INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

v.

United Mexican States

(ICSID Case No. ARB/21/25)

DECISION ON THE CLAIMANTS' APPLICATION FOR INTERIM MEASURES

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

Secretary of the Tribunal
Ms. Anneliese Fleckenstein

January 26, 2022

I. BACKGROUND

1. On December 14, 2021, the Claimants submitted an application for interim measures of protection (the "Application for Interim Measures"). The Claimants' primary request for relief was for the Tribunal to order *"Mexico to cease any action that may deprive the Tribunal of jurisdiction to hear Claimants' claims, including any action related to concluding the 821 Contract or calling on the US$ 41 million performance guarantee, until this arbitration concludes*".[1]

2. On December 18, 2021, the Claimants' submitted a supplement to their initial request ("Supplement to the Application for Interim Measures"). The Claimants again reiterated their request that "*Mexico to cease any further action that may deprive the Tribunal of jurisdiction to hear Claimants' claims, to wit, any action related to the 'finiquito' of the 821 Contract or making a claim against the US$ 41.8 million performance guarantee.*"[2]

3. On January 3, 2022, the Respondent submitted their response to the Application for Interim Measures, opposing the Claimant's request for interim measures (the "Response to the Application").

4. On January 18, 2022, the Tribunal held a videoconference with the Parties, during which the Parties made presentations summarizing their views and responded to the Tribunal's questions.

5. Having considered the Parties' written submissions and oral arguments, the Tribunal now issues this decision on the request for interim measures in the form of a procedural order (signed by the President of the Tribunal).

II. ANALYSIS

A. Introduction

6. As indicated, the Claimants' main request for relief is that the Tribunal orders "*Mexico to cease any action that may deprive the Tribunal of jurisdiction to hear Claimants' claims, including any action related to concluding the 821 Contract or calling on the US 41 million performance guarantee until this arbitration concludes*".

7. Irrespective of the broad reference to "*any action that may deprive the Tribunal of jurisdiction*", the context of the Claimants' requested relief and the information provided by the Parties makes it clear that the gist of the Claimants' objective is that Pemex's subsidiary "Pemex Exploración y Producción" (PEP), the beneficiary of the USD 41.8 million

[1] Application for Provisional Measures, ¶¶ 5, 39.
[2] Supplement to the Application for Interim Measures, ¶ 14.

performance guarantee[3] issued by the insurer Dorama (the "Dorama Bond") as guarantee for the fulfilment of the Claimants' obligations under the Contract No. 421004821 (the "821 Contract")[4] be prevented from calling the guarantee.

8. Such guarantee is regulated by clause 10 of the 821 Contract. Its amount was determined as 10% of the maximum amount of the Contract. In the clause, the Contractor expressly expressed its consent so that:

   - "the bond is paid regardless of whether any kind of appeal is filed before administrative or non-judicial authorities" (clause 10.1, A).

   - "the claim to be filed before the Surety Institution due to breach of contract shall be duly integrated with the following documents:

     1. Written complaint to the Surety Institution.
     2. Copy of the surety policy and, where appropriate, its amending documents.
     3. Copy of the guaranteed Contract including its annexes, and where appropriate its Amendment Agreements and/or Memorandum of Understanding.
     4. Copy of the document of notification to the guarantor of its breach.
     5. Termination of contract and notice.
     6. Copy of the Finiquito.
     7. Quantification of the amount claimed." (clause 10.1, G)

9. The Dorama performance bond ("*fianza de cumplimiento general de obligaciones*") materialized in the policy issued by Dorama.[5] Clause 19 K of the general conditions of the insurance policy requires that PEP provide Dorama with "a description of the breach of the guaranteed obligation which justifies the call of the guarantee, together with the documentary evidence supporting such statement and the amount of the guarantee claimed" (translation of the Tribunal).[6]

B. The Parties' positions

The Claimants' position

10. According to the Claimants, since the beginning of this arbitration Mexico has targeted two of Claimants' investments: (i) the 821 Contract, and (ii) the USD 41.8 million performance

[3] See the guarantee in R-0005.
[4] The 821 Contract (R-003 and R-003-ENG its English translation), on the "Integral Drilling and Land Wells Completion in the North and South Regions of Pemex Exploration and Production" was entered between PEP, on the one side, and Finley Resources Inc/Drake-Mesa, S. de R.L. de C.V. through the special purpose company Drake-Finley, S. de R.L. de C.V (the Contractor), on the other.
[5] See R-0005, which contains the policy as updated on January 26, 2016.
[6] R-0005-SPA.

