INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

LEGACY VULCAN, LLC

Claimant

and

UNITED MEXICAN STATES

Respondent

ICSID Case No. ARB/19/1

AWARD

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

Date of dispatch to the Parties: 27 July 2026

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Table of Contents

LIST OF DEFINED TERMS 7
I. INTRODUCTION 20
II. THE PARTIES 22
A. Claimant 22
B. Respondent 23
III. PROCEDURAL HISTORY 23
IV. FACTUAL BACKGROUND 53
A. The Investment Agreement, Port Concession, and Claimant's Acquisition and Initial Development of La Rosita, Punta Venado, El Corchalito and La Adelita 53
B. Factual Background to the Original Claims 61
1. El Corchalito and La Adelita: Authorizations and Zoning 61
2. The 2014 Agreements and POEL 2009 Amendment Process 69
3. Shutdown of Operations at El Corchalito 78
4. Litigation regarding the CALICA Port Concession 81
C. Factual Background to the Ancillary Claim 83
1. Tourism in Southeastern Mexico 83
2. The President's Morning Press Conferences 85
3. Clean Industry Certificates 89
4. PROFEPA Inspections and the Shutdown of La Rosita 91
5. Customs Permit: Renewal Delay and Cancellation Proceedings 94
6. SEMARNAT Dictamen 96
V. SUMMARY OF THE PARTIES' POSITIONS AND RELIEF SOUGHT 97
A. Claimant's Position and Relief Sought 97
1. Original Claim 97
2. Ancillary Claim and Counterclaim 99
B. Respondent's Position and Relief Sought 102
1. Original Claim 102
2. Ancillary Claim 103
VI. INTRODUCTION TO THE TRIBUNAL'S ANALYSIS 105
A. Parties' Submissions 105
B. Overview of This Award 105
VII. APPLICABLE LAW 106
VIII. JURISDICTION AND ADMISSIBILITY 108
A. Relevant Provisions 108

B. Respondent's Position 116
1. Jurisdiction Ratione Temporis 116
2. Investor and Investment 117
3. Port Tariff Claim 118
4. Ancillary Claim 120
5. Admissibility and Unclean Hands 122
6. Counterclaim 123
C. Claimant's Position 131
1. Jurisdiction ratione temporis 131
2. Investor and Investment 132
3. Port Tariff Claim 133
4. Proceedings in Mexican Courts 134
5. Ancillary Claim 135
6. Admissibility and Unclean Hands 137
7. Counterclaim 137
D. NDP Submissions 151
1. US Second NDP Submission 151
2. Respondent's Comments on US Second NDP Submission 153
3. Claimant's Comments on US Second NDP Submission 153
E. Tribunal's Analysis 155
1. Jurisdiction *Ratione Temporis* over Original Claims 155
2. The Investor under NAFTA 156
3. The Investment under NAFTA 157
4. Jurisdiction under the ICSID Convention 159
5. Admissibility of the Claims 160
6. The Port Tariff Claim 162
7. Proceedings before any Administrative Tribunal or Court 172
8. Ancillary Claim 173
9. Counterclaim 184
10. Conclusion on Jurisdiction 200
IX. APPLICABLE LEGAL STANDARDS 201
A. Relevant Provisions 201
B. Claimant's Position 202
1. The Applicable Standard for NAFTA Article 1105 202
2. The Applicable Standard for NAFTA Article 1103 206
C. Respondent's Position 209

1. The Applicable Standard for NAFTA Article 1105 209
2. The Applicable Standard for NAFTA Article 1103 213
D. NDP Submissions 217
1. US First NDP Submission 217
2. Canada's NDP Submission 220
3. US Second NDP Submission 222
4. Claimant's Comments on NDP Submissions 223
5. Respondent's Comments on NDP Submissions 224
E. Tribunal's Analysis 225
1. The Applicable Standard for NAFTA Article 1105 225
2. Applicable Standard for NAFTA Article 1103 232
X. ALLEGED BREACHES IN RELATION TO LA ADELITA 235
A. Claimant's Position 235
1. Legal Nature of the 2014 Agreements 237
2. Legitimate Expectations 238
3. Arbitrary Conduct, Due Process, Good Faith 244
4. Failure to Observe Obligations Under 2014 Agreements 248
B. Respondent's Position 248
1. Legal Nature of the 2014 Agreements 248
2. No infringement based on Respondent's alleged assurances 249
3. Alleged Violation of the MoU cannot be a denial of FET 253
4. Arbitrary Conduct 256
5. Failure to Observe Obligations under the 2014 Agreements 260
C. Tribunal's Analysis 260
1. Pre-2009 Representations 262
2. Pre-2009 Requirement for CUSTF 266
3. The POEL 2009 276
4. The 2014 Agreements 281
5. Binding Nature of the 2014 Agreements 285
6. Expectations Arising from the 2014 Agreements 289
7. Whether Respondent Breached Claimant's Legitimate Expectations 295
XI. ALLEGED BREACHES IN RELATION TO EL CORCHALITO 302
A. Claimant's Position 302
B. Respondent's Position 305
C. Tribunal's Analysis 308
1. Factual Background on El Corchalito 309

2. Basis for Supplemental Inspection 316
3. Failure to Consider Expert Evidence 319
4. Basis for the Shutdown Order 331
5. October 2020 Resolution 341
6. "Catch 22" Situation 347
7. Domestic Legal Proceedings 356
8. Conclusion on El Corchalito 360
XII. ALLEGED BREACHES IN RELATION TO LA ROSITA 361
A. US Second NDP Submissions 362
B. Amicus Submission 363
XIII. ALLEGED BREACHES IN RELATION TO PORT TARIFFS 363
XIV. QUANTUM AND RELIEF SOUGHT 364
A. Relevant Provisions 364
B. The Applicable Standard and Scope of the Claim 365
1. Claimant's Position 365
2. Respondent's Position 367
3. Tribunal's Analysis 370
C. La Adelita: Quantum and Relief Sought 386
D. El Corchalito: Quantum and Relief Sought 393
1. Causation 394
2. Overview of Valuations 395
3. The Calica Network 399
4. Appropriate CALICA-only Valuation 409
5. General Objection on Proof of Loss 414
6. Respondent's Model: Issues/Objections Raised 418
7. Market Approach 432
8. Double Taxation 436
9. Conclusion 438
XV. INTEREST 439
A. Claimant's Position 439
B. Respondent's Position 440
C. Tribunal's Analysis 441
1. Applicable Legal Standard 441
2. Function of Interest 441
3. Compounding Period 443
4. Interest Rate 444

5. Period 445
6. Conclusion 445
XVI. COSTS 445
A. Relevant Treaty and ICSID Arbitration Rule Provisions 445
B. The Parties' Positions 447
1. Claimant's Position 447
2. Respondent's Position 452
C. Tribunal's Analysis 457
1. Applicable Legal Standard 457
2. Relative Success and Failure 458
3. Procedural Conduct 459
4. Reasonableness of Costs 460
5. Conclusion on Allocation of costs 460
6. Quantification of Costs 461
XVII. CONCLUSIONS 461
A. Claimant 462
1. Original Claims 462
2. Ancillary Claim and Counterclaim 464
B. Respondent 465
1. Original Claims 465
2. Ancillary Claim and Counterclaim 465
XVIII. DECISIONS 466

LIST OF DEFINED TERMS

2021 Hearing Transcript (language), Day [#], [page:line]	Transcript of the 2021 Hearing
2023 Hearing Transcript (language), Day [#], [page:line]	Transcript of the 2023 Hearing
Amended MoU	Addendum to the Binding Memorandum of Understanding entered into between CALICA, API Quintana Roo, the State of Quintana Roo, and the Municipality of Solidaridad, dated 13 May 2015
ANAM	Mexico's National Customs Agency (*Agencia Nacional de Aduanas de México*)
Ancillary Claim	Claimant's ancillary claim concerning Mexico's alleged wrongful shutdown of Legacy Vulcan's remaining quarrying operations in Mexico
API	Integral Port Administration (*Administración Portuaria Integral*)
API Quintana Roo	Integral Port Administration of the State of Quintana Roo (*Administración Portuaria Integral de Quintana Roo, S.A. de C.V.*)
API Quintana Roo Concession	Concession to operate all port facilities in the State of Quintana Roo granted to API Quintana Roo
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings of 2006
Article 1128 Submissions	Written submissions filed by the United States and Canada on questions of interpretation of the treaty as non-disputing State Parties pursuant to NAFTA Article 1128, dated 7 June 2021

Atempa Statement	Witness Statement of Mr. José Alberto Atempa Lobato, dated 16 November 2020
Balcázar First Statement	Witness Statement of Ms. Margarita Yolanda Balcázar Mendoza, dated 23 November 2020
Balcázar Second Statement	Second Witness Statement of Ms. Margarita Yolanda Balcázar Mendoza, dated 24 May 2021
Balcázar Third Statement	Third Witness Statement of Ms. Margarita Yolanda Balcázar Mendoza, dated 16 December 2022
[redacted] First Statement	Witness Statement of [redacted] dated 19 February 2021
[redacted] Second Statement	Second Witness Statement of [redacted] dated 28 September 2022
[redacted] Third Statement	Third Witness Statement of [redacted] dated 20 February 2023
BIT	Bilateral Investment Treaty
Brattle First Report	Expert Report of Mr. Darrell Chodorow, dated 18 May 2020
Brattle Fourth Report	Fourth Expert Reports of Messrs. Darrell Chodorow and Fabricio Núñez, dated 20 February 2023
Brattle Second Report	Second Expert Report of Mr. Darrell Chodorow, dated 22 February 2021
Brattle Third Report	Third Expert Report of Messrs. Darrell Chodorow and Fabricio Núñez, dated 28 September 2022
C-#	Claimant's Exhibits
[redacted] Report	Expert Report of [redacted], dated 19 February 2021

CALICA	Calizas Industriales del Carmen, S.A. de C.V.
CALICA Network	Claimant's quarrying, shipping and distribution network
CALICA Port Concession	Concession to build and operate a private port terminal to load petrous materials granted to CALICA
Castañeda Sánchez Statement	Witness Statement of Mr. Enrique Castañeda Sánchez, dated 16 December 2022
[redacted] Report	Expert Report of [redacted] and [redacted], dated 22 February 2021
CL-#	Claimant's Legal Authority
Claimant	Legacy Vulcan, LLC
Claimant's Document Production Request	Claimant's requests for the production of documents, dated 4 January 2021
Claimant's First NDP Observations	Claimant's observations on the US First NDP Submission and Canada NDP Submission, dated 28 June 2021
Claimant's Memorial on the Ancillary Claim or Memorial AC	Claimant' Memorial on the Ancillary Claim, dated 28 September 2022
Claimant's Memorial or Memorial	Claimant's Memorial on Jurisdiction and the Merits, dated 18 May 2020
Claimant's Reply on the Ancillary Claim or Reply AC	Claimant's Reply on the Ancillary Claim, dated 20 February 2023
Claimant's Reply or Reply	Claimant's Reply Memorial on Jurisdiction and the Merits, dated 22 February 2021
Claimant's Response on Admissibility and Jurisdiction of the Counterclaim or Response on Counterclaim Jurisdiction	Claimant's Response on Admissibility and Jurisdiction of the Counterclaim, dated 27 June 2023

Claimant's Second NDP Observations	Claimant's observations on the US Second NDP Submission, dated 25 September 2023
Class Action Filing or Collective Action Lawsuit	Class action filed before the Mexican courts by Mr. Tzab in the matter *Quetzal Tzab González y Otros, Todos Integrantes de la Colectividad Actora vs Calizas Industriales del Carmen, S.A. de C.V. (SAC TUN) y Rancho Piedra Caliza S.A. de C.V.,* dated 25 October 2022
Committee to Amend the POEL	Committee to Amend the POEL, established on 30 October 2014
CONANP	*Comisión Nacional de Áreas Naturales Protegidas*
Contracting Parties	Contracting Parties to NAFTA
Counterclaim	Respondent's counterclaim against the Claimant for the alleged environmental damages caused by the latter during the development of its investment
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
Credibility First Report	First Expert Report of Mr. Timothy Hart and Ms. Rebecca Vélez, dated 13 November 2020
Credibility Fourth Report	Fourth Expert Report of Mr. Timothy Hart and Ms. Rebecca Vélez, dated 21 April 2023
Credibility Second Report	Second Expert Report of Mr. Timothy Hart and Ms. Rebecca Vélez, dated 12 May 2021
Credibility Third Report	Third Expert Report of Mr. Timothy Hart and Ms. Rebecca Vélez, dated 12 December 2022
CUSTF	Authorization for Soil-Use Change in Forested Terrains (*Autorización de Cambio de Uso del Suelo en Terrenos Forestales*)

Díaz Mondragón Statement	Witness Statement of Mr. Salomón Díaz Mondragón, dated 23 November 2020
Durán Désiga Statement	Witness Statement of Mr. José Ángel Durán Désiga, dated 24 May 2021
[redacted] First Statement	Witness Statement of [redacted] dated 18 May 2020
[redacted] Fourth Statement	Fourth Witness Statement of [redacted] dated 17 February 2023
[redacted] Second Statement	Second Witness Statement of [redacted] dated 22 February 2021
[redacted] Third Statement	Third Witness Statement of [redacted] dated 28 September 2022
Federal EIA	Corchalito/Adelita Federal Environmental Impact Authorization (*Autorización de Impacto Ambiental*), dated 30 November 2000
FET	Fair and equitable treatment
First PROFEPA Inspection Report	PROFEPA Inspection Report, dated 19 May 2017
FTC Note	NAFTA FTC, Notes of Interpretation of Certain Chapter 11 Provisions, dated 31 July 2001
Grupo ICA	Grupo Ingenieros Civiles Asociados
GSI First Report	First Expert Report of Dr. Gino Bianchi Mosquera, dated 19 February 2023
Hearing	Hearing on jurisdiction and the merits held from 26 to 30 July 2021
Hearing on the Ancillary Claim and Jurisdiction/Admissibility of the Counterclaim	Hearing on the Ancillary Claim and the jurisdiction/admissibility of the Counterclaim held from 7 to 11 August 2023

Hernández Chávez Statement	Witness Statement of Mr. José Juan Hernández Chávez, dated 23 November 2020
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, in force since 14 October 1966
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ILC Articles on State Responsibility	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
IMTA	*Instituto Mexicano de Tecnología del Agua*
INAH	*Instituto Nacional de Antropología e Historia*
INDAABIN	*Instituto de Administración y Avalúos de Bienes Nacionales*
INECC	*Instituto Nacional de Ecología y Cambio Climático*
Investment Agreement	Agreement entered into between the Federal Government, the Government of the State of Quintana Roo, and CALICA, dated 6 August 1986
Legacy Vulcan	Legacy Vulcan, LLC
Letter of 30 June 2023	Mr. Tzab's application to make a written submission pursuant to ICSID Arbitration Rule 37(2), dated 30 June 2023
LGEEPA	General Law on Ecological Equilibrium and Environmental Protection (*Ley General de Equilibrio Ecológico y la Protección al Ambiente*)
[redacted] Statement	Witness Statement of [redacted], dated 19 February 2023

[redacted] Statement	Witness Statement of [redacted], dated 20 February 2021
[redacted] First Report	Expert Report of [redacted] dated 18 May 2020
[redacted] Fourth Report	Fourth Expert Report of [redacted] dated 20 February 2023
[redacted] Second Report	Second Expert Report of [redacted] dated 21 February 2021
[redacted] Third Report	Third Expert Report of [redacted] dated 28 September 2022
Mexico	United Mexican States
MFN Clause	Most-Favored Nation Clause
MFN Treatment	Most-Favored-Nation Treatment
Mijangos Report	Expert Report of Dr. Javier Mijangos y González, dated 21 May 2021
MoU	Binding Memorandum of Understanding entered into between CALICA, API Quintana Roo, the State of Quintana Roo, and the Municipality of Solidaridad, dated 12 June 2014
MST	Minimum Standard of Treatment
NAFTA	North American Free Trade Agreement, in force since 1 January 1994
Navy Expert Report	Expert report of Lt. Commander Juan Martín Ramírez Miranda of the Mexican Navy's Engineers Service, dated 6 September 2021
Non-Disputing Parties	United States and Canada

Notice	Notice published in the Mexican Official Gazette commencing the process to declare CALICA's lots as a natural protected area, dated 8 November 2023
October 2020 Resolution	Administrative Resolution No. PFPA/4.1/2C.27.5/00028-17/012/2020, dated 30 October 2020
OIC Agreement	Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference
Parties	Claimant and Respondent
Paz Cetina Statement	Witness Statement of Mr. Alfredo Miguel Paz Cetina, dated 24 May 2021
Pedrozo Acuña Statement	Witness Statement of Mr. Adrián Pedrozo Acuña, dated 21 April 2023
Pérez Marín Statement	Witness Statement of Mr. Roberto Pérez Marín, dated 23 November 2020
[redacted] Report	Expert Report of [redacted], dated 20 February 2021
PHM	Post-Hearing Briefs
PHM on Ancillary Claim and Counterclaim or PHM AC	Post-Hearing Briefs on the Ancillary Claim and Jurisdiction/Admissibility of the Counterclaim, dated 27 October 2023
[redacted] Statement	Witness Statement of [redacted] dated 19 February 2023
PO1	Procedural Order No. 1, dated 26 November 2019
PO10	Procedural Order No. 10, dated 26 July 2023
PO11	Procedural Order No. 11, dated 19 December 2023

PO2 or Confidentiality Order	Procedural Order No. 2, dated 30 July 2020
PO3	Procedural Order No. 3, dated 30 July 2020
PO4	Procedural Order No. 4, dated 8 January 2021
PO5	Procedural Order No. 5, dated 3 June 2021
PO6	Procedural Order No. 6, dated 4 June 2021
PO7	Procedural Order No. 7, dated 11 July 2022
PO8	Procedural Order No. 8, dated 22 June 2023
PO9	Procedural Order No. 9, dated 13 July 2023
POEL 2009	Program for Local Environmental Regulation (*Programa de Ordenamiento Ecológico Local*), dated 25 May 2009
POEs	Ecological management programs (*programas de ordenamiento ecológico*)
POET 2001	Program for Territorial Environmental Regulation (*Programa de Ordenamiento Ecológico Territorial*), dated 16 November 2001
Port Terminal	Port terminal to load petrous materials in Punta Venado
Post-Site Visit Briefs	Post-Site Visit Briefs, dated 20 September 2023
Procedural Calendar	Procedural Calendar attached to PO1
Project	Claimant's quarrying, shipping and distribution network

Protocol Replacing NAFTA	Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada, dated 30 November 2018
R-#	Respondent's Exhibits
Rábago Estela Report	Expert Report of Mr. Carlos Rábago Estela, dated 24 May 2021
Rábago Estela Second Report	Second Expert Report of Mr. Carlos Rábago Estela, dated 21 April 2023
RAPICA	Rancho Piedra Caliza, S.A. de C.V.
Reply PHMs on Ancillary Claim and Counterclaim	Reply Post-Hearing Briefs on the Ancillary Claim and Jurisdiction/Admissibility of the Counterclaim, dated 12 February 2024
Request	Request for Arbitration
Respondent	United Mexican States
Respondent's Counter-Memorial on the Ancillary Claim or Counter-Memorial AC	Respondent's Counter-Memorial on the Ancillary Claim, dated 19 December 2022
Respondent's Counter-Memorial or Counter-Memorial	Respondent's Counter-Memorial on Jurisdiction and the Merits, dated 23 November 2020
Respondent's Document Production Request	Respondent's requests for the production of documents, dated 20 July 2020
Respondent's Memorial on Admissibility and Jurisdiction of the Counterclaim or Counterclaim Memorial on Jurisdiction	Respondent's Memorial on Admissibility and Jurisdiction of the Counterclaim, dated 12 May 2023
Respondent's NDP Observations	Respondent's observations on the US Second NDP Submission, dated 25 September 2023
Respondent's Rejoinder on the Ancillary Claim or Rejoinder AC	Respondent's Rejoinder Memorial on the Ancillary Claim, dated 21 April 2023

Respondent's Rejoinder or Rejoinder	Respondent's Rejoinder Memorial on Jurisdiction and the Merits, dated 24 May 2021
Rico Statement	Witness Statement of Mr. Iván Rico López, dated 15 December 2022
RL-#	Respondent's Legal Authority
Rodríguez Rosas First Statement	Witness Statement of Ms. Silvia Rodríguez Rosas, dated 23 November 2020
Rodríguez Rosas Second Statement	Second Witness Statement of Ms. Silvia Rodríguez Rosas, dated 24 May 2021
RPHM	Reply Post-Hearing Briefs
SCT	Ministry of Communications and Transportation (*Secretaría de Comunicaciones y Transportes*)
Second Article 1128 Submission of the United States of America	Second written submission filed by the United States of America as a non-disputing State Party pursuant to NAFTA Article 1128, dated 21 July 2023
SEMARNAT	Ministry of Environmental and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*)
SEMARNAT Dictamen	Report on environmental impacts from the industrial limestone extraction project carried out by Calica (currently SAC-TUN) in the municipalities of Solidaridad and Cozumel, Quintana Roo, dated 18 August 2022
Sentencia	Decision from the Mexican Third Collegiate Court of the Twenty-Seventh Circuit on the *recurso de revisión* filed by CALICA and one of its subsidiaries against a decision dismissing an *amparo*, dated 9 April 2021

Shutdown Order	*Acuerdo de Emplazamiento* ordering the shutdown of activities at El Corchalito based on the findings of the additional inspection, dated 22 January 2018
Site Visit	Two-day site visit of all three of the Claimant's lots which took place in the period 18-20 July 2023
Site Visit Minutes	Minutes of the Site Visit incorporating the Parties' agreed changes, dated 14 August 2023
Site Visit Protocol	Site Visit protocol and its Annexes
SOLCARGO First Report	Expert Report of Messrs. Gustavo Carvajal, Gustavo Alanís, Juan Pedro Machado and Carlos del Razo Ochoa, dated 20 November 2020
SOLCARGO Fourth Report	Fourth Expert Report of Messrs. Gustavo Carvajal Isunza, Juan Pedro Machado Arias y Carlos Federico del Razo Ochoa, dated 21 April 2023
SOLCARGO Second Report	Second Expert Report of Messrs. Gustavo Carvajal, Juan Pedro Machado y Carlos del Razo Ochoa, dated 24 May 2021
SOLCARGO Third Report	Third Expert Report of Messrs. Gustavo Carvajal, Juan Pedro Machado, Carlos Rábago Estela y Carlos Federico del Razo Ochoa, dated 17 December 2022
Solicitud de Reconvención	Respondent's request to file a counterclaim
State EIA	Corchalito/Adelita State Environmental Impact Authorization (*Autorización de Impacto Ambiental Estatal*), dated 11 December 1996
[redacted] First Statement	Witness Statement of [redacted] dated 18 May 2020

[redacted] Second Statement	Second Witness Statement of [redacted] dated 21 February 2021
Submissions on Costs or CS	Submissions on Costs, dated 15 March 2024
Tavera Alonso Statement	Witness Statement of Ms. Gloria Fermina Tavera Alonso, dated 21 April 2023
Total Regularization Scheme	Total Regularization Scheme entered into between the SCT and CALICA, dated 12 June 2014
Tribunal	Arbitral tribunal constituted on 20 September 2019
United States	United States of America
USMCA	Agreement between the United States of America, the United Mexican States, and Canada, dated 30 November 2018
VCLT	Vienna Convention on the Law of Treaties
Vilchis Statement	Witness Statement of Mr. Patricio Rodolfo Vilchis Noriega, dated 15 December 2022
VMC	Vulcan Materials Company
Vulica	Vulica Shipping Company, Limited
Vulica/ICA	Vulica/ICA Distribution Company

I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of the North American Free Trade Agreement, which entered into force on 1 January 1994 ("NAFTA") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "ICSID Convention").

2. The claimant is Legacy Vulcan, LLC ("**Legacy Vulcan**" or "**Claimant**"), a company incorporated under the laws of the State of Delaware, United States of America.

3. The respondent is the United Mexican States ("**Mexico**" or "**Respondent**").

4. Claimant and Respondent are collectively referred to as the "**Parties**". The Parties' representatives and their addresses are listed above on page (i).

5. Mexico, the United States of America ("**United States**") and Canada are the three contracting parties to NAFTA (each a "**Contracting Party**" and collectively "**Contracting Parties**"). The United States and Canada are non-disputing Contracting Parties and are not party to this arbitration ("**Non-Disputing Parties**"). The Non-Disputing Parties are entitled to make submissions to the Tribunal on a question of interpretation of NAFTA pursuant to NAFTA Article 1128.

6. This dispute relates to measures alleged to have been taken by Respondent with respect to Claimant's limestone quarrying operation. The quarrying operation was carried out by Claimant's subsidiary, Calizas Industriales del Carmen, S.A. de C.V. ("**CALICA**") in the state of Quintana Roo, located on the Yucatán peninsula, Mexico.

7. In 1986, CALICA, Mexico's Federal Government, and the State of Quintana Roo entered into an investment agreement ("**Investment Agreement**").[1]

8. The Investment Agreement provides for the development of two lots, being (i) La Rosita (c. 930 hectares), where the main quarry and processing plant would be located; and (ii)

[1] **C-0010-SPA**, Agreement entered into between the Federal Government, the Government of the State of Quintana Roo, and CALICA, dated 6 August 1986 ("Investment Agreement").

Punta Venado, where a port terminal would be built.[2] Quarrying operations commenced at La Rosita following its acquisition and port operations at Punta Venado were underway by approximately January 1990.[3]

9. In 1996, Claimant acquired two additional lots in the Municipality of Solidaridad, Quintana Roo (since 2025, renamed as the Municipality of Playa del Carmen, Quintana Roo) being El Corchalito (c. 369 hectares) and La Adelita (c. 882 hectares), for the expansion of quarrying operations.[4] La Rosita, El Corchalito and La Adelita are adjacent to Punta Venado.[5] Claimant's claims relate to all three lots and to the port.

10. In 2001, CALICA commenced quarrying in El Corchalito.[6] Quarrying was never commenced in La Adelita.

11. From 2013, CALICA entered into discussions with the Mexican authorities in relation to the ability to quarry La Adelita. The discussions led to the execution of certain documents in 2014 and 2015, the status of which is contested in these proceedings. Pursuant to one of those documents, a process to amend a zoning regime was entered into. The amendment process was not completed.

12. In 2017, an environmental inspection found that CALICA had exceeded its quarrying area limits in El Corchalito.[7] In 2018, the authorities issued an order to shut down activities there.[8] This was followed by a further administrative resolution in 2020.[9]

13. In parallel, a dispute arose regarding the payment of port fees by CALICA at Punta Venado, leading to a 2015 court decision, the consequences of which are contested between the Parties.

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2 **C-0010-SPA**, Investment Agreement, pp. 2-3.

3 [redacted] First Statement, ¶ 18.

4 **C-0034-SPA**, El Corchalito Title Deed, dated 28 August 1996 ("El Corchalito Title Deed"); **C-0035-SPA**, La Adelita Title Deed, dated 21 June 1996 ("La Adelita Title Deed"); [redacted] First Statement, ¶ 22.

5 Memorial, ¶ 38.

6 [redacted] First Statement, ¶ 24.

7 **C-0115-SPA**, First PROFEPA Inspection Report, dated 19 May 2017 ("First PROFEPA Inspection Report, 19 May 2017")**.**

8 **C-0117-SPA**, Shutdown Order, dated 22 January 2018 ("Shutdown Order").

9 **R-0005-ESP**, PROFEPA, File PFPA/4.1/2C.27.5/00028-17, Resolution, 30 October 2020 ("October 2020 Resolution").

14. In 2022, the La Rosita lot was shut down following an inspection of compliance with environmental regulations.[10]

15. Claimant alleges that Respondent has breached NAFTA Articles 1103 and 1105 in respect of its treatment of Claimant's investments, including CALICA. Respondent, in turn, has filed a counterclaim against Claimant in relation to alleged breaches of environmental legislation and alleged environmental harm caused by CALICA's operations.

16. Section II of this Award sets out the details of the Parties. Section III contains the procedural history. Section IV sets out the factual background to the dispute. In Section V, the Tribunal sets out a summary of the Parties' respective positions and relief sought. Section VI is an introduction to the Tribunal's analysis. Section VII deals with the applicable law. Section VIII addresses matters of jurisdiction and admissibility while Section IX covers applicable legal standards. Sections X and XI determine the alleged breaches in relation to La Adelita, El Corchalito respectively. Sections XII and XIII relate to the alleged breaches in relation to La Rosita and the port tariffs respectively. Section XIV concerns quantum and relief sought, while Section XV addresses interest and Section XVI covers costs. Section XVII contains the Tribunal's conclusions and Section XVIII sets out the decisions.

II. THE PARTIES

A. CLAIMANT

17. Claimant is Legacy Vulcan LLC ("**Claimant**"), with registered address as follows:[11]

2711 Centerville Road
Suite 400
Wilmington
Delaware 19808
United States

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[10] **C-0171-SPA**, PROFEPA Inspection Report on Environmental Impact, 2-5 May 2022 ("PROFEPA Environmental Report, 2-5 May 2022"), pp. 71-72 of the PDF; **C-0172-SPA**, PROFEPA Inspection Report on Forestry, 2-5 May 2022, ("PROFEPA Forestry Report, 2-5 May 2022"), pp. 61-62 of the PDF.

[11] RfA, ¶ 11.

18. Claimant is a limited liability company organised and existing under the laws of Delaware, USA.

19. Claimant submits its investment claims to arbitration on its own behalf under NAFTA Article 1116(1) and on behalf of its subsidiary, Calizas Industriales del Carmen, S.A. de C.V. ("**CALICA**"), under NAFTA Article 1117(1).[12]

20. Claimant is a subsidiary of Vulcan Materials Company ("**VMC**"), a publicly-traded United States company that is the largest supplier of construction aggregates (primarily crushed stone, sand and gravel) in the United States and a major producer of aggregates-based construction materials, including asphalt and ready-mixed concrete.[13]

21. Claimant is represented in this arbitration by its duly authorised attorneys, identified on page 2 above.

B. RESPONDENT

22. Respondent is the United Mexican States ("**Mexico**" or "**Respondent**").

23. Respondent is represented in this arbitration by its duly authorised attorneys, identified on page 2 above.

24. Claimant and Respondent are jointly referred to as the "**Parties**". Claimant and Respondent are individually referred to as a "**Party**".

III. PROCEDURAL HISTORY

25. On 3 December 2018, ICSID received a request for arbitration from the Claimant against the Respondent, supplemented by letters of 26 and 28 December 2018 (the "**Request**"). The Request was accompanied by Exhibits C-0001 through C-0022.

26. On 3 January 2019, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration.

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12 Memorial, ¶ 20.

13 Memorial, ¶ 18, *citing* **C-0005-ENG**, Certification of Ownership Structure of Calizas Industriales del Carmen, S.A. de C.V. and Related Mexican Subsidiaries ("CALICA Ownership Structure Certification").

In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

27. As envisaged in NAFTA Article 1123, the Parties agreed that the Tribunal would comprise of three arbitrators, one arbitrator appointed by each of the disputing parties and the third, presiding arbitrator, appointed by agreement of the disputing parties.

28. On 8 March 2019, the Claimant appointed Prof. Guido Santiago Tawil, a national of Argentina and Portugal, as arbitrator. Prof. Tawil accepted his appointment on 19 March 2019.

29. On 22 March 2019, the Respondent appointed Prof. Sergio Puig, a national of Mexico and the United States of America, as arbitrator. Prof. Puig accepted his appointment on 1 April 2019.

30. On 17 June 2019, the Parties requested the Secretary-General of ICSID to prepare a list of at least five candidates for the appointment of the President of the Tribunal. Each Party could strike the candidates that it deemed necessary and rank the remaining candidates (*strike-and-rank* procedure). The list was sent on 6 September 2019 for the Parties' consideration.

31. On 18 September 2019, the Centre informed the Parties the result of the *strike-and-rank* procedure pursuant to the Parties' agreement. As a result, the Centre proceeded with the appointment of Prof. Albert Jan van den Berg, a national of the Netherlands, as the President of the Tribunal. Prof. van den Berg accepted his appointment on 19 September 2019.

32. On 20 September 2019, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Sara Marzal, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

33. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 6 November 2019, by teleconference.

34. Following the first session, on 26 November 2019, the Tribunal issued Procedural Order No. 1 ("**PO1**") recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. PO1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, except to the extent that they are modified by Section B of NAFTA Chapter Eleven. It also provides that the procedural languages would be English and Spanish, and that the place of proceeding would be Washington D.C., United States of America. PO1 also sets out an agreed schedule for the proceedings (the "**Procedural Calendar**"). Lastly, PO1 provides in Sections 24.1 and 24.3 that the Tribunal will, after consultation with the Parties, issue a Confidentiality Order to govern matters concerning confidentiality and privacy of the arbitral proceedings, rulings, orders, decisions and the Award.

35. On 4 March 2020, the Parties notified the Tribunal that they wished to extend all the relevant deadlines and dates in the Procedural Calendar by seventy days to explore the potential resolution of the dispute.

36. On 6 March 2020, the Tribunal approved the Parties' agreement to extend all relevant deadlines and dates by seventy days.

37. On 18 May 2020, the Claimant informed ICSID that the Parties had been unable to resolve the dispute, and filed a Memorial on Jurisdiction and the Merits ("**Claimant's Memorial**" or "**Memorial**") together with Factual Exhibits C-0023 through C-0139, Legal Authorities CL-0001 through CL-0106, the Witness Statements of [redacted] ("[redacted] **First Statement**", with Exhibits [redacted]-0001 through [redacted]-0003) and [redacted] ("[redacted] **First Statement**", with Exhibits [redacted]-0001 through [redacted]-0010), and the Expert Reports of [redacted] ("[redacted] **First Report**", with Exhibits [redacted]-0001 through [redacted]-0038) and Mr. Darrell Chodorow ("**Brattle First Report**", with Exhibits DC-0001 through DC-0125).

38. On 29 June 2020, the Tribunal inquired whether the Parties would agree to the appointment of Ms. Emily Hay, then at the firm Hanotiau & van den Berg, as Assistant to the Tribunal in this case. Neither Party had objections to the appointment and Ms.

Hay's signed declaration of independence, impartiality, and confidentiality, which was circulated to the Parties on 7 July 2020.

39. On 30 June 2020, the Claimant submitted the Parties' agreed revised Procedural Calendar to the Tribunal. The Respondent confirmed its agreement on 2 July 2020 and on the same date the Tribunal approved the Parties' agreement and issued a revised Procedural Calendar.

40. On 20 July 2020, the Respondent submitted a draft Confidentiality Order on behalf of the Parties. The draft submitted reflected the Parties' joint proposal on all issues covered by the Confidentiality Order except for one section on which the Parties were unable to reach an agreement.

41. On the same date, and in accordance with the Procedural Calendar, as amended by the Parties, the Respondent submitted to the Tribunal its requests for the production of documents in the form of a Redfern Schedule (including the Claimant's objections to the requests and the Respondent's replies to such objections), together with some introductory remarks with general replies to the Claimant's objections (the "**Respondent's Document Production Request**").

42. On 21 July 2020, the Claimant confirmed its agreement with the draft Confidentiality Order submitted by Respondent and explained its position on the disputed section.

43. On 30 July 2020, based on the Parties' joint proposal and subsequent exchanges on the disputed issue, the Tribunal issued Procedural Order No. 2, resolving those issues in which there was disagreement between the Parties (the "**Confidentiality Order**" or "**PO2**").

44. On the same date, the Tribunal issued Procedural Order No. 3 ("**PO3**") deciding on the Respondent's Document Production Request.

45. On 19 October 2020, the Parties notified the Tribunal that they wished to further extend all the relevant deadlines and dates in the Procedural Calendar. On 20 October 2020, the Tribunal approved the Parties' agreement and issued a revised Procedural Calendar.

46. On 23 November 2020, and in accordance with the revised Procedural Calendar, the Respondent filed a Counter-Memorial on Jurisdiction and the Merits ("**Respondent's Counter-Memorial**" or "**Counter-Memorial**"), together with Factual Exhibits R-0001 through R-0075, Legal Authorities RL-001 through RL-075, the Witness Statements of Ms. Margarita Yolanda Balcázar Mendoza (**RW-001** or "**Balcázar First Statement**", with Exhibits MYBM-0001 through MYBM-0004), Ms. Silvia Rodríguez Rosas (**RW-002** or "**Rodríguez Rosas First Statement**", with Exhibits SRR-0001 and SRR-0002), Mr. Roberto Pérez Marín (**RW-003**, or "**Pérez Marín Statement**", with Exhibits RPM-0001 through RPM-0007), Mr. Salomón Díaz Mondragón (**RW-004** or "**Díaz Mondragón Statement**" with Exhibit SDM-0001), Mr. José Juan Hernández Chávez (**RW-005** or "**Hernández Chávez Statement**", with Exhibits JJHC-0001 through JJHC-0003) and Mr. José A. Atempa Lobato (**RW-006** or "**Atempa Statement**", with Exhibits JAAL-0001 through JAAL-0015), and the Expert Reports of Messrs. Gustavo Carvajal, Gustavo Alanís, Juan Pedro Machado and Carlos del Razo Ochoa (**RE-001** or "**SOLCARGO First Report**", with Exhibits CFRO-0001, GAO-0001, GCI-0001 through GCI-0009, and JPMA-0001 through JPMA-0012) and Mr. Timothy Hart and Ms. Rebecca Vélez (**RE-002** or "**Credibility First Report**", with Appendix A through Appendix C, Exhibits 1 through 7, Exhibits CRED-0001 through CRED-0065).

47. On 4 January 2021, the Claimant submitted to the Tribunal its requests for the production of documents in the form of a Redfern Schedule (including the Respondent's objections to the requests and the Claimant's replies to such objections), together with a pdf file containing the Claimant's instructions and definitions relating to its requests, and the Respondent's "general objections" referenced in the Redfern Schedule (the "**Claimant's Document Production Request**").

48. On 8 January 2021, the Tribunal issued Procedural Order No. 4 concerning the Claimant's Document Production Request ("**PO4**").

49. On 4 February 2021, the Claimant requested that the Tribunal draw adverse inferences from the Respondent's alleged failure to comply with the Tribunal's PO4 and, in particular, regarding the Respondent's failure to produce the "*Agreement between the Government of Quintana Roo and the Municipality of Solidaridad to amend the 2009*

POEL in respect of its soil use of the lots of CALICA to allow the production previously authorized by the 2001 POET."

