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 RESPONDENT'S CLARIFICATION REQUEST

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

Secretary of the Tribunal
Ms. Anneliese Fleckenstein

March 25, 2025

I. THE RESPONDENT'S REQUEST

1. On February 21, 2025, the Respondent sent to the Tribunal a formal "Request for Clarification" (henceforth, the "Request") of the Tribunal's Decision on Jurisdiction and Liability (henceforth, the "Decision"), as the Respondent "is concerned that the Decision on Jurisdiction and Liability (Decision) does not appear to fully address and resolve the numerous jurisdictional issues raised and, in some cases, appears to combine them with the quantification phase."[1]

2. The Request is based on Article 44 of the ICSID Convention[2] and Article 19 of the ICSID Arbitration Rules.[3] In the Respondent's view, "Article 44 of the ICSID Convention empowers the Tribunal to resolve any procedural question not covered by the applicable procedural rules, which would include clarification."[4]

3. For the Respondent, the Decision not being an award, does not have the character of *res judicata* and, hence, "[t]he Tribunal may clarify the aspects in which its analysis may have been obscure and even rectify any errors it may have made."[5] Furthermore, the Respondent states that "neither the ICSID Convention nor the Arbitration Rules prohibit the parties from requesting the Tribunal to clarify a decision."[6]

4. In the Respondent's view, "the clarification will assist the parties in the next phase,"[7] as the Decision "does not identify which of Claimants' alleged investments will be analyzed for the purpose of calculating the relevant damages. There also remain doubts as to the scope of each Treaty's protections and the Tribunal's jurisdiction *ratione temporis.* It would be far more effective for the Tribunal to clarify these issues now so that the parties can align their damages evidence accordingly."[8]

5. Finally, the Respondent emphasizes that "the purpose of this Request is to understand the analysis conducted by the Tribunal, as well as the conclusions it reached regarding the objections and arguments raised by the Respondent during the jurisdiction and merits phase of the proceedings."[9]

6. Turning now to the specific issues that the Respondent wants clarified, it requests the Tribunal's response to the following questions:

[1] Request, para. 2.
[2] "If any question of procedure arises which is not covered by this Section [Section 3 Powers and Functions of the Tribunal] or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."
[3] "The Tribunal shall make the orders required for the conduct of the proceeding."
[4] Request, para. 4.
[5] Request, para. 6.
[6] Request, para. 10.
[7] Request, para. 11.
[8] Request, para. 11.
[9] Request, para. 12.

a) Concerning the investments that the Claimants allege to have made in Mexico, with the involvement of companies allegedly under their control, such as Baku Energy Partners S.A. de C.V., Baku Exploración y Producción S.A. de C.V., Drake-Mesa, S. de R.L. de C.V., and Royal Shale Holdings, S.A. de C.V. and Royal Shale Corporation S.A. de C.V.:[10]

- Does the evidence provided by the Claimants meet the evidentiary standards applicable in this arbitration to demonstrate that they made an investment in Mexico?

- What are the specific elements that led the Tribunal to conclude that the Claimants exercised control over the entities involved in the alleged investment (Baku Energy Partners; Baku Exploración y Producción; Drake-Mesa; Royal Shale Holdings, and Royal Shale Corporation)?

- How does the gradual and reserved presentation of information of the control over the investments affect the analysis that the Claimants are investors?

- Are the activities carried out by Baku Energy Partners, Baku Exploración y Producción, Royal Shale Holdings, Royal Shale Corporation and Drake-Mesa attributable to Claimants?

- Could the pending analysis in the damages phase modify the conclusions on jurisdiction?

- Whether the conclusion regarding machinery and specialized equipment as "'tangible property' acquired for business purposes" is limited exclusively to the items listed in Exhibit DT-6, or whether any other equipment acquired by the Claimants to fulfill contractual obligations under the 821 Contract applies.

- Whether it was established that the yards and warehouses were acquired specifically for the contracts in question, or whether such issue will be resolved during the quantification phase.

