

ICSID CASE No. UNCT/18/5

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN
ACCORDANCE WITH THE AGREEMENT BETWEEN THE GOVERNMENT OF THE
UNITED MEXICAN STATES AND THE GOVERNMENT OF THE REPUBLIC OF
SINGAPORE ON THE PROMOTION AND RECIPROCAL PROTECTION OF
INVESTMENTS

AND

UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW 2010

B E T W E E N:

PACC OFFSHORE SERVICES HOLDINGS LTD

Claimant

-and-

THE UNITED MEXICAN STATES

Respondent

STATEMENT OF CLAIM

March 20, 2019

QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 MADISON AVENUE, 22ND FLOOR, NEW YORK, NY 10010

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I. INTRODUCTION

1. Pursuant to Article 11 of the Agreement between the Government of the United Mexican States and the Government of the Republic of Singapore on the Promotion and Reciprocal Protection of Investments (the **BIT** or the **Treaty**),¹ Article 20(1) of the UNCITRAL Arbitration Rules 2010 and Section 15.2 of Procedural Order No. 1 dated November 28, 2018, Claimant submits its Statement of Claim with accompanying exhibits, legal authorities, witness statements and expert reports.

2. Claimant's submission is accompanied by factual exhibits, numbered sequentially C-8 to C-246 and legal authorities numbered sequentially CL-2 to CL-161. The submission is further supported by three witness statements of the persons with actual knowledge during the relevant period that culminated in the destruction of the investment made by Claimant and its subsidiaries in Mexico, and five expert reports, namely:

- i. the Witness Statement of Captain Gerald Seow, CEO of POSH;²
- ii. the Witness Statement of Lee Keng-Lin, COO of POSH during the relevant period and currently Deputy CEO of POSH;³
- iii. the Witness Statement of Jose Luis Montalvo Sanchez Mejorada, CEO of Inversiones Costa Afuera, S.A. de C.V.;⁴
- iv. the Expert Legal Opinion of Diego Ruiz Durán on Mexican Criminal Law;⁵

¹ Agreement between the Government of the United Mexican States and the Government of the Republic of Singapore on the Promotion and Reciprocal Protection of Investments, signed on November 12, 2009, and entered into force on April 3, 2011, **CL-1**.

² Witness Statement by Captain Gerald Seow dated 20 March 2019 (**Witness Statement by Gerald Seow**).

³ Witness Statement by Lee Keng-Lin dated 20 March 2019 (**Witness Statement by Keng-Lin**).

⁴ Witness Statement by José Luis Montalvo Sánchez Mejorada dated 20 March 2019 (**Witness Statement by José Luis Montalvo**).

⁵ Expert Legal Opinion on Mexican Criminal Law by Diego Ruiz Durán dated 20 March 2019 (**Expert Legal Opinion on Criminal Law by Diego Ruiz Duran**).

- v. the Expert Legal Opinion of David Enríquez on Mexican Foreign Investment Law;⁶
- vi. the Expert Legal Opinion of Luis Manuel C. Meján Carrer on Mexican Insolvency Law;⁷
- vii. the Industry Report of Jean Richards of Quantum Shipping Services Ltd., on the offshore oil and gas supply industry;⁸ and
- viii. the Expert Valuation Report of Kiran Sequeira and Garret Rush of Versant Partners, on the valuation of the assets and business lost by Claimant as a result of Mexico's Treaty violations.⁹

II. EXECUTIVE SUMMARY

3. Claimant has initiated these proceedings in order to obtain full compensation for the damage caused by Mexico's unlawful conduct in breach of the Treaty in relation to its investments in Mexico and that of its subsidiaries.

4. In 2011, the Mexican state-owned oil & gas company, Petróleos Mexicanos (PEMEX), planned to increase its oil production levels, for which it required more modern offshore support vessels that Mexican local operators were unable to provide. POSH decided to respond to this need for foreign capital with the intention of acquiring and bareboat chartering vessels to operators that serviced PEMEX.

5. The investment thesis was straightforward. PEMEX awarded long-term contracts to Mexican-flagged vessels owned by Mexican companies with which it had long-standing relationships. Therefore, POSH needed to establish a Mexican entity and partner with a Mexican company that already had an established relationship with PEMEX. POSH decided to partner with Oceanografía, S.A. de C.V. (OSA) which was the largest oil and gas services company in Mexico and had entered into over 100 contracts with PEMEX over the previous decade. POSH would

⁶ Expert Legal Opinion on Mexican Foreign Investment Law by David Enríquez (**Expert Legal Opinion on FIL by David Enríquez**).

⁷ Expert Legal Opinion on Mexican Insolvency Law by Luis Manuel C. Meján Carrer dated 20 March 2019 (**Expert Legal Opinion on Insolvency Law by Luis Manuel Camp**).

⁸ Expert Report on the Offshore Maritime Industry by Jean Richards dated 20 March 2019 (**Expert Industry Report by Jean Richards**).

⁹ Expert Report on Damages by Versant Partners dated 20 March 2019 (**Expert Damages Report by Versant**).

provide modern vessels to serve PEMEX's offshore needs, and OSA would bid in PEMEX's public tenders. The vessels would be bareboat chartered to OSA, which would, in turn, sub-charter them to PEMEX.

6. The investment would succeed so long as the vessels of POSH's subsidiaries remained available to provide maritime services, OSA was able to perform under its bareboat charters with POSH subsidiaries including pay the charter hire, and OSA was able to contract with PEMEX to provide maritime services with the vessels owned by POSH's subsidiaries.

7. Pursuant to the investment thesis, in 2011 and 2012 POSH established a joint venture with OSA's main shareholders, incorporated several subsidiaries in Mexico, financed the acquisition of eight Mexican-flagged vessels and assigned another two Singaporean-flagged vessels through two Singaporean subsidiaries. OSA's shareholders were silent partners of the Mexican joint venture. POSH was the largest shareholder of the joint venture and retained full control of its subsidiaries.

8. By mid-2013, the investment was in full operation, generating revenue and succeeding according to plan. POSH's subsidiaries had entered into ten charter contracts with OSA, one for each vessel, and OSA had placed them at the direct or indirect service of PEMEX. To protect the investment, POSH had collateralized the financing against the vessels and had further arranged that payments owed by PEMEX to OSA would be made to an irrevocable trust, of which POSH was the primary beneficiary. By early 2014, POSH's subsidiaries were successfully performing works for PEMEX (via OSA) and building their reputation in Mexico. PEMEX's consistent business practices showed that it renewed its contracts with reliable service providers. On that basis, POSH had grounded and legitimate expectations that its contracts with PEMEX (via OSA) would be renewed too.

9. Beginning in February 2014 and over the course of several months, however, Mexico took a series of excessive, unreasonable, arbitrary and unlawful measures against OSA and its business partners, including POSH's subsidiaries, that ultimately destroyed POSH's investment.

10. Mexico engaged in a politically-motivated campaign against OSA to sever the ties it had established with PEMEX during the previous administrations led by different political parties. This campaign began with an unlawful administrative sanction banning OSA from entering into any public contract, including with PEMEX, leading to OSA's demise and destroying

its ability to perform on its contracts with POSH's subsidiaries. It continued with an unsupported criminal investigation against OSA, in which the State abused its powers, took control of OSA and decided not to effect payments owed to POSH's subsidiaries. It ended with OSA's insolvency proceedings under the firm control of the State, which decided not to perform on its contracts with POSH's subsidiaries, diverted payments owed to POSH (via the irrevocable trust) and prevented PEMEX from assigning contracts to POSH's subsidiaries. These measures either directly impacted, or were specifically targeted at POSH's investment and resulted in its destruction. Significantly, the Mexican government has never claimed that POSH or its Mexican subsidiaries were involved in any wrongdoing or had any connection with OSA's alleged wrongdoing. Regardless, Mexico took actions without regard for the harm to POSH's investment, and without any concern to its destruction.

11. *First*, Mexico issued a resolution accusing OSA of allegedly failing to provide insurance policies covering 10% of the value of nine of its contracts with PEMEX, as required by Mexican Law, and banning OSA from entering into new contracts with any public entity, including PEMEX. This measure—which was plainly unlawful and was later declared illegal and revoked by Mexican courts—irreparably impaired OSA's ability to perform on its contracts with POSH's subsidiaries. The subsequent corrective action by Mexican courts could not remedy the destructive actions of the State. When the sanction was revoked, OSA was already undergoing insolvency proceedings and thus could not meet PEMEX's financial requirements to be awarded new contracts. As a result, OSA would never be awarded a single contract by PEMEX or perform on its contracts with POSH's subsidiaries again. This measure destroyed one of the main pillars of the investment—OSA's ability to contract with PEMEX—and harmed POSH irreparably, although it has never been accused of any alleged wrongdoing.

12. *Second*, Mexico initiated a politically motivated campaign against OSA to destroy its business relationship with PEMEX that OSA had built up over several years. The Mexican press at the time echoed the collective belief that the new administration was engaged in a hunt to bring down the company that it deemed to have been favored by prior administrations, as a political *vendetta* against the opposing political party. Over the course of that campaign, Mexico would indiscriminately target OSA and its business partners, including POSH's subsidiaries, ultimately destroying their investment.

13. *Third*, Mexico initiated an unsupported criminal investigation against OSA for alleged money laundering and fraud through an unlawful criminal complaint and without any

indications of illegal activity. Given the political purpose of investigation, it is no surprise that Mexico did not discover any evidence of wrongdoing to support any charges—and in fact it never brought any charges— against OSA. In this process, however, Mexico abused its powers and adopted a series of unlawful and disproportionate measures against OSA and POSH's subsidiaries, without regard for their lawful rights as international investors and although they had no connection with OSA's alleged (and unproven) improprieties. The actions described below are a testament thereto.

14. *Fourth*, on the basis of the unlawful investigation, Mexico seized all of OSA's assets and took control of OSA. There were no signs of criminal activity by OSA and the seizure had no factual or legal basis. Moreover, Mexico did not provide any grounds for this unlawful, arbitrary and disproportionate decision. This measure directly impacted POSH since, upon taking control of OSA, the State effectively blocked the payments of OSA's debts to POSH's subsidiaries. OSA remained seized for over three years and the seizure was ultimately lifted due to the lack of evidence of any criminality. The seizure was simply a tactic for Mexico to gain full control of OSA, and resulted in the effective blocking of payments to POSH's subsidiaries.

15. *Fifth*, in addition to seizing OSA's assets, Mexico also unlawfully seized the ten vessels owned by POSH's subsidiaries which had been chartered to OSA. The detention order, directly targeted at POSH's subsidiaries was fatally flawed, as it stemmed from an unlawful criminal investigation and seizure of OSA. During the criminal investigation, Mexican public authorities never made any reference to POSH's vessels nor to their alleged connection with any crime. In addition, the authorities never disputed that the ten vessels did not even belong to OSA, but to POSH's subsidiaries. For several months, the subsidiaries were deprived of another pillar of the investment—the availability of vessels. Due to the lack of evidence of connection with any alleged crime, the authorities ended up releasing the vessels without further justification.

16. *Sixth*, Mexico drove OSA into insolvency, while acknowledging that the sanction it imposed on OSA—preventing it from entering into public contracts, including with PEMEX—was the proximate cause of the insolvency. Mexico had effectively blocked payments owed by OSA to POSH's subsidiaries upon taking control of OSA, and officially suspended all payments to creditors within the insolvency proceeding. Moreover, Mexico specifically targeted POSH and unlawfully diverted the payments owed by PEMEX to POSH via the irrevocable trust. OSA was not the lawful holder of the collection rights against PEMEX—POSH was, as primary beneficiary of the trust. This measure constituted a direct expropriation of POSH's lawful rights under the

trust and it further deprived POSH's subsidiaries from any income, value or use of another pillar of their investments—the contracts with OSA.

17. *Seventh*, Mexico blocked POSH's subsidiaries from contracting directly with PEMEX. PEMEX feared that OSA's insolvency would hinder its operations and was willing to rescind its contracts with OSA and assign new contracts directly to POSH's subsidiaries. However, the Mexican agency administering OSA after its seizure and the Mexican insolvency court presiding over OSA's insolvency proceedings prevented PEMEX from rescinding these contracts. This measure directly impacted OSA's business partners, including POSH's subsidiaries, preventing them from earning a return on POSH's vessels through PEMEX, which was the core of POSH's maritime services investment.

18. Mexico's acts and omissions deprived POSH and its subsidiaries of the value, use and benefit of their investment. The entire basis of the hitherto profitable investment was destroyed: the vessels had been detained for several months; the subsidiaries did not receive any payments from the contracts with OSA and POSH could not contract directly with PEMEX either. There was no cash flow, no activity and, for several months, no vessels. As a result, POSH's subsidiaries defaulted on the loans granted to finance the acquisition of the vessels, which were then enforced and the vessels sold to use the proceeds as re-payment for the loans. In February 2015, one year after Mexico initiated its political campaign against OSA, POSH's subsidiaries had no vessels, no contracts with OSA, and no possibility to contract with PEMEX.

19. Mexico's conduct is in breach of the provisions of the Treaty prohibiting expropriation without just, effective and prompt compensation, as well as the provisions requiring Mexico to afford fair and equitable treatment and full protection and security. These Treaty breaches caused direct and substantial harm to Claimant and its subsidiaries.

20. In accordance with well-settled principles of international law, Claimant seeks full reparation for the losses resulting from Mexico's violations of the Treaty and international law, in the form of monetary compensation sufficient to wipe out the consequences of Mexico's wrongful acts.

21. That compensation must reflect the fair market value of the investment made by POSH and its subsidiaries but-for Mexico's unlawful conduct. The fair market value of that investment has been calculated by Kiran Sequeira and Garret Rush, from Versant Partners, and

includes two components: historical losses suffered prior to the valuation date and future losses calculated on the basis of the income approach through a discounted cash flow (**DCF**) method.

22. In order for Claimant and its subsidiaries to receive full reparation for the losses caused by Mexico's wrongful conduct, the quantum of damages suffered must include prejudgment interest accruing the valuation date until the date of the award. Versant Partners has updated the above figures to include pre-judgment interest as of the date of this Statement of Claim at a normal commercial rate compounded annually. As summarized in the table below, total damages to Claimants amount to \$213,297,620 million as of March 20, 2019.

Loss by Entity (US\$)	Nominal Damages	Pre-award Interest	Total
POSH	85,472,593	66,552,572	152,025,166
GOSH	35,372,118	25,891,116	61,263,234
PFSM	5,323	3,896	9,220
POSH Honesto	-	-	-
POSH Hermosa	-	-	-
SMP	-	-	-
Total	120,850,035	92,447,585	213,297,620

23. This Statement of Claim is structured as follows. Section III describes the parties to the dispute. Sections IV to VI describe the facts relevant to the dispute. Section VII sets out the law applicable to this dispute. Section VIII addresses the basis of the Tribunal's jurisdiction over these claims. Section XIX provides an analysis of the obligations incumbent upon Mexico through the Treaty, and how Mexico's actions breached these obligations. Section XI describes the damages suffered by Claimant and its subsidiaries. Section XII contains Claimant's request for relief.

III. THE PARTIES TO THE DISPUTE

A. THE CLAIMANT

24. The Claimant in this arbitration is POSH. POSH was incorporated in Singapore on March 7, 2006, and converted into a public company limited by shares under Chapter 50 of the

Singaporean Companies Act, on April 2, 2014. POSH's registry number is 200603185Z.¹⁰ POSH's principal activities are the chartering of ships, barges and boats with crew.

25. Pursuant to Article 11(2) of the Treaty,¹¹ POSH brings this claim in its own name and on behalf of its subsidiaries in Mexico (**POSH's Subsidiaries** or the **Subsidiaries**), which are set forth below.

26. Servicios Marítimos GOSH, S.A.P.I. de C.V. (**GOSH**), is a company incorporated in and under the laws of Mexico on September 9, 2011. GOSH's registry number is 455.710-1. GOSH is a jointly controlled entity. Initially, POSH owned a 49% interest through Mayan Investments Pte. Ltd. (**MAYAN**), and three Mexican partners owned the remaining interest: Arrendadora Caballo de Mar III, S.A. de C.V. (**Arrendadora**), owned 25%, GGM Shipping, S.A. de C.V. (**GGM**), owned 25%; and Inversiones Costa Afuera, S.A. de C.V. (**ICA**), owned 1%. On September 16, 2014, GOSH Caballo Eclipse, S.A.P.I. de C.V. (**ECLIPSE**), a minority-owned, indirect subsidiary of POSH, acquired a 50% interest in GOSH from Arrendadora and GGM.¹² At the time of the measures, GOSH was a vessel owning company.

27. Servicios Marítimos POSH, S.A.P.I. de C.V. (**SMP**) is a company incorporated in and under the laws of Mexico on March 22, 2012 under the name "SERMARGOSH 2, S.A.P.I. de C.V." Its current name, SMP, was adopted on May 6, 2014. SMP's registry number is 481.265-1. SMP is a jointly controlled entity. POSH owns a 49% direct interest in SMP through MAYAN and ICA owns the remaining 51%.¹³ In the relevant period, SMP's purpose was to serve as a holding company to invest in other group companies.

28. POSH Honesto, S.A.P.I. de C.V. (**HONESTO**) is a company incorporated in and under the laws of Mexico on May 9, 2012 under the name "GOSH Rodrigo DPJ, S.A.P.I. de C.V." Its current name, HONESTO, was adopted on May 6, 2014. HONESTO's registry number is

¹⁰ Certificate confirming PACC Offshore Services Holdings Pte Ltd's conversion to a public company and change of name to PACC Offshore Services Holdings Ltd., dated April 7, 2014, **C-2**.

¹¹ Mexico-Singapore BIT, Art. 11 "Submission of a Claim... 2. An investor of a Contracting Party, on behalf of an enterprise legally constituted pursuant to the laws of the other Contracting Party that is a legal person such investor owns or controls, directly or indirectly, may submit to arbitration a claim that the other Contract Party has breached an obligation set forth in Chapter II, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.", **CL-1**.

¹² Servicios Marítimos GOSH, S.A. Shares Registry Book dated 26 September 2014, **C-9**.

¹³ Public Deed No. 63,246, recording the Extraordinary Shareholders Meeting of Servicios Marítimos POSH, S.A.P.I. de C.V., from 5 May 2014, dated 6 May 2014, p. 6, **C-10**.

473.789-1. HONESTO is a jointly controlled entity. SMP owns 99.999% interest in HONESTO. ECLIPSE owns the remaining 0.001%.¹⁴ In the relevant period, HONESTO was a vessel owning company.

29. POSH Hermosa, S.A.P.I. de C.V. (**HERMOSA**) is a company incorporated in and under the laws of Mexico on May 9, 2012 under the name “GOSH Caballo de Oro, S.A.P.I. de C.V.” Its current name, HERMOSA, was adopted on May 6, 2014. HERMOSA’s registry number is 473.788-1. HERMOSA is a jointly controlled entity: SMP owns 99.999% interest in HERMOSA. HONESTO owns the remaining 0.001%.¹⁵ In the relevant period, HERMOSA was a vessel owning company.

30. ECLIPSE is a company incorporated in and under the laws of Mexico on May 9, 2012. ECLIPSE’s registry number is 473.787-1. SMP owns 99,999% interest in ECLIPSE and HERMOSA owns the remaining 0,001%. At the time of the measures, ECLIPSE’s purpose was to serve as a holding company to invest in other group companies.¹⁶

31. POSH Fleet Services Mexico, S.A. de C.V. (**PFSM**) is a company incorporated in and under the laws of Mexico on November 23, 2011 under the name “SERMARGOSH 1, S.A.P.I. de C.V.” Its current name, PFSM, was adopted on June 13, 2013. PFSM’s registry number is 467.475-1. PFSM is a jointly controlled entity. POSH owns a 99% direct interest in PFSM through MAYAN, and ICA owns the remaining 1%.¹⁷ In the relevant period, PFSM was a technical and crew management service provider.

B. THE RESPONDENT

32. Respondent in this arbitration is the United Mexican States (**Mexico** or the **State**), a sovereign State and a Contracting Party to the Agreement between the Government of the United

¹⁴ Public Deed No. 63,244, recording the Extraordinary Shareholders Meeting of POSH Honesto, S.A.P.I. de C.V., from 5 May 2014, dated 6 May 2014, p. 6, **C-11**.

¹⁵ Public deed No. 55,143, recording the incorporation of Gosh Caballo Grano de Oro, S.A.P.I. de C.V., by SERMARGOSH2, S.A.P.I. de C.V., and Gosh Rodrigo DPJ, S.A.P.I. de C.V., dated 9 May 2012, pp. 16-17, **C-12**.

¹⁶ Public deed No. 55,144, recording the incorporation of Gosh Caballo Eclipse, S.A.P.I. de C.V., by SERMARGOSH2, S.A.P.I. de C.V., and GOSH Caballo Grano de Oro, S.A.P.I. de C.V., dated 9 May 2012, pp. 16-17, **C-13**.

¹⁷ Public Deed No. 59,370, recording the Extraordinary and Ordinary Shareholders Meeting of POSH Fleet Services Mexico, S.A. de C.V., from 5 June 2013, dated 13 June 2013, p. 6, **C-14**.

Mexican States and the Government of the Republic of Singapore on the Promotion and Reciprocal Protection of Investments.¹⁸

33. Other relevant Mexican agencies, instrumentalities and state-owned entities involved in this case are as follows.

34. *Petróleos Mexicanos* is a State-owned enterprise. *Petróleos Mexicanos* administers all the exploration, production, transportation, storage, processing, refining, and sale of oil and gas in Mexico. *Petróleos Mexicanos* is directed by an administrative council chaired by the Mexican Secretary of Energy.¹⁹

35. *PEMEX Exploración y Producción (PEP)* is a subsidiary of *Petróleos Mexicanos*. *PEP*'s main activities are oil and natural gas exploration and exploitation; conveyance, storage in terminals and first-hand commercialization. *PEP* operates in four geographic regions spanning the Mexican territory: North, South, Northeast Offshore and Southeast Offshore.²⁰ In this Statement of Claim, *Petróleos Mexicanos* and *PEP* will be collectively referred to as **PEMEX**.

36. *Secretaría de la Función Pública (SFP)* is a Mexican State organ, under the Executive branch, which controls and supervises the legality of the acts of public servants.²¹ The *SFP* banned *OSA* from entering into contracts with *PEMEX*.²²

37. *Procuraduría General de la República (PGR)* was the Mexican public institution in charge of the investigation and prosecution of federal crimes committed in Mexico. *PGR* was replaced by *Fiscalía General de la República* in December 2018. *PGR* initiated the criminal investigations against *OSA*.

38. *Servicio de Administración y Enajenación de Bienes (SAE)* is a Mexican federal institution that administers and disposes of unproductive property and enterprises.²³ *SAE* took

¹⁸ Mexico-Singapore BIT, **CL-1**.

¹⁹ Mexican Petroleum Act (*Ley de Petróleos Mexicanos*), dated 11 August 2014, Articles 1-5, **CL-2**.

²⁰ *PEMEX Exploración y Producción, About Exploration and Production*, retrieved from <http://www.pep.pemex.com/Paginas/English.aspx> (last accessed 20 March 2019), **C-15**.

²¹ *SFP Secretaría de la Función Pública, Conoce la SFP*, retrieved from <http://pcop.funcionpublica.gob.mx/index.php/conoce-la-sfp.html> (last accessed 20 March 2019), **C-16**.

²² *See infra* s. V.A.

²³ *Servicio de Administración y Enajenación de Bienes, ¿Qué hacemos?*, retrieved from <https://www.gob.mx/sae/que-hacemos> (last accessed 20 March 2019), **C-17**.

over OSA's administration after its seizure by the PGR, and later served as OSA's Visitor, Conciliator and Trustee in its insolvency proceedings.

39. Juzgado Tercero de Distrito en Materia Civil del Distrito Federal (**Insolvency Court**) is the federal district court of Mexico that heard OSA's insolvency proceedings.

C. OTHER RELEVANT NON-PARTIES

40. SEMCO Salvage (I) Pte. Ltd. (**SEMCO I**) and SEMCO Salvage (IV) (**SEMCO IV**) are companies incorporated in and under the laws of Singapore and fully owned by POSH.²⁴ SEMCO I owned the "Salvirile" vessel and SEMCO IV owned the "Salvision" vessel. Both vessels were chartered to OSA as part of the investment in Mexico.²⁵

41. POSH Gannet, S.A. de C.V. (**POSH GANNET**), is a Mexican, wholly-owned, indirect subsidiary of POSH. MAYAN owns 99% and POSH owns 1% of POSH GANNET. It was incorporated on October 23, 2013. POSH GANNET is a vessel owning company. It is not part of POSH's investment nor a claimant in this arbitration. It was not part of the joint venture with OSA and had no contracts, nor any relation with OSA.²⁶

IV. POSH'S INVESTMENT IN MEXICO

A. BACKGROUND TO POSH'S INVESTMENT IN MEXICO

1. The Global Offshore Marine Services Industry

42. Approximately 30% of the world's oil and gas production comes from offshore sources.²⁷ The offshore oil and gas industry comprises offshore platforms and offshore vessels. Offshore platforms or oil rigs are structures used for the purpose of drilling and extracting gas and oil from wells, located deep beneath the ocean floors. These platforms typically have onsite processing and storage facilities, and they may provide accommodation for the crew. Offshore vessels are ships specifically designed to support the offshore oil and gas industry. They form the

²⁴ Semco Salvage (IV) Pte. Ltd. Register of Members, **C-18**; Semco Salvage (I) Pte. Ltd. Register of Members, **C-19**.

²⁵ Bareboat Charter for Salvirile between Semco Salvage (IV) Pte. Ltd. and Oceanografía, S.A. de C.V., dated 27 December 2011, **C-20**; Bareboat Charter for Salvision between Semco Salvage (IV) Pte. Ltd. and Oceanografía, S.A. de C.V., dated 27 December 2011, **C-21**.

²⁶ Public deed No. 18,286, recording the incorporation of POSH Gannet, S.A. de C.V., by Mayan Investments, Pte. Ltd. and PACC Offshore Services Holdings, Pte. Ltd., dated 23 October 2013, **C-22**.

²⁷ U.S. Energy Information Administration, *Today in Energy*, dated 25 October 2016, retrieved from <https://www.eia.gov/todayinenergy/detail.php?id=28492> (last accessed 20 March 2019), **C-23**.

primary mode of transportation for carrying goods and workforce to oil rigs in the ocean and otherwise support the operations of the rigs. The offshore vessel industry is generally referred to as the offshore marine services industry (the **OMS Industry**).

43. The OMS Industry is involved in every step of oil and gas operations, ranging from exploration, to construction, to the extraction of resources. Specifically, seismic survey vessels, anchor-handling tug supply vessels, platform supply vessels and drilling vessels are employed during the exploration phase of an offshore oil or gas project. In turn, dredging, pipe-laying, supply and accommodation vessels, as well as the navigation and towing of large barges, are contracted during the construction phase. Finally, platform support and service vessels hold an important role to ensure effective and reliable extraction of oil and gas once the initial construction period is over. The OMS Industry generated an estimated \$20.06 billion worldwide in 2018 and is expected to grow to \$25.66 billion by 2023.²⁸

2. The Mexican Offshore Marine Services Industry

44. Mexico is the 11th largest producer of oil in the world, the 4th in the Western Hemisphere, and the 13th in net exports.²⁹ Mexico has one of the largest, currently untapped, oil and gas reserves in the world. Oil revenues generate about 5% of Mexico's export earnings³⁰ and taxes arising from State-controlled activities provide about one third of all tax revenues collected by Mexico.³¹

45. Mexico owns and controls the Mexican oil and gas industry. According to the Federal Political Constitution, all underground hydrocarbons, including oil and gas, are inalienable

²⁸ Markets and Markets, *Offshore Support Vessel Market worth 25.66 Billion USD by 2023*, retrieved from <https://www.marketsandmarkets.com/PressReleases/offshore-support-vessel.asp> (last accessed 20 March 2019), **C-24**.

²⁹ U.S. Energy Information Administration, *Total Petroleum and Other Liquids Production – 2017*, retrieved from <https://www.eia.gov/beta/international/rankings/#?cy=2017> (last accessed 20 March 2019), **C-25**.

³⁰ OEC, *Mexico (MEX) Exports, Imports and Trade Partners*, retrieved from <https://atlas.media.mit.edu/en/profile/country/mex/#Exports> (last accessed 20 March 2019), **C-26**.

³¹ See online at <https://stats.oecd.org/Index.aspx?DataSetCode=REVMEX> (last accessed 20 March 2019).

government-owned property³² and the State is in charge of the exploration and extraction of hydrocarbons.³³

46. The Mexican State has assigned the exploration and extraction of oil to PEMEX, the State-owned Mexican enterprise and one of the leading oil and gas companies in the world. PEMEX was created by a Presidential Decree in 1938 with the purpose of administering the property of all foreign oil companies in Mexico which had been nationalized.³⁴ PEMEX is currently governed by the Mexican Petroleum Act of 2014³⁵ and is in charge of the administration of all exploration, production, transportation, storage, processing, refining and sale of oil and gas in Mexico.³⁶ PEMEX is, therefore, the only oil and gas producer and the only end client for the OMS Industry in Mexico.

3. POSH's Opportunity to Invest in Mexico

47. POSH is a world-leading offshore marine services provider—the largest in Asia—with over 60 years of operating experience and specialized expertise in offshore and marine oil field services. POSH owns and/or operates over 100 vessels worldwide servicing multiple segments of the offshore oil and gas value chain.³⁷ POSH's fleet services projects involve many of the world's major oil companies and established international offshore contractors.

48. POSH operates across four major business divisions: Offshore Supply Vessels, Offshore Accommodation, Transportation & Installation, and Harbor Services and Emergency Response. POSH's vessels are specially designed ships that provide logistical support services to offshore drilling rigs, pipe laying, oil manufacturing platforms, and subsea installations used in the production and exploration activities of oil and gas projects.

³² Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos*), as last amended on 27 August 2018, Article 27, **CL-3**.

³³ *Id.*, Article 25.

³⁴ Presidential Decree issued by President Lázaro Cárdenas, dated 18 March 1938, **CL-4**.

³⁵ Mexican Petroleum Act (*Ley de Petróleos Mexicanos*), dated 11 August 2014, **CL-2**.

³⁶ PEMEX, *Organismos subsidiarios y filiales*, retrieved from <http://www.pemex.com/organismos/Paginas/default.aspx> (last accessed 20 March 2019), **C-27**.

³⁷ PACC Offshore Services Holdings Ltd. *Financial Statements and Dividend Announcement for the Third Quarter and the nine months ended 30 September 2017*, retrieved from: http://posh.listedcompany.com/newsroom/20171110_175417_U6C_SABBRGQ2KA43EVLP.1.pdf (last accessed 20 March 2019), **C-28**.

49. In 2011, PEMEX's attempts to exploit its vast resources in the Gulf of Mexico faced capital and technical constraints. PEMEX was reportedly four years behind in the repair and maintenance program of their oil field infrastructure, which substantially impaired PEMEX's oil production.³⁸ PEMEX was under political pressure to expedite the repair and maintenance works and restore production levels, for which it required additional and more modern offshore support vessels and floating assets, such as specialized light and heavy construction vessels and other logistic vessels.³⁹

50. In addition, PEMEX was about to engage in an expansion process that included drilling in deep water and offered several public tenders, including a contract for which a 2000-ton crane was required for the installation of about 57 jack-up rigs in the following 5 years.⁴⁰ Local operators did not have adequate financing or own enough vessels to meet PEMEX's demand. PEMEX was also in need of foreign capital to implement its expansion plans.

51. At the end of 2010, POSH decided to respond to PEMEX's need for foreign capital to recover its production levels and develop its expansion project with new vessels. POSH could meet PEMEX's needs, since it had access to the vessels and the necessary financing. POSH's initial plan was to lease vessels to PEMEX for three to five-year terms, with the expectation, based on PEMEX's consistent business practices,⁴¹ that PEMEX would renew the leases once POSH had established itself as a reliable service provider. POSH could, therefore, make a profitable investment without operating the vessels.

52. POSH soon learned that PEMEX awarded long-term contracts to Mexican-flagged vessels owned by Mexican companies with which it had long-standing relationships.⁴² For POSH to successfully participate in the PEMEX tenders, and benefit from a long-term investment in the Mexican offshore industry, it would need to establish a Mexican entity. Further, since it had not previously worked with PEMEX, it was necessary to partner with a Mexican company that already had an established relationship with the state-owned company. The investment would consist of

³⁸ Memorandum from Gerald Seow to POSH Board of Directors dated 3 August 2011, p. 1, **C-29**.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Expert Industry Report by Jean Richards, para. 2.6.

⁴² *Id.*, para. 3.2

acquiring vessels and bareboat chartering them to the Mexican partner, which would, in turn, place them in the service of PEMEX.⁴³

53. In early 2011, POSH engaged in discussions with several Mexican operators who were prequalified for participation in the PEMEX tenders.⁴⁴ Its initial local contact in the Mexican offshore market was [REDACTED]

[REDACTED] POSH held a series of business and other strategic meetings in Mexico in mid-June 2011.⁴⁶

54. During that trip, POSH was approached by OSA “to invest in vessels to be purchased with the sole purpose of being chartered to... OSA... and employed in contracts entered into between OSA and... PEMEX...”⁴⁷ Founded in 1968, OSA was the largest oil and gas services company in Mexico at the time. It had the largest Mexican flagged offshore construction and supplies fleet⁴⁸ and a long-standing relationship with PEMEX. OSA’s shareholders were Amado Yáñez (**Mr. Yáñez**), who owned 60%; Martín Díaz (**Mr. Díaz**), who owned 20%, and the Cargill family who owned the remaining 20%.⁴⁹

55. The establishment of a roughly 50/50 joint venture (**JV**) between POSH and OSA, or its principal shareholders, would generate productive synergies:⁵⁰ POSH would provide state-of-the-art vessels to serve PEMEX’s offshore needs, and OSA would bid for PEMEX public tenders. The vessels would be bareboat chartered to OSA, which would, in turn, charter to and operate them for PEMEX.⁵¹ POSH’s business model was “that of an equity owner of the shipping assets, rather than an operator of the vessels.”⁵²

56. The investment would rest on three essential elements: the availability of vessels,

⁴³ Email from L. Keng-Lin to D. Tay et al. dated 8 March 2011, **C-30**.

⁴⁴ *Ibid.*

⁴⁵ Email from G. Seow to [REDACTED] et al. dated 6 June 2011, **C-31**.

⁴⁶ Witness Statement by Gerald Seow, para. 17.

⁴⁷ Memorandum from Gerald Seow to POSH Board of Directors dated 3 August 2011, p. 1, **C-29**.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid*; Resolution of the POSH Board of Directors dated 4 August 2011, **C-32**.

⁵¹ Memorandum from Gerald Seow to POSH Board of Directors dated 3 August 2011, p. 1, **C-29**.

⁵² Witness Statement by Gerald Seow, para. 20.

the contracts with OSA, and OSA's ability to contract with PEMEX. On that basis, POSH decided to make an investment in Mexico, which would unfold in three phases.

B. THE FIRST PHASE OF THE INVESTMENT: GOSH

1. The establishment of the joint-venture

57. On August 12, 2011, POSH, [REDACTED], Mr. Yáñez and Mr. Díaz entered into a Master Collaboration Agreement (**MCA**).⁵³ The purpose of the MCA was to govern the establishment of the JV company in Mexico, which would then acquire the vessels, fly them under Mexican flag, and charter them to OSA, which would, in turn, render them to PEMEX. POSH would hold 35% of the JV, [REDACTED] would hold 15% of the JV company, Mr. Yáñez would hold 25%, and Mr. Díaz the remaining 25%.⁵⁴ It was further agreed that "OSA would endeavor to secure contracts with PEMEX and shall employ the vessels [to be acquired by the JV company]"⁵⁵ and would "grant a right of first refusal"⁵⁶ to the JV company over such contracts. With this framework in place, POSH could develop a solid, long-term relationship with PEMEX.

2. The Incorporation of GOSH

58. Eventually, [REDACTED] decided to withdraw from the joint venture. As a result, POSH had to decide how to allocate his 15% ownership. POSH still needed a local person to assist with establishment and supervision of the JV and identified a suitable candidate in Mr. José Luis Montalvo (**Mr. Montalvo**), a Mexican business man who had been introduced to POSH [REDACTED], and had developed strong ties with the Company.⁵⁷ POSH decided to retain 14% of the equity for itself, and allocate 1% to Mr. Montalvo. POSH lent Mr. Montalvo the capital to purchase the 1% equity in the JV through a Master Loan Agreement (**MLA**)⁵⁸ entered with ICA and a Supplement to the MLA (**Supplement**).⁵⁹ Under the MLA, POSH would retain discretion

⁵³ Master Collaboration Agreement, entered into between PACC Offshore Services Holdings Pte. Ltd., [REDACTED], Amado Omar Yáñez Osuna, and Martín Díaz Álvarez dated 12 August 2011, **C-33**.

⁵⁴ *Id.*, para. 4.2.

⁵⁵ *Id.*, para. 2.7.2.

⁵⁶ *Id.*, para. 2.7.3.

⁵⁷ Witness Statement by Gerald Seow, para. 23; Witness Statement by José Luis Montalvo, para. 12.

⁵⁸ Master Loan Agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Inversiones Costa Afuera S.A. de C.V., dated 23 November 2011, **C-34**.

⁵⁹ Master Loan Agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Inversiones Costa Afuera S.A. de C.V., dated 23 November 2011, p. 11, Supplement – Details of the Loan dated 1 February 2012, **C-34**.

to claim the JV dividends until it was fully repaid.⁶⁰ In this way, POSH granted Mr. Montalvo “skin in the game” and aligned his economic interests with POSH in the success of the investment. At the same time, POSH retained control over his 1% stake and authority to determine how much Mr. Montalvo would be remunerated through dividends according to his performance in managing POSH.

59. On August 26, 2011, GOSH was incorporated.⁶¹ After the discussions described above, POSH owned 49% of the share capital, through its wholly owned subsidiary MAYAN;⁶² Mr. Montalvo owned 1%, through ICA; Mr. Yáñez owned 25%, through Arrendadora; and Mr. Díaz owned the remaining 25%, through GGM.⁶³ Later, the parties would enter into a Shareholder’s Agreement governing their relationship thereafter, which resulted in the termination of the MCA.⁶⁴

60. The following chart illustrates the initial corporate structure.

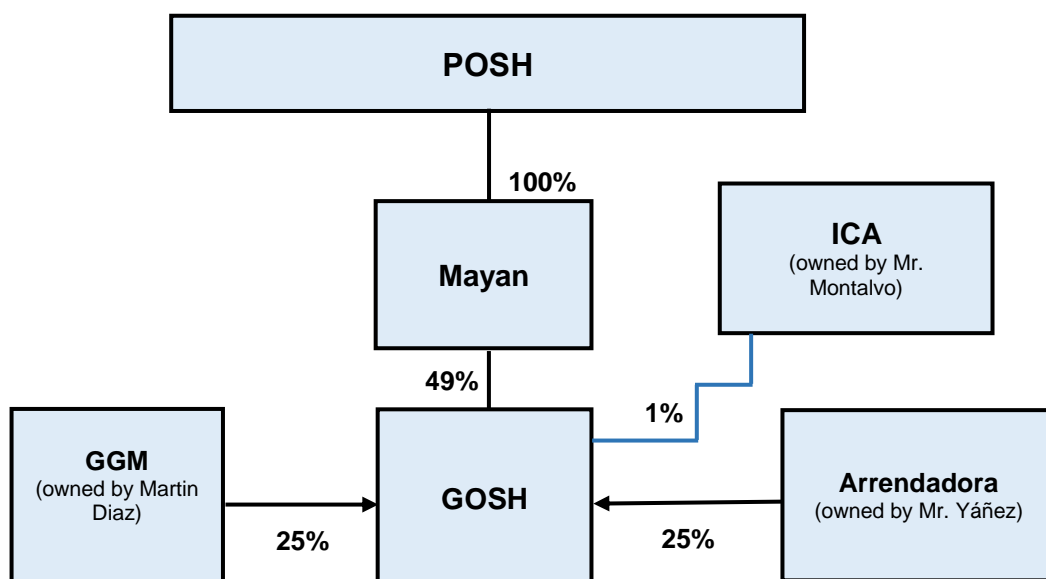
⁶⁰ Master Loan Agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Inversiones Costa Afuera S.A. de C.V., dated 23 November 2011, para. 4.1, **C-34**.

⁶¹ Public Deed No. 54,723 recording the Articles of Incorporation for Servicios Marítimos GOSH, S.A. de C.V., dated 29 August 2011, **C-35**.

⁶² *Id.*; Public Deed No. 41,537 recording the shareholders meeting from 18 May 2012, dated 25 July 2012, **C-36**; Servicios Marítimos GOSH, S.A. Shares Registry Book dated 26 September 2014, **C-9**.

⁶³ Public Deed No. 41,537 recording the shareholders meeting from 18 May 2012, dated 25 July 2012, p. 10, **C-36**. Amado Yáñez held his interests through Arrendadora Caballo de Mar III, S.A. de C.V. (Arrendadora), and Martin Diaz through GGM Shipping, S.A. de C.V. (GGM) (which later changed its name to Shipping Group Mexico SGM, S.A.P.I. de C.V.).

⁶⁴ Shareholders’ Agreement entered by and between Mayan Investments Pte. Ltd., Inversiones Costa Afuera, S.A. de C.V., GGM Shipping, S.A. de C.V., Arrendadora Caballo de Mar III, S.A. de C.V., Servicios Marítimos Gosh, S.A. de C.V., and Amado Omar Yáñez Osuna, dated 18 May 2012, **C-37**.



3. POSH's Control Over ICA and GOSH

61. As explained above, it was agreed that ICA would own 1% of GOSH, but POSH would retain full control over ICA's stake and over GOSH.

62. On December 7, 2012, POSH loaned the purchase price of ICA's shares to Mr. Montalvo.⁶⁵ In turn, Mr. Montalvo pledged ICA's shares as collateral for the repayment of the loan.⁶⁶ Under the loan and the pledge, POSH could claim, at its discretion, "all dividends, distributions or proceeds"⁶⁷ arising from ICA's shares, could also claim payment of the loan "upon... demand,"⁶⁸ and further direct Mr. Montalvo "at its sole discretion to transfer the Shares at a nominal sum to a third party(ies) nominated by [POSH] as full discharge of the Loan."⁶⁹ In this manner, POSH retained full control over ICA.⁷⁰

⁶⁵ Loan Agreement, entered into by PACC Offshore Services Holdings Pte. Ltd. and José Luis Montalvo Sánchez Mejorada dated 7 December 2012, **C-38**.

⁶⁶ Stock Pledge Agreement relating to Inversiones Costa Afuera, S.A. de C.V., entered into by and between José Luis Montalvo Sánchez Mejorada, PACC Offshore Services Holdings Pte. Ltd., and Juan Carlos Durand Hollis dated 10 December 2012, **C-39**.

⁶⁷ Loan Agreement, entered into by PACC Offshore Services Holdings Pte. Ltd. and José Luis Montalvo Sánchez Mejorada dated 7 December 2012, para. 4.1, **C-38**.

⁶⁸ *Id.*, para. 2.1.

⁶⁹ *Id.*, para. 2.5.

⁷⁰ Witness Statement by Gerald Seow, para. 25; Witness Statement by José Luis Montalvo, para. 19.

63. As mentioned above, POSH and ICA entered into the MLA and the Supplement pursuant to which POSH loaned ICA the purchase price of 1% of GOSH's shares.⁷¹ The MLA and the Supplement further illustrate ICA's nature as POSH's nominee. The loan was to be paid "upon demand"⁷² by POSH, and POSH could direct ICA "at its sole discretion to transfer the Shares at a nominal sum to a third party(ies) nominated by [POSH] as full discharge of the Loan"⁷³ and could also discretionarily claim "any dividend"⁷⁴ that ICA would receive from GOSH. ICA further agreed to pledge its shares in GOSH as collateral for the repayment of the MLA.⁷⁵ Thereafter, POSH appointed Mr. Montalvo as proxy "to represent the Company to do or execute all or any of the acts and things in connection with" the Shareholders' Meetings of GOSH. Mr. Montalvo followed "POSH's instructions as to the activities and operations of GOSH."⁷⁶

64. POSH retained discretion and control over corporate and economic rights of ICA's shares in GOSH. POSH's Board of Directors made clear that (i) 1% of GOSH shares "is held for POSH interest by a Mexican company,"⁷⁷ (ii) it was "for the benefit of POSH,"⁷⁸ (iii) was "financed by POSH and secured by share pledge,"⁷⁹ (iv) "ICA [was] owned by a Mexican *nominated* by us, *funded* by POSH and we ensure appropriate *security* over the 1%,"⁸⁰ and, in sum, that (iv) "the 1% is essentially for POSH's benefit, to ensure that we *have control over 50% of GOSH*."⁸¹ Mr. Yáñez and Mr. Díaz were "silent investors and had no involvement in the management of the company."⁸² POSH, at all times, had full control over GOSH.

4. The Financing of GOSH

⁷¹ Master Loan Agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Inversiones Costa Afuera S.A. de C.V., dated 23 November 2011, p. 11, Supplement – Details of the Loan dated 1 February 2012, **C-34**.

⁷² *Id.*, para 4.1.

⁷³ *Id.*, para 4.5.

⁷⁴ *Id.*, para 6.2.

⁷⁵ *Id.*, para. 8.1.

⁷⁶ Witness Statement by José Luis Montalvo, para. 20.

⁷⁷ Minutes of the 8th Board of Directors meeting of PACC Offshore Services Holdings Pte. Ltd. dated 18 August 2011, **C-40**.

⁷⁸ Memorandum from Gerald Seow to POSH Board of Directors dated 14 February 2012, **C-41**.

⁷⁹ Memorandum from Gerald Seow to POSH Board of Directors dated 8 May 2012, p. 1, **C-42**.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Witness Statement by José Luis Montalvo, para. 20.

65. GOSH's shareholders agreed that GOSH would initially acquire six vessels, flag them in Mexico and put them at the service of OSA's ongoing contracts with PEMEX. The purchase of the vessels would be financed by bank loans (80%) and shareholder equity (20%).⁸³

66. In July 2011, Banco Nacional de México (**Banamex**), the Mexican subsidiary of Citigroup Inc., initially approved the loan but later requested that all six vessels be flagged in Mexico prior to the release of the funds.⁸⁴ GOSH had already selected six foreign-flagged vessels and was in the process of registering and reflagging them in Mexico. POSH decided to grant a temporary bridge loan to GOSH for the cost of the vessels until the bank financing was secured.⁸⁵

67. Between August and December 2011, GOSH acquired six vessels from POSH-related entities: Caballo Argento (**Argento**), Caballo Babieca (**Babieca**), Don Casiano (**Casiano**), Caballo Copenhagen (**Copenhagen**), Caballo Monoceros (**Monoceros**), Caballo Scarto (**Scarto**, and collectively **GOSH's Vessels**).⁸⁶

68. The total initial capex and staging costs for GOSH's Vessels were \$158.91 MM, consisting of \$142.75 MM (vessel purchase price), \$6.7 MM (mobilization costs), \$3.46 MM (modification costs by POSH), and \$6 MM (expected modification costs).⁸⁷ Since external financing was not available on time, POSH provided GOSH a \$142.75 MM loan (the **Bridge Loan**) to cover the purchase price of the vessels.⁸⁸

⁸³ Witness Statement by Gerald Seow, para. 27; Witness Statement by José Luis Montalvo, para. 22.

⁸⁴ Minutes of the 8th Board of Directors meeting of PACC Offshore Services Holdings Pte. Ltd. dated 18 August 2011, p. 5, **C-40**.

⁸⁵ Witness Statement by Gerald Seow, para. 27.

⁸⁶ Bill of Sale for Caballo Argento dated 21 September 2011, **C-43**; Bill of Sale for Caballo Babieca dated 13 September 2011, **C-44**; Bill of Sale for Don Casiano dated 9 September 2011, **C-45**; Bill of Sale for Caballo Copenhagen dated 31 August 2011, **C-46**; Bill of Sale for Caballo Monoceros dated 15 December 2011, **C-47**; Bill of Sale for Caballo Scarto dated 31 August 2011, **C-48**.

⁸⁷ Memorandum from Gerald Seow to POSH Board of Directors dated 14 February 2012, **C-41**; Witness Statement by Gerald Seow, para. 27.

⁸⁸ Credit Agreement between Servicios Marítimos GOSH, S.A.P.I. de C.V. and PACC Offshore Services Holdings Pte. Ltd. dated 1 July 2013, **C-49**; Public Deed No. 33,341, recording the ship mortgage cancellation for Caballo Argento, dated 24 September 2014, **C-50**; Public Deed No. 34,704, recording the ship mortgage cancellation for Caballo Babieca, dated 10 March 2015, **C-51**; Public Deed No. 33,345, recording the ship mortgage cancellation for Don Casiano, dated 24 September 2014, **C-52**; Public Deed No. 33,342, recording the ship mortgage cancellation for Caballo Copenhagen, dated 24 September 2014, **C-53**; Public Deed No. 33,343, recording the ship mortgage cancellation for Caballo Monoceros, dated 24 September 2014, **C-54**; Public Deed No. 33,344, recording the ship mortgage cancellation for Caballo Scarto, dated 24 September 2014, **C-55**; Public Deed No. 41,537 recording the shareholders meeting from 18 May 2012, dated 25 July 2012, **C-36**.

69. Four out of the six vessels acquired by GOSH had to be modified per PEMEX's specifications,⁸⁹ and configured for "[t]ransportation, conditioning and recovery of fluids during drilling, completion and repair of wells with the support of a processor ship."⁹⁰ PEMEX required several mud-processing vessels with the necessary equipment to generate sludges for the drilling of wells (oil rigs). Generally, sludges are manufactured on land and they are transported to the drilling platform by supply vessels. Thus, mud-processing vessels are unique to the Mexican maritime industry. GOSH installed processing plants on certain supply vessels to make mixtures of cement, barite, and other additives, that were required to generate the sludges.⁹¹

70. Vessels Scarto and Copenhagen underwent these modifications in Singapore. The cost totaled \$4,967,549.33 and was paid for by POSH.⁹² Vessels Scarto, Copenhagen, Casiano and Monoceros underwent further modifications in Mexico. The cost totaled \$6,348,654.19 and was paid for by GOSH.⁹³ As a result of these modifications, GOSH's Vessels could not be deployed to any project other than PEMEX's Mexican offshore oil projects, without spending considerable time and expense in further modifications.⁹⁴

71. POSH adopted several measures to protect its investment in GOSH. *First*, POSH collateralized the Bridge Loan against GOSH's Vessels.⁹⁵ *Second*, the POSH-related entities that

⁸⁹ Witness Statement by José Luis Montalvo, para. 24.