50. On 20 February 2021, the Respondent objected to the Claimant's request arguing, *inter alia*, that the above-mentioned agreement did not exist.

51. On 13 February 2021, the Tribunal took note of the Parties' respective positions with respect to the alleged existence or non-existence of the said agreement and indicated that the Tribunal shall, in due course, weigh the evidence before it and draw such inferences as it deems fit, taking into account its relevance, weight and materiality.

52. On 22 February 2021, the Claimant filed a Reply Memorial on Jurisdiction and the Merits (the "**Claimant's Reply**" or "**Reply**"), together with Factual Exhibits C-0140 through C-0164, Legal Authorities CL-0107 through CL-0141, the Witness Statements of [redacted] ("[redacted] **Statement**") and [redacted] ("[redacted] **First Statement**", with Exhibits [redacted]0001 through [redacted]0003), the Second Witness Statements of [redacted] ("[redacted] **Second Statement**", with Exhibits [redacted]0011 through [redacted]-0013) and [redacted] ("[redacted] **Second Statement**", with Exhibits [redacted]-0004 through [redacted]-0016), the Second Expert Reports of [redacted] ("[redacted] **Second Report**", with Exhibits [redacted]0039 through [redacted]0050) and Mr. Darrell Chodorow ("**Brattle Second Report**", with Appendix E through G, Exhibits DC-0052-Am, DC-0126 through DC-0162 and Workpapers DC-0163 and DC-0164), and the Expert Reports of [redacted] ("[redacted] **Report**", with Exhibits [redacted]-0001 through [redacted]-0041), [redacted] ("[redacted] **Report**") and Drs. Omar Darío [redacted] and [redacted] ("[redacted] **Report**", with Exhibits [redacted]-001 through [redacted]-012).

53. On 1 April 2021, the Tribunal invited the Parties to confer and to submit their views on the possibility of holding the hearing remotely, given the limitations imposed as a consequence of the COVID19 pandemic. On 9 April 2021, the Parties agreed to the possibility of a remote hearing and on 15 April 2021, the Tribunal confirmed the decision to hold the hearing remotely.

54. On 14 April 2021, the Tribunal noted that the redacted versions of the briefs submitted by the Parties thus far were still outstanding and requested the Parties to submit an update, in accordance with the Confidentiality Order.

55. In light of the Parties' responses of 16 April 2021 to the Tribunal's update request, on 20 April 2021, the Tribunal invited the Parties to either agree on the redactions or submit any outstanding disagreements to the Tribunal for resolution in accordance with Sections 7.2 and 7.3 of the Confidentiality Order within 15 days.

56. On 5 May 2021, the Claimant submitted the outstanding disagreements on the proposed redactions. On 13 May 2021, the Respondent submitted its objection to the Claimant's proposed redactions. On 18 May 2021, the Claimant submitted its reply to the Respondent's objections and on 27 May 2021, the Respondent's submitted its rejoinder comments.

57. On 12 May 2021, the Tribunal circulated a draft procedural order containing a remote hearing protocol and inviting the Parties to confer and submit their agreements and respective positions on points of disagreement.

58. On 24 May 2021, the Respondent filed its Rejoinder Memorial on Jurisdiction and the Merits (the "**Respondent's Rejoinder**" or "**Rejoinder**"), together with Factual Exhibits R-0076 through R-0123, Legal Authorities RL-076 through RL-093, the Second Witness Statements by Ms. Silvia Rodríguez Rosas (**RW-007** or "**Rodríguez Rosas Second Statement**", with Exhibits SRR-0003 through SRR-0012) and Ms. Margarita Yolanda Balcázar Mendoza (**RW-008** or "**Balcázar Second Statement**", with Exhibits MYBM-0001 (re-submitted), MYBM-0005 and MYBM-0006), the Witness Statements of Mr. José Ángel Durán Désiga (**RW-009** or "**Durán Désiga Statement**") and Mr. Alfredo Miguel Paz Cetina (**RW-010** or "**Paz Cetina Statement**"), the Second Expert Reports by Messrs. Gustavo Carvajal, Juan Pedro Machado and Carlos del Razo Ochoa (**RE-003** or "**SOLCARGO Second Report**", with Exhibits GCI-0010 through GCI-0014, and JPMA-0012 through JPMA-0013) and by Mr. Timothy Hart and Ms. Rebecca Vélez (**RE-004** or "**Credibility Second Report**", with Appendix A through Appendix C, Exhibits 1 through 4, Exhibits CRED-0066 through CRED-0083), the Expert Reports of Mr. Carlos Rábago Estela (**RE-005**, or "**Rábago Estela Report**", with Exhibits CRE-

0001 through CRE-0004) and of Dr. Javier Mijangos y González (**RE-006**, or "**Mijangos Report**", with Exhibits JMG-0001 through JMG-0026).

59. On 28 May 2021, the Claimant submitted the Parties' joint comments to the draft remote hearing protocol, indicating the Parties' agreed edits or respective positions, as relevant.

60. On 3 June 2021, the Tribunal issued Procedural Order No. 5 ("**PO5**"), deciding on the outstanding disagreements on the proposed redactions.

61. On 4 June 2021, the Tribunal issued Procedural Order No. 6 ("**PO6**"), concerning the organization of the remote hearing, setting out the procedural rules that the Parties agreed upon and/or that the Tribunal determined will govern the conduct of the remote hearing.

62. On 7 June 2021, both the United States and Canada filed written submissions on questions of interpretation of the treaty as non-disputing State Parties pursuant to NAFTA Article 1128 ("**Article 1128 Submissions**").

63. On 18 June 2021, the Tribunal held a pre-hearing organizational meeting with the Parties by video conference.

64. On 28 June 2021, the Claimant submitted its comments on the Article 1128 Submissions, together with Factual Exhibits C-0165-C-0166 and Legal Authorities CL-0147-CL-0166.

65. On 9 July 2021, the Claimant requested (i) that an additional hour be added to each hearing day so as to afford the Claimant sufficient time to effectively present its case, and (ii) leave to submit additional documents into the record in accordance with Section 16.3 of PO1.

66. On 15 July 2021, after considering the Respondent's observations on the Claimant's request, the Tribunal decided to reject both of Claimant's requests.

67. From 26 to 30 July 2021, the Tribunal held a hearing on jurisdiction and the merits by video conference (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:	
Prof. Albert Jan van den Berg	President
Prof. Sergio Puig	Arbitrator
Prof. Guido Santiago Tawil	Arbitrator

ICSID Secretariat:	
Ms. Sara Marzal	Secretary of the Tribunal
Mr. Federico Salon-Kajganich	Paralegal
Assistant to the Tribunal:	
Ms. Emily Hay	Assistant to the Tribunal
For the Claimant:	
Mr. Miguel López Forastier	Covington & Burling LLP
Mr. José E. Arvelo	Covington & Burling LLP
Ms. Clovis Trevino	Covington & Burling LLP
Mr. Santiago Zalazar	Covington & Burling LLP
Ms. Kate McNulty	Covington & Burling LLP
Mr. Alex Ely	Covington & Burling LLP
Mr. Gabriel Gates	Covington & Burling LLP
Mr. Roy Goldsman	Covington & Burling LLP
Mr. Carlos Martínez	Creel, García-Cuéllar, Aiza y Enríquez, S.C.
Mr. Luis Jardón	Creel, García-Cuéllar, Aiza y Enríquez, S.C.
Ms. Gabriela Schafler	Creel, García-Cuéllar, Aiza y Enríquez, S.C.
Ms. Pamela Payró	Creel, García-Cuéllar, Aiza y Enríquez, S.C.
Ms. Mariana Westendarp	Creel, García-Cuéllar, Aiza y Enríquez, S.C.
Mr. Ernesto Enríquez	Vulcan Materials Company
Mr. Gregg McCormick	Vulcan Materials Company
Mr. Denson Franklin	Vulcan Materials Company
Mr. Jason Nabors	Vulcan Materials Company
For the Respondent:	
Mr. Orlando Pérez Gárate	Secretaría de Economía
Ms. Cindy Rayo Zapata	Secretaría de Economía
Mr. Francisco Diego Pacheco Román	Secretaría de Economía
Mr. Rafael Rodríguez Maldonado	Secretaría de Economía
Mr. Miguel Ángel Galindo Vega	Secretaría de Economía
Ms. Pamela Hernández Mendoza	Secretaría de Economía
Ms. Imelda Aime Anaid Silva Pacheco	Secretaría de Economía
Mr. Fabián Arturo Trejo Bravo	Secretaría de Economía
Mr. Stephan E. Becker	Pillsbury Winthrop Shaw Pittman LLP
Ms. David J. Stute	Pillsbury Winthrop Shaw Pittman LLP
Mr. Greg Tereposky	Tereposky & DeRose
Mr. Alejandro Barragán	Tereposky & DeRose
Ms. Ximena Iturriaga	Tereposky & DeRose
Ms. Blanca Alicia Mendoza Vera	Procuraduría Federal de Protección al Ambiente, PROFEPA
Ms. Margarita Yolanda Balcázar Mendoza	Procuraduría Federal de Protección al Ambiente, PROFEPA
Mr. Juan Manuel Torres Burgos	Secretaría de Medio Ambiente y Recursos Naturales, SEMARNAT

Mr. José Juan Hernández Chávez	Secretaría de Medio Ambiente y Recursos Naturales, SEMARNAT
Ms. Natalia García Nieto	Secretaría de Medio Ambiente y Recursos Naturales, SEMARNAT

Court Reporters:

Mr. Dante Rinaldi	Spanish Court Reporter
Mr. Paul Pelissier	Spanish Court Reporter
Mr. David Kasdan	English Court Reporter
Ms. Dawn Larson	English Court Reporter

Interpreters:

Mr. Daniel Giglio	Interpreter
Ms. Silvia Colla	Interpreter
Mr. Charles Roberts	Interpreter

Non-Disputing NAFTA Contracting Parties:

Ms. Lisa J. Grosh	U.S. Department of State
Mr. John D. Daley	U.S. Department of State
Ms. Nicole C. Thornton	U.S. Department of State
Mr. Nathaniel E. Jedrey	U.S. Department of State
Ms. Anne K. Cusick	U.S. Department of State
Ms. Julia H. Brower	U.S. Department of State
Mr. David B. Sullivan	U.S. Department of State
Ms. Catherine H. Gibson	Office of the U.S. Trade Representative

68. During the Hearing, the following persons were examined:

On behalf of the Claimant:

[redacted]	[redacted] Nolte Associates Inc.
[redacted]	[redacted]
Mr. Darrell Chodorow	The Brattle Group
Mr. Fabricio Núñez	The Brattle Group

On behalf of the Respondent:

Ms. Silvia Rodríguez Rosas	Procuraduría Federal de Protección al Ambiente, PROFEPA
Mr. José Ángel Durán Désiga	Municipio de Solidaridad, Quintana Roo
Mr. Carlos Rábago Estela	Sistemas Integrales de Gestión Ambiental, S.C.
Mr. Carlos Federico Del Razo Ochoa	SOLCARGO

Mr. Gustavo Carvajal Isunza	SOLCARGO
Mr. Juan Pedro Machado	SOLCARGO
Mr. Jorge Gómez de Silva	SOLCARGO
Dr. Javier Mijangos y González	Mijangos y González Abogados
Mr. Timothy Hart	Credibility International
Ms. Rebecca Vélez	Credibility International

69. In accordance with section 64 of PO6, on 11 August 2021, the Tribunal circulated a list of questions to the Parties. At the Claimant's request, the Tribunal provided guidance on question 15 on 30 September 2021.

70. On 1 October 2021, the Claimant requested leave to submit into the record the expert report of Lt. Commander Juan Martín Ramírez Miranda of the Mexican Navy's Engineers Service (the "**Navy Expert Report**").

71. On 4 October 2021, the Respondent filed its observations on the Claimant's request. On 8 October 2021, the Claimant filed a response to the Respondent's observations. On 11 October 2021, the Respondent filed further observations.

72. On 20 October 2021, the Tribunal decided to grant the Claimant's request and invited the Claimant to file the Navy Expert Report, together with any comments by 25 October 2021. The Tribunal also provided the Respondent the opportunity to make its observations concerning the Navy Expert Report and to file its comments together with any rebuttal evidence on 8 November 2021.

73. On 25 October 2021, the Claimant submitted the Navy Expert Report (as Exhibit C-0167), together with its comments.

74. On 1 November 2021, the Respondent requested leave to introduce into the record the decision dated 9 April 2021 from the Mexican Third Collegiate Court of the Twenty-Seventh Circuit on the *recurso de revisión* filed by CALICA and one of its subsidiaries against a decision dismissing an *amparo* (the "***Sentencia***").

75. On 8 November 2021, the Claimant filed observations on the Respondent's request of 1 November 2021, and the Respondent filed observations to the Navy Expert Report, together with Exhibits R-0125 and R-0126.

76. On 9 November 2021, the Tribunal decided to grant the Respondent's request and invited the Respondent to file the *Sentencia*, together with any comments by 11 November 2021. The Tribunal also provided the Claimant the opportunity to make its observations concerning the *Sentencia* and to file its comments together with any rebuttal evidence on 16 November 2021.

77. On 11 November 2021, the Respondent filed the *Sentencia*, together with its comments.

78. On 16 November 2021, the Claimant filed observations on the *Sentencia*.

79. On 17 November 2021, the Parties filed simultaneous Post-Hearing Briefs together with their responses to the Tribunal's questions to the Parties of 11 August 2021 ("**PHM**"). The Claimant's submission was accompanied by Legal Authorities CL-0167 to CL-0170. The Respondent's submission was accompanied by Legal Authorities RL-094 to RL-098.

80. On 16 December 2021, the Parties filed simultaneous Reply Post-Hearing Briefs together with their comments on the other Party's answers to the Tribunal's questions of 11 August 2021 ("**RPHM**"). The Claimant's submission was accompanied by Legal Authorities CL-0171 and CL-0172.

81. The Parties filed their submissions on costs on 11 February 2022. The Claimant's submission was accompanied by Legal Authorities CL-0173 and CL-0174. The Respondent's submission was accompanied by Legal Authorities RL-099 to RL-113.

82. On 8 May 2022, the Claimant filed a Request for Provisional Measures and for Leave to Submit an Ancillary Claim.

83. On 26 May 2022, the Respondent filed its Response to the Claimant's Request for Provisional Measures and for Leave to Submit an Ancillary Claim.

84. On 2 June 2022, the Claimant filed its Reply to the Respondent's Response to its Request for Provisional Measures and for Leave to Submit an Ancillary Claim.

85. On 7 June 2022, the Respondent filed its Rejoinder to the Claimant's Request for Provisional Measures and for Leave to Submit an Ancillary Claim.

86. Pursuant to the Tribunal's instructions, on 21 and 22 June 2022, the Parties introduced into the record the following Factual Exhibits and Legal Authorities in support of their submissions of 8 and 26 May and of 2 and 7 June 2022: C-0168 to C-0199 and CL-0175 to CL-0200, for the Claimant, and R-0127 to R-0135 and RL-0116 to RL-0144, for Respondent.

87. On 11 July 2022, the Tribunal issued Procedural Order No. 7 ("**PO7**") concerning the Request for Provisional Measures and for Leave to Submit an Ancillary Claim. PO7 provides, *inter alia*, a recommendation as provisional measures 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*." It also decides, by majority, to allow the Claimant to present an ancillary claim concerning Mexico's alleged wrongful shutdown of Legacy Vulcan's remaining quarrying operations in Mexico (the "**Ancillary Claim**"). Lastly, PO7 defers any decision on any counterclaim to be presented by the Respondent, subject to a reasoned application for leave by Respondent. Attached to PO7 is a partial dissenting opinion by arbitrator Prof. Puig regarding the majority's decision to allow the Claimant to present an Ancillary Claim.

88. Pursuant to the procedural calendar agreed by the Parties for the Ancillary Claim, on 28 September 2022, the Claimant filed a Memorial on the Ancillary Claim ("**Claimant's Memorial on the Ancillary Claim**" or "**Memorial AC**"), together with Factual Exhibits C-0200 through C-0279, Legal Authority CL-0201, the Third Witness Statement by [redacted] ("[redacted] **Third Statement**"), the Second Witness Statement by [redacted] ("[redacted] **Second Statement**", with Exhibits [redacted]00 through [redacted]0019), the Third Expert Reports by [redacted] ("[redacted] **Third Report**", with Exhibits [redacted]0051 through [redacted]0067), and of Messrs. Darrell Chodorow and Fabricio Núñez ("**Brattle Third Report**", with Exhibits DC-0163 through DC-0245 and Workpapers DC-0246 through DC-0252).[14]

[14] With the Respondent's consent, on 9 December 2024, the Claimant submitted a corrected version of the Brattle Third Report and an updated Workpaper O.

89. On 19 December 2022, the Respondent filed a Counter-Memorial on the Ancillary Claim ("**Respondent's Counter-Memorial on the Ancillary Claim**" or "**Counter-Memorial AC**"), together with Factual Exhibits R-0136 through R-0190, Legal Authorities RL-0145 through RL-0181, the Witness Statements by Mr. Iván Rico (**RW-0011** or "**Rico Statement**", with Exhibits IRL-0001 through IRL-0004), Mr. Patricio Rodolfo Vilchis (**RW-0013** or "**Vilchis Statement**", with Exhibits PRVN-0001 through PRVN-0005), and by Mr. Enrique Castañeda Sánchez (**RW-0014** or "**Castañeda Sánchez Statement**"), the Third Witness Statement by Ms. Margarita Yolanda Balcázar Mendoza (**RW-0012** or "**Balcázar Third Statement**", with Exhibits MYBM-0008 through MYBM-0013), the Third Expert Reports of Mr. Timothy Hart and Ms. Rebecca Vélez (**RE-0007** or "**Credibility Third Report**", with Appendix A through Appendix C, Exhibits CRED-0084 through CRED-0096), and of Messrs. Gustavo Carvajal, Juan Pedro Machado, Carlos Rábago Estela y Carlos del Razo Ochoa (**RE-0008** or "**SOLCARGO Third Report**", with Exhibits JPMA-0014 through JPMA-0015). In Section IV of its Counter-Memorial on the Ancillary Claim, the Respondent included a request to submit a counterclaim against the Claimant for the alleged environmental damages caused by the latter during the development of its investment (the "**Counterclaim**").

90. On 20 February 2023, the Claimant filed a Reply on the Ancillary Claim ("**Claimant's Reply on the Ancillary Claim**" or "**Reply AC**"), together with Appendix A, Factual Exhibits C-0280 through C-0331, Legal Authorities CL-0202 through CL-0229, the Fourth Witness Statement by [redacted] ("[redacted] **Fourth Statement**", with Exhibits [redacted]0014 through [redacted]0017), the Third Witness Statement by [redacted] ("[redacted] **Third Statement**", with Exhibits [redacted]0020 through [redacted]0032), the First Witness Statements by [redacted] **Statement**", with Exhibits [redacted]-0001 through [redacted]-0009), and by [redacted] ("[redacted] **Statement**", with Exhibits [redacted]-0001 through [redacted]-0010), the Fourth Expert Reports by [redacted] ("[redacted] **Fourth Report**", with Exhibits [redacted]0068 through [redacted]0073), and of Messrs. Darrell Chodorow and Fabricio Núñez ("**Brattle Fourth Report**", with Exhibits DC-0253 through DC-0276 and Workpaper DC-0246 (updated)), and the First Expert Report of Dr. Gino Bianchi Mosquera ("**GSI First Report**", with Exhibits GSI-

0001 through GSI-0031). In its Reply on the Ancillary Claim, the Claimant objected to the Respondent's request for leave to file the Counterclaim.

91. On 23 February 2023, the Tribunal noted that in paragraph 203 of its Counter-Memorial on the Ancillary Claim, the Respondent requested the Tribunal to undertake a site visit at La Rosita and Claimant's other sites, and that in footnote 192 of its Reply Memorial on the Ancillary Claim, the Claimant indicated that it had no objection to such a visit if the Tribunal considers it necessary. The Tribunal advised the Parties that it considered that a site visit may aid its further understanding of the Parties' dispute and proposed two options for the timing of the visit for consideration by the Parties.

92. After hearing from both Parties, on 10 March 2023, the Tribunal proposed that a two-day site visit of all three of the Claimant's lots would take place in the period 18-20 July 2023 (the "**Site Visit**"). Regarding the Respondent's request to file a Counterclaim, the Tribunal decided that it deferred its decision on the admissibility and on its jurisdiction over the Counterclaim and joined it to the merits of the Counterclaim, all of them to be decided in the final award. On this basis, the Tribunal invited the Parties to confer and agree on a schedule of submissions to brief the Tribunal on the Counterclaim.

93. On 21 March 2023, the Claimant reported to the Tribunal that the Respondent had allegedly aggravated the dispute by forcefully entering into Punta Venado, in violation of PO7, and requested the assistance of the Tribunal.

94. On 23 March 2023, after hearing both Parties, the Tribunal provided further instructions on the procedural calendar to brief the Tribunal on the Counterclaim.

95. On 24 March 2023, the Respondent proposed a timetable for briefing its Counterclaim, requesting the bifurcation of damages issues relating to the Counterclaim.

96. On 28 March 2023, the Respondent submitted its observations on the Claimant's request of 21 March 2023 regarding the Respondent's alleged violation of PO7.

97. On 29 March 2023, the Claimant objected to the Respondent's proposed timetable for the briefing of the Counterclaim and bifurcation request. The Claimant requested that the Tribunal decide on the scope of the Respondent's Counterclaim as a preliminary issue.

98. On 3 April 2023, the Claimant filed a response to the Respondent's observations of 28 March 2023.

99. On the same date, the Tribunal provided instructions on the issue of the procedural calendar for the briefing of the Counterclaim. The Tribunal granted the Respondent's request for bifurcation of the damages issues relating to the Counterclaim. The Tribunal further decided that it did not have sufficient materials before it at that stage to issue any directions with respect to the scope of the Counterclaim and invited the Parties to plead their respective cases on jurisdiction, admissibility and liability in relation to the Counterclaim as presented by the Respondent.

100. On 6 April 2023, the Respondent filed further observations on the Claimant's request of 21 March 2023 regarding the Respondent's alleged violation of PO7.

101. On the same date, the Parties submitted further comments on the procedural calendar for the briefing of the Counterclaim. The Claimant proposed that the merits of the Counterclaim (not just the damages issues) be bifurcated to be addressed later, if applicable. The Respondent accepted the Claimant's bifurcation proposal on 12 April 2023.

102. On 13 April 2023, after considering the Parties' agreement to bifurcate the merits of the Counterclaim, the Tribunal confirmed that the merits and quantum issues of the Counterclaim would be bifurcated. The Tribunal indicated that, at that stage, the Tribunal would determine the jurisdiction and admissibility of the Counterclaim only. On this basis, the Tribunal confirmed the procedural calendar for the briefing of the Counterclaim as well as the dates for the hearing on the Ancillary Claim and on the Jurisdiction and Admissibility of the Counterclaim.

103. On 19 April 2023, the Tribunal issued a decision on the alleged violations of PO7. The Tribunal granted leave to both Parties to file into the record documents in support of their correspondence by 26 April 2023 and invited the Parties to take no action that might further aggravate or extend the dispute between the Parties.

104. On 21 April 2023, the Respondent filed a Rejoinder on the Ancillary Claim ("**Respondent's Rejoinder on the Ancillary Claim**" or "**Rejoinder AC**"), together with

Factual Exhibits R-0191 through R-0219, Legal Authorities RL-0182 through RL-0201, the Witness Statements by Ms. Gloria Fermina Tavera Alonso (**RW-0015** or "**Tavera Alonso Statement**", with Exhibits GFTA-0001 through GFTA-0017), and by Mr. Adrián Pedrozo Acuña (**RW-0016** or "**Pedrozo Acuña Statement**", with Exhibits APA-0001 through APA-0006), the Fourth Expert Reports of Mr. Timothy Hart and Ms. Rebecca Vélez (**RE-0009** or "**Credibility Fourth Report**", with Appendix A through Appendix C and Exhibits CRED-0097 through CRED-0105), and of Messrs. Gustavo Carvajal, Juan Pedro Machado y Carlos del Razo Ochoa (**RE-0010** or "**SOLCARGO Fourth Report**", with Exhibits JPMA-0016 through JPMA-0030) and the Second Expert Report of Mr. Carlos Rábago Estela (**RE-0011**, or "**Rábago Estela Second Report**", with Exhibits CRE-0005 through CRE-0012).

105. On 26 April 2023, the Parties submitted additional documents in support of their correspondence regarding the Respondent's alleged violation of PO7: C-0332 to C-0350 for the Claimant, and R-0220 to R-0230 and RL-0202 to RL-0206 for the Respondent.

106. On 28 April 2023, following discussions between the Parties on a protocol for the Site Visit, the Parties provided a draft Site Visit protocol, including a number of disagreements and their respective positions.

107. On 12 May 2023, the Respondent filed a Memorial on Admissibility and Jurisdiction of the Counterclaim ("**Respondent's Memorial on Admissibility and Jurisdiction of the Counterclaim**" or "**Counterclaim Memorial on Jurisdiction**"), together with Legal Authorities RL-0207 through RL-0231.

108. On 18 May 2023, the Tribunal held a case management conference with the Parties by videoconference in relation to the draft Site Visit protocol.

109. Further drafts of the Site Visit protocol and its Annexes were submitted on 2 and 9 June 2023 respectively, in relation to which the Tribunal issued further directions on 14 June 2023.

110. On 14 June 2023, the Tribunal received correspondence from Mr. Quetzal Tzab González on behalf of "*hundreds of residents from marginalized and indigenous communities in*

Playa del Carmen, state of Quintana Roo, Mexico", which was forwarded to the Parties the following day.

111. On 21 June 2023, the Parties submitted the final draft Site Visit protocol, subject to one final disagreement on the composition of the Parties' delegations for the Site Visit.

112. On 22 June 2023, the Tribunal issued Procedural Order No. 8 ("**PO8**") concerning the Site Visit, attaching an English and Spanish version of the Site Visit protocol and its Annexes ("**Site Visit Protocol**"). On the same date, the Tribunal also invited the Parties to comment on a number of matters relating to the organization of the hearing on the Ancillary Claim and jurisdiction/admissibility of the Counterclaim to be held remotely from 7-10 August 2023, with 10 August being a reserve day.

113. On the same date, and upon invitation of the Tribunal, the Parties provided comments on the correspondence of Mr. Tzab.

114. On 27 June 2023, the Claimant filed a Response on Admissibility and Jurisdiction of the Counterclaim ("**Claimant's Response on Admissibility and Jurisdiction of the Counterclaim**" or "**Response on Counterclaim Jurisdiction**"), together with Factual Exhibits C-0332 through C-0353 and Legal Authorities CL-0230 through CL-0253. The Tribunal notes that Claimant used exhibit numbers that had already been assigned to previously filed exhibits (*see* ¶ 105 above). Accordingly, for the purposes of this Award the Tribunal will refer to these Exhibits as C-0332a through C-0350a, as appropriate.

115. On 30 June 2023, Mr. Tzab filed an application to file a written submission pursuant to ICSID Arbitration Rule 37(2) (the "**Letter of 30 June 2023**"). Attached to the Letter of 30 June 2023 was a document being a class action filed before the Mexican courts by Mr. Tzab in the matter *Quetzal Tzab González y Otros, Todos Integrantes de la Colectividad Actora vs Calizas Industriales del Carmen, S.A. de C.V. (SAC TUN) y Rancho Piedra Caliza S.A. de C.V.* ("**Class Action Filing**").

116. On 7 July 2023, each Party filed its observations on the Letter of 30 June 2023 and the Class Action Filing. The Claimant's observations were accompanied by Factual Exhibits C-0354 to C-0356 and Legal Authorities CL-0254 to CL-0264.

117. On 13 July 2023, the Tribunal issued Procedural Order No. 9 ("**PO9**") granting Mr. Tzab's application to file a written submission as a non-disputing party pursuant to ICSID Arbitration Rule 37(2), and inviting the Parties to submit any written comments on 24 September 2023.

118. On 14 July 2023, the Claimant requested leave to submit into the record the transcript and a video excerpt of President Andrés Manuel López Obrador's morning press conference (*Mañanera*) of 13 July 2023.

119. On 18 July 2023, a pre-hearing conference between the Tribunal and the Parties was held in person in Playa del Carmen, Mexico, to discuss the organization of the hearing on the Ancillary Claim and jurisdiction/admissibility of the Counterclaim.

120. Between 18 July 2023 and 20 July 2023, the Tribunal and the Parties visited the places at Playa del Carmen, Mexico, connected with the dispute pursuant to ICSID Arbitration Rule 37(1). During the Site Visit, the Claimant requested to introduce into the record (i) Oficio 401-7-1/958 of 29 November 2010 of the *Instituto Nacional de Antropología e Historia* ("**INAH**") and (ii) the Mayan Ruins Guide brochure.

121. On 21 July 2023, the United States of America filed a second written submission as a non-disputing State Party pursuant to NAFTA Article 1128 ("**Second Article 1128 Submission of the United States of America**").

122. On the same date, the Respondent submitted a response to the Claimant's request of 14 July 2023 to introduce the transcript and a video excerpt of President López Obrador morning press conference of 13 July 2023.

123. On 25 July 2023, the Respondent submitted a response to Claimant's request during the Site Visit to introduce into the record (i) INAH's Oficio 401-7-1/958 of 29 November 2010 and (ii) the Mayan Ruins Guide brochure.

124. On 26 July 2023, the Tribunal issued Procedural Order No. 10 ("**PO10**"), concerning the organization of the hearing on the Ancillary Claim and jurisdiction/admissibility of the Counterclaim, setting out the procedural rules that the Parties agreed upon and/or that the Tribunal determined will govern the conduct of the hearing.

125. On the same date, and in light of the Respondent's non-objection to the Claimant's request, the Tribunal granted the Claimant leave to introduce the new documents requested on 14 July 2023 and during the Site Visit. Pursuant to the Tribunal's instructions, such new documents were submitted into the record by the Claimant on 28 July 2023 as C-0357 to C-0360.

126. Also on 28 July 2023, the Claimant informed that, in response to the President's inquiry about the breakdown of the existing inventory at CALICA by grades during the Site Visit, it was prepared to introduce into the record reports indicating Legacy Vulcan's inventories both at CALICA's Port Terminal and Plant as of 25 July 2023, segregated by product type. Additionally, the Claimant requested leave to submit into the record the transcript and a video excerpt of President López Obrador morning press conference (*Mañanera*) of 27 July 2023.

127. On 31 July 2023, the Tribunal circulated the draft minutes of the Site Visit prepared by the Secretary of the Tribunal and invited the Parties to submit any comments by 4 August 2023.

128. On the same date, the Tribunal granted the Claimant's request to introduce the transcript and a video excerpt of President López Obrador's *Mañanera* of 27 July 2023 in light of the Respondent's non-objection.[15] Additionally, the Tribunal invited the Respondent to comment on the Claimant's request to introduce into the record reports of Legacy Vulcan's inventories at CALICA's Port Terminal and Plant as of 25 July 2023, segregated by product type. Pursuant to the Tribunal's invitation, the Respondent objected to the Claimant's request on 2 August 2023.

129. On 4 August 2023, the Parties submitted their comments on the Site Visit minutes circulated by the Tribunal on 31 July 2023.

130. On the same date, the Tribunal rejected the Claimant's request to introduce into the record reports on CALICA's inventory segregated by product on the grounds that the requirement of exceptional circumstances set forth in Section 16.3 of PO1 was not met.

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[15] Such new evidence was introduced into the record as Factual Exhibits **C-0361** and **C-0362** on 2 August 2023.

131. On 6 August 2023, the Tribunal invited each Party to comment on the other Party's comments on the Site Visit minutes. The Parties submitted their respective comments on 9 August 2023.

132. From 7 to 11 August 2023, the Tribunal held a hearing on the Ancillary Claim and the jurisdiction/admissibility of the Counterclaim by video conference (the "**Hearing on the Ancillary Claim and Jurisdiction/Admissibility of the Counterclaim**"). The following persons were present:

Tribunal:	
Prof. Albert Jan van den Berg	President
Prof. Sergio Puig	Arbitrator
Prof. Guido Santiago Tawil	Arbitrator
ICSID Secretariat:	
Ms. Patricia Cruz Trabanino	Secretary of the Tribunal
Assistant to the Tribunal:	
Ms. Emily Hay	Assistant to the Tribunal
For the Claimant:	
Mr. Miguel López Forastier	Covington & Burling LLP
Mr. José E. Arvelo	Covington & Burling LLP
Ms. Clovis Trevino	Covington & Burling LLP
Mr. Santiago Zalazar	Covington & Burling LLP
Ms. Kate McNulty	Covington & Burling LLP
Ms. Amanda Tuninetti	Covington & Burling LLP
Mr. Roy Goldsman	Covington & Burling LLP
Mr. Gabriel Gates	Covington & Burling LLP
Mr. Andrés Sánchez	Covington & Burling LLP
Mr. Yerick Reyes	Covington & Burling LLP
Ms. Sofía Gómez Ruano	Creel, García-Cuéllar, Aiza y Enríquez, S.C.
Mr. Luis M. Jardón Piña	Creel, García-Cuéllar, Aiza y Enríquez, S.C.
Ms. Sara I. Contreras Medrano	Creel, García-Cuéllar, Aiza y Enríquez, S.C.
Ms. Mariana Westendarp Palacios	Creel, García-Cuéllar, Aiza y Enríquez, S.C.
Ms. Elsa Guadalupe Ortega López	Creel, García-Cuéllar, Aiza y Enríquez, S.C.
Mr. Ernesto Enríquez	Vulcan Materials Company
Mr. Denson Franklin	Vulcan Materials Company
Mr. Gregg McCormick	Vulcan Materials Company
For the Respondent:	
Mr. Alan Bonfiglio Ríos	Secretaría de Economía
Mr. Rafael Rodríguez Maldonado	Secretaría de Economía
Ms. Pamela Hernández Mendoza	Secretaría de Economía
Mr. Alejandro Rebollo Ornelas	Secretaría de Economía
Mr. Jorge Escalona Gálvez	Secretaría de Economía

Ms. Rosa María Baltazares Gómez	Secretaría de Economía
Ms. María Daniela Parra Hernández	Secretaría de Economía
Ms. Mariah Karla Arreola Alcántara	Secretaría de Economía
Mr. Stephan J. Becker	Pillsbury Winthrop Shaw Pittman LLP
Mr. Gary J. Shaw	Pillsbury Winthrop Shaw Pittman LLP
Mr. Greg Tereposky	Tereposky & DeRose
Mr. Alejandro Barragán	Tereposky & DeRose
Ms. Ximena Iturriaga	Tereposky & DeRose
Mr. René Sánchez Galindo	Consejería Jurídica del Ejecutivo Federal
Mr. Miguel Ángel Pérez Ochoa	Consejería Jurídica del Ejecutivo Federal
Mr. Rodolfo García González	Consejería Jurídica del Ejecutivo Federal
Ms. Diana Nabil Romero García	Consejería Jurídica del Ejecutivo Federal
Ms. Blanca Alicia Mendoza Vera	Procuraduría Federal de Protección al Ambiente, PROFEPA
Ms. Vanessa Rodríguez Camarillo	Procuraduría Federal de Protección al Ambiente, PROFEPA

Court Reporters:

Mr. Leandro Iezzi	Spanish Court Reporter
Ms. Virginia Masce	Spanish Court Reporter
Ms. Guadalupe García	Spanish Court Reporter
Mr. David Kasdan	English Court Reporter

Interpreters:

Mr. Daniel Giglio	Interpreter
Ms. Silvia Colla	Interpreter
Mr. Luis Eduardo Arango	Interpreter

Non-Disputing NAFTA Contracting Parties:

Ms. Lisa J. Grosh	U.S. Department of State
Mr. John D. Daley	U.S. Department of State
Mr. David M. Bigge	U.S. Department of State
Mr. Nathaniel E. Jedrey	U.S. Department of State
Ms. Catherine Gibson	Office of the U.S. Trade Representative
Ms. Michelle Ker	Office of the U.S. Trade Representative
Mr. Brandon Whitehill	Office of the U.S. Trade Representative
Ms. Sylvie Tabet	Departments of Justice and Global Affairs of Canada
Ms. Maria Cristina Harris	Departments of Justice and Global Affairs of Canada

133. During the Hearing on the Ancillary Claim and Jurisdiction/Admissibility of the Counterclaim, the following persons were examined:

On behalf of the Claimant:

[redacted]

Mr. Gino Bianchi Mosquera	GSI Environmental Inc.
Mr. Darrell Chodorow	The Brattle Group
Mr. Fabricio Núñez	The Brattle Group
On behalf of the Respondent:	
Mr. Enrique Castañeda Sánchez	Procuraduría Federal de Protección al Ambiente, PROFEPA
Ms. Margarita Yolanda Balcázar Mendoza	Procuraduría Federal de Protección al Ambiente, PROFEPA
Mr. Patricio Rodolfo Vilchis	Procuraduría Federal de Protección al Ambiente, PROFEPA
Mr. Adrián Pedrozo	Instituto Mexicano de Tecnología del Agua
Ms. Gloria Tavera	Comisión Nacional de Áreas Naturales Protegidas
Mr. Carlos Rábago Estela	Environmental expert
Mr. Carlos Federico Del Razo Ochoa	Environmental Law Expert
Mr. Gustavo Carvajal Isunza	Environmental Law Expert
Mr. Juan Pedro Machado Arias	Environmental Law Expert
Mr. Timothy Hart	Credibility International
Mr. Rebecca Vélez	Credibility International

134. On 14 August 2023, the Tribunal, *inter alia*, circulated the minutes of the Site Visit incorporating the Parties' agreed changes (the "**Site Visit Minutes**") and invited the Parties to address any additional comments or views regarding the content of the Site Visit Minutes in their respective Post-Site Visit briefs. The Tribunal also informed the Parties that, in accordance with paragraph 64 of PO6, it would pose questions to the Parties by 25 August 2023 and invited them to address such questions in their post-hearing briefs.

135. On 15 August 2023, the Claimant requested leave to submit into the record the transcript and a video excerpt of President López Obrador's morning press conference (*Mañanera*) of 14 August 2023. On 21 August 2023, the Respondent filed observations on the Claimant's request. On 23 August 2023, considering the Respondent's non-objection, the Tribunal decided to grant the Claimant's request and invited the Claimant to file the complete transcript and video of the morning press conference of 14 August 2023 by 25 August 2023.

