

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**ESPÍRITU SANTO HOLDINGS, LP AND L1BRE HOLDING, LLC**  
**Claimants**

**v.**

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

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

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**PROCEDURAL ORDER NO. 8**

***Members of the Tribunal***

Mr. Eduardo Zuleta, President of the Tribunal

Mr. Charles Poncet, Arbitrator

Mr. Raúl Emilio Vinuesa, Arbitrator

***Secretary of the Tribunal***

Ms. Elisa Méndez Bräutigam

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November 5, 2022

## **I. INTRODUCTION**

1. On March 17, 2022, the Claimants submitted an application for provisional measures in relation to criminal actions brought by the Respondent involving the Claimants' representatives and fact witnesses in this proceeding, Mr. Eduardo Zayas Dueñas (“**Mr. Zayas**”) and Mr. Santiago León Averleyra (the “**Application**”).
2. On April 25, 2022, the Respondent submitted its response on the Application objecting to the provisional measures sought by the Claimants.
3. On May 5, 2022, the Claimants submitted their reply on the Application and on May 16, 2022, the Respondent submitted its rejoinder.
4. On June 3, 2022, the Tribunal issued Procedural Order No. 3 concerning the Claimants' Application. In its Order, the Tribunal (i) rejected the Claimants' Application, (ii) invited the Respondent to consider in good faith deferring any further proceedings to seek Mr. Santiago León Aveleyra's extradition until the award in this case has been issued, and (iii) noted that it expects the Respondent to take all appropriate steps to ensure that Mr. Zayas' 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.<sup>1</sup>
5. On September 9, 2022, the Claimants submitted an emergency motion for access to Mr. Zayas together with Exhibits A through G (the “**Emergency Motion**”). On the same day, the Tribunal invited the Respondent to comment on the motion by September 13, 2022.
6. On September 13, 2022, the Respondent requested a one-day extension to respond to the Emergency Motion, which the Tribunal granted on the same day.

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<sup>1</sup> Procedural Order No. 3, para. 156(b).

7. On September 14, 2022, the Respondent filed its response on the Emergency Motion together with Exhibits 1 through 11.
8. On September 15, 2022, the Claimants sought leave to reply to the response by September 19, 2022. On the same day, the Respondent sought permission to file a rejoinder on the Emergency Motion in the event the Claimants' request was granted. On the same day, the Tribunal granted the Parties' respective requests and instructed the Respondent to file its rejoinder by Friday, September 23, 2022.
9. On September 19, 2022, the Claimants filed their reply on the Emergency Motion together with Exhibits A through E, and on September 23 the Respondent filed its rejoinder together with Exhibits 12 and 13.
10. On September 29, 2022, the Tribunal issued Procedural Order No. 7. The Order dismissed the Claimants' Emergency Motion and ordered the Respondent "to ensure that Mr. Zayas be able to meet with the Claimants' team of 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 [...]."<sup>2</sup>
11. On October 7, 2022, the Claimants filed a renewed emergency motion for access to Mr. Zayas together with Exhibits A through E (the "**Renewed Motion**").
12. On October 11, 2022, the Respondent filed its Response on the Claimants' Renewed Motion together with Annexes 1 and 2.
13. On October 11, 2022, the Claimants wrote to the Tribunal providing an update on Mr. Zayas' situation.
14. On October 12, 2022, the Tribunal invited the Respondent to comment on the Claimants' communication of October 11 by Friday, October 14.

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<sup>2</sup> Procedural Order No. 7, para. 38.

15. On October 12, 2022, the Claimants wrote to the Tribunal seeking leave to reply to the Respondent's response.
16. On October 13, 2022, the Tribunal informed the Parties that it considered that it had sufficient information and that, after reviewing the Parties' submissions, it would determine whether further submissions or a short virtual hearing were required.
17. On October 14, 2022, the Respondent submitted its response on the Claimants' communication of October 11.
18. On October 14, 2022, the Claimants provided a further update on Mr. Zayas' situation.
19. On October 17, 2022, the Tribunal scheduled a virtual hearing on the Renewed Motion on October 25, 2022, at 11 am (Washington, D.C. time).
20. On October 24, 2022, the Claimants wrote to the Tribunal noting that they had asked the Respondent to "provide a copy of the statement Mr. Eduardo Zayas was compelled to sign at the Reclusorio [S]ur on 11 October" but that Mexico had refused, and requesting that this issue be discussed at the hearing.<sup>3</sup> On the same day, the Tribunal informed the Parties that this matter may be addressed by the Parties within the time allocated to each one.
21. On October 25, 2022, the Tribunal and the Parties held a virtual hearing on the Renewed Motion.
22. On November 1, 2022, the Claimants sought permission to submit the statement signed by Mr. Zayas to the Tribunal. On the same day, the Tribunal instructed the Claimants to explain by November 2, 2022 the subject matter of the statement and its relevance for this proceeding. The Tribunal further invited the Respondent to provide comments on the Claimants' explanation by November 4.

