

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**ESPÍRITU SANTO HOLDINGS, LP AND LIBRE HOLDING, LLC**  
**Claimants**

**v.**

**UNITED MEXICAN STATES**  
**Respondent**

**(ICSID Case No. ARB/20/13)**

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**PROCEDURAL ORDER NO. 3**  
**DECISION ON PROVISIONAL MEASURES**

***Members of the Tribunal***

Mr. Eduardo Zuleta Jaramillo, President of the Tribunal

Mr. Charles Poncet, Arbitrator

Mr. Raúl Emilio Vinuesa, Arbitrator

***Secretary of the Tribunal***

Mr. Francisco Abriani

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3 June 2022

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**I. THE PARTIES**

1. The claimants are Espíritu Santo Holdings, LP (“**ESH**”), a company incorporated under the laws of the province of Alberta, Canada, and L1bre Holding, LLC (“**L1bre Holding**”), a company incorporated under the laws of the State of Delaware, United States of America (collectively, the “**Claimants**”).
2. The responding party is the United Mexican States (the “**Respondent**” or “**Mexico**”).
3. The Claimants and the Respondent are collectively referred to as the “**Parties.**”

**II. PROCEDURAL BACKGROUND**

4. On 17 March 2022, the Claimants submitted an application for provisional measures in accordance with Article 47 of the ICSID Convention, ICSID Arbitration Rule 39, and NAFTA Article 1134, together with exhibits C-0129 through C-0149 and legal authorities CL-0119 through CL-0142 (the “**Application**”). The Application seeks urgent protection from a set of criminal actions brought by Mexico in relation to this Arbitration and involving the Claimants’ corporate representatives and fact witnesses in this proceeding, Mr. Eduardo Zayas Dueñas and Mr. Santiago León Aveleyra.
5. In their letter of the same day, the Claimants proposed a briefing schedule on the Application, suggested that one day is reserved in the event the Tribunal or the Parties seek a hearing on the Application, and requested that the Tribunal issue a ruling on the relief sought once it has reached a decision on this matter, with the reasoned decision to follow at the Tribunal’s convenience.
6. On 18 March 2022, the Tribunal invited the Respondent to comment on the briefing schedule proposed by the Claimants by 21 March 2022.
7. On 21 March 2022, the Respondent suggested an alternative schedule and requested that the main proceeding be suspended until the Tribunal render a decision on the Application.

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8. On 22 March 2022, the Claimants sought leave to reply to the Respondent's letter of 21 March 2022, which the Tribunal granted. In their reply of the same day, the Claimants opposed the Respondent's alternative briefing schedule and its request for a suspension of the main proceeding.
9. On the same day, the Respondent sought leave to respond to the Claimants' letter of 22 March 2022, which the Tribunal granted.
10. On 23 March 2022, the Respondent reiterated its request to have the main proceeding suspended and asked, in the alternative, to be granted an extension of at least six weeks after the conclusion of the written phase and the hearing on the Application, if any, to file its Counter-Memorial on the Merits.
11. On 25 March 2022, the Tribunal established a timetable for the Parties' submissions on the Application and granted the Respondent a one-week extension to file its Counter-Memorial.
12. On 25 April 2022, the Respondent submitted its response on the Application together with exhibits R-0009 through R-0042, and legal authorities RL-0013 through RL-0042 (the "**Response**") opposing the Claimants' Application for Provisional Measures.
13. On 5 May 2022, the Claimants submitted their reply on the Application together with exhibits C-0150 through C-0156, and legal authorities CL-0143 through CL-0145 (the "**Reply**").
14. On 16 May 2022, the Respondent submitted its rejoinder on the Application together with exhibits R-0161 through R-0163 and legal authorities RL-0152 and RL-0153 (the "**Rejoinder**").

### III. THE PARTIES' POSITION

#### A. THE CLAIMANTS' POSITION

15. The Claimants seek urgent protection from the Respondent's criminal actions against, among others, the Claimants' corporate representatives and fact witnesses, Messrs. Zayas and León, which have resulted in the incarceration of Mr. Zayas (the "**Criminal Actions**"). These criminal actions are described further in section 1 below.
16. Specifically, the Claimants ask the Tribunal to order the following:
  - a. that Mexico take all actions necessary to immediately stay the criminal actions during the pendency of this Arbitration, and refrain from taking any further related actions against Mr. Zayas and Mr. León during the pendency of the Arbitration;
  - b. that Mexico take all actions necessary to end the pre-trial detention of Mr. Zayas and ensure his freedom during the pendency of the Arbitration;
  - c. that Mexico take all measures necessary to immediately suspend all criminal investigations against Mr. León until the Tribunal issues a final award in this Arbitration, including withdrawing all requests for Mr. León's extradition;
  - d. that Mexico refrain from engaging in any conduct that may directly or indirectly affect the legal or physical integrity of Mr. Zayas and Mr. León;
  - e. that Mexico refrain from initiating any other criminal proceedings against Mr. Zayas and/or Mr. León, or otherwise relating to the present Arbitration or the Concession;
  - f. that Mexico suspend and/or refrain from initiating any legal proceedings in which it seeks the determination of issues by the Mexican courts that fall to be determined exclusively in the present Arbitration (including, without limitation, with respect to the validity of the Concession);

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- g. that Mexico refrain from engaging in any other course of action that might aggravate the dispute between the parties or jeopardize the procedural integrity of this Arbitration;
  - h. that Mexico pay the Claimants' costs associated with this Application; and
  - i. any further or alternative interim relief that the Tribunal considers just and appropriate (together "the **Requested Measures**").<sup>1</sup>
17. As explained in section 2 below, the Claimants submit that they meet the required legal test for this Tribunal to grant the Requested Measures.

**(1) The Criminal Actions**

18. The Claimants submit that the criminal actions in dispute can be categorized in two groups.
19. The first group refers to criminal actions involving the legality of the June 2016 Concession that Mexico, through the "*Secretaría de Movilidad*" ("**Semovi**"), granted Lusad, a company ESH established for the purpose of operating the Concession. The Concession was awarded following a "Declaration of Necessity" procedure, which is the legal framework pursuant to which Mexico City's governmental departments may grant concessions to private actors when private investment is needed.<sup>2</sup> Under the Concession, Lusad had the exclusive right to install digital taximeters in Mexico City and to develop a mobile ride-hailing application for taxis.<sup>3</sup>
20. The second group refers to alleged reprisals against the Claimants' corporate representatives and fact witnesses, Messrs. Zayas and León.<sup>4</sup>

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<sup>1</sup> Application paras. 21, 132.

<sup>2</sup> Application, para. 24.

<sup>3</sup> Application, para. 7.

<sup>4</sup> Application, para. 6.

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21. The Claimants submit that the Respondent is involved in these criminal investigations. In particular, they contend that these actions are being advanced by a special prosecutor within Mexico’s executive branch and in coordination with the Respondent’s counsel in this Arbitration.<sup>5</sup> In this regard, they argue that the Criminal Actions are being pursued in response to the filing of this Arbitration and as part of Mexico’s defense strategy. These actions, according to the Claimants, “*interfer[e] with Claimants’ due process rights, undermin[e] the Tribunal’s ability to carry out its mandate by intimidating key witnesses, and thus, aggravat[e] the dispute*”.<sup>6</sup>
22. In the Claimants’ view, denying the Requested Measures would “*countenance Mexico’s abuse of its criminal justice system, setting a dangerous precedent and imperiling this arbitral proceeding*”.<sup>7</sup>

***a. The Criminal Actions Relating to the Concession’s Legality***

23. The Claimants submit that Mexico has fabricated charges to criminalize the Concession. In their view, these charges are abusive, illegitimate, and were brought with the purpose to delegitimise the Concession as well as intimidate government employees who could provide testimony in this Arbitration adverse to Mexico’s interests.<sup>8</sup>
24. The Claimants contend that they are aware of at least [REDACTED] in Mexico, which directly relate to [REDACTED]. These are:

- a. [REDACTED]  
These charges were brought against [REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>5</sup> Reply, para. 3.

<sup>6</sup> Application, para. 19.

<sup>7</sup> Reply, para. 5.

<sup>8</sup> Application, para. 59.

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[REDACTED] Mr. Zayas filed an *amparo* action against the arrest warrant, which was suspended in October 2021.<sup>9</sup>

The Claimants submit that the First Criminal Charges are “*demonstrably false.*”<sup>10</sup>

They argue that [REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].<sup>12</sup>

The Claimants submit that, since the filing of this Arbitration, Mexico has revived its First Criminal Charges despite there being no new facts or evidence. In the Claimants’ view, this revival “*can therefore only be explained as a reprisal for the NAFTA claims, an attempt to intimidate [Mr. Zayas] as a witness, and to otherwise interfere with his obligations as a corporate representative for Claimants.*”<sup>13</sup>

b. [REDACTED]  
[REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].<sup>14</sup>

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<sup>9</sup> Application, paras. 11, 64.  
<sup>10</sup> Application, para. 11.  
<sup>11</sup> *Id.*  
<sup>12</sup> Reply, para. 16.  
<sup>13</sup> Application, para. 60.  
<sup>14</sup> Application, paras. 11, 51.