136. On 23 August 2023, the Tribunal submitted questions to the Parties in accordance with paragraph 64 of PO6.

137. On 25 August 2023, the Claimant submitted the complete transcript and a video of President López Obrador's morning press conference (*Mañanera*) of 14 August 2023 as Factual Exhibits C-0363 and C-0364.

138. On 20 September 2023, each Party filed a Post-Site Visit Brief ("**Post-Site Visit Briefs**") and answers to the Tribunal's questions.

139. On 25 September 2023, each Party submitted its comments on the Second Article 1128 Submission of the United States of America and the 30 June 2023 Letter, together with Factual Exhibits C-0365-C-0367, and Legal Authorities CL-0265-CL-0287 and RL-0232-RL-0233, respectively.

140. On 6 October 2023, the Respondent requested leave to submit into the record a letter issued by Mexico's INAH on 6 September 2023 (*Oficio No. 401.2C.7-2023/857*), and its respective exhibits.

141. On 11 October 2023, the Claimant requested leave to submit into the record the transcript and a video excerpt of President López Obrador's morning press conference (*Mañanera*) of 6 October 2023. On the same date, the Claimant filed observations on the Respondent's request of 6 October 2023, agreeing to the introduction of the letter issued by INAH on 6 September 2023 (*Oficio No. 401.2C.7-2023/857*), provided the Tribunal allowed the Claimant to introduce another letter issued by INAH in August 2021.

142. On 16 October 2023, the Respondent filed its observations on the Claimant's request of 11 October 2023, communicating that it did not object to the Claimant's request, provided the full video and transcript were introduced into the record.

143. On 19 October 2023, considering the Parties comments and the non-objection to the other Party's request, the Tribunal decided to grant (i) the Respondent's request to file *Oficio No. 401.2C.7-2023/857* and (ii) the Claimant's request to file the letter issued by INAH in August 2021 and the complete transcript and video of President López

Obrador's morning press conference of 6 October 2023. The Tribunal invited the Parties to submit the documents by 20 October 2023.

144. On 20 October 2023, the Claimant submitted the (i) complete transcript and video of President Andrés Manuel López Obrador's morning press conference (*Mañanera*) of 6 October 2023 as Factual Exhibits C-0368 and C-0369, and (ii) a letter issued by INAH in August 2021 as Factual Exhibit C-0370. On the same date, the Respondent submitted the letter issued by INAH on 6 September 2023 (*Oficio No. 401.2C.7-2023/857*) as Factual Exhibit R-0236.

145. On 24 October 2023, the Claimant requested leave to submit into the record the transcript and an excerpt video of President López Obrador's morning press conference (*Mañanera*) of 20 October 2023. The Claimant also requested the Tribunal to reiterate its order recommending that the Respondent "*take no action that might further aggravate or extend the dispute*" pursuant to PO7.

146. On 27 October 2023, the Parties filed their Post-Hearing Briefs on the Ancillary Claim and Jurisdiction/Admissibility of the Counterclaim ("**PHM on Ancillary Claim and Counterclaim**" or "**PHM AC**"), together with Legal Authorities CL-0288 to CL-0297 and RL-0234 to RL-0253.

147. On 30 October 2023, the Respondent filed observations on the Claimant's request of 24 October 2023, communicating that it did not object to the Claimant's request, provided the full video and transcript were introduced into the record. On 2 November 2023, the Claimant filed a response to the Respondent's observations of 30 October 2023, maintaining its request for the Tribunal to reiterate its provisional-measure order in PO7, recommending that Respondent refrain from further aggravating the dispute.

148. On 8 November 2023, considering the Respondent's non-objection, the Tribunal decided to grant the Claimant's request to file the transcript and a video of President López Obrador's morning press conference (*Mañanera*) of 20 October 2023 by 10 November 2023. On the same date, the Claimant submitted the complete transcript and video of President Andrés Manuel López Obrador's morning press conference (*Mañanera*) of 20 October 2023 as Factual Exhibits C-0371 and C-0372.

149. On 9 November 2023, the Claimant requested the Tribunal (i) for leave to submit into the record a notice published in the Mexican Official Gazette on 8 November 2023 commencing the process to declare CALICA's lots as a natural protected area (the "**Notice**") and (ii) to reiterate the Tribunal's order in PO7 recommending that the Respondent refrain from further aggravating the dispute.

150. On 16 November 2023, the Respondent filed observations on the Claimant's request of 9 November 2023, communicating that it did not object to the Claimant's request to introduce the Notice, provided that other documents that the Respondent referred to in its letter were introduced into the record.

151. On 17 November 2023, the Claimant requested leave to file a reply to the Respondent's communication of 16 November 2023 regarding the introduction of new documents. On the same date, the Respondent requested leave to submit into the record two *Acuerdos de Emplazamiento* issued on 23 October 2023.

152. On 22 November 2023, the Claimant requested leave to submit its observations regarding (i) the Respondent's request of 17 November 2023 on the introduction of the *Acuerdos de Emplazamiento* by 28 November 2023, and (ii) the Respondent's request of 16 November 2023 on the introduction of the additional documents by 5 December 2023.

153. On the same date, the Tribunal (i) invited the Claimant to submit its observations on the Respondent's request of 17 November 2023 regarding the *Acuerdos de Emplazamiento* by 28 November 2023, (ii) informed the Parties that, unless the Respondent had any objection, it would also invite the Claimant to submit its observations on the additional documents referred to by the Respondent in its letter of 16 November 2023 and made available by the Respondent to the Claimant on 21 November 2023 by 5 December 2023, and (iii) requested the Respondent to inform the Tribunal if it had any objection.

154. On the same date, the Respondent informed that it had objections regarding the Claimant's request to submit its comments by 5 December 2023 and informed that it would not oppose to the Claimant submitting them by 28 November 2023, along with its comments on the *Acuerdos de Emplazamiento*.

155. On 23 November 2023, the Claimant filed a response to the Respondent's observations of 22 November 2023.

156. On 27 November 2023, the Tribunal granted the Claimant's request to file the Notice published in the Mexican Official Gazette on 8 November 2023 and invited the Claimant to submit it by 28 November 2023. On the same date, after considering both Parties' communications, the Tribunal amended the procedural calendar to address the Parties' requests regarding the introduction of new documents by the Respondent.

157. On 28 November 2023, the Claimant submitted the Notice published in the Mexican Official Gazette on 8 November 2023. On the same date, the Claimant filed its observations to the Respondent's request of 17 November 2023, regarding the *Acuerdos de Emplazamiento*.

158. On 4 December 2023, the Claimant filed its observations to the Respondent's request of 16 November 2023, regarding the introduction of new documents made available by the Respondent to the Claimant on 21 November 2023.

159. On 7 December 2023, the Respondent filed its observations to the Claimant's objection to admit any of the documents.

160. On 12 December 2023, the Tribunal issued directions on the admissibility of new evidence. Regarding the Respondent's request of 16 November 2023, the Tribunal decided to amend its directions of 27 November 2023, instructing (i) the Respondent to provide the Claimant with PROFEPA's files for 2005, 2012 and 2014 by 13 December 2023, (ii) the Respondent to file a submission identifying the specific documents it sought to rely on, together with an explanation on the relevance of those documents, and the respective documents by 20 December 2023, (iii) the Claimant to file a submission in response to the Respondent's submission by 29 January 2024, and (iv) the Parties to simultaneously file their reply post-hearing briefs by 12 February 2024. Regarding the Respondent's request of 17 November 2023, considering the Claimant's non-objection to the introduction of the *Acuerdos de Emplazamiento*, the Tribunal invited the Respondent to submit these documents by 13 December 2023.

161. On 13 December 2023, the Respondent submitted the *Acuerdos de Emplazamiento* as Factual Exhibits R-0237 and R-0238.

162. On 14 December 2023, the Claimant filed its observations to the Tribunal's decision of 12 December 2023 regarding the PROFEPA's files alleging that such documents were incomplete. On the same date, the Respondent filed its observations to the Claimant's comments.

163. On 15 December 2023, the Tribunal clarified its request concerning the PROFEPA's files and ordered the Respondent to provide the Claimant with the missing pages in PROFEPA's files from 2003, 2008 and 2014. The Tribunal also directed the Respondent to submit the PROFEPA's files to the Claimant for years 2005, 2012 and 2016 as well as complete any missing documents for 2003, 2008 and 2014 by 18 December 2023.

164. On 19 December 2023, the Tribunal issued Procedural Order No. 11 ("**PO11**") rejecting both of Claimant's pending requests: (i) in relation to President López Obrador's morning press conference (*Mañanera*) of 20 October 2023, that the Tribunal reiterate its order in PO7 that the Respondent "take no action that might further aggravate or extend the dispute", and (ii) in relation to the Notice that the Tribunal reiterate its order in PO7 "recommending that Respondent refrain from further aggravating the dispute".

165. On 20 December 2023, the Respondent filed its submission regarding its request to introduce new documents of 16 November 2023, along with the respective documents as Factual Exhibits R-0239 to R-0242.

166. On 12 February 2024, each Party filed a Reply Post-Hearing Brief on the Ancillary Claim and Jurisdiction/Admissibility of the Counterclaim ("**Reply PHMs on Ancillary Claim and Counterclaim**" or "**RPHM AC**"). The Claimant's submission was accompanied by Legal Authorities CL-0298 and CL-0299. The Respondent's submission was accompanied by Legal Authorities RL-0254 to RL-0258.

167. On 15 March 2024, each Party filed a Submission on Costs ("**Submissions on Costs**" or "**CS**"). Claimant's submission was accompanied by Legal Authorities CL-0300 to CL-0304.

168. By letter of 13 June 2024, Claimant informed the Tribunal of certain new developments and requested leave to introduce new documents into the record. On 20 June 2024, following the Tribunal's invitation, Respondent filed its observations on Claimant's request of 13 June 2024.

169. On 25 June 2024, the Tribunal granted Claimant leave to introduce into the record, by 28 June 2024, the documents included in its request of 13 June 2024. On 28 June 2024, Claimant submitted the requested documents as Factual Exhibits C-0374 to C-0399.

170. By letter of 27 August 2024, Claimant informed the Tribunal of further developments concerning the declaration of CALICA's lots as natural protected areas and requested leave to introduce new documents into the record. On 2 September 2024, at the Tribunal's invitation, Respondent filed its observations on Claimant's request and sought leave to introduce additional documents into the record. On 9 September 2024, Claimant filed its response to Respondent's request of 2 September 2024.

171. On 13 September 2024, the Tribunal granted the Parties leave to introduce the documents requested in their respective applications. On 17 September 2024, within the deadline set by the Tribunal, Claimant filed Factual Exhibits C-0400 to C-0402, and Respondent filed Factual Exhibits R-0243 to R-0247 and Legal Authority RL-0259.

172. On 4 October 2024, Claimant informed the Tribunal that, on 23 September 2024, President Andrés Manuel López Obrador had signed a decree declaring CALICA's lots a natural protected area ("**ANP Decree**") and requested leave to introduce the ANP Decree into the record. By letter of 15 October 2024, at the Tribunal's invitation, Respondent filed its observations on Claimant's request of 4 October 2024 and, in turn, requested leave to introduce the following documents into the record: (i) Canada's Counter-Memorial on Jurisdiction and the Merits, dated 15 July 2024, in the case *Ruby River Capital LLC v. Canada* (ICSID Case No. ARB/23/5) ("**Canada's Counter-Memorial in *Ruby River*")**; and (ii) the "*Estudio Previo Justificativo para el Establecimiento del ANP, Felipe Carrillo Puerto*" of SEMARNAT and CONANP, dated July 2024 ("***Estudio Previo Justificativo***").

173. Pursuant to the Tribunal's invitation, on 21 October 2024, Claimant filed observations on Respondent's request of 15 October 2024, and, on 30 October 2024, Respondent filed its response to Claimant's observations of 21 October 2024.

174. On 3 November 2024, the Tribunal granted the Parties leave to introduce into the record the documents requested in their respective applications of 4 October 2024 and 15 October 2024. In addition, the Tribunal invited Claimant to seek leave, by 7 November 2024, if it wished to file any responsive documents to Canada's Counter-Memorial in *Ruby River.*

175. On 4 November 2024, Respondent submitted the *Estudio Previo Justificativo* and Canada's Counter-Memorial in *Ruby River* as Factual Exhibit R-0248 and Legal Authority RL-0260, respectively. On the same date, Claimant submitted the ANP Decree as Factual Exhibit C-0403.

176. On 7 November 2024, Claimant requested leave to introduce into the record documents responsive to Canada's Counter-Memorial in *Ruby River*. At the Tribunal's invitation, on 13 November 2024, Respondent filed its observations on Claimant's request of 7 November 2024.

177. On 15 November 2024, the Tribunal granted Claimant leave to introduce into the record the documents listed in its communication of 7 November 2024. On 19 November 2024, within the deadline set by the Tribunal, Claimant filed the responsive documents as Legal Authorities CL-0305 to CL-0308.

178. On 17 December 2024, Respondent filed an application for the Tribunal to (i) grant it leave to introduce additional documents into the record, and (ii) issue a decision on the admissibility and jurisdiction of the Respondent's Counterclaim before issuing an award with respect to the original and Ancillary Claims. On 27 December 2024, following the Tribunal's invitation, Claimant filed observations on Respondent's application of 17 December 2024.

179. On 31 December 2024, the Tribunal decided as follows: (i) it granted Respondent leave to introduce the requested documents into the record by 3 January 2025, and (ii) it rejected Respondent's request that the Tribunal first decide on the admissibility and jurisdiction

of Respondent's Counterclaim. On 3 January 2025, Respondent submitted the additional documents as Factual Exhibits R-0249 to R-0252.

180. On 4 December 2025, Respondent requested leave to introduce the award dated 21 November 2025 issued in *Access Business Group LLC v. United Mexican States* (ICSID Case No. ARB/23/15) ("**ABG Award**") into the record. Pursuant to the Tribunal's invitation, on 10 December 2025, Claimant filed observations on Respondent's request of 4 December 2025. On 16 December 2025, the Tribunal granted Respondent leave to introduce into the record the ABG Award, provided that the dissenting opinion of Prof. Franco Ferrari was also included. On 19 December 2025, within the deadline set by the Tribunal, Respondent filed the ABG Award and Prof. Ferrari's dissenting opinion as Legal Authorities RL-0261 and RL-0262.

181. On 16 June 2026, Respondent filed a request for the Tribunal to grant leave to introduce into the record the award in *Silver Bull Resources, Inc. v. United Mexican States* (ICSID Case No. ARB/23/24) ("**Silver Bull Award**"). On 22 June 2026, pursuant to the Tribunal's invitation, Claimant filed observations on Respondent's request of 16 June 2026. On 30 June 2026, the Tribunal granted the Respondent's request, and, on 1 July 2026, the Respondent filed the Silver Bull Award into the record.

182. The proceeding was closed on 27 July 2026.

IV. FACTUAL BACKGROUND

183. In this Section, the Tribunal outlines the main factual background to the Parties' dispute.

A. THE INVESTMENT AGREEMENT, PORT CONCESSION, AND CLAIMANT'S ACQUISITION AND INITIAL DEVELOPMENT OF LA ROSITA, PUNTA VENADO, EL CORCHALITO AND LA ADELITA

184. In the mid-1980s, Claimant partnered with a Mexican industrial and construction conglomerate Grupo Ingenieros Civiles Asociados ("**Grupo ICA**") in a joint venture to (i) establish a limestone quarry in Quintana Roo; (ii) build an extraction and processing plant; (iii) construct a port close to the plant; (iv) deploy a fleet of cargo vessels to export production to the United States; and (v) create a network of distribution yards in the

United States designed to receive CALICA's production and market it throughout the US Gulf Coast.[16]

185. For convenience only, Claimant's quarrying, shipping and distribution network is referred to in this Award as the "**Project**" or the "**CALICA Network**". It is noted that "CALICA Network" is a contested term and the use of this language does not prejudge any determination by the Tribunal with respect to jurisdiction, liability, or any losses in respect of Claimant's claims.

186. Claimant and Grupo ICA incorporated three operating entities for the joint venture:

(i) CALICA: responsible for operating the Project's quarrying, processing and port operations in Mexico, including undertaking the construction of the processing plant and port.[17]

(ii) Vulica Shipping Company, Limited ("**Vulica**"): responsible for transporting CALICA's production from Mexico to the United States with its fleet of vessels.[18]

(iii) Vulica/ICA Distribution Company ("**Vulica/ICA**"): until 2001, responsible for sales and marketing operations of the Project in the United States. That function is now performed by Vulcan Construction Materials, LLC.[19]

187. On 6 August 1986, CALICA, Mexico's Federal Government, and the State of Quintana Roo entered into an agreement ("**Investment Agreement**") pursuant to which government authorities: (i) confirmed that environmental impact studies had been carried out and that the Project was considered feasible; (ii) undertook, within the scope of their competences, to coordinate their functions and to provide the facilities to obtain the permits required to carry out the Project; and (iii) stated that the period of extraction would be subject to market conditions and economic feasibility.[20]

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16 **C-0026-ENG**, Vulcan Materials Company, The CALICA Story, VIMEO, uploaded on 13 May 2020.
17 **C-0010-SPA**, Investment Agreement; [redacted] First Statement, ¶¶ 20, 27, 46.
18 [redacted] First Statement, ¶ 47; Memorial, ¶ 24.
19 [redacted] First Statement, ¶ 14.
20 **C-0010-SPA**, Investment Agreement.

188. The Investment Agreement provides for the development of two lots, being (i) La Rosita, where the main quarry and processing plant would be located; and (ii) Punta Venado, where a port terminal would be built.[21]

189. La Rosita, El Corchalito and La Adelita are adjacent to Punta Venado as shown in the below aerial view of CALICA's lots.[22] Claimant's claims relate to all three lots and to the port.

190. To develop the lots, the Investment Agreement requires CALICA to keep the authorities informed of its work, including its potential expansion, and to obtain the necessary permits and authorizations. The Federal Government would, however, define the use and exploitation of the area, at a minimum at the end of the Project:[23]

> *TERCERA - La EMPRESA hará del conocimiento de SEDUE* [i.e., the Ministry of Urban Development and the Ecology]*, SCT* [i.e., the Ministry of Communications and Transportation] *y del GOBIERNO DEL ESTADO* [i.e., the Government of the State of Quintana Roo] *el calendario conforme al cual se realizarán los distintos trabajos que comprende e1 Proyecto, y se obliga a informarles bimestralmente, o cuando así se le requiera, sobre el avance de los mismos.*
>
> *CUARTA. - SEDUE. SCT y el GOBIERNO DEL ESTADO, en el ámbito de sus respectivas competencias, inspeccionarán y vigilarán el cumplimiento de las obligaciones a cargo de la EMPRESA derivadas de este instrumento o de*

21 **C-0010-SPA**, Investment Agreement, pp. 4-5.
22 Memorial, ¶ 38.
23 **C-0010-SPA**, Investment Agreement, pp. 6, 14-16.

los permisos, licencias o autorizaciones que hubieren otorgado para la ejecución de los trabajos comprendidos en el Proyecto.

QUINTA – La EMPRESA deberá someter a la consideración de la SEDUE, SCT y al ESTADO, con dos meses de anticipación cuando menos, toda acción que modifique las características del Proyecto en los términos en que fue manifestado, evaluado o autorizado; o la suspensión o abandono de los trabajos antes de los plazos aprobados, para que intervengan de acuerdo con sus facultades.

[...]

OCTAVA. - El GOBIERNO DEL ESTADO definirá con base en sus Planes de Desarrollo para esa zona, el uso y aprovechamiento del escenario resultante al término de la vida útil del Proyecto, o en su caso durante alguna de las etapas del mismo, siendo del conocimiento de las partes el Anteproyecto de Desarrollo Turístico que forma parte de este Acuerdo como anexo 6[24] *y que se incluye como una alternativa del uso probable de1 área.*

NOVENA. - La EMPRESA con base en lo establecido en la cláusula anterior, deberá presentar a consideración de las partes que intervienen en este Acuerdo, el proyecto integral de restauración y aprovechamiento de la infraestructura creada durante el desarrollo del Proyecto que es motivo de este mismo Acuerdo.

DÉCIMA.- SEDUE, SCT y el GOBIERNO DEL ESTADO se comprometen, en la esfera de sus respectivas competencias, a coordinar sus funciones y a dar las facilidades para la obtención de los permisos requeridos para la realización del Proyecto a que se refiere el presente Acuerdo.

DECIMA PRIMERA.- La Empresa se obliga, antes de iniciar el Proyecto, a obtener con apego a las disposiciones legales aplicables, la expedición de 1os permisos, licencias y autorizaciones que fueren necesarias para la ejecución de1 referido Proyecto.

[...]

DECIMA TERCERA. - La duración de este Acuerdo dependerá de los plazos y tiempos establecidos en los permisos, 1icencias, autorizaciones y concesiones a que se refiere la cláusula Décima Primera.

191. In this context, the Investment Agreement foresees that the Project would be coordinated with the "National Development Plan" in place between 1983 and 1988, including its legal provisions and strategic guidelines:[25]

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24 **C-0010-SPA**, Investment Agreement, pp. 15, 411.

25 **C-0010-SPA**, Investment Agreement, p. 13 (capital letters in original).

> *El Gobierno Federal, por conducto de SEDUE y de SCT, y el GOBIERNO DEL ESTADO, estiman conveniente, por las razones consignadas en estos antecedentes, coordinar y concertar sus acciones para la factibilidad del Proyecto, en los términos de las disposiciones legales que norman su actividad y competencia conforme a los lineamientos estratégicos que para la zona establece el Plan Nacional de Desarrollo 1983-1988 para asegurar que en la industria extractiva y de construcción, los empleos y las exportaciones estén vinculados con la conservación del ambiente y la calidad de vida de la región.*

192. The Investment Agreement thus foresees that the Project area will cover CALICA's quarrying and related transport activities and, at the end of its life, a study for its possible use for tourism:[26]

> *La EMPRESA ha elaborado y presentado a la consideración de la SEDUE y del GOBIERNO DEL ESTADO, un Proyecto para la explotación del banco de materiales, para obtener agregados para la fabricación de materiales de construcción y para la utilización directa de la piedra caliza con los mismos fines. Los productos citados se destinarán, principalmente a la exportación por vía marítima. El Proyecto comprende también la construcción, en el mismo sitio, de las obras e instalaciones de infraestructura portuaria necesarias para el manejo y exportación de los productos, por medio de embarcaciones idóneas para el transporte de grandes volúmenes.*
>
> *El proyecto elaborado por la EMPRESA, comprende los siguientes rubros: 1.- Explotación del yacimiento; 2. - Transportación del material extraído para su trituración; 3.- Instalación de la planta de trituración y clasificación; 4.-Almacenamiento, y 5.- Carga a bordo de los barcos. Dicho proyecto se agrega como anexo número 1.*
>
> *Asimismo, contiene un estudio para el aprovechamiento del área excavada al término de la vida útil del banco de material pétreo con la posibilidad de utilizarlo como lago propicio para un desarrollo inmobiliario turístico. Además se cuenta con una propuesta de arquitectura del paisaje que se realizará en algunas partes en torno de la zona del Proyecto.*

193. In all events, the Investment Agreement provides that failure to comply with the obligations contained therein will result in the termination of the Agreement and the Project:[27]

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[26] **C-0010-SPA**, Investment Agreement, p. 12. Annex 6 provides that the use of the land shall be based on economic aspects and the development of the existing area: "*el aprovechamiento de los terrenos sobre los cuales la empresa desarrollará la explotación de agregados a que se refiere este convenio, estará en función de aspectos económicos y del desarrollo que exista en la zona en el momento en que decida utilizarlos*." **C-0010-SPA**, p. 411.

[27] **C-0010-SPA**, Investment Agreement, p. 16.

> *DECIMA SEGUNDA. – El incumplimiento de cualquiera de las obligaciones que la Empresa contrae en este Acuerdo, así como de las que a su cargo deriven de los documentos anexos al mismo, dará lugar a la rescisión del Acuerdo.*
>
> *Las faltas y omisiones de la EMPRESA serán sancionadas por las autoridades competentes, con arreglo a las disposiciones legales aplicables.*
>
> *La Empresa no solamente se obliga a lo expresamente pactado en este Acuerdo y sus anexos, sino también a las consecuencias que, según su naturaleza son conformes a la buena fé [] el uso o la ley.*

194. On 10 November 1986, Respondent granted CALICA a provisional permit authorizing the construction of a port terminal to load petrous materials in Punta Venado ("**Port Terminal**").[28]

195. On 21 April 1987, Mexico's Ministry of Communications and Transportation (*Secretaría de Comunicaciones y Transportes*, "**SCT**") granted CALICA a concession to build and operate a private port terminal to load petrous materials ("**CALICA Port Concession**"). Pursuant to the CALICA Port Concession, CALICA undertook to donate six hectares of land to the SCT to build a public terminal and committed to maintain and repair the Port Terminal as needed.[29]

196. In 1986 and 1987, a Mexican subsidiary of CALICA (Rancho Piedra Caliza, S.A. de C.V., "**RAPICA**"), acquired two lots, La Rosita and Punta Venado, in the Municipality of Cozumel, Quintana Roo, and leased the lots to CALICA.[30]

197. CALICA commenced quarrying operations at La Rosita in 1987. La Rosita is the location of CALICA's first quarry and processing plant, comprising approximately 930 hectares.

198. By approximately January 1990, CALICA commenced port operations at Punta Venado, as it hosts the Port Terminal.[31] Punta Venado is adjacent to La Rosita and covers approximately 202 hectares. La Rosita and Punta Venado are separated by a federal

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28 **C-0028-SPA**, Provisional Permit to Begin Building the Project No. 28/86, dated 10 November 1986 ("Project No. 28/86 Provisional Permit").

29 **C-0012-SPA**, Concession granted by the Executive Branch through the SCT to CALICA, dated 21 April 1987, pp. 1-3.

30 **C-0029-SPA,** Punta Venado Title Deed, dated 18 December 1986 ("Punta Venado Title Deed"); **C-0030-SPA**, La Rosita Title Deed, dated 22 May 1987 ("La Rosita Title Deed").

31 [redacted] First Statement, ¶ 18.

highway but connected by a bridge (for circulation of vehicles) and an underground tunnel (for transfer of the quarry's production) built by CALICA.[32] Claimant obtained a customs permit for the operations at the Port Terminal, allowing the export of production directly from Punta Venado to the United States, without the need to go through an official Mexican customs port to clear customs.[33] This customs permit was generally renewed every three years.[34]

199. By 1991, Claimant had exported its first shipments of CALICA aggregates to the United States.[35]

200. On 17 March 1993, PROFEPA conducted an inspection of La Rosita "con el fin de verificar y comprobar el cumplimiento [de CALICA] de las disposiciones contenidas en la [LGEEPA], de las normas técnicas ecológicas y demás disposiciones jurídicas aplicables, al otorgamiento de permisos, autorizaciones, y concesiones[.]"[36] PROFEPA inspectors observed and reported on CALICA's production process, and went on to describe that CALICA:[37]

> *presenta Manifestación de Impacto Ambiental de 1986 así como recomendaciones técnicas y medidas de mitigación principalmente para [...] el proceso de explotación, [estas últimas fueron verificadas durante la visita observándose que se le da cumplimiento].*

201. In its resolution dated 29 March 1993, PROFEPA concluded that:[38]

> *En atención a lo expuesto y del análisis de la documentación legal y aprovechamiento físico de la empresa, manifestamos de manera preliminar que la citada persona moral realiza el aprovechamiento conforme a las normas aplicables.*

202. On 19 July 1993, Mexico enacted the Ports Law (*Ley de Puertos*) which required that all port concessions be held by state-owned entities called Integral Port Administration

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32 [redacted] First Statement, ¶ 22.
33 *See, e.g.*, **C-0201-SPA**, Letter No. DGJA.2022-0981 from Leonardo Contreras Gómez (Mexico's National Customs Agency) to CALICA (30 March 2022) ("Letter DGJA.2022-0981, 30 March 2022"), p. 9.
34 *See, e.g.*, **C-0175-ENG**, Vulcan Materials Co., Vulcan Reports Fourth Quarter & Full Year 2021 Results (16 February 2022), p. 7 of the PDF.
35 **C-0031-ENG**, Vulcan Materials Company, Form 10-K for the 1991 fiscal year, dated 27 March 1992.
36 **C-0280-SPA**, PROFEPA Inspection Report (17 March 1993) ("PROFEPA Inspection Report, 17 March 1993"), pp. 3-4, 11-12.
37 **C-0280-SPA**, PROFEPA Inspection Report, 17 March 1993, pp. 6, 14.
38 **C-0281-SPA**, PROFEPA Inspection Resolution (29 March 1993), p. 2.

(*Administración Portuaria Integral*, "**API**").[39] Accordingly, in 1994, the State of Quintana Roo and its municipalities created the Integral Port Administration of the State of Quintana Roo (*Administración Portuaria Integral de Quintana Roo, S.A. de C.V.,* "**API Quintana Roo**").[40]

203. The SCT granted API Quintana Roo a concession to operate all port facilities in the State of Quintana Roo ("**API Quintana Roo Concession**") except CALICA's Port Terminal, which remained under the CALICA Port Concession.[41] The CALICA Port Concession runs until 20 April 2037, with a possible 50-year extension. As amended, it entitles CALICA to operate the private and public terminals.[42]

204. In 1994, an agreement was reached between the Federal Government, State of Quintana Roo, and relevant municipalities to coordinate and implement an ecological management program for the Cancun-Tulum corridor.[43]

205. In June and August 1996, Claimant acquired two additional lots in the Municipality of Solidaridad, Quintana Roo, (since 2025, renamed as Municipality of Playa del Carmen, Quintana Roo) being El Corchalito (c. 369 hectares) and La Adelita (c. 882 hectares), for the expansion of quarrying operations.[44] Despite formally being in a different municipality, La Rosita is physically located between El Corchalito and La Adelita and thus links the three quarrying lots.

206. In 2001, Claimant purchased Grupo ICA's interest in CALICA, Vulica and Vulica/ICA.[45]

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39 **C-0047-SPA**, Mexico Federal Official Gazette, Ports Act, dated 19 July 1993 ("Ports Act").

40 **C-0048-SPA**, Quintana Roo Official Gazette, Decree creating API Quintana Roo, dated 15 March 1994.

41 **C-0049-SPA**, Mexico Federal Official Gazette, API Quintana Roo Concession, dated 26 August 1994.

42 **C-0047-SPA,** Ports Act; **C-0013-SPA**, Amendment to the Concession granted by the Federal Government through the SCT to CALICA, dated 13 August 1993; **C-0014-SPA**, Amendment to the Concession granted by the Federal Government through the SCT to CALICA, dated 7 June 1994; **C-0015-SPA**, Amendment to the Concession granted by the Federal Government through the SCT to CALICA, dated 30 September 1994; **C-0016-SPA**, Amendment to the Concession granted by the Federal Government through the SCT to CALICA, dated 13 May 2015; **C-0050-SPA**, Letter No. 7.3.1355.15 from Alejandro Hernández Cervantes (SCT) to [redacted] (CALICA), dated 22 May 2015.

43 [redacted]**0004**, Mexican Official Gazette, Coordination Agreement for the Ecological Management of the Region known as 1994 Cancun-Tulum Corridor – Ecological Management Program, dated 26 October 1994.

44 **C-0034-SPA**, El Corchalito Title Deed; **C-0035-SPA**, La Adelita Title Deed; [redacted] First Statement, ¶ 22.

45 **C-0046-ENG**, Vulcan Materials Company, Form 10-K for the 2001 Fiscal Year, dated 27 March 2002 ("Vulcan Form 10-K 2001"), p. 5; [redacted] First Statement, ¶ 26.

B. FACTUAL BACKGROUND TO THE ORIGINAL CLAIMS

1. El Corchalito and La Adelita: Authorisations and Zoning

207. La Adelita and El Corchalito are subject to environmental regulation at the federal, state, and municipal levels through ecological management programs (*programas de ordenamiento ecológico*, or "**POEs**"). These POEs have an impact on the authorizations and zoning obtained for La Adelita.

208. By way of background, at the federal level, the Ministry of Environmental and Natural Resources ("**SEMARNAT**") formulates general territorial POEs to determine guidelines and strategies for, *inter alia,* preserving, protecting, restoring, and using natural resources sustainably,[46] and marine POEs to do the same for Mexico's marine zones.[47]

209. At the state level, regional POEs can be formulated and issued by the state governments, except when they include an area under federal jurisdiction, in which case the regional POE must be prepared and approved jointly with SEMARNAT.[48]

210. At the municipal level, local authorities can issue local POEs in accordance with local environmental laws, except when they include an area under federal jurisdiction, in which case the regional POE must be prepared and approved jointly with SEMARNAT.[49] The purpose of local POEs is to regulate land used "*fundamentalmente en la realización de actividades productivas y la localización de asentamientos humanos*"[50] and, to this end, can control, monitor and change land use.[51]

211. POEs are elaborated through a multi-step process, and once adopted, are capable of review and adjustment. The POE process starts with coordination agreements being signed between federal, state and municipal governments (depending on the type of POE in question) to: (i) determine its purpose, coverage, targeted results, etc.;[52] and

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46 **C-0127-SPA**, Mexico's General Law of Ecological Balance (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*) ("LGEEPA"), Art. 20.

47 **C-0127-SPA**, LGEEPA, Art. 20 BIS 6.

48 **C-0127-SPA**, LGEEPA, Art. 20 BIS 2.

49 **C-0127-SPA**, LGEEPA, Art. 20 BIS 5.

50 **C-0127-SPA**, LGEEPA, Art. 20 BIS 4.

51 **C-0127-SPA**, LGEEPA, Art. 8.

52 **R-0015-ESP**, Regulations under the General Law of Ecological Balance and Environmental Protection for Ecological Management, Mexican Official Gazette, Mexico, 8 August 2003 ("LGEEPA Regulations"), Art. 8.

(ii) establish an ecological management committee to manage the actions necessary to carry out the POE, ecological/technical studies, and environmental logbook recording the progress of the POE's process.[53] Thereafter a technical study is carried out in four stages to: (i) describe the study area, including environmental attributes and sectoral interests;[54] (ii) identify and analyze environmental conflicts in the study area;[55] (iii) examine the evolution of environmental conflicts based on natural, social and economic variables;[56] and (iv) propose an ecological management model.[57] A POE is then proposed, based on the model resulting from the technical study and the applicable ecological strategies.[58] The proposed POE is subject to public consultation[59] before being published in the official gazette. Once published, the POE is implemented, with the relevant authorities carrying out surveillance and inspections to verify compliance. An evaluation phase follows implementation to determine whether the POE needs modification considering its effectiveness and objectives.[60]

212. With this background in mind, below are certain regulations in place at each level that are relevant to this case.

213. At the state level, Claimant's lots are in the state of Quintana Roo. At the municipal level, El Corchalito and La Adelita are in the Municipality of Solidaridad. Albeit contiguous, La Rosita and Punta Venado are in the Municipality of Cozumel.[61]

214. The Quintana Roo regime in place from 2001 to 2009 was the Program for Territorial Environmental Regulation (*Programa de Ordenamiento Ecológico Territorial,* "**POET 2001**"). El Corchalito and La Adelita were zoned as *Unidad de Gestión* or Environmental Management Unit "UGA 30", which lists "flora and fauna" as the predominant use, and "infrastructure, quarrying, tourism" as conditioned uses.[62] One condition for quarrying

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53 **R-0015-ESP**, LGEEPA Regulations, Arts. 11, 71.
54 **R-0015-ESP**, LGEEPA Regulations, Art. 42.
55 **R-0015-ESP**, LGEEPA Regulations, Art. 43.
56 **R-0015-ESP**, LGEEPA Regulations, Art. 44.
57 **R-0015-ESP**, LGEEPA Regulations, Arts. 3, 6-7.
58 **R-0015-ESP**, LGEEPA Regulations, Arts. 3, 6-7.
59 **R-0013-ESP**, Ministry of Environment and Natural Resources. Ecological Management Course, available at: https://proyectos.cuaed.unam.mx/educacion_continua/ordenamientoecologico/Nivel03/index.html.
60 **R-0015-ESP**, LGEEPA Regulations, Art. 6.
61 *See* Memorial, ¶ 78, Map 2; Memorial, ¶ 80, Map 3.
62 **C-0078-SPA**, POET (Territorial Ecological Management Program), dated 16 November 2001 ("POET 2001"), pp. 13, 15-16.

under UGA 30 was that 20% of vegetation was required to be preserved.[63] Among the incompatible uses for UGA 30 is "forestry".[64] La Rosita was zoned as UGA 19, with predominant use as "quarry", and incompatible uses including "forestry".[65]

215. On 25 May 2009, the State of Quintana Roo replaced the POET 2001 zoning regime with the Program for Local Environmental Regulation (*Programa de Ordenamiento Ecológico Local*, "**POEL 2009**"), applicable to the Municipality of Solidaridad. Under the POEL 2009, about 90% of La Adelita is zoned as UGA 5, intended for conservation, where quarrying is prohibited.[66] The remaining approximately 9% of La Adelita's area is zoned as UGA 12 for "sustainable extraction", where quarrying is a conditional use. Within the UGA 12 area, only 30% of the area may be used for quarrying, with 70% to be maintained in natural vegetation.[67]

216. Under the POEL 2009, El Corchalito was zoned as UGA 14, also for "sustainable extraction".[68] According to Claimant, in 2011 El Corchalito became subject to the Urban Development Program of Solidaridad of 2010, which does not preclude quarrying activities in that lot.[69]

217. The POEL 2009 specifies that its provisions would not apply retroactively,[70] and under the "*Control de Constitucionalidad*" provision of the POEL, it provides:[71]

> *Es muy importante precisar que este POEL, no se aplicará retroactivamente a los casos en concreto, que* ***cuentan con documentos oficiales y vigentes hasta antes de su entrada en vigor,*** *ni en lo general, ni en lo que toca a la futura renovación de los mismos, por parte de las autoridades competentes. Se reconocen y respetan pues, los derechos adquiridos concernientes, en los términos aquí precisados*. (Emphasis added)

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63 **C-0078-SPA**, POET 2001, pp. 13, 24, condition "MAE 58".
64 **C-0078-SPA**, POET 2001, p. 13.
65 **C-0078-SPA**, POET 2001, p. 9.
66 **C-0080-SPA**, POEL (Local Ecological Management Program), dated 25 May 2009 ("POEL 2009"), pp. 45, 62, 76. *See* Memorial, ¶ 80, Map 3.
67 **C-0080-SPA**, POEL 2009, p. 83.
68 **C-0080-SPA**, POEL 2009, pp. 45, 85. *See* Memorial, ¶ 80, Map 3.
69 **C-0081-SPA**, Solidaridad Municipal Program of Urban Development 2010-2050, p. III-27. *See* Memorial, ¶ 80, n. 171.
70 **C-0080-SPA**, POEL 2009, pp. 20-21.
71 **C-0080-SPA**, POEL 2009, p. 69.

