

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Legacy Vulcan, LLC

v.

United Mexican States

(ICSID Case No. ARB/19/1)

PROCEDURAL ORDER NO. 11

Members of the Tribunal

Prof. Albert Jan van den Berg, President of the Tribunal

Prof. Sergio Puig, Arbitrator

Prof. Guido Santiago Tawil, Arbitrator

Secretary of the Tribunal

Ms. Sara Marzal

Assistant to the Tribunal

Ms. Emily Hay

19 December 2023

I. INTRODUCTION

1. On 11 July 2022, the Tribunal issued Procedural Order No. 7 (“**PO 7**”) wherein it, *inter alia*, recommended “as provisional measures pursuant to Article 47 of the ICSID Convention, Rule 39 of the ICSID Arbitration Rules, and NAFTA Article 1134 that Mexico take no action that might further aggravate or extend the dispute between the Parties, including further public attacks that exacerbate the dispute between the Parties, unduly pressure CALICA or Legacy Vulcan, or render the resolution of the dispute potentially more difficult”.¹
2. On 11 October 2023, Claimant requested leave to submit into the record the transcript and an excerpt of the video of President Andrés López Obrador’s *Conferencia de Prensa Matutina* or *La Mañanera* (daily morning press conference) dated 6 October 2023. Upon leave from the Tribunal of 12 October 2023, Respondent communicated on 16 October 2023 that it did not object to Claimant’s request, provided the full video and transcript were introduced into the record. In addition, Respondent stated that “*el Presidente en ningún momento* ‘reiterated his intent to convert CALICA’s lots into a protected natural area by decree before leaving office next year’”.²
3. On 24 October 2023, Claimant requested the Tribunal (i) for leave to submit into the record the transcript and an excerpt of the video of President Andrés López Obrador’s *La Mañanera* dated 20 October 2023 (“**20 October 2023 Mañanera**”), pursuant to paragraph 16.3 of Procedural Order No. 1, and (ii) in light of the 20 October 2023 *Mañanera*, to reiterate its order in PO 7 recommending “that Mexico take no action that might further aggravate or extend the dispute”.³ In Claimant’s view, the President’s publicly made statements at the 20 October 2023 *Mañanera* were alleged attacks and threats to Claimant and CALICA in relation to this arbitration, which constitute a violation of PO 7.⁴
4. On 30 October 2023, Respondent replied that it did not object to Claimant’s request to admit into the record the 20 October 2023 *Mañanera*, provided the full video and transcript

¹ PO 7 ¶ 160(a).

² Respondent letter dated 16 October 2023, p. 1.

³ Claimant’s letter dated 24 October 2023, p. 1.

⁴ Claimant’s letter dated 24 October 2023, p. 2

were introduced into the record. Respondent requested the Tribunal to reject Claimant's allegations regarding Respondent's alleged breached of PO 7.⁵

5. On 2 November 2023, Claimant commented on Respondent's letter of 30 October 2023, maintaining its request for the Tribunal to reiterate its provisional-measure order in PO 7, recommending that Respondent refrain from further aggravating the dispute.⁶
6. On 9 November 2023, Claimant wrote to the Tribunal that Respondent "has further aggravated the dispute by publishing in the Official Gazette [on 8 November 2023] a notice commencing the process to declare CALCIA's lots as a natural protected area" ("**Notice**").⁷ Claimant requested the Tribunal (i) for leave to submit the Notice into the record; and (ii) to reiterate the Tribunal's order in PO 7, recommending that Respondent refrain from further aggravating the dispute.⁸
7. On 10 November 2023, upon the Tribunal's leave of 8 November 2023 to admit the 20 October 2023 *Mañanera* into the record, Claimant submitted the complete transcript and video of said *Mañanera*.
8. On 16 November 2023, Respondent replied that it did not object to the Notice being introduced into the record, provided that certain other documents that Respondent refers to in its 16 November 2023 letter are introduced into the record.
9. On 27 November 2023, the Tribunal admitted the Notice into the record and requested Respondent to submit it, which Respondent did on the next day. On 12 December 2023, the Tribunal issued directions in relation to Respondent's request of 16 November 2023 for introduction of documents into the record.