- Given that the Tribunal concluded that it is not necessary to analyze whether all claimed expenses and items qualify as investments at this stage, do the Claimants still have the burden of proving that such expenses and items qualify as investments under NAFTA? And if so, could this pending analysis change the findings on jurisdiction or liability at the subsequent stage?

b) Concerning the so-called "Dorama Bond":[11]

[10] Request, paras. 18, 24.
[11] Request, para. 27.

- Must the Claimants prove that the Dorama Bond is an independent investment?

- Whether the Dorama Bond qualifies as a stand-alone investment under the NAFTA definitions of "investment".

c) Concerning the Tribunal's analysis of the Claimants' alleged existing investments:[12]

- Did the Tribunal determine that Contract 821 qualifies as an investment under NAFTA or under the USMCA?

- What considerations and analyses did the Tribunal make of the rulings issued by the Mexican courts?

- Can the Tribunal reconcile its "defenselessness" determination with the express recognition that the USMCA applies to alleged violations that occurred after July 1, 2020?

d) Concerning "the prescriptive period for the claims presented by the Claimants":[13]

- In the Tribunal's view, under the principle of "procedural efficiency," can the protection of a treaty that is no longer in force be extended?

- Does the Tribunal consider that the USMCA is applicable to claims brought under NAFTA?

e) Concerning the nationality of the companies Integradora y Zapata:[14]

- The Tribunal determined that "if Mexico believed that either Integradora or Zapata were not Mexican companies, because they were not owned by Mexican nationals, it was incumbent upon Mexico to submit such evidence." Does the Tribunal consider that Mexico had the burden of proof to show that these companies are not Mexican?

- Was the Tribunal's decision on the nationality of Integradora and Zapata analyzed in light of the NAFTA or the USMCA?

7. By way of conclusion, the Respondent requests that "in accordance with Article 44 of the ICSID Convention and Rule 19 of the Arbitration Rules, the Tribunal issue a clarification of

[12] Request, p. 12, para. 34.
[13] Request, p. 13, para. 37.
[14] Request, p. 13, para. 39.

the Decision on Jurisdiction and Liability regarding the points raised in this request."[15]

II. THE CLAIMANTS' RESPONSE

8. At the invitation of the Tribunal, on March 3, 2025, the Claimants submitted their response (henceforth, "the Response") to the Respondent's Request and rejected it because it "is an attempt to appeal the Tribunal's Decision on Jurisdiction and Liability. Mexico alleges that it is merely raising questions about the Tribunal's analysis in the Decision. But the answers to Mexico's questions are either already provided in the Decision or will be addressed in the Award at the conclusion of this arbitration."[16]

9. The Claimants argue that "there is no authority that supports appealing the Decision on the grounds raised in Mexico's Request. Neither the ICSID Convention nor the ICSID Arbitration Rules authorize the Tribunal to revisit the Decision. And the Request for Clarification does not fit within the narrow rule created by the two tribunals that have allowed a pre-award decision to be reviewed."[17]

10. The Claimants recall that in 2013 the tribunal in *ConocoPhillips v. Venezuela* considered a "clarification" request under Article 44 and rightfully rejected it.[18] "Venezuela submitted a letter similar to Mexico's here, seeking 'clarification and further explanations from the Tribunal regarding certain findings in the Decision on Jurisdiction and the Merits'. In rejecting Venezuela's request, the tribunal found that Article 44 pertains to procedural matters, enabling gap-filing when the Convention and Rules are silent. 'It cannot be seen as conferring a broad unexpressed power of substantive decision.'"[19]

11. The Claimants further argue that "the tribunal in *ConocoPhillips* noted that the ICSID Convention has provisions allowing for review of actions by a tribunal only once an award is rendered. The tribunal examined Section 3 of Part IV of the Convention, finding with respect to the ability to respond to requested clarifications: 'nothing among its provisions even hinting at such a power.' The tribunal then noted that only Section 5 confers powers upon a tribunal to interpret or revise an award and upon an *ad hoc* committee to annul an award. The existing provisions and structure of the Convention 'exclude the possibility of the proposed powers of reconsideration being read into the Convention.' As a result, the tribunal rejected Venezuela's clarification request, finding that the pre-award decision was final as to the issues it addressed."[20]

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[15] Request, para. 42.
[16] Response, para. 1.
[17] Response, para. 1.
[18] **CL-0110**, *ConocoPhillips Petrozuata B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration, March 10, 2014 (henceforth, *ConocoPhillips*).
[19] Response, para. 4, citing **CL-0110**, *ConocoPhillips*, para. 22.
[20] Response, para. 5, citing **CL-0110**, *ConocoPhillips*, para. 23.