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c. [REDACTED]

25. The Claimants submit that these Criminal Actions constitute Mexico’s *post-hoc* attempt to invalidate the Concession after it was suspended.<sup>16</sup>
26. In particular, they submit that it was only after the filing of this Arbitration that Mexico took action against Mr. Zayas and Semovi in connection with the Concession. The Claimants argue that, from the moment the Concession was granted until its suspension, Mexico repeatedly acknowledged the validity and legality of the Concession, which was granted according to a public, transparent, and competitive procurement process. According to the Claimants, Mexico likewise confirmed Lusad’s compliance with its obligations under the Concession on various occasions.<sup>17</sup>
27. Furthermore, they contend that the files of the Criminal Actions evidence that there is a connection between these charges and the Arbitration, despite the fact that the Arbitration should be irrelevant to any legitimate pursuit of criminal charges against former and/or current government employees.<sup>18</sup> According to the Claimants, the files further reveal that the Respondent’s counsel in this Arbitration has communicated and shared documents, including confidential documents, related to the NAFTA claims with the prosecutor’s office.<sup>19</sup>

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<sup>15</sup> Application, paras. 11, 52.

<sup>16</sup> Application, para. 12; Reply, para. 2.

<sup>17</sup> Application, paras. 12, 31-40.

<sup>18</sup> Application, para. 53.

<sup>19</sup> Application, paras. 13, 55-58.



***b. Other Reprisals Against the Claimants' Corporate Representatives and Fact Witnesses***

28. The Claimants submit that the Respondent is illegitimately pursuing parallel actions against Mr. Zayas and Mr. León as part of “*Mexico’s campaign of retribution and intimidation against Claimants’ corporate representatives and witnesses*”<sup>20</sup> (the “**Fourth Criminal Charges**”).
29. The Fourth Criminal Charges concern [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].<sup>22</sup> According to the Claimants, this “*civil fraud dispute*” lay dormant for years and any action in relation to the business transaction had already prescribed.<sup>23</sup>
30. The Claimants argue that the files of the Fourth Criminal Charges “*reveal a coordinated motive*”<sup>24</sup> because they show that the special prosecutor was not seeking evidence to further any criminal investigation but rather focused its investigation on Lusad, which had no relation with the 2014 business deal.<sup>25</sup> They further submit that [REDACTED]  
[REDACTED] even though this entity did not exist until 2017, implies “*some behind the scenes collusion.*”<sup>26</sup> Thus, in the Claimants’ view, this criminal investigation is “*another front being exploited to disrupt and attack Claimants’ witnesses and these Arbitration proceedings*”.<sup>27</sup>

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<sup>20</sup> Application, para. 15.

<sup>21</sup> Application, para. 16.

<sup>22</sup> Application, para. 67.

<sup>23</sup> Application, paras. 16, 77.

<sup>24</sup> Application, para. 17.

<sup>25</sup> Application, para. 17.

<sup>26</sup> Reply, para. 12.

<sup>27</sup> Application, para. 71.

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31. The Claimants state that, as a result of these actions, on 9 December 2021 the prosecutor sought arrest warrants against Mr. Zayas and Mr. León in relation to these charges.<sup>28</sup> Mr. Zayas was arrested on 22 December 2021.<sup>29</sup> In a 24 December 2021 court hearing, his request to be released pending trial was denied, and, to date, Mr. Zayas remains in pre-trial detention.<sup>30</sup> According to the Claimants, Mr. Zayas is being held in “*deplorable, dangerous, and unsanitary conditions, and his mental health [has been] suffering as a result.*”<sup>31</sup> They submit that Mr. Zayas’ detention is “*arbitrary, unlawful, violates his fundamental human right to liberty and due process.*”<sup>32</sup>
32. The Claimants challenge Mr. Zayas’ preventive incarceration as “*highly unusual and extraordinary*”<sup>33</sup>. The Claimants submit that under Mexican law defendants are entitled to pre-trial release, particularly for minor crimes. Moreover, Mexico’s National Code of Criminal Procedure provides for precautionary procedures to ensure that the accused appears in court, such as travel restrictions, electronic monitoring, periodic appearances before a judge, economic guarantees, and house arrest. The Claimants contend that Mr. Zayas’ defense team was hindered from requesting these conditions during his bail hearing, and that Mexico’s refusal to apply these routine bail conditions “*only further demonstrates its retaliatory motive and bad faith.*”<sup>34</sup> The Claimants affirm that Mr. Zayas will appear when required and note that he would accept conditions on his release to ensure that he is available for trial.<sup>35</sup>

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<sup>28</sup> Application, para. 72.

<sup>29</sup> Application, para. 74.

<sup>30</sup> Application, para. 75.

<sup>31</sup> Reply, para. 2.

<sup>32</sup> Application, para. 75.

<sup>33</sup> Reply, para. 17.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

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33. Moreover, the Claimants contend that, as a result of his imprisonment, Mr. Zayas is unable to provide instructions to the Claimants' counsel in this Arbitration, thereby limiting the evidence that the Claimants' witnesses are able to provide.<sup>36</sup>
34. As to Mr. León, the Claimants note that he is currently in the U.S., and that [REDACTED]  
[REDACTED]  
[REDACTED].<sup>37</sup>
35. In their Reply, the Claimants take issue with the Respondent's reliance on unrelated cases involving Mr. Zayas and Mr. León. In their view, these cases are "*entirely disconnected*" from the Criminal Actions and did not result in any criminal actions against Mr. Zayas and Mr. León.<sup>38</sup> According to the Claimants, the Respondent relies on these cases solely to defame Mr. Zayas and Mr. León and to distract the Tribunal from the relevant facts.<sup>39</sup>

*c. Mexico's Harassment and Intimidation of the Claimants' Witnesses*

36. Finally, the Claimants submit that, after Mr. Zayas' arrest, the Respondent has continued to harass and intimidate the Claimants' witnesses, in particular by releasing confidential information to local media "*in order to encourage stories portraying Mr. Zayas and Mr. León in a negative light, and encouraging others to file fraud claims against the representatives of Lusak*".<sup>40</sup>

**(2) Legal Analysis**

37. The Claimants submit that Article 1134 of NAFTA, Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(1) expressly authorize the Tribunal to order provisional measures.<sup>41</sup>

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<sup>36</sup> Application, para. 19.

<sup>37</sup> Application, paras. 81, 82.

<sup>38</sup> Reply, para. 4.

<sup>39</sup> *Id.*

<sup>40</sup> Application, para. 78.

<sup>41</sup> Application, paras. 86-90.

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38. Relying on ICSID cases,<sup>42</sup> they state that there is “*substantial precedent*” for ordering provisional measures to enjoin domestic criminal actions in respondent States where they imperil a claimant’s right to pursue its claims through its officers or witnesses.<sup>43</sup>
39. The Claimants submit that for the Tribunal to order provisional measures it must determine that:
- a. it has *prima facie* jurisdiction and there is a *prima facie* case on the merits;
  - b. the provisional measures sought would preserve the parties’ rights;
  - c. the measures are necessary, urgent and proportionate.<sup>44</sup>
40. The Claimants contend that they have satisfied the applicable test.
41. In their Reply, they further note that Mexico agrees with the test, although it “*scarcely engages with the legal standard and the applicable case law.*”<sup>45</sup>
42. The Claimants take issue with the Respondent’s reliance on its sovereign right and obligation to investigate potential crimes in its territory to object to the Application. They contend that, by ratifying the ICSID Convention, “*Mexico ‘has accepted that an ICSID tribunal may order measures on a provisional basis, even in a situation which may entail some interference with sovereign powers and enforcement duties.*”<sup>46</sup>

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<sup>42</sup> *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 5, 19 September 2019 (hereinafter *Ipek v. Turkey*) (CL-0119); *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, 2 March 2016 (CL-0120); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010 (hereinafter *Quiborax v. Bolivia*) (CL-0121); *Lao Holdings N.V. v. The Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order, 30 May 2014 (hereinafter *Lao Holdings v. Laos*); *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) [I]*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007 (CL-0122).

<sup>43</sup> Application, paras. 84, 85.

<sup>44</sup> Application, paras. 91, 95; Reply, para. 18.

<sup>45</sup> Reply, para. 18.

<sup>46</sup> Reply, para. 19.