⁵ Respondent's letter dated 30 October 2023, p. 2.

⁶ Claimant's letter dated 2 November 2023, p. 2.

⁷ Claimant's letter dated 9 November 2023, p. 1.

⁸ Claimant's letter dated 9 November 2023, p. 2.

II. REQUESTS

10. Having dealt with Claimant’s requests for introducing the video and transcript of the 20 October *Mañanera* and the Notice, there are currently two requests outstanding, which the Tribunal shall address in this Procedural Order:
- (a) In relation to the 20 October 2023 *Mañanera*, Claimant requests a reiteration of the Tribunal’s order in PO 7 recommending “that Mexico take no action that might further aggravate or extend the dispute”;⁹ and
- (b) In relation to the Notice, Claimant requests the Tribunal to reiterate its order in PO 7, “recommending that Respondent refrain from further aggravating the dispute”.¹⁰

III. PARTIES’ POSITIONS

A. Claimant’s Position

11. Claimant argues that President López Obrador, in the 20 October 2023 *Mañanera*, disparaged Claimant and CALICA and threatened to declare the CALICA lots as a natural protected area.¹¹ According to Claimant, the President’s remarks and threats were made as Claimant had rejected the President’s purported proposal, made on television, to buy CALICA’s assets for approximately USD 355 million and to use the lots as a tourism project and natural park.¹² Claimant submits that the President has affirmed that he will “not leave [office] without resolving this issue, and [that] the best way to resolve it is to declare everything a protected natural area.”¹³
12. Claimant further contends that the President’s public statements contradict Respondent’s representation in its letter dated 16 October 2023, referred to in ¶ 2 above, that the President

⁹ See ¶ 3 above.

¹⁰ See ¶ 6 above.

¹¹ Claimant’s letter dated 24 October 2023.

¹² Claimant’s letter dated 24 October 2023, p. 1; *citing C-371, C-372*.

¹³ Claimant’s letter dated 24 October 2023, p. 2; *quoting C-372; see also C-371*.

“*en ningún momento* ‘reiterated his intent to convert CALICA’s lots into a protected natural area by decree before leaving office next year’”.¹⁴

13. Claimant submits that the President’s public attacks, threats and specific references to this arbitration in the 20 October 2023 *Mañanera* undermine the integrity of this proceeding and Claimant’s ability to pursue this arbitration.¹⁵ According to Claimant, Respondent is strong-arming it into surrendering its investments and claims for a fraction of their value. In Claimant’s view, these attacks constitute a further violation of PO 7.¹⁶
14. Claimant also rebuts Respondent’s contention that it initiated serious negotiation efforts and denies that Claimant had commented about this case to the press.¹⁷
15. Claimant further submits that, if adopted, Respondent’s declaration of CALICA’s lots as a natural protected area would constitute an expropriation of Claimant’s investments, thereby further aggravating and extending the ongoing dispute between the Parties.
16. Claimant maintains that the threatened measure is not “speculative”, as the President has reiterated that he will declare CALICA’s lots as a natural protected area if Claimant does not accept the President’s proposal.¹⁸ In support, Claimant also relies on a newspaper article, stating that the President has “reportedly signed a decree to this effect already”.¹⁹
17. Claimant disputes Respondent’s contentions that the provisional measures recommended by the Tribunal under PO 7 were limited to the original proceedings and cannot be invoked by Claimant in relation to the ancillary proceedings. Claimant maintains that the President’s remarks pertained to this arbitration and that Claimant is entitled to request a reiteration of the non-aggravation order in PO 7.²⁰

¹⁴ Claimant’s letter dated 24 October 2023, p. 2; *quoting* Respondent’s letter dated 16 October 2023, p. 1.

¹⁵ Claimant’s letters dated 24 October 2023, p. 2 and dated 2 November 2023, p. 2.

¹⁶ Claimant’s letter dated 24 October 2023, p. 2.

¹⁷ Claimant’s letter dated 2 November 2023, p. 1.

¹⁸ Claimant’s letter dated 2 November 2023, p. 2.