218. At the state level, prior to the purchase of La Adelita and El Corchalito, the State of Quintana Roo Ministry of Infrastructure, Environment, and Fisheries confirmed in April 1996 the feasibility of quarrying activities on those lots (at the time part of the 1994 Cancun-Tulum Corridor regional POE), without excluding that other licenses, permits and authorisations may be required and reserving the possibility for the authorities to review and inspect the lots and order a shutdown or request protective measures:[72]

> *1ª: La presente FACTIBILIDAD se otorga sin perjuicio de que el titular tramite y en su caso obtenga de las entidades competentes otras Licencias, Permisos, Autorizaciones, Concesiones y similares que para el caso se requieran.*
>
> *[. . .]*
>
> *4ª: El Gobierno del Estado por conducto de la Secretaría de Infraestructura, Medio Ambiente y Pesca, tendrá en todo momento la facultad de revisar e inspeccionar las instalaciones y las áreas de los predios de referencia, y podrá ordenar la clausura parcial o total, temporal o definitiva. Así como también, requerir la realización de las medidas de protección que estime necesarias para prevenir de riesgos y daños graves e inminentes al medio ambiente.*

219. On 2 September 1996, the Municipality of Solidaridad addressed a letter to CALICA stating that it "*no tiene ningún inconveniente*" in relation to the "*factibilidad para la industria extractiva y conexas*" at La Adelita and El Corchalito.[73]

220. On 11 December 1996, the State of Quintana Roo Ministry of Infrastructure, Environment, and Fisheries issued the Corchalito/Adelita State Environmental Authorisation (*Autorización de Impacto Ambiental Estatal*), granting an environmental impact authorisation for CALICA to extract petrous materials above the water table in El Corchalito and La Adelita (the "**State EIA**"), without prejudice to obtaining other authorisations necessary to carry out the operations and reserving the possibility for the

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72 **C-0071-SPA**, Letter No. SIMAP/792/996 from Sergio Pérez Perales (SIMAP) to Ricardo Dehesa Toledo (CALICA), dated 19 April 1996 ("Letter SIMAP/792/996, 19 April 1996"), pp. 6-7; **C-0072-SPA**, Letter No. SIMAP/791/1996 from Sergio Pérez Perales (SIMAP) to Jorge E. Ortega Joaquin (CALICA), dated 19 April 1996 ("Letter SIMAP/791/1996, 19 April 1996").

73 **C-0073-SPA**, Letter from Rafael Ernesto Medina Rivero (Municipality of Solidaridad) to CALICA, dated 2 September 1996 ("Municipality of Solidaridad Letter, 2 September 1996"), p. 5.

authorities to review and inspect the lots and order a shutdown or request protective measures:[74]

> *12.- Esta autorización se otorga sin perjuicio de que el titular tramite y en su caso obtenga otras autorizaciones, concesiones, licencias, permisos y similares que sean requisitos para la realización de las obras y su operación motivo de la presente.*
>
> *[. . .]*
>
> *15.- El Gobierno del Estado, por conducto de la Secretaría de Infraestructura, Medio Ambiente y Pesca, tendrá en todo momento la facultad de revisar e inspeccionar las instalaciones y las áreas y trabajos de explotación y restauración que se efectúen; y podrá ordenar la clausura parcial, total, temporal o definitiva si se infringen los principios y condiciones fijados en el presente documento y en la Ley de la materia, independientemente de los daños y perjuicios en que incidiera el titular de la presente; así como también, requerir la realización de las medidas de protección que estime necesarias para prevenir de riesgos y daños graves e inminentes al medio ambiente.*

221. The State EIA was initially valid for five years,[75] and has been reviewed and/or amended in 2006, 2011 and 2016.[76] The 2016 renewal extends the term of operation from five to 20 years, i.e., until 2036.[77]

222. In the meantime, the 1994 Cancun-Tulum Corridor regional POE was superseded by the 2001 Cancun-Tulum Corridor regional POE, which identified La Adelita and El Corchalito as "UGA 50" properties, corresponding to predominantly conservation land with conditional mining use, requiring a review and evaluation process in 3 to 5 years.[78]

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74 **C-0018-SPA**, Corchalito/Adelita State Environmental Impact Authorization, dated 11 December 1996 ("Corchalito/Adelita State EIA, 11 December 1996"), p. 10 of the PDF.

75 **C-0018-SPA**, Corchalito/Adelita State EIA, 11 December 1996, p. 5.

76 **C-0074-SPA**, First Amendment to the Corchalito/Adelita State Environmental Impact Authorization, dated 3 March 2006 ("First Corchalito/Adelita State EIA Amendment, 3 March 2006"); **C-0075-SPA**, Second Amendment to the Corchalito/Adelita State Environmental Impact Authorization, dated 19 May 2011 ("Second Corchalito/Adelita State EIA Amendment, 19 May 2011"), **C-0076-SPA,** Third Amendment to the Corchalito/Adelita State Environmental Impact Authorization, dated 8 March 2016 ("Third Corchalito/Adelita State EIA Amendment, 8 March 2016").

77 **C-0076-SPA**, Third Corchalito/ Adelita State EIA Amendment, 8 March 2016, p. 5. of the PDF

78 **C-0078-ENG**, POET 2001; **R-0023-ESP**, Cartographic Model of the Territorial Ecological Management Program of the Region known as Cancun-Tulum Corridor, Official Gazette of the State of Quintana Roo, 16 November 2001.

223. At the federal level, the plots are subject to the General Law on Ecological Equilibrium and Environmental Protection (*Ley General de Equilibrio Ecológico y la Protección al Ambiente*) ("**LGEEPA**").[79] The purpose of the LGEEPA is to set forth a general framework to attribute competence between municipal, state, and federal authorities when exercising their respective powers in environmental matters as provided by Mexico's Federal Constitution.[80]

224. On 30 November 2000, SEMARNAT (the competent authority for that matter) granted CALICA the Federal Environmental Impact Authorization (*Autorización de Impacto Ambiental*) for quarrying in El Corchalito and La Adelita below the water table (the "**Federal EIA**"). The Federal EIA, which refers to the LGEEPA, specifies, *inter alia,* that:[81]

> ***PRIMERO.-*** *La presente resolución en materia de Impacto Ambiental, permite a [CALICA] realizar la operación y mantenimiento del proyecto* ***"Aprovechamiento de Roca Caliza por Debajo del Manto Freático en los Predios El Corchalito y La Adelita en Solidaridad, Quintana Roo"****, en una superficie total de 1,251.43 ha dividido en dos predios La Adelita de 882.13 ha y El Corchalito de 369.30 ha[.]*
>
> ***SEGUNDO.-*** *La presente autorización tendrá una vigencia de* ***veinte años*** *para las obras de preparación del sitio, construcción, operación y mantenimiento del proyecto. Dicho plazo [. . .] será prorrogable a juicio de esta Secretaría, siempre y cuando [CALICA] lo solicite por escrito a esta Dirección General de Ordenamiento Ecológico e Impacto Ambiental, con treinta días naturales de antelación a la fecha de su vencimiento. Dicha solicitud deberá presentarse con la validación de la [PROFEPA], al último informe del cumplimiento de condicionantes.*
>
> *[…]*
>
> ***CUARTO.-*** *[CALICA] deberá hacer del conocimiento de esta Dirección General, de manera previa, cualquier eventual modificación a los términos previstos en [el proyecto después de la publicación de la autorización de impacto ambiental por SEMARNAT], para que con toda oportunidad se determine lo procedente. Queda prohibido desarrollar obras y actividades*

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79 **C-0127-SPA**, LGEEPA.

80 **C-0127-SPA**, LGEEPA, Arts. 1, 4.

81 **C-0017-SPA**, Corchalito/Adelita Federal Environmental Impact Authorization, dated 30 November 2000 ("Corchalito/Adelita Federal EIA, 30 November 2000"), pp. 31, 35, 36, 42-44.

de preparación, construcción, operación y mantenimiento distintas a las señaladas en la presente autorización.

QUINTO.- *[L]a presente autorización sólo se refiere a los aspectos ambientales de las obras y actividades descritas en el Término* ***PRIMERO****[,] por lo que es la obligación de [CALICA] tramitar y obtener otras autorizaciones, concesiones, licencias, permisos y similares que sean requisito para la realización de las mismas y su operación[.]*

SEXTO.- *La operación y mantenimiento del proyecto* ***"Aprovechamiento de Roca Caliza por Debajo del Manto Freático en los Predios El Corchalito y La Adelita en Solidaridad, Quintana Roo"****, se deberán sujetar a la descripción contenida en la Manifestación de Impacto Ambiental, modalidad Regional, y en los planos incluidos en ésta, así como en lo dispuesto en la presente resolución, conforme a las siguientes* ***CONDICIONANTES****[.]*

[…]

OCTAVO.- *[CALICA] deberá elaborar y presentar para su análisis y validación a la Delegación de [PROFEPA] del estado de Quintana Roo, la información del cumplimiento de los términos y las condicionantes aquí señalados en forma cuatrimestral a partir del día siguiente a la recepción del presente. Los informes deberán ser complementados con anexos fotográficos y/o videocintas, y enviar con copia del acuse de recibo correspondiente a esta Dirección General y a la Delegación de la [SEMARNAT].*

[…]

DECIMOTERCERO.- *La [SEMARNAT] podrá evaluar nuevamente la Manifestación de Impacto Ambiental, de considerarlo necesario, con el fin de revalidar la autorización otorgada, modificarla, suspenderla, anular o revocarla si estuviera en riesgo el equilibrio ecológico o se produjeran afectaciones negativas imprevistas en el ambiente[.]*

[…]

DECIMOQUINTO.- *El incumplimiento de cualquiera de los Términos resolutivos y/o la modificación del proyecto en las condiciones en que fue expresado en la documentación presentada, podrá invalidar la presente resolución, sin perjuicio de la aplicación de las sanciones previstas en la [LGEEPA] y demás ordenamientos que resulten aplicables.*

DECIMOSEXTO.- *La [SEMARNAT], a través de la [PROFEPA], vigilará el cumplimiento de los términos establecidos en el presente instrumento, así como los ordenamientos aplicables en materia de Impacto Ambiental. Para ello ejercitará, entre otras, las facultades que le confiere los Artículo[s] 55, 59 y 61 del Reglamento en materia de Impacto Ambiental de la [LGEEPA].* (emphasis in original)

225. The Federal EIA further specifies the area to be exploited in the La Adelita and El Corchalito properties, as follows:[82]

Concepto	Predio "La Adelita"	Predio "El Corchalito"
Superficie total del predio.	882.13 ha	369.30 ha
Superficie a desmontar con respecto al área arbolada.	749.81 ha	313.91 ha
Superficie correspondiente a áreas verdes.	132.32 ha (15%)	55.40 ha (15%)
Material de despalme (árboles y vegetación secundaria)	14'996,200 m^3	6'278,200 m^3

226. In 2001, CALICA commenced quarrying in El Corchalito.[83]

227. On 15 June 2009, CALICA commenced legal action against the State of Quintana Roo and the Municipality of Solidaridad to confirm its rights with respect to quarrying in La Adelita, seeing as the POEL 2009 zoned La Adelita as UGA 5 – prohibiting quarrying and promoting conservation, as opposed to UGA 30 under the POET 2001 (*see* ¶ 215 above). Specifically, CALICA challenged the POEL 2009's approval by the Municipality of Solidaridad and the State decree publishing it.[84] On 25 March 2010 the High Court of Justice of the State of Quintana Roo dismissed the claim, holding the claim

82 **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, p. 32.
83 [redacted] First Statement, ¶ 24.
84 **C-0080-SPA**, POEL 2009.

to be inadmissible because CALICA's "interests are not affected, as the [POEL 2009] does not apply to it".[85]

228. On 19 May 2011, the renewal of the State EIA stated that the lots were regulated by the zoning under the POET 2001.[86]

229. On 14 April 2013, CALICA's counsel met with SEMARNAT's General Director of Forest and Soil Management to discuss, among other things, CALICA's plans to start operations in La Adelita.[87] Part of the discussions touched upon the Authorization for Soil-Use Change in Forested Terrains (*Autorización de Cambio de Uso del Suelo en Terrenos Forestales*, "**CUSTF**") to remove vegetation from La Adelita. The CUSTF is required for the total or partial removal of vegetation from forest land for non-forest activities.[88]

2. The 2014 Agreements and POEL 2009 Amendment Process

230. From May 2013, CALICA, SCT, the State of Quintana Roo, API Quintana Roo and the Municipality of Solidaridad participated in negotiations in relation to a number of outstanding issues.[89]

231. On 12 June 2014, CALICA, the SCT, the State of Quintana Roo, API Quintana Roo and the Municipality of Solidaridad signed two documents (the "**2014 Agreements**"), followed by an amendment on 13 May 2015, as set out below. The nature of these documents is a contested matter in this arbitration, but for simplicity the Tribunal refers to them as "agreements".

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85 **C-0087-SPA**, Decision by the High Court of Justice of the State of Quintana Roo, dated 25 March 2010 ("Quintana Roo High Court Decision, 25 March 2010"), p. 8. *See* Memorial, ¶ 83.

86 **C-0075-SPA**, Second Corchalito/Adelita State EIA Amendment, 19 May 2011, p. 4.

87 [redacted] First Statement, ¶ 25.

88 **R-0026-ESP**, General Law on Sustainable Forestry Development, Mexican Official Gazette, 5 June 2018 ("2018 Sustainable Forestry Law").

89 Memorial, ¶ 87.

232. *First*, the Total Regularisation Scheme was signed by the SCT, CALICA and API Quintana Roo (as a witness) ("**Total Regularisation Scheme**") with the purpose of determining actions to solve the legal disputes related to the CALICA Port Concession.[90]

233. Under the Total Regularisation Scheme, CALICA agreed to pay concession fees as assessed by the INDAABIN and not to challenge them, and SCT agreed to cease the proceeding to revoke the CALICA Port Concession.[91]

234. In addition, CALICA agreed to relinquish its concessioned rights to the public terminal and continue to operate the private terminal under the terms of the original concession. For greater certainty of CALICA and the API Quintana Roo regarding the areas that concern each of them, the SCT would amend the API Quintana Roo Concession to specify which areas belong to CALICA or API Quintana Roo, and which areas are for common use.[92]

235. The eleventh recital to the Total Regularisation Scheme provides:[93]

> *La celebración y cumplimiento del MOU es motivo determinante de la voluntad para que CALICA celebre los términos y condiciones de este ESQUEMA DE REGULARIZACIÓN TOTAL.*

236. *Second*, a Memorandum of Understanding ("**MoU**") was signed between CALICA, API Quintana Roo, the State of Quintana Roo and the Municipality of Solidaridad, with the SCT acting as a witness. Its purpose was:[94]

> *. . . llegar a un arreglo mutuo de los conflictos originados por el uso y explotación de la infraestructura portuaria localizada en Punta Venado Quintana Roo, principalmente, con respecto al uso y explotación por CALICA, de la Terminal Portuaria de Uso Particular, y por [API Quintana Roo], de la Terminal Portuaria de Uso Público, así como la resolución de otros temas pendientes en relación con las operaciones de CALICA en su actual ubicación de Quintana Roo, México.*

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90 **C-0020-SPA**, Total Regularization Scheme entered into between the SCT and CALICA, dated 12 June 2014 ("Total Regularization Scheme"), p. 5.

91 **C-0020-SPA**, Total Regularization Scheme, p. 5, s. 2.

92 **C-0020-SPA**, Total Regularization Scheme, p. 6, s. 3(i).

93 **C-0020-SPA**, Total Regularization Scheme, pp. 5, 12.

94 **C-0021-SPA**, Binding Memorandum of Understanding entered into between CALICA, API Quintana Roo, the State of Quintana Roo, and the Municipality of Solidaridad, dated 12 June 2014 ("MoU"), pp. 3, 11 of the PDF.

237. The recitals stated, with respect to the Total Regularisation Scheme, that:[95]

> *La ejecución y cumplimiento por parte de la SCT del ESQUEMA DE REGULARIZACIÓN TOTAL es el motivo determinante de la voluntad para que CALICA celebre este Memorándum de Entendimiento.*

238. The parties to the MoU agreed, *inter alia*, in Section 3, to: [96]

> *Llevar a cabo las acciones necesarias ante las autoridades municipales o estatales, conforme a la legislación vigente, tendientes a promover la ejecución del objeto social y de negocios de CALICA y/o afiliadas en la Terminal de Uso Particular, consistentes en lo siguiente:*
>
> a) Programa de Ordenamiento Ecológico Local ("POEL") de Solidaridad.- *El Municipio de Solidaridad y la Secretaría de Ecología, revisarán EL POEL para el Municipio de Solidaridad para gestionar ante los órganos técnico y ejecutivo la incorporación del "Uso de Minería y explotación de material pétreo" con respecto a los inmuebles propiedad y/o en posesión de CALICA y/o afiliadas, conocidos como "LA ROSITA", "EL CORCHALITO" y "LA ADELITA".*
>
> *Adicionalmente, el Municipio de Solidaridad y la Secretaría de Ecología gestionarán ante dichos órganos técnico y ejecutivo que el POEL permita que en cada uno de los referidos predios se lleve a cabo la extracción y explotación de piedra caliza, materiales pétreos, agregados y derivados, incluyendo cemento, en una superficie de 50 ha por año, y que dicha extracción y explotación pueda realizarse por un plazo de 20 años, con derecho a prorroga en términos de la legislación aplicable, lo cual se gestionará ante el Instituto de Impacto y Riesgo Ambiental (INIRA).*
>
> *Para lo anterior CALICA proporcionará la información técnica necesaria y coadyuvará en la elaboración de los estudios técnicos para que la Secretaría de Ecología y Medio Ambiente del Estado de Quintana Roo y el Municipio de Solidaridad, otorguen lo anterior, por lo que procederá a la actualización del POEL de Solidaridad, lo cual demora de 2 a 4 meses, los cuales correrían a partir del momento que se emita la convocatoria lo que se hará en julio de 2014.*

239. In addition, the MoU contains agreements with respect to a number of other matters including: (i) the issuance of a new or modified State EIA; (ii) administrative acts relevant to reforestation; (iii) extraction tax; and (iv) real estate taxes.[97]

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95 **C-0021-SPA**, MoU, pp. 3, 11 of the PDF.
96 **C-0021-SPA**, MoU, pp. 4-5, 13 of the PDF.
97 **C-0021-SPA**, MoU, pp. 5, 13-14 of the PDF.

240. The MoU further provided that:[98]

> *Una vez que CALICA haya obtenido todos los permisos, autorizaciones, aprobaciones de autocorrección y aprobaciones y/o modificaciones de descuentos señalados en los sub-incisos a), b), c), d) y e) anteriores en esta Sección 3, y una vez que los compromisos aquí adquiridos por [API Quintana Roo], el Gobierno del Estado de Quintana Roo y el Municipio de Solidaridad hayan sido cumplid[o]s, CALICA (i) otorgará a la [API Quintana Roo] en comodato por 18 meses, prorrogables por el mismo plazo, el edificio que actualmente es utilizado como terminal de* ferry *ubicado en terrenos que son propiedad de CALICA o sus afiliadas y que no son parte de la Terminal Pública. cuyas áreas de dicho edificio se identificarán de manera conjunta entre CALICA y [API Quintana Roo] en un Anexo que se agregará como parte integrante de este MOU y del Convenio de Comodato que en su oportunidad se celebre, y (ii) se desistirá de los litigios existentes y promovidos por CALICA en relación con el Impuesto de Extracción y el Impuesto Predial.*
>
> *Asimismo, CALICA entregará al Gobierno Federal la Terminal Pública de Punta Venado la cual se compone por 49,363.315 m2 de tierra y 34,889.871 m2 de agua según el ESQUEMA DE REGULARIZACIÓN TOTAL y el Plano denominado SCT-CALICA-APIQROO, mismo que se adjunta al presente como Anexo, el cual ambas partes reconocen coma válido para efectos de este instrumento y en su caso para cualquier otro instrumento que derive del presente asunto.*
>
> *Una vez que CALICA haya obtenido todos los permisos, autorizaciones, aprobaciones de autocorrección y aprobaciones y/o modificaciones de descuentos señalados en los sub-incisos a), b), c), d) y e) anteriores en esta Sección 3, y una vez que compromisos aquí adquiridos por [API Quintana Roo], el Gobierno del Estado de Quintana Roo y el Municipio de Solidaridad hayan sido cumplidas, las Partes* [i.e., the parties to the MoU] *acuerdan desistirse de los juicios o acciones legales generadas con anterioridad a la celebración del presente documento o renunciarán a la ejecución de sentencia que corresponda, así como la liberación por escrito incondicional e irrevocable de todas y cada una de las reclamaciones pendientes o que generen una posible acción legal respecto de las obligaciones antes señaladas, por lo que no se reservarán ningún tipo de acción o reclamación una parte para con la otra.*

241. Following the signature of the Total Regularisation Scheme and the MoU, Claimant invested further money for the success of the Project. For instance, in July 2014,

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98 **C-0021-SPA**, MoU, pp. 6-7, 15-16 of the PDF.

Claimant commissioned the construction of two custom-built, bulk carrier vessels for [redacted] to accommodate CALICA's operations.[99]

242. *Third and finally*, following further negotiations, on 13 May 2015 the parties to the MoU entered into an Addendum to the Memorandum of Understanding ("**Amended MoU**").[100] The Amended MoU addressed two interrelated issues, namely, the amendment of the POEL 2009 and the payment of contested real estate taxes by CALICA.

243. Section 1 of the Amended MoU sets forth a detailed timeline for the stages of the amendment of the POEL 2009, as tied to the payment of the contested real estate taxes:[101]

> *Se modifican el inciso* a) Programa de Ordenamiento Ecológico Local (POEL) del Municipio de Solidaridad *de la sección 3 del "MOU", para quedar en los términos siguientes:*
>
> *3. Llevar a cabo las acciones necesarias ante las autoridades municipales y estatales, conforme a la legislación vigente, tendientes a promover la ejecución del objeto social y de negocios de CALICA y/o afiliadas en la Terminal de Uso Particular, consistentes en lo siguiente:*
>
> a) Programa de Ordenamiento Ecológico Local ("POEL") del Municipio de Solidaridad.- *El Municipio de Solidaridad y el Gobierno del Estado de Quintana Roo, a través de la SEMA [Secretaría de Ecología y Medio Ambiente del Estado de Quintana Roo], instalarán el Comité de Ordenamiento Ecológico Local para la actualización del POEL del Municipio de Solidaridad (el "Comité de Ordenamiento Ecológico"), conformado por un órgano ejecutivo y un órgano técnico, con el objeto que dentro de este proceso se proponga, gestione y actualice el* Programa de Ordenamiento Ecológico Local ("POEL") *del Municipio de Solidaridad para que en esta actualización se reconozca el uso de minería y explotación de material pétreo en los inmuebles propiedad y/o en posesión de CALICA y/o afiliadas, conocidos como "LA ROSITA", "EL CORCHALITO" y "LA ADELITA".*
>
> *Adicionalmente, el Municipio de Solidaridad y la SEMA gestionarán ante el Instituto de Impacto y Riesgo Ambiental (INIRA), previa solicitud de CALICA, la modificación de los términos y condicionantes de las autorizaciones mediante la emisión de los actos administrativos al efecto*

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99 **C-0088-ENG**, Memorandum for Meeting of the Board of Directors, dated 11 July 2014 ("Board Memorandum, 11 July 2014").

100 **C-0022-SPA**, Addendum to the Binding Memorandum of Understanding entered into between CALICA, API Quintana Roo, the State of Quintana Roo, and the Municipality of Solidaridad, dated 13 May 2015 ("Amended MoU").

101 **C-0022-SPA**, Amended MoU, pp. 3-5, 10-12 of the PDF [Capitalization in the quoted text reflects the original].

necesarios para que en cada uno de los referidos predios se lleve a cabo la extracción y explotación de piedra caliza, materiales pétreos, agregados y derivados, incluyendo cemento, en una superficie total de 50 hectáreas por año y que dicha extracción y explotación pueda realizarse por un plazo de 20 años, con derecho a prórroga en términos de la legislación aplicable. Todo lo anterior con el fin de hacer congruentes entre sí las distintas autorizaciones en materia ambiental y portuaria de carácter federal y local con lo dispuesto en el Programa de Ordenamiento Ecológico Local del Municipio de Solidaridad.

Para lo anterior, CALICA hará la petición de parte ante el INIRA, proporcionará la información técnica necesaria y elaborará los estudios técnicos para que la SEMA y el Municipio de Solidaridad, gestionen lo anteriormente mencionado.

En virtud de lo anterior, el Gobierno del Estado de Quintana Roo, a través de la SEMA y el Municipio de Solidaridad se comprometen a gestionar ante el Comité de Ordenamiento Ecológico todas las acciones necesarias hasta la aprobación y publicación de las propuestas de modificación establecidas en el presente inciso a) de esta sección 3 del MOU de la manera siguiente:

(i) En las reuniones que celebre el Comité de Ordenamiento Ecológico se deberán documentar las discusiones y acuerdos de cada una, a través del acta correspondiente, emitida y firmada por los miembros del comité.

(ii) La reunión de instalación del Comité de Ordenamiento Ecológico para la actualización del POEL del Municipio de Solidaridad, deberá realizarse del 25 al 29 de mayo de 2015, por lo que el 26 de mayo de 2015, CALICA pagará al Municipio de Solidaridad la cantidad de $3,572,497.98, correspondientes al ejercicio de 2012 por concepto de actividades de reforestación.

(iii) La primera etapa, de caracterización, (que incluye la actualización, la presentación ante el Comité y su validación respectiva) y la segunda etapa, de diagnóstico, (que incluye actualización, presentación ante Comité y validación) se llevarán a cabo de manera conjunta del 15 de Junio al 31 de julio de 2015, por lo que el 14 de julio de 2015, CALICA pagaría al Municipio de Solidaridad la cantidad de $3,036,249.00, más actualizaciones y recargos, correspondientes al pago de predial de los primeros tres bimestres del ejercicio de 2013.

(iv) La tercera etapa, de pronóstico, (que incluye actualización, presentación ante Comité y validación), se llevará a cabo del 10 de Agosto al 4 de Septiembre de 2015.

(v) La cuarta y última etapa, de modelo, (que incluye propuesta, presentación ante Comité y validación), se llevará a cabo del 17 de Septiembre al 12 de Octubre de 2015.

(vi) El periodo de consulta pública de la propuesta de Modelo del POEL se llevará a cabo del 14 al 27 de Octubre de 2015, por lo que el 14 de octubre de 2015, CALICA pagaría al Municipio de Solidaridad la cantidad de $3,036,249.00, más actualizaciones y recargos, correspondientes al pago de predial de los últimos tres bimestres del ejercicio de 2013.

(vii) La reunión del Comité para la aprobación del Modelo del POEL se llevará a cabo el 11 de Noviembre de 2015.

(viii) El Municipio de Solidaridad entregará al Cabildo del Ayuntamiento el POEL actualizado, aprobado por el Comité, el 13 de Noviembre de 2015 mismo que será analizado para su aprobación entre el 16 y el 19 de Noviembre de 2015.

(ix) Ya aprobado el POEL actualizado por el Cabildo del Ayuntamiento, el Municipio de Solidaridad lo enviará entre el 23 y el 27 de Noviembre al Ejecutivo Estatal para su publicación en el Periódico Oficial del Estado de Quintana Roo.

(x) A más tardar el 5 de Diciembre de 2015 deberá publicarse en el Periódico Oficial del Estado Quintana Roo el POEL actualizado del Municipio de Solidaridad. Al día inmediato siguiente a la publicación aquí referida, CALICA pagará al Municipio de Solidaridad la cantidad de $6,072,498.00, más actualizaciones y recargos, correspondientes al pago de predial del ejercicio de 2014.

La SEMA y el Municipio de Solidaridad se darán a la tarea de cumplir con el calendario propuesto, conforme vayan avanzando los dos órganos del Comité de Ordenamiento Ecológico (órgano técnico y órgano ejecutivo), en la validación de las etapas previstas en el procedimiento de actualización del POEL del Municipio de Solidaridad.

244. On 30 October 2014, the "Committee to Amend the POEL" ("**Committee to Amend the POEL**") was established, made up of an executive body and a technical body.[102] The executive body included representatives of SEMARNAT, the State of Quintana Roo, and the Municipality of Solidaridad. The technical body comprised members of other Mexican government entities, civil society, and the private sector, including CALICA.[103]

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102 **C-0090-SPA**, Minutes of the Meeting to Establish the Committee to Amend the POEL, dated 30 October 2014 ("POEL Committee Establishment Minutes, 30 October 2014").

103 **C-0090-SPA**, POEL Committee Establishment Minutes, 30 October 2014, pp. 7-9.

245. On 10 November 2014, the Committee to Amend the POEL met for the first time to set the groundwork for the POEL 2009's modification process.[104]

246. On 21 November 2014, the Committee to Amend the POEL met for the second time, at which time CALICA requested support for amending the POEL 2009 to allow CALICA to obtain the CUSTF permit to remove vegetation and commence quarrying activities under its prior authorisations.[105]

247. Following signature of the Amended MoU, on 29 May 2015, the Committee to Amend the POEL met for a third time and resolved to carry out the update of the POEL 2009, as follows:[106]

> ***Acuerdo 1/29/2015/:*** *Se llevará a cabo la actualización del Program[a] de Ordenamiento Ecológico Local del Municipio de Solidaridad, publicado en 2009.*

248. On 30 October 2015, at the Committee to Amend the POEL's fourth meeting, Mr. Gerardo Gómez Nieto, an environmental expert engaged by the Committee to assist with the characterization and diagnostic phases of the POEL 2009 amendment process, submitted a report entitled "Update to the Local Environmental Regulation of the Municipality of Solidaridad: Diagnostic Phase".[107] The report marked the areas of El Corchalito and La Adelita as most suitable for quarrying operations on a map of the Municipality of Solidaridad.[108]

249. On 28 January 2016, the Committee to Amend the POEL met for a fifth time and formally approved the phases of characterization and diagnosis by majority vote.[109]

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104 **C-0091-SPA**, Minutes of the First Session of the Committee to Amend the POEL, dated 10 November 2014.

105 **C-0092-SPA**, Minutes of the Second Session of the Committee to Amend the POEL, dated 21 November 2014 ("POEL Committee Second Session Minutes, 21 November 2014"), pp. 5-6.

106 **C-0093-SPA**, Minutes of the Third Session of the Committee to Amend the POEL, dated 29 May 2015, p. 5.

107 **C-0097-SPA**, Update to the Local Environmental Order Program of the Municipality of Solidaridad: Diagnostic Phase, dated 30 October 2015 ("Diagnostic Report").

108 **C-0097-SPA**, Diagnostic Report, p. 136.

109 **C-0095-SPA**, Minutes of the Fifth Session of the Committee to Amend the POEL, dated 28 January 2016 ("POEL Committee Fifth Session Minutes, 28 January 2016"), p. 7.

250. On 19 April 2016, a sixth meeting of the Committee to Amend the POEL was held, but without presenting the text for the amendment of the POEL 2009. The Committee to Amend the POEL did not have further formal meetings.[110]

251. On 7 June 2016, state and municipal elections were held in Mexico. On 25 September 2016, Mr. Carlos Manuel Joaquín González was sworn in as Governor of the State of Quintana Roo (2016-2022) and on 30 September 2016, Ms. Cristina Torres was sworn in as Mayor of the Municipality de Solidaridad (2016-2018).[111]

252. On 3 April 2017, the Legislature of the State of Quintana Roo approved a Point of Agreement introduced by state legislator (and later Solidaridad Mayor) Ms. Laura Beristain, opposing the amendment of the POEL 2009 to allow CALICA to quarry La Adelita.[112]

253. On 5 April 2017, Mayor Torres stated in a press conference that she was waiting for a status report from the Committee to Amend the POEL, following which she would make a final decision about the Point of Agreement introduced by Ms. Beristain.[113]

254. On 2 August 2017, Governor Joaquín informed CALICA in a meeting about the 2014 Agreements that amending the POEL 2009 would be difficult.[114]

255. In the meantime, local environmental groups and community organizers had started to object to the POEL 2009 amendment process under the Committee to Amend the POEL's leadership.[115]

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110 **C-0096-SPA**, Minutes of the Sixth Session of the Committee to Amend the POEL, dated 19 April 2016 ("POEL Committee Sixth Session Minutes, 19 April 2016").

111 **C-0098-SPA**, Rotunda victoria para Carlos Joaquín en elecciones de Q. Roo, SIPSE.COM, dated 6 June 2016; **C-0099-SPA**, Cristina Torres conformará un gabinete ciudadano, SIPSE.COM, dated 7 June 2016; **C-0101-SPA**, Recibimos un municipio con muchos problemas, EL UNIVERSAL, dated 30 September 2016.

112 **C-0102-SPA**, Quintana Roo Lower House, Ordinary Session No. 15, Debate Log, dated 3 April 2017 ("Quintana Roo Lower House Session, 3 April 2017"), pp. 19-40.

113 **C-0104-SPA**, No existe ninguna petición de Calica, Q.Roo para el cambio de uso de suelo: Cristina Torres, NOTICIAS CANAL 10, dated 5 April 2017.

114 [redacted] First Statement, ¶ 52.

115 **R-0050-ESP**, Underwood, Carlos. "*Calica: La minera que arrasa con todo e[n] playa del Carmen*", Revés, 15 February 2018; **R-0051-ESP**, Pacheco, Daniel. "*'Solo pedimos que se respete el uso de suelo previo' Calica*". Novedades Quintana Roo, 27 March 2017; **R-0052-ESP**, Letter from environmental organizations, 3 February 2016 ("Environmental NGOs Letter, 3 February 2016").

256. On 8 July 2018, Ms. Beristain was elected Mayor of the Municipality of Solidaridad. Under her administration, the Committee to Amend the POEL did not resume its work, and a new Municipal Ordinance Council was tasked with issuing a new POEL, in which CALICA did not participate.[116]

3. Shutdown of Operations at El Corchalito

257. On 12 May 2017, PROFEPA ordered an inspection to verify CALICA's compliance with the Federal EIA.[117] On 15-19 May 2017, PROFEPA's inspectors visited El Corchalito and La Adelita, *inter alia*, to measure the area that CALICA had quarried in El Corchalito.[118]

258. In the Inspection Report issued on 19 May 2017 ("**First PROFEPA Inspection Report**"), PROFEPA's inspectors stated that CALICA had exceeded the quarrying area limits in the Federal EIA.[119] Further, the documentation presented by CALICA was checked, and PROFEPA granted CALICA five days to rectify certain documentation lacking with respect to the amount of limestone quarried in year 17 of the Project.[120]

259. On 26 May 2017, CALICA made a submission to PROFEPA commenting on the First PROFEPA Inspection Report. It asserted, *inter alia*, that PROFEPA's inspectors had: (i) failed to establish an inspection protocol; (ii) acknowledged that their measurements were "estimates" and "approximations"; and (iii) used inadequate and improperly calibrated instruments, including a Global Positioning System (GPS) device.[121]

260. CALICA offered to submit an expert report addressing whether its observations about the PROFEPA inspection were correct,[122] which was permitted by PROFEPA. CALICA appointed Mr. Tomás de la Cruz, a civil engineer to review PROFEPA's findings.[123]

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116 **C-0105-SPA**, Laura Beristain asegura que trabajará con la sociedad, SIPSE.COM, dated 10 July 2018.
117 **C-0114-SPA**, First PROFEPA Inspection Order, dated 12 May 2017 ("First PROFEPA Inspection Order, 12 May 2017").
118 **C-0115-SPA**, First PROFEPA Inspection Report, 19 May 2017.
119 **C-0115-SPA**, First PROFEPA Inspection Report, 19 May 2017.
120 **C-0117**, Shutdown Order, pp. 284-287.
121 **C-0116-SPA**, CALICA's Observations to the First PROFEPA Inspection Report, dated 26 May 2017 ("CALICA Observations to PROFEPA, 26 May 2017"), pp. 24-25.
122 **C-0116-SPA**, CALICA Observations to PROFEPA, 26 May 2017, pp. 31-32.
123 *See* **C-0117-SPA**, Shutdown Order, p. 16.

PROFEPA engaged its own expert, Mr. David May, to additionally review PROFEPA's inspection.[124]

261. The report of Mr. May was submitted on 25 October 2017,[125] and the report of Mr. de la Cruz was submitted on 26 October 2017.[126]

262. On 24 November 2017, PROFEPA ordered another inspection,[127] which took place on 27-29 November 2017.[128]

263. With respect to El Corchalito, on 22 January 2018, PROFEPA issued an *Acuerdo de Emplazamiento* ordering the shutdown of activities at El Corchalito based on the findings of the additional inspection ("**Shutdown Order**").[129] The Shutdown order imposed a partial and temporary closure of the El Corchalito Site as a "*medida de seguridad*" because of CALICA's[130]

> *probable incumplimiento detectado durante las visitas de inspección realizadas,* ***al presuntamente haberse rebasado en 2.15 hectáreas el área autorizada para la extracción de roca caliza por debajo del manto freático, aunado a que la empresa ya realizó el aprovechamiento total de la superficie de extracción de roca caliza por debajo del nivel freático el cual le fue autorizado en anualidades hasta el 2020.***

264. The Shutdown Order noted that, if CALICA did not temporarily close El Corchalito, this would constitute "*delitos, de conformidad con [el] Código Penal Federal.*"[131]

265. The Shutdown Order also imposed corrective measures on CALICA, ordering it to file, within ten days, a certified copy of any authorizations it had received from the Ministry of Environment and Natural Resources to carry out the Project.[132]

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124 **C-0144-SPA**, Appointment by PROFEPA of David Antelmo May Gutiérrez, dated 13 September 2017.
125 **C-0145-SPA**, Expert Report of David Antelmo May Gutiérrez, dated 25 October 2017 ("May Gutiérrez Report").
126 **C-0120-SPA**, Expert Report of De la Cruz Hernández, dated 26 October 2017 ("De la Cruz Hernández Report").
127 **C-0121-SPA**, Supplemental PROFEPA Inspection Order, dated 24 November 2017 ("Supplemental PROFEPA Order, 24 November 2017").
128 **C-0118-SPA**, Second PROFEPA Inspection Report, dated 27 November 2017 ("Second PROFEPA Inspection Report, 27 November 2017").
129 **C-0117-SPA**, Shutdown Order.
130 **C-0117-SPA**, Shutdown Order, p. 280 (emphasis in original).
131 **C-0117-SPA**, Shutdown Order, p. 280.
132 **C-0117-SPA**, Shutdown Order, p. 281.

