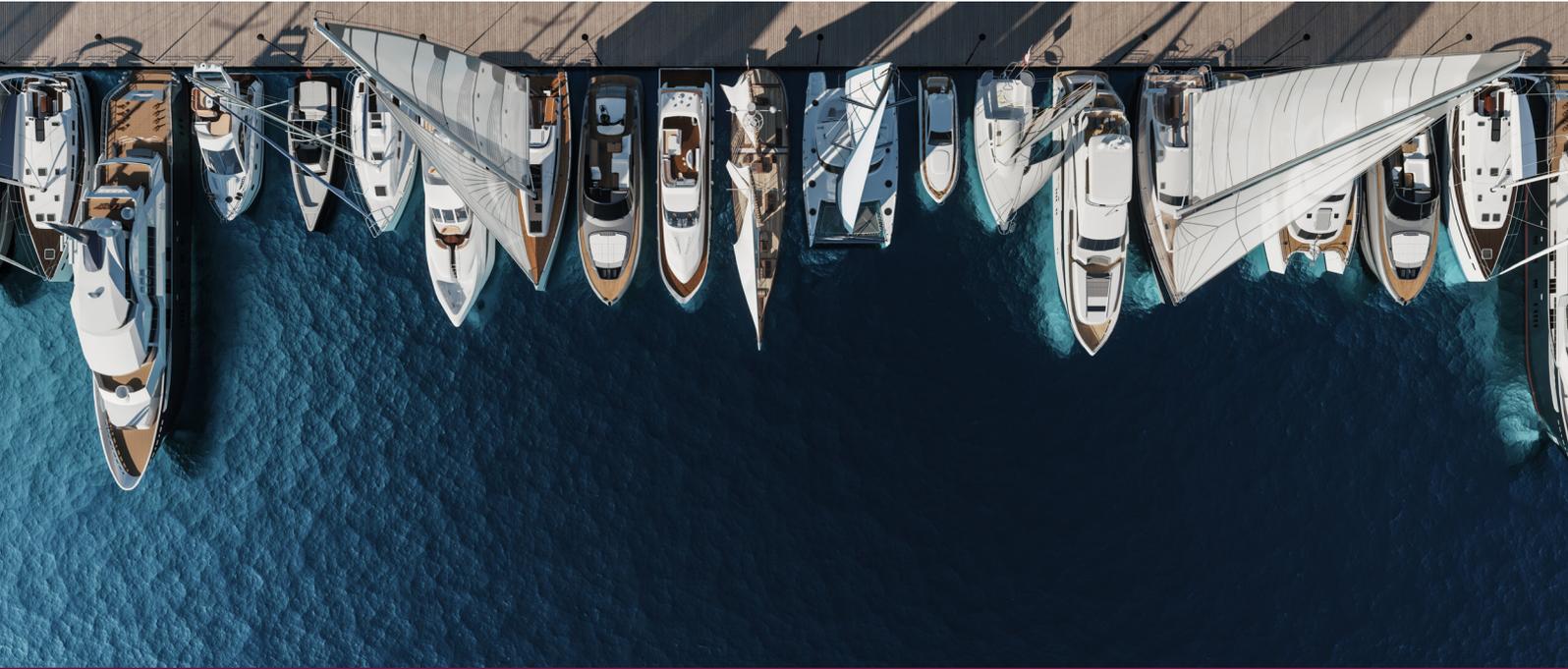


**VAN BAEEL & BELLIS**



**Arbitral tribunal awards USD 6.7 million against Mexico in *PACC Offshore Services Holdings LTD v. Mexico***

| 12 July 2022

In the recently published [award](#) (the “**Award**”) in the case of *PACC Offshore Services Holdings LTD v. United Mexican States* (ICSID Case No. UNCT/18/5, Award of 11 January 2022), a tribunal comprising Dr. Andrés Rigo Sureda (President), Professor W. Michael Reisman and Professor Phillipe Sands dismissed the majority of a claimant’s claims against Mexico under the Mexico-Singapore bilateral investment treaty (“**BIT**”). The Tribunal did, however, find that Mexico failed to accord fair and equitable treatment (“**FET**”), and awarded the claimant USD 6.7 million. Our client alert briefly sets out the Tribunal’s findings and their relevance in the wider context of investor-State dispute settlement.

## BACKGROUND AND POSH’S CLAIM

Between 2011 and 2012, PACC Offshore Services Holdings LTD (“**POSH**”), a Singaporean company, established a joint venture with *Oceanografía S.A. de C.V.* (“**OSA**”), a Mexican company, to provide offshore services to *Petróleos Mexicanos* (“**PEMEX**”), Mexico’s state-owned oil and gas company. Through the joint venture, POSH agreed to provide OSA with bareboat charter services, and OSA to sub-charter them to PEMEX.

In 2014, the Mexican authorities initiated legal proceedings against OSA arising out of allegations of money laundering and fraud. POSH argued in the present arbitration that the various measures against OSA (such as asset seizures) resulting from those legal proceedings affected POSH’s investment as well. These measures also included a detention order (the “**Detention Order**”) preventing ten vessels owned by POSH’s subsidiaries from operating throughout the application of the Detention Order.