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**a. Prima Facie Case on Jurisdiction and the Merits**

43. According to the Claimants, this Tribunal has *prima facie* jurisdiction, and they have established a *prima facie* claim on the merits.<sup>47</sup>
44. As to the Tribunal's *prima facie* jurisdiction, they submit that:
- a. the Application is made by ESH and L1bre, which are nationals of Canada and the U.S., respectively;
  - b. ESH brought the claim before NAFTA was terminated, and, under Chapter 11 of NAFTA, Mexico consented to refer to ICSID arbitration claims brought by Canadian and U.S. investors;
  - c. ESH also consented to ICSID arbitration;
  - d. while L1bre brought its claim after NAFTA was terminated, in the USMCA Mexico has agreed that certain legacy claims – such as L1bre's claims – may be brought to arbitration under NAFTA until July 1, 2023;
  - e. Mexico is a signatory and has ratified the ICSID Convention;
  - f. the Claimants are owners of an enterprise in Mexico that held the Concession and thus made an investment in Mexico; and
  - g. the Claimants have shown that they have satisfied all prerequisites and time limitations for the filing of claims under NAFTA.<sup>48</sup>

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<sup>47</sup> Application, paras. 92, 93.

<sup>48</sup> Application, para. 92.

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45. As to their *prima facie* case on the merits, the Claimants contend that insofar as their factual assertions in their Memorial on the Merits and its Addendum hold, the Tribunal might possibly conclude that an award could be made in the Claimants' favour.<sup>49</sup>

***b. The Requested Measures Would Preserve the Claimants' Rights***

46. The Claimants submit that the Requested Measures are needed to protect the procedural integrity of the Arbitration, preserve the *status quo* and avoid the aggravation of the dispute, and protect the exclusivity of this ICSID proceeding.<sup>50</sup>

47. The Claimants further submit that ICSID tribunals have confirmed that they may order provisional measures to protect these set of rights, including in cases involving domestic criminal proceedings.<sup>51</sup>

***c. The Requested Measures are Necessary***

48. The Claimants submit that ICSID tribunals have held that provisional measures are necessary when they enable the avoidance of a substantial or serious harm that would not adequately be reparable by an award of damages.<sup>52</sup>

49. The Claimants contend that Mexico's Criminal Actions have and will continue to cause harm to the Claimants and their set of rights, i.e., (i) the protection of the procedural integrity of the Arbitration; (ii) the preservation of the *status quo* and the avoidance of the aggravation of the dispute; and (iii) the protection of the exclusivity of the ICSID proceedings under Article 26 of the ICSID Convention.<sup>53</sup>

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<sup>49</sup> Application, para. 93.

<sup>50</sup> Application, para. 98.

<sup>51</sup> Application, paras. 98-101.

<sup>52</sup> Application, para. 103.

<sup>53</sup> Application, para. 110.

**(i) The Procedural Integrity of this Arbitration**

50. The Claimants submit that the procedural integrity of this Arbitration is compromised by the Criminal Actions because (i) Mexico's targeting of the Claimants' witnesses has a chilling effect on their ability to provide unadulterated testimony; (ii) the actions against the Semovi officials are likely to silence them; and (iii) [REDACTED], he will not be available to provide live testimony and, in any event, such testimony would be compromised by the fact that he is testifying against the State that is detaining him.<sup>54</sup> Relying on ICSID case law, the Claimants argue that provisional measures designed to protect the procedural integrity of the proceedings, are, by definition, necessary.<sup>55</sup>
51. Furthermore, they submit that, given that Mr. Zayas and Mr. León represent and manage the Claimants, the Criminal Actions create practical impediments for the pursuit of their claims because Mr. Zayas is unable to provide instructions and gather relevant documentary evidence, or provide additional written testimony. Furthermore, they contend that if Mexico succeeds in extraditing Mr. León, the Claimants would be left without either of their corporate representatives or fact witnesses.<sup>56</sup> In this regard, the Claimants argue that numerous tribunals have acknowledged the risks that criminal proceedings brought against the representatives or witnesses of a party to the arbitration pose to the procedural integrity of an arbitration, particularly where such proceedings are illegitimate, retaliatory or otherwise suspect.<sup>57</sup>
52. In their Reply, the Claimants express doubts as to whether the Respondent will facilitate Mr. Zayas' remote appearance in the hearing, as stated in the Response, and note that, in any event, the fact that Mr. Zayas is incarcerated may have a chilling effect on his testimony.<sup>58</sup> Further, in their view the Respondent's assertion that the Claimants' counsel

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<sup>54</sup> Application, para. 105.

<sup>55</sup> Application, para. 110.

<sup>56</sup> Application, para. 106.

<sup>57</sup> Application, para. 107.

<sup>58</sup> Reply, para. 25.

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is able to visit Mr. Zayas in prison is “*disingenuous*” because, among others, the Claimants’ counsel is not allowed to bring a laptop, has limited ability to bring in documents, and cannot speak to Mr. Zayas in a confidential setting.<sup>59</sup>

**(ii) *Status Quo* and Non-Aggravation of the Dispute**

53. The Claimants contend that the preservation of the *status quo* is a core function of provisional measures in ICSID arbitration.<sup>60</sup> In this regard, they submit that the Criminal Actions, in particular the incarceration of Mr. Zayas and the threat to Mr. León’s freedom, have disrupted the *status quo*.

54. Further, they argue that Mexico’s actions have aggravated the dispute as they have arguably given rise to a new cause of action for moral damages caused to Messrs. Zayas and León.<sup>61</sup> In their view, the dispute will continue to be aggravated so long as the Respondent continues pursuing the Criminal Actions and harassing the Claimants’ witnesses.<sup>62</sup>

**(iii) Exclusivity of ICSID Proceedings**

55. The Claimants submit that, in accordance with Article 26 of the ICSID Convention, once the subject matter of a dispute is before an ICSID tribunal the parties must withdraw or stay any and all judicial proceedings commenced before national courts in connection with the dispute before the ICSID tribunal.<sup>63</sup>

56. The Claimants contend that [REDACTED], which is at the heart of this Arbitration, violate the principle of exclusivity of ICSID proceedings. Furthermore, they argue that, through these charges, the Respondent is improperly gathering evidence from the Claimants’ witnesses and the Semovi officials,

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<sup>59</sup> Reply, para. 26.

<sup>60</sup> Application, para. 112.

<sup>61</sup> Application, para. 114.

<sup>62</sup> Application, para. 115.

<sup>63</sup> Application, paras. 116, 117.



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which is likely to be relevant to the Arbitration.<sup>64</sup> Thus, in their view, these actions ought to be stayed to preserve the exclusivity of this proceeding.

57. Although the Claimants recognize that the exclusivity of this proceeding is not affected by the Fourth Criminal Charges, they contend that provisional measures are required to enjoin them and free Mr. Zayas.<sup>65</sup>

***d. The Requested Measures are Urgent***

58. The Claimants submit that the accepted standard for the “urgency” test is whether the requested measures must be granted while an arbitration remains pending and before the issuance of an award.<sup>66</sup>
59. Further, they submit that when the rights at issue involve the procedural integrity of an arbitration, the non-aggravation of the dispute, and preserving the exclusivity of ICSID proceedings, “*the need for provisional measures is by definition urgent.*”<sup>67</sup>
60. They thus conclude that the Requested Measures are urgent because, otherwise, the Claimants’ ability to pursue their claims in this Arbitration will be affected.<sup>68</sup>

***e. The Requested Measures are Proportionate***

61. According to the Claimants, the Tribunal must determine whether the harm the Requested Measures intend to prevent outweighs any harm that these measures would cause to the Respondent.<sup>69</sup>
62. It is the Claimants’ position that even though investigating and prosecuting crimes is a sovereign power, tribunals have held that, by signing the ICSID Convention, the

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<sup>64</sup> Application, para. 118.

<sup>65</sup> Application, para. 119.

<sup>66</sup> Application, para. 122.

<sup>67</sup> Application, para. 126.

<sup>68</sup> *Id.*

<sup>69</sup> Application, para. 127.

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contracting parties have accepted some limitation on these powers. Further, they submit that tribunals have routinely held that orders suspending criminal proceedings are proportionate when the criminal proceedings are likely to affect a claimant's ability to present its case, and the proceedings are only stayed during the pendency of the arbitration.<sup>70</sup>

63. Given that the Requested Measures are only sought during the pendency of this Arbitration, the Claimants submit that they are appropriately proportionate.<sup>71</sup>

**B. THE RESPONDENT'S POSITION**

64. The Respondent submits that the Criminal Actions are not mechanisms of retaliation against the Claimants and Messrs. Zayas and León, but rather derive from the existence of potential illicit acts.<sup>72</sup>

65. Further, the Respondent submits that the Claimants' allegations regarding the criminal actions do not meet the required threshold for the Tribunal to grant the Requested Measures. In the Respondent's view, the Claimants "*seek to use the arbitral proceedings to undermine the rule of law in Mexico and seek to overturn decisions of domestic courts through this arbitration.*"<sup>73</sup>

66. The Respondent requests the Tribunal to:
- a. dismiss the Claimants' Application in its entirety;
  - b. safeguard the Respondent's rights to rebut various factual and legal allegations made by the Claimants in their Application; and

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<sup>70</sup> Application, para. 129.