266. On 24 January 2018, PROFEPA notified the Shutdown Order to CALICA.[133] The same day, PROFEPA personnel executed the Shutdown Order at CALICA's facilities.[134]

267. On 14 February 2018, CALICA filed an expert report alleging deficiencies in the methodology and instruments used by PROFEPA's inspectors.[135]

268. On 30 October 2018, PROFEPA declined to consider the expert report of CALICA, noting:[136]

> *En virtud de lo anterior, esta Dirección General* ***considera procedente desechar la prueba pericial en materia de Ingeniería Civil ofrecida por el promovente****, al no estar directamente relacionada con las actuaciones realizadas por esta autoridad, al no haberse realizado en ningún momento un "****levantamiento topográfico****" en el predio materia de la visita de inspección en cita.* (Emphasis in original)

269. On 6 November 2020, PROFEPA notified to CALICA Administrative Resolution No. PFPA/4.1/2C.27.5/00028-17/012/2020, dated 30 October 2020 (the "**October 2020 Resolution**").[137] This resolution determined that, as the 2.15 hectares exploited at El Corchalito beyond the 140 hectares authorised for CALICA's extraction activities could not be returned to their natural condition,[138] PROFEPA imposed the following on CALICA:

- Fines in an amount of MXN $7,985,053.92 for non-compliance with the law and environmental damage;[139]

- Imposition, as a sanction, of the partial, temporary closure of El Corchalito with respect to the additional 2.15 hectares exploited by CALICA;[140]

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133 **R-0007-ESP**, PROFEPA, File PFPA/4.1/2C.27.5/00028-17, Service of Notice, 24 January 2018 ("PROFEPA Notice, 24 January 2018").

134 **C-0122-SPA**, Profepa clausura proyecto de la empresa Calica en Playa, SIPSE.COM, dated 24 January 2018.

135 **C-0124-SPA**, CALICA's Observations to the Shutdown Order, dated 14 February 2018 ("CALICA Observations to Shutdown Order, 14 February 2018").

136 **C-0125-SPA**, PROFEPA Docket PFPA/4.1/2C.27.5/00028-17, dated 30 October 2018 ("PROFEPA Docket, 30 October 2018"), p. 18.

137 **R-0005-ESP**, October 2020 Resolution.

138 **R-0005-ESP**, October 2020 Resolution, pp. 198-200, 231-232.

139 **R-0005-ESP**, October 2020 Resolution, p. 234.

140 **R-0005-ESP**, October 2020 Resolution, pp. 169-198, 219-223, 234.

- Corrective measures to order CALICA to: (i) adhere to its Federal EIA in carrying out its activities; (ii) submit to PROFEPA the Federal EIA issued by SEMARNAT certifying the area of extraction for the additional 2.15 hectares exploited, or a modification to the Federal EIA extending the total authorised area below the water table and authorising the extraction exclusively in El Corchalito; and (iii) carry out reforestation and other actions necessary to recharge the aquifer damaged by CALICA's activities.[141]

270. In addition, the October 2020 Resolution mentioned that CALICA did not prove that it had: (i) a signalling system to avoid accidents prior to the First PROFEPA Inspection Report; (ii) civil liability insurance for third party damage caused by its transporters; (iii) results of the evaluation of impacts of its extraction, with video support; or (iv) delivered semi-annual results to SEMARNAT during the period of the Restoration Program of the Reforested Area.[142] CALICA was ordered to submit certain documentation to PROFEPA on these matters.[143]

4. Litigation regarding the CALICA Port Concession

271. In parallel to the environmental issues discussed above, disputes arose between the Parties regarding the CALICA Port Concession. In this respect, there are two sets of litigation.

272. The first set regards port fees.

273. In February 2003, the SCT amended the API Quintana Roo Concession to include the terminals that CALICA had built and was operating and ordered CALICA to partially assign its rights over the public terminal to API Quintana Roo.[144]

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141 **R-0005-ESP**, October 2020 Resolution, pp. 230-234.
142 **R-0005-ESP**, October 2020 Resolution, pp. 162, 163.
143 **R-0005-ESP**, October 2020 Resolution, pp. 230-234.
144 **C-0051-SPA**, API Quintana Roo First Concession Amendment, dated 27 February 2003, p. 2; **C-0052-SPA**, Letter No. 500.0194 from Francisco J. Ávila Camberos (SCT) to Armando Real Rueda (CALICA), dated 3 March 2003.

274. Upon CALICA challenging the SCT's measures, on 5 July 2006, a Federal Court of Mexico ruled that they were illegal and null.[145]

275. On 25 June 2007, the SCT amended the API Quintana Roo Concession again, excluding from API Quintana Roo's rights the areas concessioned to CALICA. However, in July 2007 the SCT issued official letters stating that pursuant to the amended concession, API Quintana Roo had the right to collect port fees for vessels docking at the Punta Venado port terminals, including CALICA's private terminal.[146]

276. CALICA challenged the measure in court but paid the port fees while the litigation was pending.

277. On 25 January 2015, Mexico's Supreme Court rendered a decision[147] that Claimant has interpreted as holding that API Quintana Roo could not collect fees from Claimant's vessels docking at Punta Venado. Respondent disagrees with Claimant's interpretation.

278. Based on Claimant's interpretation of the Mexican Supreme Court's decision, on 2 January 2018, CALICA initiated court proceedings to recover approximately [redacted] in port fees that API Quintana Roo had charged and collected in relation to Punta Venado.[148]

279. The second set of litigation relates to concession fees and revocation proceedings.

280. Under the CALICA Port Concession, concession fees are assessed by the *Instituto de Administración y Avalúos de Bienes Nacionales* ("**INDAABIN**"). In May 2010,

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145 **C-0053-SPA**, Judgment of the Federal Administrative Tribunal, Case No. 9566/03-17-10-6/51/06-PL-09-04, dated 5 July 2006, p. 176.

146 **C-0054-SPA**, Mexico Federal Official Gazette, Second Amendment to the API Quintana Roo Concession Issued by SCT, dated 25 June 2007, pp. 43, 45; **C-0055-SPA**, Letter No. API.DG.GJ.0405.07 from Javier F. Zetina González (State of Quintana Roo) to Oscar Amable Tenorio (Agencia Consignataria del Sureste, S.A. de C.V.), dated 4 July 2007 ("Quintana Roo Letter to Agencia Consignataria, 4 July 2007"); **C-0056-SPA**, Letter No. API.DG.GJ.0405.07 from Javier F. Zetina González (State of Quintana Roo) to [redacted] (CALICA), dated 9 July 2007 ("Quintana Roo Letter to CALICA, 9 July 2007"); **C-0057-SPA**, Letter No. 7.3.3033.07 from Ángel González Rul A. (SCT) to [redacted] (CALICA), dated 24 July 2007 ("SCT Letter to CALICA, 24 July 2007"); **C-0058-SPA,** Letter No. 7.3.-1679.09.4257 from Alejandro Hernández Cervantes (SCT) to Leonel Pereznieto del Prado (CALICA), dated 2 July 2009 ("SCT Letter to CALICA, 2 July 2009").

147 **C-0059-SPA**, Decision of Mexico's Supreme Court, Claim 1256/2016, dated 25 January 2017 ("Supreme Court Decision").

148 **C-0107-SPA**, CALICA's filing regarding port fees, dated 2 January 2018 ("CALICA port fees filing, 2 January 2018").

INDAABIN carried out an appraisal that CALICA considered was higher than that allowed under the CALICA Port Concession.[149]

281. On 11 June 2010, the SCT demanded payment of the concession fees based on INDAABIN's assessment.[150]

282. On 1 September 2010, CALICA challenged the appraisal in court,[151] and prevailed in February 2016.[152]

283. In the meantime, on 7 May 2013, the SCT commenced administrative proceedings to revoke the CALICA Port Concession on the basis that CALICA had not paid the concession fees.[153]

284. In June 2013, CALICA paid approximately US$ 15 million in concession fees.[154]

C. FACTUAL BACKGROUND TO THE ANCILLARY CLAIM

1. Tourism in Southeastern Mexico

285. It has long been part of Mexico's development policy to encourage tourism in Southeastern Mexico. This policy operates at the federal, state, and municipal levels, through "National Development Plans", "State Development Plans", and "Municipal Development Plans", respectively.

286. On 31 May 1983, the National Development Plan for 1983-1988 was published in the Official Gazette, including as an objective the "*uso eficiente de la capacidad instalada para el turismo social*" and "*fomentar el mejor y más amplio aprovechamiento del potencial turístico nacional*," including through opening new recreational areas.[155]

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149 **C-0060-SPA**, INDAABIN Appraisal, Generic No. G-40071-B, sequential No. 06-10-0648, dated 4 May 2010.

150 **C-0061-SPA**, Letter No. 7.3.2327.010 from Alejandro Hernández Cervantes (SCT) to Leonel Pereznieto del Prado (CALICA), dated 11 June 2010.

151 **C-0062-SPA**, CALICA Filing Requesting Annulment of INDAABIN Valuation, dated 1 September 2010.

152 **C-0063-SPA**, Judgment of the Federal Administrative Tribunal, Case No. 20699/10-17- 08-9/130/12-PL-05-04, dated 10 February 2016.

153 **C-0064-SPA**, Letter from Alejandro Hernández Cervantes (SCT) to Jorge Mario Chabolla Marquez (CALICA), dated 7 May 2013.

154 **C-0065-SPA**, Letter from Leonel Pereznieto del Prado (CALICA) to SCT, dated 18 June 2013.

155 **R-0145-ESP**, 1983-1988 National Development Plan, published in the Mexican Official Gazette on 31 May 1983, pp. 8, 105.

287. On 12 November 1984, the federal government and the government of the State of Quintana Roo signed a "Single Development Agreement", aiming to promote the 1983-1988 National Development Plan by recognizing that Quintana Roo was a strategic zone for development of the tourism sector:[156]

> *El Plan Nacional de Desarrollo considera a Quintana Roo como una zona estratégica en la región sureste del país, por su diversidad de recursos y potencialidades de crecimiento, entre los que destacan: el turismo, la pesca y la explotación forestal. Por ello, será necesario impulsar estas actividades para lograr el fortalecimiento integral de la Entidad.*
>
> *Atendiendo a los lineamientos del Plan Nacional de Desarrollo, se pretende orientar la inversión pública hacia la realización de programas como: construcción de sistemas de agua potable; ampliación y mejoramiento de los servicios públicos de salud y educación; apoyo a la construcción de viviendas, ampliación de la red estatal de carreteras; fomento a la actividad pesquera y realización de proyectos de cabotaje turístico.*

288. The 1983-1988 National Development Plan and Single Development Agreement were in place when the Investment Agreement was concluded, and the Investment Agreement makes express reference to the National Development Plan (*see* ¶ 191 above).

289. In 1989, when CALICA began quarrying activities at La Rosita, the 1989-1994 National Development Plan was in place. It contemplated the modernization of the tourism sector as one of its priorities:[157]

> *México se encuentra situado favorablemente para la expansión de su comercio externo, y sus bellezas naturales y tradiciones culturales le proveen de un gran potencial para el turismo.*

290. The 2019-2024 National Development Plan sought to guarantee employment, education, health and well-being through different regional projects, among which the so-called "Mayan Train":[158]

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156 **R-0146-ESP**, Quintana Roo Single Development Agreement entered into by the Federal Government and the Government of the State of Quintana Roo, published in the Mexican Official Gazette on 12 November 1984, p. 1. *See also* pp. 8-9, and **R-0147-ESP**, Single Development Agreement entered into by the Federal Government and the Government of the State of Quintana Roo, 22 August 1986, pp. 1, 11.

157 **R-0148-ESP**, 1989-1994 National Development Plan, published in the Mexican Official Gazette on 31 May 1989, p. 29 of the PDF.

158 **R-0142-ESP**, 2019-2024 National Development Plan, published in the Mexican Official Gazette on 12 July 2019 ("2019-2024 National Development Plan"), pp. 15-16.

> *[L]a creación de puestos de trabajo, el cumplimiento del derecho de todos los jóvenes del país a la educación superior, la inversión en infraestructura y servicios de salud y por medio de los programas regionales, sectoriales y coyunturales de desarrollo: [...] Tren Maya.*

291. The 2019-2024 National Development Plan described the Mayan Train as "*el más importante proyecto de infraestructura, desarrollo socioeconómico y turismo del presente sexenio*," with the objective of developing tourism in the Yucatán Peninsula while, among other things, consulting local and Indigenous communities:[159]

> *El Tren Maya es un proyecto orientado a incrementar la derrama económica del turismo en la Península de Yucatán, crear empleos, impulsar el desarrollo sostenible, proteger el medio ambiente de la zona – desalentando actividades como la tala ilegal y el tráfico de especies– y propiciar el ordenamiento territorial de la región. Se procurará integrar a la obra y a sus beneficios a los pobladores; se gestionarán los derechos de vía que aún no se tengan mediante acuerdos con los propietarios de los terrenos respectivos; se buscarán acuerdos benéficos en los casos en los que las vías de propiedad federal se encuentren invadidas y se pedirá la aprobación de las comunidades y pueblos originarios mediante consultas.*

2. The President's Morning Press Conferences

292. President López Obrador held morning press conferences five days a week at 7:00 am, which are generally referred to as "***mañaneras***" in Mexico (and in this Award).[160] During the period from 31 January 2022 to 2 May 2022, in approximately 16 of his *mañaneras*, President López Obrador made statements concerning, *inter alia*, CALICA's activities in La Rosita, and the impact of these activities on the environment.[161]

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159 **R-0142-ESP**, 2019-2024 National Development Plan, p. 29.

160 Counter-Memorial AC, ¶ 62.

161 **C-0176-SPA**, Transcript of President's Morning Press Conference, 31 January 2022; **C-0177-SPA**, Transcript of President's Morning Press Conference, 1 February 2022, pp. 16-17; **C-0178-SPA**, Transcript of President's Morning Press Conference, 2 February 2022 ("2 February 2022 Press Conference"), p. 22; **C-0246-SPA**, Andrés Manuel López Obrador, *Baja incidencia delictiva en Hidalgo*, YouTube (uploaded 3 February 2022) https://www.youtube.com/watch?v=OyjJQJxJtrc; **C-0215-SPA**, Transcript of President's Morning Press Conference, 7 February 2022, p. 17; **C-0247-SPA**, Andrés Manuel López Obrador, *Llamado al diálogo entre normalistas de Ayotzinapa y autoridades*, YouTube (uploaded 7 February 2022), https://www.youtube.com/watch?v=oBi2EPCTCKU; **C-0216-SPA**, Transcript of President's Morning Press Conference, 10 February 2022, pp. 30-31; **C-0248-SPA**, Andrés Manuel López Obrador, *Justicia para jubilados de Luz y Fuerza. Acuerdo de pensiones*, YouTube (uploaded 10 February 2022), https://www.youtube.com/watch?v=UlTcgvrhzR0; **C-0217-SPA**, Transcript of President's Morning Press Conference, 7 March 2022 ("7 March 2022 Press Conference"), p. 31; **C-0249-SPA**, Andrés Manuel López Obrador, *Inicia entrega de fertilizantes nacionales en nueve estados*, YouTube (uploaded 7 March 2022), https://www.youtube.com/watch?v=VtVoDxv3ba4; **C-0220-SPA**, Transcript of President's

293. For instance, on 2 February 2022, in his *mañanera*, President López Obrador stated, *inter alia*, that:[162]

> *Y, desde luego, que quiten las demandas y, si no, pues vamos a defendernos legalmente, como se está haciendo, y se va a proceder porque no tienen autorización, tienen vencidos permisos y no tienen tampoco autorización para sacar material, el gobierno federal tiene que autorizar la, en este caso, exportación.*

294. On 6 February 2022, SEMARNAT issued a press release. The press release referred to the authorization of extraction activities under the water table granted to CALICA in 2000 on the last day in office of then-President Ernesto Zedillo and Secretary of the Environment, Natural Resources and Fisheries, and stated, in part:[163]

> *Así, la responsabilidad de la Semarnap* [i.e., the predecessor of SEMARNAT] *respecto a los impactos al medio ambiente es ineludible, y resulta incongruente manifestar que se vela por la protección de los recursos*

Morning Press Conference, 23 March 2022 ("23 March 2022 Press Conference"), pp. 21-23; **C-0250-SPA**, Andrés Manuel López Obrador, *Sembramos árboles en toda la ruta del Tren Maya*, YouTube (uploaded 23 March 2022), https://www.youtube.com/watch?v=xxLNbEHmR9o; **C-0221-SPA**, Transcript of President's Morning Press Conference, 24 March 2022, ("24 March 2022 Press Conference"), pp. 44-45; **C-0251-SPA**, Andrés Manuel López Obrador, *Acertada decisión asignar aduanas a Secretaría de Marina*, YouTube (uploaded 24 March 2022), https://www.youtube.com/watch?v=QjSJy-5lINM; **C-0227-SPA**, Transcript of President's Morning Press Conference, 28 March 2022, ("28 March 2022 Press Conference"), p. 48; **C-0252-SPA**, Andrés Manuel López Obrador, *Gobierno prepara plan para fortalecer economía popular*, YouTube (uploaded 28 March 2022), https://www.youtube.com/watch?v=NJQdhL7uBto; **C-0182-SPA**, Transcript of President's Morning Press Conference, 30 March 2022; **C-0183-SPA**, Transcript of President's Morning Press Conference, 31 March 2022 ("31 March 2022 Press Conference"), pp. 7-8; **C-0254-SPA**, Andrés Manuel López Obrador, *Aseguramiento de drogas previene daños a la población*, YouTube (uploaded 31 March 2022), https://www.youtube.com/watch?v=le04l59MZJg; **C-0228-SPA**, Transcript of President's Morning Press Conference, 4 April 2022, ("4 April 2022 Press Conference"), pp. 26-27; **C-0255-SPA**, Andrés Manuel López Obrador, *La democracia debe ser parte de la vida del país*, YouTube (uploaded 4 April 2022), https://www.youtube.com/watch?v=b_xqxPrB40U; **C-0184-SPA**, Transcript of President's Morning Press Conference, 19 April 2022, ("19 April 2022 Press Conference"); **C-0185-SPA**, Transcript of President's Morning Press Conference, 20 April 2022, ("20 April 2022 Press Conference"), pp. 8-9; **C-0257-SPA**, Andrés Manuel López Obrador, *Seguridad y bienestar, fundamentales para instaurar la paz*, YouTube (uploaded 20 April 2022), https://www.youtube.com/watch?v=RoONYTUVQ-I; **C-0186-SPA**, Transcript of President's Morning Press Conference, 22 April 2022, ("22 April 2022 Press Conference"), pp. 9-10; **C-0258-SPA**, Andrés Manuel López Obrador, *Inversión pública y privada impulsa desarrollo en Veracruz*, YouTube (uploaded 22 April 2022), https://www.youtube.com/watch?v=8qwS_raNJo4; **C-0229-SPA**, Transcript of President's Morning Press Conference, 29 April 2022, ("29 April 2022 Press Conference"), pp. 32, 64, 65; **C-0259-SPA**, Andrés Manuel López Obrador, *Comunidades confían en proyecto del Tren Maya del Gobierno de México*, YouTube (uploaded 29 April 2022), https://www.youtube.com/watch?v=ABXBAf5I_JI_raNJo4.

162 **C-0178-SPA**, 2 February 2022 Press Conference, p. 23; **C-0246-SPA**, Andrés Manuel López Obrador, *Baja incidencia delictiva en Hidalgo*, YouTube (uploaded 3 February 2022), https://www.youtube.com/watch?v=OyjJQJxJtrc .

163 **C-0214-SPA**, SEMARNAT Press Release, *Las decisiones ambientales trascienden en el tiempo, caso Calica*, 6 February 2022, pp. 3-4.

> *naturales a través de condicionantes a una actividad cuyo desarrollo es irreparable en términos ambientales.*
>
> *Como se señaló en el comunicado de prensa de fecha 3 de febrero de 2022 de esta Secretaría, la minería debajo del manto freático representa la pérdida definitiva e irrecuperable del subsuelo, afectaciones a los acuíferos y a los ecosistemas, entre otros elementos que, aunados a los impactos previos en la superficie por la minería a cielo abierto que destruyó la flora y la fauna, han representado un daño insalvable a la zona.*
>
> *Por otro lado, la modificación que hizo el gobierno del estado en 2009 a su plan de ordenamiento ecológico fue para no permitir ese tipo de actividades extractivas en la zona, lo que pone en evidencia el conocimiento de que la autorización fue en detrimento del medio ambiente y la conciencia de que las responsabilidades al emitir autorizaciones de tal tipo trascienden en el tiempo y van más allá de lo que en papel se registra, pues sus efectos son directos en el territorio.*
>
> *Actualmente, el Estado mexicano hace frente a un arbitraje internacional para detener estas prácticas que ponen en riesgo el patrimonio natural de las y los mexicanos y atentan contra el derecho a un medio ambiente sano para estas y las futuras generaciones.*

295. Over the course of March and April 2022, President López Obrador made a series of statements against CALICA's activities and former Mexican officials who had granted CALICA's authorizations, also criticizing those officials and environmentalists for opposing his project to build the "Mayan Train" on environmental grounds.[164] SEMARNAT followed suit in certain public statements.[165] On 20 April 2022, the President therefore indicated that CALICA had three options – closure, accommodation for tourism, or selling the land:[166]

> *La clausura, porque ya no se permite que extraigan material, eso ya no se puede permitir. Que tienen muchas influencias en el Departamento de Estado, porque es una empresa que se llama Vulcan, es de las empresas constructoras más importantes de Estados Unidos, pero yo creo que hasta los mismos accionistas de Vulcan van a entender que esto no es posible, no*

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164 **C-0217-SPA**, 7 March 2022 Press Conference, p. 31; **C-0220-SPA**, 23 March 2022 Press Conference, pp. 21-23; **C-0221-SPA**, 24 March 2022 Press Conference, pp. 44-45; **C-0227-SPA**, 28 March 2022 Press Conference, p. 48; **C-0183-SPA**, 31 March 2022 Press Conference, pp. 7-8; **C-0228-SPA**, 4 April 2022 Press Conference, pp. 26-27; **C-0184-SPA**, 19 April 2022 Press Conference, p. 7; **C-0185-SPA**, 20 April 2022 Press Conference, p. 8; **C-0186-SPA**, 22 April 2022 Press Conference, pp. 9-10; **C-0229-SPA**, 29 April 2022 Press Conference, pp. 32, 64-65.

165 **C-0226-SPA**, SEMARNAT Press Release, ¿Dónde estaban los pseudoambientalistas cuando hace años empezó la verdadera devastación en el sureste de México?, 25 March 2022.

166 **C-0185-SPA**, 20 April 2022 Press Conference, p. 9.

puede haber un doble discurso de decir que nos preocupa el cambio climático y que estemos haciendo esta destrucción.

Entonces, si se van a tribunales, porque además hay denuncias, pues vamos a tribunales y vamos a hacer la denuncia formal en organismos internacionales. A ver qué van a hacer los de la ONU, a ver qué va a hacer Greenpeace, que nos ayuden en esto.

Esa es una opción.

La otra opción, que es importante para ellos y para todos, es buscar un acuerdo para que esa área impactada, más otras dos mil hectáreas que tienen ahí, se puedan convertir en un parque turístico. Tienen también pegado al mar la concesión de un puerto que puede ser utilizado como puerto de cruceros. Estamos hablando de una de las zonas más bellas del mundo en cuanto a playas, es el Caribe. Eso es lo segundo.

Y lo tercero es que les compramos el terreno completo, hacemos un avalúo de cuánto cuesta y tenemos recursos para convertir esto en un parque natural.

296. On 2 May 2022, President López Obrador announced that he had instructed SEMARNAT to stop CALICA's extraction activities:[167]

[E]s otra empresa, Calica, Vulcan, la empresa constructora más importante de Estados Unidos, que tiene un banco aquí, que está extrayendo grava para las carreteras de Estados Unidos y recibió permisos de los gobiernos neoliberales, y los ambientalistas nunca jamás dijeron nada, y es una destrucción al territorio sin precedente y lo siguen haciendo.

Acabo de estar el fin de semana. Y me habían engañado en que ya no estaban extrayendo material, y pasaba yo por ahí, sobrevolaba, siempre, como tres veces, y, en efecto, estaba todo parado, las grúas paradas, todo parado; pero ahora pasé, quizá no sabían o fue porque pasamos el viernes y sobrevolé y me di cuenta de que están trabajando con todo, extrayendo material y cómo están cargando un barco. Entonces, he dado instrucciones a la secretaria [of SEMARNAT] *para proceder de inmediato.*

[…]

Se va a proceder legalmente porque hay violación a las leyes y es una tremenda destrucción del medio ambiente. Además, es un atrevimiento burlarse de las autoridades de nuestro país.

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167 **C-0168-SPA**, Transcript of President's Morning Press Conference, 2 May 2022, p. 14; **C-0188-SPA**, Andrés Manuel López Obrador, *Tren Maya prioriza cuidado de zonas arqueológicas y del ambiente*, YouTube (uploaded 2 May 2022), https://www.youtube.com/watch?v=VeiERG4QXhI (screenshot at 2:14:09).

[…]

Sí, hasta que se detenga la extracción[.]

297. During the *mañanera* of 28 June 2022, the President – when informed by a member of the press of a complaint against CALICA by local communities on environmental grounds – stated that the "problem with CALICA" would prevent him from "making deals":[168]

> *Si no tuviésemos el problema con Calica —el problema me refiero a que están destruyendo el territorio y no vamos a cambiar una cosa por otra— pues de aquí a aquí no tendríamos problema, porque este puerto de Calica tiene calado suficiente, tiene 12 metros; pero como tenemos aquí la denuncia, porque están destruyendo, no podemos hacer tratos.*

3. Clean Industry Certificates

298. PROFEPA issued six Clean Industry Certificates to CALICA from 2003 to 2016, within the framework of the National Environmental Audit Program (*Programa Nacional de Auditoría Ambiental*), specifically, in 2003, 2005, 2008, 2012, 2014 and 2016.[169]

299. The Clean Industry Certificates program was developed and administered by PROFEPA to audit the environmental performance of "companies in operation, which due to their location, dimensions, characteristics, and scopes can cause effects to negative impacts to the environment."[170] These audits are conducted by PROFEPA-certified auditors tasked with verifying a "company's compliance with Federal and Local Environmental Laws, Federal and Local Environmental Regulations, mandatory technical standards issued by SEMARNAT, and applicable municipal requirements."[171] The resulting report is presented to PROFEPA to review. If no material irregularities are found, PROFEPA

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168 **C-0232-SPA**, Transcript of President's Morning Press Conference, 28 June 2022, pp. 65-66.

169 **C-0208-SPA**, Environmental Audit Report, March 2016 ("March 2016 Environmental Audit Report"), pp. 17-18; **C-0037-SPA**, Clean Industry Certificate, dated 23 June 2003 ("Clean Industry Certificate, 23 June 2003"); **C-0038-SPA**, Clean Industry Certificate, dated 16 December 2005; **C-0039-SPA**, Clean Industry Certificate, dated 31 July 2008; **C-0040-SPA**, Clean Industry Certificate, dated 28 February 2012; **C-0041-SPA**, Clean Industry Certificate, dated 2 June 2014; **C-0042-SPA**, Clean Industry Certificate, dated 27 July 2016 ("Clean Industry Certificate, 27 July 2016").

170 **C-0209-SPA**, National Environmental Audit Program Explanatory Circular ("Environmental Audit Program Circular"), p. 5 (Translation by the Tribunal); **C-0210-SPA**, LGEEPA Regulation on Environmental Audits, 29 April 2010 ("LGEEPA Audit Regulation"), Art. 6. *See* Memorial AC, ¶ 21.

171 **C-0209-SPA**, Environmental Audit Program Circular, p. 6 (Translation by the Tribunal); **C-0210-SPA**, LGEEPA Audit Regulation, Arts. 2(XXII), 6. *See* Memorial AC, ¶¶ 21-22.

issues a Clean Industry Certificate.[172] The value of the Clean Industry Certificates is contested by the Respondent.[173]

300. In November 2012 – one of the years in which a Clean Industry Certificate was issued to CALICA – PROFEPA carried out a formal inspection of CALICA's operations for purposes of:[174]

> *verificar física y documentalmente que el o los responsables de [CALICA] [...] hayan dado cumplimiento con sus obligaciones ambientales en materia de impacto ambiental, en lo referente a sus autorizaciones, permisos o licencias, otorgadas por [SEMARNAT]; y si cuenta con autorización en materia de impacto ambiental vigente.*

301. PROFEPA's 2012 inspection report noted that, while the Investment Agreement did not technically constitute an environmental impact authorization under the LGEEPA, CALICA was nevertheless considered to have complied with its environmental obligations because it commenced operations at La Rosita before that law came into effect in 1988.[175] In this respect, PROFEPA reported that it had not "*detectado hechos u omisiones presuntamente constitutivos de infracción a la normatividad ambiental*" by CALICA.[176] PROFEPA further stated that CALICA "*sí cuenta con el resolutivo o la autorización previa en materia de impacto ambiental para llevar a cabo las obras o actividades que se realizan*" in La Rosita.[177] PROFEPA concluded that "*no existen irregularidades por las cuales se proceda a emplazar a procedimiento y en su caso, sancionar al establecimiento denominado [CALICA] por incumplimiento a sus obligaciones ambientales en materia de impacto ambiental.*"[178]

302. In 2016 – another year in which a Clean Industry Certificate was issued – an environmental audit by PROFEPA-certified auditors found CALICA to be in compliance with environmental regulations and parameters with respect to all its operations,

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172 **C-0210-SPA**, LGEEPA Audit Regulation, Art. 16. *See* Memorial AC, ¶¶ 21-22.
173 *See, e.g.,* Counter-Memorial AC, ¶¶ 9, 218.
174 **C-0043-SPA**, Letter No. PFPA03.2/2C27.5/0006/12/0037 from Arturo Estrada Rangel (PROFEPA) to CALICA, dated 10 December 2012 ("PROFEPA Letter to CALICA, 10 December 2012"), p. 2 of the PDF.
175 **C-0043-SPA**, PROFEPA Letter to CALICA, 10 December 2012, pp. 6-7 of the PDF.
176 **C-0043-SPA**, PROFEPA Letter to CALICA, 10 December 2012, p. 57 of the PDF.
177 **C-0043-SPA**, PROFEPA Letter to CALICA, 10 December 2012, p. 7 of the PDF.
178 **C-0043-SPA**, PROFEPA Letter to CALICA, 10 December 2012, pp. 56-57 of the PDF.

including in La Rosita.[179] The 2016 report stated that CALICA's extractive activities at La Rosita would normally require an environmental impact authorization, but CALICA was considered to be in compliance with its environmental obligations because it was following the environmental requirements applicable when it started its activities:[180]

> *[L]as actividades de extracción de mineral pétreo (roca caliza) que realiza CALICA, requieren de procedimiento de evaluación de la manifestación de impacto ambiental. No obstante se debe considerar que la empresa inició operaciones en 1987, antes de que entrara en vigor la Ley General del Equilibrio Ecológico y la Protección al ambiente (LGEEPA); se comenta que la empresa cumplió con los requerimientos en materia ambiental que le eran aplicables cuando comenzó sus actividades, con el paso del tiempo y de acuerdo a las necesidades de crecimiento de la auditada se han ido haciendo ajustes a las autorizaciones originales, para ello se han elaborado las respectivas manifestaciones de impacto ambiental.*
>
> *Respecto a lo anterior, la empresa cuenta con autorizaciones en materia de Impacto Ambiental y Recurso Naturales.*

303. The 2016 Clean Industry Certificate expired in July 2018.[181] It was not renewed. (For context, it should be noted that El Corchalito was shut down in 2018 (*see* ¶¶ 263-270 above.)

4. PROFEPA Inspections and the Shutdown of La Rosita

304. On 29 April 2022 – the same day that President López Obrador had announced that SEMARNAT should stop CALICA's extraction activities (*see* ¶ 295 above) – PROFEPA issued two inspection orders in relation to La Rosita. One focused on environmental impacts and the other on forestry and soil use.[182]

305. On 2 May 2022, PROFEPA inspectors arrived at CALICA's site in the evening.[183] The PROFEPA inspectors were accompanied by over thirty armed Mexican marines, armed

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179 **C-0208-SPA**, March 2016 Environmental Audit Report, pp. 12, 14, 61-385. *See* Memorial AC, ¶ 24.

180 **C-0208-SPA**, March 2016 Environmental Audit Report, p. 21.

181 **C-0042-SPA**, Clean Industry Certificate, 27 July 2016, pp. 2-3.

182 **R-0127-ESP**, Forestry inspection order No. OC00158RN2022 of 29 April 2022, issued by the Directorate-General for Forestry Inspection and Surveillance of PROFEPA, p. 2; **R-0128-ESP**, Environmental impact inspection order No. PFPA/4.1/2C.27.5/024/2022 of 29 April 2022, issued by the Director-General of Environmental Impact and the Federal Maritime-Terrestrial Zone of PROFEPA, p. 2.

183 **C-0169-SPA**, Pictures of Mexico's Incursion into CALICA's Facilities, 2-5 May 2022 ("Pictures of incursion"), pp. 1-6; **R-0129-ESP**, Certificate of inspection visit No. PFPA/4.1/2C.27.5/024/2022 dated 2 May 2022 and Forestry Inspection Certificate No. AI0158RN2022 ("2 May 2022 Inspection Certificate"), pp. 2, 8.

vehicles, drones and naval vessels, which were stationed at the gate and sea-harbor entrance of CALICA's facilities.[184] In minutes of the inspection, PROFEPA recorded that the dispatch of armed personnel and vehicles was due to CALICA's refusal to allow PROFEPA inspectors access to La Rosita.[185]

306. That same day (2 May 2022), CALICA filed an amparo proceeding, referring to: (i) the President's mañanera of 2 May 2022 "en el que manifestó que dio instrucciones a la Secretaría para proceder legalmente en contra de la moral quejosa, para que no continúe con la operación del proyecto"; and (ii) the shutdown and/or suspension and/or cancellation and/or revocation order of the project named "Aprovechamiento de roca caliza por debajo del manto freático en los predios el Corchalito y la Adelita."[186] The amparo sought maintenance of the status quo, i.e., that the responsible authority refrain from shutting down, suspending, cancelling or revoking the project identified in item (ii) of this paragraph.[187]

307. On 3 May 2022, the judge presiding on the *amparo* determined that the protection requested by CALICA was only with respect to El Corchalito and La Adelita, pursuant to the framework of the project as stated in the Federal EIA.[188]

308. On 5 May 2022, PROFEPA inspectors shut down La Rosita.[189] This is because, upon conclusion of its inspections, PROFEPA's inspectors found that CALICA was operating without: (i) an environmental impact authorization; and (ii) a CUSTF to remove vegetation in La Rosita.[190] In this respect, PROFEPA's inspectors did not consider the documentation submitted to them by CALICA to be sufficient to establish the relevant

184 **C-0169-SPA**, Pictures of incursion, pp. 7-11.
185 **R-0129-ESP**, 2 May 2022 Inspection Certificate, pp. 2-4.
186 **C-0173-SPA**, Seventh District Court in the State of Quintana Roo, Federal Judiciary, Provisional Stay, Stay Proceeding 431/2022-I ("*Amparo* proceeding"), p. 2 of the PDF.
187 **C-0173-SPA**, *Amparo* proceeding, p. 2.
188 **R-0130-ESP**, Seventh District Court in the State of Quintana Roo, Indirect *amparo* 431/2022, Provisional Stay, 3 May 2022.
189 **C-0171-SPA**, PROFEPA Environmental Report, 2-5 May 2022, pp. 71-72; **C-0172-SPA**, PROFEPA Forestry Report, 2-5 May 2022, pp. 61-62. *See* Reply AC, ¶ 14.
190 **C-0171-SPA**, PROFEPA Environmental Report, 2-5 May 2022, pp. 71-72; **C-0172-SPA**, PROFEPA Forestry Report, 2-5 May 2022, p. 62. *See* Memorial AC, ¶ 64.

environmental authorizations for La Rosita, namely, a copy of the Investment Agreement, and relevant annexes, and a copy of the 2000 Federal EIA.[191]

309. On 6 May 2022, SEMARNAT issued a press release in which it stated that in 1986, the federal and state governments had granted CALICA an authorization for the exploitation of limestone under the water table in La Rosita without establishing a term of duration or specific volume of production.[192]

310. While CALICA sought to extend the *amparo* proceeding to cover La Rosita, on 9 May 2022, the judge found that the measures applied in La Rosita were not identical or related to the suspension granted for El Corchalito and La Adelita and ordered a new *amparo* proceeding to be processed separately for the measures imposed in La Rosita.[193]

311. On 25 October 2022, members of a Mayan Indigenous community filed a class action against CALICA in the First District Court in the State of Quintana Roo ("**Collective Action Lawsuit**").[194] Contemporaneous press reports refer to concerns on the part of the Indigenous community and others regarding:[195]

(i) Protection of the rights of the Indigenous people, who were being affected by the limestone dust released by the extractive activities at CALICA;

(ii) Seven neighbouring communities affected by the result of CALICA's activity; and

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191 **C-0171-SPA**, PROFEPA Environmental Report, 2-5 May 2022, pp. 13-16; 77; **C-0010-SPA**, Investment Agreement, pp. 6, 14, 37, 401. *See* Memorial AC, ¶ 70.

192 **C-0174-SPA**, PROFEPA Press Release, 6 May 2022, p. 3 (Translation by Claimant at Memorial AC, ¶ 71).