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<sup>3</sup> The Claimants' email to the Tribunal, October 24, 2022.

23. On November 1, 2022, the Respondent wrote to the Tribunal addressing the conditions for the Claimants' representatives to have access to Mr. Zayas.
24. On November 2, 2022, the Tribunal invited the Claimants to submit brief comments on the Respondent's communication of November 1 by November 4.
25. On November 2, 2022, the Claimants submitted their explanation as to the relevance of the statement signed by Mr. Zayas. On November 4, 2022, the Respondent provided its comments on the Claimants' communication.
26. On November 4, 2022, the Claimants confirmed that they had already responded to the Respondent's November 1 communication in their November 2 submission.

## **II. THE PARTIES' POSITIONS**

### **A. THE CLAIMANTS' POSITION**

27. The Claimants file their Renewed Motion due to "Mexico's continued failure to provide Claimants' counsel with access to Mr. Eduardo Zayas as mandated by Procedural Orders Nos. 3 and 7."<sup>4</sup>
28. In particular, the Claimants submit that Mexico has failed to honor its assurances that it would take all necessary steps to guarantee that the Claimants' representatives could meet with Mr. Zayas at the Reclusorio Preventivo Varonil Sur ("**Reclusorio Sur**") under conditions similar to the ones he would have normally experienced and without fear that may affect his free testimony.<sup>5</sup>
29. The Claimants contend that while they complied with the Tribunal's and Mexico's instructions to gain access to Mr. Zayas, the Respondent failed to guarantee that the

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<sup>4</sup> The Claimants' Renewed Motion, October 7, 2022, p. 1.

<sup>5</sup> The Claimants' Renewed Motion, October 7, 2022, p. 1.

Claimants' representatives and Mr. Zayas could meet in a setting that allowed for a free, open, candid and confidential conversation.<sup>6</sup>

30. In particular, the Claimants submit that their meeting with Mr. Zayas took place in a small room that was located within the prison's administrative office, where prison officials and unrestrained prisoners were present, and which had paper-thin walls and contained open partitions as well as windows allowing anyone outside of the room to hear the communications taking place inside. Further, a prison guard was standing close to the door where he could look into the room and hear their conversation.<sup>7</sup> According to the Claimants, under these conditions they were unable to prepare Mr. Zayas' witness declaration.<sup>8</sup>
31. Moreover, the Claimants submit that during their meeting with Mr. Zayas he "made a number of additional concerning statements regarding his treatment and ability to speak freely" and state that he had "recently received threats against his physical integrity."<sup>9</sup> According to the Claimants, Mr. Zayas represented to them that he felt unable to render testimony in a confidential setting.<sup>10</sup>
32. Relatedly, in their communications to the Tribunal of October 11 and October 14, 2022, the Claimants contend that Mr. Zayas was instructed to write a hand-written declaration stating that he has not been the subject of torture, violence or the like. According to the Claimants, "Mr. Zayas signed the declaration under pressure and fearing for his physical integrity."<sup>11</sup> The Claimants say that the Respondent has refused to provide a copy of this declaration.<sup>12</sup>

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<sup>6</sup> The Claimants' Renewed Motion, October 7, 2022, pp. 2-3, 5.

<sup>7</sup> The Claimants' Renewed Motion, October 7, 2022, pp. 3-4.

<sup>8</sup> The Claimants' Renewed Motion, October 7, 2022, p. 5.

<sup>9</sup> The Claimants' Renewed Motion, October 7, 2022, note 1; *see also* Hearing Transcript, October 25, 2022 (English version), p. 22, ll 14-21, p. 46, ll 3-22, p. 47, ll 1-22, p. 48, ll 1-4.

<sup>10</sup> Hearing Transcript, October 25, 2022 (English version), p. 19, ll 19-20.

<sup>11</sup> The Claimants' email to the Tribunal, October 11, 2022.

<sup>12</sup> The Claimants' email to the Tribunal, October 24, 2022.

33. Further, the Claimants submit that the premise of Mr. Zayas incarceration during the pendency of the arbitration “is increasingly suspect.”<sup>13</sup> They contend that the civil complaint against Mr. Zayas, which was the basis for the criminal case brought against him, had been recently voluntarily withdrawn by the plaintiff in that case, [REDACTED]. They state that, despite [REDACTED] withdrawal, the Respondent has not halted its prosecution of Mr. Zayas and continues keeping him incarcerated.<sup>15</sup>
34. As to the relief they seek, in their Renewed Motion the Claimants submit that the only viable option for the Claimants to prepare Mr. Zayas’ declaration consistent with the Tribunal’s orders is to transfer him regularly outside of prison for future meetings. This is not an extraordinary request, the Claimants say, given that prisoners are routinely moved from one facility to another, and the Respondent has allowed the transfer of prisoners to house arrest.<sup>16</sup> In particular, in their Renewed Motion the Claimants request that:

*Mr. Zayas be transferred to the Hogan Lovells’ Mexico City office on any day requested, from the hours of 9:00 AM to 5:00 PM subject to providing 24 hours’ notice, under requirements similar to those stated in Procedural Order No. 7, for as many days as reasonably necessary for Claimants to be able to meet with Mr. Zayas in order to work on his fact witness declaration and receive his input on Claimants’ Reply Memorial.*<sup>17</sup>

35. In their communication to the Tribunal of October 11, 2022, the Claimants seek the following relief:

*(a) Claimants reiterate their request for the relief sought in their letter of 7 October 2022. Mr. Zayas can plainly not work on his declaration and assist Claimants in connection with their forthcoming Reply submission under the current conditions.*

*(b) Claimants request the Tribunal to reconsider its ruling in Procedural Order No. 3 and requests the Tribunal to grant in full the relief Claimants initially sought in their Application for Provisional Measures of 17 March 2022. This is appropriate not only based on the above, but also considering*

<sup>13</sup> The Claimants’ Renewed Motion, October 7, 2022, p. 5.

<sup>14</sup> The Claimants’ Renewed Motion, October 7, 2022, pp. 5-6.

<sup>15</sup> The Claimants’ Renewed Motion, October 7, 2022, p. 6.

<sup>16</sup> The Claimants’ Renewed Motion, October 7, 2022, p. 5.

<sup>17</sup> The Claimants’ Renewed Motion, October 7, 2022, p. 6; *see also* the Claimants’ Renewed Motion, October 7, 2022, p. 1.

*also the latest developments regarding the withdrawal of the civil complaint that gave rise to the criminal action that Mexico used to put Mr. Zayas in pre-trial detention (the details of which are outlined in Claimants' 7 October 2022 letter).*

*(c) Claimants request the Tribunal to enjoin Mexico from submitting into evidence for any purpose in this arbitration the declaration that they obtained from Mr. Zayas under duress. Insofar as Mexico files that declaration for any purpose in this arbitration, Claimants request that it be stricken.<sup>18</sup>*

36. During the hearing of October 25, 2022, the Claimants submitted that, under the existing circumstances, transferring Mr. Zayas to the offices of Hogan Lovells is no longer an option and that ordering Respondent to transfer Mr. Zayas to house arrest is the only possible solution.<sup>19</sup> Further, they contended that the Tribunal has jurisdiction over their Renewed Motion and noted that other tribunals have afforded the relief they seek.<sup>20</sup>

**B. THE RESPONDENT'S POSITION**

37. The Respondent requests that the Claimants' Renewed Motion be dismissed.<sup>21</sup>
38. The Respondent contends that the Mexican authorities have acted in good faith during this proceeding and have undertaken all necessary steps to guarantee that the Claimants could meet with Mr. Zayas under the conditions set forth by the Tribunal in Procedural Orders Nos. 3 and 7.<sup>22</sup> According to the Respondent, it has offered more flexible conditions by allowing the Claimants' representatives to bring electronic devices and exempting them from complying with the necessary registration requirements prior to the visit.<sup>23</sup> The Respondent states that, to the contrary, the

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<sup>18</sup> The Claimants' email to the Tribunal, October 11, 2022.

<sup>19</sup> Hearing Transcript, October 25, 2022 (English version), p. 77, ll 8-19.

<sup>20</sup> Hearing Transcript, October 25, 2022 (English version), p. 24, ll 10-14, p. 48, ll 16-21.

<sup>21</sup> The Respondent's Response on the Renewed Motion, October 11, 2022, p. 7.

<sup>22</sup> The Respondent's Response on the Renewed Motion, October 11, 2022, p. 1.

<sup>23</sup> The Respondent's Response on the Renewed Motion, October 11, 2022, pp. 1, 4; the Respondent's letter to the Tribunal, October 14, 2022, p. 2.

Claimants have refused to comply with the minimum security conditions which are required to meet with Mr. Zayas in the Reclusorio Sur.<sup>24</sup>

39. Further, the Respondent submits that it took the Claimants' representatives three months after the issuance of Procedural Order No. 3 to formally request access to Mr. Zayas. Once the Claimants' representatives requested it, the Respondent says, its legal team took the necessary actions to ensure that the prison authorities granted them access in accordance with the conditions established in Procedural Order No. 7.<sup>25</sup>
40. The Respondent submits that, in light of the Claimants' Renewed Motion, the Respondent's legal team contacted the relevant prison authorities, who confirmed that (i) the Claimants' representatives were not denied access to the Reclusorio Sur, but were requested to comply with the required security measures; (ii) the Claimants' representatives were provided with a separate room to meet with Mr. Zayas to ensure a confidential setting without the presence of inmates or security personnel; and (iii) there were no security or administrative personnel accompanying the Claimants' representatives.<sup>26</sup>
41. In the Respondent's view, the Claimants do not take into account that Mr. Zayas is an inmate, which requires that strict security standards are met in order to guarantee the safety within the prison facility.<sup>27</sup> According to the Respondent, the Claimants seem to expect that Mr. Zayas is granted preferential treatment beyond what the laws and regulations governing Mexican prison authorities provide for.<sup>28</sup>
42. Further, the Respondent notes that the Claimants' representatives acted "*de [] forma abusiva*", particularly by taking pictures inside of the prison facility without

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<sup>24</sup> The Respondent's Response on the Renewed Motion, October 11, 2022, p. 1.