12. According to the Claimants, in 2014, the tribunal in *Perenco Ecuador v. Ecuador* followed the same approach as the tribunal in *ConocoPhillips v. Venezuela.*[21] "There, Ecuador submitted a 'Motion for Reconsideration' after the tribunal issued its decision on jurisdiction and liability. Similar to Mexico here, Ecuador asked the tribunal to reopen its decision because of 'repeated instances of the [Tribunal's] omitting to determine issues put to it, violating fundamental rules of procedure, manifestly exceeding its powers and failing to state the reasons on which the [decision] is based'. According to the tribunal, 'Ecuador attaches particular significance to the 'powerful dissenting opinion' of Professor Georges Abi-Saab in the case of *ConocoPhillips v. Venezuela.*' The tribunal in *Perenco* noted the threshold question was 'whether [the Tribunal] can, in the absence of an express procedural rule in the Convention or the Rules (or agreement of the Parties), reopen and amend the Decision on Jurisdiction and Liability.' Relevant here, the tribunal determined with respect to Article 44: 'There is simply no general power to reopen and reverse awards, nor does the Tribunal view the absence of such a general power to be a *lacuna* that needs to be filled.'"[22]

13. The Claimants further argue that the *Perenco* tribunal "examined both the majority decision and the dissenting opinion in *ConocoPhillips* […] issued by the State-appointed arbitrator Professor Abi-Saab [who] argued that even without express authority under the Convention or Rules, a tribunal should be able to reopen a decision under limited circumstances namely if 'it had committed an error of law or of fact that led it astray in its conclusions, or in case of new evidence or changed circumstances having the same effect.' Professor Abi-Saab believed three scenarios might constitute grounds for a tribunal to review a prior decision: 1. becoming aware of having committed an error in interpreting evidence or in establishing the facts that led it astray in its legal findings; 2. the decision did not follow from the facts as determined; that new credible evidence demonstrate that the facts as established by the tribunal were based on wrong premises; or 3. changed circumstances have rendered the decision otherwise untenable."[23] In the Claimants' view, "[t]he tribunal in *Perenco* correctly noted the predicate for Professor Abi-Saab's dissenting view. He was concerned about Venezuela submitting new evidence that was *not* available to the tribunal when it rendered its merits decision and he considered the evidence to be of great decisiveness on a particular issue during the merits phase. Notably, his concern was rooted in ICSID Arbitration Rule 38(2) ("[e]xceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor …"), and the tribunal found it understandable why he believed Rule 38(2) ought to apply. The tribunal in *Perenco* disagreed with Professor Abi-Saab's dissent. Similar to the majority in *ConocoPhillips*, the tribunal found the Convention and the Rules do not give tribunals the general power of reconsideration of a decision. Moreover, the tribunal noted, in dicta, that Ecuador provided no *new* evidence of significance akin to what Venezuela had adduced. Thus, the situation that concerned Professor Abi-Saab was not present."[24]

[21] **CL-0111**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Ecuador's Reconsideration Motion, April 10, 2015 (henceforth, *Perenco*).
[22] Response, paras. 6-7, citing **CL-0111**, *Perenco*, paras. 5, 21, 23, 77.
[23] Response, para. 8, citing **CL-0112**, *ConocoPhillips*, Dissenting Opinion of Georges Abi-Saab, para. 57.
[24] Response, paras. 9-10.