¹⁹ Claimant’s letter dated 2 November 2023, p. 2; *citing* Nido de Víboras, Luces del Siglo (1 November 2023), <https://lucsdelsiglo.com/2023/11/01/nido-deviboras-editorial-694/>.

²⁰ Claimant’s letter dated 2 November 2023, p. 2.

18. Moreover, Claimant refers to the Notice, which, according to Claimant, constitutes the first formal step for a Presidential decree to declare CALICA's lots as a natural protected area.²¹ Claimant argues that while the Notice does not mention CALICA or expressly identify the properties subject to the measure, it covers CALICA's lots as it refers to an area of 2,387 hectares located in the municipalities of Solidaridad and Cozumel and CALICA's lots have approximately that area and are located in those municipalities.²²

B. Respondent's Position

19. Respondent submits that while the Tribunal's recommendation for provisional measures in PO 7 was pursuant to statements by the President that clearly referred to this arbitration, the President's statements in the 20 October 2023 *Mañanera* relate to the negotiation proposal made to Claimant as opposed to the pending arbitration proceedings.²³ According to Respondent, those statements do not constitute a threat.²⁴
20. Respondent submits that one of the purposes of the 20 October 2023 *Mañanera* is to inform and respond to public inquiries on issues relevant to Mexico, one of which is the alleged exploitation and disposal of Mexico's natural resources.²⁵ Respondent contends that the President's statements are a consequence of the media coverage caused by Claimant who had approached the international media to comment on the development of this arbitration and to discredit the negotiation efforts initiated by Mexico.²⁶ For Respondent, Claimant has breached PO 7.²⁷
21. Respondent contends that, similar to the measures addressed by the Tribunal in ¶ 78 of PO 7, Claimant's assertion regarding Respondent's alleged intention to issue a "declaration

²¹ Claimant's letter dated 9 November 2023, p. 1; *citing*, C-0373-SPA.

²² Claimant's letter dated 9 November 2023; *citing* Notice on Official Gazette, C-0373-SPA.

²³ Respondent's letter dated 30 October 2023, pp. 1-2; *citing* C-372.

²⁴ Respondent's letter dated 30 October 2023, p. 2.

²⁵ Respondent's letter dated 30 October 2023, p. 1.

²⁶ Respondent's letter dated 30 October 2023, p. 1; *citing* Ver Bloomberg, Vulcan Seeks Biden's Protection Against Mexico Port Seizure, 19 de octubre de 2023. Vulcan Seeks Biden's Protection Against Mexico Port Seizure - Bloomberg. Ver también AMLO responde a Vulcan: anticipa declarar a Calica como área natural protegida, 20 de octubre de 2023. AMLO responde a Vulcan: anticipa declarar a Calica como área natural protegida (bloomberglínea.com).

²⁷ Respondent's letter dated 30 October 2023, p. 1.

of CALICA's lots as a natural protected area would constitute an expropriation of [Claimant's] investment" is speculative.²⁸

22. With respect to the Notice, Respondent argues that it is an informative and preliminary act that makes a study conducted by *Comisión Natural de Áreas Naturales Protegidas* (CONANP) available to the general public and is intended to gather various opinions. Respondent contends that it does not constitute a Presidential decree declaring the intended hectares as a natural protected area.²⁹ Respondent further contends that the Notice is subject to numerous steps and deadlines within a legal procedure for declaring a natural protected area.³⁰
23. According to Respondent, the fact that this dispute exists, does not exempt Mexican environmental authorities from fulfilling their obligation to exercise their functions in protecting the human right of every person to a healthy environment for his or her development and well-being, as well as the obligation to promote sustainable development, address climate change, and preserve the environment in Mexico.³¹
24. Respondent contends further that if the process subsequent to the Notice concludes in the issuance of a decree declaring a protected natural area, Mexican law provides Claimant with defenses that it can rely on.³²
25. Respondent contends that, in any event, ¶ 95 of PO 7 establishes that the provisional measures recommended in PO 7 were limited to the original proceedings. According to Respondent, PO 7 cannot be used as a justification for introducing additional evidence in the ancillary proceedings or extending the object of the provisional measures to measures of a speculative nature.³³

²⁸ Respondent's letter dated 30 October 2023, p. 2.