⁹⁰ Contract No. 421002813 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Don Casiano, dated 13 March 2012, **C-56**; Contract No. 421002811 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Copenhagen, dated 13 March 2012, **C-57**; Contract No. 421002812 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Scarto, dated 13 March 2012, **C-58**; Contract No. 421002814 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V., for Caballo Monoceros, dated 13 March 2012, **C-59**.

⁹¹ Witness Statement by José Luis Montalvo, para. 24.

⁹² Invoice number 1000078 from POSH to GOSH, regarding modifications to Copenhagen, dated 1 September 2012, **C-60**; Invoice number 1000077 from POSH to GOSH, regarding modifications to Scarto, dated 1 September 2012, **C-61**.

⁹³ Invoice number 9325 from OSA to GOSH, regarding modifications to Copenhagen, Monoceros, Scarto and Casiano, dated 15 May 2013, **C-62**.

⁹⁴ Email from K. Hwee Sen to L. Keng-Lin et al. dated 19 October 2014, **C-63**.

⁹⁵ Public Deed No. 26,325, recording the ship mortgage agreement in respect to "Caballo Babieca", dated 10 November 2011, **C-64**; Public Deed No. 26,284, recording the ship mortgage agreement in respect to "Don Casiano", dated 4 November 2011, **C-65**; Public Deed No. 26,324, recording the ship mortgage agreement in respect to "Caballo Copenhagen", dated 10 November 2011, **C-66**; Public Deed No. 27,195, recording the Ship mortgage agreement in respect to "Caballo Monoceros", dated 27 March 2012, **C-67**; Public Deed No. 26,323, recording the ship mortgage agreement in respect to "Caballo Scarto", dated 10 November 2011, **C-68**; Public Deed No. 26,283, recording the ship mortgage agreement in respect to "Caballo Argentó", dated 4 November 2011, **C-69**.

sold the vessels to GOSH transferred their rights over the repayment of the credit money and collateral to POSH.⁹⁶ As a result, POSH concentrated the rights to collect against GOSH.⁹⁷ *Third*, on May 18, 2012, all the shareholders of GOSH pledged their shares in favor of POSH as further security for the repayment of the Bridge Loan.⁹⁸

72. In the end, the conditions offered by Banamex to finance the acquisition of the vessels were deemed unacceptable, and POSH decided to take over the financing permanently.⁹⁹ On July 1, 2013, POSH granted a final credit facility to GOSH converting the Bridge Loan into a final loan (the **Loan**).¹⁰⁰ As an additional protection for the Loan, POSH, GOSH and OSA established an irrevocable trust, of which POSH was the primary beneficiary, to receive all payments owed by PEMEX in connection with the OSA-PEMEX contracts (the **Irrevocable Trust**).¹⁰¹ The purpose of the Irrevocable Trust was to secure the payments originating from PEMEX and shield them from any contingency affecting OSA.¹⁰² It was managed by a reputable third party bank, Banco Invex, S.A., Institución de Banca Múltiple, Invex Grupo Financiero (**Invex**). POSH was the primary beneficiary, OSA and GOSH the secondary beneficiaries and Invex the trustee. OSA then assigned its collection rights under the OSA-PEMEX contracts to the Irrevocable Trust and GOSH assigned its rights to receive payment under the OSA-GOSH

⁹⁶ Credit Agreement between Servicios Marítimos GOSH, S.A.P.I. de C.V. and PACC Offshore Services Holdings Pte. Ltd. dated 1 July 2013, **C-49**.

⁹⁷ *Ibid*; Public Deed No. 33,341, recording the ship mortgage cancellation for Caballo Argentio, dated 24 September 2014, **C-50**; Public Deed No. 34,704, recording the ship mortgage cancellation for Caballo Babieca, dated 10 March 2015, **C-51**; Public Deed No. 33,345, recording the ship mortgage cancellation for Don Casiano, dated 24 September 2014, **C-52**; Public Deed No. 33,342, recording the ship mortgage cancellation for Caballo Copenhagen, dated 24 September 2014, **C-53**; Public Deed No. 33,343, recording the ship mortgage cancellation for Caballo Monoceros, dated 24 September 2014, **C-54**; Public Deed No. 33,344, recording the ship mortgage cancellation for Caballo Scarto, dated 24 September 2014, **C-55**.

⁹⁸ Public Deed No. 41,537 recording the shareholders meeting from 18 May 2012, dated 25 July 2012, **C-36**.

⁹⁹ Witness Statement by Gerald Seow, para. 26.

¹⁰⁰ Credit Agreement between Servicios Marítimos GOSH, S.A.P.I. de C.V. and PACC Offshore Services Holdings Pte. Ltd. dated 1 July 2013, **C-49**.

¹⁰¹ Public Deed No. 1,015, recording the Trust Agreement dated 9 August 2013, **C-70**.

¹⁰² Witness Statement by Gerald Seow, para. 29.

contracts to the Irrevocable Trust.¹⁰³ PEMEX approved OSA's assignment of rights to the Irrevocable Trust.¹⁰⁴

73. Consequently, all payments due by PEMEX by virtue of its contracts with OSA, in connection with GOSH's Vessels, would be directly applied to the repayment of the Loan to POSH. The Irrevocable Trust was particularly important for an investment in a developing country, facing challenging economic and legal conditions, such as this one.

5. The Operations of GOSH

74. By February 16, 2012, GOSH's Vessels were all registered in the Mexican Public Maritime Registry and flying a Mexican flag.¹⁰⁵

75. By May 2012, GOSH's Vessels were servicing PEMEX's offshore oil projects. GOSH had entered into bareboat charters with OSA (the **GOSH Charters**),¹⁰⁶ the duration of which is reflected in the table below.

¹⁰³ Public Deed No. 1,143, recording the assignment of rights agreement in respect to Caballo Argento, dated 20 November 2013, **C-71**; Public Deed No. 1,144, recording the assignment of rights agreement in respect to Caballo Babieca, dated 20 November 2013, **C-72**; Public Deed No. 1,016, recording the assignment of rights agreement in respect to Caballo Copenhagen, dated 9 August 2013, **C-73**; Public Deed No. 1,017, recording the assignment of rights agreement in respect to Caballo Monoceros, dated 9 August 2013, **C-74**; Public Deed No. 1,019, recording the assignment of rights agreement in respect to Caballo Scarto, dated 9 August 2013, **C-75**; Public Deed No. 1,018, recording the assignment of rights agreement in respect to Don Casiano, dated 9 August 2013, **C-76**.

¹⁰⁴ Public Deed No. 1,143, recording the assignment of rights agreement in respect to Caballo Argento, dated 20 November 2013, **C-71**; Public Deed No. 1,144, recording the assignment of rights agreement in respect to Caballo Babieca, dated 20 November 2013, **C-72**; Public Deed No. 1,016, recording the assignment of rights agreement in respect to Caballo Copenhagen, dated 9 August 2013, **C-73**; Public Deed No. 1,017, recording the assignment of rights agreement in respect to Caballo Monoceros, dated 9 August 2013, **C-74**; Public Deed No. 1,019, recording the assignment of rights agreement in respect to Caballo Scarto, dated 9 August 2013, **C-75**; Public Deed No. 1,018, recording the assignment of rights agreement in respect to Don Casiano, dated 9 August 2013, **C-76**.

¹⁰⁵ Flagging Act for "Caballo Argento" dated 26 October 2011, **C-77**; Flagging Act for "Caballo Babieca" dated 23 December 2011, **C-78**; Flagging Act for "Caballo Copenhagen" dated 16 February 2012, **C-79**; Flagging Act for "Caballo Monoceros" dated 16 January 2012, **C-80**; Flagging Act for "Don Casiano" dated 17 October 2011, **C-81**; Flagging Act for "Caballo Scarto" dated 10 January 2012, **C-82**; Certificate of Registration for "Caballo Argento" dated 26 October 2011, **C-83**; Certificate of Registration for "Caballo Babieca" dated 23 December 2011, **C-84**; Certificate of Registration for "Don Casiano" dated 17 October 2011, **C-85**; Certificate of Registration for "Caballo Copenhagen" dated 10 February 2012, **C-86**; Certificate of Registration for "Caballo Monoceros" dated 16 January 2012, **C-87**; Certificate of Registration for "Caballo Scarto" dated 10 January 2012, **C-88**.

¹⁰⁶ Bareboat Charter for Caballo Copenhagen between Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated 1 February 2012, **C-89**; Bareboat Charter for Caballo Scarto between Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated 3 January 2012, **C-90**; Bareboat Charter for Don Casiano between Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated 18 September 2011, **C-91**; Bareboat Charter for Caballo Babieca between Servicios Marítimos

No.	Vessel	Charters w/ OSA	Lease Period
1.	Caballo Argento ¹⁰⁷	29-Oct-2011 & Addenda on 1-Feb-2013	1-Nov-2011 (365 days)
		30-Apr-2013	30-Apr-2013 (1282 days)
2.	Caballo Babieca ¹⁰⁸	20-Dec-2011 & Addenda on 1-Feb-2013	23-Dec-2011 (365 days)
		30-Apr-2013	30-Apr-2013 (1339 days)
3.	Caballo Copenhagen ¹⁰⁹	1-Feb-2012 & Addenda on 1-Feb-2013	3-Feb-2012 (365 days)
		30-Apr-2013	30-Apr-2013 (975 days)
4.	Don Casiano ¹¹⁰	18-Sept-2011 & Addenda on 1-Feb-2013	21-Sept-2011 (365 days)
		30-Apr-2013	30-Apr-2013 (975 days)
5.	Caballo Monoceros ¹¹¹	27-Jan-2012 & Addenda on 1-Feb-2013	31-Jan-2012 (365 days)
		30-Apr-2013	30-Apr-2013 (975 days)
6.	Caballo Scarto ¹¹²	3-Jan-2012 & Addenda on 1-Feb-2013	5-Jan-2012 (365 days)

GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated 20 December 2011, **C-92**; Bareboat Charter for Caballo Monoceros between Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated 27 January 2012, **C-93**; Bareboat Charter for Caballo Argento between Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated 29 October 2011, **C-94**; Bareboat Charter for GOSH Caballo Grano de Oro between GOSH Caballo Grano de Oro S.A.P.I. de C.V. and Oceanografía S.A. de C.V., dated 30 April 2013, **C-95**; Bareboat Charter for POSH Plover (tbr Rodrigo DPJ) between GOSH Rodrigo DPJ S.A.P.I. de C.V. and Oceanografía, S.A. de C.V., dated 22 June 2012, **C-96**.

¹⁰⁷ Current name POSH Sincero; previous name Malaviya 3.

¹⁰⁸ Current name, POSH Kittiwake; previous name, POSH Avocet.

¹⁰⁹ Current name, POSH Gentil; previous name, POSH Verdant.

¹¹⁰ Current name, POSH Gitano; previous name, MMPL Kestrel.

¹¹¹ Current name, POSH Galante; previous name, POSH Petrel.

¹¹² Current name, POSH Generoso, previous name, POSH Voyager.

		30-Apr-2013	30-Apr-2013 (975 days)
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76. By May 2012, OSA had employed the GOSH vessels on already existing contracts with PEMEX (the **GOSH Service Contracts**).¹¹³ OSA used GOSH's Vessels to support PEMEX's offshore oil operations in the Gulf of Mexico,¹¹⁴ located within Mexico's territorial waters.¹¹⁵ The duration of GOSH's Service Contracts is reflected in the table below.¹¹⁶

¹¹³ Contract No. 428218809 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Argentó, dated 7 March 2008, **C-97**; Contract No. 428218810 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Babieca, dated 7 March 2008, **C-98**; Contract No. 421002813 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Don Casiano, dated 13 March 2012, **C-56**; Contract No. 421002811 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Copenhagen, dated 13 March 2012, **C-57**; Contract No. 421002812 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Scarto, dated 13 March 2012, **C-58**; Contract No. 421002814 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V., for Caballo Monoceros, dated 13 March 2012, **C-59**.

¹¹⁴ Contract No. 428218809 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Argentó, dated 7 March 2008, **C-97**; Contract No. 428218810 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Babieca, dated 7 March 2008, **C-98**; Contract No. 421002813 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Don Casiano, dated 13 March 2012, **C-56**; Contract No. 421002811 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Copenhagen, dated 13 March 2012, **C-57**; Contract No. 421002812 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Scarto, dated 13 March 2012, **C-58**; Contract No. 421002814 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V., for Caballo Monoceros, dated 13 March 2012, **C-59**.

¹¹⁵ Bareboat Charter for Caballo Copenhagen between Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated 1 February 2012, **C-89**; Bareboat Charter for Caballo Scarto between Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated 3 January 2012, **C-90**; Bareboat Charter for Don Casiano between Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated 18 September 2011, **C-91**; Bareboat Charter for Caballo Babieca between Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated 20 December 2011, **C-92**; Bareboat Charter for Caballo Monoceros between Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated 27 January 2012, **C-93**; Bareboat Charter for Caballo Argentó between Servicios Marítimos GOSH, S.A. de C.V. and Oceanografía, S.A. de C.V., dated 29 October 2011, **C-94**; Bareboat Charter for GOSH Caballo Grano de Oro between GOSH Caballo Grano de Oro S.A.P.I. de C.V. and Oceanografía S.A. de C.V., dated 30 April 2013, **C-95**; Bareboat Charter for POSH Plover (tbr Rodrigo DPJ) between GOSH Rodrigo DPJ S.A.P.I. de C.V. and Oceanografía, S.A. de C.V., dated 22 June 2012, **C-96**; Contract No. 428218809 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Argentó, dated 7 March 2008, **C-97**; Contract No. 428218810 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Babieca, dated 7 March 2008, **C-98**; Contract No. 421002813 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Don Casiano, dated 13 March 2012, **C-56**; Contract No. 421002811 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Copenhagen, dated 13 March 2012, **C-57**; Contract No. 421002812 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Scarto, dated 13 March 2012, **C-58**; Contract No. 421002814 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V., for Caballo Monoceros, dated 13 March 2012, **C-59**. See Mexico-Singapore BIT, Art. 1 (definition of "territory"), **CL-1**.

¹¹⁶ Addendum No. 3. (*Convenio Modificatorio No. Tres*) to Contract No. 428218809 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V., for Caballo Argentó, dated 29 November 2012,

No.	Vessel	OSA-PEMEX Contracts	Lease Period
1.	Caballo Argento ¹¹⁷	PEP Contract No.: 428218809	29-Oct-2011/ 27-Oct-2016 (1,826 days)
2.	Caballo Babiaca ¹¹⁸	PEP Contract No.: 428218810	30-Dec-2011/ 28-Dec-2016 (1,826 days)
3.	Caballo Copenhagen ¹¹⁹	PEP Contract No.: 421002811	21-May-2012/ 31-Dec-2015 (1,320 days)
4.	Don Casiano ¹²⁰	PEP Contract No.: 421002813	21-May-2012/ 31-Dec-2015 (1,320 days)
5.	Caballo Monoceros ¹²¹	PEP Contract No.: 421002814	21-May-2012/ 31-Dec-2015 (1,320 days)
6.	Caballo Scarto ¹²²	PEP Contract No.: 421002812	21-May-2012/ 31-Dec-2015 (1,320 days)

77. GOSH chartered the vessels to OSA who, in turn, placed them at the service of PEMEX. This operation was consistent with POSH's business model as an equity owner, rather

C-99; Addendum No 1. (*Convenio Modificatorio No. Uno*) to Contract No. 428218810 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Babiaca, dated 28 November 2011, **C-100**; Contract No. 421002813 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Don Casiano, dated 13 March 2012, **C-56**; Contract No. 421002811 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Copenhagen, dated 13 March 2012, **C-57**; Contract No. 421002812 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V. for Caballo Scarto, dated 13 March 2012, **C-58**; Contract No. 421002814 between Pemex Exploración y Producción and Oceanografía, S.A. de C.V., for Caballo Monoceros, dated 13 March 2012, **C-59**.

¹¹⁷ Current name POSH Sincero; previous name Malaviya 3.

¹¹⁸ Current name, POSH Kittiwake; previous name, POSH Avocet.

¹¹⁹ Current name, POSH Gentil; previous name, POSH Verdant.

¹²⁰ Current name, POSH Gitano; previous name, MMPL Kestrel.

¹²¹ Current name, POSH Galante; previous name, POSH Petrel.

¹²² Current name, POSH Generoso, previous name, POSH Voyager.

than an operator of the vessels.¹²³

C. THE SECOND PHASE OF THE INVESTMENT: SEMCO

78. As the JV company was being established, OSA approached POSH with a request for two additional vessels to use in its offshore operations in Mexico.¹²⁴

79. These vessels would be chartered to OSA but would not be in direct contract with PEMEX. On that basis, POSH was advised that it could use Singaporean-flagged vessels under temporary permits to navigate in Mexico, which were renewable for up to two years.¹²⁵ Accordingly, POSH decided to respond to OSA's request through two wholly-owned Singaporean subsidiaries: **SEMCO I**, which owned the "Salvirile," and **SEMCO IV** which owned the "Salvision" (collectively, **SEMCO** and **SEMCO Vessels**).¹²⁶

80. On December 27, 2011, SEMCO entered into contracts with OSA¹²⁷ (the **SEMCO Charters**) and, by February 2012, the SEMCO Vessels were in full operation in Mexico. The duration of the SEMCO Charters was 2 years, with extension options to be mutually agreed by the parties. Upon the expiration of the SEMCO Charters, POSH planned to reflag the vessels in Mexico and re-charter them to OSA.

81. The following chart illustrates the corporate structure after the second phase of POSH's investment in Mexico.

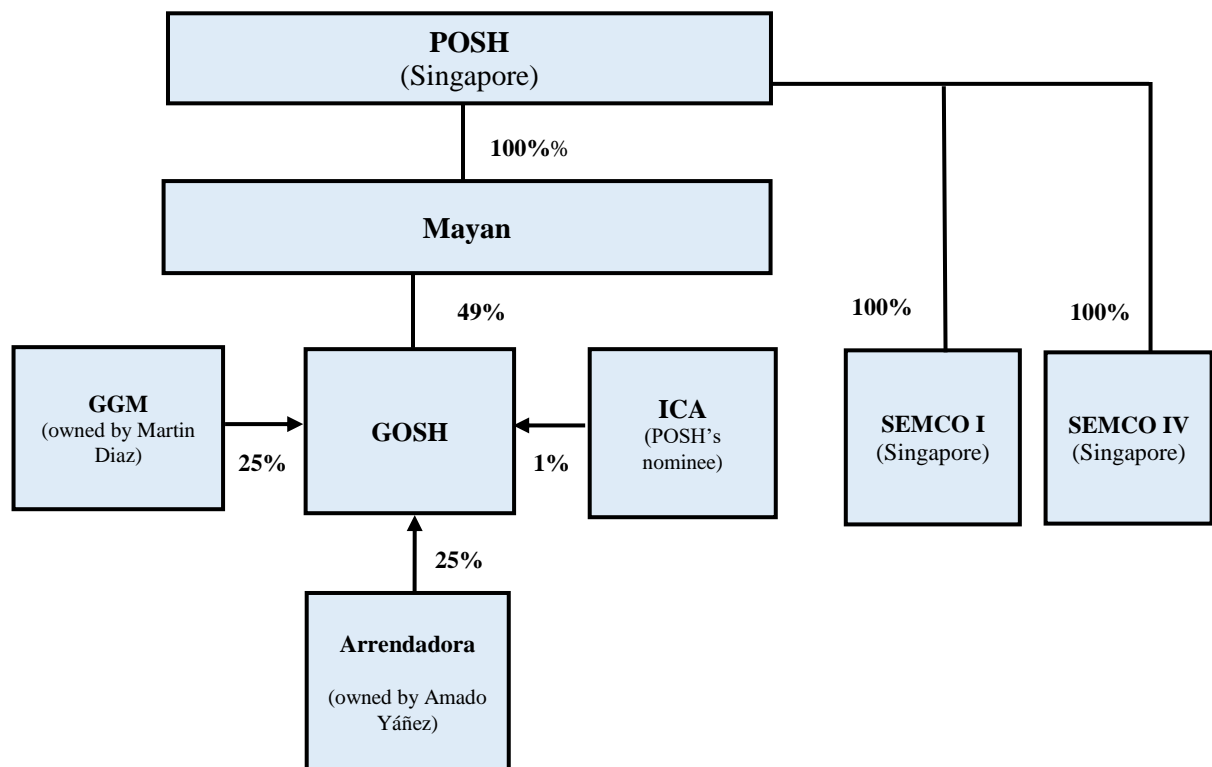
¹²³ Witness Statement by Gerald Seow, para. 31; Witness Statement by José Luis Montalvo, para. 26.

¹²⁴ Witness Statement by Gerald Seow, para. 32.

¹²⁵ *Id.*, para. 33; Witness Statement by José Luis Montalvo, para. 28.

¹²⁶ Witness Statement by Gerald Seow, para. 33; Witness Statement by José Luis Montalvo, para. 28.

¹²⁷ Bareboat Charter for Salvirile between Semco Salvage (IV) Pte. Ltd. and Oceanografía, S.A. de C.V., dated 27 December 2011, **C-20**; Bareboat Charter for Salvision between Semco Salvage (IV) Pte. Ltd. and Oceanografía, S.A. de C.V., dated 27 December 2011, **C-21**.



D. THE THIRD PHASE OF THE INVESTMENT: SMP

1. The establishment of a second joint venture

82. In discussions with POSH, Mr. Yáñez and Mr. Díaz represented that OSA had a sufficient number of contracts with PEMEX that could support even more vessels. They advocated for the establishment of a second joint-venture, which would mirror GOSH's capital structure and business model,¹²⁸ and POSH agreed. Ultimately, however, Mr. Yáñez and Mr. Martín decided not to invest in the second joint-venture but assured POSH that OSA would bareboat charter the additional vessels, and put them in the service of PEMEX.¹²⁹

83. POSH decided to move forward with the plan and created the second company to service OSA's needs in Mexico.¹³⁰ On March 22, 2012, POSH incorporated Sermargosh2, S.A.

¹²⁸ Witness Statement by Gerald Seow, para. 35; Witness Statement by José Luis Montalvo, para. 29.

¹²⁹ Witness Statement by Gerald Seow, para. 35; Witness Statement by José Luis Montalvo, para. 29.

¹³⁰ Memorandum from Gerald Seow to POSH Board of Directors dated 8 May 2012, C-42.

de C.V., later renamed Servicios Marítimos POSH, S.A.P.I. (SMP), which was owned by POSH (49%) and ICA (51%).¹³¹

84. Despite the different equity distribution, the business model mirrored that of GOSH. SMP would acquire two vessels, bareboat charter them to OSA, which would, in turn, charter them to PEMEX. The essential elements for the investment also were the availability of vessels, the contracts with OSA, and OSA's ability to render services to PEMEX.¹³²

85. ICA's role was also the same. POSH decided to keep Mr. Montalvo as its nominee and representative on the ground.¹³³ POSH and ICA entered into an additional Supplement to the MLA (**Supplement 2**), whereby POSH loaned to ICA the purchase price of SMP's shares.¹³⁴ This loan was also payable "upon demand" by POSH¹³⁵ and POSH could direct ICA "at its sole discretion to transfer the Shares at a nominal sum to a third party(ies) nominated by [POSH] as full discharge of the Loan"¹³⁶ and claim "any dividend"¹³⁷ that ICA would receive from SMP. ICA also pledged its shares in SMP as collateral for the repayment of Supplement 2.¹³⁸ On this basis, ICA followed POSH's specific instructions regarding SMP.¹³⁹ POSH retained discretion and control over corporate and economic rights of ICA's shares in SMP and, therefore, controlled SMP.

2. The Acquisition, Financing and Operation of the SMP Vessels

86. On May 9, 2012, SMP incorporated two fully-owned subsidiaries: HONESTO and HERMOSA. HONESTO acquired the vessel Rodrigo DPJ (**Rodrigo**) from a POSH-related entity

¹³¹ Public Deed No. 63,246, recording the Extraordinary Shareholders Meeting of Servicios Marítimos POSH, S.A.P.I. de C.V., from 5 May 2014, dated 6 May 2014, **C-10**.

¹³² Witness Statement by Gerald Seow, para. 36.

¹³³ Witness Statement by Gerald Seow, para. 36.

¹³⁴ Master Loan Agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Inversiones Costa Afuera S.A. de C.V., dated 23 November 2011, p. 10, Supplement – Details of the Loan dated 12 April 2012, **C-34**.

¹³⁵ Master Loan Agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Inversiones Costa Afuera S.A. de C.V., dated 23 November 2011, para. 4.1., **C-34**.

¹³⁶ *Id.*, para 4.5.

¹³⁷ *Id.*, para 6.2.

¹³⁸ *Id.*, para 8.1.; Stock Pledge Agreement relating to Sermargosh2 entered into by and between Inversiones Costa Afuera, S.A. de C.V., PACC Offshore Services Holdings Pte. Ltd., and Juan Carlos Durand Hollis dated 10 December 2012, **C-101**.

¹³⁹ Witness Statement by José Luis Montalvo, para. 30.

for \$21 MM.¹⁴⁰ HERMOSA acquired the vessel Caballo Grano de Oro (**Grano de Oro**) from a POSH-related entity for \$24.5 MM¹⁴¹ (collectively, **SMP Vessels**).

87. POSH also granted loans to HONESTO and HERMOSA to purchase the SMP Vessels from POSH-related entities.¹⁴² HONESTO and HERMOSA then mortgaged the vessels as collateral for the repayment of the loan.¹⁴³

88. The SMP Vessels were modified per PEMEX's specifications too.¹⁴⁴ The Grano de Oro was an anchor handling tug supply (AHTS) vessel and was transformed into a mud processing vessel.¹⁴⁵ The Rodrigo was originally a supply vessel, used to transport personnel or supplies, and was modified to serve as a mud vessel.¹⁴⁶ With these modifications, they could not be deployed to any project other than Pemex's Mexican offshore oil projects, without substantial time and expense for further modifications.¹⁴⁷

89. By April 2013, the SMP Vessels were chartered to OSA (the **SMP Charters**).¹⁴⁸ The duration of the SMP Charters were for seven months with extensions to be mutually agreed by the parties.¹⁴⁹ On June 24, 2013, PEMEX awarded the service contracts to OSA, under which

¹⁴⁰ Bill of Sale for POSH Plover (Rodrigo DPJ) dated 14 May 2012, **C-102**.

¹⁴¹ Bill of Sale for POSH Vantage (Caballo Grano de Oro) dated 25 July 2012, **C-103**.

¹⁴² Public Deed No. 29,100, recording the ship mortgage agreement for Caballo Grano de Oro and loan agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Gosh Caballo Grano de Oro S.A.P.I. de C.V., dated 5 February 2013, **C-104**; Public Deed No. 28,050, recording the ship mortgage agreement for Rodrigo DPJ and the loan agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Gosh Rodrigo DPJ, S.A.P.I., dated 8 August 2012, **C-105**.

¹⁴³ Public Deed No. 29,100, recording the ship mortgage agreement for Caballo Grano de Oro and loan agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Gosh Caballo Grano de Oro S.A.P.I. de C.V., dated 5 February 2013, **C-104**; Public Deed No. 28,050, recording the ship mortgage agreement for Rodrigo DPJ and the loan agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Gosh Rodrigo DPJ, S.A.P.I., dated 8 August 2012, **C-105**.

¹⁴⁴ Email from J. Phang to H. Escobedo et al. dated 19 June 2013, **C-106**; Witness Statement by José Luis Montalvo, para. 31.

¹⁴⁵ Witness Statement by José Luis Montalvo, para. 31.

¹⁴⁶ *Id.*, para. 31.

¹⁴⁷ *Id.*, para. 24; Email from K. Hwee Sen to L. Keng-Lin et al. dated 19 October 2014, **C-63**.

¹⁴⁸ Bareboat Charter for GOSH Caballo Grano de Oro between GOSH Caballo Grano de Oro S.A.P.I. de C.V. and Oceanografía S.A. de C.V., dated 30 April 2013, **C-95**; Bareboat Charter for POSH Plover (tbr Rodrigo DPJ) between GOSH Rodrigo DPJ S.A.P.I. de C.V. and Oceanografía, S.A. de C.V., dated 22 June 2012, **C-96**.

¹⁴⁹ Bareboat Charter for GOSH Caballo Grano de Oro between GOSH Caballo Grano de Oro S.A.P.I. de C.V. and Oceanografía S.A. de C.V., dated 30 April 2013, **C-95**; Bareboat Charter for POSH Plover (tbr Rodrigo

OSA intended to place the SMP Vessels (the **SMP Service Contracts**).¹⁵⁰ The duration of the SMP Service Contracts was August 1, 2013 to August 28, 2016.¹⁵¹

3. The Incorporation of Other Supporting Companies

90. POSH feared that OSA would not follow the industry's best practices in maintaining the vessels, and that this could result in damage to them.¹⁵² POSH understood that OSA could benefit from POSH's know-how and expertise and thus agreed to embed some of its superintendents at OSA to ensure adequate maintenance and protect the value of the vessels.¹⁵³

91. It soon became clear that OSA required more resources to maintain the vessels. It was subsequently agreed that POSH would provide technical and crew management assistance through a specific company, PFSM. PFSM had been incorporated by POSH, which owned 99% of the shares, and ICA, which owned 1%.¹⁵⁴ As in GOSH and SMP, in PFSM, ICA acted as POSH's nominee and followed POSH's instructions.¹⁵⁵ PFSM then signed a ship management agreement with OSA to provide technical support and crew management for GOSH's vessels, which OSA had chartered to PEMEX.¹⁵⁶

92. For further support to OSA's operations, on February 3, 2012, POSH acquired 99% of Operadora de Servicios Costa Afuera, S.A. de C.V. (**OSCA**), which was used to employ administrative personnel related to OSA's operations.¹⁵⁷

DPJ) between GOSH Rodrigo DPJ S.A.P.I. de C.V. and Oceanografía, S.A. de C.V., dated 22 June 2012, **C-96**; Expert Industry Report by Jean Richards, paras. 5.5-5.7.

¹⁵⁰ Ruling Notification Record for National Public Bid No. 18575088-522-13 dated 24 June 2013, **C-107**.

¹⁵¹ Contract No. 421003849 entered into between Pemex Exploración y Producción and Oceanografía, S.A. de C.V., for Caballo Grano de Oro, dated 5 July 2013, **C-108**; Contract No. 421003848 entered into Pemex Exploración y Producción and Oceanografía, S.A. de C.V., for Rodrigo DPJ, dated 5 July 2013, **C-109**.

¹⁵² Witness Statement by Gerald Seow, para. 39.

¹⁵³ *Id.*, para. 40.

¹⁵⁴ Public Deed No. 59,370, recording of the Extraordinary and Ordinary Shareholders Meeting of POSH Fleet Services Mexico, S.A. de C.V. from 5 June 2013, dated 13 June 2013, p. 6, **C-14**; Semco Salvage (IV) Pte. Ltd. Register of Members, **C-18**; Semco Salvage (I) Pte. Ltd. Register of Members, **C-19**.

¹⁵⁵ Witness Statement by José Luis Montalvo, para. 34.

¹⁵⁶ Memorandum, from Dawn Tay to POSH Board of Directors dated 18 November 2013, **C-110**; Management Agreement by and between POSH Fleet Services Mexico, S.A. de C.V., and Oceanografía, S.A. de C.V., dated 1 July 2013, **C-111**.

¹⁵⁷ Memorandum from Gerald Seow to POSH Board of Directors dated 14 February 2012, **C-41**.

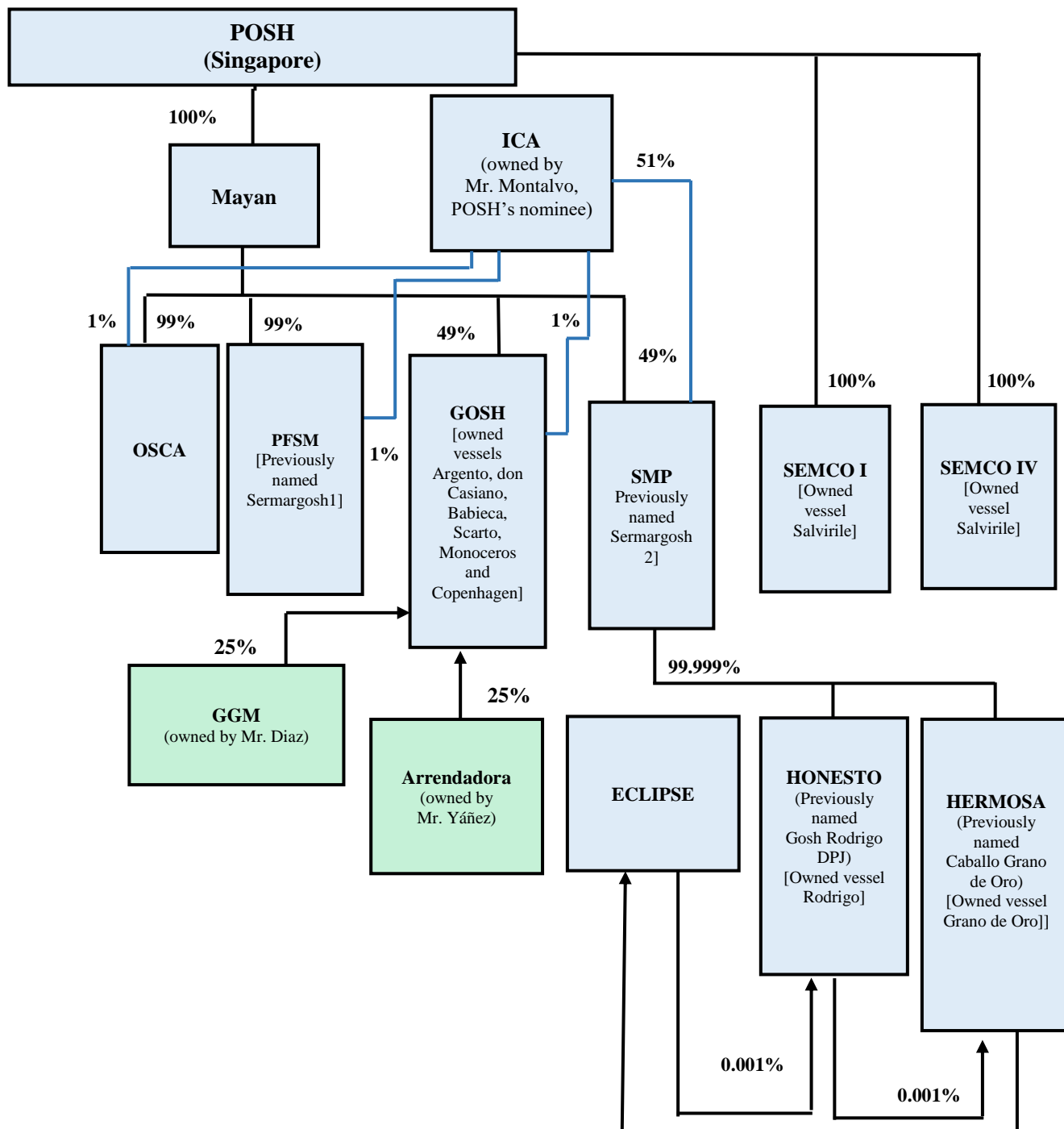
93. Finally, on May 9, 2012, SMP (POSH's subsidiary) incorporated ECLIPSE to serve as a holding company and facilitate transactions within the POSH group. ECLIPSE was owned by SMP (99.999%) and HERMOSA (0.001%).¹⁵⁸

94. POSH's investment in Mexico comprised all the Subsidiaries¹⁵⁹ and revolved around OSA. POSH chartered vessels to OSA, which, in turn, placed them at the direct or indirect service of PEMEX. The complete investment by POSH and the Subsidiaries will be referred to in this Statement of Claim as the **Investment**.

95. The following chart illustrates the corporate structure after the third phase of the Investment.

¹⁵⁸ Public deed No. 55,144, recording the incorporation of Gosh Caballo Eclipse, S.A.P.I. de C.V., by SERMARGOSH2, S.A.P.I. de C.V., and GOSH Caballo Grano de Oro, S.A.P.I. de C.V., dated 9 May 2012, pp. 16-17, **C-13**;

¹⁵⁹ Entities on which behalf POSH brings this claim.



E. OTHER ACTIVITIES IN MEXICO

96. By November 2013, PEMEX had an increasing “demand for deep-water vessels including platform supply vessels and mud-boats in Mexico”¹⁶⁰ and planned to issue several public tenders.

97. POSH decided to respond to this demand with a different business partner. On October 23, 2013, POSH incorporated POSH GANNET, a wholly owned subsidiary, which acquired the vessel Gannet.¹⁶¹ POSH subsequently partnered with Huasteca Oil Energy, S.A. de C.V. (**Huasteca**)—a Mexican company unrelated to OSA—to bid for a contract directly with PEMEX. In the end, PEMEX awarded the Gannet a contract for “[t]ransportation, conditioning and recovery of fluids during drilling, completion and repair of wells with the support of a processor vessel”.¹⁶² POSH Gannet chartered the Gannet to PACC Offshore México, S.A. de C.V. (**POM**), a minority-owned subsidiary of POSH, and subsequently POM and Huasteca jointly entered into the service contract with PEMEX.¹⁶³

98. The initial duration of the contract was from June 30, 2014 to December 31, 2016.¹⁶⁴ Consistent with PEMEX’s business practices,¹⁶⁵ however, PEMEX has renewed the contract on several occasions: until December 2017,¹⁶⁶ April 2018,¹⁶⁷ and December 2018.¹⁶⁸ In fact, the Gannet is currently servicing and working for PEMEX while the parties discuss the terms of a further renewal.¹⁶⁹ The only vessel that was chartered to PEMEX without partnering with

¹⁶⁰ Memorandum, from Dawn Tay to POSH Board of Directors dated 18 November 2013, **C-110**.

¹⁶¹ Public deed No. 18,286, recording the incorporation of POSH Gannet, S.A. de C.V., by Mayan Investments, Pte. Ltd. and PACC Offshore Services Holdings, Pte. Ltd., dated 23 October 2013, **C-22**.

¹⁶² Contract No. 421004858 between Pemex Exploración y Producción, and POSH and Huasteca Oil Energy, S.A. de C.V. dated 30 June 2014, p. 1, **C-112**.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ Witness Statement by José Luis Montalvo, para. 36; Expert Industry Report by Jean Richards, para. 2.6.

¹⁶⁶ Addendum No. 1 to Contract No. 421004858 (*Convenio Modificadorio Número Uno*) between PEP and PACC Offshore Mexico, S.A. de C.V. and Huasteca Oil Energy, S.A. de C.V., dated 28 December 2015, pp. 3-4, **C-113**.

¹⁶⁷ Addendum No. 5 to Contract No. 421004858 (*Convenio Modificadorio Número Cinco*) between PEP and, PACC Offshore Mexico, S.A. de C.V. and Huasteca Oil Energy, S.A. de C.V., dated 23 April 2018, pp. 4-5, **C-114**.

¹⁶⁸ *Ibid.*

¹⁶⁹ Witness Statement by José Luis Montalvo, para. 37.

OSA—and thus unrelated to POSH’s Investment and the Mexican acts and omissions on which this claim is based—is fully operational in Mexico, in contract with PEMEX, and turning a profit.

F. POSH’S OPERATIONS AND CONTRIBUTIONS TO MEXICO

99. By the end of 2013, POSH had a fully established investment, and solid and stable operations in Mexico. The Investment substantially contributed to Mexico’s OMS Industry and economic development, including generating direct and indirect employment for hundreds of Mexican nationals the payment of millions in taxes and fees to the Mexican tax authorities.¹⁷⁰

100. POSH’s Investment in Mexico exceeded \$190 million and supported the growth of Mexico’s oil industry.¹⁷¹ POSH had two offices, one in Mexico City and one in Ciudad del Carmen, and more than 29 staff and subcontractors, comprising 27 Mexican nationals and two Singaporeans.¹⁷² The Investment spanned multiple Mexican and Singaporean companies, including two holding companies (SMP and ECLIPSE), five vessel-owning companies (GOSH, HONESTO, HERMOSA, SEMCO I and SEMCO II), and two supporting companies (PFSM and OSCA).

101. POSH’s Subsidiaries had 10 vessels operating in Mexico, with a combined asset value of \$215 MM.¹⁷³ Eight Mexican-flagged vessels were bareboat chartered to OSA and then assigned to long-term contracts OSA had with PEMEX. Two Singaporean-flagged vessels were bareboat chartered to OSA and performing operations in support of PEMEX, but not directly employed by PEMEX. All vessels operated only within the territory of Mexico, in the Sonda de Campeche in the Gulf of Mexico, *i.e.*, within Mexican territorial waters. The vessels performed

¹⁷⁰ *Id.*, para. 38.

¹⁷¹ Credit Agreement between Servicios Marítimos GOSH, S.A.P.I. de C.V. and PACC Offshore Services Holdings Pte. Ltd. dated 1 July 2013, **C-49**; Public Deed No. 41,537 recording the shareholders meeting from 18 May 2012, dated 25 July 2012, **C-36**; Bill of Sale for Rodrigo DPJ dated 2 March 2015, **C-115**; Bill of sale for Caballo Grano de Oro dated 25 February 2015, **C-116**; Memorandum of Agreement for the sale of Salvirile dated 6 November 2017, **C-117**; Memorandum of Agreement for the sale of Salvision dated 7 August 2017, **C-118**.

¹⁷² Witness Statement by José Luis Montalvo, para. 38.

¹⁷³ Bill of Sale for Caballo Argento dated 21 September 2011, **C-43**; Bill of Sale for Caballo Babieca dated 13 September 2011, **C-44**; Bill of Sale for Don Casiano dated 9 September 2011, **C-45**; Bill of Sale for Caballo Copenhagen dated 31 August 2011, **C-46**; Bill of Sale for Caballo Monoceros dated 15 December 2011, **C-47**; Bill of Sale for Caballo Scarto dated 31 August 2011, **C-48**; Bill of Sale for Rodrigo DPJ dated 2 March 2015, **C-115**; Bill of sale for Caballo Grano de Oro dated 25 February 2015, **C-116**; Certificate of Valuation of Salvirile dated 23 July 2007, **C-119**; Certificate of Valuation of Salvision, dated 23 July 2007, **C-120**.

operations round the clock (24/7) and would only dock for short periods of time to load fuels, materials and supplies.¹⁷⁴

102. POSH also provided technical support, crew management and provisions to GOSH's vessels and was responsible for over 250 crew members¹⁷⁵ POSH further supported several Mexican companies, including catering services, logistics, and transportation companies¹⁷⁶ and substantially contributed to the development of the oil & gas industry in Mexico.¹⁷⁷

G. POSH'S ECONOMIC PROSPECTS

103. In early 2014, POSH's Investment in Mexico was on solid grounds. The three essential pillars of the investment—availability of vessels, contracts with OSA, and OSA's ability to contract with PEMEX—were successfully established and operations were rapidly expanding. POSH had protected its investment in GOSH through the Irrevocable Trust and intended to use its Mexican platform to expand into other regions of Latin America.¹⁷⁸

104. POSH's projections showed continued growth.¹⁷⁹ By the end of 2013, the Investment was projected to grow to \$127.68 million in 2014 and \$192.94 million in 2015.¹⁸⁰ POSH's loan to GOSH was expected to be fully discharged by the third quarter of 2016,¹⁸¹ based on an estimated annual EBITDA of \$33.66 million for a payback in 4.6 year. Thereafter, the growth was expected to increase substantially.¹⁸²

105. POSH had solid and legitimate grounds to believe that the Mexico operation would continue to grow, and the existing contracts would be renewed. PEMEX's consistent business practices showed that "it generally continue[d] to work with known and trusted operators and owners with Mexican flag tonnage" over the "trading life" of the vessels and "at least.. until [they

¹⁷⁴ Witness Statement by José Luis Montalvo, para. 40.

¹⁷⁵ *Id.*, para. 39.

¹⁷⁶ *Id.*, para. 38.

¹⁷⁷ *Id.*, para. 40.

¹⁷⁸ POSH Initial Public Offering Prospectus dated 17 April 2014, p. 123, **C-121**; Witness Statement by Keng-Lin, para. 27.

¹⁷⁹ Witness Statement by Keng-Lin, para. 28.

¹⁸⁰ Email and attachment from L. Peng Wu dated 22 October 2013, **C-122**.

¹⁸¹ Memorandum from Gerald Seow to POSH Board of Directors dated 8 May 2012, **C-42**.

¹⁸² Witness Statement by Keng-Lin, paras. 28-29.

are] approximately 20 years old.”¹⁸³ The value of “long term relationships... [and] the initial costs of mobilization and modifications to suit a particular market argue strongly against swopping between owning partners”¹⁸⁴ Therefore, “a renewal of an existing contract would... always be the preferred route.”¹⁸⁵ The successive renewals granted to the Gannet, which is servicing PEMEX to this day, is a testament thereto.¹⁸⁶

106. The eight vessels owned by POSH’s Subsidiaries were all under three years old and, therefore, had a long service life ahead of them.¹⁸⁷ It was reasonable to expect that PEMEX would have renewed the contracts with POSH’s vessels until the vessels reached the age of 20 years.¹⁸⁸ POSH’s business plan was, therefore, a long term one.¹⁸⁹

107. By early 2014, some contracts with OSA had already expired and POSH was in discussions for their renewal.

- The SMP Charters had expired on January 31, 2014¹⁹⁰ and POSH engaged in discussions with OSA for their renewal. During those discussions and, based on the industry’s practice, the SMP Vessels remained in possession of OSA, and performing works for PEMEX, and as a result they were still earning charter hire for SMP.¹⁹¹
- The SEMCO Charters had expired on February 21, 2014.¹⁹² The vessels assigned to these contracts were Singaporean-flagged and had temporary permits to navigate

¹⁸³ Expert Industry Report by Jean Richards, para. 7.14.

¹⁸⁴ *Id.*, para. 7.12.

¹⁸⁵ *Id.*, para. 7.13.

¹⁸⁶ Witness Statement by José Luis Montalvo, para. 37.

¹⁸⁷ Expert Industry Report by Jean Richards, para. 7.14.

¹⁸⁸ Expert Industry Report by Jean Richards, para. 7.14.

¹⁸⁹ Memorandum from Gerald Seow to POSH Board of Directors dated 8 May 2012, p. 3, **C-42**.

¹⁹⁰ Bareboat Charter for GOSH Caballo Grano de Oro between GOSH Caballo Grano de Oro S.A.P.I. de C.V. and Oceanografía S.A. de C.V., dated 30 April 2013, **C-95**; Bareboat Charter for POSH Plover (tbr Rodrigo DPJ) between GOSH Rodrigo DPJ S.A.P.I. de C.V. and Oceanografía, S.A. de C.V., dated 22 June 2012, **C-96**.

¹⁹¹ Witness Statement by José Luis Montalvo, para. 35.

¹⁹² Bareboat Charter for Salvirile between Semco Salvage (IV) Pte. Ltd. and Oceanografía, S.A. de C.V., dated 27 December 2011, **C-20**; Bareboat Charter for Salvation between Semco Salvage (IV) Pte. Ltd. and Oceanografía, S.A. de C.V., dated 27 December 2011, **C-21**.

Mexican waters up to two years. While in discussions for the renewal of the SEMCO Charters, the vessels remained in OSA's possession but not in operation.¹⁹³ Upon securing the renewal, POSH intended to flag and register the SEMCO Vessels in Mexico, through a Mexican subsidiary, and continue operations in Mexico.¹⁹⁴

- The GOSH Charters, employing six vessels, were in full force and operation. Discussions for their renewal were not expected until the date of expiration of the charters, which was at the end of 2015 and end of 2016.¹⁹⁵

108. POSH also had solid and legitimate grounds to believe that PEMEX would award new contracts to the Subsidiaries. Mexico had passed an energy reform reducing taxes imposed on PEMEX in order to expand its oil production. As a result, it was predicted that the “opening of the country’s energy industry will bring in up to \$30 billion of foreign investment annually and create as many as 2 million jobs.”¹⁹⁶ PEMEX would be looking for reliable service providers to support this expansion process, and POSH’s Subsidiaries were already successfully and reliably performing works for PEMEX and consolidating their good reputation in Mexico.

109. In sum, by February 2014, POSH’s operations in Mexico and future prospects were solid.

V. MEXICO’S ACTS AND OMISSIONS DESTROYED POSH’S INVESTMENT

110. Five months later, however, by July 2014, POSH’s Investment was destroyed and the Subsidiaries were left with nothing. This was the result of a politically motivated campaign led by the Mexican administration to bring down OSA, along with its contractors and business partners—including POSH’s Subsidiaries—due to its ties with Mexico’s prior administrations, which had been led by a different political party. It was a political *vendetta* to remove OSA from its position of preeminence as PEMEX’s main contractor, without regard for the rights of its business partners. These measures either directly impacted or specifically targeted the Subsidiaries

¹⁹³ Witness Statement by José Luis Montalvo, para. 35.

¹⁹⁴ Witness Statement by Keng-Lin, para. 32.

¹⁹⁵ Witness Statement by José Luis Montalvo, para. 35.

¹⁹⁶ The Washington Post, *Pemex, Mexico’s state oil giant, braces for a the country’s new energy landscape*, retrieved from <https://perma.cc/E3SN-ZZPZ> (last accessed 20 March 2019), **C-123**.

and resulted in the destruction of the Investment.

111. As set forth below, from February 2014 onwards, (i) Mexico unlawfully banned OSA from entering into any public contract, irreparably harming OSA's ability to perform its contracts with the Subsidiaries; (ii) Mexico initiated an unsupported criminal investigation against OSA for alleged money laundering and fraud, without any basis in fact or law, and without ever filing any charges against OSA; (iii) Mexico unlawfully seized all OSA's assets and took control over OSA, effectively blocking the payment of OSA's debts to the Subsidiaries; (iv) Mexico unlawfully seized the ten vessels owned by POSH's Subsidiaries, although they did not belong to OSA; (iv) Mexico forced OSA into insolvency and acknowledged that the administrative sanction banning OSA from entering into any public contract was the proximate cause of the insolvency; (v) Mexico officially suspended all payments to creditors, and unlawfully diverted the payments owed by PEMEX to the POSH through the Irrevocable Trust; finally, (vi) Mexico arbitrarily prevented POSH's Subsidiaries from contracting directly with PEMEX to save its operations in Mexico. These series of actions irreparably destroyed the Investment.

A. MEXICO UNLAWFULLY SANCTIONED OSA

112. OSA was PEMEX's largest contractor: since 2003, it had entered into over 150 contracts with PEMEX, with 45 awarded in the 2011-2013 period.¹⁹⁷ OSA's contracts with PEMEX represented 97% of its income.¹⁹⁸ OSA relied on those contracts to obtain cash flow to operate the vessels and pay its debts, including to POSH's Subsidiaries. Without the contracts, OSA would be forced to shut down. Mexico was well aware of this.¹⁹⁹

113. On February 10, 2014, the Mexican agency responsible for overseeing public contracts and government spending (Secretaría de la Función Pública, **SFP**), issued a resolution accusing OSA of allegedly failing to obtain insurance policies covering 10% of the value of nine of its contracts with PEMEX, as required by Mexican Law.²⁰⁰ On that basis, the SFP banned OSA

¹⁹⁷ Letter from J. Márquez Serralde to Senator L. Hernández Lecona dated 23 October 2014 (attachment containing the list of contracts entered into by OSA and PEMEX between 2003 and 2014), **C-124**.