<sup>25</sup> The Respondent's Response on the Renewed Motion, October 11, 2022, p. 2.

<sup>26</sup> The Respondent's Response on the Renewed Motion, October 11, 2022, pp. 2-3.

<sup>27</sup> The Respondent's Response on the Renewed Motion, October 11, 2022, p. 3; the Respondent's letter to the Tribunal, October 14, 2022, p. 1.

<sup>28</sup> The Respondent's Response on the Renewed Motion, October 11, 2022, p. 1.

authorization, which they then submitted into the record in this proceeding.<sup>29</sup> The Respondent contends that, in any event, the photos do not show the alleged presence of excessive security personnel, other inmates, video-cameras or any other element that could have interfered in the Claimants' representatives' conversation with Mr. Zayas.<sup>30</sup>

43. As to [REDACTED] withdrawal of her complaint against Mr. Zayas, the Respondent notes that [REDACTED] only withdrew the civil complaint, not the criminal suit against Mr. Zayas. The Respondent submits that, in any event, the Tribunal is not the competent authority to decide on the scope of [REDACTED] withdrawal.<sup>31</sup>
44. In response to the Claimants' communication of October 11, 2022, the Respondent submits that since March 2022 the Claimants have made grave accusations against Mexico concerning Mr. Zayas' health and that, as a result, the Respondent's legal team reached out to the relevant authorities to inquire about this issue. The authorities informed the Respondent's legal team that (i) Mr. Zayas is in good health and has not been threatened, and (ii) in light of the Claimants' accusations, prison personnel at the Reclusorio Sur requested that Mr. Zayas "*manifestara su estado de salud por escrito*."<sup>32</sup> The Respondent submits that it does not have a copy of this declaration, and that, in any event, the Respondent does not purport to submit it in this proceeding.<sup>33</sup>
45. During the hearing, the Respondent contended that this arbitration cannot be used to interfere with national criminal investigations initiated in relation to potential crimes involving an individual who is not a claimant in this arbitration and a victim who is

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<sup>29</sup> The Respondent's Response on the Renewed Motion, October 11, 2022, p. 4.

<sup>30</sup> The Respondent's Response on the Renewed Motion, October 11, 2022, p. 5.

<sup>31</sup> The Respondent's Response on the Renewed Motion, October 11, 2022, p. 6; the Respondent's letter to the Tribunal, October 14, 2022, p. 3.

<sup>32</sup> The Respondent's letter to the Tribunal, October 14, 2022, p. 3.

<sup>33</sup> *Id.*

not related to this proceeding.<sup>34</sup> The Respondent argued that investment tribunals have repeatedly concluded that they are not competent to order provisional measures that may impinge on criminal investigations.<sup>35</sup> Further, it contended that the Claimants' Renewed Motion (i) does not meet the standard of necessity because the criminal suit against Mr. Zayas is unrelated to this arbitration, and (ii) is not urgent considering that the Claimants' representatives waited months after the issuance of Procedural Order No. 3 before formally requesting access to Mr. Zayas.<sup>36</sup> Moreover, it would be disproportionate to order the release of Mr. Zayas as this would interfere with the jurisdiction of the relevant "*juez de control*."<sup>37</sup>

46. Finally, the Respondent submitted that Mr. Zayas' criminal counsel can resort to the competent authorities and the available mechanisms under Mexican law to safeguard Mr. Zayas' rights.<sup>38</sup>

### III. CONSIDERATIONS

47. The Tribunal recalls, as it did in Procedural Orders Nos. 3 and 7, that it has the power to order or recommend provisional measures under Article 1134 NAFTA, Article 47 of the ICSID Convention, and Rule 39(1) of the ICSID Rules of Arbitration. This is the third time this Tribunal considers a request for provisional measures concerning the detention of Mr. Eduardo Zayas Dueñas in Mexico.
48. On this occasion, the Claimants essentially request this Tribunal to reconsider its ruling in Procedural Order No. 3 and recommend that Mr. Zayas be granted house arrest.<sup>39</sup> While the Claimants initially requested this Tribunal to order that Mr. Zayas "*be transferred to the Hogan Lovells' Mexico City office on any day requested, from*

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<sup>34</sup> Hearing Transcript, October 25, 2022 (Spanish version), p. 42, ll 11-17, p. 46, ll 5-10.