<sup>71</sup> Application, para. 130.

<sup>72</sup> Response, para. 2.

<sup>73</sup> *Id.*

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- c. order the Claimants to pay the costs and expenses incurred by the Respondent in relation to the Application.<sup>74</sup>

**(1) The Criminal Actions**

67. The Respondent submits that “*the criminal investigations faced by Messrs. Zayas and León are carried out in strict accordance with the law,*”<sup>75</sup> and that, through these charges, Mexico only seeks to clarify “*facts related to possible crimes, which is a sovereign right inherent to any democratic State.*”<sup>76</sup>
68. According to the Respondent, a NAFTA arbitration does not grant immunity from criminal investigations and sanctions.<sup>77</sup> It submits that Mexican authorities, including Semovi, are under an obligation to report any activity that could constitute a crime, and Mexico’s Public Prosecutor, which is an autonomous body, has a constitutional mandate to investigate and prosecute crimes.<sup>78</sup>
69. Moreover, the Respondent argues that Messrs. Zayas and León maintain their constitutional rights to participate in these investigations and challenge any action or omission that affects their rights. In this regard, the Respondent notes that Messrs. Zayas and León have indeed filed several *amparo* proceedings in relation to the criminal investigations, which are currently pending.<sup>79</sup>
70. The Respondent contends that because these investigations are secret and confidential, its counsel does not have access to the relevant files as opposed to the Claimants’ counsel. It alleges, however, that based on the information available to it, the Claimants have omitted “*important details*” regarding these Criminal Actions.<sup>80</sup> Further, in its view, the

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<sup>74</sup> Response, para. 166.

<sup>75</sup> Response, para. 25.

<sup>76</sup> *Id.*

<sup>77</sup> Response, para. 3.

<sup>78</sup> Response, para. 13; Rejoinder, para. 4.

<sup>79</sup> Response, paras. 14, 15; Rejoinder, para. 1.

<sup>80</sup> Response, para. 5.

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Application does not meet the threshold necessary for the Tribunal to order the Requested Measures.<sup>81</sup>

***a. The First Criminal Charges***

71. With respect to the First Criminal Charges, the Respondent submits that they were brought before this Arbitration was commenced. In particular, Semovi filed its complaint four months before Libre Holding submitted its Notice of Intent and six months before ESH filed its Notice of Intent.<sup>82</sup>

72. Furthermore, the Respondent contends that the arrest warrant against Mr. Zayas in relation to the First Criminal Charges was issued [REDACTED]  
[REDACTED]  
[REDACTED]<sup>83</sup>

73. Finally, the Respondent emphasizes that, as noted in the Application, Mr. Zayas obtained a suspension of the arrest warrant. According to the Respondent, what the Claimants omit mentioning is that the court order granting the suspension also required Mr. Zayas to, among others, make certain appearances before the relevant judge, [REDACTED]  
[REDACTED]  
[REDACTED].<sup>84</sup>

***b. The Second Criminal Charges***

74. The Respondent argues that the Second Criminal Charges are being advanced by Mexico's prosecutor "*in full adherence to the applicable legal framework.*"<sup>85</sup> With respect to these charges, the Respondent makes the following remarks.

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<sup>81</sup> Response, para. 42.

<sup>82</sup> Response, para. 65.

<sup>83</sup> Response, para. 69.

<sup>84</sup> Response, para. 72; Rejoinder, para. 5.

<sup>85</sup> Response, para. 95.

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75. *First*, the Respondent notes that this criminal investigation was initiated approximately six months before the Claimants submitted their Memorial in this Arbitration, and do not involve neither Mr. Zayas nor Mr. León.<sup>86</sup>
76. *Second*, the Respondent takes issue with the Claimants' argument that the charges are abusive and were brought for the purpose of intimidating Semovi employees. In particular, the Respondent notes that the charged Semovi officials have not participated in this Arbitration, and the Claimants have not indicated their intention to present the testimony of any official or former official of Semovi.<sup>87</sup>
77. *Third*, the Respondent disagrees with the Claimants' contention that these investigations are illegitimate. The Respondent notes that the Claimants have failed to mention that [REDACTED] that more than 254 taxi drivers in Mexico City filed an *amparo* lawsuit against the "Declaration of Necessity", or that an Administrative District Court has ruled, among others, that neither Semovi nor the Adjudication Committee were empowered to grant a concession such as the one awarded by the "Declaration of Necessity" process.<sup>88</sup>
78. *Fourth*, and contrary to the Claimants' assertion, the Respondent submits that it has not supplied documents from the Arbitration to Mexico's prosecutors in charge of investigating these criminal charges.<sup>89</sup>

*c. The Third Criminal Charges*

79. The Respondent argues that these charges refer to [REDACTED] [REDACTED] In the Respondent's view, by bringing these charges the

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<sup>86</sup> Response, para. 83.

<sup>87</sup> *Id.*

<sup>88</sup> Response, paras. 87, 88.

<sup>89</sup> Response, para. 94.

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Mexican authorities were only fulfilling their obligations to report and investigate possible illicit acts.<sup>90</sup>

80. According to the Respondent, these charges do not involve Mr. Zayas nor Mr. León, and do not have any impact on the Arbitration.<sup>91</sup>
81. In response to the Claimants' allegation that Mexico's counsel in this Arbitration has been sharing documents with Semovi with respect to these charges, the Respondent confirms that it has exchanged information with Semovi in order to prepare its defense in the Arbitration and respond to the Application.<sup>92</sup> The Respondent notes that, in any event, these documents are public, were provided by the Claimants themselves, and can be downloaded from the website of the Ministry of Economy.<sup>93</sup>

***d. The Fourth Criminal Charges***

82. With respect to the Fourth Criminal Charges, the Respondent argues that the prosecutor is carrying out the investigation in accordance with the applicable legal framework, and that these investigations “[do] not constitute an action of retaliation or persecution against Messrs. Zayas and León”.<sup>94</sup> With respect to these charges, the Respondent submits as follows.
83. *First*, the complaint that gave rise to these investigations was filed one year before the Claimants' Memorial by a [REDACTED] national, [REDACTED] who has no ties to the Mexican government.<sup>95</sup>
84. *Second*, contrary to the Claimants' contention, these investigations do not relate to a “dormant” dispute. The Respondent notes that the complainant has not withdrawn her

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<sup>90</sup> Response, para. 99.

<sup>91</sup> Response, para. 103.

<sup>92</sup> Response, para. 101.

<sup>93</sup> Response, para. 102.

<sup>94</sup> Response, para. 63.

<sup>95</sup> Response, para. 43.

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complaint and that at least three other individuals have complained that they too were defrauded by the Claimants' witnesses.<sup>96</sup>

85. *Third*, the prosecutor was under a duty to investigate Ms. Pérez' complaint pursuant to its constitutional mandate to investigate any criminal activity. In the Respondent's view, these charges "*cannot be equated with a 'retaliation' against the Claimants and their witnesses.*"<sup>97</sup>

86. *Fourth*, the arrest warrants issued against Messrs. Zayas and León were requested by the prosecutor due to a "need for caution", as provided by Article 141 of the Mexican National Code of Criminal Procedures. The Respondent contends that, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].<sup>98</sup>

87. *Fifth*, during the hearing of 24 December 2021 regarding the arrest warrant, the judge considered that there were grounds to impose pre-trial detention. Mr. Zayas was accompanied by his counsel during the hearing, who was able to defend him. The judge also informed Mr. Zayas that he could negotiate a reparation agreement with the victims given that the charges pertained to property crimes, which would put an end to the criminal investigations. According to the Respondent, Mr. Zayas did not avail himself of this right.<sup>99</sup>

88. *Sixth*, Mr. León obtained a suspension of the arrest warrant issued against him but, as he did not appear before the judge, the suspension was revoked.<sup>100</sup>

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<sup>96</sup> Response, para. 53.

<sup>97</sup> Response, para. 56.

<sup>98</sup> Response, para. 49.

<sup>99</sup> Response, para. 57.

<sup>100</sup> Response, para. 61.

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89. *Seventh*, in good faith and to the extent possible, the Respondent undertakes to request the prosecutor's and/or Mexico's judicial authorities' support in ensuring that Messrs. Zayas and León participate remotely in the hearing and that the Claimants' counsel can work with Mr. Zayas in a confidential setting should Mr. Zayas' legal situation remain the same in the future.<sup>101</sup> In this regard, the Respondent submits that the Claimants have failed to prove their contention that their counsel has been unable to visit Mr. Zayas in prison.<sup>102</sup>

**(2) Other Proceedings Involving Messrs. Zayas and León**

90. The Respondent submits that the Claimants omit mentioning other legal proceedings in Mexico and the United States involving Messrs. Zayas and León, in which their business dealings have likewise been challenged. The Respondent particularly refers to the following proceedings:

a. *Espíritu Santo Holdings v. L1bero Partners and Espiritu Santo Technologies.*

This proceeding relates to a legal battle between the partners of the L1bre Project, the group comprised of Messrs. Zayas and León, and one of Lusad's shareholders, Mr. Covarrubias, and L1bero Partners LP. This dispute led to various civil and criminal proceedings in Mexico and the United States, including an ICC arbitration, in which the partners mutually accused each other of theft, fraud and embezzlement.<sup>103</sup>

b. *Commercial Litigation 191/2019*, which refers to a commercial lawsuit filed by Lusad against Messrs. Zayas and León for having carried out various acts on behalf of Lusad without the required powers.<sup>104</sup>

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<sup>101</sup> Response, para. 10.