¹⁹⁸ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.'s case, Report of the period between September 2017 and April 2018, p. 5, **C-125**.

¹⁹⁹ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.'s case, 2015 Activities Report, **C-126**.

²⁰⁰ Letter from D. Ramírez Ruiz to Senator L. Hernández Lecona dated 2 May 2014 (attachment containing the administrative procedure adopted against Oceanografía, S.A. de C.V.), **C-127**.

from entering into new contracts with any public entity, including PEMEX, for one year, nine months and 12 days; and ordered OSA to pay over MEX 24 MM. (the **Unlawful Sanction**).²⁰¹ POSH learned about the Unlawful Sanction in the press.

114. The Unlawful Sanction was illegal and contrary to Mexican Law. The Mexican statute governing bans is reserved for fraud cases, and SFP had not made any fraud-related claim. OSA challenged the Unlawful Sanction and prevailed. The Mexican courts suspended its effects in July 2014,²⁰² revoked it in November 2014²⁰³ and, on appeal, confirmed that revocation in June 2015.²⁰⁴ Mexico's own courts declared that the Unlawful Sanction was illegal because "there [wa]s no evidence to demonstrate the alleged [misconduct], and no fraudulent behavior or intent existed (as required by the law)."²⁰⁵ A Special Committee later formed by the Mexican Senate to investigate the OSA case summarized these events as follows:

The order of the Federal Government that precipitated the scandal in Oceanografía fell apart. A federal tribunal annulled the disqualification of Oceanografía to be awarded public contracts, and a 24 million Pesos fine, both imposed in February 2014 by the Public Service Secretary (SFP) as a penalty for [allegedly] deceiving Pemex Exploration and Production (PEP). The decision in favor of Oceanografía, notified on June 16, is plain and simple, that is, it invalidates the sanction, preventing SFP from resuming the proceeding. The High Court for the 10th Circuit, seated in Coatzacoalcos, Veracruz, confirmed the district's judge decision of last November who, besides declaring that *the sanction by the SFP against Amado Yáñez's company was illegal, declared the unconstitutionality of certain provisions of the Federal Anticorruption in Public Contracts Act from 2012*.²⁰⁶

²⁰¹ *Ibid.*

²⁰² Judgement of the Court of Appeals for the 10th Circuit dated 4 June 2015, **C-128**.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ *Id.*, pp. 272-273.

²⁰⁶ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.'s case, Ninth Ordinary Meeting, p. 21, **C-129**. Counsel's translation from the original in Spanish: "La resolución del Gobierno Federal que precipitó el escándalo de la empresa Oceanografía, se vino abajo. Un tribunal federal anuló en definitiva la inhabilitación a Oceanografía para recibir contratos públicos, así como una multa de 24 millones de pesos, impuestas en febrero de 2014 por la Secretaría de la Función Pública (SFP) como castigo por engañar [supuestamente] a Pemex Exploración y Producción (PEP). El amparo en favor de Oceanografía, notificado el 16 de junio, es liso y llano, es decir, invalida la sanción, sin que la SFP pueda reponer el procedimiento. El Tribunal Colegiado del Décimo Circuito, con sede en Coatzacoalcos, Veracruz, confirmó el amparo otorgado en noviembre del año pasado por un juez de distrito, quien además de declarar ilegal la sanción de la Función Pública contra la empresa de Amado Yáñez, declaró inconstitucionales aspectos de la Ley Federal Anticorrupción en Contrataciones Públicas, vigente desde 2012."

115. During the time it was in force, the Unlawful Sanction caused irreparable damage to OSA and POSH's Investment. OSA's contracts with PEMEX were expiring and needed to renew those contracts or replace them with new ones to continue operations. Without new contracts, OSA's financial situation rapidly deteriorated and so did its ability to perform on the contracts with POSH's Subsidiaries. By the time the Unlawful Sanction was suspended in July 2014, OSA was insolvent, had stopped performing on its contracts with the Subsidiaries, and did not meet the financial indicators required by PEMEX to bid for public tenders.²⁰⁷ OSA would not be awarded a single contract by PEMEX nor would it perform on its contracts with the Subsidiaries ever again.

116. Mexico's actions were illegal and unlawful, as confirmed by Mexican courts, and directly impacted the Subsidiaries. Even if they had been legitimate and reasonable—and they were not—Mexico's response was disproportionate and without regard for the rights of foreign investors under international law. This is particularly so with respect to POSH and the Subsidiaries, since there was and has never been any allegation that any of them were involved in, or had any knowledge of, OSA's alleged violations of Mexican law, let alone evidence of such involvement.

117. The Unlawful Sanction was in effect a death sentence for OSA and the Investment. It led to the destruction of OSA's ability to contract with PEMEX and to perform on its contracts with the Subsidiaries and, ultimately, to OSA's demise. In time, the political motives behind this decision would be revealed.

B. THE POLITICAL CAMPAIGN AGAINST OSA

118. As a result of the Unlawful Sanction,²⁰⁸ Banamex launched an internal review of the cash advance facility it had established with OSA, whereby OSA assigned PEMEX receivables to Banamex in exchange for cash advances. Banamex reported to the Mexican authorities its belief that a portion of the account receivables recorded by Banamex in connection with PEMEX were fraudulent.²⁰⁹

²⁰⁷ Email from J. Phang to G. Seow et al. dated 18 July 2014, **C-130**.

²⁰⁸ Email from A. Orvañanos to G. Seow et al. dated 28 February 2014, **C-131**.

²⁰⁹ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.'s case, 2015 Activities Report, p. 65, **C-126**.

119. This information was widely covered by the press and caused a nation-wide scandal in Mexico.²¹⁰ OSA was one of the largest companies in Mexico and the largest contractor of PEMEX, with over 150 contracts over the prior 15 years,²¹¹ which were worth over \$3,200 MM.²¹² PEMEX had suffered corruption scandals in the past,²¹³ and rumors surfaced about the connections between Mr. Yáñez and PEMEX, and the potential impropriety of PEMEX's directors and employees.²¹⁴ OSA had benefitted from close ties with Mexico's former presidents Mr. Vicente Fox and Mr. Felipe Calderón²¹⁵ (the **PAN Administrations**).²¹⁶ The press at the time echoed the collective belief that the new administration, led by Mr. Enrique Peña Nieto (the **PRI Administration**)²¹⁷ was attempting to "remove those [who had] benefited by the [PAN] administrations, particularly that of [Mr. Vicente] Fox."²¹⁸ There was a wide-spread belief that this case went "beyond [OSA's] legal issues,"²¹⁹ and was driven by the political agenda of the PRI Administration.²²⁰ The Mexican Senate further echoed that "the matter ceased to be an issue

²¹⁰ Expansión, *Banamex acusa fraude de Oceanografía*, February 28, 2014, retrieved from <https://expansion.mx/negocios/2014/02/28/citigroup-descubre-fraude-en-banamex> (last accessed 20 March 2019), **C-132**; El Financiero, *Banamex acusa fraude de Oceanografía por 400 mdd*, February 28, 2014, retrieved <https://www.elfinanciero.com.mx/economia/citigroup-descubre-fraude-en-mexico-y-recorta-ingresos-de-2013> (last accessed 20 March 2019), **C-133**.

²¹¹ Expansión, *Oceanografía, la preferida de PEMEX*, March 3, 2014, retrieved from <https://expansion.mx/negocios/2014/02/28/oceanografia-pemex-fraude-barco> (last accessed 20 March 2019), **C-134**.

²¹² PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, dated 30 April 2015, p. 10, **C-135**.

²¹³ Proceso, *La histórica corrupción en Pemex*, January 21, 2002, retrieved from <https://www.proceso.com.mx/239431/la-historica-corrupcion-en-pemex> (last accessed 20 March 2019), **C-136**; El Mundo, *Pemex, entre el luto y la polémica*, February 2, 2013, retrieved from <https://www.elmundo.es/america/2013/02/02/mexico/1359845752.html> (last accessed 20 March 2019), **C-137**.

²¹⁴ Vanguardia, *'Contacto' de Yáñez en Pemex ayudó al golpe de Oceanografía*, June 24, 2014, retrieved from <https://vanguardia.com.mx/contactodeyanezenpemexayudoalgolpedeoceanografia-2095390.html> (last accessed 20 March 2019), **C-138**.

²¹⁵ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, dated 30 April 2015, p. 4, **C-135**.

²¹⁶ Acronym in Spanish for *Partido de Acción Nacional*.

²¹⁷ Acronym in Spanish for *Partido Revolucionario Institucional*.

²¹⁸ Expansión, *Oceanografía, la preferida de PEMEX*, March 3, 2014, retrieved from <https://expansion.mx/negocios/2014/02/28/oceanografia-pemex-fraude-barco> (last accessed 20 March 2019), **C-134**.

²¹⁹ British Broadcasting Corporation (BBC), *Pemex y Banamex: radiografía de un escándalo financiero a gran escala*, March 4, 2014, retrieved from <https://perma.cc/P69K-VEMB> (last accessed 20 March 2019), **C-139**.

²²⁰ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, dated 30 April 2015, p. 4, **C-135**.

between private individuals... due to the potential and alleged implications for PEMEX”²²¹ and created a Special Committee to monitor the case (the **Senate Committee**). The purpose of the Senate Committee was to remedy the “scarce, incomplete, and distorted information” available to the public.²²² Certain senators expressly stated that the investigation against OSA was “a hunt to bring down the company [that had been] spoiled by the Calderon administration,” an act of “vengeance against the PAN”²²³ [Political Party] and “an opportunity to use this voluminous file to obtain a... cooperative attitude from that party...”²²⁴

120. Indeed, the facts show that the PRI Administration launched a politically motivated campaign against OSA, its shareholders and its business partners, including POSH’s Subsidiaries. All government entities coordinated efforts to adopt a series of excessive, unreasonable, arbitrary and unlawful measures against OSA and its business partners. This campaign began with an unlawful and unfounded administrative sanction banning OSA from entering into any public contract, including with PEMEX, leading to OSA’s demise and destroying its ability to perform its contracts with POSH’s subsidiaries. It continued with an unsupported criminal investigation against OSA, in which the State abused its powers, took control of OSA and decided not to effect payments owed to POSH’s subsidiaries. It ended with the insolvency proceedings of OSA under the firm control of the State, which decided not to perform on its contracts with POSH’s subsidiaries, diverted payments owed to POSH (via the irrevocable trust) and prevented PEMEX from assigning contracts to POSH’s subsidiaries. These measures either directly impacted, or were specifically targeted, at POSH’s investment and led to its destruction. Significantly, the Mexican government has never claimed that POSH or its Mexican subsidiaries were involved in any wrongful acts under Mexican law or had any connection with OSA’s alleged wrongdoing. Regardless, Mexico took actions without regard for the harm to POSH’s Investment, and without any concern to its destruction.

²²¹ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.’s case, 2015 Activities Report, p. 12, **C-126**.

²²² PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, dated 30 April 2015, p. 1, **C-135**.

²²³ *Id.*, p. 4, 12.

²²⁴ *Id.*, p. 4.

C. THE CRIMINAL INVESTIGATION

1. Mexico launched an arbitrary, unlawful and unsupported investigation for money laundering and fraud

121. On February 26, 2014, Banamex filed a criminal complaint against OSA before the PGR claiming that OSA had forged work estimates and approvals from PEMEX, to obtain over \$400 MM. in cash advances from Banamex (the **Banamex Complaint**).²²⁵

122. On the very next day, February 27, 2014, the Financial Intelligence Unit of the Ministry of Treasury (**UIF**, acronym in Spanish), filed a separate criminal complaint before the PGR claiming OSA and its shareholders had engaged in money laundering (the **UIF Complaint**). The UIF Complaint requested the seizure of OSA and all its assets.²²⁶ The PGR assigned the case to its Organized Crime Unit (**OCU**),²²⁷ which initiated a criminal investigation labeled “Averiguación Previa UEIORPIFAM/AP/065/2014” (the **Money Laundering Investigation**). The OCU has jurisdiction to investigate cases where signs of organized criminal activity are present.

123. The facts show that the Money Laundering Investigation was arbitrary, unsupported and unlawful under Mexican Law.

124. *First*, there were no signs or evidence of money laundering. That crime requires the existence of “founded signs or certainty that the resources stem, directly or indirectly, or represent the proceeds of a crime.”²²⁸ None were present. The sole factual basis of the UIF complaint is a list of offshore transactions by and to OSA. This alone led the UIF to assert that “there were significant movements of resources with characteristics that attract the attention of this Unit,”²²⁹ that the transactions had “unusual characteristics”²³⁰ because “they were made abroad,”

²²⁵ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.’s case, 2015 Activities Report, p. 11, **C-126**.

²²⁶ Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury dated 27 February, p. 24, **C-140**.

²²⁷ *Id.*, p. 26.

²²⁸ Federal Criminal Code of Mexico, Art. 400 Bis. **CL-5**.

²²⁹ Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury dated 27 February, p. 2, **C-140**.

²³⁰ *Id.*, p. 3.

and they “do not comport with the economic activity of the company.”²³¹ On that basis alone, the UIF concluded that “there [was] a *high level of probability* that [the assets in this transactions] stem from illegal activity.”²³² This was unfounded (and untrue). The UIF did not address what the alleged illegal activity was meant to be, the connection between the assets and the alleged illegal activity or the reasons why the transactions would not comport with the company’s activity.²³³

125. The UIF did not find “signs or certainty” of any illegal activity, but merely acknowledged that it was unaware of the origin of funds in certain offshore transactions. Lack of knowledge and illegal origin are two very different things.²³⁴ Under Mexican Law, lack of knowledge of the origin of the funds is not a sign of a crime of money laundering.²³⁵

126. *Second*, the “only (unproven) crime that OSA had been accused of at that time was the crime of fraud, denounced in the Banamex Complaint. Nonetheless, when the UIF Complaint was filed on February 27, 2014 “the UIF... [did not have] the Banamex Complaint or the documentation attached thereto.”²³⁶ Accordingly, the UIF Complaint “is not based on, cites, or mentions the alleged fraud against Banamex or the alleged forgery of documents; neither it is based on, cites or mentions the documents attached to the Banamex Complaint.”²³⁷ It was solely based on the list of offshore transactions. The UIF did not receive a copy of the Banamex Complaint until March 11, 2014, two weeks after filing its own complaint requesting the seizure of OSA. On that date, the UIF incorporated the Banamex Complaint for fraud into the Money Laundering Investigation, creating a joint investigation for money laundering and fraud (the **Joint Investigation**). The simple chronology of facts shows that when the UIF filed its complaint on February 27, 2014, it did not have a single argument, document or report that pointed to any illegal

²³¹ *Id.*, p. 2.

²³² *Ibid.*

²³³ Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 33.

²³⁴ *Id.*, para. 34.

²³⁵ *Id.*, para. 34.

²³⁶ *Id.*, para. 37.

²³⁷ *Id.*, para. 91.2

activity on the part of OSA or its shareholders.²³⁸ Its decision to investigate, therefore, was not on any legal basis, but rather a political one.

127. *Third*, subsequent events confirmed the lack of evidence and unlawfulness of the Joint Investigation. The UIF never found any signs of the crime of money laundering or fraud and never pressed any charges against OSA or its shareholders.²³⁹ The investigation was supervised by the OCU (Organized Crime Unit), which never found any signs of organized crime. On October 10, 2018, the OCU finally suspended the investigation and referred it to a different governmental unit. Absent any sign of money laundering, fraud or organized crime, the OCU did not have jurisdiction to pursue the investigation.²⁴⁰

128. In sum, the Money Laundering Investigation and the subsequent Joint Investigation were inherently flawed and unlawful. There was no factual or legal basis to support them, as was evident from the start, and was later confirmed by subsequent events. Mexico never pressed any charges nor did it obtain any convictions.²⁴¹ Even if they had been lawful under Mexican law—which they were not—they were arbitrary and disproportionate under international law. Mexico, however, used this inherently flawed, unlawful and arbitrary investigation to order the seizure and ultimately take full control of OSA.

2. Mexico arbitrarily and unlawfully seized all OSA’s assets and took control over OSA

129. On the day after the UIF filed its complaint for money laundering, the PGR rushed to order the “temporary seizure” of OSA, all its assets, and those of its shareholders²⁴² (the **Seizure Order**). As a result, on March 1, 2014, the PGR ordered SAE, the government agency responsible for managing seized assets,²⁴³ to take control of OSA.²⁴⁴ As of that specific point in time, SAE

²³⁸ *Id.*, para. 37.

²³⁹ *Id.*, para. 91.5

²⁴⁰ *Id.*, para. 76.

²⁴¹ *Id.*, para. 91.5.

²⁴² Seizure Order (*Acuerdo de Aseguramiento*), issued by the Special Unit for the Investigation of Illicit Funds Operations and Forgery or Alteration of Money, dated 27 February 2014, **C-141**.

²⁴³ SAE is a governmental agency, which reports to the Ministry of Treasury. See Servicio de Administración y Enajenación de Bienes, *¿Qué hacemos?*, retrieved from <https://www.gob.mx/sae/que-hacemos> (last accessed 20 March 2019), **C-17**.

²⁴⁴ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.’s case, 2015 Activities Report, **C-126**.

effectively blocked any and all payments owed by OSA to the Subsidiaries —by simply refusing to pay— and any and all payments owed by PEMEX to POSH via the Irrevocable Trust —by refusing to process invoices for works performed to PEMEX.²⁴⁵ The State effectively blocked any and all returns on POSH’s Investment.

130. Mexico’s Seizure Order, which directly and irreparably affected the Subsidiaries, was unlawful, arbitrary, disproportionate and contrary to Mexican Law.

131. *First*, the Seizure Order had no factual or legal basis to support it.²⁴⁶ The seizure of a company is “the most unusual, extreme and intrusive measure that can be adopted by the public authorities.”²⁴⁷ Mr. Diego Ruiz, expert on Mexican criminal law, explains that he had never encountered “a single case in which the seizure of an entire company had been decreed, until the one involving OSA.”²⁴⁸ It is an extraordinary precautionary measure that deprives shareholders and directors of the management of their company and its assets, before they have a chance to plead their case. Therefore “signs of criminal activity must be much more evident and widespread throughout the company.”²⁴⁹ Here, none were present.

132. The UIF Complaint did not point to any signs or evidence of the existence of a crime of money laundering—just a list of transactions— nor did the Seizure Order. It merely transcribed two paragraphs of the UIF Complaint stating that there were operations involving “significant resources that present characteristics that call the attention to this Financial Intelligence Unit [...]”²⁵⁰ On that basis alone, PGR ordered the seizure, assuming the flawed reasoning of the UIF Complaint. The Seizure Order was flawed for, among other reasons, the same as those of the Money Laundering Investigation. Mr. Ruiz explains that:

In general, a seizure order of an entire company must explain and detail (i) the need for its adoption on an objective and properly founded basis; (ii) the reasons why the complete seizure is necessary and appropriate for the investigation, based on and in reference to the documents filed with the complaint; and (iii) the specific relationship between the assets and objects of the company with the alleged crime

²⁴⁵ Witness Statement by José Luis Montalvo, at para 48.

²⁴⁶ Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 43.

²⁴⁷ *Id.*, para. 46.

²⁴⁸ *Id.*, para. 46.

²⁴⁹ *Id.*, para. 46.

²⁵⁰ Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury dated 27 February 2014, p. 2, **C-140**.

and the risk of alteration, destruction, or disappearance. The Seizure Order does not include any of the above. The PGR failed to comply with the guiding principles of its investigation.²⁵¹

133. *Second*, no factual or legal analysis was even possible, since the Seizure Order was issued on the day immediately after the UIF Complaint was filed. Given the gravity and intrusiveness of a seizure order, the public authorities have a legal duty to assess the factual and legal grounds and balance the interests involved. This is particularly so, because it is issued *ex parte*, before the accused party has had a chance to plead his case. Even partial seizures of assets, such as bank accounts, generally take weeks or months.²⁵² Here, *the PGR issued the Seizure Order in a day*. It is “physically impossible to properly assess the implications of such a complex case and weigh up the interests at stake in a single day, particularly given the lack of evidentiary support for the UIF Complaint. This constitutes a serious violation of the principles that govern the investigative activity of the PGR.”²⁵³ This further shows the administration’s political agenda to act swiftly against OSA, without regard for the lack of any objective legal or factual basis.

134. *Third*, PGR violated the public authorities’ constitutional duty to explain the basis for its resolutions. Mr. Ruiz explains that:

[t]he PGR violated the public authority’s duty to motivate its resolutions under the Mexican Constitution... Given its exceptional nature, a Seizure Order for an entire company must be based on a well-structured explanation of the need and suitability of its implementation. It must contain (i) a specific statement of the facts denounced; and (ii) sufficient evidence to conclude that the measure is essential for the protection of those objects that are considered to be related to the crime; and (iii) the reasons why another less harmful measure was not sufficient. *The Seizure Order does not contain any reasoned explanation and violates the public authorities’ constitutional duty to motivate their resolutions.*²⁵⁴

135. In a report issued in 2015, the Senate Committee highlighted that, from the investigation that was conducted, it was found that Oceanografía has over ten thousand employees, had been terminated since the company had been sanctioned.²⁵⁵ These are not signs of a crime

²⁵¹ Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 49.

²⁵² *Id.*, para. 38.

²⁵³ *Id.*, para. 50.

²⁵⁴ *Id.*, para. 51.

²⁵⁵ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.’s case, 2015 Activities Report, p. 43, **C-126**.

and are not valid grounds for the seizure of a company. In fact, they represent the PGR's acknowledgement that the Unlawful Sanction was the proximate cause of OSA's insolvency.

136. *Fourth*, the PGR violated the constitutional principle of proportionality. Even if there had been signs of criminal activity (*quod non*), the Seizure Order was excessive and disproportionate. The UIF Complaint listed a series of offshore transactions to and by OSA and contended that “the whole corporate structure had been used to receive in the said accounts... resources that are the result of... crimes.”²⁵⁶ The UIF did not mention what the purported crimes were alleged to be, how the resources were alleged to have been obtained from the purported crimes, or how the whole corporate structure—particularly the vessels—were meant to have been used to receive the funds in the bank accounts. Mr. Ruiz explains that “[t]he PGR... limited the scope of the alleged (and unknown) crime to the use of bank accounts by OSA, not the entire corporate structure of the company. Hence, even if there had been some indication of crime, which is not the case, seizing the bank accounts of OSA would have been the reasonable and proportional measure, not the seizure of the whole company.”²⁵⁷ But doing so would not have ensured the State's control over OSA. The only way to do that was to seize all of OSA—a measure for which there was no legal basis. Even if there had been, the measure was arbitrary and disproportionate under international law.

137. *Fifth*, subsequent events confirmed the unlawfulness of the seizure. OSA remained under “temporary” seizure for over three years. On June 20, 2017, POSH found out that the PGR had suddenly lifted OSA's seizure.²⁵⁸ As with the issuance of the Seizure Order, the PGR never provided any grounds for lifting it. The lifting of the Seizure Order meant, however, that there were no signs of the criminal activity upon which the seizure was purportedly based. Indeed, the UIF never found any signs of money laundering, nor did it ever press any charges against OSA or its shareholders. On October 10, 2018, after 4 years of investigation with no signs of money laundering, fraud, or organized crime, the OCU suspended the Joint Investigation and referred it to a different unit, on the ground of lack of jurisdiction.²⁵⁹

²⁵⁶ Complaint filed by the Financial Intelligence Unit of the Ministry of Treasury dated 27 February 2014, **C-140**.

²⁵⁷ Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 60.

²⁵⁸ Writ filed by the PGR to inform the lifting of the seizure of OSA, dated 16 June 2017, **C-142**.

²⁵⁹ Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 76.

138. The consequences of the Seizure Order were catastrophic for the Investment. OSA lost management and control of its operations, which were transferred to SAE, a government entity with no knowledge or experience in the OMS Industry. And SAE effectively blocked all payments owed by OSA to the Subsidiaries, and by PEMEX to POSH (through the Irrevocable Trust). The Seizure Order was unlawful and motivated by the State's intention to take control over OSA. Even if it had been lawful—and it was not—it was arbitrary and disproportionate under international law, particularly to POSH, which had no role in the alleged wrongdoing of OSA.

3. Mexico unlawfully and arbitrarily detained the 10 vessels owned by POSH's Subsidiaries

139. On March 19, 2014, in the framework of the Joint Investigation for money laundering and fraud (which was later withdrawn), and on the basis of the Seizure Order, the PGR specifically targeted POSH and the Subsidiaries by seizing and detaining their 10 vessels, and placing them under SAE's control (the **Detention Order**).²⁶⁰ On March 25, 2014, POSH unofficially learned about the Detention Order, and immediately thereafter, on March 28, 2014, submitted to the PGR the prerequisite documentation showing that the ten vessels did not belong to OSA, but to POSH and the Subsidiaries, and their detention was unwarranted.²⁶¹ This was to no avail. The Subsidiaries filed two further briefs with the PGR requesting the release of the vessels, with the same outcome.²⁶² Mexico tacitly rejected all attempts made by POSH and the Subsidiaries to recover the vessels.

140. Despite the unlawfulness of the Detention Order, POSH's Subsidiaries cooperated with the State and engaged in discussions to ensure the safe return of the vessels.²⁶³ Mexico never disputed that the vessels belonged to POSH's subsidiaries, nor did it claim that they were involved in any crime.²⁶⁴ Nonetheless, the PGR refused to release them.

²⁶⁰ Record of Service of the decision that orders the seizure of GOSH's vessels from 19 March 2014, dated 28 March 2014, **C-143**.

²⁶¹ Email from J. Phang to G. Seow et al. dated 28 February 2014, **C-144**. Email subject to attorney client-privilege. Redacted to preserve privileged information from counsel. Writ filed by José Luis Montalvo Sánchez Mejorada, on behalf of GOSH, dated 28 March 2014, **C-145**.

²⁶² Writ filed by José Luis Montalvo Sánchez Mejorada, on behalf of GOSH, dated 29 April 2014, **C-146**; Writ filed by José Luis Montalvo Sánchez Mejorada, on behalf of GOSH, dated 7 May 2014, **C-147**.

²⁶³ Email from G. Seow to R. Granguillhome Morfin dated 12 May 2014, **C-148**; Witness Statement by José Luis Montalvo, paras. 49, 51.

²⁶⁴ Witness Statement by José Luis Montalvo, para. 49.

141. During the Detention Order, GOSH's Vessels remained operational and servicing PEMEX. PFSM provided maintenance services and paid the crew and passed on those costs to OSA per their management contract.²⁶⁵ But OSA failed to meet its payment obligations as a result of the Unlawful Sanction and the Seizure Order, and PFSM was forced to assume these costs in lieu of OSA. As a result of this and other measures by Mexico, on May 16, 2014, GOSH withdrew the vessels from the GOSH Charters.²⁶⁶ But GOSH did not recover the use of the vessels. The Detention Order only allowed GOSH's Vessels to service PEMEX so, after the withdrawal, GOSH could not deploy them elsewhere.²⁶⁷ The vessels remained inoperative for the rest of the detention period and PFSM had to assume repair, maintenance and crew costs arising thereunder.²⁶⁸

142. The SMP Vessels remained on dock and inoperative. OSA was in charge of paying the crew for these vessels but did not meet its obligations. The crew threatened to stop working and abandon the vessels. SMP negotiated with the crew and port authorities to regain possession of the vessels, which it did on March 7 and 10.²⁶⁹ The vessels, however, remained inoperative during the detention period. SMP covered OSA's costs of maintenance and crew during that time.²⁷⁰

143. The SEMCO Vessels also remained on dock and inoperative during the detention period. OSA was in charge of paying the crew, which it did in this case. SEMCO could not regain possession, nor could it deploy the vessels elsewhere, until the end of the detention period.²⁷¹ The vessels depreciated because OSA did not properly maintain and repair them.²⁷² SEMCO eventually assumed the maintenance and repair costs to get the vessels operative.²⁷³

²⁶⁵ *Id.*, para. 50; Witness Statement by Gerald Seow, para. 40.

²⁶⁶ Witness Statement by José Luis Montalvo, para. 50.

²⁶⁷ *Id.*, para. 50.

²⁶⁸ Credit Recognition Request filed by POSH Fleet Services Mexico, S.A. de C.V., dated 3 September 2014, **C-149**; Witness Statement by José Luis Montalvo, para. 52; Expert Damages Report by Versant, para. 118.

²⁶⁹ Act of Protest, recording the delivery of the vessel Rodrigo DPJ, dated 7 March 2014, **C-150**; Act of Protest, recording the delivery of the vessel Caballo Grano de Oro, dated 10 March 2014, **C-151**.

²⁷⁰ Credit Recognition Request filed by POSH Honesto, S.A.P.I. de C.V., dated 3 September 2014, **C-152**; Credit Recognition Request filed by POSH Hermosa, S.A.P.I. de C.V., dated 3 September 2014, **C-153**; Witness Statement by José Luis Montalvo, para. 51; Expert Damages Report by Versant, para. 53.

²⁷¹ Witness Statement by José Luis Montalvo, paras. 52-53.

²⁷² *Id.*, para. 52.

²⁷³ Credit Recognition Request filed by SEMCO Salvage (IV) Pte. Ltd., dated 3 September 2014, **C-154**; Expert Damages Report by Versant, para. 118.

144. Months went by until Mexico lifted the detention. The SEMCO Vessels remained illegally seized for over 4 months—they were not released until June 26, 2014.²⁷⁴ GOSH's Vessels, and the SMP Vessels remained illegally seized for over 5 months—they were not released until July 16, 2014.²⁷⁵ Mexico never explained the grounds for the vessels' detention.²⁷⁶

145. The facts show that the Detention Order, which specifically targeted the assets owned by POSH and the Subsidiaries, was unlawful, arbitrary and contrary to Mexican Law.

146. *First*, the Detention Order was fatally flawed since it stemmed from the flawed Joint Investigation and Seizure Order.²⁷⁷ There were no signs of money laundering or fraud and, therefore, no reasons to seize any assets. Even if there had been, the reasonable proportionate measure would have been the seizure of the bank accounts.²⁷⁸

147. *Second*, there was no factual or legal basis to seize the vessels owned by POSH's Subsidiaries. The Seizure Order applied to OSA, *its* assets, and those of its shareholders.²⁷⁹ It did not include assets owned by third parties. The ten vessels were owned by POSH's Subsidiaries. This was conveyed to the authorities, and they never disputed it. Indeed, on May 9, 2014, SAE admitted that OSA did not own most of the fleet in its possession.²⁸⁰

²⁷⁴ Record of Service of the decision that orders the lifting of the interim measures and the release of the vessels Salvision and Salvirile from 25 June 2014, dated 26 June 2014, **C-155**.

²⁷⁵ Record of Service of the decision that orders the lifting of the interim measures and the release of the vessel Rodrigo DPJ from 16 July 2014, dated 16 July 2014, **C-156**; Record of Service of the decision that orders the lifting of the interim measures and the release of the vessels Caballo Scarto, Don Casiano, Caballo Monoceros, Caballo Babieca, Caballo Copenhagen and Caballo Argento from 16 July 2014, dated 16 July 2014, **C-157**; Record of Service of the decision that orders the lifting of the interim measures and the release of the vessel Caballo Grano de Oro from 16 July 2014, dated 16 July 2014, **C-158**.

²⁷⁶ Record of Service of the decision that orders the lifting of the interim measures and the release of the vessels Salvision and Salvirile from 25 June 2014, dated 26 June 2014, **C-155**; Record of Service of the decision that orders the lifting of the interim measures and the release of the vessel Rodrigo DPJ from 16 July 2014, dated 16 July 2014, **C-156**; Record of Service of the decision that orders the lifting of the interim measures and the release of the vessels Caballo Scarto, Don Casiano, Caballo Monoceros, Caballo Babieca, Caballo Copenhagen and Caballo Argento from 16 July 2014, dated 16 July 2014, **C-157**; Record of Service of the decision that orders the lifting of the interim measures and the release of the vessel Caballo Grano de Oro from 16 July 2014, dated 16 July 2014, **C-158**.

²⁷⁷ Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 91.4.

²⁷⁸ *Id.*, para. 91.3

²⁷⁹ Record of Service of the decision that orders the seizure of GOSH's vessels from 19 March 2014, dated 28 March 2014, **C-143**.

²⁸⁰ Decision by the Insolvency Court declaring the insolvency of OSA, p. 22 (reproducing fact number 18 of SAE's answer to the insolvency claim), **C-159**.

148. Not only did OSA not own any of the ten vessels, it did not even have a legal right to possess or use the SEMCO and SMP Vessels. The SEMCO Charters had expired on December 27, 2014, and the SMP Charters had expired on January 31, 2014. The vessels remained in OSA's possession during negotiations for their renewal, but on February 10 and 12, 2014, HONESTO, HERMOSA and SEMCO had sent letters to OSA demanding payment of outstanding amounts and, if not paid, requesting repossession of the vessels.²⁸¹ All this evidence was disregarded by the Mexican authorities. As Mr. Ruiz explains "the factual premises for the Detention Order were not present, and the action failed to comply with the principles of action of public authorities."²⁸²

149. *Third*, the ten vessels were not related, in any way, to the crimes allegedly committed by OSA. Under Mexican Law, the authorities may seize "the instruments, objects or products of the crime, as well as assets in which there is evidence or could be related with the crime..."²⁸³ The UIF Complaint cited a list of offshore transactions but made no reference to the vessels. The PGR based the Seizure Order on the UIF Complaint and never mentioned any alleged illegal activity, nor its connection with the vessels, particularly those neither owned nor rightfully possessed by OSA. The Detention Order, issued as a result of the Seizure Order, lacks any legal foundation and violated the Subsidiaries' due process rights.²⁸⁴

150. *Fourth*, subsequent events confirmed the unlawfulness of the Detention Order. The Detention Order was issued on the basis of the Seizure Order, which was issued in the framework of the Joint Investigation. And, as noted, the Joint Investigation concluded with no charges being filed, let alone convictions obtained.²⁸⁵ There was no basis for any of the crimes OSA was purported to have committed and there was never any basis for the Detention Order. Mexico's ultimate release of the vessels is a testament thereto.

²⁸¹ Notice of Repossession and Notice of Default and Requirement of Payment in relation to the vessel Rodrigo DPJ, sent by GOSH Rodrigo DPJ, S.A.P.I. de C.V. to Oceanografía, S.A. de C.V., dated 10 February 2014, **C-160**; Notice of Repossession of vessel Caballo Grano de Oro, sent by GOSH Caballo Grano de Oro S.A.P.I. de C.V. to Oceanografía, S.A. de C.V., dated 10 February 2014, **C-161**.

²⁸² Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 68.

²⁸³ Federal Code of Criminal Procedures, Art. 181, **CL-6**.

²⁸⁴ Expert Legal Opinion Criminal Law by Diego Ruiz Durán, para. 91.4.

²⁸⁵ *Id.*, para. 74.

151. The Detention Order, which specifically targeted POSH and Subsidiaries, was unlawful and illegal under Mexican Law. Even if it had been legal—and it was not—it was arbitrary and disproportionate and violated the Subsidiaries rights under international law.

4. Mexico initiated several other unsupported criminal investigations against OSA’s shareholders for financial fraud

152. By May 2014, the Joint Investigation was showing no sign of money laundering. Mexico was adamant, however, on prosecuting OSA. Mexico opened several new investigations for purported financial fraud against OSA’s shareholders. Although these were different allegations, they were based on the same facts. These investigations were initiated after the Seizure Order and the Detention Order and have no bearing on those measures.²⁸⁶ The fact that no convictions have ever been obtained as a result of these new investigations, however, reveals the politically motivated nature of all of Mexico’s actions.

153. On May 5, 2014, the PGR launched an investigation labeled “Indagatoria Número UEIORPIFAM/AP/115/2014” against Mr. Yáñez and others, for the alleged use of bank credits for purposes other than those for which they were granted (Article 112.V of the Law on Financial Institutions). Mexico never disclosed information on this case. Upon information and belief, charges were pressed against Mr. Yáñez under criminal proceeding no. 47/2014 (**Criminal Proceeding 47/2014**).²⁸⁷ This proceeding stems from the Banamex Complaint and the alleged forgery of documents resulting in a \$400 MM fraud. Upon information and belief, Mr. Yáñez was arrested but challenged his arrest, prevailed and was released. No convictions were ever obtained.²⁸⁸

154. On May 28, 2014, the PMF launched an investigation labeled “Indagatoria Número UEIORPIFAM/AP/136/2014” against Mr. Díaz for the alleged use of bank credits for purposes other than those for which they were granted (Article 112.V of the Law on Financial

²⁸⁶ *Id.*, para. 78.

²⁸⁷ *Id.*, para. 81.

²⁸⁸ *Id.*, para. 81.

Institutions).²⁸⁹ Mexico never disclosed any information on this proceeding but, upon information and belief, no convictions were ever obtained.²⁹⁰

155. Finally, on October 17, 2017, Mexico launched a new investigation labeled “Indagatoria número UEIORPIFAM/AP/239/2014” against Mr. Yáñez for allegedly providing false data on the assets and liabilities of a company to a financial institution (Article 112.I of the Mexican Law on Financial Institutions).²⁹¹ This proceeding is also based on the facts reported by Banamex regarding the alleged forgery of documents resulting in a \$400 MM fraud. Upon information and belief, Mexico pressed charges against Mr. Yáñez under Criminal Proceeding 96/2014 (the **Criminal Proceeding 96/2014**).²⁹² Mr. Yáñez was arrested and put in prison for 3 years pending trial. He challenged his detention before a Mexican court, prevailed, and was released.²⁹³

156. Mr. Yáñez has always denied any wrongdoing and, after 18 months of the investigation, has not been convicted to date (the proceeding is still ongoing).²⁹⁴ Mexico has not disclosed any documentation on Criminal Proceeding 96/2017, invoking the Mexican Law on Transparency, which governs the confidentiality of criminal proceedings. The Senate Committee, however, prepared a chronology of facts, based on the limited information made available to it, public statements by government officials, and press coverage. This chronology suffices to show that the accusation of financial fraud against Mr. Yáñez was not factually supported:

- In October 2014, a Mexican insolvency court held that OSA did not owe Banamex any money from the cash advances, and the decision was upheld on appeal.²⁹⁵

²⁸⁹ *Id.*, para. 82.

²⁹⁰ Reforma, *Reponen amparo a socio de Oceanografía*, dated 29 May 2015, retrieved from <https://perma.cc/G5ZB-4QP2> (last accessed 20 March 2019), **C-162**.

²⁹¹ Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 84.

²⁹² El Financiero, *Dictan formal prisión a Amado Yáñez*, dated 28 October 2014, retrieved from <https://perma.cc/CNH5-3K4C> (last accessed 20 March 2019), **C-163**.

²⁹³ Excelsior, *Liberan a Amado Yáñez con brazalete*, dated 14 April 2017, retrieved from <https://www.excelsior.com.mx/nacional/2017/04/14/1157635> (last accessed March 20 2019), **C-164**.

²⁹⁴ The proceeding is inherently flawed since Article 23 of the Federal Constitution and the principle *non bis in idem* forbid the launching of two criminal actions against the same person, based on the same facts, for different crimes. Criminal Proceedings 47/2014 and 96/2014 are clearly two separate actions, based on the same facts, for two different—but certainly similar—crimes (Subsections I and V of the Law on Financial institutions). Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 86.

²⁹⁵ Judgment on Recognition of Credits, dated 23 October 2014, p. 41, **C-165**.

- On October 27, 2014, the “insolvency judge... rejected [Banamex] as a legitimate creditor”²⁹⁶ because it had failed to prove “liabilities for 5,624 billion pesos, that is, 450 million dollars”;²⁹⁷ and the judge established that the documentation of the credit claimed by Banamex “*was not solid enough* to validate its status as a creditor”.²⁹⁸
- On January 28, 2015, Mr. Yáñez produced before the criminal court hearing the case a document showing that [Banamex] collected “5.304 billion pesos from PEMEX” in payments from [OSA]. These collections mean 396 million dollars, which is very close to the 400 million Banamex submitted as unrecoverable, since they were based on collection estimates that were falsified by the company and with help from bank officials...”²⁹⁹

157. These additional proceedings were launched after the Seizure Order and the Detention Order and, therefore, have no bearing thereon.³⁰⁰ They are a testament, however, to the political persecution led by the Mexican authorities against OSA, its managers and shareholders, and the PRI’s Administration desire to dispense with OSA, as a political vengeance for its previous ties with the PAN Administrations.³⁰¹ Mexico is yet to obtain a single conviction.

158. What is directly relevant for POSH’s Investment is that, as a result of Mexico’s unlawful investigations, Mexico unlawfully seized all of OSA’s assets, unlawfully took full control of OSA, effectively blocked all payments to POSH and the Subsidiaries, and unlawfully seized the ten vessels owned by POSH and the Subsidiaries. These measures deprived OSA of its ability to perform on its contracts with the Subsidiaries, effectively deprived POSH and the Subsidiaries from payments for works performed to OSA and further deprived them of the vessels for several

²⁹⁶ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.’s case, 2015 Activities Report, p. 38, **C-126**.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.’s case, 2015 Activities Report, p. 40, **C-126**.

³⁰⁰ Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 78.

³⁰¹ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, dated 30 April 2015, p. 4, **C-135**.

months. Thereafter, Mexico would initiate an insolvency proceeding against OSA that would also deprive them of the contracts with OSA.

D. THE INSOLVENCY PROCEEDINGS

159. After the Unlawful Sanction, the demise of OSA was a foregone conclusion. The Mexican authorities forced OSA into insolvency, took full control over it during the insolvency proceeding, and adopted measures specifically targeting POSH and the Subsidiaries that resulted in the destruction of the Investment. All of this, without regard for the international law and treaty rights of foreign investors like POSH, who were innocent of, and unrelated to any alleged improper actions by OSA.

1. Mexico forced OSA's insolvency

160. On April 9, 2014, the PGR filed for involuntary insolvency proceedings against OSA (the **Insolvency Claim**) before a Federal Court in Mexico (the **Insolvency Court**).³⁰² POSH only knew about this through the press.

161. In the Insolvency Claim, the PGR acknowledged that the insolvency was a result of the Unlawful Sanction—later revoked by Mexican courts—and the “importance and social and public transcendence” of the case given OSA’s ties to PEMEX.³⁰³ The Insolvency Claim reads as follows:

4. On February 11, 2014, the Public Function Secretariat, published in the Federation’s Official Gazette, the Circular *****, through which it communicates to the offices of the Republic’s Attorney General and entities of the Federal Public Administration, as well as the federal entities, that they must *abstain from accepting proposals or celebrating contracts with the company Oceanografía, S.A. de C.V.*, on the grounds of being disqualified for the term of one year, nine months and twelve days. The referred Circular reads as follows: (...).

5. As it was previously indicated, the intervention of this company is justified under the Insolvency Law, the purpose of which is to govern commercial bankruptcies, is of public interest and its object is not limited to the conservation of companies, but also to avoid that the general breach of its payments obligations put in risk the viability of the companies themselves and of all other companies with whom they maintain a commercial relationship, with the consequences that this implies for workers, providers and other third parties that may suffer a general noncompliance of the company’s obligations.

³⁰² Statement of Claim for the Declaration of Insolvency, filed by the PGR, dated 9 April 2014, **C-166**.

³⁰³ *Id.*, p. 12.

The *importance, social and public transcendence*, means the link between Oceanografía, S.A. de C.V. and Petróleos Mexicanos, including the latter's subsidiaries, in relation to the operation and exploitation of the former, makes it necessary to demand the declaration of a commercial bankruptcy status of the latter to avoid harm to the operation and exploitation of the former and, with that, avoid the harm of its operations.³⁰⁴

162. SAE informed the Insolvency Court that OSA's estimated liquid assets at the time amounted to \$500,000.³⁰⁵ SAE acknowledged that, when it took over OSA's administration, "[t]he main source of the company's resources [came] from the collection from PEMEX; which represents more than 90% of their income."³⁰⁶ SAE also reported that OSA is "prevented from entering into new contracts with PEMEX"³⁰⁷ and "in general default of its obligations,"³⁰⁸ which is the legal premise for the declaration of insolvency under Mexican Law.

2. Mexico suspended all payments to creditors and unlawfully seized the payments owed to the Trust

(a) Mexico suspended all payments to creditors

163. On April 14, 2014, the Insolvency Court admitted the Insolvency Claim (**Writ of Admission**), initiating insolvency proceedings against OSA (the **Insolvency Proceeding**) and

³⁰⁴ Statement of Claim for the Declaration of Insolvency, filed by the PGR, dated 9 April 2014, p. 13, **C-166**. Translation by counsel from original in Spanish: "4.- El 11 de febrero de 2014, la Secretaría de la Función Pública, publicó en el Diario Oficial de la Federación, la Circular ***** mediante la cual, se comunica a las dependencias, Procuraduría General de la República y entidades de la Administración Pública Federal; así como a las entidades federativas, que deberán abstenerse de aceptar propuestas o celebrar contratos con la persona moral Oceanografía, S.A. de C.V., por encontrarse inhabilitada por el plazo de un año nueve meses y doce días. La referida Circular es del tenor literal siguiente: [...] 5. Como se ha señalado con anterioridad, la intervención de esta Representación Social se justifica en cuanto a que la Ley de Concursos Mercantiles, cuyo objeto es regular el concurso mercantil, es de interés público y su propósito no se limita a conservar las empresas, sino también evitar que el incumplimiento generalizado de sus obligaciones de pago ponga en riesgo la viabilidad de las mismas y de las demás con las que mantenga una relación de negocios, con las consecuencias que ello implica para los trabajadores, proveedores y demás terceros que pueden resentir un incumplimiento generalizado en el pago de las obligaciones a cargo del comerciante. La importancia, trascendencia social y pública, significa la vinculación entre la empresa Oceanografía, S.A. de C.V. y Petróleos Mexicanos, incluidas sus subsidiarias, en función de la operación y explotación de esta última, hace necesario exigir la declaración de estado de concurso mercantil de la primera, para evitar que la operación y explotación de la segunda se vea afectada y con ello, evitar la afectación de sus operaciones."

³⁰⁵ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.'s case, 2015 Activities Report, p. 18, **C-126**.

³⁰⁶ Letter from M. Fuentes Méndez to J. H. Ruiz Reynaud dated 4 April 2014, p. 2, **C-167**.

³⁰⁷ *Ibid.*

³⁰⁸ Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, Fifth Meeting dated 24 September 2014, p. 2, **C-168**.

directing OSA, under SAE's administration, to file the Answer to the Insolvency Claim in 9 days.³⁰⁹

164. The Writ of Admission ordered the Federal Institute of Insolvency Specialists (**IFECOM**, acronym in Spanish) to appoint SAE as Visitor, which is the organ in charge of evaluating the financial situation of the company. SAE accepted the appointment and, in turn, assigned this task to Mr. José Antonio de Anda Turati.³¹⁰ SAE would therefore act in a double capacity: as OSA's administrator after the seizure, managing all operations; and as OSA's Visitor after the Insolvency Claim, assessing its financial situation. Since SAE had no experience in the offshore industry, OSA sought to ensure its viability by retaining management of operations.³¹¹ SAE refused³¹² and the insolvency Court denied OSA's request.³¹³ Mexico retained full control over OSA.

165. The Writ of Admission also ordered, as precautionary measures, that (i) any execution proceedings against OSA be suspended; (ii) all payments in favor of any and all of OSA's creditors be suspended; (iii) all payments owed to OSA be made to SAE instead; and (iv) only payments that were "indispensable" to continue operations be made by SAE, as administrator of OSA.³¹⁴

166. As noted above, when SAE took over the administration of OSA, it had effectively blocked payments to the Subsidiaries by simply refusing to pay. The Writ of Admission went further and suspended any such payments indefinitely. Thereafter, SEMCO, HONESTO and HERMOSA were officially deprived of payments for services duly rendered under the charter

³⁰⁹ Insolvency Court decision, dated 14 April 2014 (admitting the filing of PGR's complaint), **C-169**.

³¹⁰ Writ filed by Servicio de Administración y Enajenación de Bienes, dated 25 April 2014 (requesting the appointment of José Antonio de Anda Turati as the formal visitor for the insolvency proceeding), **C-170**.

³¹¹ Writ filed by Oceanografía, S.A. de C.V., dated 24 April 2014 (requesting permission to be involved in the administration of the company), **C-171**.

³¹² Writ filed by Servicio de Administración y Enajenación de Bienes, dated 2 May 2014 (responding to Oceanografía S.A. de C.V.'s request to participate in the administration of the company), **C-172**.

³¹³ Insolvency Court decision, dated 6 May 2014 (rejecting Oceanografía S.A. de C.V. request to participate in the administration of the company), **C-173**.

³¹⁴ Insolvency Court decision, dated 14 April 2014 (admitting the filing of PGR's complaint), pp. 1, 3, **C-169**.

contracts,³¹⁵ while being forced to make additional payments to preserve their vessels.³¹⁶ SAE informed POSH that it was preparing a “list of vessels that will continue with the contracts”³¹⁷ and “they will ensure to pay charter and vessel expense to keep the vessel operational.”³¹⁸ However, SAE never paid that charter hire to any of POSH’s Subsidiaries.

(b) SAE sought and obtained the unlawful Diversion Order

167. GOSH and PFSM were protected against the suspension of payments to OSA’s creditors, since all payments due by PEMEX to OSA in connection with the GOSH Charters were to be made to the Irrevocable Trust. SAE conveyed to POSH that “since the payment rights had been assigned to an irrevocable trust account, [the] revenues for these vessels [were] assured.”³¹⁹ In fact, SAE sought to achieve the exact opposite, specifically targeting POSH’s rights under the Irrevocable Trust.

168. On May 2, 2014, SAE filed a writ with the Insolvency Court **(i)** informing it of the existence of certain trusts whereby OSA had assigned PEMEX’s receivables arising from the OSA-PEMEX contracts; and **(ii)** requesting that the Court order PEMEX to disregard these trusts and make payments to SAE instead.³²⁰ On May 6, 2014, the Insolvency Court ordered PEMEX to disregard the trusts and make the payments to SAE (the **Diversion Order**).³²¹

169. On May 9, 2014, PEMEX sought clarification as to whether the Diversion Order was applicable to a list of trusts entered into by OSA—including the Irrevocable Trust.³²² On May

³¹⁵ GOSH and PFSM had an additional protection and were initially not affected by this measure, as all payments owed by PEMEX to OSA were to be made to the Trust, where POSH was the primary beneficiary. But, as explained in the following sections, that will soon be illegally affected too.