guarantee securing the performance under that contract. The Claimants argue that shortly after the Tribunal was constituted, Pemex (Mexico's State-owned oil company) issued a "*unilateral 'finiquito' and proceeded to call on the performance bond. Pemex's refusal to request work under the 821 Contract — claiming that its budget was insufficient — ultimately gave rise to this arbitration. Now, Mexico is trying to call the US$ 41.8 million guarantee that Claimants provided to secure performance of work that Pemex never requested.*"[7]

11. The Claimants argue that Mexico's actions are wrongful and "*an overt attempt to buttress its argument that the Tribunal lacks jurisdiction.*"[8] Indeed, according to the Claimants, it has been the Respondent's position since the registration of this arbitration that the Tribunal lacks jurisdiction because the Claimants do not have an existing investment. According to the Claimants, Pemex's actions seek to eliminate those investments.[9]

12. It is the Claimants' position that the following is uncontested: through an international bidding process, the Claimants were granted Contract 821 which required the Claimants to provide equipment, goods and materials to drill oil and gas wells for Pemex and by which Pemex agreed to request a minimum amount of work valued at USD 169 million and a maximum amount of work of USD 818.3 million. Further, Pemex would request such work through work orders and the Claimants provided a guarantee of approximately USD 41.8 million to secure the performance of those work orders. Finally, under Contract 821 Pemex can initiate an administrative process to rescind the 821 Contract if there are 15 unfulfilled work orders.[10]

13. According to the Claimants, after posting this guarantee and investing large amounts in purchasing, importing and keeping available specialized equipment and goods, Pemex did not fulfil the minimum amount of work orders and, claiming budgetary constraints, stopped issuing them after requesting and paying the Claimants only approximately USD 48 million in work.[11] The Claimants argue that in light of these actions, they sought judicial relief, which led Pemex to retaliate by alleging that it had properly issued a new work order that the Claimants argue was never received nor discussed with them.

14. The Claimants argue that contrary to the rescission provision in 821 Contract, Pemex sought rescission after only one alleged unfulfilled work order. According to the Claimants, they brought the dispute on the rescission to local courts, as required under the 821 Contract, but the Federal Court of Administrative Justice "*rewrote the 821 Contract. It determined that one supposed unfulfilled work order sufficed.*"[12] The Claimants state that

[7] Application for Provisional Measures, ¶¶ 3, 14.
[8] *Id*, ¶ 4
[9] *Id*, ¶ 4
[10] *Id*, ¶ 6.
[11] *Id*, ¶ 8.
[12] *Id*, ¶ 12.

two weeks after the Tribunal's constitution, Pemex proceeded to start the *finiquito* process but failed to properly notify the Claimants of this action.

15. The Claimants base their request for interim measures on NAFTA Article 1134 and ICSID Arbitration Rule 39. According to the Claimants, neither NAFTA nor the ICSID Arbitration Rules specifies the criteria that the Tribunal must apply when considering such a request, but that other arbitral tribunals have considered up to six factors: (i) *prima facie* jurisdiction to order the requested measures; (ii) *prima facie* case on the merits; (iii) a risk of serious or irreparable harm; (iv) urgency; (v) balance of the hardships weighing in favor of interim measures; and (vi) no prejudgment of the merits.[13]

16. The Claimants submit that each of these factors are met in the present case:

    16.1. First, the Tribunal has *prima facie* jurisdiction because the dispute satisfies the jurisdictional requirements of the ICSID Convention and NAFTA Articles 1118 to 1121. In particular, (a) Finley and Prize are U.S. companies incorporated in the State of Texas and Prize owns Drake-Mesa, which is a Mexican company; (b) Finley and Prize have made investments in Mexico, which include the 821 Contract and the US$ 41.8 million performance guarantee; and (c) Finley and Prize have satisfied the procedural requirements of NAFTA Articles 1118 to 1121.