<sup>35</sup> Hearing Transcript, October 25, 2022 (Spanish version), p. 44, ll 4-8.

<sup>36</sup> Hearing Transcript, October 25, 2022 (Spanish version), p. 43, ll 4-17.

<sup>37</sup> Hearing Transcript, October 25, 2022 (Spanish version), p. 44, ll 12-15.

<sup>38</sup> Hearing Transcript, October 25, 2022 (Spanish version), p. 30, ll 16-17, p. 31, ll 1.

<sup>39</sup> The Claimants' email to the Tribunal, October 11, 2022; Hearing Transcript, October 25, 2022 (English version), p. 77, ll 8-19.

*the hours of 9:00 AM to 5:00 PM subject to providing 24 hours' notice [...] for as many days as reasonably necessary [...]*”,<sup>40</sup> they then submitted that transferring the witness to house arrest would be the only possible solution to the impossibility to obtain a free testimony from Mr. Zayas.<sup>41</sup> During the hearing of October 25, 2022, the Claimants also referred to the need to order a stay of the criminal proceedings pending against Mr. Zayas.<sup>42</sup>

49. As stated in Procedural Order No. 3, a request for provisional measures must meet several requirements: (i) *prima facie* jurisdiction and a *prima facie* case; (ii) necessity; (iii) proportionality, and (iv) urgency.<sup>43</sup> In Procedural Orders Nos. 3 and 7, the Tribunal found that these requirements were not completely met in the present case. The question now before the Tribunal is whether the events that occurred since the issuance of Procedural Order No. 7 justify revisiting the issue. Having examined the evidence submitted by the Parties and giving careful consideration to the arguments on both sides, the majority of the Tribunal finds that the Claimants have failed to satisfy the requirements for the requested provisional measure.
50. The Claimants have invoked in favor of their applications for provisional measures the interim award in *Pugachev v. Russia*.<sup>44</sup> The majority of the Tribunal does not see how the *Pugachev* decision would support the interim relief sought by the Claimants. It is worth recalling that the *Pugachev* tribunal denied a request for interim measures related to the protection of witnesses.<sup>45</sup> It further denied the claimant's request to suspend criminal proceedings in Russia.<sup>46</sup> The *Pugachev* Interim Award only granted

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<sup>40</sup> The Claimants' Renewed Motion, October 7, 2022, p. 6.

<sup>41</sup> Hearing Transcript, October 25, 2022 (English version), p. 77, ll 8-19.

<sup>42</sup> Hearing Transcript, October 25, 2022 (English version), pp. 48, ll 21-22 and 64, ll 1-3.

<sup>43</sup> Procedural Order No. 3, June 3, 2022, para. 123.

<sup>44</sup> *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, July 7, 2017 (**RL-0020**). Cited, e.g., in the Claimants' Reply on the Emergency Motion, September 19, 2022, note 1.

<sup>45</sup> *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, July 7, 2017, paras. 336ff. (**RL-0020**).

<sup>46</sup> *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, July 7, 2017, paras. 275, 430 (**RL-0020**).

a request to seek suspension of extradition proceedings in France in circumstances that substantially differ from the ones in this case as explained below.<sup>47</sup>

51. The facts of this case are substantially different to the *Pugachev v. Russia* case. First, Mr. Pugachev was not a witness, as Mr. Zayas, but the claimant in the arbitration.<sup>48</sup> Second, the commencement of criminal proceedings against Mr. Pugachev was clearly connected to the facts underlying his claim against the Russian Federation.<sup>49</sup> Such factual connection is neither evident nor apparent in the case of Mr. Zayas. Third, the criminal proceedings against Mr. Pugachev were commenced on the initiative of organs of the Russian State.<sup>50</sup> By contrast, the criminal proceedings against Mr. Zayas were launched before the arbitration began as a response to a criminal complaint filed by a foreign third party unrelated to the Respondent. Fourth, the extradition of Mr. Pugachev was imminent, so that, there was an evident risk to his ability to appear in the hearings and present his case against Russia.<sup>51</sup> In the case of Mr. Zayas the conditions to render testimony may not be ideal, precisely because he is in prison. Still, the evidence suggests that – with the cooperation and coordination of the Respondent, the Claimants’ counsel, and Mr. Zayas’ criminal attorney – Mr. Zayas will be able to render testimony under the conditions set by the Tribunal in Procedural Orders Nos. 3 and 7.
52. The majority of the Tribunal further finds that the present case is also fundamentally different from *Hydro v. Albania*, where the arbitral tribunal, including one of the arbitrators in this case, recommended the respondent State to suspend criminal proceedings against Mr. Francesco Becchetti and Mr. Mauro De Renzis and to take

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<sup>47</sup> *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, July 7, 2017, paras. 275, 430 (RL-0020).