193 **R-0131-ESP**, Seventh District Court in the State of Quintana Roo, Indirect *Amparo* 431/2022, Agreement, 9 May 2022.

194 **C-0283-SPA**, Class Action Complaint (Quetzal Tzab González & Others) Against CALICA, 25 October 2022 ("Collective Action Lawsuit"). *See also* **R-0162-ESP**, Ramírez Ana, *QRoo: Movimiento indígena interpone acción colectiva contra Calica*, La Jornada Maya, 24 October 2022; **R-0165-ESP**, Rosales Sánchez, Juan José, *Acciones Colectivas. Reflexiones desde la judicatura*, Coords. Leonel Castillo González and Jaime Murillo Morales, Mexico, 1st. edition, *Editorial del Poder Judicial de la Federación*, Federal Judiciary Council, Institute of the Federal Judiciary- School of the Judiciary, 2013, p. 12. *See* Counter-Memorial AC, ¶ 139.

195 **R-0167-ESP**, Aristegui Noticias. Presentan demanda colectiva contra Calica por daños a salud y medio ambiente en Quintana Roo, 25 October 2022; **R-0162-ESP**, Ramírez Ana, QRoo: Movimiento indígena interpone acción colectiva contra Calica, La Jornada Maya, 24 October 2022. See Counter-Memorial AC, ¶ 139.

(iii) Explosives used by CALICA affecting houses built in concrete.

312. The Indigenous community further called for the closure of CALICA's facilities and compensation from CALICA for alleged harm to the environment and health of children.[196]

5. Customs Permit: Renewal Delay and Cancellation Proceedings

313. In the course of its operations, CALICA secured and renewed, approximately every three years, a customs permit, authorizing the export of production directly from Punta Venado to the United States.[197]

314. CALICA's customs permit, which was due to expire on 2 January 2022, was not renewed until after its expiry, in April 2022.[198]

315. The basis for the non-renewal of the customs permit is disputed between the Parties.

316. According to Claimant, the customs permit was not renewed based on an alleged lack of re-certification by the Mexican Navy of compliance with Mexico's International Ship and Port Facility Security Code.[199] By Claimant's account, the Navy refused to act on CALICA's multiple requests to renew that certification. As a result of the delay in the renewal, CALICA was unable to export aggregates for approximately six weeks, from early January through mid-February 2022.[200]

317. On 2 February 2022, CALICA received the Navy's certification, however, the customs permit was not renewed by Mexico's National Customs Agency ("**ANAM**") immediately.[201]

318. According to Respondent, the customs authority did not refuse to renew the permit, but only required CALICA to submit its application in compliance with all the legal

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196 **R-0162-ESP**, Ramírez Ana, *QRoo: Movimiento indígena interpone acción colectiva contra Calica*, La Jornada Maya, 24 October 2022. *See* Counter-Memorial AC, ¶ 139.

197 **C-0278-SPA**, Customs Act, 15 December 1995, Art. 11; **C-0201-SPA**, Letter DGJA-2022-0981, 30 March 2022, p. 9. *See* Memorial AC, ¶ 18.

198 [redacted] Third Statement, ¶¶ 12-22. *See* Memorial AC, ¶ 19.

199 Third Statement, ¶ 12. *See* Memorial AC, ¶ 32.

200 Third Statement, ¶ 13. *See* Memorial AC, ¶ 32.

201 Third Statement, ¶ 14. *See* Memorial AC, ¶ 33.

requirements.[202] Therefore, according to Respondent, once all these requirements were met, the customs authority issued an authorisation for the exit of goods from the national territory ("*para la salida de mercancías del territorio nacional por lugar distinto al autorizado*") and in accordance with the applicable *Reglas de Comercio Exterior*.[203]

319. On 10 February 2022, Respondent's customs agency granted a temporary two-month renewal of CALICA's custom permit. According to Claimant, this temporary renewal was granted after it pleaded with Mexican authorities at the highest level to address this delay.[204]

320. According to Claimant, during negotiations around the renewal of its customs permit, the Ministry of Interior demanded that CALICA refrain from carrying out quarrying operations in La Rosita in exchange for renewing the customs permit. CALICA did not agree to this proposal.[205] Respondent denies Claimant's account, stating that the customs permit was already issued one day before Legacy Vulcan's communication that such a condition existed.[206]

321. From 11 February 2022 until 13 March 2022, Claimant temporarily focused its operations on shipping accumulated materials that were already extracted from its quarry, rather than quarrying more material.[207] According to Claimant, this was done to give space to the then-ongoing discussions with the government and as a voluntary gesture of good faith.[208] According to Respondent, Claimant verbally agreed to suspend its quarrying activities and work on the tourism development proposal.[209]

322. After 13 March 2022, Claimant states that it restarted quarrying activities in La Rosita and that it communicated this to Respondent.[210]

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202 **R-0177-ESP**, General Administration of Customs, Requisition OF.G.800.02.03.00.00.00.21-526, 7 December 2021. *See* Counter-Memorial AC, ¶ 378.

203 *See* Counter-Memorial AC, ¶ 378, *citing* **R-0180-ESP**, SAT, General Foreign Trade Rules for 2022, Rule 2.4.1.

204 [redacted] Third Statement, ¶¶ 15-16. *See* Memorial AC, ¶ 33.

205 [redacted] Third Statement, ¶ 15. *See* Memorial AC, ¶ 33.

206 Rejoinder AC, ¶ 246. *See* **C-0179-ENG**, Letter from Thompson S. Baker to Ambassador Esteban Moctezuma, 11 February 2022 ("[redacted] Letter, 11 February 2022"); [redacted] Third Statement, ¶ 17.

207 **C-0179-ENG**, [redacted] Letter, 11 February 2022. *See* Memorial AC, ¶ 34.

208 **C-0179-ENG**, [redacted] Letter, 11 February 2022. *See* Memorial AC, ¶ 34.

209 *See* Counter-Memorial AC, ¶ 114.

210 *See* Memorial AC, ¶ 34, *citing* [redacted] Third Statement, ¶ 16.

323. In April 2022, according to Claimant, CALICA's customs permit was renewed for a three-year term.[211]

324. On 10 May 2022, Respondent's customs agency suspended CALICA's renewed customs permit and commenced an administrative proceeding to revoke it. The document initiating the suspension and cancellation proceedings refers to PROFEPA's temporary total closure of La Rosita and findings made in relation to environmental irregularities on that lot. It states, in part, as follows:[212]

> *En razón de lo expuesto y fundado, [CALICA], se encuentra dentro del supuesto de cancelación, descrito en la fracción VI del artículo 144-A de la Ley Aduanera, en relación con el resolutivo Décimo Numeral 8, de la Autorización para la salida de mercancías de territorio nacional por lugar distinto al autorizado, contenida en el oficio DGJA.2022 0981 de 30 de marzo de 2022, puesto que existe evidencia de que cometió actos contrarios a las disposiciones establecidas en los artículos* [list of provisions] *de la Ley General del Equilibrio Ecológico y la Protección al Ambiente;* [list of provisions] *de la Ley Federal de Responsabilidad Ambiental, lo que vulnera el interés general, y que en consecuencia de ello fueron suspendidas por la SEMARNAT las actividades y las obras relacionadas con la autorización en cita atento a los documentos que obran en el expediente ANAM-3S.3.2022.5 "2" por lo cual se da inicio a un procedimiento de cancelación, ordenando la suspensión de operaciones de la autorizada y se le otorgará un plazo de diez días para que el interesado ofrezca las pruebas y alegatos que a su derecho convengan, debiendo dictar la resolución que corresponda en un plazo que no excederá de cuatro meses a partir de la notificación del inicio del procedimiento.*

6. SEMARNAT Dictamen

325. On 18 August 2022, SEMARNAT published a report entitled Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo ("**SEMARNAT Dictamen**").[213] On the same date, SEMARNAT published a PowerPoint presentation on its website describing, inter alia, the purpose and findings of

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211 *See* Memorial AC, ¶ 35.

212 **C-0194-SPA**, Mexico's National Customs Agency, Official Letter DGJA.2022.1658, 10 May 2022, p. 18. *See* Memorial AC, ¶ 35; Counter-Memorial AC, ¶ 380.

213 **C-0237-SPA**, SEMARNAT, Report on environmental impacts from the industrial limestone extraction project carried out by Calica (currently SAC-TUN) in the municipalities of Solidaridad and Cozumel, Quintana Roo, 18 August 2022 ("SEMARNAT Dictamen"). See Memorial AC, ¶ 86.

the SEMARNAT Dictamen ("**SEMARNAT Dictamen PowerPoint**").[214] According to the SEMARNAT Dictamen PowerPoint, the SEMARNAT Dictamen was carried out for the purpose of quantifying the environmental impact caused by CALICA's activities.[215]

326. The SEMARNAT Dictamen was coordinated by SEMARNAT, with the involvement of the Instituto Mexicano de Tecnología del Agua ("**IMTA**"), the Comisión Nacional de Áreas Naturales Protegidas ("**CONANP**") and the Instituto Nacional de Ecología y Cambio Climático ("**INECC**").[216]

327. According to the SEMARNAT Dictamen PowerPoint, the findings of environmental impacts by Claimant included, *inter alia*: (i) loss of vegetation; (ii) loss of habitat for endangered species; (iii) fragmentation of biological corridor; (iv) loss of soil; (v) changes in the flow of groundwater; (vi) contamination of water; and (vii) deforestation.[217]

V. SUMMARY OF THE PARTIES' POSITIONS AND RELIEF SOUGHT

A. CLAIMANT'S POSITION AND RELIEF SOUGHT

1. Original Claim

328. Claimant argues that Respondent has carried out three wrongful measures, namely, it: (i) repudiated the 2014 Agreements when SEMARNAT would not issue the CUSTF permit to allow Claimant to remove vegetation from (and thus quarry at) La Adelita, and abandoned the POEL 2009 amendment process that was agreed to lead to the awarding of that permit;[218] (ii) failed to comply with the rulings of its own judiciary when API Quintana Roo charged CALICA for docking at the CALICA's private Port Terminal despite the courts' decision that such was unlawful;[219] and (iii) unlawfully shut down operations at El Corchalito and *de facto* barred further operations at La Adelita because

214 **C-0235-SPA**, SEMARNAT, *Environmental Disaster in Violation of the Human Right to a Healthy Environment*, 18 August 2022 ("SEMARNAT Dictamen PowerPoint"). *See* Memorial AC, ¶ 86.
215 **C-0235-SPA**, SEMARNAT Dictamen PowerPoint, p. 17.
216 **C-0235-SPA**, SEMARNAT Dictamen PowerPoint, p. 17.
217 **C-0235-SPA**, SEMARNAT Dictamen PowerPoint, pp. 20-22.
218 Memorial, ¶¶ 111-131.
219 Memorial, ¶¶ 132-137.

of the finding that Claimant had exceeded its quarrying area limits under the Federal EIA.[220]

329. Claimant thus submits that Respondent has breached the NAFTA by failing to accord its investments fair and equitable treatment in violation of Article 1105 thereof. Through the most-favoured nation clause ("**MFN Clause**") in NAFTA Article 1103, Claimant further contends that Respondent has failed to observe the international obligations it has assumed regarding Claimant's investments.

330. In the Memorial, Claimant asks for an award in its favour as follows:[221]

> a. Upholding the claims asserted by the Claimant in this proceeding;
>
> b. Declaring that the Respondent has breached NAFTA and applicable principles of international law:
>
> i. By failing to accord Claimant's investments, including CALICA, fair and equitable treatment in violation of Article 1105; and
>
> ii. By failing to observe the obligations it has assumed regarding the Claimant's investments (an international obligation that is applicable through the most-favored-nation clause of Article 1103 of NAFTA);
>
> c. Determining that this breach has caused damages to Claimant;
>
> d. Ordering the Respondent to pay to the Claimant compensation, in accordance with NAFTA and customary international law, in an amount sufficient to provide full reparation to the Claimant for the damages incurred as a result of the Respondent's conduct in violation of NAFTA, including:
>
> i. Compensation for damages arising out of Mexico's repudiation of the 2014 Agreements in the amount of [redacted]
>
> ii. Compensation for damages arising out of Mexico's shutdown of CALICA's operations in El Corchalito in the amount of [redacted];
>
> iii. Compensation for port fees that Mexico illegally charged CALICA and never reimbursed in the amount of [redacted]

220 Memorial, ¶¶ 138-159.
221 Memorial, ¶ 347.

iv. Compensation of [redacted] to account for the double taxation that would result on a portion of this Award;

v. Pre-Award compound interest at a rate reflecting the cost of short-term borrowing by the Government of Mexico from the date of each breach to the date of the award, and post-Award compound interest also reflecting the cost of short-term borrowing by the Government of Mexico from the date of the Award until actual and full payment by Mexico, even if the Award is converted into a judgement of a court of a State party to the ICSID Convention;

e. Giving Respondent the option to pay less than the full amount ordered above for items (i), (ii), (iv) and (v) if Mexico's instrumentalities, (x) within three months from the issuance of the Award, were to amend the POEL to expressly allow quarrying operations by CALICA in La Adelita, *and* (y) immediately close all administrative and judicial proceedings against CALICA arising out of the inspection of El Corchalito, allowing CALICA to resume operations normally with no penalties to CALICA or any of its affiliates or any of their respective employees, agents, advisors or other representatives (collectively, the "Settlement Measures"), in which case Respondent shall pay the damages effectively incurred up to the performance of the Settlement Measures;

f. Ordering Respondent to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of legal representation, plus interest thereon; and

g. Such other or additional relief as may be appropriate under the applicable law or that may otherwise be just and proper.

331. In the Reply, Claimant asked the Tribunal to "dismiss the defenses raised in the Respondent's Counter-Memorial" and otherwise repeated the same requests for relief, with a small addition to item d.iii in ¶ 330 above, as underlined: "Compensation for port fees that Mexico illegally charged CALICA <u>and Vulica</u> and never reimbursed in the amount of [redacted]".[222]

2. Ancillary Claim and Counterclaim

332. Claimant's Ancillary Claim relates to Respondent's shutdown of CALICA's remaining quarrying and export operations in La Rosita and Punta Venado.

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222 Reply, ¶ 288.

333. In the Memorial on Ancillary Claim, Claimant seeks the following relief:[223]

a. Upholding Claimant's ancillary claim;

b. Declaring that Respondent has breached NAFTA and applicable principles of international law by failing to accord Claimant's investments, including CALICA, fair and equitable treatment in violation of Article 1105;

c. Determining that this breach has caused damages to Claimant;

d. Ordering Respondent to pay to Claimant compensation, in accordance with NAFTA and customary international law, in an amount sufficient to provide full reparation to Claimant for the damages incurred as a result of the wrongful conduct at issue regarding this ancillary claim, including;

i. Compensation for damages arising out of Respondent's wrongful measures in the amount of [redacted]

ii. Compensation of [redacted] to account for the double taxation that would result on a portion of this Award;

iii. Pre-Award compound interest at a rate reflecting the cost of short-term borrowing by the Government of Mexico from the date of the breach to the date of the Award, and post-Award compound interest also reflecting the cost of short-term borrowing by the Government of Mexico from the date of the Award until actual and full payment by Respondent, even if the Award is converted into a judgment of a court of a State party to the ICSID Convention;

e. Ordering Respondent to pay all costs and expenses of this arbitration proceeding (including this ancillary claim), including the fees and expenses of the Tribunal and the cost of legal representation, plus interest thereon; and

f. Such other or additional relief as may be appropriate under the applicable law or that may otherwise be just and proper.

334. In the Reply on Ancillary Claim, repeated a similar request for relief, with the following changes and additions as underlined:[224]

223 Memorial AC, ¶ 185.
224 Reply AC, ¶ 281.

a. Upholding Claimant's ancillary claim and dismissing Respondent's jurisdictional objection to this claim;

b. Declaring that Respondent has breached NAFTA and applicable principles of international law by failing to accord Claimant's investments, including CALICA, fair and equitable treatment in violation of Article 1105;

c. Determining that this breach has caused damages to Claimant;

d. Ordering Respondent to pay to Claimant compensation, in accordance with NAFTA and customary international law, in an amount sufficient to provide full reparation to Claimant for the damages incurred as a result of the wrongful conduct at issue regarding this ancillary claim, including;

   i. Compensation for damages arising out of Respondent's wrongful measures in the amount of [redacted]

   ii. Compensation of [redacted] to account for the double taxation that would result on a portion of this Award;

   iii. Pre-Award compound interest at a rate reflecting the cost of short-term borrowing by the Government of Mexico from the date of the breach to the date of the Award, and post-Award compound interest also reflecting the cost of short-term borrowing by the Government of Mexico from the date of the Award until actual and full payment by Respondent, even if the Award is converted into a judgment of a court of a State party to the ICSID Convention;

e. Ordering Respondent to pay all costs and expenses of this arbitration proceeding (including this ancillary claim), including the fees and expenses of the Tribunal and the cost of legal representation, plus interest thereon;

f. Rejecting Respondent's request for leave to file its counterclaim; and

g. Ordering such other or additional relief as may be appropriate under the applicable law or that may otherwise be just and proper. (citation omitted; emphasis added to reflect additions in the Reply on Ancillary Claim)

335. In its Response on Counterclaim Jurisdiction, Claimant requests that the Tribunal render an Award in its favour:[225]

[225] Response on Counterclaim Jurisdiction, ¶ 185.

a. Dismissing Mexico's counterclaim for lack of jurisdiction or because it otherwise is inadmissible;

b. Ordering Mexico to pay all costs and expenses incurred by Claimant in connection with Mexico's counterclaim, including the fees and expenses of the Tribunal and the cost of legal representation, plus interest thereon; and

c. Ordering such other or additional relief as may be appropriate under the applicable law or that may otherwise be just and proper.

336. In its C-PHM AC, Claimant requests the Tribunal to "dismiss Mexico's counterclaim and order Mexico to pay all costs and expenses associated with this wasteful litigation tactic."[226]

B. RESPONDENT'S POSITION AND RELIEF SOUGHT

1. Original Claim

337. Respondent disputes that the measures underlying Claimant's original claim are unlawful. Specifically, Respondent argues that it: (i) did not repudiate the 2014 Agreements, considering that those Agreements are not legally binding;[227] (ii) has complied with the Mexican courts' decisions regarding the payment of the Port Terminal fees, considering that those decisions do not, contrary to Claimant's assertions, stand for the proposition that API Quintana Roo had been unlawfully charging fees for Claimant's use of CALICA's private terminal;[228] and (iii) lawfully shut down operations at El Corchalito considering that the Shutdown order was, *inter alia*, properly notified, justified by CALICA's non-compliance with the Federal EIA, and needed as a safety measure to protect the environment.[229]

338. Respondent denies Claimant's allegations and requests that the Tribunal reject Claimant's claims. It requests as follows:[230]

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226 C-PHM AC, ¶ 95.
227 Counter-Memorial, ¶¶ 205-206.
228 Counter-Memorial, ¶¶ 245-270.
229 Counter-Memorial, ¶¶ 71-125.
230 Counter-Memorial, ¶¶ 541-542.

541. La Demandada solicita este Tribunal ordenar a la Demandante a pagar los costos y gastos en los que ha incurrido a raíz de este arbitraje, incluidos:

(i) la parte de los gastos del Tribunal que corresponden a México;

(ii) la parte de los gastos de administración del procedimiento ante el CIADI que corresponden a México;

(iii) los honorarios de los asesores legales externos de México; y

(iv) el pago de los expertos contratados por México.

542. La Demandada tiene derecho a un laudo de costos a su favor por las siguientes razones:

1. La Demandada no violó ninguna de sus obligaciones conforme al TLCAN.

2. La Demandante ha presentado una reclamación carente de méritos para tratar de obtener un beneficio indebido.

339. Respondent repeats the above requests in its Rejoinder.[231]

2. Ancillary Claim

340. Respondent denies Claimant's allegations and requests that the Tribunal reject Claimant's claims. It requests as follows:[232]

633. La Demandada solicita respetuosamente a este Tribunal resolver:

(i) Que la reclamación de la Demandante es inadmisible porque se basa en conductas irregulares en contravención de la normativa ambiental; y, en su caso,

(ii) Que carece de competencia ratione temporis respecto a las reclamaciones formuladas por la Demandante porque se basan en hechos que ocurrieron cuando el TLCAN ya no se encontraba vigente; o, en su caso,

(iii) Que la reclamación de la Demandante carece de méritos y, en consecuencia, México no es responsable de ninguna supuesta violación al TLCAN; o en su caso,

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231 Rejoinder, ¶¶ 502-503. *See also* R-PHM, ¶ 191.

232 Counter-Memorial AC, ¶¶ 633-635.

(iv) Que el monto de daños equivale al cálculo que presentó la Demandada.

634. La Demandada también solicita respetuosamente al Tribunal que, en caso de que determine alguno de los supuestos señalados en los incisos (i), (ii) o (iii) supra, ordene a la Demandante a pagar los costos y gastos en los que la Demandada ha incurrido a raíz de este arbitraje, incluidos:

(i) la parte de los gastos del Tribunal que corresponden a México;

(ii) la parte de los gastos de administración del procedimiento ante el CIADI que corresponden a México;

(iii) los honorarios de los asesores legales externos de México;

(iv) el pago de los expertos contratados por México;

(v) y cualquier otro gasto incurrido por el Gobierno de México en relación con este procedimiento; y

(vi) el pago de los intereses que se generen derivado de la falta de pago inmediato de los conceptos antes referidos.

635. La Demandada tiene derecho a un laudo de costos a su favor por las siguientes razones: (i) la Demandante presentó una reclamación respecto a la cual el Tribunal carece de jurisdicción; y, en su caso, (ii) la Demandada no violó ninguna de sus obligaciones conforme al TLCAN; y (iii) la Demandante ha presentado una reclamación carente de méritos con la única intención de obtener un indebido beneficio.

341. Respondent repeats the above requests in its Rejoinder on Ancillary Claim, with the following additions as underlined:[233]

492. La Demandada tiene derecho a un laudo de costos a su favor dado que: <u>(i) la Demandante presentó una reclamación inadmisible por no tener las "manos limpias" al incumplir con la legislación nacional</u>; (ii) el Tribunal carece de jurisdicción, dado que la Demandada no consintió en arbitrar estas reclamaciones al amparo del TLCAN; (iii) la Demandada no cometió ninguna violación a sus obligaciones previstas en el TLCAN; y (iv) la Demandante ha presentado una reclamación carente de méritos con la única intención de obtener un indebido beneficio.

493. <u>La Demandada considera que, al tomar su decisión sobre costos, el Tribunal debe tener presente la evidencia aportada por la Demandada respecto a ilicitudes cometidas por la Demandante en el curso de sus actividades en México; la solicitud de la Demandante de sustanciar una nueva etapa de arbitraje, a pesar de estar claramente fuera de la jurisdicción</u>

[233] Rejoinder AC, ¶¶ 490-493. *See also* R-PHM AC, ¶ 225.

> *de este Tribunal; y el ocultamiento de información para hacer creer al Tribunal que la Demandada incumplió la RP 7, mediante las comunicaciones de la Demandante del 21 de marzo y 3 de abril del año en curso.* (emphasis added to reflect additions in Rejoinder on Ancillary Claim)

342. In relation to the counterclaim, Respondent requests the Tribunal to:[234]

> *. . . determinar que tiene jurisdicción y competencia sobre la demanda reconvencional de la Demandada, y que es admisible, al cumplirse los requisitos para que un tribunal tenga jurisdicción sobre una reconvención: (i) estar dentro de los límites del consentimiento de las partes; (ii) caer dentro de la jurisdicción del CIADI, y (iii) relacionarse directamente con la reclamación principal.*

VI. INTRODUCTION TO THE TRIBUNAL'S ANALYSIS

A. PARTIES' SUBMISSIONS

343. In the analysis below, the Tribunal has considered not only the positions of the Parties as summarized in this Award, but also the numerous detailed arguments made in the Parties' written submissions and during the Hearing. To the extent that these arguments are not referred to expressly, they have been subsumed into the Tribunal's analysis.

B. OVERVIEW OF THIS AWARD

344. In the Sections that follow, the Tribunal sets out the Parties' positions with respect to the various aspects of the Parties' dispute, together with the Tribunal's analysis and determinations on each matter. Section VIII concerns jurisdiction and admissibility. Section IX covers applicable legal standards. Sections X, XI and XII address Claimant's claims for alleged breaches in relation to La Adelita, El Corchalito and La Rosita respectively. Section XIV deals with quantum and relief sought. Section XV covers interest and XVI addresses costs. The Tribunal's conclusions are summarized in Section XVII and the decisions are contained in Section XVIII.

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[234] Counterclaim Memorial on Jurisdiction, ¶ 248.

VII. APPLICABLE LAW

345. NAFTA Article 1131(1) is entitled "Governing Law" and provides: "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

346. Likewise, NAFTA Article 102(2), addressing the objectives of NAFTA, states that "[t]he Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law."

347. Article 42 of the ICSID Convention provides:

> (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.
>
> (2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.
>
> (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

348. For the purposes of Article 42(1) of the ICSID Convention, the Tribunal considers that in accordance with NAFTA Article 1131(1), the Parties have agreed that their dispute shall be decided in accordance with the provisions of NAFTA and applicable rules of international law. This is in line with Claimant's submission on this point.[235]

349. The Tribunal further notes the terms of NAFTA Article 1112(1) and Article 103(2), which provide additional clarity on the relevant applicable law in the event of any inconsistency between (i) NAFTA Chapter Eleven and other chapters of the NAFTA; or (ii) between the NAFTA and other agreements. In this regard, Article 1112(1) provides: "In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency." Article 103(2) provides: "In the event of any inconsistency between this Agreement and such other agreements [to which

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235 Memorial, ¶ 186.

the Parties to the NAFTA are party], this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement."

350. Also relevant is NAFTA Article 1131(2), which provides: "An interpretation by the [NAFTA Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section." In this regard, the Tribunal notes that the Commission adopted interpretations of, *inter alia*, NAFTA Article 1105(1), on 31 July 2001 ("**FTC Note**").[236]

351. It is clear from the FTC Note insofar as it concerns NAFTA Article 1105(1) that a tribunal deciding a dispute concerning, *inter alia*, the interpretation and application of this provision is required to have regard, at the very least, to customary international law to determine the content, under customary international law, of the minimum standard of treatment requirement for purposes, *inter alia*, of interpreting and applying the concepts of "fair and equitable treatment" and "full protection and security". It follows, and in the Tribunal's view this accords with a plain reading of both NAFTA Article 1131(1) and Article 102(2), that the phrase "applicable rules of international law" in NAFTA Article 1131(1) addresses not only, for example, rules of interpretation of treaties, such as those reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("**VCLT**"), but also any other applicable rules of international law that may be relevant to the case before it. This would include, for example, relevant and applicable rules on State responsibility for questions of attribution of conduct, as well as other relevant and applicable rules of international law that inform the interpretation and application of the provisions, *inter alia*, of Section A of NAFTA Chapter Eleven that are in issue in the proceedings. It will be a matter for each tribunal constituted under Section B of NAFTA Chapter Eleven to evaluate, with the assistance of submissions of the parties on the

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[236] Under the heading "Minimum Standard of Treatment in Accordance with International Law", the Commission adopted the following interpretations: "1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)." **C-0132-ENG**, NAFTA FTC, Notes of Interpretation of Certain Chapter 11 Provisions, dated 31 July 2001 ("FTC Note"), pp. 2-3.

matter, the precise scope of the phrase "applicable rules of international law" in the circumstances of the case before it.

352. As regards the interpretation of NAFTA, the Tribunal will proceed by reference to the commonly accepted customary international law rules of interpretation of treaties reflected in Articles 31 and 32 of the VCLT.

353. Claimant does not base its claims on Mexican law, except insofar as it considers necessary to set out the factual context of the dispute.[237] The Tribunal confirms that Mexican law is relevant, including to determine the facts related to the Parties' dispute. In the present case, both Parties make submissions on the position under Mexican law which are disputed. Mexican law does not govern the Tribunal's determinations on the merits of the dispute. Unless otherwise stated, to the extent that the Tribunal is required to resolve the Parties' dispute about the position of Mexican law on a particular disputed issue, it does so as a matter of fact.

VIII. JURISDICTION AND ADMISSIBILITY

354. In this Section the Tribunal will decide upon various matters implicating the jurisdiction of the Tribunal and the admissibility of the claims and counterclaim. In Section I.A the Tribunal sets out legal provisions relevant to its analysis. Sections B and C contain Respondent's and Claimant's positions on jurisdiction and admissibility, respectively. Section D summarizes the US NDP and the Parties' comments thereon insofar as it concerns jurisdiction and admissibility. Section E comprises the Tribunal's analysis on the jurisdiction and admissibility matters raised.

A. RELEVANT PROVISIONS

355. NAFTA Article 201(1) provides, in part, as follows:

> For purposes of this Agreement, unless otherwise specified:
>
> [. . .]
>
> **enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-

[237] Memorial, ¶ 186; 2021 Hearing Transcript (English), Day 1, 76:2-6 (Tribunal Question to Claimant).

> owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association;
>
> **enterprise of a Party** means an enterprise constituted or organized under the law of a Party;
>
> [. . .]

356. NAFTA Article 1101(1) relates to the scope and coverage of NAFTA Chapter 11 and provides:

> This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) investors of another [Contracting] Party;
>
> (b) investments of investors of another [Contracting] Party in the territory of the [Contracting] Party; and
>
> (c) with respect to Articles 1106 and 1114, all investments in the territory of the [Contracting] Party.

357. NAFTA Article 1116 is entitled "Claim by an Investor of a Party on its Own Behalf" and provides:

> 1. An investor of a [Contracting] Party may submit to arbitration under this Section a claim that another [Contracting] Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the [Contracting] Party's obligations under Section A,
>
> and that the investor has incurred loss or damage by reason of, or arising out of, that breach.
>
> 2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

358. NAFTA Article 1117 is entitled "Claim by an Investor of a [Contracting] Party on Behalf of an Enterprise" and provides:

> 1. An investor of a [Contracting] Party, on behalf of an enterprise of another [Contracting] Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other [Contracting] Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the [Contracting] Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.
>
> 2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.
>
> 3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.
>
> 4. An investment may not make a claim under this Section.

359. NAFTA Article 1118 is entitled "Settlement of a Claim through Consultation and Negotiation" and provides that "the disputing parties should first attempt to settle a claim through consultation or negotiation."

360. NAFTA Article 1119 is entitled "Notice of Intent to Submit a Claim to Arbitration" and states as follows:

> The disputing investor shall deliver to the disputing [Contracting] Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify:
>
> (a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise;
>
> (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions;

(c) the issues and the factual basis for the claim; and

(d) the relief sought and the approximate amount of damages claimed.

361. NAFTA Article 1120 provides, in part:

(1) Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:

(a) the ICSID Convention, provided that both the disputing [Contracting] Party and the [Contracting] Party of the investor are parties to the Convention;

[. . .]

(2) The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

362. NAFTA Article 1121 states as follows, in relevant part:

(1) A disputing investor may submit a claim under Article 1116 to arbitration only if:

(a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and

(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another [Contracting] Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any [Contracting] Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing [Contracting] Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing [Contracting] Party.

(2) A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:

(a) consent to arbitration in accordance with the procedures set out in this Agreement; and

(b) waive their right to initiate or continue before any administrative tribunal or court under the law of any [Contracting] Party, or other dispute settlement procedures, any proceedings with respect

> to the measure of the disputing [Contracting] Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing [Contracting] Party.
>
> (3) A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.
>
> [. . .]

363. NAFTA Article 1122 is entitled "Consent to Arbitration" and provides:

> (1) Each [Contracting] Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.
>
> (2) The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:
>
> (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;
>
> [. . .]

364. NAFTA Article 1139 includes a number of definitions, including the following:

> For purposes of this Chapter:
>
> **enterprise** means an "enterprise" as defined in Article 201 (Definitions of General Application), and a branch of an enterprise;
>
> **enterprise of a [Contracting] Party** means an enterprise constituted or organized under the law of a [Contracting] Party, and a branch located in the territory of a [Contracting] Party and carrying out business activities there.
>
> **[. . .]**
>
> **investment** means:
>
> (a) an enterprise;
>
> [. . .]
>
> (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
>
> [. . .]

> (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
>
> (h) interests arising from the commitment of capital or other resources in the territory of a [Contracting] Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the [Contracting] Party, including [. . .] concessions [. . .].
>
> **investor of a [Contracting] Party** means a [Contracting] Party or state enterprise thereof, or a national or an enterprise of such [Contracting] Party, that seeks to make, is making or has made an investment;
>
> (emphasis in original)

365. NAFTA Article 1121 is entitled "Conditions Precedent to Submission of a Claim to Arbitration." Article 1121(1) provides:

> A disputing investor may submit a claim under Article 1116 to arbitration only if:
>
> (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and
>
> (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another [Contracting] Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any [Contracting] Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing [Contracting] Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing [Contracting] Party.

366. NAFTA Art 2103(1) states that "[e]xcept as set out in this Article, nothing in this Agreement shall apply to taxation measures."

367. ICSID Convention Article 25 provides, in relevant part:

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the

> Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) "National of another Contracting State" means:
>
> [. . .]
>
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.
>
> [. . .]

368. ICSID Convention Article 41 further provides:

> (1) The Tribunal shall be the judge of its own competence.
>
> (2) Any objection by a party to the dispute that the dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

369. ICSID Convention Article 46 provides:

> Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

370. The Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican Sates, and Canada ("**Protocol Replacing NAFTA**") is relevant to the Tribunal's jurisdiction over Claimant's ancillary Claim and Respondent's counterclaim. It concerns the relationship between NAFTA and the Agreement between the United States of America, the United Mexican States, and Canada ("**USMCA**"). The Protocol Replacing NAFTA provides, in Article 1, that:[238]

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[238] **C-0313-ENG**, Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada, 30 November 2018 ("Protocol Replacing NAFTA"), Art. 1.

> Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA.

371. Annex 14-C of the USMCA is entitled "Legacy Investment Claims and Pending Claims", and provides, in paragraph 1:[239]

> Each [Contracting] Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:
>
> (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
>
> (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
>
> (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.[240]

372. Paragraph 2 of Annex 14-C of the USMCA provides that "[t]he consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of," *inter alia*, Chapter II of the ICSID Convention.[241]

373. Paragraph 3 of Annex 14-C of the USMCA provides that "[a] [Contracting] Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994."[242]

374. Paragraph 4 of Annex 14-C of the USMCA provides:[243]

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239 **C-0314-ENG**, USMCA, Annex 14-C.

240 Footnote 20 to Annex 14-C of the USMCA provides: "For greater certainty, the relevant provisions in Chapter 2 (General Definitions), Chapter 11 (Section A) (Investment), Chapter 14 (Financial Services), Chapter 15 (Competition Policy, Monopolies and State Enterprises), Chapter 17 (Intellectual Property), Chapter 21 (Exceptions) and Annexes I-VII (Reservations and Exceptions to Investment, Cross-Border Trade in Services and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim." Footnote 21 to Annex 14-C of the USMCA provides: "Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)." **C-0314-ENG**, USMCA, Annex 14-C.

241 **C-0314-ENG**, USMCA, Annex 14-C, ¶ 2.

242 **C-0314-ENG**, USMCA, Annex 14-C, ¶ 3.

243 **C-0314-ENG**, USMCA, Annex 14-C, ¶ 4.

> For greater certainty, an arbitration initiated pursuant to the submission of a claim under paragraph 1 may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by the expiration of consent referenced in paragraph 3, and Article 1136 (Finality and Enforcement of an Award) of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.

375. Paragraph 5 of Annex 14-C of the USMCA states as follows:

> For greater certainty, an arbitration initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 while NAFTA 1994 is in force may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by the termination of NAFTA 1994, and Article 1136 of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.

376. Paragraph 6 of Annex 14-C of the USMCA states that for the purposes of Annex 14-C:

> (a) "legacy investment" means an investment of an investor of another [Contracting] Party in the territory of the [Contracting] Party established or acquired between January 1, 1994 and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement;
>
> (b) "investment", "investor", and "Tribunal" have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994; and
>
> (c) "ICSID Convention", "ICSID Additional Facility Rules", "New York Convention", and "Inter-American Convention" have the meanings accorded in Article 14.D.1 (Definitions).

B. RESPONDENT'S POSITION

1. Jurisdiction Ratione Temporis

377. In relation to jurisdiction *ratione temporis*, Respondent argues that the Tribunal does not have jurisdiction to analyze claims based on events prior to December 2015, due to the three-year statute of limitations under NAFTA. Respondent relies, in this regard, on NAFTA Articles 1116(2) (claim by an investor on its own behalf) and 1117(2) (claim by an investor on behalf of an enterprise) (*see* ¶¶ 357 and 358 above).

378. According to Respondent, Claimant's account of the facts goes back to 1986 and spends nearly forty pages on events prior to 2000. While Claimant states that these are merely contextual references, Respondent argues that the Tribunal must be careful to avoid

relying on these facts to support Claimant's claims.[244] Specifically, Respondent asserts that any commitments made by the Mexican authorities with respect to the establishment of La Rosita and the port are not relevant to Claimant's efforts to expand its operations at El Corchalito and La Adelita.[245] In its Rejoinder, Respondent acknowledges Claimant's confirmation that it is not asserting that any events prior to December 2015 constitute breaches of NAFTA.[246]

379. Respondent further submits that the requirement to submit claims to arbitration within three years is a question of jurisdiction, not admissibility.[247] Respondent relies, in support, on the decisions of a number of treaty arbitration tribunals,[248] including NAFTA tribunals,[249] as well as the positions of the United States and Mexico in NAFTA Article 1128 submissions.[250]

2. Investor and Investment

380. Respondent asserts that the Tribunal has no jurisdiction with respect to investments made in the Bahamas and the United States. Insofar as Claimant describes the CALICA Network as including (i) three cargo vessels owned and operated by a Bahamian company, Vulica Shipping Company Ltd; (ii) US sales distribution yards located along the US Gulf Coast; and (iii) the sales and marketing operations of a US company Vulcan Construction Materials, Respondent argues that these are not investments in Mexico and

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244 Counter-Memorial, ¶¶ 271, 273; *see* Memorial, ¶¶ 6-109.

245 Counter-Memorial, ¶ 281.

246 Rejoinder, ¶ 300. *See* Reply, ¶¶ 117, 120.

247 Counter-Memorial, ¶¶ 275-276*, citing* **RL-002-ENG**, *Merrill & Ring Forestry L.P. v. Government of Canada*, Opinion of W. Michael Reisman with respect to the effect of NAFTA Article 1116(2), ¶ 16; Rejoinder, ¶ 301.

