

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)

PROCEDURAL ORDER NO. 13

ON THE PUBLICATION OF THE DECISION ON JURISDICTION AND LIABILITY

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

Date: December 3, 2024

I. INTRODUCTION

1. On November 23, 2024, the Respondent requested ICSID and the Tribunal that the Decision on Jurisdiction and Liability rendered by the Tribunal in English on November 4, 2024 (“the Decision”, henceforth) not be made public on the ICSID website until the translation in Spanish of the Decision is also available.
2. In support of its request the Respondent argued that the official languages of the procedure are both Spanish and English, and paragraph 11.11 of Procedural Order No.1 foresees that orders and decisions be issued in both languages. The Respondent further stressed that the Decision will be of significant interest in Mexico, but could not be understood by the general public if it is not published in Spanish.
3. On November 26, 2024, the Claimants indicated that to the extent that Mexico had not asked for any redactions of the Decision, “we understand that the parties are now free to disseminate the decision”.
4. Later that day, the Tribunal communicated to the Parties that it understood that the Claimants did not oppose the Respondent’s request that ICSID postpone the publication of the decision on its website until it is available in both English and Spanish, even if they asserted their right to be able to “disseminate” the Decision (in English) to third parties immediately. However, to the extent that the Claimants’ position was not absolutely clear, the Tribunal invited the Parties to clarify their position and, if possible, reach an agreement on this point. Were the Parties not to agree, the Tribunal would decide the matter.
5. On November 27, 2024, at the Claimants’ request, the ICSID Secretariat informed that it estimated that the Spanish translation of the Decision would be ready in approximately 8 weeks from that date.

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6. Later that day, the Claimants informed the Tribunal that the Parties had exchanged their respective positions, and it was apparent that the parties would require a ruling from the Tribunal on the issue. The Claimants clarified that, in their view, the publication of the English version of the Decision while the Tribunal finalizes the Spanish version of the Decision is appropriate.
7. The Claimants recall that paragraph 11.1 of Procedural Order No. 1 applies to this Decision and provides that “[t]he Tribunal may initially make any order or decision in English or Spanish and subsequently shall issue that order or decision in the other procedural language. Both language versions shall be equally authentic.” Claimants emphasize “decision.” Mexico, however, appears to believe that the applicable provision is paragraph 11.13 of Procedural Order No. 1, which provides that “[t]he Tribunal shall render the award in English and Spanish simultaneously. Both language versions shall be equally authentic.” Thus, the Tribunal will have to decide whether the Decision on Jurisdiction and Liability is a “decision” under Paragraph 11.1 -as the Claimants believe- or an “award” under Paragraph 11.13- as Mexico argues-.
8. The Claimants further state that if the Tribunal were to believe that the English and Spanish versions of the Decision should be published together, they request that they be allowed to disseminate the Decision to third parties who have expressed interest in the outcome. In their view, nothing prevents Mexico from issuing its own translation of the Decision once it is published.
9. In a letter dated also November 27, 2024, the Respondent reiterated its view that the Decision should not be published until it is also available in Spanish.
10. The Respondent argues that, in light of its nature and the issues it addresses, the Decision should have been rendered in both languages simultaneously, as foreseen in paragraph 11.13 of Procedural Order No.1. It notes that the Decision does not deal with procedural issues -like extending a deadline or deciding on exhibition requests-, but with the merits of the dispute and it is thus a crucial decision in this arbitration, not a purely procedural one.

11. The Respondent argues that it has the right to have the Decision in Spanish, as an official language of this arbitration, before the proceedings continue. It recalls that it has been a common practice in this arbitration to postpone the publication of documents on the ICSID's website until the documents were available in both languages. In the Respondent's view, the publication or dissemination of the Decision in English before the Spanish version is available would entail an irreparable violation of Mexico's rights, as the fact that Spanish is an official version of this arbitration cannot be ignored.
12. The Respondent reiterates that the Decision will be of great interest in Mexico, but its publication only in English would affect the public's capacity to understand it. Its translation into Spanish is not Mexico's responsibility.
13. Finally, the Respondent recall that under paragraphs 12 and 13 of Procedural Order No.2 the public dissemination of the documents of this arbitration can only be carried out through their publication by the ICSID Secretariat on its website, the Claimants not being authorized to disseminate to third parties any documents before their publication on ICSID's website.

THE TRIBUNAL'S ANALYSIS

14. The Tribunal agrees with the Respondent that the Decision rendered on November 24, 2024 is not just a procedural order, but deals with the merits of the case, to the point that it declares Mexico liable for some breaches of the NAFTA.
15. Thus, given the contents of the Decision, were other arbitration rules different from the ICSID Arbitration Rules applicable to this case, the Decision might indeed have been rendered as a "Partial Award", as envisaged for instance in Article 34.1 of the UNCITRAL Arbitration Rules, which reads:

"The arbitral tribunal may make separate awards on different issues at different times".