³¹⁶ Credit Recognition Request filed by POSH Honesto, S.A.P.I. de C.V., dated 3 September 2014, **C-152**; Credit Recognition Request filed by POSH Hermosa, S.A.P.I. de C.V., dated 3 September 2014, **C-153**; Witness Statement by José Luis Montalvo, para. 63; Credit Recognition Request, filed by SEMCO Salvage (IV) Pte. Ltd., dated 3 September 2014, **C-154**; Expert Damages Report by Versant, para. 178.

³¹⁷ Email from J. Phang to G. Seow et al. dated 14 May 2014, **C-174**. Email subject to attorney client-privilege. Redacted to preserve privileged information from counsel.

³¹⁸ Email from J. Phang to G. Seow et al. dated 14 May 2014, **C-174**. Email subject to attorney client-privilege. Redacted to preserve privileged information from counsel.

³¹⁹ Email from G. Seow to R. Granguillhome Morfin dated 12 May 2014, **C-148**.

³²⁰ Writ filed by Servicio de Administración y Enajenación de Bienes, dated 2 May 2014 (responding to Oceanografía S.A. de C.V.’s request to participate in the administration of the company), **C-172**.

³²¹ Insolvency Court decision, dated 6 May 2014 (ordering PEMEX to make payments to the Servicio de Administración y Enajenación de Bienes), **C-175**.

³²² Writ by Pemex, dated 8 May 2014 (requesting clarification on the Insolvency Court’s Diversion Order), **C-176**.

8, 2014, SAE sought a court order directing PEMEX to disregard *all* trusts, including the Irrevocable Trust, and to make relevant payments to SAE. On 9 May 2014, the Insolvency Court affirmed that the Diversion Order applied to all trusts listed by PEMEX, including the Irrevocable Trust.³²³

170. On May 15, 2014, Invex, POSH and GOSH challenged the Diversion Order and requested the Insolvency Court to lift the order, since OSA was not the legitimate holder of those collection rights, but they rather belonged to the Irrevocable Trust and its beneficiaries.³²⁴ That was the only reason POSH established the Irrevocable Trust.³²⁵ Despite these efforts, on May 16, 2014, the Insolvency Court confirmed the Diversion Order.³²⁶ POSH, GOSH and Invex filed Amparo complaints against the Diversion Order, which were ultimately dismissed for formal reasons, without a decision on the merits.³²⁷

(c) The Diversion Order was unlawful, arbitrary, and illegal under Mexican law

171. The Diversion Order constituted a direct expropriation of POSH's rights under the Irrevocable Trust.

172. *First*, “OSA was not the rightful holder of the collection rights derived from the Contracts” with Pemex.³²⁸ OSA had entered into an agreement with POSH, GOSH and Invex establishing the Irrevocable Trust, in which POSH was the primary beneficiary.³²⁹ Clause 2 of the Irrevocable Trust provided that “OSA and GOSH... establish this trust with the Trustee by means of assignment” of the trust patrimony. Clause 6 provided that the trust patrimony comprised “all payments by PEP [PEMEX]”³³⁰ arising from the GOSH Service Contracts, and “all payments by

³²³ Insolvency Court decision, dated 9 May 2014 (affirming the diversion order), p. 3-4, **C-177**.

³²⁴ Writ filed by Invex, dated 15 May 2014 (requesting the court to order PEP to pay Invex as the legitimate holder of the contracts' collection rights), **C-178**.

³²⁵ Witness Statement by Gerald Seow, para. 29.

³²⁶ Insolvency Court decision, dated 16 May 2014 (affirming the diversion order), **C-179**.

³²⁷ 14th Court in Civil Matters for the 10th Circuit decision, dated 3 June 2015 (dismissing POSH's appeal), **C-180**.

³²⁸ Expert Legal Opinion on Insolvency Law by Luis Manuel Meján, p. 12..

³²⁹ Public Deed No. 1,015, recording the Trust Agreement dated 9 August 2013, **C-70**.

³³⁰ *Ibid*.

OSA”³³¹ arising from the GOSH Charters. Section I.(g) of the Recitals designated POSH as primary beneficiary.³³²

173. OSA had sought and obtained PEMEX’s express authorization to assign all collection rights arising from the GOSH Service Contracts to the Irrevocable Trust. And OSA entered into six agreements with GOSH and Invex, one for each of GOSH’s Vessels (the **Assignment of Rights**)³³³ in which OSA had expressly assigned all collection rights arising from the GOSH Service Contracts to the Irrevocable Trust in which POSH was a primary beneficiary.

174. Under Mexican Law, “the assignment of rights to a trust results in the loss of ownership of the right by the transferor and the acquisition of ownership by the transferee. The result is the replacement of the creditor.”³³⁴ Moreover, “[b]y virtue of the trust, the trustor *transmits the property of, or title to* one or more assets or rights...”³³⁵ Mexican courts have clearly confirmed this point:

[t]he assets transferred to the trust comprise an *autonomous patrimony, different than that of the individuals who participate in its creation* (trustor and trustee)... since [the assets] are assigned to a specific purpose they are different to the individual rights of the parties who participated in its creation... *the trust involves the transmission of property rights over the assets assigned to the trust...* [which] leave the patrimony of the trustors and become part of an autonomous patrimony...³³⁶

³³¹ *Ibid.*

³³² *Ibid.*

³³³ Public Deed No. 1,143, recording the assignment of rights agreement in respect to Caballo Argentio, dated 20 November 2013, **C-71**; Public Deed No. 1,144, recording the assignment of rights agreement in respect to Caballo Babieca, dated 20 November 2013, **C-72**; Public Deed No. 1,016, recording the assignment of rights agreement in respect to Caballo Copenhagen, dated 9 August 2013, **C-73**; Public Deed No. 1,017, recording the assignment of rights agreement in respect to Caballo Monoceros, dated 9 August 2013, **C-74**; Public Deed No. 1,019, recording the assignment of rights agreement in respect to Caballo Scarto, dated 9 August 2013, **C-75**; Public Deed No. 1,018, recording the assignment of rights agreement in respect to Don Casiano, dated 9 August 2013, **C-76**.

³³⁴ Expert Legal Opinion on Insolvency Law by Luis Manuel Meján, para. 43.

³³⁵ Mexican General Law on Titles and Financial Transactions, Art. 381, **CL-7**.

³³⁶ Decision in cases 1135/2004, 1132/2004, and 1134/2004, Mexican Supreme Court, dated January 14, 2007. Published in the Federal Public Gazette, Volume XXVII, February 2008, p. 16, **CL-8**. Counsel translation from original in Spanish: “los bienes dados en fideicomiso integran un patrimonio autónomo, distinto del de las personas que intervienen en su creación (fideicomitente, fiduciario y/o fideicomisario) ... al estar destinados a un fin específico, quedan fuera de los derechos que en lo individual hubiesen tenido las partes que intervienen en su creación ... el fideicomiso implica la transmisión de los derechos o de la propiedad de los bienes dados en fideicomiso ... los bienes entregados al fideicomiso salen del patrimonio de los fideicomitentes y pasan a formar parte de un patrimonio autónomo ...”

175. Accordingly, OSA had ceased to be the rightful holder of the collection rights upon entering the Irrevocable Trust and the Assignment of Rights. OSA, “the original creditor, had assigned its collection rights to the Irrevocable Trust and its beneficiary, who had become the new creditors.”³³⁷ Therefore, the “Diversion Order is not consistent with Mexican law and violates the rightful ownership of the Irrevocable Trust and its legitimate beneficiaries over the collection rights arising from the contracts signed between OSA and Pemex.”³³⁸

176. *Second*, the Irrevocable Trust and the Assignment of Rights were valid, binding enforceable contracts with which the parties had to comply. Under Mexican Insolvency Law, (MIL), “[s]ave for the exceptions provided herein, *the provisions on obligations and contracts, and stipulations by the parties, will remain applicable.*”³³⁹ Valid, binding and enforceable contracts remain so irrespective of the insolvency proceeding.³⁴⁰ There are two exceptions whereby a valid, binding and enforceable agreement may be deprived of legal effects under the MIL: the annulment of contracts executed with fraud to creditors³⁴¹ and the opposition by the Conciliator in the interest of the estate.³⁴² Neither of those actions was taken here. As Mr. Luis Manuel Camp, expert on Mexican insolvency law explains, the conclusion is clear:

The Irrevocable Trust and the Assignment of Rights were, therefore, valid and binding contracts for the parties, which were obliged to comply therewith. Under these contracts, Pemex had to pay the amounts arising from its contracts with OSA to the Irrevocable Trust, in which POSH was the primary beneficiary... Consequently, the Diversion Order violated the legitimate rights of the parties

³³⁷ Expert Legal Opinion on Insolvency Law by Luis Manuel Meján, para. 51.

³³⁸ *Id.*, para. 53.

³³⁹ Mexican General Law on Titles and Financial Transactions, Art. 86, **CL-7**.

³⁴⁰ Expert Legal Opinion on Insolvency Law by Luis Manuel Meján, para. 22.

³⁴¹ Mexican General Law on Titles and Financial Transactions, Art. 113: “All acts made with fraud to creditors will not render effects against the Estate.” For this to happen, the administrator of the insolvency must file a claim with the court seeking the annulment of a contract and showing that it is fraudulent to creditors (e.g. the contract had no consideration or was executed with the intention of avoiding payment to creditors). The counterparty to that contract will then file an answer to the claim, likely denying the allegations of fraud, and the court will resolve either annulling the contract or declaring its validity. This was not the case here. The court never annulled the Irrevocable Trust or the Assignment of Rights.”, **CL-7**.

³⁴² Mexican General Law on Titles and Financial Transactions, Art. 92: “contracts... pending execution must be fulfilled, unless the Conciliator opposes in the interest of the estate.”, **CL-7**. The Conciliator, appointed after the insolvency declaration, must also show why the non-compliance is in the interest of the estate. Here, the Conciliator never opposed to the fulfillment of the contracts. In fact, it was the PGR who requested interim measures in the Insolvency Claim (before the insolvency declaration) seeking an order that payments be addressed to SAE. The court granted the measures in the Writ of Admission. And, on the same day, SAE, as Visitor, requested the execution of those interim measure on certain trusts entered into by OSA. The Conciliator never opposed to the fulfillment of the contracts.

under valid and binding contracts, which were never annulled or canceled during the Insolvency Proceeding.

177. In sum, Mexico unlawfully expropriated POSH's rights under the Irrevocable Trust.

(d) The consequences of Diversion Order were irreparable for POSH

178. At this point, it was clear that the essential elements of POSH's Investment had been destroyed by Mexico's acts and omissions. *One*, OSA had been unlawfully banned from entering into any contracts with PEMEX, which impaired its ability to perform on its contracts with the Subsidiaries and led to its insolvency. The contracts with PEMEX were expiring and OSA was not eligible for new contracts. *Two*, the ten vessels owned by POSH's Subsidiaries had been unlawfully seized. *Three*, the payments to SEMCO, HONESTO, HERMOSA and PFSM had been suspended. And *four*, the payments to the Irrevocable Trust in connection with the GOSH Service Contracts had been unlawfully diverted.

179. The Subsidiaries could not redeploy the vessels during the detention period, received no income stream from the vessels and had no prospects for future income, since OSA was not eligible for new contracts. The Subsidiaries were forced, however, to continue paying the vessels' financing and covering the cost of the crew and maintenance of the vessels. All this took place even before the insolvency Court had the chance to assess and declare OSA's insolvency.

3. Mexico acknowledged that the Unlawful Sanction was the proximate cause of the insolvency

180. On May 6, 2014, SAE filed the Answer to the Insolvency Claim on behalf of OSA, in which it did not challenge any of the statements made by the PGR in the Insolvency Claim. SAE merely accepted PGR's statements with minor clarification as to certain figures.³⁴³ SAE confirmed OSA's insolvency and underscored that the Unlawful Sanction was seriously undermining OSA's viability, as some contracts with PEMEX had expired and OSA was not eligible to enter into new ones:³⁴⁴

In addition to the foregoing, it is important to highlight that the main client of the alleged insolvent is Pemex Exploration and Production; as the services contracts

³⁴³ Writ filed by Servicio de Administración y Enajenación de Bienes, dated 6 May 2014 (answering the insolvency claim on behalf of OSA), **C-181**.

³⁴⁴ Insolvency Court decision, dated 8 July 2014 (declaring the insolvency of Oceanografía S.A. de C.V.), p. 24, **C-182**.

that were entered into have started to become due and considering that according to the circular published in the Federation's Official Gazette on February 11, 2014, the company is currently disqualified by the Public Function Secretariat through Pemex Exploration and Production's Internal Control Organ, thus it cannot take part in new tenders and/or celebrate additional contracts.³⁴⁵

181. On May 15, 2014, the Insolvency Court ordered SAE to assess OSA's financial condition. On June 5, 2014, SAE filed a report on OSA's financial condition.³⁴⁶ It was so critical that, on the same date, SAE sought interim relief to suspend the effects of the Unlawful Sanction and allow OSA to enter into new contracts with PEMEX (the **Request for Interim Measures**). SAE explained, with a great level of detail, the Unlawful Sanction's fatal consequences on OSA's finances:

- (i) SAE informed that the Unlawful Sanction prevented OSA from contracting with its main client, PEMEX:

The disqualification referred to herein, decided by Pemex Exploration and Production's Internal Control Organ, means that Oceanografía, S.A. de C.V. is unable to take part in new tenders and to enter into new contracts which constitute the company's main source of income...³⁴⁷

- (ii) SAE explained that, since the Unlawful Sanction was issued, ten contracts with PEMEX had expired and five had been rescinded, so the income of the company was severely limited:

[i]t needs to be considered that nearly 40% of the contracts that Oceanografía had entered into and from which received an income, have expired (10 contracts) or have been terminated (5 contracts),

³⁴⁵ *Ibid.* Translated by counsel from the original in Spanish: "Adicional a lo anterior, es importante destacar que el principal cliente de la presunta concursada es Pemex Exploración y Producción; siendo que los contratos de prestación de servicios que en su momento fueron celebrados han empezado a vencer y considerando que conforme a la circular publicada en el Diario Oficial de la Federación el día 11 de febrero de 2014, el comerciante se encuentra inhabilitado por parte de la Secretaría de la Función Pública a través del Órgano Interno de Control de Pemex Exploración y Producción, por lo que no puede participar en nuevas licitaciones y/o celebrar contratos adicionales."

³⁴⁶ Report subscribed by José Antonio de Anda Turati on Oceanografía, S.A. de C.V.'s financial situation, dated 5 June 2014, **C-183**.

³⁴⁷ Writ filed by Servicio de Administración y Enajenación de Bienes, dated 26 June 2014, p. 2, **C-184**. Translated by counsel from the original in Spanish: "La inhabilitación de referencia, que resolvió el Órgano Interno de Control en Pemex Exploración y Producción, trae como consecuencia que Oceanografía, S.A. de C.V. esté imposibilitada para participar en nuevos procedimientos de contratación así como para celebrar nuevos contratos con quien representa su principal fuente de ingresos [...]"

so the number of contracts that can provide income to the alleged insolvent has been sensibly reduced in the last months.³⁴⁸

- (iii) SAE indicated that the Unlawful Sanction also limited the cash flow on which the company relied to operate the vessels and pay salaries:

These conditions substantially restrict the cash flow needed to operate and pay the salaries of the employees required to continue rendering services.³⁴⁹

- (iv) SAE warned that the Unlawful Sanction would lead to the stagnation of the company, preventing it from generating any income, ultimately resulting in the cancelation of operations and contracts:

In the event that Oceanografía, S.A. de C.V. is prevented from participating in tenders for new contracts, this would cause the stagnation of the insolvent company, limiting the exercise of the company's purpose for which it was created, preventing new income and displacing it from the market, which in turn would lead to the cancellation of its operations and contracts with subcontractors, providers, workers, etc., with the fatal consequences that this would entail, in particular for the employees of the alleged insolvent.³⁵⁰

- (v) SAE informed that there were PEMEX tenders in which OSA could participate and generate cash flow—unfortunately, as we know now, OSA was not able to bid for those tenders:

According to the information published in the 'Annual Program of Acquisitions, Leases, Works and Services 2014 Update' by PEMEX Exploration and Production... the alleged insolvent could participate in different tenders, considering that it has the experience and operational capacity. In case the insolvent were to be awarded

³⁴⁸ *Id.*, p. 2-3. Counsel's translations from the original in Spanish: "[e]s de considerar que cerca del 40% de los contratos que Oceanografía S.A. de C.V. tenía en operación y de los cuales recibía algún recurso, han concluido su vigencia (10 contratos) o bien han sido rescindidos (5 contratos), por lo que el número de contratos que pueden proveer de recursos a la presunta concursada se ha visto sensiblemente reducido en los últimos meses."

³⁴⁹ *Id.*, p. 3. Counsel's translations from the original in Spanish: "Estas condiciones restringen de manera sustancial el flujo necesario para operar y pagar la nómina de los empleados requeridos para continuar la prestación de los servicios."

³⁵⁰ *Id.*, p. 4. Counsel's translations from the original in Spanish: "En el evento de que se impida a Oceanografía, S.A. de C.V. participar en licitaciones de nuevos contratos, provocaría el estancamiento de la concursada, limitando el ejercicio del objeto para el que fue constituida, impidiendo el ingreso de nuevos recursos y permitiendo que sea desfasada del mercado, lo que a la postre conduciría a la cancelación de sus operaciones y contratos con los subcontratistas, proveedores, trabajadores, etc., con las funestas consecuencias que ello acarrearía, de manera particular para los trabajadores de la presunta concursada."

with the relevant resolutions, it would count with enough resources to render the services offered, which would generate a considerable number of employments, as well as a positive impact in the economy of the Sonda de Campeche.³⁵¹

- (vi) SAE finally warned that the Unlawful Sanction would only aggravate the company's finances, placing it under an imminent risk of complete shutdown:

The requested interim measure will prevent the aggravation of the company's financial situation and, indeed, addresses the imminent risk that Oceanografía, S.A. de C.V., would completely shut down its operations putting at risk, not only the employment sources, but also, in some way, the oil exploitation by the Mexican State through Pemex Exploration and Production.³⁵²

182. SAE's words were categorical. The State entity acknowledged that OSA relied on public contracts to operate and that the Unlawful Sanction would irreversibly limit OSA's cash flow, leading to a complete shutdown of operations. SAE was right about this.

183. On July 8, 2014, the Insolvency Court issued its judgment on the Insolvency Claim (the **Judgment**).³⁵³ The Insolvency Court stated that OSA was insolvent, and confirmed that any execution proceedings against OSA, and any payments in favor of any and all of OSA's creditors, must be suspended. The Judgment further ordered that IFECOM proceed to appoint SAE as Conciliator, which is the organ in charge of preparing the list of creditors and proposing a settlement agreement. SAE had already acted in a double capacity, as OSA's Administrator and Visitor. Thereafter, it would act in a third one, as OSA's Conciliator. At every stage of the proceeding, the State had firm control over OSA.

³⁵¹ *Id.*, p. 5. Counsel's translations from the original in Spanish: "De acuerdo a la información publicada en el "Programa Anual de Adquisiciones, Arrendamientos, Obras y Servicios Actualización 2014" por PEMEX Exploración y Producción... la presunta concursada podría participar en diversas licitaciones, considerando que cuenta con la experiencia y capacidad operativa. En caso de que la concursada fuese favorecida con los fallos correspondientes, y contara con recursos suficientes para proporcionar los servicios ofertados, generaría un número considerable de fuentes de empleo, así como un impacto positivo en la economía de la sonda de Campeche."

³⁵² *Id.*, p. 4. Counsel's translations from the original in Spanish: "La medida cautelar que se solicita evitará que se agrave la situación financiera de la empresa y desde luego acota el riesgo inminente de que Oceanografía, S.A. de C.V., suspenda por completo sus operaciones poniendo en riesgo no sólo las fuentes de empleo, sino de alguna manera la explotación petrolera que lleva a cabo el Estado Mexicano a través de Pemex Exploración y Producción."

³⁵³ Insolvency Court decision, dated 8 July 2014 (declaring the insolvency of Oceanografía S.A. de C.V.), **C-182**.

184. The Judgment also acknowledged that OSA's contracts with PEMEX were expiring or being terminated, and OSA was not eligible to renew them or enter into new ones. It reiterated that Unlawful Sanction limited OSA's ability to operate and pay its obligations:

[f]ederal, which shall abstain from accepting proposals or entering into contracts with Oceanografía, S.A. de C.V., as it is disqualified for the term of a year, nine months, and twelve days, so it cannot take part in new contracting proceedings with Pemex Exploration and Production. Under this scenario, in the word of Petitioner, close to forty per cent of the contracts with Oceanografía, S.A. de C.V., have expired (ten contracts) or have been terminated (five contracts), which substantially limits the flow needed to operate and pay its employees' payroll needed to continue with the rendering of services, in this sense and concerning the legislation that regulates Pemex Exploration and Production, it is prevented from contracting with the insolvent.³⁵⁴

185. The Judgment further explained that PEMEX had charged OSA certain contractual penalties in connection with the PEMEX-OSA contracts (the **Contractual Penalties**), because OSA could not perform them. These penalties further undermined OSA's liquidity and ability to perform on its contracts and pay salaries.³⁵⁵

186. To address those issues, the Judgment adopted the interim measures requested by SAE, namely: (i) the suspension of the effects of the Unlawful Sanction issued by the State; (ii) the suspension of Contractual Penalties by the State-owned company; and (iii) the return of the Contractual Penalties charged from February 28, 2014 to the date of the Judgment.³⁵⁶ The fact that this was the only interim relief granted by the court is very illustrative. *The court believed that these measures had led to OSA's insolvency and, if not immediately suspended, could lead to OSA's bankruptcy.*

187. The interim measures came too late, however, because by that point OSA could no longer qualify for PEMEX's contracts. As a POSH representative conveyed internally, Ms.

³⁵⁴ *Id.*, p. 37. Translated by counsel from the original in Spanish: “[f]ederativas, que deberán abstenerse de aceptar propuestas o celebrar contratos con Oceanografía, sociedad anónima de capital variable, por encontrarse inhabilitada por el plazo de un año, nueve meses y doce días, por lo que no puede participar en nuevos procedimientos de contratación con Pemex Exploración y Producción. Situación por la cual, a decir de la promovente, cerca del cuarenta por ciento de los contratos de Oceanografía, sociedad anónima de capital variable, han concluido su vigencia (diez contratos) o bien han sido rescindidos (cinco contratos), lo que limita de manera sustancial el flujo necesario para operar y pagar la nómina de los empleados que se requieren para continuar con la operación de servicios, de esta manera y atendiendo a la legislación que rige a Pemex Exploración y Producción, el impide contratar con la concursada.”

³⁵⁵ *Id.*, p. 35.

³⁵⁶ *Id.*, pp. 33-34.

██████████, legal manager from PEMEX (██████████) explained that, even at that point, “OSA must still meet all normal PEMEX requirements that is common to all providers... since OSA does not meet many of those requirements (for e.g. financial indicators, minimum capital requirement, etc.) she does not see how OSA can win new contracts with PEMEX.”³⁵⁷ ██████████ also stated that “[e]ven with the Pemex penalties being suspended and paid to OSA... OSA would not have enough working capital to get most of their vessel[s] running.”³⁵⁸ As a result of the Unlawful Sanction, PEMEX did not award a single contract to OSA ever again.

4. Mexico arbitrarily prevented PEMEX from rescinding the contracts with OSA and assigning them to POSH’s Subsidiaries

188. Mexico had the opportunity to save POSH’s Investment in Mexico by allowing PEMEX to assign the contracts with OSA to POSH’s Subsidiaries. However, SAE did not cancel the GOSH Charters in the interest of preserving the insolvency estate, nor did the Insolvency Court allow PEMEX to rescind the GOSH and the SMP Service Contracts. These arbitrary and unreasonable measures directly impacted OSA’s business partners, including the Subsidiaries, and culminated the destruction of the Investment.

189. OSA’s seizure and subsequent insolvency put PEMEX’s operations at risk. PEMEX did not want them interrupted and was willing to rescind the GOSH and SMP Service Contracts and assign new contracts directly to GOSH and SMP³⁵⁹ (the SEMCO Vessels were not in direct contract with PEMEX so there was no possibility of switching to a direct contract with PEMEX there). In an attempt to save its operations in Mexico, POSH engaged in discussions with PEMEX to achieve this.

190. As early as the end of February 2014, POSH “look[ed] into requesting for the assignment of the 6 GOSH contracts and the 2 [SMP] contracts to the POSH group. POSH “underst[ood] that PEMEX desire[d] this as well, since they d[id] not want the service interrupted”³⁶⁰ and “believe[d] that PEMEX will issue this ‘approval to assign the contract’ to the

³⁵⁷ Email from J. Phang to G. Seow et al. dated 18 July 2014, **C-130**.

³⁵⁸ *Ibid.*

³⁵⁹ Email from J. Phang to G. Seow et al. dated 28 February 2014, **C-144**. Email subject to attorney client-privilege. Redacted to preserve privileged information from counsel.

³⁶⁰ Email from J. Phang to G. Seow et al. dated 28 February 2014, **C-144**. Email subject to attorney client-privilege. Redacted to preserve privileged information from counsel.

POSH group in relation to the contract.”³⁶¹ At that time, “PEMEX [had] already indicated to the AG that it need[ed] for all the charters to be unaffected” and “it is likely that the assignment will be expedited.”³⁶²

191. In March 2014, POSH met with [REDACTED], Chief of Staff to PEP’s Director General [REDACTED]. He conveyed that “PEMEX will award long term charters to the vessels in about 3 weeks”³⁶³ and “agreed that Pemex will transfer the charter of the 6 GOSH vessels from OSA to GOSH, if SAE agrees.”³⁶⁴ On March 31, 2014, POSH’s local counsel attended a creditors’ meeting with SAE, where SAE conveyed that it had “very little cash flow to operate OSA” and “[was] looking to assign the OSA contracts to the vessels owners, for e.g. GOSH...”³⁶⁵ POSH further met with [REDACTED], from PEMEX, who recommended:

a quick negotiation with SAE, so that the cancellation of the contracts can proceed as soon as possible. This will then allow PEMEX to give new contracts to [POSH]. In fact she advised that she just met with [REDACTED] [PEMEX’s Director General] and she has been tasked to find ways to help us. She also mentioned that Marcia Fuentes is the point person for SAE... and that [POSH] should try to engage with her to come up with a solution.³⁶⁶

192. Mr. Montalvo also engaged in discussions with SAE which, as Conciliator, had the ability to cancel the GOSH and SMP Service Contracts with PEMEX in the interest of preserving the estate. SAE conveyed, however, that it would only cancel the contracts in exchange for a “hair cut to the debt of POSH Group”³⁶⁷ and “a higher amount of commission”³⁶⁸ for OSA. SAE’s proposal was coercive, abusive and arbitrary. POSH’s Subsidiaries were OSA’s rightful creditors for services rightfully performed, and OSA’s commission (2.5%) was commercially reasonable, which SAE never denied. SAE was using its position of power to obtain undue benefits so they

³⁶¹ Email from J. Phang to G. Seow et al. dated 28 February 2014, **C-144**. Email subject to attorney client-privilege. Redacted to preserve privileged information from counsel.

³⁶² Email from C. Tay to G. Seow et al. dated 1 March 2014, **C-185**. Email subject to attorney client-privilege. Redacted to preserve privileged information from counsel.

³⁶³ Email from G. Seow to G. Yeoh dated 19 March 2014, **C-186**.

³⁶⁴ *Ibid.*

³⁶⁵ Email from J. Phang to G. Seow et al. dated 1 April 2014, **C-187**.

³⁶⁶ Email from J. Phang to G. Seow et al. dated 18 July 2014, **C-130**.

³⁶⁷ Email from J. Phang to G. Seow et al. dated 20 August 2014, **C-188**.

³⁶⁸ *Ibid.*

could “report back to the Ministry of Finance that they... managed” to reduce OSA’s debt.³⁶⁹ In a desperate attempt to salvage operations in Mexico, POSH conveyed that it would even be “agreeable to [SAE’s] proposal... of a partial waiver of the ‘pre-trust debt from OSA/SAE in return for the cancellation of all the 8 contracts with OSA/PEMEX.”³⁷⁰

193. The window for this solution was very narrow. If no action was taken immediately, POSH’s Subsidiaries would not survive: “The reality is that GOSH has no more equity left... There is no goodwill since the contracts are no longer here.”³⁷¹ POSH was “bleeding in Mexico and any work for [POSH’s] vessels, even short term in nature will help to stem [the] losses.”³⁷² The work, however, never came.

194. In fact, while the discussions with SAE and PEMEX were ongoing, OSA—under SAE’s administration—requested that the Insolvency Court forbid PEMEX from rescinding its contracts with OSA, including the GOSH and the SMP Service Contracts.³⁷³ On August 15, 2014, the Insolvency Court so ordered.³⁷⁴ This eliminated any possibility for POSH’s Subsidiaries to contract directly with PEMEX and save POSH’s Investment in Mexico. PEMEX could not assign existing contracts per the court’s resolution, and refused to award new contracts to POSH’s Subsidiaries, on the ground that their vessels were still registered in PEMEX’s system as being used in the contracts PEMEX had with OSA:

[w]hile PEMEX replied formally that we’re free to participate in the tender with our vessels, they also reply verbally (and did not put down in writing) that as long as we propose vessels linked to existing contracts, we will be penalized by PEMEX.³⁷⁵

195. SAE’s actions and the Insolvency Court’s ruling were arbitrary and unreasonable, and culminated in the destruction of POSH’s Investment. SAE and the Insolvency Court may have

³⁶⁹ *Ibid.*; Witness Statement by José Luis Montalvo, para. 60.

³⁷⁰ Email from J. Phang to G. Seow et al. dated 20 August 2014, **C-188**.

³⁷¹ Email from G. Seow to G. Yeoh et al. dated 25 July 2014, **C-189**.

³⁷² Email from G. Yeoh to F. Seow et al. dated 24 July 2014, **C-190**.

³⁷³ Writ filed by Servicio de Administración y Enajenación de Bienes, dated 27 June 2014 (requesting an injunction regarding contractual penalties), **C-191**.

³⁷⁴ Insolvency Court decision, dated 15 August 2014 (granting the injunction requested by SAE), **C-192**.

³⁷⁵ Email from J. Phang to G. Seow et al. dated 25 June 2014, **C-193**.

intended to safeguard OSA's operations with PEMEX by preserving the contracts, but it was too little too late.

196. *First*, all Mexican authorities involved in the Insolvency Proceeding had agreed that OSA could not operate and pay its debts without new contracts; and OSA would never receive new contracts since it did not meet PEMEX's tender requirements. The PGR,³⁷⁶ SAE,³⁷⁷ and the Insolvency Court³⁷⁸ had all reached the same conclusion during the insolvency proceeding. SAE had even acknowledged to POSH that it was "currently broke and... ha[d] no budget at all to pay... any money."³⁷⁹ It was clear, in sum, that maintaining the existing contracts with PEMEX would be a futile attempt to solve what had become an irreversible problem.

197. *Second*, PEMEX was also certain that OSA would not be able to operate the vessels and comply with the contracts. In a report addressed to the Senate Committee, PEMEX extensively explained why the rescission of some contracts was the reasonable and practical solution for all parties involved:

Oceanografía *lacked liquidity* to finish the works. This led the parties to conclude that the administrative termination of the contracts was the best solution for them, taking the following into consideration:

1° Oceanografía *did not have the financial and physical capacities* for performing the works;

2° There was a latent *dramatic decrease in the resources* of the company;

3° Given the characteristics and installations where works were to be performed, Oceanografía *could not recover from the delays*;

4° Through the implementation and settlement of the administrative termination proceedings, PEP could pay all the amounts of works that Oceanografía could not collect; either for unfinished or unforeseen works;

³⁷⁶ In the Insolvency Claim, the PGR cited the Unlawful Sanction as one of the proximate causes for OSA's insolvency. See Claim for the Declaration of Insolvency, filed by the PGR, dated 9 April 2014, **C-166**.

³⁷⁷ In the Answer to the Insolvency Claim, SAE underscored that the Unlawful Sanction was seriously undermining OSA's viability, as some contracts with PEMEX had already expired and OSA was not eligible to enter into new contracts. See Insolvency Court decision, dated 15 August 2014 (granting the injunction requested by SAE), **C-192**. In the Request for Interim Measures, SAE had explained, in great level of detail, that absent new contracts, OSA would not be able to attend its obligations and would be forced to shut down. See Writ filed by Servicio de Administración y Enajenación de Bienes, dated 26 June 2014.

³⁷⁸ In the Judgment, the Insolvency Court echoed that, as a result of the Unlawful Sanction, OSA lacked the liquidity and resources to operate, and ordered its suspension as an interim measure. See Insolvency Court decision, dated 8 July 2014 (declaring the insolvency of Oceanografía S.A. de C.V.), **C-182**.

³⁷⁹ Email from J. Phang to G. Seow et al. dated 20 August 2014, **C-188**.

5° The foregoing would help the company to solve its labor debts, which at that time turned critical.

6° As part of the audit to one of the contracts, *the auditors recommended to terminate the contract*.

7° PEP could *contract a new company for the termination of the works*.

8° PEP could execute the contractual warranties.

The decision to terminate the contracts was reinforced by the consideration that as a result of the insolvency proceeding, *the company could not recover the delays*, besides the legal status of the company would take a reasonable time to be concluded and there was a recommendation from the auditors, where it was indicated that PEP must go forward with the administrative termination proceeding as established in the contract.³⁸⁰

198. *Third*, subsequent events confirmed that the decision to maintain OSA's contracts with PEMEX was unreasonable and doomed to fail. As anticipated, OSA did not have the cash flow or resources to operate the vessels and it soon began defaulting. After several months of default, on September 29, 2014, the court had no other choice but to lift the interim measures forbidding PEMEX from rescinding the contracts with OSA:

On September 29, 2014, a hearing was held deciding to indefinitely stay the interim measures... awarded on August 15, 2014, and to initiate, resume the proceeding, determine and dictate decisions on the proceedings for the administrative rescission of the contracts and/or agreements; as well as the complaints and requests of

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Transcript of the Meeting of the Senate Special Commission for the Attention and Monitoring of the Oceanografía case, dated April 28 2015, p. 6, **C-194**. Counsel's translation from the original in Spanish: "[l]a empresa Oceanografía *carecía de liquidez* para la conclusión de los trabajos. Lo anterior llevó a las partes a concluir que la rescisión administrativa de los contratos era la mejor solución para los mismos, tomando en cuenta lo siguiente: 1° Que Oceanografía *no contaba con las capacidades físicas y financieras* para la realización de los trabajos. 2° Se apreciaba una *dramática disminución en los recursos de la citada empresa*. 3° Dadas las características e instalaciones donde se realizarían los trabajos, Oceanografía *no podría recuperar los atrasos*. 4° Mediante la implementación de los procedimientos de rescisión administrativa y el finiquito de los mismos, PEP podía realizar el pago de todas aquellas cantidades de obra que la empresa Oceanografía no había podido cobrar; ya sea por ser trabajos inconclusos o trabajos ejecutados no estimados. 5° Lo anterior ayudaría a la empresa a solventar sus pasivos laborales, que en ese momento se tornaron críticos. 6° Como parte de la auditoría realizada a uno de los contratos, se recomendó por parte de los órganos fiscalizadores rescindir el contrato. 7° PEP podría realizar la contratación de una nueva empresa para la conclusión de los trabajos. 8° PEP podría ejecutar las garantías pactadas en dichos contratos. La decisión de rescindir los contratos se reforzó con la consideración de que como resultado del procedimiento de concurso mercantil, *la empresa no podría recuperar los atrasos; además de que la situación jurídica de la empresa demoraría un tiempo razonable en concluirse y que existía una recomendación realizada por el personal auditor, donde se señaló que PEP debía implementar el procedimiento de rescisión administrativa establecido en el contrato*.

payment derived from the warranties and/or securities given by OSA, in its capacity of guarantor and/or joint obligee in the execution of contracts and agreements.³⁸¹

199. As a result, 36 out of the 39 OSA-PEMEX contracts that were in force in February 2014 had been rescinded or terminated by February 2015. Of the three contracts remaining, only two remained operational, while one was in process of rescission. The Director General of PEMEX, Mr. Hernández, explained this before the Senate Committee:

[t]he *contractual breaches* attributable to the service provider led to 27 out of 39 contracts entered into with Oceanografía, S.A. de C.V., are now administratively terminated, 20 of which belong to the Maintenance and Logistic Deputy Director; five to the Drilling Business Unit; and two to the Deputy Director of Projects Services.

Now, out of these contracts, 9 were terminated at their contractual date; 5 belong to the Maintenance and Logistics Deputy Director; and 4 to the Drilling Unit.

At this time, out of this number of contracts, only 3 are in force; out of which 2 *are operative*: one with the Maintenance and Logistics Deputy Director, and another one with the Drilling Business Unit. A third one is under termination process before the Drilling Business Unit.³⁸²

200. By that time, unfortunately, POSH's Investment was completely destroyed. As will be explained below, POSH's Subsidiaries had defaulted on their loans, which were being foreclosed and the collaterals were being enforced.

201. As Mr. Camp explains, three conclusions can be drawn from the above:

³⁸¹ Report of Pemex Internal Control Body, dated 29 October 2014, p. 9, **C-195**. Translated by counsel from the original in Spanish: "El 29 de septiembre de 2014, se llevó a cabo audiencia incidental en la que se concedió suspensión definitiva para el efecto de que no se prorrogue por el plazo contemplado en cada uno de los contratos señalados las medidas precautorias dictadas el 15 de agosto de 2014, así como iniciar, continuar la tramitación, determinar y emitir resoluciones de los procedimientos de rescisión administrativa de los contratos y/o convenios; así como de los reclamos y requerimientos de pago derivados de las garantías y/u obligado solidario en la ejecución de contratos y convenios."

³⁸² Transcript of the Meeting of the Senate Special Commission for the Attention and Monitoring of the Oceanografía case, dated 28 April 2015, p. 7, **C-194**. Translated by counsel from the original in Spanish: "[I]os incumplimientos contractuales imputables al prestador de los servicios, conllevaron a que actualmente 27 contratos de los 39 que se encontraban celebrados con la empresa Oceanografía S.A. de C.V., se encuentran rescindidos administrativamente; de los cuales 20 pertenecen a la Subdirección de Mantenimiento y Logística; cinco a la Unidad de Negocios y Perforación; y dos a la Subdirección de Servicio a Proyectos. Ahora bien, de estos contratos 9 fueron terminados en la fecha pactada; y de los cuales 5 pertenecen a la Subdirección de Mantenimiento y Logística; y 4 a la Unidad de Perforación. Actualmente, de este volumen de contratos vig. V., sólo tres de ellos se encuentran vigentes; de los cuales 2 se encuentran operando: uno con la Subdirección de Mantenimiento y Logística; y otro más con la Unidad de Negocios de Perforación. Un tercero está en proceso de rescisión en la propia Unidad de Negocio de Perforación."

One: SAE was aware, or had an obligation to be, that OSA could not receive new contracts while it was undergoing insolvency proceedings since it did not meet the necessary economic requirements therefor. Two: SAE was aware of, and had acknowledged, that without new contracts, OSA could not meet its obligations under the current contracts with Pemex. Three: SAE was aware of, and had acknowledged, that the breach of the Pemex contracts resulted in conventional penalties, which would constitute claims against the estate.

Based on the documentation from the insolvency proceeding, SAE should have canceled the contracts with Pemex, under Article 86 LCM, for being contrary to the interests of the estate. On the same basis, the Insolvency judge should have allowed the rescission of the contracts with Pemex, for being beneficiary for the interests of the estate.³⁸³

202. In sum, POSH engaged in consultations with PEMEX and SAE seeking to contract eight vessels directly with PEMEX. This would have saved POSH's Investment in Mexico. SAE and the Insolvency Court blocked that possibility. Their measures were arbitrary and unreasonable, as anticipated by all Mexican public entities and confirmed by subsequent events.

5. POSH's Subsidiaries attempted to recover damages in the Insolvency Proceeding, to no avail

203. As noted above, POSH's Subsidiaries stopped receiving payments from OSA as SAE took over its administration. POSH stopped receiving payments when the Insolvency Court issued the Diversion Order. POSH's Subsidiaries sent several notices of default to OSA demanding payment and informing that, if the outstanding amounts were not settled, they would be forced to terminate the GOSH Charters.³⁸⁴ SAE never responded to these notices and GOSH withdrew GOSH's Vessels.³⁸⁵

204. On September 3, 2014, POSH's Subsidiaries filed claims in the Insolvency Proceeding seeking the recognition of their credits³⁸⁶ with the relevant supporting documentation.

³⁸³ Expert Legal Opinion on Insolvency Law by Luis Manuel Meján, para. 90.

³⁸⁴ Notice of Repossession and Notice of Default and Requirement of Payment in relation to the vessel Rodrigo DPJ, from GOSH Rodrigo DPJ, S.A.P.I. de C.V. to Oceanografía, S.A. de C.V., dated 10 February 2014, **C-160**; Notice of Repossession of vessel Caballo Grano de Oro, sent by GOSH Caballo Grano de Oro S.A.P.I. de C.V. to Oceanografía, S.A. de C.V., dated 10 February 2014, **C-161**; Letter from Incisive Law LLC to Oceanografía S.A., de C.V., dated 12 February 2014, **C-196**; Notice of Default under Clause 28 of the Bareboat Charters, from Servicios Marítimos GOSH, S.A.P.I. de C.V. to Oceanografía, S.A. de C.V., dated 8 May 2014, **C-197**.

³⁸⁵ Notice of Default under Clause 28 of the Bareboat Charters, from Servicios Marítimos GOSH, S.A.P.I. de C.V. to Oceanografía, S.A. de C.V., dated 8 May 2014, **C-197**.

³⁸⁶ Credit Recognition Request filed by Servicios Marítimos GOSH, S.A.P.I. de C.V., dated 3 September 2014, **C-198**; Credit Recognition Request filed by Semco Salvage IV Pte. Ltd., dated 3 September 2014, **C-154**; Credit Recognition Request filed by POSH Honesto, S.A.P.I. de C.V., dated 3 September 2014, **C-152**; Credit

On October 23, 2014, the Insolvency Court issued the list of credits and creditors (**Credit Recognition Resolution**), designating POSH's Subsidiaries as ordinary creditors (*acreedores comunes*).³⁸⁷ POSH's Subsidiaries appealed the Credit Recognition Resolution, clarifying the amounts claimed, which totaled \$61,258,582.62. The Court of Appeal unlawfully denied the appeal, based on inconsistencies in OSA's documentation, which were not attributable to POSH's Subsidiaries. The chart below illustrates the claims filed in the Insolvency Proceeding.

COMPANY	ACTIVITY	AMOUNT	CONCEPT
GOSH	Leased six vessels to OSA: Argento, Don Casiano, Babieca, Scarto, Monoceros and Copenhagen	US\$33,178,572.05	(1) Unpaid invoices for lease of vessels: US\$30,489,706.40; (2) Debit note: US\$188,865.60; and (3) Dry dock reserve: US\$2,500,000.
PFSM	Provided management and crew services to OSA	US\$14,579,677.23	Unpaid invoices for services rendered
HONESTO	Leased one vessel to OSA: Rodrigo DPJ	US\$3,827,326.10 plus MXP \$630,924	(1) Unpaid invoices for lease of vessel: US\$812,000; (2) Unpaid vessel repairs US\$86,550.06; (3) Pending vessel repairs: US\$1,468,776.04; (4) Lost profits for 146 days the vessel was out of commission due to repairs: US\$1,460,000; and (5) Salary paid to crew of vessel: MXP \$630,924.
HERMOSA	Leased one vessel to OSA: Caballo Grano de Oro	US\$4,029,773.96 plus MXP \$400,100	(1) Unpaid invoices for lease of vessel: US\$1,015,000; (2) Unpaid vessel repairs US\$864,773.96; (3) Lost profits for 172 days the vessel was out of commission

Recognition Request filed by POSH Hermosa, S.A.P.I. de C.V., dated 3 September 2014, **C-153**; Credit Recognition Request filed by POSH Fleet Services Mexico, S.A. de C.V., dated 3 September 2014, **C-149**.

³⁸⁷

Judgment on Recognition of Credits, dated 23 October 2014, pp. 32-39, **C-165**.

COMPANY	ACTIVITY	AMOUNT	CONCEPT
			due to repairs: US\$2,150,000; and (4) Salary paid to crew of vessel: MXP \$400,100.
SEMCO	Leased two vessels to OSA: Salvirile and Salvision	US\$5,643,243.28	(1) Unpaid invoices for lease of vessels: US\$1,917,899.52; (2) Unpaid vessel repairs US\$2,885,760.42; and (3) Salary paid to crew of vessels: US\$839,538.34.
		TOTAL: US\$61,258.582.62 and MXP \$1,031,024	

205. In the Insolvency Proceeding, the State sought and obtained recognition of tax credits against OSA in the amount of 153,050,116.43 Investment Units³⁸⁸ (the **Tax Credits**).³⁸⁹ PEMEX sought and obtained recognition of certain contractual penalties arising from OSA's contractual breaches in the amount of 6,437,750.09 Investment Units³⁹⁰ (the **Contractual Penalties**).³⁹¹

206. The prospects for ordinary creditors to recover any amount in the Insolvency Proceeding are non-existent. In contrast, the State will recover the Tax credits, which are preferential, and PEMEX will recover the Contractual Penalties, which are considered security credits for the preservation of the estate, and are also preferential.³⁹² A brief summary of the Insolvency Proceeding shows this.

³⁸⁸ Equivalent to approximately MXP 765,250,582.15 and USD 57,537,637.75 at the time.

³⁸⁹ Judgment on Recognition of Credits, dated 23 October 2014, p. 29-31, **C-165**.

³⁹⁰ Equivalent to approximately MXP 32,188,750.45 and USD 2,420,206.8 at the time.

³⁹¹ Judgment on Recognition of Credits, dated 23 October 2014, p. 26, **C-165**.

³⁹² Insolvency Court Decision, dated 3 March 2015 (determining the amount for PEMEX to return to Oceanografía, S.A. de C.V., for retained contractual penalties), **C-199**.

207. On March 3, 2015, the Insolvency Court issued a decree establishing that the amount returned by PEMEX for Contractual Penalties was considered a security credit for the preservation of the estate and, therefore, preferential to other claims.³⁹³

208. On May 18, 2015, the Insolvency Court issued a resolution approving the restructuring agreement supported by the majority of unsecured creditors (**First Agreement**). Some creditors challenged the First Agreement and the Court of Appeals eventually revoked it.³⁹⁴ The Insolvency Proceeding resumed. On January 4, 2016, OSA and its Recognized Creditors submitted a second restructuring agreement to the Insolvency Court, which approved it on January 26, 2016 (**Second Agreement**).³⁹⁵ This approval was also reversed on appeal³⁹⁶ and the Insolvency Proceeding resumed again.

209. On August 8, 2016, the Insolvency Court declared OSA's bankruptcy.³⁹⁷ The Insolvency Court appointed SAE as trustee, which is the organ in charge of liquidating the company. SAE would thereafter act in its forth different capacity so far in the Insolvency Proceeding.³⁹⁸ On June 20, 2017, the Insolvency Court issued a decree informing, without any further detail, that on June 15, 2017, the PGR had lifted OSA's seizure.³⁹⁹ As a result, SAE was relieved of its capacity as trustee. The creditors then appointed Mr. Jose Daniel Rocha Perea as trustee.⁴⁰⁰

210. On January 12, 2018, the Insolvency Court approved a third restructuring agreement (**Third Agreement**),⁴⁰¹ whereby all ordinary creditors forwent 96% of their credits. In contrast, the Tax Credits (held by the State) and security claims against the estate (held by PEMEX)

³⁹³ *Ibid.*

³⁹⁴ Insolvency Court Decision, dated 18 May 2015 (approving the First Restructuring Agreement), **C-200**; Circuit Court of Appeals Decision, dated 25 September 2015 (revoking the approval of the First Restructuring Agreement), **C-201**.

³⁹⁵ Insolvency Court Decision, dated 26 January 2016, (approving the Second Restructuring Agreement), **C-202**.

³⁹⁶ Court of Appeals Decision, dated 8 July 2016 (revoking the approval of the Second Restructuring Agreement), **C-203**.

³⁹⁷ Insolvency Court Decision, dated 8 August 2016 (declaring the bankruptcy of Oceanografía, S.A. de C.V.), **C-204**.

³⁹⁸ Insolvency Court Decision, dated 14 April 2014 (admitting the filing of PGR's complaint), **C-169**.

³⁹⁹ Writ filed by PGR informing lifting seizure of OSA, dated June 16, 2017, **C-205**.

⁴⁰⁰ Writ filed by Oceanografía, S.A. de C.V., dated 16 June 2017 (requesting the appointment of José Daniel Rocha Perea on behalf of creditors), **C-206**.

⁴⁰¹ Insolvency Court decision, dated 12 January 2018 (approving the Third Restructuring Agreement), **C-207**.

have preferential status and have not forgone a portion of their credits. The Third Agreement has also been appealed and is pending resolution.

211. In sum, ordinary creditors are not expected to recover anything in the Insolvency Proceeding. Even if the Third Agreement is upheld on appeal, which is unlikely, it will be very difficult for OSA to comply with it, given its poor financial condition. Even if it could comply, ordinary creditors have forgone 96% of their credits. As a result, the POSH Subsidiaries withdrew their claims in the Insolvency Proceedings prior to filing their claims before this international Tribunal.⁴⁰²

6. Conclusion

212. Mexico engaged in a politically motivated campaign and coordinated effort to bring down OSA and its shareholders, along with its contractors, creditors and business partners, including POSH's Subsidiaries. Mexico's measures were taken indiscriminately, injuring third parties, like POSH, which have never even been accused or suspected of complicity in OSA's alleged wrongdoing. This arbitrary political campaign against OSA ultimately resulted in the destruction of the Investment in Mexico. Specifically:

- *Mexico unlawfully withdrew OSA's life support (the "Unlawful Sanction").* Mexico banned OSA from entering into any public contract, harming OSA's financial situation, leading to its demise and irreparably impairing its ability to perform on its contracts with POSH's Subsidiaries. This measure was unlawful and was later revoked by Mexican courts. The revocation came late, however, since OSA was already undergoing insolvency proceedings and did not meet PEMEX's financial requirements for new contracts. PEMEX never awarded a single new contract to OSA again.
- *Mexico initiated an unsupported criminal investigation against OSA for alleged money laundering and fraud (the "Joint Investigation").* Mexico did not identify any sign of illegal activity, since none was present. The complaint is based on a list of offshore transactions; no explanation was provided as to the alleged illegal nature of the origin of the funds. Mexico never pressed any charges for money laundering or fraud. In this process, however, Mexico abused its powers and

⁴⁰² Claims are not the same, not triple identity.

adopted a series of unlawful and disproportionate measures against OSA and POSH's subsidiaries, without regard for their lawful rights as international investors.