<sup>102</sup> Rejoinder, para. 1.

<sup>103</sup> Response, paras. 29-35.

<sup>104</sup> Response, paras. 37, 38.



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91. According to the Respondent, the existence of these additional proceedings undermines the credibility of the Claimants' Application.<sup>105</sup>

**(3) Legal Analysis**

92. The Respondent submits that to grant the Requested Measures, the Tribunal must determine that (i) it has *prima facie* jurisdiction; (ii) there is a right that could be affected and there is a *prima facie* case; and (iii) the measures are necessary, urgent and proportional.<sup>106</sup>
93. The Respondent argues that the Claimants have failed to meet the “*high evidentiary standard*” for this Tribunal to order provisional measures under Article 1134 NAFTA, Article 47 of the ICSID Convention and ICSID Arbitration Rule 39.<sup>107</sup> In this regard, the Respondent submits that tribunals have been extremely cautious when deciding to grant provisional measures to avoid interfering with domestic criminal proceedings.<sup>108</sup> In its view, “*an investment arbitration, and mainly a phase of provisional measures, cannot and should not affect the sovereign right of a State to investigate and punish crimes.*”<sup>109</sup>

***a. The Tribunal Lacks Jurisdiction to Grant the Requested Measures***

94. The Respondent submits that the Claimants conflate the Tribunal's jurisdiction to resolve the disputes underlying this Arbitration with the Tribunal's “competence” to grant the Requested Measures.<sup>110</sup>
95. The Respondent does not deny that the Tribunal has the power to grant provisional measures under the applicable rules. However, it contends that the Tribunal is not competent to grant these measures because (i) they would affect the rights of third parties,

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<sup>105</sup> Response, para. 27.

<sup>106</sup> Response, para. 114.

<sup>107</sup> Response, para. 106.

<sup>108</sup> Response, para. 109.

<sup>109</sup> Response, para. 113.

<sup>110</sup> Response, para. 117.

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namely the victims who denounced the alleged criminal activity that gave rise to the Criminal Actions, (ii) the facts that underlie the Criminal Actions occurred before the Claimants filed their claims in this Arbitration, and (iii) Mexico's prosecutor was obliged to investigate these possible crimes according to its constitutional mandate.<sup>111</sup>

96. The Respondent further argues that the measures requested by the Claimants “*would create a dangerous and disruptive precedent,*”<sup>112</sup> which would empower investor-State tribunals to resolve criminal complaints as a domestic court, release detainees, suspend criminal investigations, suspend arrest warrants or extradition procedures, and affect the rights of complainants.<sup>113</sup>
97. In this regard, the Respondent notes that NAFTA does not exempt any member from applying its internal laws, nor does it provide immunity against criminal investigations.<sup>114</sup>

***b. The Claimants Have Not Made a Prima Facie Showing of a Right that Could be Affected***

98. The Respondent contends that the Claimants have failed to demonstrate that the Criminal Actions have affected the integrity of this Arbitration, aggravated the dispute, or affected the exclusivity of the Tribunal's jurisdiction.<sup>115</sup>
99. The Respondent further takes issue with the case law relied on by the Claimants. In its view, none of the cases cited in the Application are analogous to this dispute and, thus, they do not justify granting the Requested Measures.<sup>116</sup>

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<sup>111</sup> Response, para. 123.

<sup>112</sup> Response, para. 124.

<sup>113</sup> *Id.*

<sup>114</sup> Response, para. 121.

<sup>115</sup> Response, para. 127.

<sup>116</sup> Response, para. 126; Rejoinder, para. 14.

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**(i) The Integrity of the Arbitration**

100. The Respondent submits that it has neither affected the integrity of the proceedings nor the Claimants' ability to participate in this Arbitration. In particular, the Respondent states that it has a genuine interest in Messrs. Zayas and León participating in the Arbitration so that it can exercise its right to cross-examine them during the hearing and challenge their witness statements.<sup>117</sup>
101. In the Respondent's view, the time period that has elapsed since Mr. Zayas' detention and the fact that the Claimants had knowledge of the criminal investigations prior to initiating this Arbitration is proof that the integrity of the Arbitration has not been affected.<sup>118</sup>

**(ii) The Dispute has not Been Aggravated**

102. The Respondent submits that a tribunal may only grant provisional measures if there are substantive and procedural rights that ought to be protected during the arbitration and that must be preserved before the tribunal resolves the jurisdictional issues or the merits of the claim.<sup>119</sup>
103. The Respondent contends that the Claimants' rights have not been aggravated; rather, the Claimants are seeking to immunize their witnesses from the application of the law. In particular, the Respondent submits that:
- a. Messrs. Zayas and León face arrest warrants because Mexico's prosecutor proved to the judges that there was a "need for caution" that justified their incarceration;<sup>120</sup>

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<sup>117</sup> Response, para. 129.

<sup>118</sup> Response, para. 130.

<sup>119</sup> Response, para. 131.

<sup>120</sup> Response, para. 133.

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- b. it is still premature to determine whether Messrs. Zayas and León will be criminally prosecuted and sentenced to prison. In fact, it is possible that Messrs. Zayas and León obtain favourable judgments;<sup>121</sup>
- c. Messrs. Zayas and León have at their disposal domestic legal mechanisms to exercise their rights;<sup>122</sup>
- d. the Claimants were aware of the criminal investigations prior to bringing this Arbitration;<sup>123</sup>
- e. the Claimants' witnesses, mainly Mr. Zayas, has an extensive history of complaints filed against him;<sup>124</sup>
- f. the Fourth Criminal Charges do not have a "strong linkage" with this Arbitration;<sup>125</sup> and
- g. Mexican authorities did not coordinate the timing of the investigations or the issuance of the arrest warrants. Criminal investigations take time, especially considering the complexity of the facts and the disruption caused by the COVID-19 pandemic. Thus, the fact that the investigations that began between 2018 and 2021 are still ongoing is not attributable to Mexico.<sup>126</sup>

**(iii) The Exclusivity of ICSID Proceedings Has Not Been Affected**

104. The Respondent contends that issues arising during the course of criminal proceedings will generally not fall within the jurisdiction of an investor-State tribunal. In its view, in several investment cases, including cases relied on by the Claimants, tribunals have rejected the

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<sup>121</sup> Response, para. 136.

<sup>122</sup> *Id.*

<sup>123</sup> Response, para. 134.

<sup>124</sup> Response, para. 137.

<sup>125</sup> Response, para. 138.

<sup>126</sup> Response, para. 139.

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argument that the exclusivity of an ICSID arbitration may be affected by domestic criminal proceedings as such proceedings do not involve claims similar in nature or subject to investment arbitration.<sup>127</sup>

105. In particular, the Respondent argues that the Fourth Criminal Charges are unrelated to this Arbitration, and that there are no reasons to suppose that the exclusivity of the ICSID proceeding has been violated.<sup>128</sup>

*c. The Requested Measures are not Necessary*

106. The Respondent submits that a measure will be necessary if its purpose is to prevent substantial or irreparable damage to the rights of one of the parties. Further, it contends that, in line with the jurisprudence of the International Court of Justice, investment tribunals have concluded that the requesting party must meet a high standard to show that a measure is necessary.<sup>129</sup>
107. The Respondent contends that the Claimants have failed to show irreparable damage or a serious risk considering the following facts:
- a. Messrs. Zayas and León have evaded the prosecutor's and judges' orders;
  - b. the special prosecutor demonstrated that the detention of Mr. Zayas was warranted;
  - c. the criminal investigations that Messrs. Zayas and León face were initiated by complaints filed by private parties;
  - d. Messrs. Zayas and León have legal remedies they can resort to at the appropriate procedural time;

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<sup>127</sup> Response, paras. 141-145.

<sup>128</sup> Response, para. 142.

<sup>129</sup> Response, para. 147.

