". "Furthermore, the Claimants had the burden of proof to demonstrate their alleged investments and should have included such documents in their Statement of Claim" or, at the latest, with the Reply.

15. Thus, for the Respondent, "the fact that the Claimants have chosen to submit witness statements rather than documentary evidence in no way justifies the existence of exceptional circumstances".

B. DOCUMENTS EVIDENCING THE ALLEGED IMPORTATION OF INVESTMENTS

16. The Claimants recall that when, in their Statement of Claim, they argued that they imported equipment into Mexico to conduct the work requested under their three contracts with Pemex, Mexico did not contest in its Counter-Memorial that equipment was purchased in

the United States and exported to Mexico, but only questioned who purchased the equipment.

17. According to the Claimants, in their Reply they explained that an entity called Drake-Mesa, LLC had purchased the equipment and then transferred ownership to Drake-Mesa S. de R.L. de C.V. upon their import into Mexico. In support of that fact, the Claimants submitted testimony from Jim Finley who explained that a list of equipment was kept with respect to the equipment purchased for use in Mexico - C- 0148.

18. The Claimants consider that in its Rejoinder Mexico changed its focus by arguing for the first time that the Claimants had not submitted "reliable evidence of what equipment was sent to Mexico" and that the Claimants' list of equipment purchased for use in Mexico under the contracts "does not validate that any particular item was sent to Mexico." The Claimants further complain that Mexico attacks Jim Finley's credibility and reputation and even suggests in a footnote that he submitted testimony describing a list for equipment that was used in Finley Resources's operations in the United States, not in Mexico.

19. For the Claimants, had Mexico challenged whether equipment was imported into Mexico, the Claimants could have responded in their Reply and could have submitted the documents showing these imports. Instead, Mexico waited to raise the issue only in its Rejoinder, and worse, it did so by attacking the credibility of Jim Finley without any basis for doing so.

20. The Respondent argues, on its side, that the Claimants had the burden of proof to demonstrate their alleged investments and should have included such documents in their Statement of Claim or, at the latest, with the Reply, particularly since, contrary to the Claimants' statement, the Respondent had argued in its Counter-Memorial that the Claimants had not demonstrated that they had made an investment within the meaning of the NAFTA and the USMCA.

21. For the Respondent, the Claimants acknowledge that they had the opportunity to submit these documents with their Reply when they point out that "[h]ad Mexico challenged

whether equipment was imported into Mexico, Claimants could have responded in their Reply", but failed to do so even if the documents were in their possession.

C. DOCUMENTS EVIDENCING OWNERSHIP OF BAKU EXPLORACIÓN Y PRODUCCIÓN, S.A. AND ROYAL SHALE CORPORATION, S.A.

22. The Claimants argue that, after Mexico questioned in its Counter-Memorial the ownership of the real estate purchased in connection with the operations conducted under the 803, 804 and 821 Contracts, they explained in their Reply that Baku Exploración y Producción, S.A. ("Baku"), a subsidiary of Prize Permanent Holdings, had purchased this land. And on February 24, 2023, they disclosed to Mexico documents that evidence Prize's ownership of Baku.

23. In spite of that disclosure, in its Rejoinder Respondent challenged Mr. Kernion's testimony about Prize's ownership of Baku and claimed that the Claimants had not provided evidence of such ownership.

24. The Claimants argue that, similarly, when Mexico claimed in its Counter-Memorial that the Claimants had not provided evidence of Royal Shale Corporation, one of the owners of Bisell Construcciones e Ingeniería, S.A. de C.V., the Claimants produced to Mexico documents proving that ownership.

25. Despite this production, according to the Claimants Mexico asserts in its Rejoinder that the Claimants "have expressly refused to provide information about Royal Shale Corporation", that "Claimants wish to hide the identity of the other owners of Drake-Mesa and Bisell" and, even worse, that Royal Shale and the other owners of Bisell were "connected to unlawful activity, such as tax evasion or money laundering", which is pure speculation, if not libel.

26. The Respondent argues that in its Counter-Memorial it questioned the existence of ownership and control of Bisell's owners' companies.

27. The Respondent further states that "the mere exchange of documents in the production of documents phase is not sufficient to support Claimants' allegations since the documents had to be submitted by a party together with one of its pleadings in accordance with the procedural calendar". The Claimants had the burden of proof to demonstrate their alleged investments, and they should have included such documents together with their Statement of Claim. They did not and even choose not to submit supporting documents with their Reply, on the basis that Mexico was not entitled to know the ownership of Royal Shale Holdings.

D. DOCUMENTS ON THE "DETAILED PROGRAM" RELATED TO WORK ORDER 082-2016

28. The Claimants argue that in its Rejoinder Mexico introduced a new argument that they had not made in their Counter-Memorial: it blamed the Claimants for Pemex being unable to request and obtain a drilling permit before issuing Work Order 082-2016, as Pemex needed "technical information" to obtain the permit which, according to Mexico, the Claimants failed to provide.