<sup>48</sup> *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, July 7, 2017, para. 1 (RL-0020).

<sup>49</sup> *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, July 7, 2017, paras. 266f., 331 (RL-0020).

<sup>50</sup> *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, July 7, 2017, paras. 266f. (RL-0020).

<sup>51</sup> *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, July 7, 2017, paras. 321ff. (RL-0020).

all actions necessary to suspend extradition proceedings pending against them.<sup>52</sup> In the majority view, there are two key differences between the *Hydro v. Albania* case and the facts before this Tribunal. First, Mr. Becchetti and Mr. De Renzis were claimants in the arbitral proceedings.<sup>53</sup> This circumstance was essential to the *Hydro* Tribunal's decision to grant interim relief. The arbitrators underlined that “[t]he ability of the Claimants to effectively participate in this arbitration, specifically Messrs Becchetti and De Renzis is extremely important. Not only are they Claimants in their own right but they are intimately connected with the Corporate Claimants.”<sup>54</sup> From the standpoint of the arbitral proceedings, the circumstances of Messrs. Becchetti and De Renzis are therefore not comparable to the situation of Mr. Zayas in the view of the majority of this Tribunal, who may be connected to the Claimants but is not a claimant in his own right, but only a witness. Second, as opposed to the present case, the criminal proceedings were closely related to the investment and, thus, to the factual matrix of the arbitration.<sup>55</sup> This is not the case for the proceedings pending against Mr. Zayas, which are wholly unrelated to the NAFTA claim and revolve around third-party interests.

53. The present case is hence fundamentally different from other cases where arbitral tribunals have granted provisional measures concerning criminal proceedings. The majority of the Tribunal concludes that the Claimants' Renewed Motion does not satisfy the standard formulated in past cases for granting the interim relief sought.
54. As regards *prima facie* jurisdiction, the arbitral tribunal in *Pugachev v. Russia* held that “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

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<sup>52</sup> *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, March 3, 2016, para. 5.1 (CL-0120). Cited, e.g., in the Claimants' Reply on the Emergency Motion, September 19, 2022, note 1 and in the Claimants' Application, March 17, 2022, para. 20.

<sup>53</sup> *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, March 3, 2016, para. 1.2.b (CL-0120).

<sup>54</sup> *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, March 3, 2016, para. 3.36 (CL-0120).

<sup>55</sup> *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, March 3, 2016, paras. 2.31 and 3.41 (CL-0120).

*interim measures.*<sup>56</sup> In Procedural Order No. 3, the Tribunal noted that a request for provisional measures concerning criminal proceedings must meet a “particularly high” threshold.<sup>57</sup> This holds especially true when the criminal complaint at stake involves third-party victims, in respect of which this Tribunal has no jurisdiction.<sup>58</sup>

55. There is no doubt that the criminal proceedings that have resulted in Mr. Zayas’ arrest were initiated due to a criminal complaint by a third party unrelated to the Mexican State. This factual setting has not changed. The Claimants submit that the third party withdrew the civil action against Mr. Zayas.<sup>59</sup> However, the Respondent has stated, and the Claimants have not disputed, that the withdrawal of the civil action does not result in the termination or withdrawal of the criminal proceedings.<sup>60</sup>
56. The Tribunal observes that the proceedings pending against Mr. Zayas bear no relation to the NAFTA claims of ES Holdings and L1bre Holding. The alleged criminal offences of Mr. Zayas are entirely divorced from the factual matrix of the NAFTA case. Against this background, even assuming that the criminal case against Mr. Zayas might cause some disruption in the conduct of the arbitration, it would be improper for this Tribunal to intervene in Mexico’s exercise of its criminal jurisdiction. As expressed by the Tribunal in *Hydro v. Albania*:

*[...] [T]here may be situations where incarceration of a claimant would disrupt an arbitration but where it would be improper for the tribunal to intervene. An example given by counsel is where a person is charged with a serious offence totally unrelated to the factual circumstances of the dispute being arbitrated, such as murder. But that is not the situation here.*

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<sup>56</sup> *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, July 7, 2017, para. 216 (**RL-0020**).

<sup>57</sup> Procedural Order No. 3, June 3, 2022, para. 122; *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision regarding Claimant’s Application for Provisional Measures, July 31, 2009, para. 137 (**RL-0022**).

<sup>58</sup> Procedural Order No. 3, June 3, 2022, paras. 127-128.

<sup>59</sup> The Claimants’ Renewed Motion, October 7, 2022, pp. 5-6.

<sup>60</sup> The Respondent’s Response on the Renewed Motion, October 11, 2022, pp. 5-6; the Respondent’s letter to the Tribunal, October 14, 2022, p. 3. Cf. also the Claimants’ Renewed Motion, October 7, 2022, pp. 5-6.