14. The Claimants acknowledge that in 2016, the tribunal in *Standard Chartered Bank v. Tanzania Electric Supply Company*,[25] while stating that neither the Rules nor the Convention had a provision "dealing explicitly with the question of reconsideration of a decision," noted that Articles 51 and 52 authorize reconsideration of an award. Article 51 allows revising an award in light of 'the discovery of some fact of such a nature as to decisively affect the award.' Article 52 relates to annulment of an award. The tribunal acknowledged that there is no equivalent to these provisions with respect to decisions,"[26] but determined, nevertheless, that it had the inherent authority to determine its own competence which included the ability to redetermine its decisions. For the Claimants, "[w]hile this decision is not particularly well-reasoned, it appears to be premised on the tribunal's notions of practicality and efficiency. In creating this authority, the tribunal was guided by the limitations under Article 51 in reopening awards: (i) a fact is discovered; (ii) of such a nature as decisively to affect the pre-award decision; (iii) which was unknown to the Tribunal and to the applicant when the pre-award decision was rendered; (iv) the applicant's ignorance was not due to negligence; and (v) the request for reconsideration being made within 90 days after the discovery of the fact."[27]

15. The Claimants further indicate that the tribunal in *Standard Chartered Bank* "cautioned about the narrow scope of its newfound authority."[28] The tribunal specifically noted that "[w]hatever the power the tribunal has to reconsider a decision, that power must at least extend to the grounds for reopening an award in Article 51. But such a power should not be seen as unlimited. As stated earlier, the decisions made by ICSID tribunals in the course of a case are binding, and it would lead to considerable uncertainty if tribunals were to assert an unconstrained power to reopen any decisions made. A decision of an ICSID tribunal cannot be considered to be merely a draft that can be reopened at will."[29] According to the Claimants, the tribunal in *Standard Chartered Bank* "emphasized why it was creating this new power. There was an allegation that the tribunal had reached its decision without knowing 'material facts which had been deliberately withheld by one of the Parties' and that it might have reached a different decision had it known such facts. Indeed, the tribunal noted the egregious nature of the material facts that had been withheld and how it had been misled."[30]

16. The Claimants state that they do not agree with the tribunal in *Standard Chartered Bank*: "Neither the ICSID Convention nor the ICSID Rules authorize tribunals to create rules to reopen decisions. In this regard, the tribunals in *ConocoPhillips* and *Perenco* were correct. Such requests are reserved for awards at the conclusion of the arbitration, and even then, under very limited and exceptional circumstances not present here."[31]

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[25] **CL-0113**, *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (TANESCO)*, ICSID Case No. ARB/10/20, Award, September 12, 2016 (henceforth, *Standard Chartered Bank*).
[26] Response, para. 11, citing **CL-0113**, *Standard Chartered Bank*, para. 307.
[27] Response, para. 12.
[28] Response, para. 13.
[29] Response, para. 13, citing **CL-0113**, *Standard Chartered Bank*, para. 322.
[30] Response, para. 14 citing **CL-0113**, *Standard Chartered Bank*, para. 324.
[31] Response, para. 15.

17. Furthermore, the Claimants stress that "Mexico does not present any new evidence that surfaced after the Decision was rendered. Mexico also does not allege that Claimants concealed such evidence. In fact, as the Tribunal is aware, Mexico failed to comply with its disclosure obligations regarding material issues in dispute and hid critical witness evidence from the Tribunal."[32]

18. The Claimants' analysis further extends to the 2017 decision by the tribunal in *Burlington Resources Inc. v. Ecuador*,[33] when the tribunal "was confronted with Ecuador's request to reconsider the tribunal's decision on liability. Ecuador questioned the legal basis for one of the tribunal's rulings. It also argued that the tribunal had made a decision without the full knowledge of the facts because the claimant had withheld key evidence. The tribunal in *Burlington* confirmed that there is no authority under the ICSID Convention or the ICSID Rules for tribunals to reconsider their decisions. The tribunal noted the above conflicting decisions in *ConocoPhillips* and *Perenco* with [*Standard Chartered Bank*], the latter sharing a view that Professor Abi-Saab previously expressed."[34] According to the Claimants, the tribunal "cautioned against reopening decisions made prior to an award: 'Whatever the justification, these tribunals express the opinion that an issue resolved once in the course of an arbitration should in principle not be revisited in the same proceedings. Irrespective of *res judicata*, the rationale for this opinion is obvious: a contrary view would defeat the purpose of efficient dispute settlement, entailing constant re-litigation of issues already resolved, with unavoidable adverse consequences in terms of increased costs and length of proceedings. In addition, the possibility of re-litigating issues would jeopardize legal certainty and ultimately undermine the confidence of the users in the system.'"[35]