    16.2. Second, in terms of a *prima facie* case, Claimants allege breaches of three NAFTA provisions: (i) Mexico breached NAFTA Article 1102 because it chose to treat domestic companies more favourably than Finley and Prize; (ii) Mexico breached NAFTA Article 1105(1) by "*unjustifiably repudiating the 821 Contract, engaging in arbitrary conduct, discriminating against Claimants, and denying them justice through the conduct of Mexico's court system*"[14]; and (iii) "*Mexico breached its obligation to respect its contractual obligations under the 821 Contract with Finley, Prize, and Drake-Mesa, an obligation under the Mexico-Denmark bilateral investment treaty that Mexico incorporated under NAFTA Article 1103.*"[15]

    16.3. Third, the Claimants argue that they face irreparable harm. According to the Claimants, they have previously argued that their investments include Contract 821 and the US$ 41.8 million performance guarantee. If Mexico is successful in its *finiquito* process it will eliminate these investments and deprive the Tribunal of its jurisdiction so that Claimants will be unable to obtain compensation under NAFTA.

[13] *Id*, ¶¶ 18 and 19.
[14] *Id*, ¶ 29.
[15] *Id*, ¶ 30.

16.4. Fourth, the Claimants submit that the request is urgent because according to Pemex' demand for the performance guarantee, Pemex has already finalized the *finiquito* process and their rights are being prejudiced.

16.5. Fifth, if the Tribunal does not grant the interim measures, the "*Claimants could lose the ability to assert their claims and obtain relief. This is clearly significant harm."*[16]

16.6. Sixth, the Claimants submit that a decision on this application will have no binding effect for any future matters concerning jurisdiction or merits as the Claimants are only requesting the Tribunal to prohibit Mexico from taking any further actions that might deprive the Tribunal's jurisdiction. Furthermore, during the videoconference held on January 18, 2022, the Claimants made clear that the only (or certainly chief) ground for their request was the preservation of the Tribunal's jurisdiction.[17]

The Respondent's position

17. For the Respondent, investment arbitration practice requires that "*five standards have to be fulfilled before a Tribunal orders interim measures: i) demonstrate prima facie the Tribunal's jurisdiction; ii) identification of a right capable of being affected and demonstrate prima facie the existence of a claim; and iii) demonstrate that interim measures are necessary, iv) urgent and v) proportional. Furthermore, the analysis of these standards or requirements in no way implies that the Tribunal should prejudge legal issues, e.g., the jurisdiction of the tribunal itself*".[18]

18. Furthermore, according to the Respondent, "*interim measures in investment disputes are an extraordinary measure and their request, analysis and determination should not be taken lightly*".[19] For Respondent, "*the party requesting the interim measure has the burden of proof to demonstrate the urgency and necessity of the required measures*".[20]

19. Concerning jurisdiction, the Respondent claims that the Tribunal lacks competence to grant the interim measures requested by Claimants, a concept which, for the Respondent, should not be confused with the jurisdiction of the Tribunal to resolve the dispute raised by the Claimants in ICSID Case No. ARB/21/25, on which the Respondent has not yet filed its jurisdictional objections.[21]

20. For the Respondent, the Dorama Bond is not an investment under NAFTA, but a

[16] *Id*, ¶ 35.
[17] *Id*, ¶¶ 1, 5 and 39; Hearing on Provisional Measures of January 18, 2022, minute 8:56, minute 21:51, minute 58:02 and at 1 hour 23 minutes.
[18] *Id*, ¶44.
[19] *Id*, ¶45.
[20] *Id*, ¶46.
[21] Response to Application, ¶ 49-50.

commercial contract and "*it is inappropriate and improper for the Claimants to make these allegations or characterize the bond as an investment through a Request for Interim Measures*".[22] According to the Respondent, under the Mexican legal system a bond is a commercial contract regulated by specific mercantile laws, supplemented by the Commercial Code.[23]

21. The Respondent states that since June 15, 2018 PEP has been trying to enforce the Dorama Bond, "*due to contractual breaches incurred by the Contractors*". [24] The Respondent furthermore states that "[i]*n the event that PEP would refrain from exercising its contractual rights, that would imply the expiration of the Dorama bond claim*".[25] However, "*the Contractors have avoided any attempt by PEP to conclude the finiquito of Contract 821*"[26], which under paragraph B.6 of clause 10 of the Dorama Bond PEP must present to Dorama as part of the documentation to enforce the bond.