248 Counter-Memorial, ¶ 277*, citing* **RL-003-ENG**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (*Rusoro v. Venezuela*, Award), ¶¶ 203-240, also citing **RL-004-ESP**, *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016 ("*Corona Materials v. Dominican Republic*, Award"), ¶¶ 57, 238.

249 Counter-Memorial, ¶ 278*, citing* **RL-005-ENG**, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 ("*Resolute Forest Products v. Canada*, Decision on Jurisdiction"), ¶¶ 83, 85.

250 Counter-Memorial, ¶¶ 279-280*, citing* **RL-006-ENG**, *Eli Lilly and Company v. Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Submission of United States of America, 18 March 2016, ¶ 83; **RL-007-ENG**, *Eli Lilly and Company v. Government of Canada,* UNCITRAL, ICSID Case No. UNCT/14/2, Submission of Mexico pursuant to NAFTA Article 1128, ¶¶ 6, 8.

any claim regarding the treatment of non-Mexican investments is beyond this Tribunal's jurisdiction.[251]

381. In this regard, Respondent argues that pursuant to NAFTA Article 1117(1), Claimant may only bring a claim on behalf of "an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly." In Respondent's view, the CALICA Network is not an enterprise of another Party under that provision, but a concept used by Claimant.[252] Respondent relies on the definition of "enterprise" (NAFTA Article 201) and "enterprise of a Party" (NAFTA Article 1139) in support.[253]

382. For Respondent, this point is particularly important with respect to Claimant's claim for damages, and will be discussed further at ¶¶ 1244 *et seq* below.[254] In this respect, Respondent submits that Claimant asserts that losses suffered by the Bahamian entity are losses to the US entity, without regard for its distinct legal personality.[255]

3. Port Tariff Claim

383. Respondent submits that Claimant's fair and equitable treatment ("**FET**") claim with respect to port charges is inconsistent with NAFTA Article 2103(1) (*see* ¶ 366 above). In Respondent's view, taxation measure is broadly defined to include any measure that "is part of the regime for the imposition of a tax".[256] Relying on the decision of the *Feldman v. Mexico* tribunal, Respondent submits that while NAFTA contains some exceptions to the exclusion of jurisdiction over tax matters, a claim under Article 1105 is not one of those exceptions.[257]

384. According to Respondent, under Mexican law, those who make use of national ports or terminals for public use outside an authorized port are obliged to pay the Mexican State the deep-sea port fee for each vessel in deep-sea or cabotage traffic that enters such ports.

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251 Counter-Memorial, ¶¶ 282-283. *See* Memorial, ¶ 24; Chodorow First Report, ¶ 45. *See also* Rejoinder, ¶¶ 302-304, 307.

252 Counter-Memorial, ¶ 284*, citing* NAFTA, Art. 1117(1).

253 Counter-Memorial, ¶ 285*, citing* NAFTA, Arts. 201, 1139.

254 Counter-Memorial, ¶ 287.

255 Rejoinder, ¶ 305. *See* Reply, ¶ 122.

256 Counter-Memorial, ¶ 289*, citing* NAFTA, Art. 2103(1); **RL-005-ENG**, *Resolute Forest Products v. Canada*, Decision on Jurisdiction, ¶ 326.

257 Counter-Memorial, ¶¶ 289-290*, citing* **RL-008-ESP**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 9 December 2002, ¶ 109, n. 9.

Respondent argues that these harbor dues, like taxes, are considered contributions under the Federal Tax Code.[258]

385. Specifically, Respondent asserts that the Federal Tax Code precisely determines the elements of this tax, i.e., an active subject (the Mexican State); a passive subject (the individuals or legal entities that use the ports), a taxable event (the entry or arrival to any land or water area that comprises the port) and a rate and taxable base (set based on the gross tonnage units). In Respondent's view, when the port or terminal is concessioned to an API the charge takes the form of a port tariff, which does not mean that it loses its character as a contribution under the Federal Tax Code.[259]

386. Respondent further contends that Claimant is aware of this situation, since on at least three occasions tax review appeals have been filed against the determinations issued in the proceedings that have analyzed the validity of API Quintana Roo's 2007 concession and the official notices of 24 July 2007 and 2 July 2009.[260]

387. On the merits of the claim, Respondent asserts, *inter alia*, that (i) the Mexican Supreme Court decision of 25 January 2017 does not establish that CALICA is entitled to any reimbursement, or that API Quintana Roo must make such reimbursement;[261] (ii) the claim made for port fees is the very fees that CALICA agreed to waive collection rights under the 2014 Agreements;[262] (iii) the Mexican courts have rejected Claimant's request for an order specifying that CALICA is the only one authorized to collect the port fee at Punta Venado;[263] (iv) CALICA has no right to collect the port fee;[264] (v) CALICA did not make the payment for which it is claiming reimbursement;[265] (vi) CALICA relinquished the public use terminal and thus any rights derived from it;[266] and (vii) the

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258 Counter-Memorial, ¶ 289, *citing* **R-0054-ESP**, Federal Duties Law, Mexican Official Gazette, 31 December 1981 ("Federal Duties Law"), Arts. 200, 200-A, 201, 201-A; **R-0061-ESP**, Federal Tax Code, Mexican Official Gazette, Mexico City, D.F., 31 December 1981 ("Federal Tax Code"), Art. 2, s. IV.

259 Rejoinder, ¶ 310, *citing* **R-0061-ESP**, Federal Tax Code; *see* Rejoinder, § II.E.2.

260 Rejoinder, ¶ 311; *see* Rejoinder, § II.E.1.

261 Counter-Memorial, ¶ 365, *citing* **C-0059-SPA**, Supreme Court Decision, p. 47. *See also* Counter-Memorial, ¶ 374; Rejoinder, ¶ 348.

262 R-PHM, ¶ 115, *citing* 2021 Hearing Transcript (Spanish), Day 2, 355 ([redacted] Testimony).

263 Counter-Memorial, ¶¶ 372-373, *citing* **R-0073-ESP**, TFJFA, File 26098/07-17-10.2, Judgment, 5 June 2013, pp. 24-25.

264 Counter-Memorial, ¶ 376; *see* Counter-Memorial, § II.G.3.

265 Counter-Memorial, ¶ 376; *see* Counter-Memorial, § II.G.2.

266 Counter-Memorial, ¶ 376; *see* Counter-Memorial, § II.G.7.

request for payment made by CALICA to API Quintana Roo through the judicial procedure called "voluntary jurisdiction" does not grant it any right.[267]

4. Ancillary Claim

388. Respondent submits that the Tribunal does not have jurisdiction to decide the ancillary claim as the events forming part of the ancillary claim first occurred in 2022. Since NAFTA ceased to be in force as of 1 July 2020, Respondent argues that it is not possible for it to be in breach of NAFTA.[268] In its view, Respondent and the other parties to the USMCA did not consent to NAFTA claims being adjudicated based on measures subsequent to the entry into force of the USMCA.[269]

389. Respondent disagrees with Claimant's assertion that the Tribunal has already ruled on Respondent's jurisdictional objection in PO7.[270] Respondent contends that, in light of the ancillary claim being filed late, and the Tribunal including two new rounds of submissions and a rehearing, Respondent timely raised its jurisdictional objections pursuant to Rule 41 of the ICSID Arbitration Rules.[271] According to Respondent, its argument that the ancillary claim is brought pursuant to an incorrect treaty has not been considered by the Tribunal and therefore the Tribunal cannot dismiss it for allegedly being resolved or untimely.[272]

390. Respondent contends that it is now bound by the provisions of USMCA, which replaced the NAFTA provisions, and is different in scope.[273] Respondent relies on the following in support of its argument: (i) Annex 14-C of USMCA;[274] (ii) Article 13 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Articles on State Responsibility**");[275] (iii) Article 1 of the

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267 Counter-Memorial, ¶ 376; *see* Counter-Memorial, § II.G.8; Rejoinder, ¶ 348.
268 Counter-Memorial AC, ¶ 407.
269 Counter-Memorial AC, ¶ 414.
270 Rejoinder AC, ¶ 255. *See* Reply AC, ¶¶ 134-137.
271 Rejoinder AC, ¶ 256.
272 Rejoinder AC, ¶ 257.
273 Counter-Memorial AC, ¶ 407.
274 Counter-Memorial AC, ¶ 408, *citing* **C-0314-ENG**, Annex 14-C of USMCA.
275 Counter-Memorial AC, ¶ 408, *citing* **RL-0147-ESP**, ILC's Articles on Responsibility of States for Internationally Wrongful Acts, Art. 13.

Protocol Replacing NAFTA;[276] (iv) VCLT Articles 31 and 32 ;[277] and (v) the Commentary to the VCLT.[278]

391. Respondent further submits that the investment that is the subject of the ancillary claim is not part of a covered sector.[279] Respondent argues that a claim for breach of the MST can only be brought against Respondent if the claim qualifies for filing under Annex 14-E of USMCA, including that the investment falls under the "covered sector" as defined in USMCA Annex 14-E(6)(b).[280]

392. Respondent further argues that Claimant's investments in La Rosita and Punta Venado are not a protected "legacy investment" within the meaning of USMCA Annex 14-C, because they were established in 1986 under the 1986 Investment Agreement and were acquired through sales and purchases in 1986 and 1987, almost eight years before the entry into force of NAFTA on 1 January 1994.[281]

393. As well as its jurisdictional objections, Respondent opposes Claimant's ancillary claim on the merits, arguing that it did not act arbitrarily or unfairly, without good faith or in violation of Claimant's alleged expectations.[282] Respondent argues that the actions of the Mexican government authorities were reasonable and justified.[283] Respondent further submits that NAFTA requires deference to environmental laws, and relies on NAFTA Article 1114(1) which in its view is based on the deference customary international law accords to sovereign acts to protect the environment.[284]

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276 Counter-Memorial AC, ¶ 408, *citing* **RL-0148-ESP**, Protocol Replacing the North American Free Trade Agreement with the Agreement between Canada, the United States of America, and the United Mexican States, Art. 1.

277 Rejoinder AC, ¶¶ 259-260, *citing* **R-0185-ESP**, Vienna Convention on the Law of Treaties ("VCLT"), Arts. 31-32.

278 Rejoinder AC, ¶ 261, *citing* **RL-0201-ENG**, Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II, p. 219.

279 Counter-Memorial AC, ¶ 411.

280 Counter-Memorial AC, ¶ 410. While Respondent did not specify which treaty it is referring to when making reference to Annex 14-E, the Tribunal understands the Respondent to be referring to Annex 14-E of the USMCA.

281 R-PHM AC, ¶ 20.

282 Counter-Memorial AC, ¶ 417.

283 Counter-Memorial AC, ¶ 415.

284 Counter-Memorial AC, ¶¶ 420, 422, *citing* **RL-0150-ENG**, Meg Kinnear, Andrea Bjorklund & John Hannaford, *Investment Disputes under NAFTA*: *An Annotated Guide to NAFTA Chapter 11* (Kluwer 2006), ¶¶ 1114-1119, *citing* **CL-0019-ENG**, *Metalclad Corporation v. The United Mexican States*, ICSID Case

5. Admissibility and Unclean Hands

394. Respondent submits that Claimant's ancillary claim should be declared inadmissible pursuant to the principle of *nemo auditur propriam turpitudinem allegans (*or no one can be heard to invoke his own turpitude).[285] Respondent argues that Claimant should not be allowed to bring a claim against it based on the omission of information and alleged violations that result from Claimant's own actions.[286]

395. According to Respondent, CALICA omitted information and failed to comply with its environmental obligations as determined by PROFEPA's inspection visits.[287] Respondent argues that CALICA: (i) did not have a current and valid environmental impact authorization; (ii) did not have a CUSTF authorization pursuant to which it carried out removal of vegetation in compliance with environmental laws; (iii) exceeded the extraction limits it requested;[288] and (iv) concealed the fact that it intended to quarry for many more decades and in greater quantity than disclosed to Respondent.[289]

396. Respondent contends that parties with "unclean hands" have no standing in the arbitration.[290] Respondent draws parallels between the present case and the *Al-Warraq v. Indonesia* case, wherein the tribunal found that the claimant benefitted economically through conduct that was detrimental to public interest, making the claim inadmissible pursuant to the "unclean hands" doctrine.[291]

397. Similarly, Respondent submits that Claimant's ancillary claim should be declared inadmissible as it is primarily premised on the closure of La Rosita for environmental breaches.[292] Respondent argues that Claimant obtained an economic benefit to the

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No. ARB(AF)/97/1, Award, 30 August 2000 ("*Metalclad v. Mexico*, Award"), ¶ 98*, citing* **CL-0003-ENG**, Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford, 2007) [Excerpts], ¶ 7.24; Rejoinder AC, ¶ 313.

285 Counter-Memorial AC, § III(A).

286 Counter-Memorial AC, ¶ 396, citing **RL-0145-ENG**, Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. The Government of Mongolia and MonAtom LLC, PCA Case No. 2011-09, 25 July 2012, Decision on Jurisdiction ("Khan Resources v. Mongolia, Decision on Jurisdiction").

287 Counter-Memorial AC, ¶ 398; *see also* Counter-Memorial AC, ¶ 396.

288 Counter-Memorial AC, ¶ 398.

289 Rejoinder AC, ¶ 289.

290 Counter-Memorial AC, ¶ 394*, citing* **RL-003-ENG**, *Rusoro v. Venezuela*, Award, ¶ 492.

291 Counter-Memorial AC, ¶ 394*, citing* **RL-0124-ENG**, *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014 ("*Al-Warraq v. Indonesia*, Final Award"), ¶¶ 634-641, 646.

292 Counter-Memorial AC, ¶ 395; Rejoinder AC, ¶ 294.

detriment of the public interest, i.e., the environment, due to alleged environmental breaches in La Rosita.[293] Respondent contrasts Claimant's actions with those of the environmental authorities and contends that the latter based their actions in good faith in accordance with the Mexican legal framework.[294]

398. Respondent contends that NAFTA's objective of strengthening the development and enforcement of environmental laws and regulations, as opposed to an abstract obligation, requires investors and persons trading under NAFTA to conduct their activities in accordance with environmental laws and regulations throughout their activities.[295] Respondent argues that this is reaffirmed by NAFTA Article 1114.[296]

399. Respondent argues that, contrary to Claimant's view, the "unclean hands" doctrine applies generally to illegalities arising throughout the life of the investment, and not only at the time of the establishment of the investment.[297]

400. In Respondent's view, the principle of *nemo auditur propriam turpitudinem allegans* should also lead to the dismissal of Claimant's ancillary claim on the merits, as PROFEPA legitimately imposed security measures as a result of Claimant's illegal act.[298]

6. Counterclaim

401. Respondent submits that the Tribunal has jurisdiction over its counterclaim. In this regard, Respondent submits that the environmental violations by Claimant are directly and closely related to the claims presented in this arbitration, including the measures initially claimed and the measures included in the ancillary claim.[299] Respondent relies on the *Limited Liability v. Ukraine* case, wherein it was held that whether a tribunal has

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293 Counter-Memorial AC, ¶ 395; Rejoinder AC, ¶ 294.
294 Counter-Memorial AC, ¶ 395.
295 Rejoinder AC, ¶ 299.
296 Rejoinder AC, ¶ 300.
297 Rejoinder AC, ¶ 288, citing, inter alia, **RL-0187-ENG**, Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, and Bangladesh Oil Gas and Mineral Corporation, ICSID Case No. ARB/10/11 and ICSID Case No. ARB/10/18, Decision on Jurisdiction, 19 August 2013, ¶ 482; **RL-0189-ENG**, Espíritu Santo Holdings, LP, and L1bre Holding, LLC v. United Mexican States, ICSID Case No. ARB/20/13, Non-Disputing Party Submission of the Government of Canada pursuant to NAFTA Article 1128, 21 March 2023, ¶ 4.
298 Counter-Memorial AC, ¶ 399.
299 Counter-Memorial AC, ¶ 496, *citing* Reply AC, ¶¶ 129-131, *citing* Rejoinder AC, ¶¶ 94-95; Counterclaim Memorial on Jurisdiction, ¶ 145.

jurisdiction over a party's counterclaim depends on: (i) the dispute settlement terms of the invoked treaty; (ii) the nature of the counterclaim; and (iii) the relationship between the counterclaim and the claims in the arbitration.[300]

(a) NAFTA

402. Respondent contends that, contrary to Claimant's contention, NAFTA and the applicable arbitration rules grant jurisdiction to the Tribunal to hear Respondent's counterclaim.[301]

403. In Respondent's view, the counterclaim is within the limits of the consent of the Parties.[302] Respondent contends that NAFTA Articles 1121 and 1122 establish the conditions of its consent to arbitrate a claim, and within those conditions both the respondent party and the disputing investor consent to submit their claim to arbitration in accordance with the procedures set forth in the NAFTA.[303]

404. Respondent asserts that NAFTA Article 1120 contemplates the possibility for a disputing investor to submit its claim to arbitration under the arbitration rules listed, which in this case is the ICSID Convention and its arbitration rules.[304] Respondent further argues that NAFTA Article 1120 states that the rules applicable to the arbitration procedure shall be followed, except to the extent modified by NAFTA.[305] For Respondent, NAFTA does not contain any provision prohibiting the filing of a counterclaim under the ICSID Convention and its arbitration rules. It only limits the circumstances in which a party may file a counterclaim under NAFTA Article 1137(3).[306]

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300 Counter-Memorial AC, ¶ 495, *citing* **RL-0166-ENG**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008 ("*Limited Liability v. Ukraine*, Final Award"), ¶ 118, *citing*, *inter alia*, **CL-0197-ENG**, *Iberdrola Energia S.A. (Spain) v. The Republic of Guatemala*, UNCITRAL, PCA Case No. 2017/41, Final Award, 24 August 2020 ("*Iberdrola v. Guatemala (II)*, Final Award"), ¶ 384; Counterclaim Memorial on Jurisdiction, ¶¶ 142-143*, citing* **RL-0208-ENG**, *Oxus Gold v. The Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, ¶ 939. *See* Reply AC, ¶ 237.

301 Counter-Memorial AC, ¶ 497; Counterclaim Memorial on Jurisdiction, ¶ 146. *See* Reply AC, ¶ 259. *See also* Counterclaim Memorial on Jurisdiction, ¶¶ 166-167.

302 Counterclaim Memorial on Jurisdiction, § III.A.2.a.

303 Counterclaim Memorial on Jurisdiction, ¶¶ 176, 190*, citing* **C-0008-ENG**, Legacy Vulcan, LLC's and Calizas Industriales del Carmen, S.A. de C.V.'s executed instrument of consent and waiver pursuant to NAFTA Article 1121 ("Consent and Waiver pursuant to NAFTA Art. 1121", p. 5.

304 Counterclaim Memorial on Jurisdiction, ¶ 177.

305 Counterclaim Memorial on Jurisdiction, ¶ 177.

306 Counterclaim Memorial on Jurisdiction, ¶ 177.

405. By reference to NAFTA Article 1137(3), Respondent acknowledges that it is excluded from arguing as a counterclaim that Claimant will receive indemnification or other compensation for the alleged damages.[307] This exclusion would make no sense, in Respondent's view, unless a counterclaim is permitted in other circumstances.[308]

406. Respondent submits that its counterclaim is based on Claimant's breaches of environmental legislation and on the environmental damages caused by said breaches, and therefore the described prohibition in NAFTA Article 1137(3) is not applicable.[309]

407. For Respondent, explicit authorization of counterclaims would be unnecessary and express language would be necessary to exclude counterclaims.[310] Respondent submits that a restrictive wording of the acceptance of the offer to arbitrate, embodied in a specific treaty, should not exclude a State's counterclaim as an investment treaty is not an "à la carte selection" of provisions from which the investor can choose.[311]

408. Respondent relies on the *Aven v. Costa Rica* Award, wherein the tribunal analyzed Article 10.20(7) of the United States-Central America-Dominican Republic Free Trade Agreement, which Respondent argues is identical to NAFTA Article 1137(7), and held that "*el derecho de la Demandada a una reconvención de conformidad con el Tratado se contempla y se encuentra dentro del alcance de la jurisdicción de un tribunal constituido en virtud del Tratado*"[312] .

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307 Counter-Memorial AC, ¶¶ 500-501; Counterclaim Memorial on Jurisdiction, ¶¶ 150-154*, citing* **R-0186-ESP**, Diccionario de la Real Academia Española, "*Aducir*"; **R-0235-ENG**, Cambridge Dictionary, "Assert"; **R-0187-ESP**, Diccionario de la Real Academia Española, "*Reconvención*".

308 Counter-Memorial AC, ¶ 502, citing **RL-0167-ENG**, A. Bjorklund, The Role of Counterclaims in Rebalancing Investment Law.

309 Counterclaim Memorial on Jurisdiction, ¶¶ 154-157*, citing* **RL-0210-ESP**, United States - Guidelines for Reformulated and Conventional Gasoline, Report of the Appellate Body, p. 27, *citing* **RL-0231-ENG**, *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award, 5 May 2015, ¶ 267.

310 Counterclaim Memorial on Jurisdiction, ¶¶ 161-162*, citing* **RL-0212-ENG**, *The Islamic Republic of Iran v. United States of America*, Case ITL 83-B1-FT, Interlocutory Award, 9 September 2004 ("*Iran v. United States,* Award") (Counterclaim), ¶ 87. *See also* Counterclaim Memorial on Jurisdiction, ¶¶ 162-163, *citing* **RL-0212-ENG**, *Iran v. United States*, Interlocutory Award (Counterclaim), ¶ 87; Counterclaim Memorial on Jurisdiction, ¶ 164.

311 Counterclaim Memorial on Jurisdiction, ¶ 188.

312 Counter-Memorial AC, ¶¶ 504-505*, citing* **RL-0168-ESP**, *David Aven et al. v. The Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018 ("*Aven v. Costa Rica*, Final Award"), ¶ 694; Counterclaim Memorial on Jurisdiction, ¶ 165.

409. Respondent submits that Claimant consented to the possibility of Respondent filing a counterclaim under "the procedures set forth [in NAFTA Article 1137(3)]" in light of its Notice of Intent ("**Notice of Intent**"), which states:[313]

> Legacy Vulcan and Calica hereby consent to submit to ICSID arbitration, pursuant to NAFTA Article 1121, the disputes described herein and any other disputes that have arisen or may arise in the future between the parties.

410. Respondent further argues that the procedural requirements for the filing of the application for counterclaim are satisfied through its application in the Counter-Memorial on ancillary claim and the factual and legal grounds on which the application is based.[314] In Respondent's view, this is consistent with the Tribunal's directions in PO7, wherein Claimant did not comply with the requirement to exhaust the consultation period and its ancillary claim was admitted.[315]

(b) The ICSID Convention and ICSID Arbitration Rules

411. Respondent submits that the ICSID Convention grants jurisdiction to the Tribunal to hear the counterclaim.[316] Respondent argues that ICSID Convention Article 46 establishes the possibility for a tribunal, at the request of one of the parties, to rule on a counterclaim filed by a respondent State.[317] Respondent further relies on Rule 40 of the ICSID Arbitration Rules.[318]

412. Respondent argues that the history of the ICSID Convention shows that the intention of Article 46, a mandatory provision, was to determine that the tribunal hearing a claim would be obliged to exercise jurisdiction over a counterclaim in order to avoid the need

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313 Counterclaim Memorial on Jurisdiction, ¶ 171*, citing* **C-0007-SPA**, Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter 11, dated 3 September 2018 ("Notice of Intent"), p. 9, also citing Request for Arbitration, ¶ 12.

314 Counter-Memorial AC, ¶ 518.

315 Counter-Memorial AC, ¶ 518.

316 Counter-Memorial AC, ¶ 506; Counterclaim Memorial on Jurisdiction, ¶ 173.

317 Counter-Memorial AC, ¶ 506, *citing, inter alia,* **RL-0169-ENG**, C. Schreuer, L. Malintoppi, A. Reinisch, and A. Sinclair, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), pp. 641, 732, 751-752, *citing* **C-0129-ENG**, ICSID Convention, Article 46; Counterclaim Memorial on Jurisdiction, ¶¶ 174, 178.

318 Counter-Memorial AC, ¶ 507, *citing* ICSID Arbitration Rules (2006), Rule 40; Counterclaim Memorial on Jurisdiction, ¶¶ 174, 178.

to compose another tribunal to decide an issue directly related to the claim submitted to the arbitration.[319]

413. Respondent contends that for a tribunal to adjudicate such a counterclaim under the ICSID Convention and the applicable rules: (i) the counterclaim must be within ICSID's jurisdiction; and (ii) there must be a connection between the claims and counterclaims.[320] Respondent submits that its counterclaim meets these conditions.[321]

414. Respondent argues that the counterclaim is within the jurisdiction of ICSID as Claimant consented to the jurisdiction of the Centre in its Notice of Intent and Article 25 of the ICSID Convention states that the consent given by the parties may not be unilaterally withdrawn.[322]

415. Respondent argues, relying on the opinion of Professor Michael Reisman, that when the signatory parties to the applicable treaty, among other things, consent to ICSID jurisdiction, the consent component of ICSID Convention Article 46 imports itself into any ICSID arbitration that the investor chooses to pursue.[323] Respondent contends that Professor Reisman's opinion has been replicated by arbitral tribunals which have upheld their jurisdiction over counterclaims under the ICSID Convention without the need for the investor's express consent to arbitrate such counterclaims.[324] Respondent argues that such consent may be inferred from Claimant's conduct in initiating the arbitration under

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319 Counterclaim Memorial on Jurisdiction, ¶ 193, *citing* **RL-0220-ENG**, Executive Directors of the International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, ¶ 13, *citing* **RL-0221-ENG**, History of ICSID Convention, ICSID, Vol. II-2, pp. 810-811.

320 Counter-Memorial AC, ¶ 508*, citing* **RL-0171-ENG***, Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3 Award, 4 October 2013 ("*Metal-Tech v. Uzbekistan*, Award"), ¶ 407.

321 Counter-Memorial AC, ¶ 508.

322 Counter-Memorial AC, ¶¶ 509-510; *see* Notice of Intent, p. 9; *see also* Request for Arbitration, ¶ 12; Counterclaim Memorial on Jurisdiction, ¶¶ 194-196; *see also* Counterclaim Memorial on Jurisdiction, ¶ 189, *citing* **C-0007-SPA**, Notice of Intent.

323 Counterclaim Memorial on Jurisdiction, ¶ 179, *citing* **RL-0215-ENG**, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Declaration of Prof. W. Michael Reisman, 28 November 2011, ("*Roussalis v. Romania*, Declaration of Prof. W. Michael Reisman").

324 Counterclaim Memorial on Jurisdiction, ¶¶ 180-187, citing, inter alia, **RL-0216-ENG**, Martin Jarrett, Sergio Puig and Steven Ratner, Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals, Journal of International Dispute Settlement, p. 4, citing **RL-0214-FR**, Antoine Goetz & Others v. Republic of Burundi, ICSID Case No. ARB/01/2, Award, 21 June 2012, ¶¶ 279-280.

the permissive procedural rules of the ICSID Convention which contemplates the possibility of counterclaims.[325]

(c) Existence of Environmental Obligations under NAFTA

416. Respondent submits that NAFTA grants jurisdiction to hear claims from a State for environmental violations in the form of a counterclaim.[326] In its view, obligations for the investor may be inferred from NAFTA Article 1114, with respect to the environmental legislation of the host State.[327] Respondent relies, *inter alia,* on *Aven v. Costa Rica*, wherein, Respondent argues, the tribunal analyzed a provision similar to NAFTA Article 1114(2) and determined that: (i) the measures adopted by the host State for the protection of the environment should be considered binding on all those under the State's jurisdiction, particularly foreign investors; and (ii) investors have an obligation not only under domestic law, but also the treaty.[328]

417. Respondent contends that the counterclaim is based on environmental devastation caused by Claimant with respect to non-renewable natural resources.[329] Respondent relies on the decisions in *Perenco v. Ecuador* and *Burlington v. Ecuador*, wherein the tribunals decided the counterclaims and awarded costs to the State for the environmental damage caused.[330]

(d) Connection Between the Claim and the Counterclaim

418. Respondent further submits that there is a connection between the counterclaim and Claimant's claims.[331] Respondent relies on ¶ 130 of PO7 where the Tribunal noted that Claimant's Project encompassed four lots when establishing its jurisdiction over

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325 Counterclaim Memorial on Jurisdiction, ¶ 187.

326 Counter-Memorial AC, § IV(A)(2).

327 Counter-Memorial AC, ¶¶ 512, 516, *citing* **RL-0168-ESP**, *Aven v. Costa Rica*, Final Award, ¶¶ 732, 738.

328 Counter-Memorial AC, ¶ 513, citing **RL-0168-ESP**, Aven v. Costa Rica, Final Award, ¶ 734. See also Counter-Memorial AC, ¶ 516, citing **RL-0174-ESP**, Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 8 December 2016 ("Urbaser v. Argentina, Award), ¶¶ 1183, 1194-1195, 1200, 1207, 1210.

329 Counter-Memorial AC, ¶ 515.

330 Counter-Memorial AC, ¶ 515, *citing* **CL-0102-ENG**, *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Award, 27 September 2019 ("*Perenco v. Ecuador*, Award"), ¶¶ 34, 889, 899, 1023; **RL-0173-ESP**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017, ¶¶ 52, 104, 112, 878-879, 1075.

331 Counter-Memorial AC, § IV(A)(1)(b)(2); *see also* Counter-Memorial AC, ¶ 518; Counterclaim Memorial on Jurisdiction, ¶ 239.

Claimant's ancillary claim.[332] Respondent argues that the counterclaim relates precisely to environmental damage generated by the development and implementation of the Project in the four lots identified by the Tribunal.[333]

419. Respondent contends that Claimant's breaches of environmental legislation and environmental authorizations relate to the alleged effects of CALICA's rock quarrying Project that are the subject of Claimant's original claims.[334]

420. Respondent further contends that Claimant's initial claim is based on the alleged right to mine at La Adelita and El Corchalito, pursuant to the Federal EIA and Investment Agreement, and the ancillary claim is based on the alleged indefinite authorization to mine La Rosita, while the counterclaim is based on the alleged non-compliance or non-existence of the environmental impact authorizations and other missing permits Claimant allegedly should have obtained for its Project.[335] Accordingly, Respondent argues that all claims are based on the same facts, and both claims and counterclaim are based on NAFTA, with reference to the analysis of Mexican environmental law.[336]

421. Respondent submits that the harm caused by Claimant is indivisible, as noted by the Tribunal in PO7 in relation to the ancillary claim.[337] Respondent argues that for the same reason that it is not possible to separate Claimant's original claims from the ancillary claim, it is also not feasible to separate the environmental damage caused by Claimant, given that the alleged environmental damage is not related to the geographical division of Claimant's properties, but derives directly from Claimant's Project such that it goes beyond Claimant's properties.[338] Respondent contends that it makes no difference whether the counterclaim is related to the Project or measures complained of in the ancillary claim, as the link exists in both cases.[339]

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332 Counter-Memorial AC, ¶ 511; Counterclaim Memorial on Jurisdiction, ¶ 196.
333 Counter-Memorial AC, ¶ 511; Counterclaim Memorial on Jurisdiction, ¶ 196.
334 Counterclaim Memorial on Jurisdiction, ¶ 240.
335 Counterclaim Memorial on Jurisdiction, ¶ 241.
336 Counterclaim Memorial on Jurisdiction, ¶ 241.
337 Counterclaim Memorial on Jurisdiction, ¶ 242, *citing* PO7, ¶¶ 137-138.
338 Counterclaim Memorial on Jurisdiction, ¶ 243. *See also* Counter-Memorial AC, ¶ 518.
339 Counterclaim Memorial on Jurisdiction, ¶ 243. *See* Reply AC, ¶¶ 275-277.

(e) Timeliness

422. Respondent submits that, contrary to Claimant's contention, the request to file the counterclaim was in line with the applicable arbitration rules and with the Tribunal's reasoning in PO7.[340]

423. Respondent argues that, in accordance with PO7, it requested to file its counterclaim in the Counter-Memorial to Ancillary Claim.[341] Respondent contends that pursuant to ICSID Arbitration Rule 40 and PO7, it was logical to expect that Respondent should have requested to file its counterclaim no later than in its Counter-Memorial, as it did.[342] In any event, Respondent relies on ICSID Arbitration Rule 40 to argue that just as the ancillary claim was authorized by this rule, its counterclaim is also authorized by this rule.[343]

424. Respondent further argues that a party's right cannot be undermined solely because there is an agreed procedural schedule.[344]

(f) Procedural Efficiency and Fairness

425. Respondent submits that the counterclaim ensures procedural efficiency as the counterclaim and Claimant's claims are connected.[345] For Respondent, the claims and counterclaims should be heard by the same tribunal in order to avoid inconsistent or contradictory decisions.[346] Respondent argues that the considerations afforded to the ancillary claim in PO7 should apply to the counterclaim as well, on grounds of fairness.[347]

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340 Counterclaim Memorial on Jurisdiction, ¶¶ 198-199, *citing* PO7, ¶ 153.
341 Counterclaim Memorial on Jurisdiction, ¶ 202.
342 Counterclaim Memorial on Jurisdiction, ¶ 203.
343 Counterclaim Memorial on Jurisdiction, ¶ 204, *citing* ICSID Arbitration Rule 40; *see also* Counterclaim Memorial on Jurisdiction, ¶ 200.
344 Counterclaim Memorial on Jurisdiction, ¶ 205.
345 Counterclaim Memorial on Jurisdiction, ¶ 207.
346 Counter-Memorial AC, ¶ 518, citing, inter alia, **RL-0175-ENG**, Klöckner Industrie-Anlagen GmbH and Others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Excerpts of Award, 21 October 1983, ¶ 25.
347 Counterclaim Memorial on Jurisdiction, ¶¶ 208-210, *citing* Request for Provisional Measures and for Leave to File a Subordinate Claim, ¶ 50*, citing* PO7, ¶ 146, *citing* **RL-0215-ENG**, *Roussalis v. Romania*, Declaration of Prof. W. Michael Reisman; **RL-0223-ENG**, *Westinghouse Electric Corporation v. The Islamic Republic of Iran, The Islamic Republic of Iran Air Force, Iran Air, National Iranian Oil Company*, Interlocutory Award No. ITL 67-389-2, 12 February 1987 "*Westinghouse v. Iran and Others*, Interlocutory Award"), ¶ 1.

Respondent contends that accepting its counterclaim would not affect Claimant, while dismissing it would affect Respondent's procedural rights.[348]

426. Respondent contends that contrary to Claimant's contention of a due process violation, the purpose of a counterclaim serves both as an independent claim for liability and damages, as well as a tool (incidentally) focused on the dismissal or set-off of the investor's legal action and is a fundamental element of the respondent State's right to present its case on an equal footing with the investor. In Respondent's view, it is therefore to be treated as a general principle of law that rests on reasons of fairness.[349] Respondent argues that the right of a State to present a counterclaim allows the investor's failure to comply with its obligations to be sanctioned and held accountable.[350]

C. CLAIMANT'S POSITION

1. Jurisdiction ratione temporis

427. Claimant contends that its claims were brought within the three-year limitation period under NAFTA Articles 1116(2) and 1117(2). According to Claimant, the relevant breaches and losses it claims stem from (i) Respondent's failure to amend the POEL 2009 by 5 December 2015, as required by the 2014 Agreements; (ii) Respondent's disregard of its judiciary's determination, made final in January 2017, that API Quintana Roo had no right to collect port fees from CALICA for over a decade; and (iii) Respondent's shutdown of CALICA's operations in El Corchalito in January 2018.[351]

428. Since Claimant brought its claims to arbitration on 3 December 2018, it argues that they are timely and that Respondent does not refute this.[352] In Claimant's view, the Tribunal

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348 Counterclaim Memorial on Jurisdiction, ¶ 245. *See* Reply AC, ¶ 279.

349 Counterclaim Memorial on Jurisdiction, ¶ 211, *citing* **RL-0222-ENG**, Crina Baltag and Ylli Dautaj, Regime Interaction in Investment Arbitration: Counterclaims, Kluwer Arbitration Blog, *citing* **RL-0223-ENG**, *Westinghouse v. Iran and Others*, Interlocutory Award, ¶ 1.

350 Counterclaim Memorial on Jurisdiction, ¶ 211, citing **RL-0216-ENG**, Martin Jarrett, Sergio Puig and Steven Ratner, Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals, pp. 4, 17.

351 Reply, ¶ 117. *See* Memorial, ¶¶ 184-185.

352 Reply, ¶¶ 117-118.

is not jurisdictionally constrained from considering background facts relevant to the dispute, as has been recognized by multiple arbitral tribunals.[353]

429. For Claimant, it is an academic question whether the timing requirement of NAFTA Articles 1116(2) and 1117(2) is an issue of admissibility or jurisdiction.[354]

2. Investor and Investment

430. Claimant files its investment claims on its own behalf under NAFTA Article 1116(1) and on behalf of its enterprise, CALICA, under NAFTA Article 1117(1).[355] According to Claimant, CALICA is (i) an entity constituted and organized under the laws of Mexico; and (ii) indirectly owned and controlled by Legacy Vulcan. Claimant argues that CALICA is therefore both an enterprise and an investment of Claimant in Mexico under NAFTA Articles 201 and 1139.[356]

431. Claimant further argues that its investments in Mexico satisfy the definition of investment in NAFTA Chapter 11 (*see* ¶ 364 above). In addition to CALICA, an "enterprise" under NAFTA that is indirectly owned and controlled by Claimant, Claimant asserts that it indirectly (i) owns and controls real estate in Mexico, including the Punta Venado port area and the limestone reserves in La Rosita, El Corchalito, and La Adelita, acquired for the sole purpose of developing the Project; and (ii) holds the CALICA Port Concession. Claimant further submits that it has committed capital in Mexico in connection with the Project, including hundreds of millions of dollars to produce and export aggregates.[357]

432. Claimant agrees with Respondent that only investments located in Mexico qualify for protection under NAFTA.[358] However, according to Claimant, Respondent conflates

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353 Reply, ¶ 118, citing, **CL-0009-ENG**, William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 ("Bilcon v. Canada, Award"), ¶ 282; **CL-0011-ENG**, Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 ("Mondev v. United States, Award"), ¶ 70, also citing **RL-003-ENG**, Rusoro v. Venezuela, Award, ¶ 223.