- *Mexico unlawfully seized all of OSA's assets and took control over OSA (the "Seizure Order").* Based on the unlawful criminal investigation, PGR ordered the "temporary seizure" of OSA and placed it under SAE's administration. There were no signs of criminal activity and the Seizure Order had no factual or legal basis. No analysis of the case had even been possible, since the Seizure Order was issued the day after the complaint for money laundering had been filed. Even if there had been signs of criminal activity, the reasonable proportionate measure would have been the seizure of the bank accounts, not the entire company. This measure directly impacted POSH since, upon taking control of OSA, the State effectively blocked any and all payments of OSA's debts to POSH's subsidiaries.
- *Mexico unlawfully seized the ten vessels owned by POSH's Subsidiaries (the "Detention Order").* The detention order, directly targeted at POSH's Subsidiaries, was fatally flawed, as it stemmed from an unlawful criminal investigation and seizure of OSA. There was no factual or legal basis to detain the vessels owned by POSH's Subsidiaries. They were not owned, or even rightfully possessed in some cases⁴⁰³ by OSA, nor were they related in any way to the alleged crimes. This was confirmed by subsequent events since, after several months, Mexico released the vessels.
- *Mexico drove OSA into insolvency (the "Insolvency Proceeding").* As a result of the Unlawful Sanction, OSA did not have enough cash flow to operate the vessels or pay its debts. This allowed Mexico to initiate OSA's Insolvency Proceeding and appoint SAE as OSA's Visitor, Conciliator and Trustee, retaining full control over the company.
- *Mexico suspended all payments to creditors, and unlawfully diverted the payments owed by PEMEX to the Irrevocable Trust, where POSH was the primary beneficiary (the "Diversion Order").* Mexico had effectively blocked payments

⁴⁰³

This was the case for SMP and SEMCO Vessels.

owed by OSA to POSH's Subsidiaries upon taking control of OSA, but officially suspended all payments to creditors within the subsequent insolvency proceeding. Mexico went further and also blocked all payments owed by PEMEX to POSH via the Irrevocable Trust. This measure was unlawful and contrary to Mexican Law. OSA was not the rightful holder of the collection rights—the Irrevocable Trust and its beneficiaries were. The Irrevocable Trust and the Assignment of Rights were valid, binding, enforceable contracts that were never annulled by the court or cancelled by the conciliator.

- *Mexico acknowledged that the Unlawful Sanction was the proximate cause of insolvency.* SAE requested, and the Insolvency Court granted, an interim measure suspending the effects of the Unlawful Sanction. The Court acknowledged that this measure had led to OSA's insolvency and believed, if not immediately suspended, could lead to OSA's bankruptcy. This came too late, however, as OSA was unable to bid for public contracts once the Unlawful Sanction was finally suspended.
- *Mexico unreasonably and arbitrarily prevented POSH's Subsidiaries from contracting directly with PEMEX.* By then, it was clear that OSA could not operate and pay its debts without new contracts; and OSA would never receive new contracts since it did not meet PEMEX's tender requirements. PEMEX was interested in assigning OSA's contracts to POSH's Subsidiaries to avoid interruption of service. SAE refused to cancel OSA's contracts and the Insolvency Court prohibited PEMEX from rescinding them, fatally condemning POSH's operations in Mexico. These measures were arbitrary and unreasonable, as anticipated by all Mexican public authorities involved in the Insolvency Proceeding and confirmed by subsequent events. One year after the Unlawful Sanction, 37 out of the 39 contracts had been rescinded, terminated or were in the process of rescission. POSH's Subsidiaries were in no condition to enter into new contracts then.

213. Mexico's acts and omissions destroyed POSH's Investment in Mexico. OSA could not contract with PEMEX; the vessels had been detained for several months; POSH's Subsidiaries did not receive any payments from OSA or PEMEX (through the Irrevocable Trust) while still incurring in costs to maintain the vessels and pay the crews; and the Subsidiaries could not contract

directly with PEMEX for the services they were previously rendering through OSA. There was no cash flow, no activity and, for several months, no vessels.

VI. FURTHER MITIGATION OF DAMAGES, LOAN DEFAULT AND SALE OF THE VESSELS

A. FURTHER MITIGATION OF DAMAGES

214. As explained above, POSH employed all its efforts to mitigate damages within the Insolvency Proceeding. POSH attempted to contract directly with PEMEX to save its operations in Mexico, but the Insolvency Court blocked that possibility. POSH's Subsidiaries filed the pertinent claims in the Insolvency Proceeding, but the chances of recovery are non-existent.⁴⁰⁴ POSH further employed all its efforts to mitigate damages outside the Insolvency Proceeding. It spent substantial amounts repairing and reconfiguring the vessels and sought new charters.

215. During the detention period, OSA had failed to properly maintain and preserve the vessels, which were returned in poor condition and with structural damage. Albeit not having received any payment from OSA or PEMEX, the Subsidiaries were forced to spend substantial amounts repairing the vessels.⁴⁰⁵ Moreover, six out of the ten vessels indirectly owned by POSH had been modified per PEMEX's specifications.⁴⁰⁶ POSH's Subsidiaries further spent substantial time and cost reconfiguring the vessels to service clients other than PEMEX.

216. Any attempt to re-charter the vessels in Mexico, however, faced virtually insurmountable difficulties. As noted above, PEMEX is the sole producer of oil and gas in Mexico and, therefore, the sole end client for the oil and gas offshore services industry.⁴⁰⁷ But POSH's ability to re-contract with PEMEX for the services the vessels were previously rendering through OSA had been blocked by the Insolvency Court. Even once that prohibition had been lifted, PEMEX was wary of entering into contracts for the use of vessels that had previously serviced PEMEX-OSA contracts. Similarly, given the lack of publicly available information about the

⁴⁰⁴ Even if the Third Agreement is upheld in appealed and OSA is able to comply with it, which is highly unlikely, ordinary creditors would have still foregone 96% of their claims.

⁴⁰⁵ Credit Recognition Request filed by POSH Honesto, S.A.P.I. de C.V., dated 3 September 2014, **C-152**; Credit Recognition Request filed by POSH Hermosa, S.A.P.I. de C.V., dated 3 September 2014, **C-153**; Credit Recognition Request filed by SEMCO Salvage (IV) Pte. Ltd., dated 3 September 2014, **C-154**; Witness Statement by José Luis Montalvo, paras. 50,-52, 63; Expert Legal Opinion on Insolvency Law by Luis Manuel Meján, para. 91.

⁴⁰⁶ Witness Statement by José Luis Montalvo, para. 24, 31.

⁴⁰⁷ Presentation "POSH – Overview of the Market – Opportunity for POSH", **C-208**.

proceedings involving OSA, Mexican counterparts in the OMS Industry were very reluctant to do business with companies that had been affected by the OSA “scandal.” Thus, the opportunities in Mexico were practically non-existent.⁴⁰⁸ As summarized by Jean Richards, expert on the Maritime Industry:

Absent any renewals with PEMEX, I consider that there was no market and no viable alternatives for POSH’s Subsidiaries in Mexico. PEMEX has a monopoly in the Mexican oil and gas industry and is the main charterer. Therefore, for any vessel to find period time-charter employment it would have been with PEMEX. I consider it to be extremely unlikely that the Vessels could have found any chartering employment in Mexico following termination of the contracts. Even if a third party Mexican manager could have been found as an alternative manager to OSA the outcome would, in my opinion, have been the same. Any local operator, owner or manager would trade their vessels with PEMEX as the end user. Such local operators would know that the Vessels in the POSH fleet had been terminated and would not wish to take the risk of association with these particular vessels.⁴⁰⁹

217. Despite these evident difficulties, POSH continued in its attempt to secure contracts for the vessels, including new contracts with PEMEX. POSH’s Subsidiaries submitted the Rodrigo (owned by HONESTO) and the Argento (owned by GOSH) for new tenders with PEMEX. Neither was awarded the contract.⁴¹⁰ POSH then learned that PEMEX had “blacklisted Amado [Yáñez] and OSA,” and that the vessels had been disqualified “as Pemex has insisted that [the] vessels [were] named in a contract between OSA and Pemex. This is even after Marcia [from SAE] ha[d] confirmed that the contracts ha[d] already been terminated.”⁴¹¹ POSH eventually learned, however, that:

[t]he actual reason why POSH Honesto was disqualified was because Pemex felt that POSH Honesto [wa]s still partly owned by Amado... In fact, Amado [Yáñez] ha[d] informed Pemex in some of his earlier documents that he [wa]s the owner of POSH Honesto and POSH Hermosa... Because of this, Pemex [wa]s unwilling to give any contracts for those two vessels... Pepe [*Mr. Montalvo*] explained to Marcos that Amado... ha[d] never owned POSH Honesto and POSH Hermosa... As such, Marcos... requested for a meeting with Pepe, together with Valeria (Legal Manager handling this case) later this week. Pepe is to present all the relevant documents showing that Amado is no longer related to POSH Group.⁴¹²

⁴⁰⁸ Witness Statement by Gerald Seow, paras. 43-44.

⁴⁰⁹ Expert Industry Report by Jean Richards, para. 2.8.

⁴¹⁰ Email from G. Seow to W. Long Peng dated 21 November 2014, **C-209**.

⁴¹¹ Email from J. Phang to J. L. Montalvo Sánchez Mejorada dated 14 October 2014, **C-210**.

⁴¹² *Ibid.*

218. The efforts were futile. It became clear that PEMEX was acting under the specific instructions not to contract vessels previously operated by OSA.

219. POSH's Subsidiaries did in fact try to re-charter the vessels outside of Mexico and engaged in discussions with several operators to that effect. GOSH Vessels and SMP Vessels were Mexican flagged and based in Mexico and most had been specially configured as mud processing vessels for PEMEX. This substantially impaired potential deals since the costs of reconfiguration and redeployment are very high.

220. The table below illustrates POSH's efforts to re-charter the vessels by October 2014. Only two of those potential charters were in Mexico: notably, the PEMEX tenders that were not awarded to POSH's Subsidiaries.

Charter Prospects as of Oct 10, 2014				
No	MV Vessel	Vessel Location	S&P Status	Forward Prospects
Servicios Marítimos Posh S.A.P.I. de C.V (formerly Sermargosh2 S.A.P.I. de C.V.)				
1	POSH HONESTO	Ciudad del Carmen, Campeche, MX	Documentation in process with lawyers GT	Vessel proposed on PEMEX tender N°513-14: - 776 days - Starting January 2015 - Results on 18th September
2	POSH HERMOSA	Ciudad del Carmen, Campeche, MX	Documentation in process with lawyers GT	None
Servicios Marítimos Gosh S.A.P.I. de C.V				
3	CABALLO SCARTO	Dos Bocas, Tabasco, MX	Documentation in process with lawyers GT	None
4	DON CASIANO	Dos Bocas, Tabasco, MX	Documentation in process with lawyers GT	None
5	CABALLO MONOCEROS	Ciudad del Carmen, Campeche, MX	Documentation in process with lawyers GT	Potential interest from AMAPET to hire the MONOCEROS, to be confirmed
6	CABALLO COPENHAGEN	Dos Bocas, Tabasco, MX	Documentation in process with lawyers GT	None
7	CABALLO ARGENTO	Dos Bocas, Tabasco, MX	Documentation in process with lawyers GT	Earmarked for 3 prospective charters in West Africa: • Tullow Ghana (1 x PSV) - 100+123 days

Charter Prospects as of Oct 10, 2014				
No	MV Vessel	Vessel Location	S&P Status	Forward Prospects
				<ul style="list-style-type: none"> - Commencement in end Sep 14 - Tender is still under evaluation by client - Likely to receive results by 18th Sep <p>• Saipem Congo (2 x PSV)</p> <ul style="list-style-type: none"> - 40+30 days - 1st PSV required by early Oct 14 & 2nd PSV required by early Nov 14 - Likely to confirm award by 12th Sep <p>• ENI Ghana (3 x PSV)</p> <ul style="list-style-type: none"> - 3.5+1 year - Commencement window: Jan – Apr 15 - Currently in the midst of tender preparation <p>Vessel Proposed in PEMEX tender N°547-14 in Mexico (1 PSV):</p> <ul style="list-style-type: none"> - 1262 days - commencement on January 2015 - likely to receive results by 3rd October
8	CABALLO BABIECA	Dos Bocas, Tabasco, MX	Documentation in process with lawyers GT	<p>Earmarked for 3 prospective charters in West Africa:</p> <p>• Tullow Ghana (1 x PSV)</p> <ul style="list-style-type: none"> - 100+123 days - Commencement in end September 14 - Tender is still under evaluation by client - Likely to receive results by 18th September <p>• Saipem Congo (2 x PSV)</p> <ul style="list-style-type: none"> - 40+30 days - 1st PSV required by early October 14 & 2nd PSV required by early November 14

Charter Prospects as of Oct 10, 2014				
No	MV Vessel	Vessel Location	S&P Status	Forward Prospects
				<ul style="list-style-type: none"> - Likely to confirm award by 12th September • ENI Ghana (3 x PSV) <ul style="list-style-type: none"> - 3.5+1 year - Commencement window: Jan – April 15 - Currently in the midst of tender preparation

221. Finally, under serious cash-flow strain, POSH's Subsidiaries attempted to secure spot charters wherever possible, including outside Mexico. Spot charters were ultimately secured only for two vessels, the Argento and the Babieca (notably the only two vessels not configured as mud processing vessels for PEMEX). The Argento worked for AMAPET in Mexico from August 9, 2014 until September 14, 2014.⁴¹³ The Babieca worked in Congo beginning in October 2014.⁴¹⁴ Despite numerous attempts, it was not possible to secure any charters for the other eight vessels prior to their sale in satisfaction of the loans with POSH.

B. THE DEFAULT ON THE LOANS, FORECLOSURE, AND THE ENFORCEMENT OF THE COLLATERALS

222. Mexico's acts and omissions caused the Subsidiaries to default on their loans granted by POSH, which led to their foreclosure and the enforcement of the collaterals granted by the companies and their shareholders. At that point, the Investment vanished. There were no longer any vessels and no contracts with OSA or PEMEX.

223. **Default on the loans.** As soon as SAE took over the administration of OSA, on March 1, 2014, it stopped (i) processing invoices to get payments from PEMEX for GOSH

⁴¹³ Time Charter Party for Offshore Service Vessels for Caballo Argento between Servicios Marítimos Gosh, S.A.P.I. de C.V., and Aprovevisionamientos Marítimos y Petroleros, S.A. de C.V. dated 9 August 2014, **C-211**; Time Charter Party for Offshore Services Vessels for Caballo Argento between Servicios Marítimos Gosh, S.A.P.I. de C.V., and Aprovevisionamientos Marítimos y Petroleros, S.A. de C.V. dated 16 August 2014, **C-212**.

⁴¹⁴ Agreement for the hire of PSV POSH Kittiwake between Petro S. Management Consulting FZE and Posh Semco Pte. Ltd. dated 1 October 2015, **C-213**; Time Charter Party for Offshore Services Vessels between Petro Services Congo SARL and Posh Semco Pte. Ltd. dated 6 November 2014, **C-214**; Agreement for the hire of PSV "Caballo Babieca" between Petro S. Management Consulting FZE and Posh Semco Pte. Ltd. dated 15 November 2014, **C-215**.

Vessels;⁴¹⁵ and (ii) paying its obligations to HONESTO, HERMOSA and SEMCO.⁴¹⁶ With the Diversion Order, on May 6, 2014, PEMEX also stopped making payments to the Trust, in which POSH was the primary beneficiary.⁴¹⁷

224. After futile attempts to recover payment, GOSH was forced to withdraw its vessels and terminate the GOSH Charters with OSA. With no income and an inability to re-charter their vessels in Mexico, GOSH, HONESTO and HERMOSA soon defaulted on the loans granted by POSH to purchase their vessels. On March 7, 2014, POSH sent GOSH a notice of default on the loan, and on March 11, 2014, POSH notified GOSH that it was terminating the Loan.⁴¹⁸ POSH also informed HONESTO and HERMOSA of their default and subsequent foreclosure of the loan.⁴¹⁹ POSH did not enforce the MCA and loans granted to ICA since, as explained above, ICA was POSH's nominee.

225. **Enforcement of the Share Pledges.** As a result of GOSH's default on the Loan, the share pledges granted by Arrendadora and GGM became enforceable.⁴²⁰ On March 13, 2014, POSH sent notice to Arrendadora and GGM commencing enforcement of the share pledges. GGM and Arrendadora did not paid their share of the outstanding balance on the Loan, so POSH applied to the Mexican courts requesting approval to sell their shares.⁴²¹ On July 31 and August 7, 2014, the Mexican courts authorized the sale of Arrendadora's and GGM's shares in GOSH, respectively.⁴²²

226. On August 13, 2014, GOSH's shareholders approved the sale of GGM's and Arrendadora's shares to ECLIPSE, a company designated by POSH and an indirect subsidiary

⁴¹⁵ Witness Statement by José Luis Montalvo, para. 56.

⁴¹⁶ *Id.*, para. 55.

⁴¹⁷ Insolvency Court Decision, dated 6 May 2014 (ordering PEMEX to make payments to the Servicio de Administración y Enajenación de Bienes), **C-175**.

⁴¹⁸ Act of Protest, recording the delivery of the vessel Rodrigo DPJ, dated 7 2014, **C-150**; Act of Protest, recording the delivery of the vessel Caballo Grano de Oro, dated 10 March 2014, **C-151**.

⁴¹⁹ Witness Statement by Keng-Lin, para. 42.

⁴²⁰ POSH did not enforce the loan granted to ICA, since it was POSH's nominee and under its control.

⁴²¹ Writ filed by POSH, dated 3 April 2014 (requesting the approval to sell Arrendadora Caballo de Mar III, S.A. de C.V., shares in GOSH), **C-216**; Writ filed by POSH, dated 28 March 2014 (requesting the approval to sell Shipping Group Mexico SGM, S.A.P.I. de C.V.'s shares in GOSH), **C-217**.

⁴²² Public Deed No. 33,064, recording the Shareholders' Meeting of Servicios Marítimos GOSH, S.A.P.I. de C.V., from 13 August 2014, dated 26 August 2014, **C-218**.

thereof.⁴²³ On September 17, 2014, ECLIPSE signed a share purchase agreement and acquired the GGM and Arrendadora shares in GOSH. At that point, Mr. Yáñez and Mr. Martín (OSA's main shareholders) ceased to have an interest in GOSH.

227. **Seizure and Sale of GOSH's Vessels.** To mitigate damages arising from GOSH's default on the Loan, POSH entered into an agreement with GOSH to sell the GOSH Vessels and repay the Loan with the sale proceeds thereof (the **Settlement**). Pursuant to the Settlement, GOSH's Vessels were all reflagged and eventually acquired by other POSH-designated entities as repayment of the Loan.

228. On February 25, 2015, the Scarto was sold to Adara Ltd. for \$17,200,000.⁴²⁴ On February 26, 2015, the Argento was sold to Maritime Charlie Pte. Ltd. for \$24,000,000.⁴²⁵ On February 26, 2015, the Casiano was sold to Adara Ltd. for \$21,200,000.⁴²⁶ On August 20, 2015, the Copenhagen was sold to Adara Ltd. for \$23,500,000.⁴²⁷ On February 26, 2015, the Monoceros was sold to Adara Ltd. for \$21,200,000.⁴²⁸ On April 28, 2015, the Babieca was sold to Maritime Charlie Pte. Ltd. for \$17,000,000.⁴²⁹

229. The same happened to the SMP Vessels. On December 26, 2014, the HONESTO shareholders unanimously agreed to sell the Rodrigo and use the proceeds to repay in full the loan granted by POSH.⁴³⁰ On March 2, 2015 the Rodrigo was sold to Adara Ltd. for \$19,663,278.61.⁴³¹ Similarly, on December 26, 2014, the HERMOSA shareholders unanimously agreed to sell the Grano de Oro and use the proceeds to repay in full the loan granted by POSH.⁴³² On February 25,

⁴²³ *Ibid.*

⁴²⁴ Bill of Sale for POSH Generoso (former Caballo Scarto) 25 February 2015, **C-224**.

⁴²⁵ Bill of Sale for POSH Sincero (former Caballo Argento), dated 26 February 2015, **C-220**.

⁴²⁶ Bill of Sale for POSH Gitano (former Don Casiano) dated 26 February 2015, **C-221**.

⁴²⁷ Bill of Sale for POSH Gentil (former Caballo Copenhagen) dated 20 August 2015, **C-222**.

⁴²⁸ Bill of Sale for POSH Galante (former Caballo Monoceros) 26 February 2015, **C-223**.

⁴²⁹ Bill of Sale for POSH Kittiwake (former Caballo Babieca) dated 28 April 2015, **C-219**.

⁴³⁰ Public Deed No. 20.172, recording the Ordinary Shareholders Meeting of POSH Honesto, S.A.P.I. de C.V. from 26 December 2014, dated 27 January 2015, **C-225**.

⁴³¹ Bill of Sale for POSH Honesto (former Rodrigo DPJ) dated 2 March 2015, **C-226**.

⁴³² Public Deed No. 20.171, recording the Ordinary Shareholders Meeting of POSH Hermosa, S.A.P.I. de C.V., from 26 December 2014, dated 27 January 2015, **C-227**.

2015, the Grano de Oro was sold to Adara Ltd. for \$24,500,000.⁴³³ The SEMCO vessels, the Salvirile and Salvision, left Mexico to be laid up in Batam Indonesia and were later sold for scrap.

230. The chart below illustrates the sale of the vessels to third parties in settlement of the pertinent loans.

Sale of Vessels					
No	Name of Vessel	Name of Seller	Name of Buyer	Date of MOA	Completion Date
Servicios Marítimos Gosh S.A.P.I. de C.V					
1	POSH Generoso (formerly <i>Caballo Scarto</i>)	Servicios Marítimos Gosh S.A.P.I. de C.V.	Adara Limited	15.12.2014	25.02.2015
2	POSH Sincero (fka <i>Caballo Argento</i>)	Servicios Marítimos Gosh S.A.P.I. de C.V.	Maritime Charlie Pte. Ltd.	15.12.2014	26.02.2015
3	POSH Galante (fka <i>Caballo Monoceros</i>)	Servicios Marítimos Gosh S.A.P.I. de C.V.	Adara Limited	15.12.2014	26.02.2015
4	POSH Gitano (fka <i>Don Casiano</i>)	Servicios Marítimos Gosh S.A.P.I. de C.V.	Adara Limited	15.12.2014	26.02.2015
5	POSH Kittiwake (fka <i>Caballo Babieca</i>)	Servicios Marítimos Gosh, S.A.P.I. de C.V.	Maritime Charlie Pte. Ltd.	16.04.2015	28.04.2015
6	POSH Gentil (fka <i>Caballo Copenhagen</i>)	Servicios Marítimos Gosh S.A.P.I. de C.V.	Adara Limited	20.08.2015	20.08.2015
Subsidiaries of Servicios Marítimos Posh S.A.P.I. de C.V (formerly Sermargosh2 S.A.P.I. de C.V.)					
7	POSH Hermosa (fka <i>Caballo Grano de Oro</i>)	POSH Hermosa S.A.P.I. de C.V.	Adara Limited	15.12.2014	25.02.2015

⁴³³ Bill of Sale, for POSH Hermosa (former Caballo Grano de Oro) to Adara Limited, dated February 25, 2015, C-228.

Sale of Vessels					
No	Name of Vessel	Name of Seller	Name of Buyer	Date of MOA	Completion Date
8	POSH Honesto (fka Gosh Rodrigo DPJ)	POSH Honesto S.A.P.I. de C.V.	Adara Limited	15.12.2014	02.03.2015
Semco Salvage Entities					
9	Salvirile	Semco Salvage (I) Pte. Ltd.	Intraports Marine Pte. Ltd.	06.11.2017	06.11.2017
10	Salvision	Semco Salvage (IV) Pte. Ltd.	Ocean Solution Maritime Management Sdn Bhd	07.08.2017	07.08.2017

231. As a result of the sale of the vessels, the loans granted by POSH to GOSH, HONESTO and HERMOSA were paid and terminated.

232. In February 2014, POSH's operations in Mexico were on solid grounds and the projections showed continued growth and expansion. Mexico then conducted a politically motivated campaign to bring down OSA, along with its contractors and business partners, without regard for their rights under international law and notwithstanding the absence of any allegation, much less proof, that POSH was involved in any of the alleged crimes committed by OSA (which themselves have not been proven some five years later). As a result, within 18 months, POSH's Investment had vanished. There were no longer any vessels, there were no contracts and no future prospects.⁴³⁴ This arbitration is brought to hold Mexico accountable and to make POSH whole for the losses caused by Mexico's wrongful acts.

⁴³⁴ HONESTO later repurchased the Rodrigo as part of a new investment by POSH, unrelated to POSH's Investment, OSA, the Charters, or OSA's Service Contracts with PEMEX.

VII. THE LAW APPLICABLE TO THIS DISPUTE

233. Article 17 of the Treaty provides that “[a] tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and the applicable rules and principles of international law.”⁴³⁵

234. POSH’s claims arise from Mexico’s obligations as set out in the Treaty. International jurisprudence is clear that the Treaty itself, as a *lex specialis*, is the primary source of law governing the dispute. To the extent it is required, customary international law supplements and informs the Treaty’s provisions.⁴³⁶ The Treaty is to be further supplemented by other rules of international law since, as the Vienna Convention provides, treaties are “governed by international law” and must be interpreted in the light of “any relevant rules of international law applicable”.⁴³⁷ Applicable rules of international law include customary international law as well as the “general principles of law recognized by civilized nations” referred to in Article 38 of the Statute of the International Court of Justice.⁴³⁸

235. Mexican law informs the content of the rights and obligations of POSH and its Subsidiaries within the domestic legal and regulatory framework and Mexico’s commitments under that same framework, including those which POSH considers to have been violated by the Mexican government.⁴³⁹ However, international law applies to a dispute under the Treaty; a State may not invoke domestic law to excuse or preclude a claim under the Treaty. As explained in the International Law Commission’s Articles on Responsibility of States for Intentionally Wrongful Acts (**ILC Articles**):

The characterization of an act of a State as internationally wrongful is governed by

⁴³⁵ Mexico-Singapore BIT, Art. 17, **CL-1**.

⁴³⁶ *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, para. 102 (“the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law”), **CL-9**; *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award, 27 June 1990, paras. 20-21, **CL-10**; *Middle East Cement Shipping and Handling Co SA v. Arab Republic of Egypt*, ICSID Case No ARB/99/6, Final Award, 12 April 2002, paras. 85-87, **CL-11**.

⁴³⁷ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Arts 2(1)(a), 31(3)(c), **CL-12**.

⁴³⁸ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award, 22 September 2014, para. 575, **CL-13**.

⁴³⁹ *See supra*, para. 212.

international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.⁴⁴⁰

236. The Tribunal must therefore apply the provisions of the Treaty, informed and supplemented as necessary by customary international law.

VIII. THE TRIBUNAL HAS JURISDICTION OVER POSH'S CLAIMS

A. THE TRIBUNAL HAS JURISDICTION *RATIONE TEMPORIS*

237. Pursuant to Article 27, the Treaty “applies to investments made before or after its entry into force, but not to claims or disputes arising out of events which occurred, or to claims or disputes which had been settled, prior to that date.”⁴⁴¹

238. The BIT was signed on November 12, 2009, and entered into force on April 3, 2011.⁴⁴² The Tribunal has jurisdiction *ratione temporis* over this dispute.

B. POSH IS A PROTECTED INVESTOR UNDER THE TREATY

239. Article 1(8) of the BIT defines “investor of a Contracting Party” as a:

(a) natural person having the nationality of a Contracting Party in accordance with its applicable laws, or

(b) an enterprise which is either constituted or otherwise organized under the law of a Contracting Party, and is engaged in substantive business operations in the Area of that Contracting Party;

having made an investment in the Area of the other Contracting Party.⁴⁴³

240. POSH is a company incorporated in and under the laws of Singapore⁴⁴⁴ and is engaged in substantive business operations in Singapore. Its headquarters are located in Singapore and it is listed on the Singapore stock exchange. Claimant is an “investor” within the meaning of the Treaty.

⁴⁴⁰ International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Art. 3, **CL-14**.

⁴⁴¹ Mexico-Singapore BIT, Art. 27, **CL-1**.

⁴⁴² *Id.*, p. 1.

⁴⁴³ *Id.*, Art. 1(8).

⁴⁴⁴ Certificate confirming PACC Offshore Services Holdings Pte Ltd’s conversion to a public company and change of name to PACC Offshore Services Holdings Ltd., dated April 7, 2014, **C-2**.

C. POSH HAS MADE INVESTMENTS IN MEXICO PROTECTED UNDER THE TREATY

241. Article 1(7) of the BIT defines protected “investments” in broad and unqualified terms:

“investment” means an asset owned or controlled, directly or indirectly by investors of one Contracting Party and established or acquired in accordance with the laws and regulations of the other Contracting Party in whose Area the investment is made, and in particular includes:

- (a) an enterprise;
- (b) shares, stocks, and other forms of equity participation in an enterprise, or futures, options, and other derivatives;
- (c) bonds, debentures, and other debt securities of an enterprise:
 - (i) where the enterprise is an affiliate of the investor; or
 - (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a Contracting Party or an entity directly owned and controlled by a Contracting Party;
- (d) loans to an enterprise:
 - (i) where the enterprise is an affiliate of the investor; or
 - (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a Contracting Party or an entity directly owned and controlled by a Contracting Party;
- (e) interests arising from the commitment of capital or other resources in the Area of a Contracting Party to economic activity in such Area, such as under:
 - (i) contracts involving the presence of an investor's property in the Area of the other Contracting Party, including turnkey or construction contracts, or concessions;
 - (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; or
 - (iii) licenses, authorizations, permits, and similar instruments;
- (f) movable or immovable property, and related rights such as leases, mortgages, liens or pledges, acquired in the expectation or used for the purpose of economic benefit or other business purposes;
- (g) intellectual property rights; and

(h) claims to money involving the kind of interests set out in sub-paragraphs (a) to (g) above, but not claims to money that arise solely from:

(i) commercial contracts for the sale of goods or services by a national or enterprise in the Area of a Contracting Party to an enterprise in the Area of the other Contracting Party; or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by sub-paragraph (d) above.⁴⁴⁵

242. Article 1(2) of the BIT further defines an “enterprise” as “any entity constituted or organized under the applicable law of a Contracting Party, whether or not for profit, and whether privately or governmentally owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association, and a branch of an enterprise.”⁴⁴⁶

243. Pursuant to these broad definitions, Claimant’s covered investments included *inter alia*:

- an “enterprise” (GOSH, SMP, HONESTO, HERMOSA and PFSM);
- “shares, stocks, and other forms of equity participation in an enterprise” (POSH’s shareholdings in the Subsidiaries);
- “loans to an enterprise” (the loan POSH extended to GOSH, HONESTO and HERMOSA for the acquisition of the vessels);
- “interests arising from the commitment of capital or other resources in the Area of a Contracting Party to economic activity in such Area” such as “contracts involving the presence of an investor’s property in the Area of the other Contracting Party” and “contracts where remuneration depends substantially on the production, revenues or profits of an enterprise” (*inter alia*, the GOSH, SMP and SEMCO Charters);
- “movable or immovable property, and related rights such as leases, mortgages, liens or pledges, acquired in the expectation or used for the purpose of economic benefit

⁴⁴⁵ Mexico-Singapore BIT, Art. 1(1) (emphasis added), **CL-1**.

⁴⁴⁶ *Id.*, Art. 1(2).

or other business purposes” (the Vessels as well as the mortgages on GOSH’s Vessels and SMP Vessels);

- “intellectual property rights” (POSH’s and its Subsidiaries’ goodwill and reputation); and
- “claims to money” (*inter alia*, claims to money under the Charters and claims to money under the terms of the Irrevocable Trust).

244. In addition, the Investment was “established or acquired in accordance with the laws and regulations” of Mexico, as required by the Treaty. POSH and the Investment were unrelated to, and had no connection with any alleged (and unproven) wrongdoing by OSA. Mexico has never accused POSH or the Subsidiaries of any impropriety. Also, POSH and its Subsidiaries have complied with Mexican Foreign Investment Law (**FIL**). The FIL establishes certain restrictions on foreign ownership of “shipping companies engaged in commercial exploitations of ships for inland and coastal navigation”⁴⁴⁷ that “do not apply to POSH’s Subsidiaries, which have complied therewith.”⁴⁴⁸ As Mr. David Enriquez —expert on foreign investment and maritime law— explains and has been confirmed by Mexican Administrative Authorities:

[o]wning vessels and bareboat chartering them in exchange for a rate or providing technical or crew management services do not qualify as ‘commercial exploitation of vessels’ for the purposes of the FIL. The Mexican Administrative authorities have so confirmed by means of the confirmation of criteria number DAJCNE.315.14.92.

Fourth, HONESTO, HERMOSA and GOSH engaged in bareboat chartering vessels to OSA. PFSM provided technical and crew management services to OSA. Under Mexican Law, these activities do not qualify as “commercial exploitation of vessels” for the purposes of the FIL.

Fifth, the ownership restrictions provided under Article 7 of the FIL do not apply to POSH’s Subsidiaries.

245. The Investment is, therefore, protected under the Treaty.

⁴⁴⁷ Mexican Foreign Investment Law (*Ley de Inversión Extranjera*), Art. 7, **CL-15**.

⁴⁴⁸ Expert report on Foreign Investment Law by David Enriquez, at para. 34.

D. THE PARTIES HAVE CONSENTED TO ARBITRATION

246. Mexico expressly and unequivocally consented to resolve investment disputes with Singaporean investors through international arbitration by way of Article 11(3)(c) of the Treaty, which provides that “A disputing investor may submit the claim to arbitration under... the UNCITRAL Arbitration Rules.” Article 12 further provides that:

1. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with this Section.
2. The consent and the submission of a claim to arbitration by the disputing investor shall be deemed to have satisfied the requirements of: ... Article II of the New York Convention for an “agreement in writing”.

247. In the Notice of Arbitration, POSH accepted, in writing, Mexico’s standing offer of consent to investors under UNCITRAL Rules.

E. THE TRIBUNAL HAS JURISDICTION OVER THE CLAIMS POSH BRINGS ON BEHALF OF POSH’S SUBSIDIARIES

248. POSH “owns” and directly and indirectly “controls” its Subsidiaries. Under Article 11(2) of the Treaty, POSH is entitled to bring this claim on its own name and on behalf of its Subsidiaries.

249. The ordinary meaning of “control” encompasses effective or *de facto* control. Here, ample documentary evidence, corroborated by the relevant witnesses, shows that POSH has had, at all times, effective or *de facto* control of its Subsidiaries.

1. Applicable law

250. Article 11(2) of the BIT provides as follows:

An investor of a Contracting Party, on behalf of an enterprise legally constituted pursuant to the laws of the other Contracting Party that is a legal person such investor owns or controls, directly or indirectly, may submit to arbitration a claim that the other Contracting Party has breached an obligation set forth in Chapter II, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.⁴⁴⁹

251. Article 17 of the BIT provides that “[a] tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement [the Treaty] and the applicable

⁴⁴⁹ *Id.*, Art. 1(1).

rules and principles of international law”. It follows that the concept of “control” for purposes of Article 11(2) of the Treaty must be interpreted in the framework of the Treaty and international law, in accordance with the customary rules of treaty interpretation set out in Articles 31 and 32 of the VCLT.⁴⁵⁰

2. The ordinary meaning of “control”

252. Article 31 of the VCLT requires that the terms of the treaty be interpreted in accordance with their “ordinary meaning” in their “context”. The ICJ has confirmed that “the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavor to give effect to them in their *natural and ordinary meaning* in the context in which they occur.”⁴⁵¹

253. Article 11(2) of the Treaty applies to an “enterprise legally constituted pursuant to the laws of the other Contracting Party” (Mexico), which is under the “control” of a national of another Contracting State (Singapore).

254. General and legal dictionaries in the English language confirm that the plain and ordinary meaning of “control” is directed to management and oversight. The *Oxford Dictionary* defines “control” as “[t]he act or power of directing or regulating; command, regulating influence”.⁴⁵² The *Black’s Law Dictionary* defines “control” as “the direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct or oversee.”⁴⁵³ Control, therefore, refers to management power.

3. Control under NAFTA

255. NAFTA tribunals have confirmed that “control” encapsulates *de facto* or effective control. NAFTA precedents are particularly apposite considering that the mechanism enshrined

⁴⁵⁰ See e.g. *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Award, 29 May 2013, para. 112, **CL-16**.

⁴⁵¹ *Competence of the General Assembly for the admission to a State to the United Nations*, Advisory Opinion, 3 March 1950, ICJ Rep. 4, p. 8 (emphasis added), **CL-17**. See A. Aust, *Modern Treaty Law and Practice* (2nd ed., 2007), p. 235 (observing that “in most cases, it is important to give a term its ordinary meaning, since it is reasonable to assume, at least until the contrary is established, that the ordinary meaning is most likely to reflect what the parties intended”), **CL-18**.

⁴⁵² Shorter Oxford English Dictionary (6th ed., 2007), p. 510, **CL-19**.

⁴⁵³ Black’s Law Dictionary (7th ed., 1999), p. 330, **CL-20**.

in Article 11(2) of the Treaty is also provided under Article 1117 of NAFTA,⁴⁵⁴ which enables investors of one Contracting Party to bring claims “on behalf of an enterprise of another Party that is a juridical person that the investor owns or *controls directly or indirectly*”.⁴⁵⁵ NAFTA and the Treaty thus afford the same ability to investors to assert claims on behalf of their controlled subsidiaries.

256. In *Thunderbird v. Mexico* the claimant sought to pursue claims on behalf of the “EDM companies” under Article 1117 of the NAFTA. Thunderbird owned less than 50 per cent of the shares in EDM, but the Tribunal observed that it “had the ability to *exercise a significant influence on the decision-making* of EDM and was, through its actions, officers, resources, and expertise, the *consistent driving force* behind EDM’s business endeavor in Mexico.” As a result, the tribunal concluded that effective or *de facto* control qualified as “control” for the purposes of the treaty:

The Tribunal does not follow Mexico’s proposition that Article 1117 of the NAFTA requires a showing of legal control. The term “control” is not defined in the NAFTA. Interpreted in accordance with its ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective or “de facto” control is, in the Tribunal’s view, sufficient for the purposes of Article 1117 of the NAFTA.⁴⁵⁶

257. The *Thunderbird* tribunal further identified the certain factors as indicators of *de facto* control:

It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholder meetings. Control can also be achieved by the *power to effectively decide and implement the key decisions* of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation.⁴⁵⁷

⁴⁵⁴ See North American Free Trade Agreement, 32 ILM 289, 605 (1993), Art. 1117, **CL-21**; US Model BIT (2012), Art. 24(1)(b), **CL-22**; *Article 1116 – Claim by an Investor of a Party on its Own Behalf*, in M. Kinnear et al (ed.), *Investment Disputes under Nafta* (2006), pp. 1-41, **CL-23**; *Article 1117 – Claim by an Investor of a Party on Behalf of an Enterprise*, in M. Kinnear et al (ed.), *Investment Disputes under Nafta* (2006), pp. 1-6, **CL-24**; A. Bjorklund, *NAFTA Chapter 11*, in C. Brown (ed.), *Commentaries On Selected Model Investment Treaties* (2013), pp. 500-504, **CL-25**.

⁴⁵⁵ North American Free Trade Agreement, Art. 1117(1), **CL-21**.

⁴⁵⁶ *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, para. 106, **CL-26**.

⁴⁵⁷ *Id.*, para. 108.

258. In *SD Myers v. Canada*, a US claimant, SDMI, did not own any shares in Myers Canada, but the two companies were owned and managed by the same individual. The tribunal accepted these circumstances as evidencing the control by SDMI over Myers Canada for purposes of the NAFTA.⁴⁵⁸

Taking into account the objectives of the NAFTA, and the obligation of the Parties to interpret and apply its provisions in light of those objectives, the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organize the way in which it conducts its business affairs.⁴⁵⁹

259. In assessing control for NAFTA purposes, tribunals look to management authority, contribution of expertise, and initial capitalization efforts. Disputing parties also regularly reference managerial authority as a factor in determining standing under the NAFTA. In *Vito G. Gallo v. Government of Canada*, the respondent argued that the claimant could not be considered an investor because he “[d]id not contribute any technical, management or other expertise to the Enterprise.”⁴⁶⁰

4. Control under other treaties and arbitral practice

260. Other investment treaties and arbitral decisions have defined “control” as the direct or indirect power to make decisions within a company. These treaties and awards shed additional light on the meaning of the concept of control under international law.

261. Article 1(6) of the ECT contains a definition of “investment” that refers to “every kind of asset, owned *or controlled* directly or indirectly by an Investor”.⁴⁶¹ The ECT includes the following Understanding with respect to the meaning of “control”:

For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor’s (a) *financial interest*, including equity interest, in the Investment; (b) ability to exercise

⁴⁵⁸ *Id.*, para. 67.

⁴⁵⁹ *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 229, **CL-27**.

⁴⁶⁰ *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award, 15 September 2011, para. 145, **CL-28**.

⁴⁶¹ The Energy Charter Treaty, 2080 UNTS 95; 34 ILM 360 (1995), Understanding No. 3 with respect to Art. 1(6), **CL-29**.

substantial influence over the management and operation of the Investment; and (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.⁴⁶²

262. Certain BITs, particularly those of the Netherlands, define corporate nationality by reference to control by nationals of the State party to the BIT. Under these definitions, a company controlled by Netherlands nationals but incorporated elsewhere is treated as a Netherlands company.

263. In *Aguas del Tunari v. Bolivia*, the tribunal interpreted Article 1(b)(iii) of the Netherlands-Bolivia BIT that defines “nationals” *inter alia* as “legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party.”⁴⁶³ The tribunal concluded that the term “controlled” meant both the actual exercise of powers or direction and the rights arising from the ownership of shares,⁴⁶⁴ and held that various elements may contribute to the legal capacity to control:

In the case of a minority shareholder, the legal capacity to control an entity may exist by reason of the percentage of shares held, legal rights conveyed in instruments or agreements such as the articles of incorporation or shareholders’ agreements, or a combination of these.⁴⁶⁵

264. In *Awdi v. Romania* the tribunal applied Article 1(1)(a) of the Romania-United States BIT, which defines the term “investment” as meaning “every kind of investment in the territory of one Party owned or *controlled directly or indirectly* by nationals or companies of the other Party”. The tribunal found that “[a]s held by other investment treaty tribunals, ‘control’ may also be a ‘*de facto*’ control whenever it is clearly shown that a... shareholder ‘dominated the company decision-making structure’.”⁴⁶⁶ This is the case at hand.

⁴⁶² *Ibid.*

⁴⁶³ *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 217 (referring to the Netherlands-Bolivia BIT, 1992), **CL-30**.

⁴⁶⁴ *Id.*, para. 227.

⁴⁶⁵ *Id.*, para. 264.

⁴⁶⁶ *Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, para. 194, **CL-31**.

5. POSH at all times controlled the Subsidiaries

265. POSH owned or controlled all of its Subsidiaries. POSH owned 99% of PFSM and the record shows that POSH controlled GOSH, SMP, HONESTO and HERMOSA, through Mr. Montalvo and ICA.

266. *First*, POSH controlled Mr. Montalvo's involvement in the JV. Mr. Montalvo would act as POSH's nominee in the JV, serve as POSH's attorney in fact in all matters pertaining to the JV and follow POSH's instructions.

267. *Second*, POSH controlled ICA, owned by Mr. Montalvo. POSH loaned the purchase price of ICA's shares to Mr. Montalvo.⁴⁶⁷ In turn, Mr. Montalvo pledged ICA's shares as collateral for the repayment of the loan.⁴⁶⁸ Under the loan and the pledge, POSH was entitled to "all dividends, distributions or proceeds"⁴⁶⁹ arising from ICA's shares, could claim payment of the loan "upon... demand,"⁴⁷⁰ and further direct Mr. Montalvo "at its sole discretion to transfer the Shares at a nominal sum to a third party(ies) nominated by [POSH] as full discharge of the Loan."⁴⁷¹

268. *Third*, POSH controlled GOSH. POSH owned 49% of GOSH and controlled ICA's 1% stake. POSH loaned ICA the purchase price of 1% of GOSH's shares.⁴⁷² The loan was to be paid "upon demand"⁴⁷³ by POSH, and POSH could direct ICA "at its sole discretion to transfer the Shares at a nominal sum to a third party(ies) nominated by [POSH] as full discharge of the Loan"⁴⁷⁴ and claim "any dividend"⁴⁷⁵ that ICA would receive from GOSH. ICA further pledged

⁴⁶⁷ Loan Agreement, entered into by PACC Offshore Services Holdings Pte. Ltd. and José Luis Montalvo Sánchez Mejorada dated 7 December 2012, **C-38**.

⁴⁶⁸ Stock Pledge Agreement relating to Inversiones Costa Afuera, S.A. de C.V., entered into by and between José Luis Montalvo Sánchez Mejorada, PACC Offshore Services Holdings Pte. Ltd., and Juan Carlos Durand Hollis dated 10 December 2012, **C-39**.

⁴⁶⁹ Loan Agreement, entered into by PACC Offshore Services Holdings Pte. Ltd. and José Luis Montalvo Sánchez Mejorada dated 7 December 2012, para. 4.1, **C-38**.

⁴⁷⁰ *Id.*, para. 2.1.

⁴⁷¹ *Id.*, para. 2.5.

⁴⁷² Master Loan Agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Inversiones Costa Afuera S.A. de C.V., dated 23 November 2011, **C-34**.

⁴⁷³ *Id.*, para. 4.1.

⁴⁷⁴ *Id.*, para. 4.5.

⁴⁷⁵ *Id.*, para. 6.2.

its shares in GOSH as collateral for the repayment of the ICA Loan.⁴⁷⁶ Thereafter, POSH appointed Mr. Montalvo as its proxy “to represent the Company to do or execute all or any of the acts and things in connection with” the Shareholders’ Meeting of GOSH. Mr. Montalvo followed POSH’s specific instructions regarding GOSH.⁴⁷⁷

269. POSH retained both corporate and economic rights over ICA’s shares in GOSH. POSH’s Board of Directors made clear that (i) 1% of GOSH shares “is held for POSH interest by a Mexican company;”⁴⁷⁸ (ii) it was “for the benefit of POSH;”⁴⁷⁹ (iii) was “financed by POSH and secured by share pledge;”⁴⁸⁰ (iv) “ICA [was] owned by a Mexican *nominated* by us, *funded* by POSH and we ensure appropriate *security* over the 1%;”⁴⁸¹ and, in sum, that (iv) “the 1% is essentially for POSH’s benefit, to ensure that we *have control over 50% of GOSH*.”⁴⁸²

270. POSH would, at all times, have full control over GOSH. POSH controlled a 50% stake, was the largest shareholder and directly managed all of GOSH’s operations. Mr. Yáñez and Mr. Díaz were “silent investors and had no involvement in the management of the company.”⁴⁸³

271. *Fourth*, POSH controlled SMP, HONESTO and HERMOSA. POSH owned 49% of SMP (who fully owned HONESTO and HERMOSA) and controlled ICA’s remaining 51% stake. POSH loaned ICA the purchase price of SMP’s shares.⁴⁸⁴ This loan was also payable “upon demand” by POSH⁴⁸⁵ and POSH could direct ICA “at its sole discretion to transfer the Shares at a nominal sum to a third party(ies) nominated by [POSH] as full discharge of the Loan”⁴⁸⁶ and claim

⁴⁷⁶ *Id.*, para. 8.1; Stock Pledge Agreement entered into by and between Inversiones Costa Afuera S.A. de C.V. and PACC Offshore Services Holdings Pte. Ltd. dated 18 May 2012, **C-229**.

⁴⁷⁷ Witness Statement of José Luis Montalvo, para. 20.

⁴⁷⁸ Minutes of the 8th Board of Directors meeting of PACC Offshore Services Holdings Pte. Ltd. dated 18 August 2011, **C-40**.

⁴⁷⁹ Memorandum from Gerald Seow to POSH Board of Directors dated 14 February 2012, **C-41**.

⁴⁸⁰ Memorandum from Gerald Seow to POSH Board of Directors dated 8 May 2012, p. 1, **C-42**.

⁴⁸¹ *Ibid.*

⁴⁸² *Ibid.*

⁴⁸³ Witness Statement of José Luis Montalvo, para. 20.

⁴⁸⁴ Master Loan Agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Inversiones Costa Afuera S.A. de C.V., dated 23 November 2011, p. 10, Supplement – Details of the Loan dated 12 April 2012, **C-34**.

⁴⁸⁵ Master Loan Agreement entered into by PACC Offshore Services Holdings Pte. Ltd. and Inversiones Costa Afuera S.A. de C.V., dated 23 November 2011, para. 4.1, **C-34**.

⁴⁸⁶ *Id.*, para 4.5.

“any dividend”⁴⁸⁷ that ICA would receive from SMP. ICA also pledged its shares in SMP as collateral for the repayment of the loan.⁴⁸⁸ On this basis, ICA followed POSH’s specific instructions regarding SMP.⁴⁸⁹ POSH retained both corporate and economic rights and full control over SMP. Mr. Montalvo explains that ICA’s “role in SMP was the same as in GOSH, serving as POSH’s nominee and acting under its instructions.”⁴⁹⁰

272. Mr. Montalvo summarized his involvement in all of the Subsidiaries as follows: “With regards to all Mexican operations, I always consulted with POSH and followed POSH’s specific instructions.”⁴⁹¹

273. In sum, POSH controlled the Subsidiaries at all times. Under Article 11(2) of the Treaty, POSH is entitled to bring this claim on its own name and on behalf of its Subsidiaries.

IX. POSH’S CLAIMS ARE ADMISSIBLE

274. Articles 10 and 11 of the Treaty establish a number of requirements of the admissibility of the claims. All of these requirements are satisfied in this case.

A. CLAIMANT HAS COMPLIED WITH THE COOLING-OFF AND NOTICE OF INTENT REQUIREMENTS

275. Article 10 of the Treaty requires that the investor engage in consultations and send a notice of intent, six months prior to submitting its claim to arbitration:

1. The disputing parties should first attempt to settle a claim through consultation or negotiation.
2. With a view to settling the claim amicably, the disputing investor shall deliver to the disputing Contracting Party written notice of its intention to submit a claim to arbitration at least six months before the claim is submitted under Article 11. Such notice shall specify:

⁴⁸⁷ *Id.*, para 6.2.

⁴⁸⁸ *Id.*, para 8.1; Stock Pledge Agreement relating to Sermargosh2 entered into by and between Inversiones Costa Afuera, S.A. de C.V., PACC Offshore Services Holdings Pte. Ltd., and Juan Carlos Durand Hollis dated 10 December 2012, **C-101**.

⁴⁸⁹ Witness Statement of José Luis Montalvo, para. 30.

⁴⁹⁰ *Id.*, para. 34.

⁴⁹¹ *Id.*, para. 34.