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- e. investment arbitration cannot serve as a mechanism to provide immunity from claims filed by private parties;
- f. in the event the legal situation of Messrs. Zayas and León does not change, the Respondent will request the relevant authorities to ensure their remote appearance;
- g. the legal situation of Messrs. Zayas and León remains uncertain and may change in the near future; and
- h. the Claimants' counsel is able to visit Mr. Zayas in prison to provide him with information regarding the Arbitration and assist him with preparing his second witness statement.<sup>130</sup>

***d. The Requested Measures are not Urgent***

108. The Respondent submits that the requirements of necessity and urgency are related and that, with respect to the latter, the Claimants must prove that “*the tribunal cannot wait until the award is issued to prevent irreparable harm from occurring.*”<sup>131</sup>
109. According to the Respondent, the Claimants have not shown any urgency. The Respondent emphasizes that the Claimants were aware of the existence of some of these criminal investigations prior to submitting their Memorial, and that they waited three months from the arrest of Mr. Zayas before submitting their Application.<sup>132</sup>
110. Based on the above, the Respondent concludes that the Requested Measures are neither urgent nor necessary.

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<sup>130</sup> Response, para. 148; Rejoinder, paras. 14-15.

<sup>131</sup> Response, para. 150.

<sup>132</sup> Response, paras. 152, 153; Rejoinder, para. 16.

***e. The Requested Measures are not Proportional***

111. The Respondent argues that the Tribunal must strike a balance between the Claimants' alleged harm and the potential harm that the Requested Measures may cause to Mexico. It contends that the Tribunal must "*show special care*" when granting provisional measures in order not to affect the Claimants' rights, and, at the same time, "*the sovereign rights of a State, such as for example to investigate possible illicit conduct.*"<sup>133</sup>
112. In this regard, the Respondent submits that the Requested Measures are disproportionate as they would require the Tribunal to act as a Mexican court to order the suspension of the criminal investigations and revoke the arrest warrants and the pre-trial detention.<sup>134</sup>
113. Further, in its view, investment tribunals should be cautious when granting provisional measures in instances in which they might affect third parties who are exercising their rights, such as the private parties who initiated some of the criminal investigations against Messrs. Zayas and León.<sup>135</sup>
114. Finally, the Respondent contends that tribunals must be careful when granting provisional measures in instances which involve "*a degree of speculation.*" In this regard, the Respondent submits that the Criminal Actions are at an early stage and, thus, the legal situation of Messrs. Zayas and León might change in the near future.<sup>136</sup>

**IV. THE TRIBUNAL'S ANALYSIS**

115. The Tribunal begins by observing that its power to order or recommend provisional measures is well-established under the rules applicable to this arbitration. Article 1134 NAFTA provides:

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<sup>133</sup> Response, para. 155.

<sup>134</sup> Response, para. 163.

<sup>135</sup> Response, para. 161; Rejoinder, para. 17.

<sup>136</sup> Response, para. 161.

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*Article 1134: Interim Measures of Protection. A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.*

116. The ICSID Convention confirms this power in Article 47:

*Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.*

117. Finally, the ICSID Rules of Arbitration provide in Rule 39(1):

*At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.*

118. The Parties agree that a party requesting provisional measures must satisfy five requirements: (i) *prima facie* jurisdiction;<sup>137</sup> (ii) *prima facie* case;<sup>138</sup> (iii) necessity;<sup>139</sup> (iv) proportionality;<sup>140</sup> and (v) urgency.<sup>141</sup> These requirements enjoy widespread acceptance in investment arbitration.<sup>142</sup>

119. The Tribunal notes that the provisional measures requested by the Claimants can be classified in two groups. The first group refers to current and future criminal actions against

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<sup>137</sup> Application, para. 91; Response, para. 114.

<sup>138</sup> Application, para. 93; Response, para. 114.

<sup>139</sup> Application, para. 95; Response, para. 114.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Cf. *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, 7 July 2017, (hereinafter *Pugachev v. Russia*), para. 212 (**RL-0020**); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, paras. 45, 46 (**CL-0126**).



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Mr. Zayas and Mr. León. The second group refers to measures more general in scope, which pertain to present and future proceedings not specifically directed against Mr. Zayas and Mr. León. In addition, the Claimants request that Mexico be ordered to cover the Claimants' costs associated with its application for provisional measures.<sup>143</sup> Mexico requests the Tribunal to dismiss the Application, to safeguard the Respondent's rights to rebut various factual and legal allegations made by the Claimants in their Application, and to order the Claimants to pay the costs and expenses incurred by the Respondent in relation to the Application.<sup>144</sup>

120. The Tribunal will first consider the request for provisional measures regarding criminal actions against Mr. Zayas and Mr. León (A). It will then consider the other provisional measures requested by the Claimants (B). Finally, it will address issues of costs (C) and preservation of rights (D).

**A. PROVISIONAL MEASURES CONCERNING CRIMINAL ACTIONS AGAINST MR. ZAYAS AND MR. LEÓN**

121. The first group of provisional measures requested by the Claimants pertain to criminal actions against Mr. Zayas and Mr. León. Specifically, the Claimants request this Tribunal to: (i) require Mexico to take all actions necessary to immediately stay the Criminal Actions during the pendency of the Arbitration, and refrain from taking any further related actions against Mr. Zayas and Mr. León during the pendency of the Arbitration; (ii) require Mexico to take all actions necessary to end the pre-trial detention of Mr. Zayas and ensure his freedom during the pendency of the Arbitration; (iii) require Mexico to take all measures necessary to immediately suspend all criminal investigations against Mr. León until the Tribunal issues an award in this Arbitration, including withdrawing all requests for Mr. León's extradition; (iv) require Mexico to refrain from engaging in any conduct that may directly or indirectly affect the legal or physical integrity of Mr. Zayas and Mr. León; (v)

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<sup>143</sup> Application, paras. 21, 132.

<sup>144</sup> Response, para. 166.

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require Mexico to refrain from initiating any other criminal proceedings against Mr. Zayas and/or Mr. León.<sup>145</sup>

122. The Arbitral Tribunal observes, as a preliminary matter, that the Claimants bear the burden of demonstrating that all requirements for granting the Requested Measures are met.<sup>146</sup> In respect of the measures concerning the criminal actions against Mr. Zayas and Mr. León, the request must meet an exceptionally high standard. As noted by the Tribunal in *Caratube v. Kazakhstan*, “a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state.”<sup>147</sup>
123. The Tribunal will now consider the requirements for a successful application for provisional measures, namely, (i) *prima facie* jurisdiction; (ii) a *prima facie* case; (iii) necessity; (iv) proportionality; and (v) urgency.<sup>148</sup>
124. As regards *prima facie* jurisdiction, the Claimants submit that this Tribunal “has *prima facie* jurisdiction *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione voluntatis*.”<sup>149</sup> The Claimants further observe that the Respondent’s arguments on *prima facie* jurisdiction focus on “the relief sought.”<sup>150</sup> For the Claimants, this line of argument “is incorrect and lacks any support.”<sup>151</sup> In turn, the Respondent argues that the Claimants are confusing the jurisdiction of the Tribunal to decide on the dispute with its competence to grant the provisional measures they request.<sup>152</sup> While the Respondent does not call into question the Tribunal’s authority to recommend provisional measures, it submits that this

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<sup>145</sup> Application, paras. 21, 132.

<sup>146</sup> *Pugachev v. Russia*, para. 214 (RL-0020).

<sup>147</sup> *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision regarding Claimant’s Application for Provisional Measures, 31 July 2009 (hereinafter *Caratube v. Kazakhstan*), para. 137 (RL-0022).

<sup>148</sup> Cf. para. 118 *supra*.

<sup>149</sup> Application, para. 92.

<sup>150</sup> Reply, para. 21.

<sup>151</sup> *Id.*

<sup>152</sup> Response, para. 117.

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Tribunal is not competent to recommend the provisional measures the Claimants are requesting.<sup>153</sup> The reasons are twofold. First, those measures affect third-party victims who denounced the acts allegedly committed by Mr. Zayas and Mr. León. Second, the Prosecutor's Office has an obligation to investigate and eventually prosecute crimes committed in areas under its jurisdiction.<sup>154</sup>

125. In the view of the Tribunal, the issue in this case is not its authority to recommend or order provisional measures in general. The wording of Article 1134 NAFTA, Article 47 of the ICSID Convention, and Rule 39(1) of the ICSID Arbitration Rules is broad. Depending on the specific circumstances of the case, an ICSID tribunal can order provisional measures concerning criminal proceedings. In *Caratube v. Kazakhstan*, the tribunal explained:

*[T]he language authorizing ICSID Tribunals in Article 47 of the Convention and Rule 39 is very broad and does not give any indication that any specific state action must be excluded from the scope of possible provisional measures. [...] this broad language can be interpreted to the effect that, in principle, criminal investigations may not be totally excluded from the scope of provisional measures in ICSID proceedings.*<sup>155</sup>

126. Notwithstanding this broad authority to order provisional measures, analysis of *prima facie* jurisdiction for the purpose of deciding on a request for provisional measures cannot be entirely detached from the specific measures under consideration. As noted by the tribunal in *Pugachev v. Russia*, “Claimant must prove, not only that this Tribunal has *prima facie* jurisdiction over the general dispute, but also that it has *prima facie* jurisdiction for the requested interim measures.”<sup>156</sup>
127. In the case at hand, the Tribunal cannot turn a blind eye to the fact that some of the criminal proceedings against Mr. Zayas and Mr. León appear to involve third-party victims and were initiated in response to criminal complaints by third parties. This is particularly the

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<sup>153</sup> Response, para. 119.