22. The Respondent argues that Pemex and the Claimants -acting as the Contractor- agreed in clause 47 of the 821 Contract "*that the law applicable to Contract 821 would be Mexican law and any dispute relating to the interpretation or execution of Contract 821 would be resolved by commercial arbitration in accordance with the International Chamber of Commerce (ICC) Rules of Arbitration, except for administrative and early termination proceedings. This means that the administrative termination of Contract 821 had to be resolved through a nullity proceeding ('jucio de nulidad') before the Federal Court of Administrative Justice (TFJA)*".[27] Thus, "*the Tribunal is simply faced with a request to act as a Mexican court and recommend the suspension of the finiquito of Contract 821 and the enforcement of the Dorama Bond. The Tribunal has no jurisdiction to recommend such an interim measure*".[28]

23. The Respondent requests the Tribunal to take into account that "*since the first investment arbitration faced by Mexico under NAFTA, as well as the investment arbitrations faced by Canada or the United States under NAFTA, it has been consistently concluded that the dispute settlement mechanism was not created to resolve contractual disputes, much less to resolve 'contractual disappointments' of foreign investors, nor can it serve as a substitute mechanism for existing judicial proceedings under the Mexican legal system to resolve disputes between parties*".[29] More specifically, for Respondent, "*contractual disputes with public companies or State-owned entities are not subject to investment*

[22] *Id*, ¶ 24.
[23] *Id*, ¶25.
[24] Response to the Application, ¶26.
[25] *Id*, ¶29.
[26] *Id*, ¶32.
[27] *Id*, ¶22.
[28] *Id*, ¶43.
[29] *Id*, ¶53.

arbitration provided for in NAFTA Chapter XI".[30]

24. On the existence of a right susceptible of being affected, the Respondent rejects "*any causal link between a) execution of the finiquito of Contract 821 and the claim to enforce the Dorama Bond and b) the alleged impact on the jurisdiction of the Tribunal*".[31] For Respondent, "*the settlement of Contract 821, the enforcement of the Dorama Bond, and any legal proceedings that may arise from them are contractual issues, and the Claimants have not been able to explain and demonstrate that they are relevant for the jurisdiction of the Tribunal and the possibility that it may issue an award. It should be remembered that Contract 821 was terminated in August 2017 and since July 2018 PEP has tried to enforce the Dorama Bond, all of this long before the commencement of the NAFTA Arbitration*".[32] The Respondent further notes that "*Contracts 803 and 804 were terminated and settled, and their finiquitos formalized on February 10 and April 10, 2015, respectively*".[33]

25. Furthermore, according to the Respondent, the interim measures requested are not necessary to avoid an irreparable damage, because "*the Contractors have at their disposal defence mechanisms in accordance with the Mexican legal system to challenge the notifications of PEP (nullity of notifications ancillary procedure) and oppose the enforcement of the Dorama Bond*".[34]

26. Besides, the Respondent asserts that the Claimants have not been able to demonstrate that the settlement (*finiquito*) of Contract 821 is a situation that requires the application of an urgent measure, particularly because "*PEP's claims at enforcing the Dorama Bond claim are in an early stage, the surety institution has not decided whether PEP's claims are admissible, and probably it will be necessary for PEP to initiate commercial litigation against Dorama. This makes it clear that there is a high degree of speculation in the Claimants' allegations*".[35]

27. On proportionality, the Respondent argues that "*the only goal of the interim measures requested by Claimants is to give Contractors an advantage over PEP's contractual rights". Furthermore, the Contractors, PEP and Dorama are not parties in the NAFTA Arbitration or the ICSID Case ARB/21/25 and there would not exist a a genuine balance between the alleged rights that the Claimants claim to be preserved and PEP's contractual rights*".[36]

28. Finally, on the pre-judgement of issues, the Respondent concludes that "*by seeking to prohibit PEP from enforcing the rights under the Dorama Bond, the Claimants ask the*

[30] *Id*, ¶54.
[31] *Id*, ¶59.
[32] *Id*, ¶61.
[33] *Id*, ¶39-41.
[34] *Id*, ¶65.
[35] *Id*, ¶71.
[36] *Id*, ¶76.