(a) the name and address of the disputing investor and, where a claim is made by an investor on behalf of an enterprise according to Article 11 paragraph 2, the name and address of the enterprise;

(b) the provisions of Chapter II alleged to have been breached;

(c) the factual and legal basis of the claim;

(d) the kind of investment involved pursuant to the definition set out in Article 1;
and

(e) the relief sought and the approximate amount of damages claimed.⁴⁹²

276. Claimant has satisfied both requirements. On May 4, 2017, POSH sent a written notice of intent to submit a claim to arbitration to Mexico pursuant to Article 10 of the Treaty⁴⁹³ and a further letter on August 3, 2017.⁴⁹⁴ On January 19, 2018, Mexico confirmed in writing that a settlement was not achieved and that it does not otherwise intend amicably to settle this dispute.⁴⁹⁵

277. Despite Claimant's good faith efforts, and notwithstanding discussions with different governmental entities, the parties have failed to resolve this dispute.⁴⁹⁶ As a result, on May 4, 2018, Claimant submitted the dispute to arbitration.

B. CLAIMANT HAS COMPLIED WITH WAIVER AND CONSENT REQUIREMENTS UNDER THE TREATY

278. Articles 11(4)-(6) of the Treaty require that the investor send consent and waiver forms to the State:

4. A disputing investor may submit a claim to arbitration only if:

(a) the investor consents to arbitration in accordance with the procedures set forth in this Section; and

(a) the investor and, where the claim is for loss or damage to an interest of an enterprise of the other Contracting Party that is a legal person that the investor owns or controls, directly or indirectly, the enterprise, waives its right to initiate or

⁴⁹² Mexico-Singapore BIT, Art. 10, **CL-1**.

⁴⁹³ *Ibid.*

⁴⁹⁴ Letter from Tai-Heng Cheng to Lic. S. Atayde Arellano et al. dated 4 May 2017, **C-8**.

⁴⁹⁵ Email from Samantha Atayde Arellano (Mexico) to Tai-Heng Cheng (Quinn Emanuel), dated Jan. 19, 2018, **C-5**.

⁴⁹⁶ One, but by no means least, of such efforts includes a settlement negotiations meeting held between the Claimant and the Respondent on October 24, 2017.

continue before any administrative tribunal or court under the laws of the disputing Contracting Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Contracting Party that is alleged to be a breach of Chapter II, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the laws of the disputing Contracting Party.

5. A disputing investor may submit a claim to arbitration on behalf of an enterprise of the other Contracting Party that is a legal person that the investor owns or controls, directly or indirectly, only if both the investor and the enterprise:

(a) consent to arbitration in accordance with the procedures set forth in this Section; and

(b) waive their right to initiate or continue before any administrative tribunal or court under the laws of the disputing Contracting Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Contracting Party that is alleged to be a breach under Chapter II, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the laws of the disputing Contracting Party.

6. Any consent and waiver required by this Article shall be in writing, delivered to the disputing Contracting Party and included in the submission of a claim to arbitration.

279. Claimant has satisfied both requirements. On March 7 and June 8, 2014, POSH and POSH's Subsidiaries submitted their consent and waiver forms.⁴⁹⁷

C. THE FORK-IN-THE-ROAD PROVISION IS NOT APPLICABLE

280. Article 11(9) of the Treaty provides that "[i]f the investor, or an enterprise that an investor owns or controls, submits the dispute referred to in paragraphs 1 or 2 above to the competent judicial or administrative courts of the disputing Contracting Party, *the same dispute* may not be submitted to arbitration as provided in this Section."⁴⁹⁸

281. POSH and its Subsidiaries have not submitted the same dispute to the courts or administrative tribunals of Mexico, nor have they agreed with Mexico to submit this dispute to

⁴⁹⁷ Consent and Waiver Forms of PACC Offshore Services Holdings Ltd, dated March 7, 2018, **C-6**; Consent and Waiver Forms of Servicios Marítimos GOSH, S.A.P.I de C.V., POSH Hermosa, S.A.P.I de C.V., POSH Honesto, S.A.P.I de C.V., and POSH Fleet Services Mexico, S.A. de C.V., dated March 7, 2018, **C-7**; Consent and Waiver Forms of Servicios Marítimos POSH, S.A.P.I de C.V. and GOSH Caballo Eclipse, S.A.P.I de C.V. dated June 8, 2018, **C-9**.

⁴⁹⁸ Mexico-Singapore BIT, Art. 11, **CL-1**.

any other dispute-settlement procedures. The fork-in-the-road clause in Article 11(9) of the Treaty is not applicable.

282. As noted above, the insolvency claims filed by POSH's Subsidiaries in OSA's Insolvency Proceeding have been withdrawn. Even if they had not been, these were not the "same claim" for the purposes of the fork-in-the-road provision.

283. The fork in the road provision applies when the disputes at issue involve (i) the same parties, (ii) the same object and (iii) the same cause of action. As explained by the tribunal in *Corona Material v. Dominican Republic*, the provision is applicable "to claims of an alleged breach of an obligation" under the investment treaty "before a court or administrative tribunal."⁴⁹⁹ The fork-in-the-road is, therefore:

[c]learly intended to deal with the situation in certain civil law countries where international treaties have direct effect and thus an alleged breach of an international treaty can form a cause of action under the domestic law of such States. The Claimant would have fallen afoul of this provision if Walvis (or Corona) had submitted a claim in the local courts for the "same alleged breach" (i.e., a breach of Section A of Chapter 10 of DR-CAFTA [the investment chapter]) as in the present proceeding. If [Claimant] had submitted an administrative contentious proceeding which did not invoke DR-CAFTA's Chapter 10, it would not have run afoul of Article 10.18.4 [i.e. the fork-in-the-road provision].⁵⁰⁰

284. Similarly, in *CMS v. Argentina*, Argentina argued that CMS had taken the fork-in-the-road since the local company, TGN, in which it held shares, had appealed a judicial decision to the Federal Supreme Court and had sought other administrative remedies. The tribunal rejected Argentina's arguments finding that:

Had the Claimant renounced recourse to arbitration, for example by resorting to the courts of Argentina, this would have been a binding selection under the BIT. In that case, the Tribunal would agree with Counsel for the Republic of Argentina that although Carlos Calvo, a distinguished Argentine international jurist who fathered the Calvo Doctrine and Clause, will not become an honorary citizen of countries having entered into bilateral investment treaties, this would still be a binding

⁴⁹⁹ *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, para. 269, **CL-32**.

⁵⁰⁰ *Ibid.*

decision. However, as no such renunciation took place, the Calvo Clause will not resuscitate in this context.⁵⁰¹

285. In *Enron v. Argentina*, the tribunal also confirmed that:

[e]ven if there was recourse to local courts for breach of contract this would not prevent resorting to ICSID arbitration for violation of treaty rights, or that in any event, as held in *Benvenuti & Bonfant*, any situation of *lis pendens* would require identity of the parties.⁵⁰²

286. In *Pan American v. Argentina*, the tribunal even assumed that identity of the parties means that the respondent state would have to be itself a respondent in the local litigation proceedings and that even if a reference to the applicable investment treaty was made in the local proceedings, this would not be dispositive of the issue. In the words of the tribunal:

In the present case, there is neither identity of the parties nor identity of the cause of action. In the local claim, the Government of Argentina is not a party (although it appeared as an *amicus curiae*). The cause of action is also different. The local claim is not based on an alleged violation of the BIT, even though the BIT was referred to in passing.⁵⁰³

287. In the present case, GOSH, PFSM, HONESTO and HERMOSA filed insolvency claims against OSA in the Insolvency Proceeding. These claims were later withdrawn before the filing of this arbitration. In any case, they would never meet the triple identity test that has been

⁵⁰¹ *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of Tribunal on Objections to Jurisdiction, 17 July 2003, paras. 80-81, **CL-33**. See *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, paras. 89-92, **CL-34**; *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, paras. 95-97, **CL-35**.

⁵⁰² *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, paras. 97-98, **CL-36**. See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, 30 April 2004, para. 7575 (citing *Benvenuti & Bonfant v. Congo*, ICSID Award, Aug. 8, 1980, International Legal Materials, Vol. 21, 1982, p. 740), **CL-37**.

⁵⁰³ *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic and BP America Production Company, Pan American Sur SRL, Pan American Fuegoína, SRL and Pan American Continental SRL v. Argentine Republic*, ICSID Case No. ARB/03/13 & ARB/04/8, Decision on Preliminary Objections, 27 July 2006, para. 157, **CL-38**. See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, paras. 117-118, (“while the dispute which gave rise to the proceedings before the Egyptian courts and authorities related to questions of contract interpretation and of Egyptian law, the dispute before this ICSID Tribunal deals with alleged violations of the two BITs, specifically of the provisions on fair and equitable treatment, on continuous protection and security, and on the obligation to promote investments. There is nothing unsound in the Claimants’ assertion that the damage they suffered because of the alleged fraud was compounded by the subsequent conduct of the organs of the Egyptian State until the Court of Ismailia adopted the judgment which – according to the Claimants – definitively eliminated all prospects that the Claimants could obtain redress from the Egyptian State”), **CL-39**.

consistently applied by arbitral tribunals. They do not have the same parties, the same object or the same cause of action as this arbitration claim. They were filed against OSA in the Insolvency Proceeding to recover outstanding payments arising from the contracts. This arbitration, in contrast, involves POSH as claimant (on its own name and on behalf of its Subsidiaries) and Mexico, not OSA, as respondent. It also involves different claims than the Insolvency Proceedings, namely, recovery for the losses suffered on the entire investment and not simply claims for outstanding payments. The fork-in-the-road provision does not apply here.

D. CLAIMANT’S CLAIMS ARE NOT TIME-BARRED

288. Article 11(8) of the BIT provides for a 3-year limitation period as follows:

A dispute may be submitted to arbitration provided that the investor has delivered to the disputing Contracting Party its notice of intent referred to in Article 10 no later than three years from the date that either the investor, or the enterprise of the other Contracting Party that is a legal person that the investor owns or controls, directly or indirectly, first acquired or should have first acquired knowledge of the alleged breach **and** knowledge that the investor or the enterprise has incurred loss or damage. (emphasis added)

289. Mexico’s sequence of measures, which have been fully set out in Section V above, commenced in or around February 14, 2014 (date of the Unlawful Sanction) and continued well after August 15, 2014 (when the insolvency Court blocked the possibility of directly contracting with PEMEX), culminating in the destruction of the Investment. The written notice of intent to submit a claim to arbitration to Mexico pursuant to Article 10 of the BIT was sent on May 4, 2017.

290. The three-year limitation period contained in Article 11(8) Treaty is, therefore, satisfied in light of the “creeping” nature of Mexico’s Treaty violations.⁵⁰⁴ Not more than three years elapsed from (i) the date POSH first acquired knowledge of all of Mexico’s breaches that form the basis of the claims presented in this arbitration and the full consequences of those breaches for POSH and (ii) the date it commenced arbitration.

⁵⁰⁴ See *Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 213 (noting with respect to similar 3-year limitation in Canada-Venezuela BIT that the relevant date for time bar purposes is when claimant obtained actual or constructive knowledge of measures as well as of their consequences for its investment); para. 229 (noting that conduct occurring outside of 3-year limitation may be considered as part of a unitary composite breach when sufficiently linked to later conduct occurring within the 3-year period), **CL-40**.

X. MEXICO BREACHED ITS OBLIGATIONS UNDER THE TREATY AND INTERNATIONAL LAW

291. Mexico has breached its obligations under the Treaty through a series of omissions and measures taken by State authorities and state-owned companies, including the UIF, PGR, SAE, PEMEX and the Insolvency Court. As noted below, the actions of these State organs are attributable to Mexico.

292. In summary, Mexico has breached:

- the obligation not to expropriate Claimant's investments under Article 6 of the Treaty;
- the obligation to accord Claimant's investments fair and equitable treatment arising under Article 4(1) of the Treaty; and
- the obligation to accord Claimant's investments full protection and security arising under Article 4(1) of the Treaty.

A. MEXICO IS RESPONSIBLE FOR THE ACTS AND OMISSIONS OF ITS AGENCIES AND INSTRUMENTALITIES

293. Mexico has breached its obligations under the Treaty through a series of acts and omissions taken by several State Authorities and State-owned entities, including the UIF, PGR, SAE, PEMEX and the Insolvency Court. The acts and omissions of these authorities and entities are attributable to Mexico.

294. Under the ILC Articles, conduct will be attributable to a state if it can be established that the impugned conduct was carried out by: (i) an "organ" of the state, recognized as such either expressly in law or *de facto*;⁵⁰⁵ (ii) an entity empowered by a state to exercise elements of "governmental authority", and in relation to the specific acts in question, acting under the cloak of that governmental authority;⁵⁰⁶ or (iii) an entity or individual acting in accordance with the

⁵⁰⁵ ILC Articles, Art. 4, **CL-14**.

⁵⁰⁶ *Id.*, Art. 5. See *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitral Award, 22 September 2005, para. 2.2.2.1 ("It is generally recognized, in international law, that States are responsible for acts of their bodies or agencies that carry out State functions"), **CL-41**.

instructions, or under the direction or control of the State in relation to the specific acts in question.⁵⁰⁷

295. Under Article 4 of the ILC Articles, the acts of an organ of a State are attributable to that State under international law:

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.

296. The Commentary to the ILC Articles adds the following explanation:

the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind of classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs.⁵⁰⁸

297. In this case, UIF, PGR, SAE, PEMEX and the Insolvency Court are all Mexican State organs.

- Petróleos Mexicanos (PEMEX) is a State-owned enterprise. PEMEX was created by Law Presidential Decree in 1938⁵⁰⁹ and is currently governed, among others, by the Mexican Petroleum Act.⁵¹⁰ PEMEX Exploración y Producción (PEP) is a subsidiary of PEMEX.

⁵⁰⁷ ILC Articles, Art. 8, **CL-14**.

⁵⁰⁸ *Id.*, p. 40; R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2012), p. 216 (“The state’s responsibility extends to all branches of the government, that is, to the executive, the legislature, and to the judiciary”), **CL-42**.

⁵⁰⁹ Presidential Decree issued by President Lázaro Cárdenas, dated 18 March 1938, **CL-4**.

⁵¹⁰ Mexican Petroleum Act (*Ley de Petróleos Mexicanos*), dated 11 August 2014, Articles 1-5, **CL-2**.

- Secretaría de la Función Pública (SFP) is Mexican State organ, under the Executive branch, which controls and supervises the legality of the acts of public servants.⁵¹¹ The SFP is governed by the Federal Public Administration Organic Act.
- Procuraduría General de la República (PGR) was the Mexican public institution in charge of the investigation and prosecution of federal crimes committed in Mexico. It was governed, among other legislation, by the Political Constitution of Mexico.⁵¹² The new Fiscalía General de la República replaced the PGR in December 2018.
- Servicio de Administración y Enajenación de Bienes (SAE) is a Mexican federal institution that administers and disposes of unproductive property and enterprises.⁵¹³ SAE is governed, among other legislation, by the Federal Act on the Administration and Transfer of Public Property.
- Juzgado Tercero de Distrito en Materia Civil del Distrito Federal (Insolvency Court) is a federal district court, which forms part of Mexico's judiciary power.

298. All of the above are state organs and all of their relevant acts and omissions are attributable to Mexico under international law.

B. MEXICO EXPROPRIATED THE INVESTMENT MADE BY POSH AND ITS SUBSIDIARIES IN BREACH OF ITS OBLIGATIONS UNDER ARTICLE 6 OF THE TREATY

1. The expropriation standard

299. Article 6 of the Treaty provides that neither Contracting Party shall expropriate investments of nationals of the other Contracting Party, except under certain conditions:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law; and

⁵¹¹ SFP Secretaria de la Función Pública, *Conoce la SFP*, retrieved from <http://pcop.funcionpublica.gob.mx/index.php/conoce-la-sfp.html> (last accessed 20 March 2019), **C-16**.

⁵¹² Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos*), as last amended on 27 August 2018, Article 27, **CL-3**.

⁵¹³ Servicio de Administración y Enajenación de Bienes, *¿Qué hacemos?*, retrieved from <https://www.gob.mx/sae/que-hacemos> (last accessed 20 March 2019), **C-17**.

(d) on payment of compensation in accordance with paragraph 2 below.

2. Compensation shall:

(a) be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred. The fair market value shall not reflect any change in value because the intended expropriation had become publicly known earlier. Valuation criteria may include the going concern value, asset value, including declared tax value of tangible property, and other criteria, as appropriate, to determine the fair market value;

(b) be paid without delay;

(c) include interest at a commercially reasonable rate for that currency, from the date of expropriation until the date of actual payment; and

(d) be fully realizable and freely transferable.

3. Notwithstanding paragraphs 1 and 2, any measure of expropriation relating to land, which shall be defined in each Contracting Party's domestic laws and regulations and amendments thereto, shall be for a purpose and upon payment of compensation in accordance with the aforesaid laws and regulations.⁵¹⁴

300. Expropriation can be effected through various State actions, as set forth below.

(a) Expropriation may be effected indirectly and incrementally

301. Article 6 of the BIT encompasses both “direct and indirect expropriation”⁵¹⁵ and measures “the effect of which is tantamount to expropriation”⁵¹⁶ (also known as *de facto* expropriation).

302. This encapsulates the well-established principle that expropriation may occur directly, through formal acts of outright seizure or transfer of property to the State, or indirectly, when the State's measures in respect of a foreign national's property or investment have the same practical effect as a direct expropriation—namely, the substantial deprivation of the use or economic benefit of property.⁵¹⁷ As the tribunal in *Metalclad v Mexico* explained:

⁵¹⁴ Mexico-Singapore BIT, Art. 6, **CL-1**.

⁵¹⁵ *Ibid.*

⁵¹⁶ *Ibid.*

⁵¹⁷ *Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, para. 103, **CL-43**. See, e.g., *Middle East Cement Shipping*, para. 107, **CL-11**; *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No ARB/96/1, Final Award, 17 February 2000, para. 77, **CL-44**.

[E]xpropriation... includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State.⁵¹⁸

303. Expropriation encompasses not only forced transfers of title, but also other types of interference with property. The 1961 Harvard Draft Convention classically provided that “[a] ‘taking of property’ includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.”⁵¹⁹

304. Many significant investment treaty awards are to similar effect. In *Middle East Cement*, the tribunal noted that “[w]hen measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as ‘creeping’ or ‘indirect’ expropriation.”⁵²⁰ Similarly, the *Tecmed* tribunal observed that although indirect expropriation does “not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect.”⁵²¹

⁵¹⁸ *Metalclad*, para. 103, **CL-43**.

⁵¹⁹ L. Sohn and R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 1961 (55) AM. J. INT’L L. 545, p. 553, **CL-45**. See United Nations Conference on Trade and Development (“UNCTAD”), *Taking of Property* (2000) pp. 3-4, 20 (“The taking of property by Governments can result from legislative or administrative acts that transfer title and physical possession. Takings can also result from official acts that effectuate the loss of management, use or control, or a significant depreciation in the value, of assets. Generally speaking, the former can be classified as ‘direct takings’ and the latter as ‘indirect takings.’ Direct takings are associated with measures that have given rise to the classical category of takings under international law. They include the outright takings of all foreign property in all economic sectors, takings on an industry-specific basis, or takings that are firm specific [...] In contrast, some measures short of physical takings may amount to takings in that they result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor [...] Some particular types of such takings have been called ‘creeping expropriations’, while others may be termed ‘regulatory takings’. All such takings may be considered ‘indirect takings’[...] It is not the physical invasion of property that characterizes nationalizations or expropriations that has assumed importance, but the erosion of rights associated with ownership by State interferences.”), **CL-46**.

⁵²⁰ *Middle East Cement Shipping*, para. 107, **CL-11**.

⁵²¹ *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 114 (stating that although indirect expropriation does “not have a clear or unequivocal definition, it is generally understood that [it] materialize[s] through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect”), **CL-47**. See

305. As Professors Michael Reisman and Robert Sloane explain:

[F]oreign investments may be expropriated ‘indirectly through measures tantamount to expropriation or nationalization.’ This phrase [...] also captures the multiplicity of inappropriate regulatory acts, omissions, and other deleterious conduct that undermines the vital normative framework created and maintained by BITs – and by which governments can, in effect but not name, now be deemed to have expropriated a foreign national’s investment. The major innovation of the ‘tantamount’ clause, found in substance in almost all BITs, therefore consists in extending the concept of indirect expropriation to an egregious failure to create or maintain the normative ‘favorable conditions’ in the host state.⁵²²

306. The critical factor in determining whether a government measure constitutes an expropriation is the effect that the measure has on the asset in question, *i.e.* its *use, value or economic benefit for the investor*. Measures that amount to expropriation can also include conduct which deprives the investor of its ability to manage, use or control its property in a meaningful way.⁵²³ As held by the tribunal in *Compañía del Desarrollo de Santa Elena v Costa Rica*:

There is ample authority for the proposition that a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property.⁵²⁴

307. Similarly, in *AES v Hungary*, the tribunal held that an expropriation occurs when the investor is “deprived, in whole or significant part, of the property in or effective control of its investment: or for its investment to be deprived, in whole or significant part, of its value.”⁵²⁵

Burlington Resources v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, dated 14 December 2012, para. 397 (“When a measure affects the environment or conditions under which the investor carries on its business, what appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment. In this sense, some tribunals have focused on the use and enjoyment of property. The loss of viability does not necessarily imply a loss of management or control.”), **CL-48**.

⁵²² M. W. Reisman and R. D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, Faculty Scholarship Series (2004) Paper 1002, p. 118-119, **CL-49**.

⁵²³ UNCTAD, “Expropriation: A Sequel, UNCTAD Series on Issues in International Investment Agreements II” (2012) UNCTAD/DIAE/IA/2011/7, p. 21, **CL-50**.

⁵²⁴ *Santa Elena*, para. 77 (emphasis added), **CL-44**.

⁵²⁵ *AES Summit Generation Limited and AES-Tisza Erőmű Kft v Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para 14.3.1., **CL-51**.

308. Neither the State’s intent, nor its subjective motives, nor the form of the action, constitute relevant criteria for finding whether a measure amounts to expropriation.⁵²⁶ As explained by the Iran-US Claims Tribunal:

While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.⁵²⁷

309. In sum, the question of whether a measure constitutes an expropriation depends upon the actual effect of the measures on the investor’s property. A series of measures that deprive an investor of the use or enjoyment of its investment, including the deprivation of all or a significant part of the economic benefit of its property, amounts to expropriation. If the measures at stake have these effects, there is no need to inquire into the motives, intentions or form of the measures in order to conclude that an expropriation has occurred.

(b) Expropriation Effected Incrementally Is a Composite Act

310. An indirect expropriation, which takes place through a series of measures over time, with the aggregate effect of destroying the value of an investment, is referred to as a “creeping” expropriation. In isolation, the measures might not have an expropriatory effect—it is the effect in the aggregate that must be considered.

311. The comments to the 1967 OECD Draft Convention on the Protection of Foreign Property, which describe its provisions as covering “creeping nationalization,” explain that under these provisions, “measures otherwise lawful are applied in such a way as to deprive ultimately the alien of the enjoyment or value of his property, without any specific act being identifiable as outright deprivation.”⁵²⁸

⁵²⁶ See, e.g., *Santa Elena*, para. 77, **CL-44**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.5.20, **CL-52**.

⁵²⁷ *Tipetts, Abbett, McCarthy, and Stratton v TAMS-AFFA Consulting Engineers of Iran and others*, Award, 22 June 1984, Iran-US Claims Tribunal Report (1984-Volume 6), p. 4 (emphasis added), **CL-53**.

⁵²⁸ *OECD Draft Convention on the Protection of Foreign Property*, 7 ILM 117 (1968), p. 338, **CL-54**.

312. In addition, the deprivation may be evident only in hindsight, as Reisman and Sloane observe:

Discrete acts, analyzed in isolation rather than in the context of the overall flow of events, may, whether legal or not in themselves, seem innocuous vis-à-vis a potential expropriation. Some may not be expropriatory in themselves. Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omissions, which in the aggregate expropriated the foreign investor's property rights.⁵²⁹

313. A “creeping” expropriation occurs taking into account a series of acts and/or omissions in the aggregate; and when such an expropriation is effected in breach of the legality requirements set forth in the BITs, it is a “composite act” as described in Article 15 of the ILC Articles on State Responsibility.⁵³⁰

314. As the *Siemens v. Argentina* tribunal observed, an expropriation can happen over time:

By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.⁵³¹

315. Reisman and Sloane also observe that a wide variety of measures might cumulatively result in an expropriation:

⁵²⁹ M. W. Reisman and R. D. Sloane, p. 123-124, **CL-49**.

⁵³⁰ ILC Articles, Art. 15(1) (“The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.”), **CL-14**. See, e.g., *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, para. 669 (“State responsibility for creeping expropriation is reflected in the concept of a composite act, defined in Article 15(1) of the ILC’s Articles on State Responsibility”), **CL-55**.

⁵³¹ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 263, **CL-56**. See *Compañía de Aguas*, Award, para. 7.5.31 (“It is well established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached”), **CL-52**; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 20.22 (“Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property.”), **CL-57**.

Without concurrently purporting to take title to property or to appropriate a foreign investor's commercial rights, a state might, for example... refuse to hold feckless administrators to account for failure to carry out their assigned tasks. A wide variety of measures – including taxation, regulation, denial of due process, delay and non-performance, and other forms of governmental malfeasance, misfeasance, and nonfeasance – may be deemed expropriatory if those measures significantly reduce an investor's property rights or render them practically useless.⁵³²

(c) Expropriation may affect rights, not only physical assets

316. As investment is defined under the Treaty to include “interests arising from the commitment of capital or other resources in the Area of a Contracting Party to economic activity in such Area” such as “contracts involving the presence of an investor's property in the Area of the other Contracting Party” and “contracts where remuneration depends substantially on the production, revenues or profits of an enterprise” and “moveable and immovable property, and related rights such as leases, mortgages, liens or pledges, acquired in the expectation or used for the purpose of economic benefit or other business purposes.”⁵³³ It follows that an expropriation of such rights must comply with the Treaty's provisions on expropriation.

317. Numerous authorities confirm that rights and interests under contracts may be expropriated and that such expropriations occur when a State uses its governmental authority to deprive a foreign investor of the use, enjoyment or value of such rights. As Christie observed in his classic study of the subject, “contract and many other so-called intangible rights can, under certain circumstances, be expropriated, even by indirect interference...”⁵³⁴

318. The *Norwegian Ship owners' Claims* case is instructive in this regard. There, the Permanent Court of Arbitration held that the detention by the United States of certain ships being built in U.S. shipyards had the effect of taking also associated contracts, finding, “whatever the intentions may have been, the United States took, both in fact and in law, the contracts under which the ships in question were being or were to be constructed.”⁵³⁵

⁵³² M. W. Reisman and R. D. Sloane, p. 123, **CL-49**.

⁵³³ Mexico-Singapore BIT, Art. 1, **CL-1**.

⁵³⁴ G.C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 BRIT. Y.B. INT'L L. 307 (1962), pp. 318-319, **CL-58**.

⁵³⁵ *Norwegian Shipowners' Claims (Norway v. United States)*, Award, 13 October 1922, 1 RIAA 307, p. 19, **CL-59**.

319. The Iran-United States Claims Tribunal in the *Amoco* case ruled that expropriation “may extend to any right which can be the object of a commercial transaction;”⁵³⁶ and the tribunal in *SPP v. Egypt* held that “[t]he Respondent’s cancellation of the project had the effect of taking certain important rights and interests of the Claimants... Clearly, those rights and interests were of a contractual rather than *in rem* nature... Moreover, it has long been recognized that contractual rights may be indirectly expropriated. In the judgment of the Permanent Court of International Justice concerning *Certain German Interest in Polish Upper Silesia*, the Court ruled that, by taking possession of a factory, Poland had also ‘expropriated the contractual rights’ of the operating company.”⁵³⁷

320. The *Vivendi II* tribunal observed that “it has been clear since at least 1903, in the *Rudolff case*, that the taking away or destruction of rights acquired, transmitted and defined by contract is as much a wrong entitling the sufferer to redress as the taking away or destruction of a tangible property.”⁵³⁸ In *CME v Czech Republic*, the tribunal found that the claimant’s contract rights had been expropriated indirectly through interference by a regulatory authority, the Media Council:

The Respondent’s view that the Media Council’s actions did not deprive the Claimant of its worth, as there has been no physical taking of the property by the State or because the original License... always has been held by the original Licensee and kept untouched, is irrelevant. What was touched and indeed destroyed was the Claimant’s and its predecessor’s investment as protected by the Treaty. What was destroyed was the commercial value of the investment...⁵³⁹

321. In *Pope & Talbot*, an investor’s access to the US softwood lumber market was regarded as a property right protected by the NAFTA.⁵⁴⁰ As noted by Abdala, Spiller and Zuccon, “[i]n economic terms, the seizure of property and the seizure of rights to cash flows have exactly the same consequences”.⁵⁴¹

⁵³⁶ *Amoco Int’l Finance Corp. v. Iran*, Iran-US Claims Tribunal, Award, 14 July 1987, 15 Iran-US CTR 189, para. 108, **CL-60**.

⁵³⁷ *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, paras. 164-165, **CL-61**.

⁵³⁸ *Compañía de Aguas*, Award, para. 7.5.18, **CL-52**.

⁵³⁹ *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, para. 591, **CL-62**.

⁵⁴⁰ *Pope & Talbot, Inc. v. Canada*, UNCITRAL, Interim Award, 26 June 2000, para. 96, **CL-63**.

⁵⁴¹ S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008), p. 70 (citing M. Abdala, P. Spiller and S. Zuccon, *Chorzow’s Compensation Standard as Applied in ADC v. Hungary*, 3(4) Transnational

322. Finally, as Wälde and Kolo observed, the modern rules regarding investment protection are not aimed only at the protection of tangible property, but recognize and protect the value of property that comes from “the capability of a combination of rights in a commercial and corporate setting and under a regulatory regime to earn a commercial rate of return.”⁵⁴²

(d) Expropriation can occur through judicial measures and seizures

323. It is also well established that expropriation can crystallize through any measure taken by the state or its organs, including its courts. Newcombe and Paradell note that:

The basis for a claim of denial of justice is that the judicial system has failed to provide justice. Special considerations apply to judicial systems in terms of international minimum standards of procedural due process. Further, a judicial system is specifically designed to allow for review and the correction of due process errors. A due process failure can only be made out where the judicial system has been tested and exhausted. An IIA claim arising as a result of the conduct of the executive branch, for example the denial of a business permit by a government department, gives rise to a categorically different type of claim, which may arise based on various IIA standards, such as national treatment, fair and equitable treatment or expropriation. Finally, a court may also violate an IIA standard – not as a denial of justice – but as a direct breach of the IIA attributable to the respondent state with no requirement to exhaust local remedies. For example, a court decree freezing assets is a measure attributable to the state and an IIA claim might be made without the requirement to exhaust local remedies. An unjustified, complete and permanent freezing order on assets, for example, might well amount to an expropriation, for which the state would be responsible.⁵⁴³

324. This approach has also been endorsed by arbitral tribunals. In *Rumeli v. Kazakhstan*, the tribunal held that:

Whereas most cases of expropriation result from action by the executive or legislative arm of a State, a taking by the judicial arm of the State may also amount to an expropriation.

It is a characteristic of judicial expropriation that it is usually instigated by a private party for his own benefit, and not that of the State. This is no doubt a relevant

Dispute Management 6 (2007), **CL-64**. See A. Reinisch, *Expropriation*, in *The Oxford Handbook of International Investment Law* (P. Muchlinski et. al. (ed.), 2008), p. 410, (“Whether expropriation, including indirect expropriation, may concern intangible property is, in the first instance, a question of the applicable definition of ‘property’ or ‘investment’. Since most BITs, and the majority of other investment instruments, contain broad definitions of what constitutes an ‘investment’, anything covered by such definitions will be protected not only against direct but also against indirect expropriation”). **CL-65**..

⁵⁴² T. Wälde and A. Kolo, *Environmental Regulation, Investment Protection and ‘Regulatory Taking’ in International Law*, 50 INT’L AND COMP. L. Q. 811 (2001), p. 835, **CL-66**.

⁵⁴³ A. Newcombe and Ll. Paradell, *Law and Practice of Investment Treaties*, 244 (2009), **CL-67**.

consideration, although not in itself decisive, as has already been observed. The Tribunal considers however, and Respondent indeed accepted in paragraph 259 of its Rejoinder, that a transfer to a third party may amount to an expropriation attributable to the State if the judicial process was instigated by the State.⁵⁴⁴

325. In *Saipem v. Bangladesh*, the tribunal held that:

[t]here is no reason why a judicial act could not result in an expropriation. Nothing in the BIT indicates such a limitation. Moreover, Bangladesh did not cite any decision supporting the opposite view. Quite to the contrary, the Tribunal notes that the European Court of Human Rights had no hesitation to hold that court decisions can amount to an expropriation.⁵⁴⁵

326. In *Sistem v. Kyrgyzstan* the tribunal also found that the claimant's investment, consisting of the construction and operation of a hotel, was expropriated by local court decisions, which abrogated its ownership rights in the hotel.⁵⁴⁶

2. Mexico has expropriated the investment made by POSH and the Subsidiaries

327. Consistent with the provisions of the Treaty, an "investment is not a single right but is, like property, correctly conceived of as a bundle of rights, some of which are inseparable from others and some of which are comparatively free-standing."⁵⁴⁷ As Professor James Crawford explained in a statement adopted by the tribunal in *ADC v. Hungary* in analogous circumstances, "what was expropriated was that bundle of rights and legitimate expectations."⁵⁴⁸

328. POSH and the Subsidiaries had a bundle of rights and legitimate expectations in relation to its investment in the Mexican offshore oil and gas sector in partnership with OSA. Through a series of measures, acts, and omissions, Mexico ultimately deprived them of the value,

⁵⁴⁴ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paras. 702-704, **CL-68**.

⁵⁴⁵ *Saipem S.p.A. v. The people's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Final Award, 30 June 2009, para. 129, **CL-69**.

⁵⁴⁶ *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, para. 122, **CL-70**. See *Valeri Belokon v. Kyrgyz Republic*, UNCITRAL, Award, 24 October 2014, para. 215, **CL-71**.

⁵⁴⁷ *ATA Construction, Industrial and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, para. 96, **CL-72**.

⁵⁴⁸ *ADC Affiliate Ltd. et. al. v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 303-304, **CL-73**. See *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, para. 67 ("The Tribunal considers that [...] the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value."), **CL-74**.

benefit, use and enjoyment of its rights and investments, as their operations were frustrated and in effect taken entirely.

329. The expropriation of the Investment made by POSH and the Subsidiaries in Mexico was creeping and indirect and thus constituted measures having an effect equivalent to expropriation. As mentioned above, whether Mexico intended to expropriate the investment is not determinative, although in this case, the State knowingly and intentionally engaged in a politically motivated campaign to cut-off OSA's ties with PEMEX, in violation of Mexican law and without regard for the rights of international investors.

330. The investment made by POSH and its Subsidiaries was based on three essential pillars: the availability of vessels, the contracts with OSA and OSA's ability to contract with PEMEX. Through various acts and omissions, Mexico deprived POSH and the Subsidiaries from the use, value and benefit of the investment. In summary:

- It is public knowledge that the PRI Administration initiated a politically motivated campaign against OSA to sever the ties it had established with PEMEX during the PAN Administrations. Even the Mexican Senate admitted that there was “a hunt to bring down the company [that had been] spoiled by the Calderon administration,”⁵⁴⁹ as an act of “vengeance against the PAN”⁵⁵⁰ [Political Party], “to obtain a... cooperative attitude from that party...”⁵⁵¹
- Mexico unlawfully banned OSA from entering into any public contract, including with PEMEX, harming OSA's financial situation irreparably, impairing its ability to perform on the contracts with the Subsidiaries and leading to its demise. This measure was declared unlawful and later revoked by Mexican Courts but it was too little too late. OSA was already undergoing insolvency proceedings and did not meet PEMEX's financial requirements for new contracts. This measure destroyed one of the main pillars of the investment—OSA's ability to contract with PEMEX.

⁵⁴⁹ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.'s case, 2015 Activities Report, **C-126**.

⁵⁵⁰ *Ibid.*

⁵⁵¹ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, dated 30 April 2015, p. 1, **C-135**

- Mexico initiated an unsupported criminal investigations against OSA for alleged money laundering and fraud to obtain over \$400 MM. from Banamex. Mexico did not show any sign of illegal activity, since none was present. Mexico never pressed any charges, which clearly illustrates the political nature of the investigation.
- Based on the unlawful investigation, Mexico unlawfully seized all OSA's assets and took control of OSA. The PGR ordered the "temporary seizure" of OSA and placed it under SAE's administration. There were no signs of criminal activity and the Seizure Order had no factual or legal basis. Thereafter, SAE effectively blocked all payments to POSH's subsidiaries (by simply refusing to effect payment) and to POSH (by not processing PEMEX's invoices for work performed). OSA remained seized for over 3 years and the seizure was finally lifted due to the lack of evidence of any crime. As noted above, no charges were ever pressed as a result of the investigation.
- Mexico unlawfully seized the ten vessels owned by POSH's Subsidiaries. The Detention Order was fatally flawed, since it stemmed from an unlawful criminal investigation and seizure of OSA. There was no factual or legal basis to detain the vessels owned by POSH's Subsidiaries. For several months, POSH's Subsidiaries were deprived of another pillar of the investment—the availability of vessels.
- Mexico drove OSA into insolvency. As a result of the Unlawful Sanction, OSA did not have enough cash flow to operate the vessels and pay its debts. Thereafter, Mexico initiated OSA's Insolvency Proceeding and appointed SAE as OSA's Visitor, Conciliator and Trustee, retaining full control over the company.
- Mexico suspended all payments to creditors, including to POSH's Subsidiaries, which had effectively been blocked by SAE upon taking control of OSA. Moreover, Mexico unlawfully diverted the payments owed by PEMEX to POSH via the Irrevocable Trust. This measure was, in fact, a direct expropriation of POSH's lawful rights under the Irrevocable Trust. It further deprived POSH's Subsidiaries from any income, value or use of the the contracts with OSA. As noted in the *Norwegian Ship owners' Claims* case "whatever the intentions may have been, the

[State] took, both in fact and in law, the contracts under which the ships in question were being” operated.⁵⁵²

- Mexico acknowledged that the Unlawful Sanction was the proximate cause of OSA’s insolvency. Both SAE and the Insolvency Court acknowledged that this measure had led to OSA’s insolvency and, if not immediately suspended, could lead to OSA’s bankruptcy.
- Finally, Mexico blocked POSH’s Subsidiaries from contracting directly with PEMEX. SAE refused to cancel OSA’s contracts and the Insolvency Court prohibited PEMEX from rescinding them, fatally condemning the Subsidiaries’ operations in Mexico.

331. Mexico’s acts and omissions either directly impacted or specifically targeted POSH’s Subsidiaries and deprived them of the value, use and benefit of the Investment; the vessels had been detained for several months; POSH’s Subsidiaries did not receive any payments from the contracts with OSA (from OSA or PEMEX through the Irrevocable Trust) while still incurring in costs to preserve the vessels and pay the crews; and the Subsidiaries could not contract directly with PEMEX for the services they were previously rendering through OSA. There was no cash flow, no activity and, for several months, no vessels. As a result, GOSH, HONESTO and HERMOSA defaulted on the loans granted to finance the acquisition of the vessels, which were enforced and the vessels sold to use the proceeds as re-payment for the loans. In February 2015, one year after Mexico initiated its political crusade against OSA, the Subsidiaries had no vessels, no contracts with OSA, and no possibility to contract with PEMEX.

332. Just as the State’s intention is not determinative of whether there has been an expropriation, as the tribunal in *Biloune v. Ghana* observed in finding an expropriation in that case, one need not plumb the Government’s motivations to conclude on this record that the Government’s conduct unquestionably caused the irreparable and total loss of Claimants’ investments and other factors support the conclusion that this loss was an expropriation.⁵⁵³

⁵⁵² *Norwegian Shipowners*, p. 19, **CL-59**.

⁵⁵³ *Biloune and Marince Drive Complex Ltd. v. Ghana*, Award on Jurisdiction and Liability, 27 October 1989, ICJ Reports 1993, p. 209, **CL-75**.

333. In this case, however, there was a political intention to bring down OSA without regard for the lawful rights of innocent international investors. The impacts of the State's conduct, consistent with that intention, was not merely a consequential effect of the State's action and inaction directed to achieve other public purpose goals. Action and deliberate inaction followed the intention to put an end to the ties that OSA had developed with the previous administrations, without regard for Mexican law or the international rights of the investors.

3. Mexico's expropriation was unlawful

334. Mexico's expropriation of Claimant's investment was unlawful because it (a) lacked compensation, (b) lacked due process, (c) was discriminatory, and (d) lacked any public benefit. The wording of Article 6 is clear in that that all conditions must be met lest an expropriation be deemed unlawful.⁵⁵⁴

(a) The expropriation lacked any public interest

335. Under Article 6 of the BIT, the expropriation must be adopted in the public interest to be lawful. This requires a concrete, genuine interest of the public that is furthered by the expropriation.⁵⁵⁵

336. The *ADC v. Hungary* tribunal explained: "[i]f mere reference to 'public interest' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met."⁵⁵⁶ In that case, Hungary claimed that the legislation that served as the basis for the taking of the claimants' investment was "important for the harmonization of the Hungarian Government's transport strategy, laws and regulations with the EU law..."⁵⁵⁷ The evidence showed, however, that the Government's real motivation was to take

⁵⁵⁴ Arbitral tribunals have consistently held that when a treaty cumulatively requires several conditions for a lawful expropriation, failure of any one of those conditions makes the expropriation wrongful. *See, e.g., Compañía de Aguas*, Award, para. 7.5.21, ("If we concluded that the challenged measures are expropriatory, there will be a violation of Article 5(2) of the Treaty [on expropriation], even if the measures might be for a public purpose and non-discriminatory, because no compensation has been paid"), **CL-52**; *Bernardus Henricus Funnekotter & Ors. v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, para. 98 ("The Tribunal observes that the conditions enumerated in Article 6 are cumulative. In other terms, if any of those conditions is violated, there is a breach of Article 6"), **CL-76**.

⁵⁵⁵ *ADC*, para. 432, **CL-73**.

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *ADC*, para. 430, **CL-73**.

the claimants' concession to operate an airport terminal to pave the way for a more lucrative deal for the State.⁵⁵⁸

337. The *Siag v. Egypt* case demonstrates that a State must be transparent regarding the purpose of the expropriation. In that case the State “failed to satisfy the ‘public purpose’ limb”⁵⁵⁹ of the BIT because whereas it argued that the expropriated land was later used to transport gas to Jordan, the decree taking the land was based on an alleged failure of the claimant to honor its contractual commitments. The tribunal emphasized that the BIT required “that the public purpose [be] the reason the investment was expropriated.”⁵⁶⁰

338. Similarly, in *Siemens v. Argentina*, while the tribunal acknowledged that Argentina faced a dire fiscal situation and noted that an expropriation based on a related emergency law that followed could be in the public interest, the tribunal was not persuaded that the actions at issue in fact were taken on that basis. Rather, the evidence showed that Argentina began taking the actions that culminated in the deprivation of the claimant's property in order “to reduce the costs . . . of the Contract” and “as part of a change of policy,” and that reference instead to the emergency law “became a convenient device to continue the process started more than a year earlier long before the onset of the fiscal crisis.”⁵⁶¹

339. In this case, the expropriation of the investment made by POSH and its Subsidiaries was not for a legitimate public purpose. The fact there were (unproven) fraud accusations against OSA does not satisfy the public purpose requirement. The PRI's Administration desire to punish OSA and its business partners for OSA's ties with the previous administrations is not a legitimate public purpose either. In fact, there has not been any “purpose” articulated by Mexico, as it never explained, for example, why the Unlawful Sanction was issued in violation of Mexican Law or the Joint Investigation against OSA initiated without any factual basis to support it. .

⁵⁵⁸ *Id.*, paras. 304, 433, 476, **CL-73**. See *Liberian Eastern Timber Corp. v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, para. 35 (“There was no evidence of any stated policy on the part of the Liberian Government to take concessions of this kind into public ownership for the public good. On the contrary, evidence was given to the Tribunal that areas of the concession taken away from LETCO were granted to other foreign-owned companies”), **CL-77**.

⁵⁵⁹ *Waguih Elie George Siag and Corinda Vecchi v. Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009, paras. 432-433, **CL-78**.

⁵⁶⁰ *Id.*, paras. 429-31.

⁵⁶¹ *Siemens*, para. 273, **CL-56**.

340. Mexico's expropriation therefore lacked public interest and was unlawful under the Treaty.

(b) The expropriation lacked due process of law

341. The Treaty provides that an expropriation that is not taken under due process of law is wrongful. The Treaty does not distinguish between substantive and procedural due process. Accordingly, Mexico was bound to respect both substantive and procedural due process in carrying out the expropriation.⁵⁶² Claimant was denied both forms of due process.

342. Tribunals have confirmed that a lawful exercise of the right to expropriate requires compliance with *substantive* due process. In *Vivendi v. Argentina*, the tribunal recognized that a claimant could be denied substantive due process or "substantive justice" through a "substantively unfair" result.⁵⁶³ As regards *procedural* due process, the tribunal in *ADC v. Hungary* explained that it:

demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that "the actions are taken under due process of law" rings hollow.⁵⁶⁴

343. To comply with the Treaty's requirements, an expropriation cannot be motivated by discriminatory intent and must be effected under due process of law. The due process requirement, however, is not necessarily satisfied by the requirements of the State's municipal law, but incorporates an international standard of due process. As Rudolf Dolzer and Margrete Stevens observe in their study of bilateral investment treaties:

[I]t may be assumed that where the term 'due process of law' is incorporated in a treaty its use is not necessarily identical to what might be the case in domestic law.

⁵⁶² *Siag*, para. 440, **CL-78**.

⁵⁶³ *Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentina*, ICSID Case No. ARB/97/3, Award, 21 November 2000, para. 80, **CL-79**.

⁵⁶⁴ *ADC*, para 435, **CL-73**. See *Ioannis Kardassopoulos v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, paras. 395-396, **CL-80**.

In an international instrument, the requirement would suggest that the investor for example has the right to advance notification and a fair hearing before the expropriation takes place; and that the decision be taken by an unbiased official and after the passage of a reasonable period of time.⁵⁶⁵

344. In this case, the measures adopted by Mexico in the administrative proceeding that ended with the Unlawful Sanction, in the unsupported criminal investigation that resulted in no charges, and in the state-driven insolvency proceedings that resulted in OSA's demise, were contrary to Mexican law and violated Claimant's due process. These measures had a direct impact on, or specifically targeted the Subsidiaries, and resulted in the destruction of the Investment, yet no POSH entity was notified in advance of any of them, nor did they have an opportunity to be heard.

(c) The expropriation lacked compensation

345. Article 6 of the BIT requires that expropriatory measures shall be accompanied by "prompt, adequate and effective compensation". The same provision defines how compensation must be calculated and how it must be paid:

Compensation shall:

- (a) be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred. The fair market value shall not reflect any change in value because the intended expropriation had become publicly known earlier. Valuation criteria may include the going concern value, asset value, including declared tax value of tangible property, and other criteria, as appropriate, to determine the fair market value;
- (b) be paid without delay;
- (c) include interest at a commercially reasonable rate for that currency, from the date of expropriation until the date of actual payment; and
- (d) be fully realizable and freely transferable.

346. To date, Mexico has not paid any compensation to Claimant, much less the "adequate and effective" compensation required by the Treaty. Mexico's enduring failure to pay any compensation makes the expropriation unlawful under the Treaty.⁵⁶⁶

⁵⁶⁵ ADC, para. 435 (emphasis in original), **CL-73**. See *Siag*, paras. 441-442 (where government resolution that in effect terminated contract for alleged failure to meet contractual obligations but that was issued "*without any legal basis, in all respects*" was found to be an expropriation without due process), **CL-78**.

⁵⁶⁶ See, e.g., *Burlington*, Decision on Liability, paras. 543-45, **CL-48**.

(d) The expropriation was discriminatory

347. Under Article 6 of the BIT, an expropriation is unlawful if it is discriminatory. Several of Mexico's measures were targeted specifically at Claimant and its Subsidiaries, including the Detention Order of the Vessels and the Diversion Order of the Irrevocable Trust funds or the order preventing PEMEX from rescinding the contracts with OSA and assigning new contracts to POSH's Subsidiaries. These measures were by definition discriminatory. The discriminatory nature of Mexico's expropriation renders it unlawful under the Treaty.

C. MEXICO TREATED POSH'S AND ITS SUBSIDIARIES UNFAIRLY AND INEQUITABLY, IMPAIRING THEM THROUGH UNREASONABLE AND ARBITRARY MEASURES

1. The legal standard

348. Pursuant to Article 4(1) of the Treaty, "[e]ach Contracting Party shall accord to investments of investors of the other Contracting Party treatment in accordance with customary international law, including fair and equitable treatment... For greater certainty, paragraph 1 prescribes the standard of treatment for foreigners according to customary international law as the minimum standard of treatment that must be afforded to investors of the other Contracting Party."⁵⁶⁷

349. The fair and equitable treatment (**FET**) standard has evolved over time and been interpreted as being composed of several distinct strands, including the duties to safeguard legitimate expectations, act transparently, provide a stable legal and business framework, act in good faith and for a proper purpose, and refrain from arbitrary or discriminatory measures.⁵⁶⁸

2. The evolution of the standard

350. Many tribunals have observed that the content of the customary minimum standard of treatment, as it has evolved over time, is not materially different from the content of the fair and equitable treatment standard as it is applied by investment treaty tribunals today.⁵⁶⁹

⁵⁶⁷ Mexico-Singapore BIT, Art. 4(1), **CL-1**.

⁵⁶⁸ See, e.g., R. Dolzer and Schreuer, pp. 145-160, **CL-42**.

⁵⁶⁹ See, e.g., *Rusoro*, paras. 520-521 (The customary international minimum standard "has developed and today is indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter. The whole discussion of whether [...] the BIT incorporates or fails to incorporate the [customary international minimum] Standard when defining FET has become dogmatic: there is no substantive difference in the level of protection afforded by both standards."), **CL-40**; *Rumeli*, para. 611 (The tribunal "shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from

351. In the NAFTA case of *Mondev v. United States*,⁵⁷⁰ for example, the tribunal found “no doubt” that the NAFTA’s reference to the minimum standard of treatment refers to the standard under “customary international law as it stood no earlier than the time at which NAFTA came into force.”⁵⁷¹ The tribunal noted in this regard the considerable development over time in both substantive and procedural rights under international law, as well as the concordant body of practice reflected in more than 2,000 investment treaties that “almost uniformly provide for fair and equitable treatment of foreign investments.”⁵⁷² The tribunal also observed that each State party to the NAFTA, including Mexico, accepted that the minimum standard of treatment “can evolve” and “has evolved.”⁵⁷³ The tribunal in *Mondev* thus concluded that, in modern times, “what is unfair or inequitable need not equate with the outrageous or the egregious,” and “a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”⁵⁷⁴

the minimum standard of treatment in customary international law.”), **CL-68**; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 361 (“[T]he minimum requirement to satisfy this standard [fair and equitable treatment] has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law.”), **CL-81**; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 592 (“[T]he Tribunal also accepts, as found by a number of previous arbitral tribunals and commentators, that the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law.”), **CL-82**; *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 291 (“[I]t appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied.”), **CL-83**.

