

**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)**

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**PROCEDURAL ORDER NO. 11**  
**(Additional evidence)**

***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

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January 26, 2024

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## **I. BACKGROUND**

1. On December 22, 2023, the Claimants requested, pursuant to Paragraph 16.3 of Procedural Order No. 1, leave to submit into the evidentiary record a document called “Alegatos” that Finley, Drake-Finley, and Drake-Mesa had filed with the administrative court in the annulment proceeding against Pemex’s resolution that administratively rescinded the 821 Contract.
2. Following the Arbitral Tribunal’s invitation, on January 12, 2024 the Respondent submitted its comments on the Claimants’ request and asked the Tribunal to reject it.

## **II. THE PARTIES’ POSITIONS**

### **1.The Claimants’ position**

3. The Claimants recall that in paragraph 87 of the second report of Mr. Jorge Asali, the Respondent’s expert, he wrote that “it is not clear that the Claimants had asserted in their annulment lawsuit the illegality of the administrative termination of Contract 821 for its violation of Clause 15.1 (r)”. One of the documents cited by Mr. Asali in support of that statement was a document referred to as “JAH-0086” and described by Mr. Asali as “Claimants’ extension of complaint”.
4. The Claimants recall also that Mexico’s Rejoinder did not cite paragraph 87 of Mr. Asali’s second report, nor did it address Clause 15.1 (r) of the 821 Contract.
5. The Claimants argue that when preparing for the hearing, the Claimants discovered that the Exhibit JAH-0086 cited in Mr. Asali’s second report was missing and alerted Mexico about this fact. Mexico’s responded that the reference to such exhibit in Mr. Asali’s report was an “inadvertent error” and an “erroneous citation since such evidence does not exist”.
6. Counsel for the Claimants further explain that, on the weekend before the hearing, they were informed by their clients about the existence of a Word version of the Alegatos that their attorney in Mexico had submitted in 2018 in the 821 Contract annulment proceeding before the Tribunal Federal de Justicia (“TFJA”), in which Finley, Drake-Finley, and Drake-Mesa expanded upon the fourth and seventh challenges raised in their initial complaint (i.e., the

illegality of the administrative rescission and ineffective notice) and argued that (i) Work Order 028-2016 was fabricated to create a fake breach as part of Pemex's retaliation for the civil lawsuit that they had initiated; and (ii) the rescission was invalid because Clause 15.1(r) of the 821 Contract required 15 unfulfilled work orders, not one.

7. Claimants did not have an official copy of the Alegatos filed with the TFJA and wished to confirm that the Word version of the Alegatos had actually been submitted to the administrative court before formally raising it in this arbitration.
8. On December 8, 2024 (Day Five of the hearing), the Claimants' counsel stated that a colleague of the Claimant's counsel's Mexico City office had confirmed that he had been able to review the file of the annulment procedure before the TFJA and, even if he had not been allowed to make a copy or take pictures of the officially filed document, he could confirm that Finley, Drake-Finley, and Drake-Mesa had filed the Alegatos on May 25, 2018, and that the official filing matched the Word version that was in the Claimants' possession.
9. Later that month, the Claimants asked Mexico to assist them in obtaining a copy of the official version of the Alegatos and shortly thereafter Mexico confirmed that Pemex Exploración y Producción ("PEP") had managed to identify this document after a new search in its internal files of the Contract 821 annulment proceedings.
10. The Claimants argue that there are exceptional circumstances which justify that they are allowed to submit the Alegatos as new evidence.
11. First, the importance of the Alegatos (and the arguments presented to the TFJA about, *inter alia*, the fabricated work order and Clause 15.1(r)) of the 821 Contract) did not surface until the Claimants notified Mexico about the missing Exhibit JAH-0086 on November 6, 2023.
12. Second, the document has significant relevance, to the extent that (i) it contradicts Mr. Asali's statement in paragraph 87 of his second report; (ii) Mexico's witnesses testified that the issue of Clause 15.1 (r) of the 821 Contract had not been raised in the 821 Contract annulment proceeding; (iii) during the hearing, Mexico implied that the TFJA did not deny justice, but argued instead that the blame lied with Mexican counsel's purported failure and ineffectiveness; (iv) during the hearing, the Tribunal inquired whether the questions of the

alleged fake Work Order and Clause 15.1(r) of the 821 Contract were raised to the administrative court.