19. The Claimants recognize that the *Burlington* tribunal found that "there might be exceptional circumstances warranting reopening a decision. Similar to [*Standard Chartered Bank*], the tribunal was guided by ICSID Convention Article 51, and determined that decisions could be reconsidered if, and only if, a decisive and previously unknown fact comes to light. In making this determination, the tribunal cautioned that its decision 'is not a draft that can be reopened at will.'"[36] And "[a]pplying its newfound authority, the tribunal found that Ecuador's questions about the tribunal's legal interpretation amounted to an appeal. The tribunal noted appeals are not allowed under ICSID Convention Article 53. With respect to Ecuador's claim that the tribunal was misled as to the facts, the tribunal noted that Ecuador had not raised any new factual information that was previously unknown to the parties or the tribunal, nor was such information capable of decisively influencing the outcome of the decision. In the end, the *Burlington* tribunal rejected Ecuador's appeal attempt."[37]

[32] Response, para. 16.
[33] **CL-0114**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, February 7, 2017 (henceforth, *Burlington*).
[34] Response, para. 18.
[35] Response, para. 18, citing **CL-0114**, *Burlington*, para. 91.
[36] Response, para. 19, citing **CL-0114**, *Burlington*, para. 96.
[37] Response, para. 20.

20. The Claimants express their disagreement with the *Burlington* tribunal as well, and insist that "[n]either the ICSID Convention nor the ICSID Rules authorize tribunals to create rules to reopen decisions. In this regard, the tribunals in *ConocoPhillips* and *Perenco* were correct. Such requests are reserved for awards at the conclusion of the arbitration, and even then, under very limited and exceptional circumstances not present here."[38]

21. The Claimants conclude that, in light of the above, "the Tribunal should reject Mexico's Request for Clarification. There is no authority under the ICSID Convention or the ICSID Arbitration Rules that authorize Mexico to pose questions to the Tribunal or allow the Tribunal to respond to such questions. This is particularly true when Mexico's questions are nothing more than a veiled attempt to request the Tribunal reconsider its Decision on Jurisdiction and Liability. The Decision was not a draft or advisory, and it should not be subject to second-guessing under the guise of 'understanding the Tribunal's analysis.' Moreover, Mexico's Request for Clarification does not satisfy the arbitrator-created rule to reconsider pre-award decisions. Mexico did not offer any new facts or circumstances to justify reviewing the Decision."[39]

III. THE TRIBUNAL'S ANALYSIS

22. The Tribunal finds it useful to start its analysis by recalling the dispositive part of its January 8, 2025 Revised Decision on Jurisdiction and Liability, which reads:

> **A. ON JURISDICTION**
>
> *1. The Tribunal declares that it has jurisdiction to decide the following claims:*
>
> *a) that Mexico breached Article 14.6 on MST of the USMCA as a result of the lack of due process and denial of justice resulting from delays by the Mexican courts in deciding the lawsuits related to the 803 and 804 Contracts.*
>
> *b) that Mexico breached Article 1105 on MST and FET of the NAFTA as a result of the TUCMA Judgment which decided the contractual lawsuit related to the 821 Contract.*
>
> *c) that Mexico breached Article 1105 on MST and FET of the NAFTA as a result of the TFJA Judgment, dated October 4, 2018, which upheld the administrative rescission by PEP of the 821 Contract.*
>
> *d) that Mexico breached Articles 1105 on MST and FET of the NAFTA and Article 1102 on National Treatment of the NAFTA as a result of acts related to the 821 Contract which PEP or PEMEX carried out after March 25, 2018.*

[38] Response, para. 21.
[39] Response, paras. 22-23.