<sup>154</sup> Response, para. 123.

<sup>155</sup> *Caratube v. Kazakhstan*, para. 136 (RL-0022).

<sup>156</sup> *Pugachev v. Russia*, para. 216 (RL-0020).

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case of the Fourth Criminal Charges, concerning fraud, which originated from a complaint filed by [REDACTED] national.<sup>157</sup> [REDACTED]

[REDACTED].<sup>158</sup> This appears to have resulted in Mr. Zayas' arrest on 22 December 2021 and an arrest warrant against Mr. León.<sup>159</sup>

128. The Claimants were unable to justify why this Tribunal would be competent to grant provisional measures that will certainly affect the interests of persons that are not a party to this arbitration, such as [REDACTED]. The Tribunal must recognize that Mexican authorities have the duty to investigate crimes committed in areas under their jurisdiction. The Tribunal shall exercise utmost restraint when it comes to provisional measures affecting third parties, in respect of which it has no jurisdiction.
129. Without prejudice to the foregoing, it is not clear that the Claimants' request would meet the other requirements for a successful application for provisional measures. The Claimants submit that "*the Requested Measures are urgently required to ensure that the Claimants' due process rights are not affected by Mexico's pursuit of these retaliatory Criminal Actions against Claimants' corporate representatives and witnesses*".<sup>160</sup> They assert that the criminal actions against Mr. Zayas and Mr. León are a retaliation for the initiation of the NAFTA arbitration. The Tribunal cannot conclude that this has been established satisfactorily.
130. The timing of the criminal actions directly and specifically involving Mr. Zayas and Mr. León (the First Criminal Charges and the Fourth Criminal Charges) suggests otherwise. In relation to the First Criminal Charges, the Tribunal observes that Semovi filed its complaint four months before Libre Holding submitted its Notice of Intent and six months before

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<sup>157</sup> Response, para. 43.

<sup>158</sup> Application, para. 16.

<sup>159</sup> Application, paras. 72 ff.; Response, paras. 49, 50.

<sup>160</sup> Application, para. 131.

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ESH filed its Notice of Intent.<sup>161</sup> The Fourth Criminal Charges, also discussed at para. 127 above, concern a complaint that was filed by a [REDACTED] one year before the Claimants' Memorial. The case moreover pertains to a business transaction dating back to 2014.<sup>162</sup> As explained in *Pugachev v Russia*, “higher evidentiary burden may be required to prove the connection between the arbitration and measures already existing at the time of commencement of the arbitration.”<sup>163</sup>

131. The Respondent has clarified the circumstances under which the Mexican authorities ordered the arrest of Mr. Zayas and Mr. León. It is not implausible that they may have seen a “need for caution” under Article 141 of the Mexican National Code of Criminal Procedures.<sup>164</sup> According to the information provided by the Respondent, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].<sup>165</sup>

132. Mr. Zayas seems to have repeatedly failed to appear before Mexican judges.<sup>166</sup> He had the opportunity to challenge the arrest warrants before domestic authorities, without success. Moreover, in the *amparo* proceedings initiated by Mr. Zayas, the Tenth Judge of the Criminal District noted that Mr. Zayas had justified his failure to appear before the court on a COVID-19 infection but had nonetheless travelled outside Mexico City. This led the Judge to revoke the suspension of an arrest warrant against Mr. Zayas.<sup>167</sup> For his part, Mr. León is still in the United States, where he has requested political asylum.<sup>168</sup>

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<sup>161</sup> Response, para. 65.

<sup>162</sup> Application, para. 16; Response, para. 43.

<sup>163</sup> *Pugachev v. Russia*, para. 251 (RL-0020).

<sup>164</sup> Response, paras. 49, 54

<sup>165</sup> Response, para. 49.

<sup>166</sup> The Respondent provides a chronological overview of the facts at para. 72 of the Response.

<sup>167</sup> Acuerdo del 27 de diciembre de 2021 dentro del Juicio de Amparo 729/2021 (R-0021), also discussed in the Response, para. 72.

<sup>168</sup> Response, para. 58.

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133. Mexico has put forward what appear to be plausible reasons for the Mexican authorities' decision to hold Mr. Zayas in custody and to seek the extradition of Mr. León. It is not for a NAFTA tribunal to exercise judicial review of the decisions of domestic prosecutors, criminal courts, and other competent authorities in such matters. In this case, there is a plausible explanation for Mexican authorities' decision to hold Mr. Zayas in custody and to seek the extradition of Mr. León. There is not sufficient evidence that the said criminal actions were initiated as a retaliation for this Arbitration or are intended to jeopardize the arbitral proceedings. Neither is it established that the criminal actions and arrest warrants against Mr. Zayas and Mr. León would seek to influence their testimony in the Arbitration.
134. As to the necessity of the measures sought, in *Ipek v. Turkey* the Tribunal held that interim measures must be “urgently necessary to ensure a fair trial of the claims that are before it.”<sup>169</sup> In other words, they must be indispensable to prevent irreparable harm,<sup>170</sup> in the sense of “harm that cannot be repaired by an award of damages.”<sup>171</sup> Tribunals have found that this standard is met where precautionary measures are required to preserve the integrity of the proceedings.<sup>172</sup> In *PNG v. Papua New Guinea*, the Tribunal explained that “the party requesting provisional measures must demonstrate that, if the requested measures are not granted, there is a material risk of serious or irreparable injury.”<sup>173</sup> Whether or not a specific measure satisfies the necessity requirement depends on the specific circumstances of the case. As noted by the *PNG* Tribunal:

*The degree of “gravity” or “seriousness” of harm that is necessary for an order of provisional relief cannot be specified with precision and depends in part on the circumstances of the case, the nature of the relief requested and the relative harm to be suffered by each party [...].*<sup>174</sup>

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<sup>169</sup> *Ipek v. Turkey*, para. 41 (CL-0119).

<sup>170</sup> Cf. *Quiborax v. Bolivia* (CL-0121).

<sup>171</sup> *Id.*, para. 156.

<sup>172</sup> *Id.*, para. 157.

<sup>173</sup> *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures, 21 January 2015 (hereinafter *PNG v. Papua New Guinea*), para. 109 (RL-0017).

<sup>174</sup> *Id.*

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135. In the present case, the evidence is insufficient to establish a risk of irreparable harm arising from the criminal proceedings against Mr. Zayas and Mr. León, the arrest warrant against Mr. León, and the imprisonment of Mr. Zayas. It has not been established that pending criminal proceedings would preclude them from providing testimony in the Arbitration. Referring to the situation of Mr. Zayas, who remains in prison, Mexico explained:

*[T]here is no legal impediment whatsoever for members of Hogan Lovells, Freshfields and Mr. Zayas' defense attorneys (made up of members of the law firm Cantoral Cárdenas Abogados) to visit Mr. Zayas in prison so that they provide information related to the arbitration; assist him in the preparation of a second witness statement and appear via videoconference in case he is called to the hearing.*<sup>175</sup>

136. The Tribunal has no reason to question such a statement, yet it intends to emphasize that Mexico is under the obligation to ensure that, despite the criminal actions launched against them, Mr. Zayas and Mr. León will be able to provide uninhibited testimony before this Tribunal without any fear of adverse consequences. Accordingly, as long as Mr. Zayas remains in custody, Mexico shall ensure his physical integrity and guarantee that the Claimants' counsel can meet and work with him in a confidential setting. The Tribunal will also invite Mexico to take steps to ensure that the actions against Mr. León do not turn into an obstacle to the arbitral proceedings, for instance by considering in good faith deferring any further proceedings to seek Mr. León's extradition until the award has been issued. The Tribunal will consequently issue a formal recommendation that the Respondent acts accordingly.
137. The Tribunal sees no reason to go further. In the absence of a clear and proven risk to the integrity of the arbitration proceedings, the measures sought are not urgently necessary. The timing of the Application for Provisional Measures confirms this impression.
138. Finally, the fact that the measures would affect in some cases the rights of third parties and, in any case, the ability of Mexico to investigate and prosecute crimes allegedly committed

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<sup>175</sup> Response, para. 148. *See also* Response, paras. 9, 10.