*The alleged offences here are not divorced from the investments made by the Claimants.*<sup>61</sup>

57. In their repeated requests concerning Mr. Zayas' imprisonment, the Claimants have thus been unable to establish the jurisdiction of this Tribunal to grant a provisional measure granting Mr. Zayas house arrest, a measure that may not only interfere with the courts of Mexico in a case unrelated to the investment claim but affect the interests of persons that are not a party to this arbitration. This Tribunal has to adjudicate the investment claim under NAFTA. In the majority view, it cannot recommend provisional measures that overstep the authority of domestic criminal courts in criminal matters, along with the interests of a third-party victim who has no standing in this arbitration.
58. The Tribunal takes note of the Claimants' allegations on the conditions of the prison where Mr. Zayas is being held and that he "*recently received threats against his physical integrity.*"<sup>62</sup> However, Mr. Zayas is not a party to the present arbitration. Neither does counsel for the Claimants represent his interests. Accordingly, in the view of the majority of the Tribunal, concerns about Mr. Zayas' health and conditions of imprisonment should be raised by his attorney before competent domestic authorities. This arbitration is not the proper forum to address such concerns. If the conditions for house arrest under Mexican criminal law are met, as claimed by the Claimants, it is for Mr. Zayas' counsel to request to the proper Mexican courts the change in the conditions of imprisonment of Mr. Zayas. There is no evidence before this Tribunal that such a request has been made. What the Claimants are asking this Tribunal to do is to substitute counsel of Mr. Zayas for counsel for the Claimants and to substitute Mexican courts for this Tribunal and decide on matters related to the imprisonment of Mr. Zayas. Those are matters for a Mexican court to decide at the request of Mr. Zayas' criminal attorney.

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<sup>61</sup> Emphasis added. *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, March 3, 2016, para. 3.19 (CL-0120).

<sup>62</sup> The Claimants' Renewed Motion, October 7, 2022, note 1; *see also* Hearing Transcript, October 25, 2022 (English version), p. 22, ll 14-21, p. 46, ll 3-22, p. 47, ll 1-22, p. 48, ll 1-4.

59. The conditions of Mr. Zayas as an inmate, as submitted by the Claimants, merit the concern and empathy of this Tribunal. However, as expressed in Procedural Order No. 7, for the purposes of the present arbitration this Tribunal is concerned with the situation of Mr. Zayas only as far as it may prevent him from rendering testimony in the investment arbitration proceedings.<sup>63</sup> The Tribunal has not been presented with any material evidence suggesting that Mr. Zayas is being specifically pressured to abstain from rendering testimony or to make an untruthful statement in these proceedings. Neither is there any evidence that Mr. Zayas' conditions of imprisonment are substantially different from those of other inmates. Even assuming the existence of differential treatment of Mr. Zayas in respect of other inmates, there is no evidence that the difference directly affects this arbitration. The Claimants' counsel representation that Mr. Zayas feels unable to render confidential testimony is insufficient in the opinion of the majority of the Tribunal.<sup>64</sup> Representations about Mr. Zayas' sense of fear do not provide sufficient justification for a NAFTA Tribunal to recommend the transfer to house arrest of a witness who is in prison for reasons unrelated to the investment claim, due to criminal proceedings commenced prior to the initiation of the arbitral proceedings in response to a third-party complaint.
60. Besides *prima facie* jurisdiction, a party requesting provisional measures must satisfy the requirement of necessity. This requirement entails a high burden where interim measures affect criminal proceedings.<sup>65</sup> In *Hydro v. Albania*, the Tribunal defined the threshold as one of absolute necessity:

*“[C]riminal law and procedure are a most obvious and undisputed part of State sovereignty. That (trite) fact supports the approach adopted here by the Tribunal, namely that any obstruction of the investigation or prosecution of conduct that is reasonably suspected to be criminal in nature should only be ordered where that is **absolutely necessary**.”*<sup>66</sup>

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<sup>63</sup> Procedural Order No. 7, September 29, 2022, para. 31.

<sup>64</sup> Hearing Transcript, October 25, 2022 (English version), p. 19, ll 17-20.

<sup>65</sup> Cf. Procedural Order No. 3, June 3, 2022, para. 134.

<sup>66</sup> Emphasis added. *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, March 3, 2016, para. 3.16 (CL-0120).