2. The Tribunal declares that it does not have jurisdiction on any of the other claims made by the Claimants in this arbitration.

B. ON LIABILITY

1. *The Tribunal dismisses the claims that Mexico breached Article 14.6 on MST of the USMCA as a result of the alleged lack of due process and denial of justice resulting from delays by the Mexican courts in deciding the Claimants' lawsuits related to the 803 and 804 Contracts.*

2. The Tribunal dismisses the claim that Mexico breached Article 1105 on MST of the NAFTA as a result of the TUCMA Judgment which decided the contractual lawsuit related to the 821 Contract.

3. The Tribunal declares that Mexico breached Article 1105 on MST and FET of the NAFTA as a result of the October 4, 2018, judgment of the TFJA which upheld the administrative rescission by PEP of the 821 Contract.

4. The Tribunal declares that Mexico breached Article[] 1105 on MST and FET of the NAFTA and Article 1102 on National Treatment of the NAFTA as a result of the following acts by PEP related to the 821 Contract:

a) The decision adopted on May 16, 2018, during a meeting of PEP's management in Villahermosa (Tabasco) (the 'Villahermosa Meeting'), to call the Dorama Bond.

b) The issuance on November 10, 2021, of the unilateral finiquito of the 821 Contract Bond.

c) The continuation, after April 9, 2018 (i.e., the date of the Acta Circunstanciada settling the dispute between PEP and Integradora and Zapata), of PEP's legal defense against the Claimants in the nullity proceedings decided by the TFJA Judgment on October 4, 2018.

d) Any other acts by PEP or Pemex which took place after March 25, 2018 and were carried out in preparation, or as a consequence, of the unilateral finiquito of the 821 Contract, like the calling of the Dorama Bond.

23. As a preliminary remark, the Tribunal observes that none of the questions raised in the Request make any reference to that dispositive part of the Decision, let alone ask for a clarification of any specific determination contained therein.

24. For the Tribunal, the Request asks it to do several different things:

(i) To "clarify the aspects in which its analysis may have been obscure" and allow the Claimants "to understand the analysis conducted by the Tribunal, as well as the conclusions it reached," particularly on the jurisdictional objections raised by the Respondent;[40]

(ii) To "rectify any errors [the Tribunal] may have made";[41]

(iii) To "assist the parties in the next phase," particularly by identifying "which of Claimants' alleged investments will be analyzed for the purpose of calculating the relevant damages" or by dispelling "doubts as to the scope of each Treaty's protections and the Tribunal's jurisdiction *ratione temporis.*"[42]

25. For the Tribunal, the specific issues raised or requests for clarification made in the Request can be grouped into two main buckets, corresponding, broadly, on the one hand, with the objectives mentioned under i) and ii) in the preceding paragraph (objectives which could be labeled, for short, "Removing obscurities and rectifying errors") and, on the other hand, under iii) (*i.e.* "Providing guidance for the *quantum* phase", for short).

a) Removing obscurities and rectifying errors

26. This first "bucket" consists of questions on which the Respondent seems to disagree with the contents, justification, sufficiency or consistency of the Tribunal's findings, implicit disagreements which are presented in the guise of questions. The specific questions which belong in this bucket are:

- *Does the evidence provided by the Claimants meet the evidentiary standards applicable in this arbitration to demonstrate that they made an investment in Mexico*?
- *How does the gradual and reserved presentation of information of the control over the investments affect the analysis that the Claimants are investors?*
- *Could the pending analysis in the damages phase modify the conclusions on jurisdiction?*
- *What considerations and analysis did the Tribunal make of the rulings issued by the Mexican courts?*

[40] Request, paras. 6, 12.
[41] Request, para. 6.
[42] Request, para. 11.