⁵⁷⁰ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, **CL-84**.

⁵⁷¹ *Id.*, para. 125.

⁵⁷² *Id.*, paras. 116-117 (further observing that these treaties “will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law”), para. 125 (emphasizing that “the investments of investors under NAFTA are entitled, under the customary international law which NAFTA Parties interpret Article 1105(1) to comprehend, to fair and equitable treatment”).

⁵⁷³ *Id.*, paras. 124, 119 (“The United States itself accepted that Article 1105(1) is intended to provide a real measure of protection of investments, and that having regard to its general language and to the evolutionary character of international law, it has evolutionary potential.”).

⁵⁷⁴ *Id.* para. 116 (finding it “unconvincing to confine the meaning of ‘fair and equitable treatment’ [...] of foreign investments to what [that term] – had [it] been current at the time – might have meant in the 1920s when applied to the physical security of an alien”); *Chemtura Corporation v. Government of Canada*, NAFTA Chapter Eleven, UNCITRAL, Award, 2 August 2010, para. 121 (observing that it could not “overlook the evolution of customary international law, nor the impact of BITs on this evolution”), **CL-85**; *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award, 31 March 2010, para. 193 (noting “a shared view that customary international law has not been frozen in time and that it continues to evolve in accordance with the realities of the international community”), **CL-86**.

352. The tribunal in *Waste Management v. Mexico*,⁵⁷⁵ a seminal case on the minimum standard of treatment, took note of the discussions of that standard in prior NAFTA cases and found that “despite certain differences of emphasis a general standard for Article 1105 [providing for the minimum standard of treatment] is emerging.”⁵⁷⁶ In often-cited remarks that have established the contemporary minimum standard of treatment in the context of foreign investment, the tribunal in *Waste Management* observed:

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... 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.⁵⁷⁷

353. A State thus will be deemed to have violated its obligation to accord the minimum standard of treatment, including fair and equitable treatment, if it undertakes arbitrary measures or if it breaches representations on which the claimant reasonably relied when it made its investment.

354. The tribunals in *Azurix v. Argentina*⁵⁷⁸ and *Siemens v. Argentina*,⁵⁷⁹ likewise found that the minimum standard of treatment under customary international law “has evolved,”⁵⁸⁰ with the *Azurix* tribunal observing that the standard is “substantially similar” to the standard of fair and equitable treatment.⁵⁸¹ In *Duke Energy v. Ecuador*,⁵⁸² the tribunal noted “the evolution in the latest ICSID decisions,” and held that the standard for fair and equitable treatment under the BIT and

⁵⁷⁵ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, **CL-87**.

⁵⁷⁶ *Id.*, paras. 91-98.

⁵⁷⁷ *Id.*, para. 98.

⁵⁷⁸ *Azurix*, Award, **CL-81**.

⁵⁷⁹ *Siemens*, **CL-56**.

⁵⁸⁰ *Azurix*, Award, para. 36, **CL-81**; *Siemens*, para. 295-297, 299, **CL-56**.

⁵⁸¹ *Azurix*, Award, para. 361, 364 (“The question whether fair and equitable treatment is or is not additional to the minimum treatment requirement under international law is a question about the substantive content of fair and equitable treatment and, whichever side of the argument one takes, the answer to the question may in substance be the same.”), **CL-81**.

⁵⁸² *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, **CL-88**.

the minimum standard of treatment under customary international law are “essentially the same.”⁵⁸³

355. The NAFTA tribunal in *Merrill & Ring v. Canada* described the situation as one in which the customary law standard has led to and resulted in establishing the fair and equitable treatment standard, which is a “a requirement that aliens be treated fairly and equitably in relation to business, trade and investment;” that “it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*,” and that “the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.”⁵⁸⁴

356. Consistent with the view that the fair and equitable treatment standard as it is applied by investment treaty tribunals today reflects the evolution of the customary international law minimum standard of treatment, the *Waste Management* tribunal’s articulation of the standard has been endorsed by numerous tribunals as describing the content of the generally accepted standard. This includes other tribunals, which like *Waste Management*, were addressing fair and equitable treatment provisions that are expressly tied to the customary international law minimum standard of treatment.⁵⁸⁵ It, however, also includes tribunals addressing fair and equitable

⁵⁸³ *Id.*, paras. 333, 335-337; *see also Saluka*, para. 291 (stating that “the difference between the Treaty standard [...] and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real”), **CL-83**.

⁵⁸⁴ *Merrill*, paras. 209-210, **CL-86**. *See Bilcon of Delaware et al. v Canada*, PCA Case No. 2009-04, Award, 17 March 2015, para. 435 (citing *Merrill v. Canada*), **CL-89**.

⁵⁸⁵ *E.g., Bilcon*, paras. 442-443 (“The formulation of the ‘general standard for Article 1105’ by the *Waste Management* Tribunal is particularly influential [...] While no single arbitral formulation can definitively and exhaustively capture the meaning of Article 1105, the Tribunal finds this quote from *Waste Management* to be a particularly apt one.”), **CL-89**; *Mobil Investments Canada Inc. and Murphy Oil Corp. v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 141 (“The [*Waste Management*] tribunal identified the customary international law standard.”), **CL-90**; *Merrill*, para. 199 (“*Waste Management* also identified unfair and inequitable treatment with conduct that is arbitrary, grossly unfair, unjust or idiosyncratic which, in so far as it also encompasses questions of due process, leads to an outcome which ‘offends judicial propriety’ [...]”), **CL-86**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, para. 455 (“The Arbitral Tribunal agrees with the many arbitral tribunals [including *Waste Management*] and authorities that have confirmed that such is the content of the minimum standard of treatment in customary international law.”), **CL-91**; *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013, para. 641 (“The Tribunal refers to the *Waste Management* tribunal’s opinion”) (counsel translation), **CL-92**; *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, para. 219 (“The Tribunal finds that *Waste Management II* persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment. The Tribunal accordingly adopts the *Waste Management II* articulation of the minimum standard for purposes of this case.”), **CL-93**; *Chemtura*, paras. 122, 215 (“In line with *Mondev*, the Tribunal will take account of the evolution of international customary law in ascertaining the content of the international minimum standard” [...] and agreeing with the *Waste*

treatment provisions containing a general reference to international law,⁵⁸⁶ as well as those without any such express references.⁵⁸⁷

Management II, *Mondev*, and *ADF* tribunals that a violation need not be outrageous to breach Article 1105), **CL-85**; *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 283 (“The central inquiry therefore is: what does customary international law *currently* require in terms of the minimum standard of treatment to be accorded to foreigners? The *Waste Management II* tribunal concluded that a general interpretation was emerging from NAFTA awards”), **CL-94**; *Methanex Corp. v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter C, ¶ 12, Chapter D, ¶ 8 (referring to the fair and equitable treatment standard articulated in *Waste Management v. Mexico* with approval), **CL-95**; *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004, para. 95 (“The ICSID tribunal in *Waste Management II* made what it called a ‘survey’ of standards of review applied by international tribunals dealing with complaints under Article 1105. It observed the emergence of a ‘general standard for Article 1105.’”), **CL-96**.

⁵⁸⁶ E.g., *Gold Reserve*, paras. 568-573 (noting that “[i]n *Waste Management v. Mexico* the tribunal summarized its position on the FET standard” and citing this summary with approval), **CL-13**; *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, para. 558, n. 878 (“as has been found by many other investment treaty tribunals presented with the task of ascertaining the standard’s meaning – even where the applicable treaty contains no reference to customary international law – there is much to be said for the general approach stated by the tribunal in *Waste Management*”), **CL-97**; *OKO Pankki Oyj et al v. The Republic of Estonia*, ICSID Case No. ARB/04/6, Award, 19 November 2007, para. 239 (“It is therefore helpful to consider what arbitration tribunals have decided in practice, in specific cases, particularly in [...] *Waste Management* [...]”), **CL-98**; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 348 (“There is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the Parties, which derive from the obligation of good faith. This has been aptly stated by the tribunal in *Waste Management*.”), **CL-99**; *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras. 127-128 (“[T]he fair and equitable treatment analysis involves consideration of the investor’s expectations when making its investment in reliance on the protections to be granted by the host State [...] this view is reflected in [...] *Waste Management*.”), **CL-100**; *Azurix*, Award, paras. 368-373 (referring to *Waste Management* in discussing the modern interpretation of the fair and equitable treatment standard), **CL-81**.

⁵⁸⁷ E.g., *Biwater*, para. 597-600 (citing the NAFTA cases of *Waste Management v. Mexico* and *International Thunderbird v. Mexico*, and stating that their “description of the general threshold for violations of this standard is appropriate”), **CL-82**; *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014, para. 282 (citing *Waste Management v. Mexico* for the proposition that “fair and equitable treatment is frequently noted to include a prohibition on conduct that is ‘arbitrary,’ ‘idiosyncratic,’ or ‘discriminatory’” and noting that “[t]here is an inherent logic to this association”), **CL-101**; *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction, 15 December 2014, para. 337 (citing *Waste Management v. Mexico* for the proposition that “a violation of the obligation to accord fair and equitable treatment involves ‘arbitrary [...] notoriously unfair behavior [...] idiosyncratic’ or that ‘involves a lack of due process.’”) (counsel translation), **CL-102**; *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, 21 May 2013, para. 604 (“The Tribunal is then in agreement with what has been affirmed by other arbitral tribunals [including *Waste Management v. Mexico*] in which the FET serves as the legal basis to protect foreign investors from arbitrary, inconsistent, not transparent and capricious behavior attributable to host States.”) (counsel translation), **CL-103**; *Rupert Binder v. Czech Republic*, UNCITRAL, Final Award (Redacted), 15 July 2011, para. 445 (citing *Waste Management v. Mexico* for the assertion that “[t]he state’s failure to observe the legitimate expectations of the investor that it has itself induced will amount to a breach of the fair and equitable treatment standard”), **CL-104**; *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 216 (“[O]ne of the major components of the FET standard is the parties’ legitimate and reasonable expectations with respect to the investment they have made [...] It comes into consideration whenever the treatment attributable to the State is in breach of representations made by it which were said to be reasonably relied

357. As this review of recent cases reflects, the minimum standard of treatment under customary international law has evolved and, in the context of foreign investment, has converged in substance with the standard of fair and equitable treatment. Specifically, as demonstrated above, it now is axiomatic that a host State has legal obligations under the minimum standard of treatment—and thus under Article 4(1) of the Treaty—to act in good faith, to refrain from exercising its powers arbitrarily, to provide a stable and secure legal and business environment, and to honor legitimate expectations that arose from conditions that it offered to induce the investor’s investment.

3. Elements of the fair and equitable treatment standard

358. It is generally accepted that the FET standard of conduct cannot readily be reduced to a statement of the host State’s legal obligations without reference to the specific facts of a case.⁵⁸⁸ Tribunals have concluded that the ordinary meaning of “fair and equitable” is “just”, “even-handed”, “unbiased”, and “legitimate”.⁵⁸⁹

359. Tribunals have elucidated a number of specific categories required by the FET standard, including the duty to safeguard legitimate expectations, provide transparency and due process, act for a proper purpose, refrain from arbitrary or discriminatory measures, and act in good faith. These strands are described below.

upon by the Claimant. This concept was stated by the tribunal in *Waste Management*.”), **CL-105**; *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, para. 173 (“*Waste Management* considered it ‘relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.’”), **CL-106**; *Siemens*, para. 299 (“[Under] *Waste Management II*, the current standard includes the frustration of expectations that the investor may have legitimately taken into account when it made the investment.”), **CL-56**; *Saluka*, para. 302 (“The standard of ‘fair and equitable treatment’ is therefore closely tied to the notion of legitimate expectations [as] [t]he tribunal in *Waste Management* [...] stated.”), **CL-83**; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), 26 June 2009, para. 203 (noting approvingly that *Saluka v. Czech Republic* endorsed and commended *Waste Management v. Mexico*’s threshold for infringement of the fair and equitable treatment standard as a useful guide), **CL-107**; *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 522 (“There is no dispute that conduct that is substantively improper, whether because it is arbitrary, manifestly unreasonable, discriminatory or in bad faith, will violate the fair and equitable treatment standard [...] [a]s stated by the *Waste Management II* tribunal.”), **CL-108**.

⁵⁸⁸ See, e.g., Dolzer and Schreuer, p. 132 (The clause is broadly designed “to fill gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties”. The principle of good faith is the “common guiding beacon” that will orient the understanding and interpretation of the obligations), **CL-42**; *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 297, **CL-109**.

⁵⁸⁹ *Saluka*, paras. 297-298, **CL-83**. See *MTD Equity Sdn. Bhd. & Anor. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 113, **CL-110**; *Azurix*, Award, para. 360, **CL-81**.

(a) Safeguarding legitimate expectations

360. A cornerstone of the fair and equitable treatment standard is the requirement that investors be accorded a stable and predictable investment environment. Specifically, fair and equitable treatment includes the “obligation to treat foreign investors so as to avoid the frustration of investors’ legitimate and reasonable expectations.”⁵⁹⁰ In *Bayindir v Pakistan*, the tribunal expressed this idea succinctly:

The Tribunal agrees with Bayindir when it identifies the different factors which emerge from decisions of investment tribunals as forming part of the [fair and equitable treatment] standard. These comprise the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion or from frustrating the investor’s reasonable expectations...⁵⁹¹

361. The seminal award in *Tecmed v Mexico* offers a particularly clear articulation in this regard:

The Arbitral Tribunal considers that this provision of the Agreement [FET], in light of the good faith principle established by international law, *requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments [...] The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions [...] that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.* The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.⁵⁹²

362. An investor may legitimately expect that a State will “conduct itself vis-à-vis his investment in a manner that [is] reasonably justifiable and [does] not manifestly violate basic

⁵⁹⁰ *Saluka*, para. 302, **CL-83**.

⁵⁹¹ *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para. 178 (emphasis added), **CL-111**. See *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para 284, **CL-112**; *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA Case No UN 3467, Final Award, 1 July 2004, paras. 183, 186, **CL-113**.

⁵⁹² *Tecmed*, para 154 (emphasis added), **CL-47**.

requirements of consistency, transparency, even-handedness and non-discrimination.”⁵⁹³ Likewise, in *Saluka v Czech Republic*, the tribunal held that a foreign investor “is entitled to expect that the [host State] will not act in a way that is manifestly inconsistent, non-transparent, and unreasonable.”⁵⁹⁴

363. Precisely on this basis, the tribunal in *CME v Czech Republic* found that the Czech Republic’s legislative and regulatory changes had unlawfully harmed CME’s investment by altering the country’s investment framework, “by evisceration of the arrangements in reliance upon [which] the foreign investor was induced to invest.”⁵⁹⁵

364. At very least, therefore, an investor can have the legitimate expectation that the conduct of the host State will be fair and equitable in the sense that it will not fundamentally *contradict basic principles of its own laws and regulations*. This includes, as noted by the tribunal in *Alpha v Ukraine*, a legitimate expectation that a State will not act “beyond its authority.”⁵⁹⁶

(b) Transparency and due process

365. Transparency and due process are also fundamental elements of the fair and equitable treatment obligation. While they merit separate consideration as a subset of this standard, they are inextricably linked with the investor’s legitimate expectation of a stable and predictable legal framework. The focus under this limb of the standard is, however, more on *how* the government implements its measures against the investor rather than on the measures themselves.

366. The recent case of *Gold Reserve v Venezuela* is instructive in this regard. The tribunal in that case found that Venezuela’s measures had breached the fair and equitable treatment guarantee by “failing to ensure a transparent and predictable framework for [the investor’s] business planning and investment.”⁵⁹⁷ The tribunal noted its belief that the reasons for the cancellation were not limited to those officially stated by the Ministry, but, rather, were to be found

⁵⁹³ *Ioannis*, para. 441, **CL-80**.

⁵⁹⁴ *Saluka*, para 309, **CL-83**.

⁵⁹⁵ *CME*, Partial Award, para. 611, **CL-62**.

⁵⁹⁶ *Alpha Projektholding GmbH v Ukraine*, ICSID Case No ARB/07/16, Award, 8 November 2010, para. 422, **CL-114**.

⁵⁹⁷ *Gold Reserve*, para 609, **CL-13**.

in “*the change of political priorities of the Administration... taken regarding mining of mineral reserves starting in late 2007 by the highest levels of authority.*”⁵⁹⁸

367. The duty to ensure transparency and due process may manifest itself in a variety of contexts but most typically includes the duty to forewarn an investor of an intended measure and allow the investor reasonable legislative or procedural recourse to contest it. The tribunal in *Kardassopoulos and Fuchs v Georgia* stressed the need to give an investor a reasonable chance (within a reasonable timeframe) to claim its legitimate rights and have its claims heard.⁵⁹⁹

368. In the same vein, in *PSEG v Turkey*, the tribunal found a breach of the fair and equitable treatment standard in the face of “an evident negligence on the part of the administration in the handling of the negotiations with the Claimants” and “serious administrative negligence and inconsistency,” and thus concluded that “the fair and equitable treatment obligation was seriously breached by what has been described... as the ‘roller-coaster’ effect” referring to continuous legal changes and inconsistencies in the administration’s practices.⁶⁰⁰

(c) Unreasonable and discriminatory measures

369. Reasonable and non-discriminatory measures are also fundamental elements of the FET standard and the minimum standard of treatment. The standard of reasonableness of State conduct is flexible and broad, to be determined in light of all the circumstances of the case. In the words of the tribunal in *CME v Czech Republic*:

[t]he determination of reasonableness is in its essence a matter for the arbitrator’s judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behavior in light of the goals of the Treaty.⁶⁰¹

⁵⁹⁸ *Id.*, para 580. The official reason conveyed by the Ministry of Mining for the cancellation of the mining rights was that the investor had not complied with certain obligations under the concessions. However, the tribunal noted that the allegations of non-compliance had never before been raised by the State and indeed contradicted years of written certifications issued by the same Ministry, suggesting that the investor had complied sufficiently with those obligations.

⁵⁹⁹ *Ioannis*, para. 396, **CL-80**; *ADC*, para. 435, **CL-73**.

⁶⁰⁰ *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No ARB/02/5, Award, 19 January 2007, paras. 246, 250, **CL-115**.

⁶⁰¹ *CME*, Partial Award, para 158, **CL-62**.

370. Most tribunals agree that arbitrary or discriminatory conduct is *per se* a breach of the FET standard.⁶⁰² The essence of the protection from arbitrary or discriminatory measures is that the State's impugned decision must find a rational basis.

371. Tribunals have accepted the following as arbitrary: (i) measures that inflict damage on the investor without serving any apparent legitimate purpose; (ii) measures that are not based on legal standards but on discretion, prejudice, or personal preference; and (iii) measures taken for reasons that are different from those put forward by the decision maker.⁶⁰³

372. The *Gold Reserve v. Venezuela* case is instructive in this regard. There, the tribunal found there was a lack of fair and equitable treatment because decisions regarding permits and licenses were made on the basis of political policies and not applicable legal rules;⁶⁰⁴ reflecting a lack of transparency as to the real reasons behind the decisions, which were taken entirely as a matter of political preferences, and also displaying a lack of good faith.⁶⁰⁵

(d) Acting for a proper purpose

373. A State is required to exercise its powers and take decisions for a proper purpose. In *Tecmed*, Mexico's regulatory body for environmental issues refused to renew the claimant's permit to operate a landfill. It did so not because of the landfill's environmental impact, but because the site had "become a nuisance due to political reasons relating to the community's opposition". The tribunal held that such politically-motivated conduct amounted to a breach of the fair and equitable treatment standard.⁶⁰⁶

374. Similarly, the tribunal in *Azurix*, found that Argentina had breached the fair and equitable treatment standard as a result of the arbitrary actions of provincial authorities who

⁶⁰² See, e.g., *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, para. 290, **CL-116**; UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11 (Vol. III) (1999), p. 37, **CL-117**.

⁶⁰³ *EDF v. Romania*, para. 303, **CL-105**; *Lemire*, Decision on Jurisdiction and Liability, para. 262, **CL-112**; *CME*, Partial Award, para. 158 ("the determination of reasonableness is in its essence a matter for the arbitrator's judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behavior in light of the goals of the Treaty"), **CL-62**.

⁶⁰⁴ *Gold Reserve*, para. 581, **CL-13**.

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *Tecmed*, paras. 164, 166, **CL-47**.

intervened “for political gain” during a tariff dispute with ABA, which provided potable water and sewerage services.⁶⁰⁷

375. A further aspect of this requirement is that a State must not engage in conduct that is intended to coerce or harass a foreign investor. The *Tokios Tokelés v. Ukraine* tribunal held that a State campaign to punish an investor “must surely be the clearest infringement one could find of the provisions and aims of the Treaty”.⁶⁰⁸ In *Vivendi v. Argentina II*, the tribunal found that the State, improperly and without justification, had mounted an illegitimate “campaign” against the investment, which constituted a breach of the fair and equitable treatment standard.⁶⁰⁹ In *Pope & Talbot v. Canada*, the tribunal found that the relevant government organ had:

changed its previous relationship with the Investor and the Investment from one of cooperation ... to one of threats and misrepresentation. Figuring in this new attitude were assertions of non-existent policy reasons for forcing them to comply with very burdensome demands for documents, refusals to provide them with promised information, threats of reductions and even termination of the Investment’s export quotas, serious misrepresentations of fact in memoranda to the Minister concerning the Investor’s and the Investment’s actions and even suggestions of criminal investigation of the investment’s conduct.⁶¹⁰

(e) Good faith

376. Good faith is a broad principle that is one of the foundations of international law in general and of foreign investment law in particular.⁶¹¹ Arbitral tribunals have confirmed that good faith is inherent in the concept of FET and minimum standard of treatment.⁶¹² Several tribunals have confirmed that State conduct that is carried out in demonstrable lack of good faith will, of itself, constitute a breach of the obligation to afford FET.⁶¹³

377. In *Bayindir v. Pakistan*, the investor claimed that its expulsion was based on local favoritism and on bad faith, since the reasons given by the government did not correspond to its

⁶⁰⁷ *Azurix*, Award, para. 144, **CL-81**.

⁶⁰⁸ *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, para. 123, **CL-118**.

⁶⁰⁹ *Compañía de Aguas*, Award, paras. 7.4.19-7.4.41, **CL-52**.

⁶¹⁰ *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award in Respect of Damages, May 31, 2002, para. 68, **CL-119**.

⁶¹¹ *See Dolzer and Schreuer*, pp. 156-58, **CL-42**.

⁶¹² *See Ibid; Siag*, para. 450 (describing the principle that States must act in good faith as the “general, if not cardinal principle of customary international law”), **CL-78**.

⁶¹³ *See, e.g., Rumeli*, para. 609, **CL-68**; *Biwater*, para. 602, **CL-82**.

actual motivation.⁶¹⁴ The tribunal found that “the allegedly unfair motives of expulsion, if proven, are capable of founding a fair and equitable treatment claim under the BIT”.⁶¹⁵ The *Frontier Petroleum* tribunal held that the concept of “bad faith”:

[i]ncludes a conspiracy by state organs to inflict damage upon or to defeat the investment, the termination of the investment for reasons other than the one put forth by the government, and *expulsion of an investment based on local favoritism*.⁶¹⁶

378. It follows that action in bad faith against the investor is a violation of the FET standard.⁶¹⁷ However, arbitral practice clearly indicates that the standard may be violated even if no *mala fide* is involved.⁶¹⁸ FET, like the prohibition on unreasonable and discriminatory measures, is an objective standard, and can be breached even where the State has acted in good faith.⁶¹⁹

4. Mexico breached the fair and equitable treatment standard

379. Section V of this Statement of Claim detailed the litany of breaches of the generally recognized “strands” of the FET standard that were committed by Mexico.

380. *First*, Mexico initiated a politically motivated campaign against OSA to sever the ties it had established with PEMEX during the previous administrations, without regard to the rights of innocent investors like POSH. As noted above, even the Mexican Senate stated that there was “a hunt to bring down the company [that had been] spoiled by the Calderon administration,” as an act of “vengeance against the PAN”⁶²⁰ [Political Party], “to obtain a... cooperative attitude

⁶¹⁴ *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, paras. 232-243, **CL-120**.

⁶¹⁵ *Id.*, para. 250.

⁶¹⁶ *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 300 (emphasis added), **CL-121**.

⁶¹⁷ Dolzer and Schreuer, p. 157, **CL-42**.

⁶¹⁸ *See, e.g., Occidental*, para. 186 (“this is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not”), **CL-113**.

⁶¹⁹ *Ibid.* (finding that the fair and equitable treatment standard represents “an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not”).

⁶²⁰ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.’s case, 2015 Activities Report, **C-126**.

from that party...”⁶²¹ As in *Gold Reserve v Venezuela*, the reasons for Mexico’s actions were not limited to those officially stated, but, rather, were to be found in “the... *political priorities of the Administration*.”⁶²²

381. *Second*, Mexico unlawfully banned OSA from entering into any public contract, including with PEMEX, impairing OSA’s ability to perform on its contracts with the Subsidiaries and leading to its demise. This measure was unlawful, unreasonable and arbitrary. In acknowledgement of this, Mexican courts later revoked the Unlawful Sanction when it was too late. OSA was already undergoing insolvency proceedings and did not meet PEMEX’s financial requirements for new contracts.

382. *Third*, Mexico initiated an unsupported criminal investigations against OSA for alleged money laundering and fraud through an unlawful criminal complaint and without “any element of conviction, even in a circumstantial way, about any criminal activity.”⁶²³ Mexico never pressed any charges, which clearly illustrates the political nature of the investigation, withdrawn years later.

383. *Fourth*, on the basis of the unlawful investigation, Mexico seized all of OSA’s assets and took control of OSA, effectively blocking all payments to POSH’s Subsidiaries. Mexico disregarded the rule of law and abused its authority. As Mr. Ruiz, the criminal law expert explains: “The Seizure Order had no factual support. It is an extreme and intrusive measure, and the signs of criminal activity must be more evident and widespread. The Seizure Order simply transcribes, however, two paragraphs from the UIF Complaint in which it is stated that there were ‘transfers that have drawn the attention of this unit.’ No factual analysis of the case was made. The Seizure Order was neither relevant nor appropriate for the investigation.”⁶²⁴

⁶²¹ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, dated 30 April 2015, p. 1, **C-135**.

⁶²² *Gold Reserve*, para. 580, The official reason conveyed by the Ministry of Mining for the cancellation of the mining rights was that the investor had not complied with certain obligations under the concessions. However, the tribunal noted that the allegations of non-compliance had never before been raised by the State and indeed contradicted years of written certifications issued by the same Ministry, suggesting that the investor had complied sufficiently with those obligations, **CL-13**.

⁶²³ Expert Legal Opinion on Criminal Law by Diego Ruiz Durán, para. 91.2.

⁶²⁴ *Id.*, para. 91.3.

384. The PGR further violated the constitutional duty of public authorities to explain the basis of its resolutions: the Seizure Order “merely transcribed three paragraphs of the UIF Complaint, without any analysis. It did not explain “the special circumstances, particular reasons, or immediate causes that have been taken into account” nor did it justify that “in the specific case the legal theory was established.”⁶²⁵

385. In addition, the Seizure Order was unreasonable, arbitrary and disproportionate: “[t]he PGR limited the scope of the alleged (and unknown) crime to the use of bank accounts by OSA, not to the entire corporate structure of the company. Even if there had been some indication of crime, which is not the case, the reasonable and proportional measure would have been to seize OSA bank accounts, as confirmed by Mexican case-law”⁶²⁶ and international law. A testament to the arbitrariness and disproportionateness of the Seizure Order is that, after three years, “the PGR ordered the lifting of the seizure without even bringing criminal action against OSA. The PGR did not justify its decision, but the only reason why this lifting can be decreed is because of the absence of evidence of the crime pursued.”⁶²⁷

386. *Fifth*, Mexico unlawfully seized the ten vessels owned by POSH’s Subsidiaries. The Detention Order, specifically targeted at POSH’s Subsidiaries, was fatally flawed, since it stemmed from an unlawful criminal investigation and seizure of OSA. The measure was unlawful, unreasonable and arbitrary under international law: “[t]he vessels were not related to the alleged (and unknown) crime. The UIF Complaint, the Seizure Order and the Detention Order made no reference at all to the vessels, not to their status as alleged instruments, objects, or products of the alleged (and unknown) crime nor to their possible relation with the alleged (and unknown) crime.”⁶²⁸ An illustration of this arbitrariness is that the authorities ended up releasing the vessels without explanation.⁶²⁹

387. *Sixth*, Mexico drove OSA into insolvency, acknowledging that the Unlawful Sanction had been the proximate cause of the insolvency. Mexico further suspended all payments to creditors, including the Subsidiaries, which had been previously blocked by SAE, and

⁶²⁵ *Id.*, para. 91.3

⁶²⁶ *Id.*, para. 91.3

⁶²⁷ *Id.*, para. 91.3

⁶²⁸ *Id.*, para. 91.4.

⁶²⁹ PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, dated 30 April 2015, **C-135**.

unlawfully diverted the payments owed by PEMEX to POSH via the Irrevocable Trust. Mexico disregarded the rule of law, violated POSH lawful rights and abused its authority:

The Diversion Order violated the rightful ownership by the Irrevocable Trust and its beneficiaries of the collection rights derived from the contracts executed between OSA and Pemex...

The Diversion Order violated the provisions of valid and binding contracts. The Irrevocable Trust and the Assignment of Rights were valid and binding contracts, and its parties were obliged to comply with them....

The Insolvency judge lacked jurisdiction and authority to decide on a legal relationship between third parties...

The lawful, reasonable decision by the judge would have been to leave the trusts unaffected and allow the rightful owner of the collection rights (the trust and its beneficiaries) to receive the payments owed by PEMEX.⁶³⁰

388. *Seventh*, Mexico blocked POSH's Subsidiaries from contracting directly with PEMEX. SAE refused to cancel OSA's contracts and the Insolvency Court prohibited PEMEX from rescinding them, fatally condemning POSH's operations in Mexico. This measure was unreasonable and arbitrary for three reasons:

One: SAE was aware, or had an obligation to be, that OSA could not receive new contracts while it was undergoing insolvency proceedings since it did not meet the necessary economic requirements therefor. Two: SAE was aware of, and had acknowledged, that without new contracts, OSA could not meet its obligations under the current contracts with Pemex. Three: SAE was aware of, and had acknowledged, that the breach of the Pemex contracts resulted in conventional penalties, which would constitute claims against the estate...

The reasonable decision by the judge would have been to permit the rescission of the contracts. The reasonable decision by the Conciliator would have been to cancel the contracts in the interest of the estate.⁶³¹

389. *Eighth*, Mexico acted with lack of transparency and in breach of foreign investors' due process. Despite their destructive effects for the Investment, all measures within the criminal investigation were adopted in secrecy, without notice to POSH's Subsidiaries or an opportunity to be heard. Within the insolvency proceeding, SAE also acted with opacity and in breach of its fiduciary obligations. The Senate Committee acknowledged this in a report:

⁶³⁰ Expert Legal Opinion on Mexican Insolvency Law by Luis Manuel Meján, para. 108.

⁶³¹ *Id.*, para. 89.

[i]t is not known whether SAE has performed crucial tasks regarding Oceanografía because of the opacity exercised in the preparation of the diagnosis of goods, assets and liabilities of the shipping company. SAE has also failed to provide the investigative commission of this Senate with the details of the technical assessment it should have made of Oceanografía in order to fully understand the nature of the fraud... It can be concluded that SAE did not meet its fiduciary responsibilities in the Oceanografía case in terms of transparency and sufficient disclosure of information.⁶³²

390. *Ninth*, Mexico abused its power and violated the POSH's and its Subsidiaries' due process, by adopting all possible roles OSA's insolvency proceeding, incurring in evident conflict of interest:

SAE... perform[ed] contradictory functions defending conflicting interests. It is not possible to defend the interests of the insolvent company and, at the same time, assess its financial situation with independence and objectivity, negotiate with the creditors or proceed with its sale. Especially, when other state agencies (such as Pemex, the Mexican Institute of Social Security [IMSS], the National Workers' Housing Fund Institute [INFONAVIT], the Tax Administration Service [SAT]) are recognized creditors in the insolvency proceeding. In addition, the Secretary of Finance and Public Credit is part of the decision-making bodies of the SAT (a creditor in the insolvency proceeding), the SAE (Administrator, Visitor, Conciliator, and Receiver) and PEMEX (creditor and main client of the insolvent). The conflict of interests is evident.⁶³³

391. In sum, Mexico acted for an improper purpose, launching a political campaign against a company based on its belief that it had been favored by its political rivals. Mexico violated POSH's legitimate expectations that the State would "conduct itself vis-à-vis his investment in a manner that [is] reasonably justifiable and [would] not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination."⁶³⁴ Mexico fundamentally disregarded the rule of law, acted "beyond its authority,"⁶³⁵ violated the investor's due process and adopted the three generally-recognized types of arbitrary measures: those (i) that inflict damage on the investor without serving any apparent legitimate purpose; (ii) that are not

⁶³² PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, dated 30 April 2015, p. 15, **C-135**.

⁶³³ Expert Legal Opinion on Mexican Insolvency Law by Luis Manuel Meján, para. 105.

⁶³⁴ *Ioannis*, para. 441, **CL-80**.

⁶³⁵ *Alpha Projektholding*, para. 422, **CL-114**.

based on legal standards but on discretion, prejudice, or personal preference; and (iii) that are taken for reasons that are different from those put forward by the decision maker.⁶³⁶

392. These arbitrary and discriminatory acts and omissions both together and in isolation constitute a breach of Mexico's obligation under Article 4(1) of the Treaty to provide fair and equitable treatment to Claimants' Investment.

D. MEXICO FAILED TO PROVIDE FULL PROTECTION AND SECURITY

1. The legal standard

393. Pursuant to Article 4(1) of the Treaty, "[e]ach Contracting Party shall accord to investments of investors of the other Contracting Party treatment in accordance with customary international law, including... full protection and security".⁶³⁷

394. The obligation to provide full protection and security refers to the general obligation of the host State of a foreign investment to enforce its laws and make available appropriate legal remedies to redress harms in a reasonable manner. The historical origins of the standard show that it always has been centrally focused on the host State's obligation to provide legal security for foreign persons as well as their property.

2. Full protection and security extends to legal protection and security of the investments

395. The obligation to accord full protection and security requires the State to enforce its laws in a manner reasonably expected under the circumstances to protect covered investments; in that sense, it is said to be a standard of due diligence. As Dolzer and Stevens have described, "the standard provides a general obligation for the host State to exercise due diligence in the protection of foreign investment."⁶³⁸

396. Arbitral tribunals have consistently held that while the standard certainly includes the obligation to provide police protection, it relates broadly to the State's obligation to provide

⁶³⁶ *EDF v. Romania*, para. 303, **CL-105**; *Lemire*, Decision on Jurisdiction and Liability, para. 262, **CL-112**; *CME*, Partial Award, para. 158 ("the determination of reasonableness is in its essence a matter for the arbitrator's judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behavior in light of the goals of the Treaty"), **CL-62**.

⁶³⁷ Mexico-Singapore BIT, Art. 4(1), **CL-1**.

⁶³⁸ R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995), p. 61, **CL-122**.

protection and security to investments through the enforcement of laws and by maintaining and making available a legal system capable of providing adequate remedies against harms more generally.⁶³⁹

397. Tribunals focus on the fact that a good faith interpretation of the ordinary meaning of the treaty terms does not support the conclusion that the obligation is limited to protection against physical harm. For example, in *Vivendi II v. Argentina*, the tribunal held:

[T]he text of Article 5(1) does not limit the obligation to providing reasonable protection and security from ‘physical interferences’... If the parties to the BIT had intended to limit the obligation to ‘physical interferences’, they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor’s investment of protection and full security.⁶⁴⁰

398. Similarly, in *Azurix v Argentina* the tribunal held that “when the terms ‘protection and security’ are qualified by ‘full’ and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.”⁶⁴¹ The *Biwater Gauff v Tanzania* tribunal elaborated that “when the terms ‘protection’ and ‘security’ are qualified by ‘full’, the content of the standard may extend to matters other than physical security. It implies a State’s guarantee of stability in a secure environment both physical, commercial and legal. It would in the Arbitral Tribunal’s view be unduly artificial to confine the notion of ‘full security’ only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments.”⁶⁴²

399. Some tribunals have noted in addition that in the context of a treaty that defines investments as including intangible property, it is incompatible to limit protection and security only against physical harms. As the *Siemens v. Argentina* tribunal reasoned, “[i]t is difficult to

⁶³⁹ C. Schreuer, *Full Protection and Security*, J. INT’L DISP. SETTLEMENT (2010), p. 1 (“[m]ore recently tribunals have found that provisions of this kind also guaranteed legal security enabling the investor to pursue its rights effectively.”), **CL-123**.

⁶⁴⁰ *Compañía de Aguas*, Award, paras. 7.4.15, 7.4.16 (finding that interpreting the standard to guarantee legal and economic security “is consistent with the decisions of recent international tribunals”), **CL-52**.

⁶⁴¹ *Azurix*, Award, para. 408, **CL-81**.

⁶⁴² *Biwater*, paras. 729, 730 (the full protection and security standard is not “limited to a State’s failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself”), **CL-82**.

understand how the physical security of an intangible asset would be achieved.”⁶⁴³ The *National Grid v. Argentina* tribunal also held that where investment was “broadly defined to include intangible assets,” there was “no rationale for limiting the application of a substantive protection of the Treaty to . . . physical assets.”⁶⁴⁴

400. In *CME v. Czech Republic*, the tribunal found that the State had breached the obligation to provide full protection and security where the decision of a regulatory authority (the Media Council) had created a legal situation that enabled the investor’s local partner to terminate the contract on which the investment depended. Referring to the obligation to accord full protection and security, the Tribunal held:

The Media Council’s actions in 1996 and its actions and inactions in 1999 were targeted to remove the security and legal protection of the Claimant’s investment in the Czech Republic.... The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued.⁶⁴⁵

401. The *AMT* tribunal described the standard of full protection and security as:

an obligation of vigilance, in the sense that ... the receiving State of investments ... shall take all measures necessary to ensure the full enjoyment of protection and security of its investment and should not be permitted to invoke its own legislation to detract from any such obligation. [The State] must show that it has taken all measures of precaution to protect the investments ...⁶⁴⁶

402. While the terms of the Treaty provides that the obligation to provide “full protection and security’... do[es] not require treatment in addition to or beyond that which is

⁶⁴³ *Siemens*, paras. 303, 308 (While the provision considered by the tribunal in *Siemens* refers to “full protection and legal security,” the tribunal made its observation about intangible assets before considering the impact of the term “legal security” on its analysis in that case. In that case the tribunal concluded that the initiation of renegotiations for the sole purpose of reducing costs for the host State, unsupported by any declaration of public interest, affected the legal security of *Siemens* investment, **CL-56**.)

⁶⁴⁴ *National Grid*, paras. 187, 189, **CL-106**. In *National Grid* the tribunal found that changes introduced in the applicable regulatory framework governing the investment, which effectively dismantled that framework, and the uncertainty generated thereby for the claimant’s investment were contrary to the State’s obligation to accord full protection and security.

⁶⁴⁵ *CME*, Partial Award, para. 613, **CL-62**. See *Siag*, para. 448 (treaty claim based on the guarantee of “full protection in the territory of the other Contracting Party” applied in the context of an expropriation of the claimant’s investment by executive resolutions contrary to repeated court rulings that the expropriation was illegal), **CL-78**.)

⁶⁴⁶ *American Manufacturing and Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, para. 6.05, **CL-124**.

required by the customary international law minimum standard of treatment of aliens,”⁶⁴⁷ the conclusion that the obligation extends to legal protection and security and is not limited to providing protection and security against physical harm remains valid. The provision in the Treaty that full protection and security’ requires the level of protection required under the customary international law minimum standard of treatment of aliens⁶⁴⁸ does not detract from that conclusion. As rigorously demonstrated by George Foster in a detailed monograph analyzing the origins of the full protection and security obligation,⁶⁴⁹ the customary international law minimum standard of treatment includes an obligation to provide protection and security for foreigners’ persons and property not only in relation to physical harm, but more generally and specifically including legal protection against harm to persons and property. As Foster summarizes the customary international law standard:

Protection and security obliges the host state to act with due diligence as reasonably necessary to protect foreigners’ persons and property, as well as to possess and make available an adequate *legal system*, featuring such protections as appropriate remedial mechanisms, due process, and a right to compensation for expropriation.⁶⁵⁰

403. As such, the standard is distinct, but overlaps with the customary obligation to provide fair and equitable treatment, which by contrast “concerns the manner in which the state treats the investment when interacting with it, requiring that the state act reasonably and in good faith.”⁶⁵¹ Conduct that can violate both standards thus includes a denial of justice or an arbitrary application of the law.⁶⁵²

404. By tracing commentary, state practice, and *opinio juris*, Foster demonstrates that the customary obligation to exercise reasonable diligence to provide protection and security was never limited exclusively to police protection in relation to physical harms, but also included the

⁶⁴⁷ Mexico-Singapore BIT, Art. 4(2), **CL-1**.

⁶⁴⁸ *Id.*, Arts. 4(1), 4(2).

⁶⁴⁹ G. Foster, *Recovering “Protection and Security”: The Treaty Standard’s Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 VANDERBILT J. TRANSNAT’L L. 1095 (2012), **CL-125**.

⁶⁵⁰ *Id.*, p. 1103 (emphasis in original).

⁶⁵¹ *Ibid.*

⁶⁵² *Ibid.*

exercise of reasonable due diligence to ensure that legal protection and security was provided against economic losses⁶⁵³

405. Among the several notable examples cited is the claim of the United States before the International Court of Justice in the *ELSI* case in which the United States presented claims against Italy on behalf of the U.S. company Raytheon under the U.S.-Italy FCN Treaty, which provided that nationals of each State would receive “the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law.”⁶⁵⁴ The United States claimed that the Italian courts’ failure to decide a legal petition sufficiently promptly was a breach of the full protection and security obligation as it was a denial of “procedural justice,” resulting from the lack of an adequate remedial mechanism.⁶⁵⁵ Although the Court ruled against the United States on this claim on the ground that the sixteen month delay at issue was not sufficiently grave to be contrary to the international standard of treatment, the treatment of the claim shows that the United States argued and the ICJ accepted that the obligation to provide full protection and security includes legal security.⁶⁵⁶

406. Thus, upon analysis, the Treaty contains the same standard and thus the same obligation for Mexico to provide full protection and security to covered “investments” or “returns of investors,” as they case may be, and does not demand more or less from the Contracting State Parties.⁶⁵⁷

⁶⁵³ *Id.*, p. 1116-1149.

⁶⁵⁴ *Id.*, p. 1143 (*citing* US-Italy FCN Treaty).

⁶⁵⁵ *Ibid.* (*citing* Elettronica Sicula SpA (*ELSI*) (US v It.) ¶ 110, 1989 ICJ 15).

⁶⁵⁶ *Id.*, p. 1144.

⁶⁵⁷ In the event, however, that the Tribunal considers the full protection and security protections in the Treaty to be limited in substance, POSH is entitled under the MFN treatment provision in Article 3(2) of the Mexico-Singapore BIT to the more expansive protections contained in Mexico’s treaties with third States, including the Agreement between the United Mexican States and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments (2001), article 2(2), **CL-126**. In any event, Mexico’s obligations to POSH under the Mexico-Germany BIT are in no way diminished by Mexico’s agreement with Singapore regarding the standard of treatment to be accorded to investors such as POSH.

3. Mexico failed to accord full protection and security to the investment made by POSH and its Subsidiaries

407. Through its acts and omissions set out in detail above, Mexico failed to provide legal protection and security to the Investment made by POSH and the Subsidiaries and therefore violated its obligation under the Treaty to accord full protection and security. Among other things:

- Mexico failed to honor the rule of law in the administrative proceeding resulting in the Unlawful Sanction, which led to OSA's demise, and deprived POSH and its Subsidiaries of a stable and predictable environment. The Unlawful Sanction was plainly illegal and minimal diligence on the part of the State would have sufficed to observe this.
- Mexico failed to honor the rule of law in the criminal investigations against OSA, adopting investigative measures without any element, even circumstantial, of a crime. The investigations were later dropped for this reason. Mexico failed to employ the necessary diligence in the conduct of the investigation.
- Mexico failed to honor the rule of law and to protect POSH's Investment by unlawfully seizing all OSA's assets and taking control over OSA. There were no signs of criminal activity and the Seizure Order lacked factual or legal basis. Minimal diligence on the part of the State would have shown this. OSA remained seized for over 3 years and the seizure was finally lifted due to the lack of evidence of any crime.
- Mexico failed to honor the rule of law by unlawfully detaining the ten vessels owned by POSH's Subsidiaries. Mexico did not employ the legal diligence required by international law to protect the investment nor did it allow the investor reasonable procedural recourse to contest it. It was undisputed that the vessels did not belong to OSA, nor were they associated with any of the alleged crimes. POSH's representative filed three briefs with the PGR showing this and requesting the release of the vessels. All three briefs went unanswered. A testament to the lack of evidence of any crime is the fact that the vessels were released several months later without any further explanation.
- Mexico failed to protect the investment made by POSH and its Subsidiaries during the insolvency proceeding against OSA. Mexico suspended payments to creditors

and unlawfully deprived POSH, as beneficiary, of the payment owed by PEMEX to the Irrevocable Trust.

- Mexico failed to provide an objective, impartial and independent supervision of the Insolvency Proceeding, since “SAE... perform[ed] contradictory functions defending conflicting interests. It is not possible to defend the interests of the insolvent company and, at the same time, assess its financial situation with independence and objectivity, negotiate with the creditors or proceed with its sale. Especially, when other state agencies (such as Pemex, the Mexican Institute of Social Security [IMSS], the National Workers' Housing Fund Institute [INFONAVIT], the Tax Administration Service [SAT]) are recognized creditors in the insolvency proceeding.”⁶⁵⁸
- Mexico further coerced POSH and its Subsidiaries to accept a “hair cut to the debt” and a “higher commission” in exchange for the cancellation of OSA’s contracts, which was the sound and reasonable commercial decision.

408. In sum, the State’s actions, including through its administrative, criminal and judicial bodies, withdrew and withheld legal protections from the investment made by POSH and its Subsidiaries in violation of its obligation to provide full protection and security under the Treaty. These wrongful failures of protection have cumulatively caused the complete deprivation of the use, value, and enjoyment of the investment. Mexico breached its “obligation of vigilance” and failed “to take all measures necessary to ensure the full enjoyment of protection and security of [the] investment ...”⁶⁵⁹

⁶⁵⁸ Expert Legal Opinion on Mexican Insolvency Law by Luis Manuel Meján , para. 105.

⁶⁵⁹ *American Manufacturing*, para. 6.05, **CL-124**.

XI. CLAIMANT IS ENTITLED TO COMPENSATION

409. As demonstrated in Section V above, Mexico breached the provisions of the Treaty prohibiting expropriation without just, effective and prompt compensation, as well as the provisions requiring Mexico to afford fair and equitable treatment and full protection and security. These Treaty breaches caused direct and substantial harm to POSH and its Subsidiaries.

410. In accordance with well-settled principles of international law, POSH seeks full reparation for the losses suffered by POSH and its Subsidiaries as a result of Mexico's violations of the Treaty and international law, in the form of monetary compensation sufficient to wipe out the consequences of Mexico's wrongful acts.⁶⁶⁰

411. POSH's claim for damages is explained and quantified in the Versant Report submitted with this Statement of Claim by economists Kiran Sequeira and Garret Rush, both experts with extensive experience in the valuation and quantification of damages (the **Versant Report**).⁶⁶¹ The Versant Report relies on the fair market value of the investments made by POSH and its Subsidiaries. Versant has analyzed the operational costs inputs by renowned maritime expert Jean Richards from Quantum Shipping Services Ltd., with 45 years of experience in the maritime industry (the **Industry Report**).⁶⁶²

412. The damages suffered by POSH and its Subsidiaries comprise two different time periods: historical losses incurred up until the valuation date—May 16, 2014—and the lost value of the businesses as a going concern as of the valuation date. On the basis of the Versant and Industry Reports, POSH estimates the damages caused by Mexico's breaches at \$213,297,620, as of March 20, 2019, as summarized in the table below:⁶⁶³

⁶⁶⁰ ILC Articles, Art 31, **CL-14**.

⁶⁶¹ Expert Damages Report by Versant.

⁶⁶² Expert Industry Report by Jean Richards.

⁶⁶³ Expert Damages Report by Versant, Table 49, p. 109.

Loss by Entity (US\$)	Nominal Damages	Pre-award Interest	Total
POSH	85,472,593	66,552,572	152,025,166
GOSH	35,372,118	25,891,116	61,263,234
PFSM	5,323	3,896	9,220
POSH Honesto	-	-	-
POSH Hermosa	-	-	-
SMP	-	-	-
Total	120,850,035	92,447,585	213,297,620

413. In the following sections, Claimant addresses: (A) the applicable standards for the assessment of compensation; (B) the quantum of compensation owed to POSH; (C) interest; and (C) tax.

A. APPLICABLE PRINCIPLES AND METHODOLOGY

1. Full compensation is the appropriate standard of reparation

414. It is a well-established principle of international law that a State must afford “full reparation for the injury caused by [its] internationally wrongful act.”⁶⁶⁴ Reparation may take the form of restitution, compensation or satisfaction, either individually or in combination.⁶⁶⁵ Here, restitution in kind is neither possible nor practical.⁶⁶⁶ The appropriate remedy is monetary compensation sufficient to efface the consequences of Mexico’s internationally wrongful conduct.

415. The Treaty does not address the standard of compensation owed for a breach of any of its terms. It does, however, specify in Article 6 the steps necessary to render an expropriation legal. This regime requires “just and effective compensation,” reflecting the market value of the property lost as a result of the government action.⁶⁶⁷ This provision is inapplicable to the assessment of damages in the case at hand where, as explained in section V above, no compensation has ever been paid, and thus Mexico’s expropriation is unlawful.

⁶⁶⁴ ILC Articles, Art. 31(1), **CL-14**.

⁶⁶⁵ *Id.*, Art. 34.

⁶⁶⁶ *See, e.g., CMS*, Award, para. 406, **CL-116**.

⁶⁶⁷ Mexico-Singapore BIT, Art. 6(2)(a), **CL-1**.