61. The Claimants must provide clear evidence of a risk of irreparable injury if the measures are not granted.<sup>67</sup> While this Tribunal has required Mexico to ensure that Mr. Zayas be allowed to declare in “*conditions similar to the ones he would have normally experienced*”<sup>68</sup>, it has also acknowledged that the conditions of a detainee cannot be identical to those a person would experience in freedom.<sup>69</sup>
62. The Claimants’ request for reconsideration is not motivated by an absolute lack of access to Mr. Zayas, but by the conditions and physical setting under which their conversation with Mr. Zayas took place.<sup>70</sup> The evidence on the record shows that the Claimants do have access to Mr. Zayas. Moreover, Mexican authorities have granted exceptions to the general visit regime applicable to inmates, including the authorization of counsel for the Claimants and other members of the Claimants’ team to meet with Mr. Zayas, allowing the use of computers and other electronic devices, offering separate areas for the interviews, and allowing flexibility in the timing of the previous notice of the visits.
63. During the hearing, the Respondent mentioned the possibility of better coordination to improve the conditions of the visits for the purposes of obtaining Mr. Zayas’ testimony.<sup>71</sup> Further, in a communication dated November 1, 2022 the Respondent indicated that it is taking steps to assure the availability of a room that meets the conditions established by the Tribunal for the meetings of Mr. Zayas and counsel for the Claimants. The Tribunal invites the Parties to seek the necessary coordination, with the cooperation of the Respondent, counsel for Mr. Zayas, and counsel for the Claimants.

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<sup>67</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, January 21, 2015, para. 109 (**RL-0017**).

<sup>68</sup> Procedural Order No. 3, June 3, 2022, para. 165(b).

<sup>69</sup> Procedural Order No. 7, September 29, 2022, para. 34.

<sup>70</sup> The Claimants’ Renewed Motion, October 7, 2022, pp. 2-3, 5.

<sup>71</sup> Cf. Hearing Transcript, October 25, 2022 (English version), p. 40 ll 13ff; the Respondent’s opening presentation during the hearing, slides 13, 26.

64. The Tribunal understands that the conditions for interviewing Mr. Zayas in prison are not ideal but, in the majority view and for the above reasons, the situation does not satisfy the threshold of necessity. There is indeed no indication that meeting Mr. Zayas in the current conditions entails a serious or irreparable injury to the Claimants that cannot be redressed by an award of damages.<sup>72</sup>
65. The majority of the Tribunal also takes the view that the Claimants have failed to fulfill the requirement of proportionality. Interference with criminal proceedings is an intense encroachment on a State's sovereignty.<sup>73</sup> The Claimants have requested this Tribunal to intervene in criminal proceedings resulting from a third-party complaint, unrelated to the NAFTA claim, launched against a witness rather than a party to the arbitral proceedings, and where competent domestic courts ordered to hold the detainee in custody due to unjustified failures to appear before criminal judges.<sup>74</sup> The fact that counsel for the Claimants has access to Mr. Zayas in less than ideal conditions – conditions that the Respondent has agreed to improve – is manifestly insufficient to tip the balance of proportionality in favor of a provisional measure that would allow Mr. Zayas to leave prison and await the result of the criminal proceedings in house arrest. Neither is it reasonable to stay criminal proceedings in the present circumstances. The measures requested by the Claimants are manifestly disproportional.
66. The majority of the Tribunal finally holds that the Claimants have failed to meet the requirement of urgency. There is no evidence that Mr. Zayas' counsel has attempted to obtain house arrest for his client or filed a complaint before Mexican courts about his conditions of imprisonment. The Respondent has shown that it took months for the Claimants' representatives to formally request access to Mr. Zayas after the

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<sup>72</sup> Cf. *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosc Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, February 26, 2010, para. 156 (CL-0121).

<sup>73</sup> *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3, June 23, 2015, para. 77 (RL-0021).

<sup>74</sup> The Tribunal already assessed the circumstances of Mr. Zayas' arrest in Procedural Order No. 3, June 3, 2022, para. 132.

issuance of Procedural Order No. 3.<sup>75</sup> If there is any urgency in the present case, such urgency is – at least in part – the result of the conduct of the Claimants and Mr. Zayas’ attorney. Under these circumstances, this Tribunal is unable to see an urgency justifying the requested provisional measures.

67. In sum, the majority of the Tribunal sees no reason to depart from its previous findings concerning the incarceration of Mr. Zayas. The Claimants have failed to fulfill the requirements for a decision recommending that Mr. Zayas be transferred to house arrest. Neither have they satisfied the even higher standard for ordering a stay of the ongoing criminal proceedings against Mr. Zayas.
68. Finally, the majority of the Tribunal sees no reason for a refusal by the Claimants to accept conditions other than house arrest that the Respondent has offered and that may allow the Claimants’ counsel to meet with Mr. Zayas privately with the proper coordination between the Parties and Mr. Zayas’ counsel.

#### **IV. DECISION**

69. For the above reasons, the majority of the Tribunal:
1. **DISMISSES** the Claimants’ Renewed Motion of October 7, 2022 in its entirety;
  2. **REAFFIRMS** its findings and decisions in Procedural Orders Nos. 3 and 7.

[Signed]

Eduardo Zuleta Jaramillo  
President of the Tribunal  
Date: November 5, 2022

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<sup>75</sup> The Respondent’s Response on the Renewed Motion, October 11, 2022, p. 2; Hearing Transcript, October 25, 2022 (Spanish version), p. 43, ll 10-17.