16. But this being an ICSID arbitration, the Tribunal should necessarily follow the ICSID Arbitration Rules, which are different from other arbitration rules (like UNCITRAL's) and enshrine the principle of "only one award" in an arbitration.
17. Such ICSID "only one award" rule stems from the ICSID Convention, which in Articles 48-49 refer to "the award", in the singular. There is not a trace in the ICSID Convention of any provision similar to Article 34.1 of the UNCITRAL Arbitration Rules quoted above. Under the same principle, only "the award" is capable of enforcement under ICSID Convention Article 54. Article 53.2 reiterates that for enforcement purposes, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52. In other words, under the ICSID Convention and Arbitration Rules, only the final decision bringing to an end the case should be considered an "award".
18. This has consistently been made clear by ICSID in its explanation of the ICSID Arbitration Rules¹:
- "There is only one award in an ICSID case, and it is the Tribunal's last decision which disposes of the case. Any other ruling before the final award, such as a decision on liability, is not considered an award, and recourse cannot be taken against it until after the award is rendered. If a Tribunal issues a decision on jurisdiction upholding its jurisdiction, such decision forms part of the eventual award. If a Tribunal decides that it has no jurisdiction, it renders an award" (emphasis added).
19. Thus, to the extent that the Decision upheld the Tribunal's jurisdiction to decide some of Claimants' claims, under the ICSID rules it cannot be considered an "award", as the only award will be the Tribunal's "last decision which disposes of the case", *i.e.* the forthcoming award deciding the *quantum* phase (unless, of course, the two parties, by a common accord, decide to discontinue the arbitration).

¹ ICSID Arbitration Rules (2016) and ICSID Arbitration Rules (2022).

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20. As the Decision is not an “award” under the ICSID rules, the Tribunal complied strictly with them by issuing it in keeping with paragraph 11.11 of Procedural Order No.1, rather than paragraph 11.13. Therefore, contrary to the suggestion that the Respondent makes *in fine* in its November 27, 2024 letter, the Tribunal may not withdraw now its November 24, 2024 Decision (in English) and re-issue it later, when it is available in both official languages of the arbitration.
21. In conclusion, from a legal standpoint it is clear for the Tribunal that the Respondent does not have a legal right, under the ICSID Arbitration Rules, to have the Decision treated as if it were an award, to which the rule contained in paragraph 11.13 of Procedural Order No.1 were applicable. For that very reason, the Tribunal does not see either how the publication of the Decision only in English could entail an “irreparable violation” of the Respondent’s legal rights, as argued by Mexico in its November 27, 2024 letter.
22. The question, thus, boils down to whether, as a matter of mere opportunity, not legality, the Tribunal could request the ICSID Secretariat to postpone the publication of the Decision until its Spanish version is available.
23. The Tribunal could have indeed countenanced such postponement had the Claimants agreed to it, which they have not.
24. The Tribunal shares the Respondent’s view that, in keeping with the provisions of Procedural Order No.2, the publicity of the Decision should be seen as a binary “black or white” issue -*i.e.* the Decision either remains confidential or is made public by ICSID, without any intermediate possibility allowing for a “private dissemination” of the Decision which is not accessible to the public at large.
25. The Tribunal, while sensitive to the Respondent’s interest in having the Decision released in Spanish so that it can be understood easily in Mexico, has come to the conclusion that the principle of transparency and public disclosure, as invoked by the Claimants and

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enshrined in Procedural Order No.1, trumps Mexico's concerns, as the contents of the Decision may also be of interest to other parties. Hence, it has concluded that the Decision should be published immediately, for the time being in English.

26. Regarding the translation of the Decision into Spanish and the Respondent's disappointment about its slow pace, the Tribunal has been informed by the ICSID Secretariat that the translation process is well underway and that it will make its best to expedite it.

27. Concerning the continuation of the arbitration, the Tribunal notes that Mexico has indicated that it will not be ready to do so until the Decision is available also in Spanish. The Tribunal respects that point of view and, this being a question of mere opportunity, does not see any obstacle in postponing the sending to the Parties of the announced draft procedural order on the next stage of the arbitration until the Decision is available also in Spanish.

DECISION

In light of the foregoing, the Tribunal decides that its November 4, 2024 Decision on Jurisdiction and Liability be published immediately on the ICSID's website.

On behalf of the Tribunal

[Signed]

Manuel Conthe Gutiérrez
President of the Tribunal
Date: December 3, 2024