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within its jurisdiction cannot be ignored from the point of view of proportionality. As stated by the tribunal in *Caratube v. Kazakhstan II*:

*[T]he requested measures be ‘appropriate’ in the circumstances of the individual case to achieve their purpose. This includes a balancing of the Parties’ respective interests at stake. The fact that the Respondent is a State is relevant in this regard. [...] this Tribunal must be mindful when issuing provisional measures not to unduly encroach on the State’s sovereignty and activities serving public interests.*<sup>176</sup>

139. Proportionality is a high bar when it comes to the State’s criminal jurisdiction. As noted by the tribunal in *EuroGas v Slovak Republic*, “*the right and duty to conduct criminal prosecutions is a prerogative of any sovereign State and that only exceptional circumstances may therefore justify that an arbitral tribunal order provisional measures which interfere with criminal proceedings*”.<sup>177</sup>
140. The Claimants have requested provisional measures also in respect of future criminal actions that might be brought against them. In view of the situation as it is today, it would be disproportionate to prohibit the future initiation of criminal proceedings against Mr. Zayas and Mr. León. Witnesses in ICSID proceedings enjoy no immunity from criminal jurisdiction *per se* and creating such immunity, albeit temporarily, would fail to properly heed Mexico’s criminal jurisdiction.

**B. OTHER PROVISIONAL MEASURES REQUESTED BY THE CLAIMANTS**

141. The second group of provisional measures does not specifically refer to Mr. Zayas and Mr. León. The Claimants request this Tribunal to: (i) require Mexico to refrain from initiating any other criminal proceedings otherwise relating to the present Arbitration or the Concession; (ii) require Mexico to suspend and/or refrain from initiating any legal proceedings in which it seeks the determination of issues by the Mexican courts that fall to

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<sup>176</sup> *Caratube International Oil Company LLP & Mr. Devinci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Claimants’ Request for Provisional Measures, 4 December 2014 (hereinafter *Caratube v. Kazakhstan II*), para. 121 (**RL-0016**).

<sup>177</sup> *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3, 23 June 2015 (hereinafter *EuroGas v. Slovak Republic*), para. 77 (**RL-0021**).



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be determined exclusively in the present Arbitration (including, without limitation, with respect to the validity of the Concession); (iii) require Mexico to refrain from engaging in any other course of action that might aggravate the dispute between the parties or jeopardize the procedural integrity of this Arbitration; and (iv) grant any further or alternative interim relief that the Tribunal considers just and appropriate.<sup>178</sup>

142. The Tribunal will first address the request to require Mexico “*to refrain from initiating any other criminal proceedings [...] otherwise relating to the present Arbitration or the Concession*”.<sup>179</sup> This request cannot be granted in the absence of any evidence of a specific risk or urgent necessity for such a broad provisional measure. As noted by the tribunal in *Caratube v. Kazakhstan II*, cited above,<sup>180</sup> the Tribunal “*must be mindful when issuing provisional measures not to unduly encroach on the State’s sovereignty and activities serving public interests*”.<sup>181</sup> This Tribunal has found no sufficient evidence that Mexico might be using criminal investigations as a reprisal for this Arbitration or to intimidate witnesses. Neither can it be assumed that the Respondent would do so in future.
143. The Claimants also request this Tribunal to order Mexico to suspend or refrain from initiating any legal proceedings seeking that domestic courts determine issues falling under the present Arbitration, such as the validity of the Concession. This raises two questions.
144. The first is whether the Tribunal should order Mexico to refrain from initiating any legal proceedings in some way related to issues falling under the present arbitration proceedings. This measure would be clearly disproportionate, and the alleged risk is far from established.
145. The second question is whether this Tribunal should order Mexico to suspend already existent legal proceedings involving the validity of the Concession. According to the Claimants, the First, Second, and Third Criminal Charges are related to the Concession.<sup>182</sup>

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<sup>178</sup> Application, paras. 21, 132.

<sup>179</sup> Application, paras. 21(e), 132(e).

<sup>180</sup> See para. 138 *supra*.

<sup>181</sup> *Caratube v. Kazakhstan II*, para. 121 (RL-0016).

<sup>182</sup> Reply, para. 12.

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The Tribunal observes that, while some of these proceedings involve Mr. Zayas and Mr. León, others do not (e.g. the Second Criminal Charges).

146. The question before the Tribunal is whether legal proceedings allegedly involving the validity of the Concession pose a risk to the integrity of this Arbitration and the exclusivity of the ICSID proceedings. The existence of such a risk has not been conclusively demonstrated. The mere fact that domestic criminal cases have some relation to the factual matrix of the case is insufficient to justify ordering them stayed. As noted by the tribunal in *Lao Holdings v. Laos*:

*The ICSID Convention extends only to investment disputes. [...] Issues of such criminal liability by definition fall outside the scope of the Centre's jurisdiction and the competence of this Tribunal. Neither the ICSID Convention nor the BIT imposes a prohibition on a State that enjoins it from exercising criminal jurisdiction over such matters. [...] The Tribunal rejects any suggestion that ordinary domestic criminal law of general application was intended to be or is constrained by the initiation of ICSID proceedings under the BIT. As expressed by the Respondent, "an arbitration clause is not a license for general lawlessness".*<sup>183</sup>

147. Under truly extraordinary circumstances ICSID tribunals may issue provisional measures restricting the sovereign right of a State to investigate crimes within its jurisdiction, as would be the case of criminal proceedings launched with the sole or main purpose of unduly collecting evidence for the arbitration.<sup>184</sup> The Application was unable to meet this high threshold. Mexico has offered reasonable explanations for the initiation of the criminal actions.
148. The Tribunal has already addressed the First Criminal Charges, which [REDACTED], concluding that it has not been established that they constitute a coordinated manoeuvre to interfere with the NAFTA proceedings.<sup>185</sup> As to the Second Criminal Charges, [REDACTED]  
[REDACTED]

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<sup>183</sup> *Lao Holdings v. Laos*, para. 21 (CL-0123).

<sup>184</sup> Cf. *Lao Holdings v. Laos*, paras. 26 ff (CL-0123).

<sup>185</sup> See para. 130 above.



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parties and curtail Mexico's ability to investigate and prosecute crimes allegedly committed in areas under its jurisdiction. Great caution is mandatory before ordering provisional measures that could encroach the State's sovereign right to exercise criminal jurisdiction in its own territory.<sup>191</sup> Generally phrased, possible risks to the integrity of the arbitral proceedings or to the exclusivity of ICSID jurisdiction do not suffice. The Tribunal is not in a position to grant the interim relief sought by the Claimants.

152. The Tribunal must now determine whether it should require Mexico to refrain from engaging in any other course of action that might aggravate the dispute between the Parties or jeopardize the procedural integrity of this Arbitration. There is no clear evidence that Mexico is currently attempting to jeopardize the proceedings or taking actions that could aggravate the dispute. As explained above, Mexico has offered plausible explanations and the Tribunal sees no urgent need to issue any blank provisional order against Mexico, which is anyway under a strict duty to act in good faith in the proceedings.

153. The Claimants have also requested the Tribunal to grant any further or alternative interim relief that the Tribunal considers just and appropriate.<sup>192</sup> The Claimants have not provided evidence warranting any further provisional measures. Consequently, the Tribunal sees no need to grant any further interim relief at the current stage of the proceedings.

**C. COSTS**

154. Finally, the Claimants request the Tribunal to require Mexico to cover the costs associated with the Application.<sup>193</sup> The Respondent has also requested the Tribunal to compensate Mexico for the costs and expenses incurred during this procedural stage.<sup>194</sup> The Tribunal will consider the allocation of costs in its final decision in this Arbitration.

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<sup>191</sup> Cf. *Caratube v. Kazakhstan II*, para. 121 (**RL-0016**).

<sup>192</sup> Application, paras. 21, 132.

<sup>193</sup> *Id.*

<sup>194</sup> Response, para. 166.

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**D. PRESERVATION OF RIGHTS**

155. The Respondent has requested the Tribunal to safeguard its right to refute factual and legal arguments submitted by the Claimants in connection with the Application for Provisional Measures.<sup>195</sup> The Tribunal clarifies that this decision is made on the basis of the evidence submitted by the Parties as of the date of this decision and considering the situation of fact, as it stands at the moment. This Procedural Order does not preclude the Parties from seeking interim relief in the future, should the circumstances change.

**V. DECISION**

156. For the reasons set out above:

- a. The Tribunal **REJECTS** the Claimants' Application for Provisional Measures, subject to hereunder at (b).
- b. In the interest of maintaining the integrity of the Arbitration, the Tribunal (i) formally invites the Respondent to consider in good faith deferring any further proceedings to seek Mr. Santiago León Aveleyra's extradition until the award has been issued; and (b) expects the Respondent to take all appropriate steps to ensure that Mr. Eduardo Zayas Dueñas' freedom of movement is not unduly restrained and that he will be able to meet with counsel and render testimony not only in conditions similar to the ones he would have normally experienced, but without any fear that may affect his free testimony.
- c. The Tribunal reserves its decision on the allocation of costs.

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<sup>195</sup> Response, para. 166 (iii).

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On behalf of the Tribunal,

[Signed]

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Prof. Eduardo Zuleta Jaramillo  
President of the Tribunal  
Date: 3 June 2022