Tribunal to pre-judge whether it has jurisdiction and whether the termination of Contract 821 was invalid, which is prohibited by NAFTA Article 1134".[37]

29. In support of the existence of such prohibition under NAFTA Article 1134, the Respondent recalls[38] the tribunal's decision in Procedural Order No.2 in the case *Marvin Feldman v. Mexico*, ARB (AF)/99/1-discussed by G. Kaufmann-Kohler in her chapter on "Interim Relief in Investment Treaty Arbitration" (2018)-, where the tribunal recalled that NAFTA Article 1134 qualifies the Tribunal's power to order provisional measures and stated that "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".

C. The Tribunal's analysis

30. In the Tribunal's view, there are no fundamental differences between the Claimants[39] and the Respondent[40] on the conditions that a request for interim measures must meet to be granted. Other than the intensity of the thresholds applicable to the different criteria, the fundamental discrepancy between the Parties hinges on whether these conditions have been satisfied in the case at hand.

31. The Tribunal shares the Parties' apparently broad agreement on the conditions necessary for a successful request for interim measures. But more fundamentally, in the Tribunal's view, these conditions should be considered as being "conjunctive", i.e., all of them must be met for the request to be granted; conversely, a request for interim measures is not successful as soon as one fundamental condition is not met.

32. Hence, the Tribunal need not discuss and settle all the discrepancies between the Parties on whether the various theoretical conditions mentioned above have been met and will instead focus on one fundamental condition which, in its view, the Claimant's request for provisional measures fails *prima facie* to meet: the alleged risk of irreparable harm, which, according to the Claimants' request, would consist in the risk of the Tribunal losing its jurisdiction if the measures are not granted.

i. Risk of loss of jurisdiction /risk of irreparable harm

33. Indeed, as discussed, the Claimants have exclusively based their request for interim measures on the proposition that they seek to protect the "*Tribunal's jurisdiction*" and that Mexico is trying to eliminate both of the Claimant's investments (the 821 Contract and the

[37] *Id*, ¶78.
[38] *Id*, footnote 81, ¶78.
[39] See Request for Interim Measures of Protection, ¶ 19.
[40] See Response to Claimant's Request for Interim Measures, ¶ 44.

Dorama Bond) in an attempt to deprive the Tribunal of its jurisdiction.[41] *Prima facie*, the Tribunal does not share the Claimants' assumption.

34. In the Tribunal's view, its own jurisdiction cannot be affected by events subsequent to the date of the Claimants' application. It is indeed entirely uncontroversial as a matter of international law that acts subsequent to the date of initiation of the arbitration are irrelevant for the purpose of assessing the tribunal's jurisdiction. Indeed, the ICSID Convention explicitly recognises this position, and there exists authoritative case law confirming that position. As such, if jurisdiction existed at the date of commencement of the arbitration, it would continue to exist. No conduct of the Parties taken after the request for arbitration may affect the existence, *vel non*, of the Tribunal's jurisdiction.

35. In the Tribunal's view, the relevant moment in order to determine whether the Tribunal has jurisdiction to hear this arbitration case is the time when the Claimants, by submitting their request for arbitration, accepted Mexico's offer to arbitrate the dispute.

36. This is so because, according to Article 25(1) of the ICSID Convention:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally." (Emphasis added).

37. This should be read in conjunction with Institution Rule 2(3), under which:

> "'Date of consent' means the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted".

38. The clearest expression of this legal position is from the *Vivendi v Argentina* case, where that ICSID tribunal held the following: (emphasis added)

> "]I]t is generally recognized that the determination of whether a party has standing in an international judicial forum, for purposes of jurisdiction to institute proceedings, is made by reference to the date on which such proceedings are deemed to have been instituted. ICSID Tribunals have consistently applied this Rule. More specifically, in ICSID arbitration, the critical date for purposes of determining the nationality of the foreign investor under Article 25(2) of the ICSID Convention is the date of consent, i.e. generally

[41] See, e.g., Request for Interim Measures of Protection, ¶ 1, 4, 25, 32. 39(1); Hearing on Provisional Measures of January 18, 2022, minute 8:56, minute 21:51, minute 58:02 and at 1 hour 23 minutes.

the date when the arbitration is instituted in case of a dispute arising out of a BIT.