416. In the absence of *lex specialis*, the relevant standard for the determination of the compensation owed to POSH and its Subsidiaries must be assessed with reference to applicable principles of customary international law.⁶⁶⁸

417. It is firmly established that the customary international law principle governing recovery from injury for internationally wrongful acts is that of “full reparation.”⁶⁶⁹ As established in *Chorzów Factory* by the Permanent Court of International Justice (PCIJ) in 1928:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that *reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.*⁶⁷⁰

418. The obligation to provide full reparation is also reflected in the International Law Commission’s Articles on State Responsibility,⁶⁷¹ which provide that a State “responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby” and that such compensation “shall cover any financially assessable damage including loss of profits insofar as it is established.”⁶⁷²

⁶⁶⁸ See *Crystallex*, para 846, **CL-55**; *Burlington Resources, Inc. v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 160, **CL-127**; *ADC*, paras. 481, 483, **CL-73**; *Amoco*, paras. 189, 191-93, **CL-60**; *Nykomb Synergetics Technology Holding AB v Republic of Latvia*, Stockholm Chamber of Commerce, Arbitral Award, 16 December 2003, para. 5.1, **CL-128**.

⁶⁶⁹ ILC Articles, Art. 31 (“1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”), **CL-14**.

⁶⁷⁰ *Case Concerning the Factory at Chorzów (Germany/Poland)* (Merits) [1928] PCIJ Series A, No 17, p. 46 (emphasis added), **CL-129**; see also ILC Articles, Art. 34 (“Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination”), **CL-14**.

⁶⁷¹ The International Law Commission’s Articles on State Responsibility, and in particular Article 36, have frequently been invoked in investment treaty decisions in relation to compensation issues. See, e.g., *Siemens*, para 352, **CL-56**; *Compañía de Aguas*, Award, para. 8.2.6, **CL-52**; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc v United Mexican States*, ICSID Case No ARB(AF)/04/05, Award, 21 November 2007, paras. 280-281, **CL-130**; *Gemplus SA and others v United Mexican States, and Talsud SA v United Mexican States*, ICSID Case Nos ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010, paras. 13.79-13.81, **CL-131**; *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Award, 28 March 2011, paras. 151, 245, **CL-132**; *El Paso*, para. 710, **CL-99**.

⁶⁷² ILC Articles, Art. 36, **CL-14**.

419. Tribunals have repeatedly espoused the “full reparation” principle set out above as the international law standard applicable to the compensation owed for breaches of BITs.⁶⁷³ As explained recently in *Gold Reserve v Venezuela*:

[I]t is well accepted in international investment law that the principles espoused in the *Chorzow Factory* case, even if initially established in a State-to-State context, are the relevant principles of international law to apply when considering compensation for breach of a BIT. It is these well-established principles that represent customary international law, including for breaches of international obligations under BITs, that the Tribunal is bound to apply.⁶⁷⁴

420. Thus, any monetary award must put POSH and the Subsidiaries in the economic position that they would have been in had the internationally wrongful act not occurred at all.⁶⁷⁵ As the tribunal in *Vivendi v Argentina II* stated:

Based on these principles [of international law], and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to *eliminate the consequences of the state’s action*.⁶⁷⁶

421. The standard described above represents a different standard of compensation than that applicable to lawful expropriations under the Treaty. The practical effect of this distinction is that, for lawful expropriations, the focus is on finding the neutral or objective “value of the property concerned” prior to the date of expropriation and promptly compensating the investor accordingly.⁶⁷⁷ For unlawful expropriations and other treaty breaches, as in the present case, the focus is on establishing the subjective value that will reinstate the injured party to the “financial

⁶⁷³ See *CMS*, Award, para. 400, **CL-116**. For examples of more recent cases, see *Sempra Energy*, para. 400, **CL-109**; *Compañía de Aguas*, Award, paras. 8.2.4-8.2.5, **CL-52**; *Duke Energy*, para. 468, **CL-88**; *Biwater*, paras. 773, 775, **CL-82**.

⁶⁷⁴ *Gold Reserve*, para. 678, **CL-13**.

⁶⁷⁵ *Chorzów*, p. 46, **CL-129**; *Crystallex*, paras. 847-849, **CL-55**; *Petrobart Limited v Kyrgyz Republic*, SCC Case No 126/2003, Arbitral Award, 29 March 2005, pp. 78-79 (“The Arbitral Tribunal agrees that, insofar as it appears that Petrobart has suffered damage as a result of the Republic’s breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred.”), **CL-133**.

⁶⁷⁶ *Compañía de Aguas*, Award, para 8.2.7 (emphasis added), **CL-52**.

⁶⁷⁷ I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (2009), para 2.97, **CL-134**.

situation [it] would be in if the unlawful act had not been committed.”⁶⁷⁸

422. Investment tribunals applying the “full reparation” standard have focused on making the investor “whole” by a variety of means.⁴⁷⁹ These have included: (i) pushing back the date of valuation from the date of seizure to the date of the award, to ensure that the investor rather than the State benefits from any increase in value of the expropriated asset (as decided in *ConocoPhillips v Venezuela*);⁶⁷⁹ (ii) awarding consequential damages (as held in *Siemens v Argentina*);⁶⁸⁰ and (iii) awarding “disturbance” damages for the disruption caused by an unlawful seizure (as ruled in *Funnekotter v Zimbabwe*).⁶⁸¹ These cases illustrate that the principle of full reparation is well-established and has to be ensured by all possible means.

2. Compensation must be equal to fair market value

423. The proper method for calculating damages is determining the fair market value (FMV) of each of the assets, as outlined in further detail below.⁶⁸²

⁶⁷⁸ *Id.*, para 2.101. See *Gold Reserve*, para. 681 (“reparation should wipe-out the consequences of the breach and re-establish the situation as it is likely to have been absent the breach. As the consequence of the serious breach in the present situation was to deprive the investor totally of its investment, the Tribunal considers it appropriate that the remedy that would wipe-out the consequences of the breach is to assess damages using a fair market value methodology.”), **CL-13**; *Azurix*, Award, paras. 423-424, 438, **CL-81**; *Compañía de Aguas*, Award, para 8.2.7 (“Based on these principles [of customary international law], and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state’s action.”), **CL-52**; *Ioan Micula*, para. 917 (“the claimant must be placed back in the position it would have been ‘in all probability’ but for the international wrong.”), **CL-108**.

⁶⁷⁹ *ConocoPhillips Petrozuata BV and others v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013, paras. 342-343, **CL-135**. The ICSID tribunal noted the unlawful nature of the expropriation and, rather than apply the standard of compensation set out in the applicable treaty (which required the “fair market value” of the investment to be assessed immediately before the expropriation), applied the *Chorzów Factory* test to establish that full compensation required the investment to be valued at the date of the award. See *ADC*, paras. 496-497, **CL-73**.

⁶⁸⁰ *Siemens*, para. 352, **CL-56**. The tribunal noted that “[t]he key difference between compensation under the Draft Articles and the *Factory at Chorzow* case formula, and Article 4(2) of the Treaty is that under the former, compensation must take into account ‘all financially assessable damage’ or ‘wipe out all the consequences of the illegal act’ as opposed to compensation ‘equivalent to the value of the expropriated investment’ under the Treaty. Under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages.” (emphasis added), **CL-56**.

⁶⁸¹ *Bernardus*, para. 138 (The Tribunal concluded that “the Claimants must obtain reparation for the disturbances resulting from the taking over of their farms and for the necessity for them to start a new life often in another country.”), **CL-76**.

⁶⁸² J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), p. 3 (stating that “[c]ompensation reflecting the capital value of property taken or

424. The 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment are clear in this regard, providing that compensation for expropriation “will be deemed ‘adequate’ if it is based on the fair market value of the taken asset.”⁶⁸³ Similarly, according to the International Law Commission’s Articles on State Responsibility, “[c]ompensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the ‘fair market value’ of the property lost.”⁶⁸⁴

425. The Iran-US Claims Tribunal has defined FMV as “the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat.”⁶⁸⁵

426. As recently recognized by the tribunal in *Crystallex v Venezuela*, proper assessment of an investment’s FMV ensures that the injured party is restored to the situation it would have been in *but-for* the internationally wrongful acts:

[I]t is well-accepted that reparation should reflect the “fair market value” of the investment. Appraising the investment in accordance with the fair market value methodology indeed *ensures that the consequences of the breach are wiped out and that the situation which would, in all probability, have existed if the wrongful acts had not been committed is reestablished*.⁶⁸⁶

destroyed as the result of an internationally wrongful act is generally assessed on the basis of the ‘fair market value’ of the property lost.”), **CL-136**; C. N. Brower and J.D. Brueschke, *The Iran-United States Claims Tribunal* (1998), p. 3 (stating that “market price is the most reliable indicator of the actual value of an asset at a determined date”), **CL-137**; *Santa Elena*, paras 69-70, **CL-44**; *Compañía de Aguas*, Award, paras 8.2.9-8.2.11, **CL-52**.

⁶⁸³ World Bank Group, *Guidelines on the Treatment of Foreign Direct Investment*, (1992) Vol(2) ICSID Review–Foreign Investment Law Journal 297, p. 6, **CL-138**. See Crawford, p. 3, **CL-136**.

⁶⁸⁴ ILC Articles, Art. 36, Commentary para. 22, **CL-14**. See Brower and Brueschke, p. 3 (“[M]arket price is the most reliable indicator of the actual value of an asset at a determined date.”), **CL-137**; *Sempra Energy*, para. 404, **CL-109**; *ADC*, para. 499, **CL-73**.

⁶⁸⁵ *Starrett Housing Corporation and others v Government of the Islamic Republic of Iran*, Final Award, 14 August 1987, (1987-Volume 16) Iran-US Claims Tribunal Report, para. 27, **CL-139**.

⁶⁸⁶ *Crystallex*, para. 850, **CL-55**. See *Gold Reserve*, para. 681 (“As the consequence of the serious breach in the present situation was to deprive the investor totally of its investment, the Tribunal considers it appropriate that the remedy that would wipe-out the consequences of the breach is to assess damages using a fair market value methodology.”), **CL-13**; *Compañía de Aguas*, Award, para. 8.2.10, **CL-52**.

427. International tribunals have regularly applied the FMV standard in cases involving both breaches of the fair and equitable treatment⁶⁸⁷ and expropriation⁶⁸⁸ clauses of bilateral investment treaties. Therefore, the standard for calculating compensation for Mexico's expropriation would be the same for either breach of the Treaty, as described above.

3. Methodologies to assess the FMV

428. The relevant method for the assessment of the FMV of an asset depends on the circumstances and characteristics of each individual case. In *Crystallex v Venezuela*, the tribunal explained as follows:

Tribunals may consider any techniques or methods of valuation that are generally acceptable in the financial community, and whether a particular method is appropriate to utilize is based on the circumstances of each individual case. A tribunal will thus select the appropriate method basing its decision on the circumstances of each individual case...⁶⁸⁹

429. In accordance with these observations, in order to reliably assess the quantum of damages it is owed, Claimant has carefully considered the individual characteristics of each asset as well as the applicable financial and industry standards.

430. Versant explains that the FMV shall include two components. One, it shall include the losses already suffered by POSH and its Subsidiaries at the time of the valuation. Two, it must also take future profitability into consideration in order to provide full compensation⁶⁹⁰ where the investment is a "going concern."⁶⁹¹ In *Chorzów Factory*, the PCIJ specifically noted that "future prospects," "probable profit" and future "financial results" were factors material to the

⁶⁸⁷ See, e.g., *CMS*, Award, para. 410, **CL-116**; *Azurix*, Award, para. 424, **CL-81**; *Enron Corporation and Ponderosa Assets LP v Argentine Republic*, ICSID Case No ARB/01/3, Award, 22 May 2007, paras. 359-363, **CL-140**; *Sempra Energy*, paras. 403-404, **CL-109**; *El Paso*, para. 703, **CL-99**.

⁶⁸⁸ See, e.g., *Metalclad*, para. 118, **CL-43**; *CME Czech Republic BV v Czech Republic*, UNCITRAL, Final Award, 14 March 2003, paras. 496-499, **CL-141**; *Bernardus*, para. 124, **CL-76**.

⁶⁸⁹ *Crystallex*, para. 886, **CL-55**.

⁶⁹⁰ *Compañía de Aguas*, Award, para. 8.3.3, **CL-52**.

⁶⁹¹ See World Bank Group, p 6. (For a definition of a "going concern): "[A]n enterprise consisting of income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and which could have been expected with reasonable certainty, if the taking had not occurred, to continue producing legitimate income over the course of its economic life in the general circumstances following the taking by the State.", **CL-138**.

valuation.⁶⁹² Similarly, in the case of *Phillips Petroleum v Iran* the Iran-US Claims Tribunal explained that:

[A]nalysis of a revenue-producing asset... must involve a careful and realistic appraisal of the revenue-producing potential of the asset over the duration of its term, which requires appraisal of the level of production that reasonably may be expected, the costs of operation, including taxes and other liabilities, and the revenue such production would be expected to yield, which, in turn, requires a determination of the price estimates for sales of the future production that a reasonable buyer would use in deciding upon the price it would be willing to pay to acquire the asset.⁶⁹³

431. GOSH, SMP, HONESTO, HERMOSA and PFSM were all “going concerns” or “in production properties” at the time of Mexico’s measures. However, in a conservative approach, Versant only takes into account GOSH and PFSM, since their contracts with OSA were in force at the time of Mexico’s measures. Therefore, their FMV will take into account the value of future cash flows that GOSH and PFSM would have generated in the absence of Mexico’s unlawful conduct.

432. The most appropriate way to determine the FMV of going concerns like GOSH and PFSM is the DCF method. Favored in both international finance and international law,⁶⁹⁴ the DCF method projects the future cash flows that a company would have generated for equity-holders in the absence of wrongful government conduct, and then discounts them back to the valuation date at a rate that accounts for the risk associated with those cash flows.⁶⁹⁵ The discount rate most frequently adopted is the weighted average cost of capital (**WACC**)—*ie*, the average market value of all financing sources (cost of debt and equity weighted by a ratio of debt to equity) in the going concern’s capital structure. The WACC is carefully constructed to reflect the risk that future cash

⁶⁹² Chorzów, pp. 50-51, **CL-129**.

⁶⁹³ *Phillips Petroleum Company Iran v Islamic Republic of Iran and the National Iranian Oil Company*, Award, 29 June 1989, (1989-Volume 21) Iran-US Claims Tribunal Report, para. 111 (emphasis added), **CL-142**.

⁶⁹⁴ See, e.g., World Bank Group, pp. 6-7, **CL-138**; N. Rubins and N.S. Kinsella, *International Investment, Political Risk and Dispute Resolution: A Practitioner’s Guide* (2005), pp. 3-4, **CL-143**; P. D. Friedland and E Wong, *Measuring Damages for the Deprivation of Income-Producing Assets: ICSID Case Studies*, (1991) Vol 6(2) ICSID Review–Foreign Investment Law Journal 400, p. 407, **CL-144**; W. C. Lieblich, *Determinations by International Tribunals of the Economic Value of Expropriated Enterprises*, (1990) Vol 7(1) Journal of International Arbitration 37, p. 2, **CL-145**; *Gold Reserve*, para. 831, **CL-13**.

⁶⁹⁵ World Bank Group, pp. 11 (defining DCF as “the cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected minus that year’s expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of money, expected inflation, and the risk associated with such cash flow under realistic circumstances.”), **CL-138**.

flows will not materialize as projected. In this way, the DCF methodology reflects the transaction price at which willing buyers and sellers in the marketplace would transfer an equity stake in the company to be valued as of the valuation date. The DCF method has been widely endorsed and applied by international arbitral tribunals to determine the appropriate compensation due as a result of expropriation, as well as other breaches of investment treaties.⁶⁹⁶

433. In order to reflect the *Chorzów Factory* “full reparation” principle, the valuer normally creates two DCF models, one projecting future cash flows assuming the offending measures are in place (the “actual” model), and one assuming that the government had never breached the treaty (the “but-for” model). The difference in the value of the company in the “but-for” and the “actual” model then provides the primary measure of damages. In the present case, the full expropriation of GOSH and PFSM means that the “actual” value of these investments is necessarily zero—in other words, Mexico’s wrongful conduct caused the loss of the full value of the company.

434. For the reasons set out above, the DCF method is the appropriate method to assess the FMV of the expropriated investments in GOSH and PFSM, and is the methodology that has been adopted in the Versant Report.

4. The valuation date

435. Pursuant to the full reparation principle, the injured claimant must be made whole, and the consequences of the State’s internationally wrongful conduct must be entirely wiped out. This standard of full reparation is the guiding principle affecting all aspects of the valuation analysis—including the appropriate date of valuation.⁶⁹⁷

436. Determination of the appropriate valuation date therefore requires the tribunal “precisely to ensure full reparation and to avoid any diminution of value attributable to the State’s

⁶⁹⁶ See, eg, *CMS*, Award, paras. 411-417, **CL-116**; *Enron*, Award, para. 385, **CL-140**; *Biwater*, para. 793, **CL-82**; *National Grid*, para. 275, **CL-106**; *Lemire*, Award, para. 254, **CL-132**.

⁶⁹⁷ Mexico-Singapore BIT, Article 6(2)(a) (requires Mexico to provide just and effective compensation “immediately before the expropriation.”), **CL-1**. As outlined above, however, Article 6(2)(a) does not address the compensation owed for unlawful expropriations or for violations of other Treaty provisions, including Mexico’s obligations to provide fair and equitable treatment and full protection and security. The proper valuation date, therefore, is a question of fact for the Tribunal and must be determined in accordance with the customary international law principle of full reparation.

conduct leading up to the expropriation.”⁶⁹⁸ In other words, the valuation date must reflect the situation that would have existed *but-for* the State’s wrongful conduct. As set out by the tribunal in *Santa Elena v Costa Rica*:

The expropriated property is to be evaluated as of the date on which the governmental ‘interference’ has deprived the owner of his rights or has made those rights practically useless. This is a matter of fact for the Tribunal to assess in the light of the circumstances of the case.⁶⁹⁹

437. Further, where the value of an investment has increased following expropriation, “full reparation may require... the valuation date to be fixed at the date of the award.”⁷⁰⁰ This was the conclusion reached by the tribunal in the *ADC v Hungary* case, which explained that, in cases in which the value of an investment actually increases following an expropriation, “the *Chorzów Factory* standard requires that the date of valuation should be the date of the Award and not the date of expropriation, *since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed*.”⁷⁰¹ The same reasoning has been repeatedly applied by other tribunals.⁷⁰² As the *Quiborax v Bolivia* tribunal noted, this approach reflects the fact that “what must be repaired is the actual harm done, as opposed to the value of the asset when taken.”⁵¹⁰

438. In this case, the valuation date represents the State measure that culminated in the destruction of the Investment. The valuation date is May 16, 2014 (**Valuation Date**), the date when the Insolvency Court confirmed the Deviation Order, which instructed PEMEX to make payments to SAE instead of the Irrevocable Trust. This measure deprived POSH, as primary beneficiary, of payments arising from GOSH’s Charters and the PFSM management contract. And both GOSH and PFSM are considered the two “going concerns” of the investment for the purposes

⁶⁹⁸ *Ioannis*, para. 517, **CL-80**.

⁶⁹⁹ *Santa Elena*, para. 78, **CL-44**.

⁷⁰⁰ *Crystallex*, para. 843, **CL-55**. See *Ioannis*, para. 514 (“full reparation for an unlawful expropriation will require damages to be awarded as of the date of the arbitral Award.”), **CL-80**; G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals: Volume I* (1957) p. 660 (“[T]he value of the property at the time of the indemnification, rather than that of the seizure, may constitute a more appropriate substitute for restitution.”), **CL-146**.

⁷⁰¹ *ADC*, para 497, **CL-73**; see *Yukos Universal Limited (Isle of Man) v Russian Federation*, PCA Case No AA 227, Final Award, 18 July 2014, paras. 1767-1769, **CL-147**.

⁷⁰² See, e.g., *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award, 28 July 2015, para. 764, **CL-148**; *ConocoPhillips*, ICSID Case, paras. 342-43, 401, **CL-135**; *El Paso*, para. 706, **CL-99**; *Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica*, ICSID Case Nos ARB/08/1 and ARB/09/20, Award, 23 May 2012, para. 307, **CL-149**.

of the DCF analysis. On the Valuation Date, Claimant understood that its investment in Mexico had been destroyed and thus withdrew GOSH's Vessels from the GOSH Charters.

B. CALCULATION OF THE FMV OF POSH'S INVESTMENT AND POSH'S SUBSIDIARIES

1. Introduction

439. Under Article 11(2) of the Treaty, POSH brings this claim in its own name and on behalf its controlled subsidiaries: GOSH, SMP, HONESTO, HERMOSA and PFSM.

440. In the interest of clarity, Versant follows a three-step process to calculate the damages: (i) it assesses the amount of damages suffered by each company separately, taking into account POSH's losses of cash-flows owed to the Irrevocable Trust; (ii) it then allocates the appropriate proportion of the damages calculated in step (i) to POSH, consisting of cash flows owed to POSH per the Loan granted to finance the acquisition of the vessels and to POSH's equity ownership in the subsidiaries; and (iii) it calculates the amount remaining, after allocating the cash flows described in (ii), as the damages suffered by the subsidiaries (i.e. (i) less (ii) is equal to (iii)).

441. Versant's FMV calculation comprises two elements: the historical losses suffered until the Valuation Date, and the DCF analysis after the Valuation Date.

2. Historical losses suffered prior to the valuation date

442. To calculate the historical losses suffered prior to the Valuation Date, Versant computes the revenues and costs of the companies as they would have been but-for Mexico's unlawful conduct.

443. Versant divides the historical losses in three components: (a) amounts owed for work performed and invoiced; (b) lost charter hire for the period over which vessels were detained by the Mexican authorities; (c) demobilization fees and repair costs of the vessels. Each component is addressed below.

444. **Amounts owed for work performed and invoiced.** Between January 2013 and March 19, 2014, the ten vessels owned by POSH's Subsidiaries provided services in direct or indirect support of PEMEX's offshore exploration and production activities via their charters with OSA. As a result of Mexico's acts and omissions, POSH and its Subsidiaries suffered \$36,515,290 in damages according to the following losses:

- GOSH: \$5.84 million of unpaid work performed by its six vessels, prior to the establishment of the Irrevocable Trust.⁷⁰³
- POSH: \$27.80 million of unpaid to the Irrevocable Trust for works performed by GOSH and PFSM until the March 19, 2014 Detention Order.⁷⁰⁴
- SMP: \$1.58 million of unpaid work performed by its two vessels until the date of the Detention Order.⁷⁰⁵
- SEMCO: \$1.30 million of unpaid work performed by its two vessels until the date of the Detention Order.⁷⁰⁶

445. **Charter hire for the detention period.** On March 19, 2014, the ten vessels owned by POSH's Subsidiaries were unlawfully detained by the Mexican authorities. From that date until the Valuation Date, POSH and its subsidiaries did not receive any payment from OSA, nor could they re-charter and redeploy the vessels elsewhere. In addition, Versant deducts the operating costs incurred by GOSH, HONESTO, HERMOSA over the detention period. The historical losses during the detention period due to lost charter hire amounts to \$11,289,516.⁷⁰⁷

446. **Demobilization fees and repair costs.** As a result of Mexico's acts and omissions, SEMCO was not paid a demobilization fee of \$1.80 million for the SEMCO Vessels,⁷⁰⁸ per Clause 16 of the SEMCO Charters.⁷⁰⁹ In addition, as a result of poor maintenance of the vessels during the detention period, HONESTO, HERMOSA and SEMCO were forced to pay \$1,355,806 in repair costs.⁷¹⁰

⁷⁰³ Expert Damages Report by Versant, p. 65, para. 159.

⁷⁰⁴ Expert Damages Report by Versant, Table 21, p. 68.

⁷⁰⁵ Expert Damages Report by Versant, p. 60, para. 160.

⁷⁰⁶ Expert Damages Report by Versant, p. 60, para. 161.

⁷⁰⁷ Expert Damages Report by Versant, Table 23, p. 71.

⁷⁰⁸ Expert Damages Report by Versant, p. 71.

⁷⁰⁹ Bareboat Charter for Salvirile between Semco Salvage (IV) Pte. Ltd. and Oceanografía, S.A. de C.V., dated 27 December 2011, Clause 16, (VP-XX); **C-20**; Bareboat Charter for Salvision between Semco Salvage (IV) Pte. Ltd. and Oceanografía, S.A. de C.V., dated 27 December 2011, Clause 16, (VP-XX), **C-21**.

⁷¹⁰ Expert Damages Report by Versant, Table 24, p. 72.

447. **Summary of historical losses.** In total, the historical losses amount to \$50,960,613. The table below illustrates the total losses suffered for each different concept.⁷¹¹

Component	Amount (US\$)
Amounts Outstanding for Work Performed	36,515,290
Lost Charter Hire for Vessels detained by Mexican Authorities	11,289,516
Demobilization Fee	1,800,000
Repair Costs	1,355,806
Claimant's Historical Loss	50,960,613

448. The table below illustrates the damages suffered by each entity.⁷¹²

Source of Loss <i>US\$</i>	Nominal Damages
	Historical Losses
GOSH	41,293,157
PFSM	-
POSH Honesto	2,731,004
POSH Hermosa	2,422,653
SEMCO	4,513,798
Total	50,960,613

449. As noted above, Versant then allocates the appropriate proportion of the damages to POSH, consisting of (i) POSH's 100% equity ownership of SEMCO; (ii) POSH's 49% equity ownership in GOSH, HONESTO and HERMOSA at the valuation date; and (iii) cash flows owed to POSH per the loans granted to GOSH, HONESTO and HERMOSA to finance the acquisition of the vessels. This covers the totality of historic losses, which are, therefore, entirely attributable to POSH.⁷¹³

⁷¹¹ Expert Damages Report by Versant, Table 24, p. 72

⁷¹² Expert Damages Report by Versant, Table 40, p. 103.

⁷¹³ Expert Damages Report by Versant, Table 41, p. 103.

Loss by Entity <i>US\$</i>	Nominal Damages
	Historical Losses
POSH	50,960,613
GOSH	-
PFSM	-
POSH Honesto	-
POSH Hermosa	-
SMP	-
Total	50,960,613

450. Versant explains that the table above “demonstrates that while historical losses originate from different sources, they are ultimately incurred by POSH, as both a debt and equity holder.”⁷¹⁴

3. The future losses as of the valuation date

451. In order to assess the full compensation of POSH and its subsidiaries, Versant calculates the FMV of the investments as of May 16, 2014 using the DCF method.⁷¹⁵ Versant adopts a conservative approach and only assesses the FMV of GOSH and PFSM, since those companies were in contract with OSA at the time of the Valuation Date.

452. To calculate the FMV of GOSH and PFSM, Versant computes the projected revenues and costs of the companies, as they would have been but-for Mexico’s unlawful conduct as of May 16, 2014. Given that both companies were parties to the Irrevocable Trust, in which POSH was the primary beneficiary, Versant also takes into account the cash-flows that would have been paid to POSH through the Irrevocable Trust.

(a) The DCF analysis of GOSH

453. Versant’s assessment of GOSH’s value as of May 16, 2014, but-for Mexico’s actions and omissions, involves the following calculations:

⁷¹⁴ Expert Damages Report by Versant, p. 103, para. 256.

⁷¹⁵ Versant considered other valuation approaches, such as the book value, the replacement cost value, the liquidation value, the net capital contribution and the historical values of capital contributions. They rejected them as inappropriate methods of valuation for the reasons described in the Compass Lexecon Report, para 42.

- (i) determining the future revenues of GOSH based on expected renewals of the Charters with OSA and expected charter rates;
- (ii) calculating the cash flows for GOSH by subtracting from these revenues the expected operating costs and capital expenditures associated with the expected charter rates; and
- (iii) determining the net present value of these cash flows by discounting them using the discount rate of GOSH.

(i) *Future revenues of GOSH*

454. The GOSH Charters with OSA and the GOSH Service Contracts between OSA and PEMEX were in force at the time of the Valuation Date. Based on the industry report prepared by Ms. Jean Richards and PEMEX’ expected growing demands for offshore support vessels, Versant explains that, but-for the Mexico actions, PEMEX would have renewed the GOSH Service Contracts over the life span of the vessels, which would likely range from 20 to 25 years:

As discussed by Ms. Richards, a trading life of 20 to 25 years is a reasonable assumption for these vessels... Given that these vessels were less than 10 years old at contract expiration, we follow her estimation that the vessels would have each been eligible for, and obtained, contract renewals at least until the date of their 4th special survey, at approximately 20 years old...⁷¹⁶

455. Also based on Ms. Richards report, Versant calculates the expected renewal rates for the GOSH Charters, based on the expected renewal rate for the GOSH Service Contracts, and then accounts for the number of days that the vessels would be dry-docked and not operative. On that basis, Versant calculates the expected revenues of GOSH.

(ii) *Operating costs, capital expenditures and other costs*

456. From the revenues calculated in section (i) above, Versant deducts, based on Ms. Richards report, OSA’s commission, operating costs and drydocking costs.⁷¹⁷ Versant also

⁷¹⁶ Expert Damages Report by Versant, p. 76, paras. 186-187.

⁷¹⁷ Deducting OSA’s commission, operating costs, and dry-docking costs from total revenues results in earnings before interest, taxes, depreciation and amortization (“EBITDA”). Versant’s forecast for GOSH’s EBITDA results in an average EBITDA margin of 62.7%, which is below the average EBITDA Margin for GOSH in 2013 of 70.0%.

estimates a depreciation expense for GOSH of approximately US\$ 8.6 million per year⁷¹⁸ and factors in a Mexican corporate tax of 30%.⁷¹⁹ After calculating revenues and costs, Versant calculates a free cash flows to the firm (FCFF) figure for GOSH (*i.e.* “funds available to all investors, debt and equity, after paying operating expenses, addressing changing working capital needs, and funding long term investments”).⁷²⁰ Versant concludes that GOSH would have generated \$334,747,930 from 16 May 2014 to 30 September 2031.⁷²¹

(iii) *The discount rate (WACC)*

457. In accordance with accepted principles of corporate finance, Versant has undertaken a DCF analysis by discounting projected cash flows to the valuation date at a rate equivalent to the WACC.⁷²² The WACC quantifies the risks associated with GOSH, on the basis of the rate of return that shareholders and lenders expect to receive on their capital investment.⁷²³ This is a simulation of the analysis that would have been undertaken by willing buyers and willing sellers with a long-term investment perspective, consistent with the “fair market value” standard.

458. As Versant explains,⁷²⁴ the WACC is comprised of three main components: (i) the cost of debt; (ii) the cost of equity; and (iii) the relative weight between debt and equity. Using these three components, the WACC takes into account the rate of return required by both shareholders and lenders, and thus captures the implicit risk associated with the expected future cash flows of GOSH.

459. To calculate the cost of equity, Versant uses the Capital Asset Pricing Model,⁷²⁵ which included a premium for GOSH’s exposure to Mexican country risk, as it is standard practice.⁷²⁶ Under this model, the relevant cost of equity is calculated based on the risk-free rate, combined with estimates for the equity risk, industry risk and country risk faced by investors in

⁷¹⁸ Expert Damages Report by Versant, p. 82, para. 199.

⁷¹⁹ Expert Damages Report by Versant, p. 83, para. 200.

⁷²⁰ Expert Damages Report by Versant, p. 73, para. 182.

⁷²¹ Expert Damages Report by Versant, table 34, p. 93.

⁷²² Expert Damages Report by Versant, p. 86, para. 208.

⁷²³ Expert Damages Report by Versant, p. 86, paras. 210-212.

⁷²⁴ Expert Damages Report by Versant, p. 86, para. 209.

⁷²⁵ Expert Damages Report by Versant, p. 86, para. 209.

⁷²⁶ Expert Damages Report by Versant, p. 88, para. 213.

companies providing services to Mexico's oil and gas industry. The cost of debt is assumed to be the same as that of GOSH's debt to POSH (adjusted for the Mexican corporate tax rate). The cost of equity and the cost of debt were then weighted based upon the average leverage for the industry. The WACC at which Versant then arrives is 8.33%.⁷²⁷

(iv) *GOSH's Enterprise Value*

460. Versant then calculates an Enterprise Value of GOSH as of May 16, 2014, by discounting the free cash flow figure of \$335 million by the WACC. On that basis, Versant concludes GOSH's But-for Enterprise Value as of May 16, 2014 to be \$205,747,070.⁷²⁸

(b) **The DCF analysis of PFSM**

461. Versant explains that the DCF analysis related to PFSM is simpler than that of GOSH for the following reasons:

Based on PFSM's management fee of US\$ 10,000 per vessel, we estimate that PFSM would have earned US\$ 11.1 million in total revenues in the But-for Scenario from 16 May 2014 to 30 September 2031... In addition, based on PFSM's Excel Financial Statements we estimate that PFSM incurred US\$ 489,336 in operating costs between July 2013 and May 2014.²⁰⁷ This is consistent with an annualized operating cost of US\$ 534,754 per year (or US\$ 89,126 per vessel). We assume PFSM's operating costs per vessel would increase annually by 2%, in line with the assumptions used for GOSH's operating costs per vessel... Our assumptions for revenues and operating costs result in an EBITDA margin of 10.5% for PFSM over the forecast period.

PFSM had no fixed assets or loans, thus we assume no depreciation or interest expenses. Consistent with our GOSH assumptions, we assume a 30% corporate income tax for Mexico. Based on these assumptions, we estimate PFSM would have generated US\$ 0.8 million in FCFF in the But-for Scenario. Discounted at our WACC of 8.33%, PFSM's But-for Enterprise Value as of 16 May 2014 is US\$ 0.6 million.⁷²⁹

462. On that basis, the combined But-For Enterprise Value of GOSH and PFSM amounts to \$206,338,545.⁷³⁰

⁷²⁷ Expert Damages Report by Versant, para. 222.

⁷²⁸ Expert Damages Report by Versant, table 38, p. 101.

⁷²⁹ Expert Damages Report by Versant, pp. 98-99, paras. 240-243.

⁷³⁰ Expert Damages Report by Versant, table 38, p. 101

(c) Deducting the Actual Scenario from the But-For Scenario

463. Versant then calculates and deducts the Enterprise Value of GOSH and PFSM in the Actual Scenario. In the Actual Scenario, the vessels were the primary assets of the Investment. After GOSH's default on the loan granted by POSH, both entities entered into the Settlement Agreement to sell the six vessels and use the proceeds to repay the loan. Versant explains that:

The Settlement and Discharge Agreement details that GOSH's obligation to POSH would be offset by the market value of the vessels returned to GOSH. Based on an independent valuation, the market value of the six GOSH vessels returned to POSH was US\$ 126 million. Therefore, the market value exceeded the debt obligation plus interest by approximately US\$ 6 million.

The Settlement and Discharge Agreement further specifies that the excess of market value over debt obligations should be used to pay operational debts owed by GOSH, including, for example, a working capital loan. This excess was offset by a working capital loan of over US\$ 6 million. The result is that the market value of the six GOSH vessels, while covering the debt related to the vessels, did not satisfy the full amount owed related to other obligations falling short by US\$ 223,205.⁷³¹

464. After deducting the Actual Enterprise Value from the But-For Enterprise Value, Versant concludes that "the value of Claimant's debt investment is entirely offset by the value of the vessels returned to Claimant. The excess offsets additional losses due to outstanding liabilities owed to Claimant by GOSH."⁷³²

(d) Total DCF damages

465. Versant concludes that the total DCF damages suffered by GOSH and PFSM, after withholding tax and dividends, amount to \$69,886,422, as per the table below.⁷³³

⁷³¹ Expert Damages Report by Versant, p. 100, paras. 247-248.

⁷³² Expert Damages Report by Versant, p. 100, para. 248.

⁷³³ Expert Damages Report by Versant, table 38, p. 101

Component	Amount (US\$)
GOSH But-for Enterprise Value	205,747,070
PFSM But-for Enterprise Value	591,475
But-for Enterprise Value	206,338,545
Actual Scenario Value	(126,000,000)
Lost Value	80,338,545
Withholding Tax on Dividends	(10,449,123)
Lost Value after Withholding Tax	69,889,422

466. As noted above, Versant then allocates the appropriate proportion of the damages to POSH, consisting of (i) POSH 99% equity ownership of PFSM; (ii) POSH 49% equity ownership of GOSH at the Valuation Date; (ii) cash flows owed to POSH per the Irrevocable Trust per the loan granted to GOSH to finance the acquisition of the vessels. The amount remaining, after allocating the cash flows described above constitute the damages suffered by GOSH and PFSM. After that allocation, the total DCF damages for each company is illustrated in the table below.⁷³⁴

Loss by Entity <i>US\$</i>	Nominal Damages
	Lost Value
POSH	34,511,981
GOSH	35,372,118
PFSM	5,323
POSH Honesto	-
POSH Hermosa	-
SMP	-
Total	69,889,422

4. Total nominal damages

467. Versant concludes that the total nominal damages (total damages pre-interest), including historical losses (\$50,960,613) and DCF analysis (\$69,889,422) amount to \$120,850,035.

⁷³⁴ Expert Damages Report by Versant, table 43, p. 104.

After allocating the appropriate damages to POSH, the total nominal damages, including both historical losses and DCF analysis is as follows.⁷³⁵

Loss by Entity <i>US\$</i>	Nominal Damages		
	Historical Losses	Lost Value	Total
POSH	50,960,613	34,511,981	85,472,593
GOSH	-	35,372,118	35,372,118
PFSM	-	5,323	5,323
POSH Honesto	-	-	-
POSH Hermosa	-	-	-
SMP	-	-	-
Total	50,960,613	69,889,422	120,850,035

C. FULL REPARATION REQUIRES CLAIMANT AND ITS SUBSIDIARIES TO BE AWARDED INTEREST AT A COMMERCIALY REASONABLE RATE

1. Claimant and its Subsidiaries should receive pre- and post-award interest at a rate that ensures “full reparation”

468. Interest is an integral component of full compensation under customary international law.⁷³⁶ A State’s duty to make reparation arises immediately after its unlawful actions cause harm, and to the extent that payment is delayed, the claimant loses the opportunity to invest the compensation.⁷³⁷ As the International Law Commission’s Articles on State Responsibility make clear, when interest is awarded it should run “from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.”⁷³⁸ This encompasses both pre- and post-award interest. As Ripinsky and Williams explain:

In most cases, tribunals have not considered post-award interest separately from pre-award interest, and have simply granted it until the date of full payment of the

⁷³⁵ Expert Damages Report by Versant, p. 102.

⁷³⁶ *Compañía de Aguas*, Award, para 9.2.1 (“the liability to pay interest is now an accepted legal principle”), **CL-52**; ILC Articles, Art. 38, para. 2 (“As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgment or award concerning, the claim and to the extent that it is necessary to ensure full reparation.”), **CL-14**; J. Y. Gotanda, *Awarding Interest in International Arbitration*, (1996) Vol 90 The American Journal of International Law 40, p. 18, **CL-150**; *Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7, Award, 13 November 2000, para. 96, **CL-151**; *Santa Elena*, paras. 96-97, **CL-44**. See *Siemens*, para. 395, **CL-56**.

⁷³⁷ *Metalclad*, para. 128, **CL-43**. See *Compañía de Aguas*, Award, para. 9.2.3, **CL-52**.

⁷³⁸ ILC Articles, Art. 38(2), **CL-14**.

award. This automatically turns pre-award interest into post-award, and there is no change in the rate and mode of calculation.⁷³⁹

469. Since the payment of interest is an integral element of reparation, the purpose of an award of interest is the same as that of an award of damages for breach of an international obligation: the interest awarded should place the victim in the economic position it would have occupied had the State not acted wrongfully.⁷⁴⁰ On this basis, international arbitral tribunals accept that interest is not an award *in addition* to reparation; rather, it is a component of, and should give effect to, the principle of full reparation.⁷⁴¹ The requirement of full reparation must therefore inform all aspects of an interest award, including the appropriate rate of interest, whether interest should be simple or compound and the periodicity of compounding.⁷⁴²

470. As a result, POSH and its Subsidiaries are entitled to receive interest *until Mexico effectively pays the Award* at a rate that reflects the damage that was suffered for not having received the sums Mexico owes to them for the breaches of the Treaty. Interest shall keep accruing until full payment of the Award by Mexico, including post-award interest.

471. Claimant requests in this case an interest at a commercially reasonable rate applicable as provided in Article 6 of the Treaty.⁷⁴³ Versant provides two commercially reasonable

⁷³⁹ Ripinsky and Williams, pp. 4-5 (citing *Compañía de Aguas*, Award, para. 11.1), **CL-64**; *PSEG*, paras. 348, 351, **CL-115**; *Petrobart*, pp. 88-89, **CL-133**; *MTD*, paras. 247, 253, **CL-110**; *Nykomb Synergetics*, para. 5.3, **CL-128**; *Tecmed*, paras. 197, 201, **CL-47**; *Marvin Feldman v Mexico*, ICSID Case No ARB(AF)/99/1, Award, 16 December 2002, paras. 205, 211, **CL-152**; *Middle East Cement Shipping*, paras. 174, 175, 178, **CL-11**; *Pope & Talbot*, Award in Respect of Damages, paras. 90-91, **CL-119**; *SD Myers*, paras. 303, 306, 312, **CL-27**; *SwemBalt AB v Republic of Latvia*, UNCITRAL, Decision by the Court of Arbitration, 23 October 2000, para. 47, **CL-153**; *Southern Pacific Properties*, paras. 232-236, 257, **CL-61**.

⁷⁴⁰ ILC Articles, Art. 38(1) (“Interest on any principal sum due [...] shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.”), **CL-14**.

⁷⁴¹ See *Asian Agricultural Products Ltd (AAPL)*, para. 114 (“the case-law elaborated by international arbitral tribunals strongly suggests that in assessing the liability due for losses incurred the interest becomes an integral part of the compensation itself”), **CL-10**; *Middle East Cement Shipping*, para. 174 (“Regarding such claims for expropriation, international jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation due”), **CL-11**. See Gotanda, *Awarding Interest in International Arbitration*, pp. 2-3, 18, 21-22, **CL-150**; J. Y. Gotanda, *A Study of Interest*, (2007) Villanova Law Working Paper Series, pp. 4-5, 26-29, **CL-154**.

⁷⁴² Compounding periodicity is the regularity with which interest accrued is added to the underlying capital amount. Capital growth increases when the compounding period is shortened. See Gotanda, *A Study of Interest*, p. 5, **CL-154**.

⁷⁴³ Mexico-Singapore BIT, Art. 5 (establishing that compensation “shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contract Party.”), **CL-1**; Expert Damages Report by Versant, paras. 263, 264.

rates: LIBOR + 4% (the Settlement Agreement between POSH and GOSH reflected LIBOR +4%) and 12% (the interest rate specified in the Charters).

2. Interest should be compounded annually

472. The only way to fully compensate POSH and its Subsidiaries for Mexico's unlawful conduct is to compound the pre-award interest rate on an annual basis.⁷⁴⁴ Tribunals have frequently noted that compound interest best gives effect to the rule of full reparation.⁷⁴⁵ Compound interest ensures that a respondent State is not given a windfall as a result of its breach, as compounding recognizes the time value of the claimant's losses.⁷⁴⁶ It also "reflects economic reality in modern times" where "[t]he time value of money in free market economies is measured in compound interest."⁷⁴⁷ On this basis, interest awarded to POSH and its Subsidiaries should be subject to reasonable compounding. The appropriate periodicity of the compounding is annual.

3. POSH and its Subsidiaries are entitled to pre- and post-award interest

473. Moreover, to the extent Mexico does not promptly remit payment for awarded damages, POSH and its Subsidiaries are entitled to compound interest accruing from the date of the award until payment is made in full. The purpose of post-award interest is "to compensate the additional loss incurred from the date of the award to the date of final payment."⁷⁴⁸ Any delays in payment of a damages award should therefore be reflected and accounted for through the

⁷⁴⁴ See Gotanda, *A Study of Interest*, p. 35 ("[T]he opportunity cost in a commercial enterprise is a forgone investment opportunity. Thus, awarding compound interest at the claimant's opportunity cost would be the most appropriate way to compensate it for the loss of the use of its money."), **CL-154**; see also *ADC*, para. 522 ("[T]ribunals in investorState arbitrations in recent times have recognized economic reality by awarding compound interest"), **CL-73**.

⁷⁴⁵ See, e.g., *Azurix*, Award, para. 440, **CL-81**; *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No ARB/98/2, Award, 8 May 2008, paras. 709, 712, **CL-155**; *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Award, 5 September 2008, paras. 308-313, **CL-156**; *National Grid*, para. 294, **CL-106**; *Bernardus*, para. 146, **CL-76**; *Siag*, paras. 595-598, **CL-78**; *Alpha Projektholding*, para. 514, **CL-114**; *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Award, 21 June 2011, para. 382, **CL-157**; *El Paso*, para. 746, **CL-99**. See *Marion Unglaube*, para. 325, **CL-149**; *Quasar de Valores SICAV SA and others v Russian Federation*, SCC Case No 24/2007, Award, 20 July 2012, para. 226, **CL-158**.

⁷⁴⁶ T. J. Sénéchal and J. Y. Gotanda, *Interest as Damages*, (2008-2009) Vol 47 Columbia Journal of Transnational Law 491, p. 43, **CL-159**. See A. X. Fellmeth, *Below-market Interest in International Claims Against States*, (2010) Vol 13(2) Journal of International Economic Law 423, p. 20, **CL-160**.

⁷⁴⁷ *Continental Casualty*, para. 309, **CL-156**.

⁷⁴⁸ *Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Award, 23 September 2003, para. 380, **CL-161**.

determination of post-award interest. The interest rates applicable to pre-award interest shall be applicable for post-award interest, until full payment of the Award by Mexico.

D. TAX

474. The valuations set out in the Versant Report have been prepared net of Mexican tax. Consequently any taxation by Mexico of the eventual Award in this arbitration would result in POSH and its Subsidiaries being effectively taxed twice for the same income, thereby undermining the very purpose of the Award—*ie*, place POSH and its Subsidiaries in the financial position in which it would have been had Mexico not breached its obligations under the Treaty. This principle has been confirmed by the tribunal in *Rusoro v Venezuela* in the following terms:

The BIT specifies that the compensation for expropriation must be “prompt, adequate and effective” and “shall be paid without delay and shall be effectively realizable and freely transferable”.... If the Bolivarian Republic were to impose a tax on Rusoro’s award, Venezuela could reduce the compensation “effectively” received by Rusoro. A *reductio ad absurdum* proves the point: Venezuela could practically avoid the obligation to pay Rusoro the compensation awarded by fixing a 99% tax rate on income derived from compensations issued by international tribunals, thereby ensuring that Rusoro would only effectively receive a compensation of 1% of the amount granted [....] In conclusion, the Tribunal declares that the compensation, damages and interest granted in this Award are net of any taxes imposed by the Bolivarian Republic and orders the Bolivarian Republic to indemnify Rusoro with respect to any Venezuelan taxes imposed on such amounts.⁷⁴⁹

475. To secure the finality of the Tribunal’s Award in this arbitration, Claimant requests that the Tribunal declare that: (i) its Award is made net of all applicable Mexican taxes; and (ii) Mexico may not tax or attempt to tax the Award.

E. SUMMARY OF DAMAGES

476. POSH and its Subsidiaries are entitled to full compensation for Mexico’s breaches of the Treaty. Taking into account an interest rate of LIBOR +4% (as under the Settlement Agreement) such compensation amounts to a total figure of \$158,553,163, as summarized below:⁷⁵⁰

⁷⁴⁹ *Rusoro*, paras. 852-855, **CL-40**. See *Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata BV v Petróleos de Venezuela SA*, ICC Case No 16848/JRF/CA, Final Award, 17 September 2012, paras. 313, 333(1)(vii), **CL-41**; *Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal LDA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/23, Award, 12 December 2016, paras. 788-792, **CL-42**.

⁷⁵⁰ Expert Damages Report by Versant, Table 47, p. 108.

Loss by Entity (US\$)	Nominal Damages	Pre-award Interest	Total
POSH	85,472,593	27,534,157	113,006,751
GOSH	35,372,118	10,167,441	45,539,559
PFSM	5,323	1,530	6,853
POSH Honesto	-	-	-
POSH Hermosa	-	-	-
SMP	-	-	-
Total	120,850,035	37,703,129	158,553,163

477. Taking into account an interest rate of 12% (as under the Charters), the compensation amounts to \$213,297,620.⁷⁵¹

Loss by Entity (US\$)	Nominal Damages	Pre-award Interest	Total
POSH	85,472,593	66,552,572	152,025,166
GOSH	35,372,118	25,891,116	61,263,234
PFSM	5,323	3,896	9,220
POSH Honesto	-	-	-
POSH Hermosa	-	-	-
SMP	-	-	-
Total	120,850,035	92,447,585	213,297,620

478. The same interest rate will accrue on these amounts after the Award is issued and until payment in full by Mexico.

479. The compensation should be paid without delay, be effectively realizable and be freely transferable, and bear interest at a compound rate sufficient fully to compensate POSH and its Subsidiaries for the loss of the use of its capital as at the respective dates of valuation for each of its investments. The award of damages and interest should be made net of all Mexican taxes; Mexico should not tax, or attempt to tax, the payment of the Award.

XII. REQUEST FOR RELIEF

480. On the basis of the foregoing, without limitation and reserving POSH and its Subsidiaries' right to supplement these prayers for relief, including without limitation in the light of further action which may be taken by Mexico, Claimant respectfully requests that the Tribunal:

⁷⁵¹ Expert Damages Report by Versant, Table 49, p. 109.

- (i) DECLARE that Mexico has breached 4(1) (Fair and Equitable Treatment and Full Protection and Security) and 6 (Expropriation) of the Treaty;
- (ii) ORDER Mexico to compensate POSH for its losses resulting from Mexico's breaches of the Treaty and international law for an amount of \$152,025,166 as of May 16, 2014 plus interest until payment at a commercially reasonable rate, compounded annually;
- (iii) ORDER Mexico to compensate GOSH for its losses resulting from Mexico's breaches of the Treaty and international law for an amount of \$61,263,234 as of May 16, 2014 plus interest until payment at a commercially reasonable rate, compounded annually;
- (iv) ORDER Mexico to compensate PFSM for its losses resulting from Mexico's breaches of the Treaty and international law for an amount of \$9,220 as of May 16, 2014 plus interest until payment at a commercially reasonable rate, compounded annually;
- (v) DECLARE that: (a) the award of damages and interest be made net of all Mexican taxes; and (b) Mexico may not deduct taxes in respect of the payment of the award of damages and interest;
- (vi) AWARD such other relief as the Tribunal considers appropriate; and
- (vii) ORDER Mexico to pay all of the costs and expenses of these arbitration proceedings.

Respectfully submitted,



QUINN EMANUEL URQUHART & SULLIVAN, LLP

Tai Heng-Cheng
Stephen Jagusch
Duncan Watson
Simon Navarro
Diego Durán
Odysseas Repousis
Manuel Valderrama