²⁹ Respondent's letter dated 16 November 2023, p. 1.

³⁰ Respondent's letter dated 16 November 2023, p. 1.

³¹ Respondent's letter dated 16 November 2023, pp. 1-2.

³² Respondent's letter dated 16 November 2023, p. 2.

³³ Respondent's letter dated 30 October 2023, p. 2.

IV. TRIBUNAL'S ANALYSIS

26. Claimant's requests, referred to in ¶ 10 above, concern a reiteration of the Tribunal's recommendation in PO 7. In PO 7, the Tribunal, *inter alia*, recommended that "Mexico take no action that might further aggravate or extend the dispute between the Parties, including further public attacks that exacerbate the dispute between the Parties, unduly pressure CALICA or Legacy Vulcan, or render the resolution of the dispute potentially more difficult".³⁴
27. The above-stated provisional measures recommended by the Tribunal in PO 7 are also applicable to the ancillary claim in this arbitration.
28. The Tribunal notes that it is not being requested to recommend further provisional measures going beyond the recommendation of provisional measures made in PO 7, as quoted in ¶ 1 above. Rather, Claimant only requests the Tribunal to reiterate the provisional measures recommended by it in PO 7 in light of Respondent's actions, referred to in Claimant's letters of 24 October and 9 November 2023. Accordingly, the Tribunal shall determine whether any of the circumstances that Claimant has referred to in relation to its reiteration requests fall within the ambit of the Tribunal's earlier recommendation.

A. Claimant's Request regarding the 20 October 2023 *Mañanera*

29. Claimant requests in relation to the President's 20 October 2023 *Mañanera* that the Tribunal reiterates its order in PO 7, recommending "that Mexico take no action that might further aggravate or extend the dispute".
30. The relevant passages of the 20 October 2023 *Mañanera* that Claimant refers to as containing threats, which are allegedly made in reference to the present arbitration proceedings, are quoted below:³⁵

³⁴ PO 7 ¶ 160(a).

³⁵ C-371, p.15.

PREGUNTA : ¿Cuánto pedían ellos ?

PRESIDENTE ANDRÉS MANUEL LÓPEZ OBRADOR : No, nada, ellos no quieren nada, ellos lo que quieren es que se termine el gobierno para volver a explotar.

PREGUNTA: Ellos demandaban por mil 900 millones de dólares.

PRESIDENTE ANDRÉS MANUEL LÓPEZ OBRADOR: Sí, sí, y hay un litigio de esta naturaleza. Pero yo quiero decirles aquí a todos los mexicanos que yo no me voy a ir sin resolver esto y la mejor forma de resolverlo es que se declare zona natural protegida todo, y que se les pague de conformidad con la ley la indemnización correspondiente.

PREGUNTA: ¿Qué recursos ocuparía?

PRESIDENTE ANDRÉS MANUEL LÓPEZ OBRADOR: Sencillamente se declara área natural protegida.

PREGUNTA: ¿Por decreto?

PRESIDENTE ANDRÉS MANUEL LÓPEZ OBRADOR: Por decreto. Si no hay respuesta de parte de ellos, si no quieren ayudar, esa va a ser la decisión.

PREGUNTA: ¿Un plazo?

PRESIDENTE ANDRÉS MANUEL LÓPEZ OBRADOR: No, vamos a esperar, nada más antes de que yo me vaya. Ya se les va a depositar en un juzgado los seis mil, siete mil millones de pesos, y vamos a emitir el decreto para destinar toda el área a la protección del medio ambiente; no se va a poder construir nada, va a ser para conservaresta reserva.

31. A delicate balance needs to be maintained by the Tribunal to ensure that the integrity of the proceedings is not violated by a party's (here Mexico's) actions, and at the same time, to not unduly encroach on the State's sovereignty.
32. In PO 7, the Tribunal regarded certain presidential statements regarding Claimant's claims and damages sought in the original claims phase of the arbitration, as "jeopardis[ing] the integrity of the arbitral process" and tantamount to "prosecution of the dispute in the media

and other public fora”.³⁶ On this basis, the Tribunal recommended the provisional measures in PO 7.