This is not only a principle of ICSID proceedings, it is an accepted principle of international adjudication that jurisdiction will be determined in the light of the situation as it existed on the date the proceedings were instituted. Events that take place before that date may affect jurisdiction; events that take place after that date do not. The ICJ developed cogent case law to this effect in the *Lockerbie case*. There, in a preliminary objection, Libya relied on the Montreal Convention to establish the Court's jurisdiction. The United States and the United Kingdom contended that Security Council Resolutions adopted after the initiation of the proceedings deprived the Court of jurisdiction. The Court rejected categorically the arguments of the United States and the United Kingdom, deciding that:

> 'The Court cannot uphold this line of argument. Security Council Resolutions 748 (1992) and 883 (1993) were in fact adopted after the filing of the Application on 3 March 1992. In accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so. The subsequent coming into existence of the above-mentioned Resolutions cannot affect its jurisdiction once established.'

The Court confirmed this rule in the *Arrest Warrant* case, where it stated:

> 'The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction...'

The consequence of this rule is that, once established, jurisdiction cannot be defeated. It simply is not affected by subsequent events. Events occurring after the institution of proceedings (other than, in a case like this, an *ad hoc* Committee's Decision to annul the prior jurisdictional finding) cannot withdraw the Tribunal's jurisdiction over the dispute.[42] (emphasis added)

[42] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, ¶¶ 61-63.

39. It should be noted that the legal authority in *Vivendi v. Argentina* is by no means an isolated finding; several ICSID tribunals have confirmed this position.[43]

40. In keeping with what is set forth in Article 25(1) of the ICSID Convention and Institution Rule 2(3) and the consistent case law cited and referred to above, the Tribunal is not persuaded *prima facie* by the Claimants' argument that, if the *finiquito* of the 821 Contract was carried through and the Dorama Bond called by PEP, this would be affecting this Tribunal's jurisdiction.

41. Consequently, the Tribunal does not see how, assuming that it had jurisdiction to hear the case as of the "date of consent" (i.e., March 25, 2021), it could subsequently lose it as a result of PEP's actions. More specifically, were the Tribunal come to the view during the arbitration that, as argued by the Claimants, the Dorama Bond was an investment protected under NAFTA, then the fact that PEP was at some point hypothetically successful in its attempts to call the guarantee would not, in the Tribunal's view, alter its jurisdiction.

42. Finally, the Tribunal has reviewed the case law cited by the Claimants during the conference held on January 18, 2022 underpinning their concern that the Tribunal's jurisdiction may potentially be (successfully) challenged by the Respondent on the basis of an objection of lack of continuous ownership/investment, as discussed in the cases *National Grid v. Argentine Republic*; *EnCana Corp. v. Republic of Ecuador*(LCIA Case No. UN3431); and *Mondev v. United States of America*(ICSID Case No. ARB(AF)99/22).[44] The Tribunal finds that this case law is in line with the case law cited by the Tribunal above and supports the Tribunal's reasoning that events bearing on the existence or ownership of the investment (such as a potential completion of the *finiquito* of the 821 Contract or a foreclosure of the Dorama Bond by PEP) that may occur after the time of commencement of the arbitration cannot alter the Tribunal's jurisdiction.

43. Consequently, the Tribunal is not persuaded that granting the requested measures is necessary to prevent the serious or irreparable damage to Claimants in terms of a loss of the Tribunal's jurisdiction. Hence, the Tribunal cannot grant the request submitted by Claimants. However, the Tribunal emphasizes that the decision given in the present proceedings is based on a *prima facie* assessment and in no way prejudges the question of the jurisdiction of the Tribunal or any questions relating to the merits of the case. It leaves

[43] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, ¶ 255-256; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 197; *Highbury International AVV and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/1, Award, 26 September 2013, ¶ 155; *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016, ¶ 108; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019, ¶ 202.

[44] *See* p. 8 of Claimant's power point presentation, January 18, 2022.

unaffected the right of the Claimants and the Respondent to submit arguments in respect of those questions in future stages of this case.

III. ORDER

In light of the foregoing, the Tribunal hereby decides:

1. Not to grant any of the interim measures requested by the Claimants in their December 14, 2021 Application for Interim Measures, as supplemented by their December 18, 2021 Supplement to the Application for Interim Measures.

2. To leave to the Award the decision on the allocation of costs resulting from these proceedings on interim measures.

[Signed]
Mr. Manuel Conthe Gutiérrez
President of the Tribunal
Date: January 26, 2022