- *Can the Tribunal reconcile its "defenselessness" determination with the express recognition that the USMCA applies to alleged violations that occurred after July 1, 2020?*

- *In the Tribunal's view, under the principle of "procedural efficiency," can the protection of a treaty that is no longer in force be extended?*

- *Does the Tribunal consider that the USMCA is applicable to claims brought under the NAFTA?*

- *The Tribunal determined that "if Mexico believed that either Integradora or Zapata were not Mexican companies, because they were not owned by Mexican nationals, it was incumbent upon Mexico to present that evidence." Does the Tribunal consider that Mexico had the burden of proof to show that these companies are not Mexican?*

- *Was the Tribunal's decision on the nationality of Integradora and Zapata analyzed in light of the NAFTA or the USMCA?*

27. In the Tribunal's view, these questions amount to a tacit appeal against the corresponding findings of the Decision.

28. This is openly recognized when the Respondent argues, for instance, that "[t]he Tribunal's analysis fails to identify and address that a domestic court legally and definitively resolved the scope and nature of the termination, and thus the validity of the 821contract, in accordance with domestic law. This gives the appearance that this Tribunal considered its role as an appellate court that could reverse the judicial determinations of a Mexican court. In particular, Respondent does not see that the Tribunal's Decision has analyzed and described the effects of the determination made by national courts pursuant to their legislation."[43]

29. As it will be discussed in the section on the legal basis of the Request, the Tribunal has to dismiss all these questions, as they amount to an appeal against the Decision, something not authorized under the Rules.

b) Providing guidance for the *quantum* phase

30. This second "bucket" consists of questions related to issues which the Decision did not address or decide, either because the Tribunal did not find it necessary to decide them in a Decision on Jurisdiction and Liability or because they did not come up, but which, nonetheless, according to the Respondent, are likely to come up and be relevant in the *quantum* phase.

31. The specific questions that belong to this category are as follows:

[43] Response, paras. 31-32.

- *Whether the conclusion regarding machinery and specialized equipment as "'tangible property' acquired for business purposes" is limited exclusively to the items listed in Exhibit DT-6, or whether any other equipment acquired by Claimants to fulfill contractual obligations under the 821 Contract applies.*

- *What are the specific elements that led the Tribunal to conclude that the Claimants exercised control over the entities involved in the alleged investment (Baku Energy Partners; Baku Exploración y Producción; Drake-Mesa; Royal Shale Holdings, and Royal Shale Corporation)?*

- *Whether the Dorama Bond qualifies as a stand-alone investment under the NAFTA definitions of "investment".*

- *Did the Tribunal determine that Contract 821 qualifies as an investment under the NAFTA or under the USMCA?*

- *Must the Claimants prove that the Dorama Bond is an independent investment?*

- *Are the activities carried out by Baku Energy Partners, Baku Exploración y Producción, Royal Shale Holdings, Royal Shale Corporation and Drake-Mesa attributable to the Claimants?*

- *Whether it was established that the yards and warehouses were acquired specifically for the contracts in question, or whether such issue will be resolved during the quantification phase.*

- *Given that the Tribunal concluded that it is not necessary to analyze whether all claimed expenses and items qualify as investments at this stage, do the Claimants still have the burden of proving that such expenses and items qualify as investments under the NAFTA? And if so, could this pending analysis change the findings on jurisdiction or liability at the subsequent stage?*

32. Through these questions the Respondent does not appeal or challenge the Decision, but invites the Tribunal to go beyond it, supplement it and decide now, before the pleadings of the *quantum* phase, several issues of which, in the Respondent's view, will come up during that new phase.

33. Irrespective of whether the Tribunal has the authority to do so -something to be discussed in the following section-, the Tribunal does not consider it appropriate to respond at this juncture to the questions in this bucket, as (i) it is uncertain whether they will come up during the *quantum* phase; and (ii) even if they do, it will be for the Parties to address them in their pleadings, without any constraint from the Tribunal other than its January 8, 2025 Decision

and the Tribunal's reminder to the Parties in paragraph 3 of Procedural Order No. 14.[44] If the questions in this second bucket do come up in the new phase of the arbitration and become relevant for the determination of *quantum*, it will be indeed for the Tribunal to decide them, after due consideration of the Parties' arguments, in the Award.