POSH argued specifically that Mexico’s measures against OSA amounted to an unlawful expropriation of POSH’s investment, and to a breach of the FET and full protection and security (“**FPS**”) standards of the BIT, claiming damages in excess of USD 200 million.

## THE AWARD

### ***No jurisdiction in respect of most of the claims brought by POSH***

At the outset, the Tribunal noted that: (i) OSA did not qualify as an investor or as an investment under the BIT, (ii) POSH’s connection with OSA was purely contractual, and (iii) the measures attributable to POSH’s connection with OSA were separate from those allegedly taken against POSH and its subsidiaries.

The Tribunal also pointed out that “[a] *potentially endless chain of consequences may flow from any government decision or action, and it is necessary and reasonable to find some limit to the claims which can be brought*”. It would be unrealistic to presume that the parties to the

BIT intended to “*permit an infinite number of investment claims in relation to any one measure, including in respect of consequences that could not have been foreseen or intended by the decision-maker*”. On this basis, the Tribunal declined jurisdiction to hear any claims relating to those measures that were “*entirely dependent on the fact that the Claimant happened to contract with OSA*” given that POSH was “*insufficiently proximate or indirectly affected by the measures objected*”. As a result, the Tribunal retained jurisdiction only in respect of a limited number of claims, such as those arising out of the Detention Order.

### **No unlawful expropriation**

The Tribunal dismissed all of POSH’s claims that its investments had been unlawfully expropriated. Notably, as regards the Detention Order, the Tribunal found that the measure did not have an equivalent effect to expropriation because POSH and its subsidiaries were deprived of their vessels only for a short period of time.

### **Breach of the FET standard**

The Tribunal found that Mexico had breached the FET standard in the context of the Detention Order. It held that the detention of the vessels of POSH’s subsidiaries was “*arbitrary, grossly unfair and unjust*” because (i) POSH’s subsidiaries were deprived of the income generated by their vessels during the detention period, (ii) Mexico had not compensated POSH’s subsidiaries, and (iii) the “*actual reason*” for the attachment of POSH’s subsidiaries’ vessels was not uncertainty as to their ownership, but Mexico’s need to ensure the vessels’ service to PEMEX.

### **No consideration of the FPS standard “for reasons of judicial economy”**

POSH claimed that Mexico’s course of conduct, considered “*as a composite act*”, was in breach of its obligation to provide FPS. In addition, POSH argued that the “[i]ndividual components” of Mexico’s conduct amounted to violations of the FPS standard on their own account.

The Tribunal rejected the “*composite act*” argument, and did not find it necessary to consider the “*individual components*” raised by POSH in the context of FPS, as it had already considered them in the context of Mexico’s alleged expropriations and breach of FET. The Tribunal took this approach “*for reasons of judicial economy*”.

## **THE DISSENTING OPINION**

In his concurring and dissenting opinion (the “**Dissenting Opinion**”), Professor Reisman stated that he could not “*concur with those parts of the Award which pick, choose, and, in effect, redraft provisions of the BIT*”, and argued that the Award employed “*an impermissible methodology for treaty interpretation and application*”.

Professor Reisman agreed that Mexico had failed to accord FET, but dissented from the Award’s reasoning as follows:

- (i) the Award’s exclusion of the treatment of OSA from the Tribunal’s jurisdiction was “*mistaken*” because POSH had been required to enter a joint venture with OSA as a matter of Mexican foreign investment law. The derivative injury suffered by POSH as a result of the treatment of OSA under domestic law was “*proximate and should sound in the BIT*”;

- (ii) the Award essentially redrafted the BIT's provision on expropriation. Professor Reisman recalled that under the applicable BIT there were three essential elements to an expropriation claim: (i) a qualifying investment; (ii) an attributable measure; and (iii) a payment of compensation. As such, the pertinent question before the Tribunal was whether Mexico's contested measures entailed an obligation to compensate for expropriation; not whether the measure in question was undertaken in accordance with domestic law or due process. Professor Reisman found that the Detention Order had, in fact, amounted to an unlawful expropriation. He also considered that the compensation awarded to POSH for Mexico's failure to accord FET did not cover the damage suffered by POSH or its subsidiaries which resulted from Mexico's expropriation; and
- (iii) the Award disregarded the long-term effects of the Detention Order and its expropriatory character in the calculation of damages.

## COMMENT

The Award in this case is especially notable when read in conjunction with the critical Dissenting Opinion of Professor Reisman. The Tribunal members' differing reasoning and, at times, opposite interpretations of the BIT are quite stark.

Professor Reisman's dissent will likely form the basis of an annulment application of this Award (given that the claimant was awarded just under USD 7 million on its claim in excess of USD 200 million). What remains to be seen is whether his critical Dissenting Opinion in this case will have any effect in [Shanara Maritime International, S.A., y Marfield Ltd. Inc. v. United Mexican States](#) and [Terence Highlands v. United Mexican States](#), two pending investment arbitrations which similarly relate to measures taken by Mexico in the context of OSA's alleged money laundering and fraud. Given Professor Reisman's critical dissent, the POSH Award does not indicate a clear path to victory for Mexico in these related arbitrations, and is likely to generate much discussion in these tribunals' deliberations.

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