## **2.The Respondent’s position**

13. According to the Respondent, there are no exceptional circumstances which justify the filing of the new document requested by the Claimants.
14. Concerning timeliness, the Respondent stresses that the document was available to the Claimants for a long time – since it was filed by the Claimants on May 25, 2018 in the 821 Contract annulment proceeding – and “if a Party chose not to submit evidence that was available to it at the time of filing its written submissions, that situation would, in and of itself, not be exceptional”.
15. In fact, the document (“Escrito de Alegatos”) is expressly referred to on page 7 of the judgment of the TFJA, submitted as Exhibit RZ-039 of the Claimants’ expert first report.
16. If the Claimants or their experts considered the document relevant, they should have filed it as evidence at the appropriate time. It is now too late to introduce new evidence and new arguments in this arbitration regarding the Alegatos.
17. Furthermore, the document also lacks relevance and materiality for this arbitration, as Mexican law forbids the TFJA to consider new arguments not included in the initial demand or in its extension (“ampliación de la demanda”).
18. This is so because Article 47 of the Ley Federal del Procedimiento Contencioso-Administrativo (“LFPCA”) expressly states that the “alegatos” cannot “broaden the dispute” (“ampliar la *litis*”). As confirmed by Mr. Asali and case law, the “escrito de alegatos” is not a statement of claim (“demanda”), nor an extension of the claim (“ampliación de la demanda”), but a document filed at the end of the proceeding which the counterparty cannot respond to. Its purpose is to recapitulate what has been argued and proved as a result of the statement of claim, the answer to the claim and, when applicable, the extension of the claim and its response.
19. According to the Respondent, the dispute (*litis*) in the 821 Contract annulment proceeding in 2017 did not include the alleged illegality of the rescission as a result of Clause 15.1(r) of the

821 Contract, nor the fabrication of the work order alleged in this arbitration. In the annulment proceeding in Mexico the Claimants only argued that they had not been made aware of the order, as they were not adequately notified.

20. Finally, the Respondent rejects the accusations made by the Claimants in their December 22, 2023 communication concerning the way in which Mexico and its expert behaved concerning the “Alegatos”.

### **III. THE TRIBUNAL’S ANALYSIS**

21. In order to decide if the “Alegatos” may be submitted into the evidentiary record of this arbitration, this Procedural Order will focus (i) on the relevance and materiality of the “Alegatos” in this arbitration, and (ii) the factual background as to why this document was not previously brought to the attention of the Tribunal.

22. Concerning the first issue, the Tribunal considers the document relevant and material, principally as it may have a bearing on whether the decision taken by the judgment rendered by the TFJA on October 4, 2018 (i.e. Exhibit RZ-039) may or may not be a case of “denial of justice” or contribute to establish it.

23. The Tribunal has noted the Respondent’s comment on the scope of Article 47 of the LFPCA and the two rulings attached on the “alegatos de bien probado”. However, as such argument goes to the merits of the case, the Tribunal will have to assess it in the award, after having considered the Parties’ Post-Hearing Briefs. Hence, the Tribunal cannot reject now the filing of the “Alegatos” on the basis of such argument.

24. Concerning the factual reasons why the document has not been submitted so far in this arbitration, the Tribunal notes the special circumstances mentioned by the Parties in relation to the “Alegatos”.

25. As indicated by the Respondent, the “Alegatos” were originally presented by the Claimants themselves in May 2018 and, hence, the Claimants would have been expected to keep a copy of the document and, if they considered it relevant for this arbitration, should have filed it together with their Statement of Claim or, at the latest, their Reply.

26. However, the Tribunal also notes that the Claimants have mentioned a set of unusual circumstances on the side of the Respondents. Indeed, in his second expert report Mr. Asali cited a document, referred to as JAH-0086, which, according to the Claimants, was in all likelihood the “Alegatos”, even if, as declared by Mr. Asali during the hearing, it was quoted by mistake, to the point that he did not attach it to his second report. It was this and the exchanges that, starting in November 6, 2023, the Parties had on this issue which appear to have led the Claimants to realize the potential relevance of this document, search their old files related to the 2018 annulment proceeding and, after finding the “Alegatos” in Word format, look strenuously for a copy of the “Alegatos” as officially filed back then in Mexico.
27. As part of its effort to help the Claimants to get a copy of the original “Alegatos”, the legal department of PEP, after getting the “Alegatos” in Word format and making a new search in its files, was able to locate a copy of the official document, which the Respondent furnished voluntarily to the Claimants.
28. The Tribunal finally notes that, according to the Claimants, the content of the “Alegatos” contradicts both Mr. Asali’s statement in paragraph 87 of his second report and the oral testimony of Mexico’s witnesses that the issue of Clause 15.1 (r) of the 821 Contract was not raised in the 821 Contract annulment proceeding.
29. Pursuant to Rule 34.1 of the Arbitration Rules, the Tribunal “shall be the judge of the admissibility of any evidence adduced”. Thus, all in all, the Tribunal, bearing in mind the potential relevance and materiality of the “Alegatos”, as explained above, and the complex set of factual circumstances which have surrounded their belated emergence in this arbitration, has come to the conclusion that it should allow the Claimants to file the “Alegatos” pursuant to paragraph 16.3 of Procedural Order No.1.

#### **IV. DECISION**

In light of the above:

The Tribunal, pursuant to paragraph 16.3 of Procedural Order No.1, authorizes the Claimants to submit the new document they referred to in their December 22 letter, containing the “Alegatos”

filed by Finley, Drake-Finley and Drake-Mesa with the TFJA in the annulment proceeding against Pemex's resolution that administratively rescinded the 821 Contract.

[signed]

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Mr. Manuel Conthe Gutiérrez  
President of the Tribunal  
Date: January 26, 2024