33. With respect to the 20 October 2023 *Mañanera*, the Tribunal concurs with Respondent that the presidential statements quoted in ¶ 30 above, relate to the negotiation proposal by Respondent. In the Tribunal’s view, these presidential statements do not give rise to the same level of seriousness as the facts underlying the provisional measures recommended in PO 7. While the presidential statements relate to matters in the arbitration, the Tribunal considers that they are more of an informative rather than a threatening nature as alleged by Claimant.
34. Accordingly, the Tribunal is not persuaded that a reiteration of its recommendation in PO 7 “that Mexico take no action that might further aggravate or extend the dispute”, is warranted in view of the presidential statements in the 20 October 2023 *Mañanera*.
35. In this respect, at this point, it is irrelevant to address whether, as Respondent contends, the President’s statements are a consequence of the media coverage caused by Claimant who allegedly approached the international media to comment on the development of this arbitration and discredited the negotiation efforts initiated by Mexico.³⁷

B. Claimant’s Request regarding the Notice

36. Claimant requests in relation to the Notice that the Tribunal reiterates its order, recommending that Respondent refrain from further aggravating the dispute.
37. The Tribunal is not in a position to determine at this stage and based on the materials before it whether the issuance of the Notice may be considered an action by Respondent that will further aggravate or extend the dispute between the Parties.
38. According to Claimant, the Notice is the “first formal step for a Presidential decree to declare CALICA’s lots as a natural protected area”.³⁸ It does not appear to be Claimant’s

³⁶ PO 7, ¶ 93.

³⁷ Respondent’s letter dated 30 October 2023, p. 1.

³⁸ Claimant’s letter dated 9 November 2023, pp. 1-2.

argument, and, in any event, Claimant has not substantiated, that the declaration of CALICA's lots as a natural protected area is the automatic outcome following the issuance of the Notice. Respondent has not denied that the Notice initiates the formal process for decreeing the CALICA lots as a natural protected area. It has, however, also stated that this Notice constitutes an "*acto informativo y preliminar*" and that "*el Aviso está sujeto a numerosos pasos y plazos dentro de un procedimiento legal de declaratoria de área natural protegida*".³⁹

39. As such, it appears to the Tribunal that the Notice is subject to a procedure with an uncertain outcome. In light of this, the Tribunal is not persuaded that the Notice, in and of itself, leads to a further aggravation or extension of the present dispute.
40. Also coupled with the President's statements, it remains speculative whether a decree will follow with certainty to declare the CALICA lots as a natural protected area. While Respondent's representation in its correspondence dated 16 October 2023 that "*el Presidente en ningún momento 'reiterated his intent to convert CALICA's lots into a protected natural area by decree before leaving office next year'*"⁴⁰ seems to be contradicted by the President's statements, the President's intention is not made out.
41. Consequently, the Tribunal is not persuaded that the issuance of the Notice in and of itself warrants a reiteration of the Tribunal's recommendation in PO 7 that Respondent refrain from further aggravating the dispute. However, in the event that circumstances further develop with more clarity, Claimant is at liberty to make a corresponding request.

³⁹ Respondent's letter dated 16 November 2023, p. 1.

⁴⁰ Respondent's letter dated 16 October 2023, p. 1.

V. DECISION

42. On the basis of the above, the Tribunal hereby decides as follows:
- (a) REJECTS Claimant’s request in relation to the 20 October 2023 *Mañanera* that the Tribunal reiterates its order in PO 7, recommending “that Mexico take no action that might further aggravate or extend the dispute”.
 - (b) REJECTS Claimant’s request in relation to the Notice that the Tribunal reiterates its order in PO 7, recommending that Respondent refrain from further aggravating the dispute.
 - (c) RESERVES the matter of costs related to Claimant’s requests; and
 - (d) REJECTS any remaining request.

On behalf of the Tribunal,

[Signed]

Prof. Albert Jan van den Berg
President of the Tribunal
Date: 19 December 2023