29. For the Claimants, had Mexico made these arguments in its Counter-Memorial, the Claimants could have submitted in its Reply a document that Mexico produced to the Claimants following the Tribunal's PO4 (Request No. 9.29), which proves that Pemex did not need anything from the Claimants to obtain the drilling permit for the Coapechaca 1240.

30. The Respondent argues that the Claimants should have included such documents in their filing of the Statement of Claim since they had the burden to prove their case.

31. Furthermore, the Respondent notes that in paragraph 108 of its Counter-Memorial it argued that one of the grounds for termination of Contract 821 had been the "failure to comply with Annex DT-2 of Contract 821, which required Drake Finley to submit to PEP the drilling work program, perform verifications, and provide the necessary drilling equipment to perform the required work." Thus, as the documents referred to by the Claimants existed at least since before August 28, 2017, the Claimants should have filed them at the latest with their Reply.

III. TRIBUNAL'S ANALYSIS

32. The Tribunal is of the view that, in deciding whether the additional evidence mentioned by the Claimants in their November 13 communication should be filed and be included in the Electronic Hearing Bundle, some practical considerations should be taken into account.

33. First, the Tribunal notes that both Parties, including the Respondent, have already in their possession 3 of the 4 groups of documents which the Claimants are seeking to file (*i.e.*, documents A, C and D), and it is only the Tribunal which has not had access to them. Thus, such documents are "new" only for the Tribunal, and its filing would not put the Respondent at a disadvantage, while providing the Tribunal with information which is already in the Parties' possession.

34. Second, the information contained in the documents will in all likelihood, one way or another, come up and be mentioned during the examination of the Claimants' witnesses, Messrs. Finley and Kernion, which might likely be followed by a request, either from the Parties or from the Tribunal itself, that the documents be filed after the Hearing. Thus, the admission now of the documents, and of any others as well that the Respondent may want to file in rebuttal, will avoid procedural discussions during the examination of the Claimants' witnesses and make for a more efficient Hearing.

35. Third, the Tribunal notes that the Respondent itself does not appear to attach particular importance to the documents, since it argues in its November 15, 2023 response that the documents "are in no way determinative of the issues surrounding whether Claimants demonstrated that they made an investment in Mexico, nor would they resolve any other relevant issue." Thus, the filing of the documents now is not likely to put the Respondent at a disadvantage and run afoul of the principle of due process.

36. Fourth, 3 of the 4 groups of documents (namely, documents A, B and C), while not apparently determinative in the Respondent's view, are related to one of the jurisdictional objections raised by the Respondent, namely, that the existence of a protected "investment" by the Claimants in Mexico is not established, and, hence, are of interest for the Tribunal.

Thus, by being admitted prior to the Hearing, it will be possible to test the documents against the witnesses' testimony, thereby facilitating their assessment by the Tribunal were the Tribunal to find them determinative or relevant concerning the issue of whether there exists a protected investment by the Claimants.

37. Finally, there are ways that the Tribunal can and will pursue to preserve the balance between the Parties and the rights of the Respondent if, as it has claimed, it might be adversely affected by the filing of the additional evidence: first, the Tribunal will offer the Respondent an opportunity to file any document or other evidence which Mexico considers responsive to the additional evidence filed by the Claimants; and second, as foreseen in paragraph 49 of PO9, if justified as a result of the Hearing or appropriate on other grounds, the Tribunal might potentially decide that a new round of written allegations takes place after the Hearing, before the Parties simultaneously file their Post-Hearing Briefs, thereby allowing the Respondent to plead and respond in writing to the new additional evidence filed now by the Claimants.

38. The Tribunal notes that paragraph 15.1 of PO1 establishes that the 2020 IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules"), to the extent that they are consistent with the ICSID Arbitration Rules, will guide the Tribunal on evidentiary matters. One of the rules contained in the 2020 IBA Rules, which is not inconsistent with the ICSID Arbitration Rules, is contained in article 3.10 (i) of the IBA Rules, which empowers arbitral tribunals, at any time before the arbitration is concluded, to "request any Party to produce documents".

39. In keeping with that provision, the Tribunal has decided, on its own volition and motion, to request the Claimants to submit into the record the documents mentioned in their November 13, 2023 letter and to request the Respondent, if it so wishes, to submit into the record any documents or other evidence that it considers responsive to the documents newly filed by the Claimants.

40. In so deciding, the Tribunal does not see any need to rule on the issue, debated between the Parties, of whether the "exceptional circumstances" envisaged in paragraph 16.3 of PO1 were or not forthcoming.

IV. DECISION

In light of the above, The Tribunal decides:

1. To request the Claimants, on the basis of article 3.10 i) of the IBA Rules on the Taking of Evidence in International Arbitration, to produce and file urgently the evidence described in their latest memorandum, dated November 13, 2023.

2. To invite the Respondent, if it so wishes, to produce and file urgently any documents or other additional evidence which it considers responsive to the Claimants' newly filed documents, with a written statement on the content of this evidence.

3. To direct the Parties to include any newly produced documents resulting from the above in the Electronic Hearing Bundle described in paragraph 19 of PO9.

For and on behalf of the Tribunal,

[signed]

Mr. Manuel Conthe Gutiérrez
President of the Tribunal
Date: November 22, 2023