IV. THE LEGAL BASIS FOR THE RESPONDENT'S REQUEST

34. Turning now to the legal basis of the Request, the Tribunal notes, *first*, that the Request does not adduce any new fact or make reference to any new evidence which, unknown to the Tribunal at the time when it rendered its Decision, might justify that the Tribunal "revisits" its Decision, as envisaged, for instance, for awards in Article 51 of the ICSID Convention or Rule 50(1)(c)(ii), as a result of the "discovery of some fact of such a nature as decisively to affect the award, and evidence that when the award was rendered that fact was unknown to the Tribunal and to the applicant, and that the applicant's ignorance of that fact was not due to negligence."

35. Consequently, the Tribunal does not see a need to take a view on the question so thoroughly discussed by the Claimants in their Response on whether tribunals have an implicit power to revisit their decisions on jurisdiction and liability before rendering their award if in the meantime new facts or evidence emerge which are at odds with those previous decisions. Thus, the Tribunal does not see any need to discuss the *ConocoPhillips*, *Perenco*, *Standard Chartered Bank* or *Burlington* cases, as, particularly the last two, they are not directly relevant to the present case.

36. *Second*, as already indicated in paragraph 23 above, the Request does not refer to any ambiguity or obscurity in the dispositive part of the Decision, an ambiguity or obscurity which might have indeed produced uncertainty on the scope of the breaches attributed to Mexico in the Decision and, hence, prevented the Parties from assessing with certainty the *quantum* of Mexico's liability, thereby requiring from the Tribunal a genuine clarification of its Decision before the start of this second phase of the arbitration.

37. *Third*, as previously indicated, the two provisions on which the Respondent has based its Request are Article 44 of the ICSID Convention and Rule 19 of the ICSID Rules of Arbitration, two provisions which vest the Tribunal with the power to decide, by means of a procedural order, any "question of procedure" which the "conduct of the proceeding" may require.

[44] "3. This phase of the arbitration is concerned with the *quantum* of the Claimants' damage, if any. Thus, the Parties' submissions and evidence shall relate to factual and legal matters directly related to, and specifically relevant for, the determination of such *quantum*."

38. In the Tribunal's view, as indicated in paragraph 36 above, these two provisions might arguably be invoked to seek from the Tribunal a genuine "clarification" of the dispositive part of its Decision, had it been shown by any Party that it contained some ambiguity or obscurity of such a nature that they could have a decisive bearing on the Tribunal's decision on *quantum*, which had, thus, to be dispelled before the start of the *quantum* phase. But, as already explained in paragraph 23, this is not the case of the Request.

39. In conclusion, the two provisions cannot be seen as the basis for the Tribunal to achieve the two objectives which, on the Tribunal's interpretation, are in fact sought by the Request: namely, that, as in a successful appeal, the Tribunal rectifies or expands some of the findings of the Decision; and that the Tribunal provides "guidance" to the Parties on how it will likely deal in the Award with issues or arguments which the Parties may potentially raise during the *quantum* phase.

V. DECISION ON THE REQUEST

40. On the basis of the foregoing, the Tribunal decides:

> To dismiss in its entirety the Request made by the Respondent in its letter dated February 21, 2025 that the Tribunal issue a clarification of the Decision on Jurisdiction and Liability regarding the points raised in such Request.

VI. DECISION ON COSTS FOR THE REQUEST

41. The Claimants have requested the Tribunal to "issue an interim award favoring Claimants for the amount of attorney's fees and costs they have incurred in addressing Mexico's Request."[45]

42. At this stage, the Tribunal does not consider it appropriate to issue an interim award on costs solely in connection with the Request. Accordingly, the Tribunal will appropriately deal with any decision on costs related to the Request at the time of the final Award or the termination of this arbitration.

On behalf of the Tribunal

[Signed]

Mr. Manuel Conthe Gutiérrez
President of the Tribunal
Date: March 25, 2025

[45] Response, paras. 26-27.