354 Reply, ¶ 118.

355 Memorial, ¶ 20; C-PHM, ¶ 13, *citing* 2021 Hearing Transcript (English), Day 1, 77:1-12 (Claimant's Opening Statement); **C-0009-ENG**, NAFTA, Art. 1116(1).

356 Memorial, ¶ 20.

357 Memorial, ¶ 165; *see* Memorial ¶¶ 4, 20, 23-29, 28-38.

358 C-PHM, ¶ 15, *citing* 2021 Hearing Transcript (English), Day 1, 120:22-121:11 (Claimant's Opening Statement).

jurisdictional requirements with the causation requirement for compensation. Claimant argues that it has not submitted any claim on behalf of the CALICA Network under NAFTA Article 1117(1), but only the Mexican enterprise CALICA.[359] In this respect, Claimant submits that the value of its integrated quarrying, shipping, and distribution business, i.e., the CALICA Network, has substantially decreased as a direct result of Respondent's breaches. The fact that some elements of this network are located outside of Mexico does not, in Claimant's view, deprive the Tribunal of jurisdiction over Claimant's claim or preclude consideration of claimed loss or damage that was proximately caused to Claimant by Respondent's breaches.[360]

3. Port Tariff Claim

433. Claimant contends that the port fees at issue in its port fee claim do not qualify as a tax under Mexican law and are therefore not an excluded "taxation measure" under NAFTA Article 2103.[361] Claimant submits, in this respect, that the port fees it claims (*tarifas portuarias)* are not taxes, as confirmed by Respondent's witness Mr. Atempa. These are distinct from port duties (*derechos de puerto*), which Claimant has not claimed.[362]

434. Claimant submits, in this respect, that the Mexican Ports Law (*Ley de Puertos*) provides that port fees (*tarifas portuarias)* are amounts that port concessionaires such as CALICA may charge a third party for using their infrastructure or for related services. Port duties (*derechos de puerto*), on the other hand, are levies paid to the Mexican government for the use of public assets, including public ports.[363]

435. Claimant rebuts Respondent's argument that CALICA's terminal is concessioned to an API so the sums API Quintana Roo charged are fiscal contributions. Claimant submits, in this respect, that (i) CALICA is the sole concessionaire of the Punta Venado infrastructure so its terminal is not concessioned to an API; and as such (ii) the port fees arose from vessels docking at CALICA's private port terminal.[364]

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359 Reply, ¶ 122; C-PHM, ¶ 15. *See* Memorial, ¶¶ 20, 172; Request, ¶ 12.
360 Reply, ¶ 123*, citing* **C-0009-ENG**, NAFTA, Art. 1116(1); *see* Memorial, ¶ 337; C-PHM, ¶ 18.
361 Reply, ¶ 124. *See* Counter-Memorial, ¶¶ 289-290, *citing* **C-0156-ENG**, NAFTA, Article 2013(1).
362 Reply, ¶ 125, *citing* Atempa Statement, ¶¶ 9, 13, 17. *See* Memorial, ¶¶ 66, 225; Counter-Memorial, ¶¶ 289-290. *See also* C-PHM, ¶ 28.
363 C-PHM, ¶ 28. *See* Reply, ¶ 112, *citing* **C-0155-SPA**, Mexican Ports Law, Art. 40, Section X.
364 C-PHM, ¶ 29, *citing* Rejoinder, ¶ 423; Atempa Statement, ¶ 17; *see* Rejoinder, ¶ 281.

4. Proceedings in Mexican Courts

436. In Claimant's view, CALICA's domestic litigation proceedings in Mexico are permitted by NAFTA Article 1121 (*see* ¶ 365 above) and do not impact the Tribunal's ability to award compensation.[365]

437. According to Claimant, CALICA is not seeking compensatory but only declaratory relief in domestic proceedings. In this respect, Claimant asserts that CALICA commenced five legal actions challenging measures adopted by PROFEPA and SEMARNAT following the administrative proceeding before the agencies concerning El Corchalito. Of those five, two actions remained pending at the time of the post-hearing submissions on the original claims: (i) the annulment proceeding against the October 2020 Resolution, i.e., PROFEPA's administrative resolution dated 30 October 2020; and (ii) the *amparo* proceeding against SEMARNAT's decision to suspend its consideration of CALICA's application to renew and amend the Federal EIA.[366]

438. Claimant argues that (i) multiple NAFTA tribunals have held that pending domestic proceedings seeking declaratory relief do not prevent a tribunal from determining liability for treaty claims premised on the same adverse measures;[367] and (ii) the existence of pending domestic proceedings does not affect the Tribunal's ability to award compensation regarding the El Corchalito dispute.[368] Claimant relies, in support, on its undertaking to prevent double recovery which was referred to by the tribunal in *Chevron v. Ecuador* as removing the danger of duplicative recovery.[369]

439. Claimant further contends that there is no requirement to pursue domestic remedies before making an FET claim under NAFTA (unlike a denial of justice claim based on judicial conduct). Insofar as Claimant's claims relate to administrative actions or inaction, it submits that such proceedings should be tested against the standards of due process and

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365 C-PHM, ¶ 20.

366 C-PHM, ¶ 21, *citing* **RD-0003**, Table I: CALICA's Challenges against PROFEPA and SEMARNAT Measures; 2021 Hearing Transcript (English), Day 1, 74:9-75:13, 75:22-76:13 (Claimant's Opening Statement).

367 C-PHM, ¶ 23, *citing*, *inter alia*, **CL-0168-ENG**, *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction, 2 April 2015, ¶ 176.

368 C-PHM, ¶ 23, *citing* **RL-093-ENG**, *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010 ("*Chevron v. Ecuador I*, Partial Award on the Merits"), ¶ 557.

369 C-PHM, ¶ 23, *citing* **RL-093-ENG**, *Chevron v. Ecuador I*, Partial Award on the Merits, ¶¶ 517, 557.

procedural fairness applicable to administrative officials, as held by the *Thunderbird v. Mexico* tribunal.[370]

5. Ancillary Claim

440. Claimant's ancillary claim with respect to La Rosita and CALICA's remaining operations is that Respondent has breached its obligation to afford fair and equitable treatment to Claimant's investments pursuant to NAFTA Article 1105.[371] According to Claimant, Respondent has engaged in arbitrary and unjust conduct in contravention of notions of due process and frustrated Claimant's legitimate expectations.[372]

441. Specifically, Claimant submits that Respondent's shutdown was arbitrary because it was: (i) politically motivated; (ii) contrary to good faith; and (iii) in contravention of basic notions of due process.[373] It is Claimant's position that Respondent has also frustrated its legitimate expectations by blocking its remaining operations in Mexico and contradicting its prior representations regarding Claimant's and CALICA's ability to quarry La Rosita for export to the United States for as long as economically feasible.[374]

442. Claimant argues that the Tribunal has jurisdiction to adjudicate its ancillary claim, referring to PO7 which states that the "ancillary claim [is] within the scope of the consent of the Parties and within the jurisdiction of ICSID."[375] Claimant contends that the ancillary claim is within the scope of the Parties' consent to arbitrate the original claim as it is related to the Project. [376] Accordingly, the NAFTA requirements of written notice of claim, expiry of six-months period and the investor's consent and waiver are applicable and covered by compliance with these requirements in relation to the original claim.[377]

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370 C-PHM, ¶¶ 25-26, citing **CL-0004-ENG**, International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL Award, 26 January 2006 ("Thunderbird v. Mexico, Award"), ¶ 200.

371 Memorial AC, ¶¶ 91, 95.

372 Memorial AC, ¶ 91.

373 Memorial AC, ¶ 96.

374 Memorial AC, ¶¶ 125, 128, 136; Reply AC, ¶ 175*, citing* **CL-0009-ENG**, *Bilcon v. Canada,* Award, ¶ 470, *citing* **CL-0004-ENG**, *Thunderbird v. Mexico,* Award, ¶ 147.

375 Memorial AC, ¶ 90, *citing* PO7, ¶ 150*, citing* **C-0279-SPA**, Mexican Geological Service, Mining Panorama of the State of Quintana Roo: Directorate of Research and Development (2021) ("Mining Panorama Report 2021"), pp. 29-32.

376 Memorial AC, ¶ 90*, citing* PO7, ¶¶ 149-150, *citing* **C-0279-SPA**, Mining Panorama Report 2021, ¶¶ 149, 151-152.

377 Memorial AC, ¶ 90, *citing* PO7, ¶ 149.

443. Further, Claimant argues that Respondent gave its consent to arbitrate the Parties' investment dispute pursuant to ICSID Convention Article 25 and NAFTA Article 1122, and Claimant's consent to arbitrate can be found in its original Notice of Intent to Submit a Claim to Arbitration.[378]

444. Claimant contends that Respondent, for the first time in its Counter-Memorial on Ancillary Claim, raises an entirely new jurisdictional objection by arguing that the Tribunal lacks jurisdiction as Respondent's shutdown of CALICA's remaining operations occurred in May 2022, after NAFTA was superseded by the USMCA.[379] Claimant argues that, contrary to Respondent's argument, Annex 14-C of USMCA makes it clear that NAFTA Chapter 11 protections remain in force for legacy investments, such as Claimant's project in Mexico, for three years, i.e., until 30 June 2023. Claimant contends that, pursuant to principles of treaty interpretation in the VCLT, Respondent's conduct falls within that timeframe.[380]

445. Claimant submits that NAFTA applies to the Parties' dispute regarding Respondent's treatment of Claimant's Project in Mexico, and that treatment includes Respondent's shutdown of La Rosita and Punta Venado.[381] Claimant contends that the facts that form the basis of Claimant's ancillary claim are part of the series of acts in issue in the dispute.[382] Claimant relies on the Tribunal's pronouncements in PO7 to argue that the subject matter of Claimant's claim arose before the USMCA superseded the NAFTA in 2020 and that the subject matter cannot now be artificially split for jurisdictional purposes.[383] Further, Claimant argues that the Tribunal already determined that it had the power to order provisional measures pursuant to NAFTA Article 1134, thereby applying provisions of NAFTA to Respondent's conduct in 2022.[384]

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378 Memorial AC, ¶ 90, *citing* PO7, ¶¶ 150-152.
379 Memorial AC, ¶ 114. *See* Counter-Memorial AC, ¶¶ 407-414.
380 Reply AC, ¶ 114.
381 Reply AC, ¶ 134, *citing* PO1; **C-0010-SPA**, Investment Agreement, pp. 2-3, *citing* PO7, ¶ 137.
382 Reply AC, ¶ 134.
383 Reply AC, ¶ 135, citing PO7, ¶ 135, citing **CL-0208-ENG**, Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), ICJ Judgment, 21 April 2022, ¶¶ 45-47.
384 Reply AC, ¶ 136, *citing* PO7, ¶¶ 98, 160(a).

6. Admissibility and Unclean Hands

446. Claimant submits that Respondent's argument based on the "unclean hands" doctrine does not render Claimant's ancillary claim inadmissible as Respondent is incorrect on the facts and application of the said doctrine.[385]

447. Claimant argues that Respondent's own cited authorities require that for the "unclean hands" doctrine to apply, the investment be obtained or made illegally.[386] However, according to Claimant, Respondent has not alleged or proven that Claimant made its investment illegally.[387] Respondent only alleges that Claimant's quarrying operations at La Rosita violated applicable environmental laws.[388] Similarly, with regard to Respondent's reliance on *Al-Warraq v. Indonesia*, Claimant contends that Respondent has failed to explain how Article 9 of the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference ("**OIC Agreement**"), an explicit provision on which the Tribunal in *Al-Warraq* relied, is connected to the provisions of NAFTA and thereby relevant to this case.[389]

7. Counterclaim

448. Claimant submits that Respondent's request for leave to submit a counterclaim is untimely and should be rejected on this basis alone.[390] Claimant further submits that neither NAFTA nor the ICSID Arbitration Rules vest the Tribunal with jurisdiction over Respondent's counterclaim.[391] Claimant argues that Respondent's counterclaim falls outside the scope of the Parties' consent to arbitrate, does not implicate any cause of action arising under NAFTA, and is not closely related to Claimant's ancillary claim.[392]

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385 Reply AC, ¶ 138.
386 Reply AC, ¶ 139*, citing* **RL-0145-ENG**, *Khan Resources v. Mongolia*, Decision on Jurisdiction, ¶¶ 382, 384*, citing* **RL-003-ENG**, *Rusoro v. Venezuela*, Award, ¶ 492, n. 406.
387 Reply AC, ¶ 139.
388 Reply AC, ¶ 139. *See* Counter-Memorial AC, ¶ 398.
389 Reply AC, ¶ 140, *citing* **CL-0124-ENG**, *Al-Warraq v. Indonesia*, Final Award, ¶¶ 631-648.
390 Reply AC, ¶ 248.
391 Reply AC, ¶ 248.
392 Reply AC, ¶ 257, *citing* **RL-0166-ENG**, *Limited Liability v. Ukraine*, Final Award, ¶ 118; Response on Counterclaim Jurisdiction, ¶ 77.

(a) Timeliness

449. Relying on ICSID Arbitration Rule 40(2), Claimant argues that Respondent is required to present any counterclaim no later than in its counter-memorial.[393] Claimant contends that Respondent's Counter-Memorial on Ancillary Claim only contains a request for leave to file a counterclaim because Respondent let months pass after the Tribunal issued PO7 without seeking leave to file its counterclaim.[394]

450. Claimant contends that at this stage of the proceeding, Respondent has filed two counter-memorials: (i) on 23 November 2020, addressing Claimant's original claims; and (ii) on 12 May 2023, addressing Claimant's ancillary claim.[395] Claimant argues that its original claims were directed to CALICA's La Adelita and El Corchalito lots, as well as port fees associated with Punta Venado.[396] Accordingly, Claimant submits that pursuant to ICSID Arbitration Rule 40(2), Respondent was required to file any counterclaims relating to those claims with its first Counter-Memorial on 23 November 2020. By failing to do so, in Claimant's view, Respondent waived its right to bring a counterclaim regarding alleged breaches of environmental law related to El Corchalito and La Adelita.[397]

451. Further, Claimant contends that Respondent had, or should have had, knowledge of the breaches and losses it alleges with respect to La Rosita well before the date it filed its first counter-memorial in November 2020.[398] Claimant argues that given that Respondent did not file its counterclaim regarding that lot in its counter-memorial of November 2020, Respondent waived its right to bring a counterclaim alleging breaches of domestic environmental obligations in La Rosita.[399]

452. Claimant submits that even if Respondent's allegations of environmental violations and damage had any merit, Respondent's claims are time-barred under NAFTA

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393 Reply AC, ¶ 252, *citing* ICSID Arbitration Rule 40(2); Response on Counterclaim Jurisdiction, ¶ 174.
394 Reply AC, ¶ 252.
395 Response on Counterclaim Jurisdiction, ¶ 175.
396 Response on Counterclaim Jurisdiction, ¶ 175, *citing* PO7, ¶ 71.
397 Response on Counterclaim Jurisdiction, ¶ 175. *See also* Reply AC, ¶¶ 277-278; Response on Counterclaim Jurisdiction, ¶ 162.
398 Response on Counterclaim Jurisdiction, ¶ 176.
399 Response on Counterclaim Jurisdiction, ¶ 176.

Articles 1116(2) and 1117(2) as Respondent had actual or constructive knowledge before 19 December 2019 of the breaches and damage it alleges.[400]

453. Claimant submits, relying on the decision in *Resolute Forest v. Canada*, that Respondent has failed to meet its burden of showing that it first acquired, or should have first acquired, knowledge of the alleged breaches and of the resulting loss or damage underpinning its claim after 19 December 2019, and that the Tribunal has the jurisdiction to hear its counterclaim.[401]

(b) NAFTA Article 1121

454. Claimant contends that Respondent has failed to comply with the waiver requirement in NAFTA Article 1121(1)(b) and (2)(b), which defeats the Tribunal's jurisdiction over the counterclaim.[402] In Claimant's view, compliance with this requirement entails: (i) submission by Respondent of a waiver declaring its intent to adhere to the conditions of NAFTA Article 1121; and (ii) discontinuing or refraining from pursuing any relevant domestic dispute settlement proceedings relating to Claimant's measures that Respondent alleges were in breach of NAFTA.[403]

455. Claimant submits that the compensatory damages Respondent imposed on CALICA regarding El Corchalito are duplicative of Respondent's counterclaim.[404] For Claimant, Respondent admits this when describing Claimant's alleged breaches in El Corchalito as mirroring the purported violations identified in PROFEPA's 2020 Resolution.[405]

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400 Response on Counterclaim Jurisdiction, ¶¶ 120, 127; *see also* Response on Counterclaim Jurisdiction, ¶ 119.

401 Response on Counterclaim Jurisdiction, ¶¶ 125-126, *citing* **CL-0246-ENG**, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 ("*Resolute Forest v. Canada*, Decision on Jurisdiction"), ¶ 85.

402 Response on Counterclaim Jurisdiction, ¶¶ 179, 181, 183, *citing* **C-0009-ENG**, NAFTA Art. 1121(1)(b) and 1121(2)(b), *citing* **CL-0252-ENG**, *Waste Management, Inc. v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 ("*Waste Management v. Mexico (I)*, Award"), § IV. *See also* Response on Counterclaim Jurisdiction, ¶ 180.

403 Response on Counterclaim Jurisdiction, ¶ 180, *citing* **CL-0252-ENG**, *Waste Management v. Mexico (I)*, Award, ¶ 24.

404 Response on Counterclaim Jurisdiction, ¶ 181, *citing* **R-0076-ESP**, Specialized Chamber in Environmental and Regulatory Matters of the Federal Administrative Court, Annulment Proceeding No. 73/21-EAR-01-6, Initial Filing, 8 January 2021 ("Annulment Proceeding No. 73/21-EAR-01-6, Initial Filing"). *See* Counterclaim Memorial on Jurisdiction, ¶ 1.

405 Response on Counterclaim Jurisdiction, ¶ 181, *citing* **R-0005-ESP**, October 2020 Resolution, pp. 200-202. *See* Counterclaim Memorial on Jurisdiction, ¶ 40.

456. [redacted]

457. Claimant argues that Respondent has also taken the initial steps to launch administrative proceedings of the same nature against CALICA regarding La Rosita.[408] According to Claimant, PROFEPA shut down La Rosita in May 2022, and while PROFEPA has unreasonably and inexplicably delayed issuing an *Acuerdo de Emplazamiento* to formally charge CALICA with infractions, a domestic proceeding similar to that regarding El Corchalito will follow its eventual issuance, requiring CALICA to pay compensation for the alleged environmental damage Respondent claims CALICA has caused.[409]

(c) Scope of Consent

458. Claimant submits that, contrary to Respondent's contention, pursuant to ICSID Convention Article 46 and ICSID Arbitration Rule 40(1), absent consent in a treaty or a separate agreement between parties to arbitrate counterclaims, a tribunal would lack jurisdiction to consider a respondent's counterclaim.[410]

459. Claimant argues that for this Tribunal to have jurisdiction over Respondent's counterclaim, it has to fall within the scope of the Parties' arbitration agreement in NAFTA or some other agreement between them.[411] For Claimant, the consent to arbitrate

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406 Response on Counterclaim Jurisdiction, ¶ 181, *citing* **R-0005-ESP**, October 2020 Resolution, p. 219.

407 Response on Counterclaim Jurisdiction, ¶ 181, *citing* **R-0076-ESP**, Annulment Proceeding No. 73/21-EAR-01-6, Initial Filing, 8 January 2021.

408 Response on Counterclaim Jurisdiction, ¶ 182.

409 Response on Counterclaim Jurisdiction, ¶ 182, *citing, inter alia,* **C-0171-SPA**, PROFEPA Environmental Report, 2-5 May 2022, p. 72; [redacted] Fourth Report, ¶¶ 107-118; **C-0114-SPA**, First PROFEPA Inspection Order, 12 May 2017, p. 2.

410 Reply AC, ¶ 258, *citing* ICSID Convention, Art. 46, also citing ICSID Arbitration Rule 40(1); **CL-0197-ENG**, *Iberdrola v. Guatemala (II),* Final Award, ¶ 384; Response on Counterclaim Jurisdiction, ¶ 85. *See* Counterclaim Memorial on Jurisdiction, ¶¶ 177-178.

411 Reply AC, ¶ 259.

must be unequivocal, clear, and unambiguous.[412] Claimant submits that the Parties have not agreed to arbitrate Respondent's counterclaim, and Respondent's contention that the Tribunal nevertheless has jurisdiction pursuant to NAFTA Article 1137(3) is meritless.[413]

460. Claimant denies that the ICSID Convention and ICSID Arbitration Rules constitute expressions of consent to arbitrate Respondent's counterclaim.[414] Claimant argues that ICSID Convention Article 46 and ICSID Arbitration Rule 40(1) require that counterclaims fall within the scope of consent of the Parties.[415] In its view, there was no intention under ICSID Convention Article 46 to extend the jurisdiction of the arbitral tribunal.[416] Claimant submits that numerous tribunals have confirmed that the existence and scope of parties' consent to arbitrate is dictated not by the ICSID Convention, but by the instrument of consent, which is usually the investment treaty under which the claim arises.[417]

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412 Response on Counterclaim Jurisdiction, ¶¶ 79, 94, *citing* **CL-0032-ENG**, *ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 ("*ICS v. Argentina*, Award on Jurisdiction"), ¶ 281. *See also* Response on Counterclaim Jurisdiction, ¶¶ 98-99, *citing* **CL-0241-ENG**, Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, ("Algiers Accord Claims Settlement Declaration"), Iran-U.S. C.T.R. 9, 19 January 1981), Art. II(1), *citing* **CL-0242-ENG**, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Submission of the United Mexican States, 3 April 2000 ("*Pope & Talbot v. Canada*, Mexico's Submission"), ¶ 9; Response on Counterclaim Jurisdiction, ¶ 83, *citing* **CL-0234-ENG**, *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/01, Decision on the Preliminary Question, 17 July 2003, ¶ 64, *citing* **CL-0235-ENG**, *Canfor Corporation v. United States of America and Terminal Forest Products Ltd. v. United States of America* (Consolidated), UNCITRAL, Decision on Preliminary Question, 6 June 2006, ¶ 186. *See also* Response on Counterclaim Jurisdiction, ¶ 99, *citing* **RL-0212-ENG**, *Iran v. United States*, Interlocutory Award (Counterclaim), ¶ 43.

413 Reply AC, ¶ 259.

414 Response on Counterclaim Jurisdiction, ¶ 86.

415 Response on Counterclaim Jurisdiction, ¶ 86, *citing* **C-0129-ENG**, ICSID Convention, Art. 46, also citing ICSID Arbitration Rule 40(1).

416 Response on Counterclaim Jurisdiction, ¶ 86, *citing* **CL-0236-ENG**, Summary Record of Proceedings, Geneva Consultative Meeting of Legal Experts, 17-22 February 1964 in History of the ICSID Convention, Vol. 2 (ICSID 1970) pp. 367, 422.

417 Response on Counterclaim Jurisdiction, ¶¶ 87-88, *citing* **RL-0171-ENG**, *Metal Tech v. Uzbekistan*, Award, ¶ 409, *citing* **CL-0223-ENG**, *Roussalis v. Romania*, Award, ¶¶ 775, 866; Reply AC, ¶ 260, *citing*, *inter alia*, **CL-0224-ENG**, *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 333. *See also* Reply AC, ¶ 262, *citing* **CL-0225-ENG**, *Karkey Karadeniz Elektrik Uretim AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 ("*Karkey v. Pakistan*, Award"), ¶¶ 1012-1013; Response on Counterclaim Jurisdiction, ¶ 116.

461. Claimant denies that NAFTA Article 1137(3) contains the Parties' consent to arbitrate Respondent's counterclaim.[418] Claimant contends that Respondent's argument distorts the plain meaning of NAFTA Article 1137(3) and ignores the requirement that consent to arbitrate must be clear, unambiguous, and not inferred.[419] In its view, NAFTA Article 1137(3) is a substantive provision, as opposed to a procedural one,[420] and reflects the incorporation into NAFTA of the "collateral source rule", whereby "any recovery by a victim from a third party is not applied to reduce the liability of the wrongdoer", thereby permitting "an investor to continue to pursue a claim notwithstanding the receipt of compensation through insurance".[421]

462. In Claimant's view, even a cursory review of those provisions in NAFTA shows that only investors with covered investments may bring disputes to arbitration under the treaty.[422]

463. Claimant contends that NAFTA Article 1122(2) also confirms that the requirement "for written consent of the parties" under the ICSID Convention is satisfied by the consent found in NAFTA Article 1122(1). Claimant submits that NAFTA Article 1122, which specifically addresses "Consent to Arbitration", limits submission of a claim to a "disputing investor" only.[423] Accordingly, contrary to Respondent's contention, Claimant's Notice of Intent does not contain the consent to arbitrate counterclaims.[424]

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418 Response on Counterclaim Jurisdiction, ¶ 91; *see also* Response on Counterclaim Jurisdiction, ¶¶ 93, 102, 117*, citing* **CL-0240-ENG**, Hege Elizabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay between national and international law*, 146 (Oxford University Press 2013), *citing* **CL-0243-ENG**, *The Lopez-Goyne Family Trust and Ohters v. The Republic of Nicaragua*, ICSID Case No ARB/17/44, Award, 1 March 2023 ("*Lopez-Goyne v. Nicaragua*, Award"), ¶ 587.

419 Response on Counterclaim Jurisdiction, ¶ 92*, citing* **CL-0228-ENG**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015 ("*Gavazzi v. Romania*, Decision on Jurisdiction, Admissibility and Liability"), ¶ 154; *see* Counterclaim Memorial on Jurisdiction, ¶ 151.

420 Response on Counterclaim Jurisdiction, ¶ 106.

421 Response on Counterclaim Jurisdiction, ¶ 93*, citing* **CL-0238-ENG**, Kenneth J. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), pp. 583, 659. *See also* Reply AC, ¶ 259*, citing* **C-0009-ENG**, NAFTA, Art. 1137(3).

422 Reply AC, ¶ 260.

423 Reply AC, ¶ 260*, citing* **C-0009-ENG**, NAFTA, Art. 1112; Response on Counterclaim Jurisdiction, ¶ 89.

424 Response on Counterclaim Jurisdiction, ¶ 111*, citing* **C-0007-SPA**, Notice of Intent, § 5; *see* Counterclaim Memorial on Jurisdiction, ¶ 171. *See also* Reply AC, ¶ 263.

464. In Claimant's view, NAFTA Articles 1116, 1117, 1120 and 1121 confirm that only investors may file claims, by referring only to claims by an investor.[425] Claimant submits that the text also clarifies that relief in the form of monetary damages or restitution is appropriate only where a NAFTA Contracting Party is found to have breached the treaty, and may only be imposed on a NAFTA Contracting Party, and not a disputing investor.[426] Claimant argues that Respondent's interpretation of NAFTA Articles 1116 and 1117 disregards the definitions of "disputing investor" and "disputing Party", as well as the distinction between the two under NAFTA.[427] Claimant contends that Respondent ignores the explicit roles assigned to each as set forth in NAFTA Articles 1116, 1117, 1119 through 1122, 1125, and 1135.[428]

465. Claimant contends that numerous tribunals have dismissed respondent counterclaims asserted under similarly worded investment treaties to NAFTA.[429] Furthermore, Claimant argues that there is not a single decision by a NAFTA tribunal upholding jurisdiction to hear a counterclaim.[430] Claimant contends that the near unanimous international investment law jurisprudence holds that where treaties specify that investment arbitration claims are to be filed by "investors", there is no consent and thus no jurisdiction over a respondent's counterclaim.[431]

466. Contrary to Respondent's contention, Claimant argues that consent may not be "inferred" from Claimant's initiation of this arbitration.[432] Claimant relies on the decision in *ICS*

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425 Reply AC, ¶ 260, *citing* **C-0009-ENG**, NAFTA, Art. 1134. *See also* Response on Counterclaim Jurisdiction, ¶¶ 104, 107, *citing* **CL-0240-ENG**, Hege Elizabeth Kjos, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW 146 (Oxford University Press 2013); **CL-0245-SPA**, *Alicia Grace and Others v. United Mexican States*, ICSID Case No. UNCT/18/4, Statement of Defense, 1 June 2020, ¶ 591. *See also* Response on Counterclaim Jurisdiction, ¶ 108; Reply AC, ¶¶ 260-261, *citing* **RL-003-ENG**, *Rusoro v. Venezuela*, Award, ¶ 606.

426 Response on Counterclaim Jurisdiction, ¶ 109.

427 Response on Counterclaim Jurisdiction, ¶ 110; *see* Counterclaim Memorial on Jurisdiction, ¶ 172.

428 Response on Counterclaim Jurisdiction, ¶ 110. While Claimant states "as set forth in Articles 1116, 1117, 1119 through 1112" in its submission, the Tribunal understands Claimant to be referring to NAFTA Articles 1119 through 1122.

429 Response on Counterclaim Jurisdiction, ¶ 113. *See also* Response on Counterclaim Jurisdiction, ¶ 104.

430 Response on Counterclaim Jurisdiction, ¶ 113; *see* Counterclaim Memorial on Jurisdiction, ¶ 167.

431 Response on Counterclaim Jurisdiction, ¶ 114, *citing* **CL-0197-ENG**, *Iberdrola v. Guatemala (II)*, Final Award, ¶ 391.

432 Response on Counterclaim Jurisdiction, ¶ 80; *see* Counterclaim Memorial on Jurisdiction, ¶ 187. *See also* Response on Counterclaim Jurisdiction ¶ 82, *citing* **CL-0233-ENG**, *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Mexico's Post-Hearing Brief, 17 August 2018 ("*B-Mex v. Mexico*, Mexico's Post-Hearing Brief"), ¶ 21.

Inspection v. Argentina in this respect, as well as the fact that Respondent has taken a similar position in other NAFTA arbitrations.[433]

467. For Claimant, Respondent's interpretation would render redundant the text that Respondent and Canada have included in subsequent treaties, such as Article 9.19(2) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**"), to affirmatively authorize State parties to bring counterclaims against investors.[434]

468. Claimant contends that Respondent's reliance on *Aven v. Costa Rica* is misplaced, as Respondent ignores several distinctions between the text of CAFTA-DR and NAFTA that renders the reasoning in *Aven v. Costa Rica* inapplicable in this arbitration.[435] While several key procedural provisions in CAFTA-DR could conceivably be read neutrally to apply to State parties and investors alike, Claimant submits that NAFTA Articles 1116, 1117, 1118 and 1137 make reference to "Parties" (i.e., the NAFTA Contracting Parties) and "investors", as opposed to the "claimant" and "respondent" found in CAFTA-DR.[436]

469. According to Claimant, even in cases where the applicable treaty text references counterclaims, tribunals have concluded that they lack jurisdiction over those claims.[437]

(d) The Nature of the Counterclaim

470. Claimant submits that the nature of Respondent's counterclaim does not implicate any investor obligations under NAFTA Chapter 11.[438] Contrary to Respondent's contention, Claimant argues that NAFTA Article 1114 does not imply an obligation on the investor

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433 Response on Counterclaim Jurisdiction, ¶¶ 80-82*, citing* **CL-0032-ENG**, *ICS v. Argentina*, Award on Jurisdiction, ¶ 280; **CL-0233-ENG**, *B-Mex v. Mexico*, Mexico's Post-Hearing Brief, ¶ 2(ii).

434 Response on Counterclaim Jurisdiction, ¶¶ 95-96.

435 Response on Counterclaim Jurisdiction, ¶ 100.

436 Response on Counterclaim Jurisdiction, ¶ 101*, citing* **CL-0222-ENG**, *Aven v. Costa Rica*, Final Award, ¶ 740.

437 Response on Counterclaim Jurisdiction, ¶ 117*, citing* **CL-0243-ENG**, *Lopez Goyne v. Nicaragu*a, Award, ¶ 605; **CL-0222-ENG**, *Aven v. Costa Rica*, Final Award, ¶ 743.

438 Reply AC, ¶ 264; Response on Counterclaim Jurisdiction, ¶ 137.

to comply with Respondent's environmental laws and this cannot be a basis for a counterclaim.[439]

471. For Claimant, NAFTA Article 1114(1) clarifies obligations imposed on NAFTA Contracting Parties elsewhere under Chapter 11 of NAFTA and confirms that the NAFTA Contracting Parties may enact and enforce environmental measures, provided such measures are "otherwise consistent with [NAFTA Chapter 11]".[440] In its view, NAFTA Article 1114(2) regulates the conduct of NAFTA Contracting Parties by discouraging derogation or waiving of certain domestic measures, and providing for State-to-State consultations between NAFTA Contracting Parties where such conduct may occur.[441] Claimant submits that neither paragraph of NAFTA Article 1114 mentions investor obligations or can reasonably be read to generate any treaty obligations to which investors are bound.[442]

472. Claimant relies on other NAFTA provisions to argue that they provide context for NAFTA Article 1114. In this respect, Claimant relies on NAFTA Article 1101 to argue that the scope of obligations set forth in NAFTA Chapter 11 applies only to "measures adopted or maintained by a Party" and not to investor conduct.[443] Further, Claimant contends that the absence of any reference to investor compliance with environmental measures in NAFTA Article 102 underscores that Respondent's argument lacks basis.[444]

473. Claimant relies on the decisions in *Lopez Goyne v. Nicaragua* and *Gavazzi v. Romania* to argue that absent explicit language, investment treaties do not impose any affirmative obligations on investors, nor do they allow respondent States to bring counterclaims on the basis of alleged violations of domestic law.[445]

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439 Reply AC, ¶ 264; *see* Counter-Memorial AC, ¶ 512; Response on Counterclaim Jurisdiction, ¶¶ 138-139, *citing* **C-0009-ENG**, NAFTA, Art. 1114. *See also* Reply AC, ¶¶ 266-267, *citing* **C-0009-ENG**, NAFTA, Art. 1114(1).

440 Response on Counterclaim Jurisdiction, ¶ 140, *citing* **C-0009-ENG**, NAFTA, Art. 1114; Reply AC, ¶ 267.

441 Response on Counterclaim Jurisdiction, ¶ 140; Reply AC, ¶ 267.

442 Response on Counterclaim Jurisdiction, ¶ 140.

443 Response on Counterclaim Jurisdiction, ¶ 141, *citing* **C-0009-ENG**, NAFTA, Art. 1101.

444 Response on Counterclaim Jurisdiction, ¶ 141, *citing* **C-0009-ENG**, NAFTA, Art. 102(2).

445 Response on Counterclaim Jurisdiction, ¶¶ 142-143, *citing* **CL-0243-ENG**, *Lopez Goyne v. Nicaragu*a, Award, ¶ 601; **CL-0228-ENG**, *Gavazzi v. Romania*, Decision on Jurisdiction, Admissibility and Liability, ¶¶ 154, 156, 162.

474. Claimant submits that the arbitral decisions Respondent cites in this respect do not support its position.[446] Claimant argues that the tribunal in *Aven v. Costa Rica* held that, along with procedural shortcomings, the provision in CAFTA-DR, which is similar to NAFTA Article 1114(1), did not give rise to any corresponding obligation for investors that would support the filing of a counterclaim by a respondent under the treaty.[447]

475. Claimant argues that the tribunal in *Urbaser v. Argentina* explicitly rejected the argument Respondent makes in this arbitration, holding that reliance on mere reference to domestic measures in the text of treaty does not suffice to establish violation of domestic laws.[448] In its view, the tribunal in that case held that even if counterclaims were theoretically possible under an investment treaty, under the treaty in question, there were no applicable obligations which claimant could have breached.[449]

476. Claimant contends that Respondent has expressly disclaimed reliance on NAFTA Article 1114 in this case.[450] Claimant argues that to the extent Respondent's proposed counterclaim is based exclusively on that allegedly waived provision, Respondent's request to file the counterclaim should be rejected.[451] In its view, Respondent cannot reverse its position now, especially when the alleged violations and harms arising from quarrying in Claimant's lots were well known, or should have been well known, to Respondent at the time of the waiver.[452] Claimant argues that allowing Respondent to backpedal its waiver of NAFTA Article 1114 at this late stage would cause undue prejudice to Claimant, given that Respondent had the opportunity to invoke that provision for alleged environmental violations and harm at a prior stage of this arbitration.[453]

477. With regard to Respondent's reliance on the decision in *Burlington v. Ecuador*, Claimant contends that in that case both parties had agreed that the tribunal had jurisdiction, which

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446 Reply AC, ¶ 268; *see* Counter-Memorial AC, ¶ 513. *See also* Response on Counterclaim Jurisdiction, ¶¶ 144-145.

447 Reply AC, ¶ 268; Response on Counterclaim Jurisdiction, ¶ 146*, citing* **CL-0222-ENG**, *Aven v. Costa Rica*, Final Award, ¶¶ 734-735, 742-743.

448 Response on Counterclaim Jurisdiction, ¶ 144*, citing* **RL-0174-ESP**, *Urbaser v. Argentina*, Award, ¶¶ 1185, 1206.

449 Reply AC, ¶ 269*, citing* **RL-0174-ESP**, *Urbaser v. Argentina*, Award.

450 Reply AC, ¶ 265; *see* Reply AC, § III.C; Response on Counterclaim Jurisdiction, ¶¶ 138, 148*, citing* 2021 Hearing Transcript (English), Day 1, 239:12-241:4.

451 Reply AC, ¶ 265; Response on Counterclaim Jurisdiction, ¶ 150.

452 Response on Counterclaim Jurisdiction, ¶ 149.

453 Response on Counterclaim Jurisdiction, ¶ 150.

is not the case in this arbitration.[454] Claimant argues that, contrary to Respondent's assertion, Claimant's Notice of Intent was submitted in accordance with NAFTA Article 1121, which contemplates the conditions under which a disputing investor may submit a claim, as opposed to Claimant's consent to arbitrate counterclaims by Respondent.[455] In Claimant's view, Respondent's reliance on *Perenco v. Ecuador* is unavailing as in that case, the legal relationship giving rise to the counterclaim was a contract as opposed to a treaty.[456]

478. Claimant relies on the decisions in *Gavazzi v. Romania* and *Anglo-American v. Venezuela* in support of its position that there are no obligations that bind investors under NAFTA Chapter 11 that would sustain Respondent's counterclaim.[457]

479. Claimant submits that with regard to Respondent's reliance on environmental treaties, Respondent's arguments find no basis in the text of NAFTA and are wholly contradicted by both prior NAFTA arbitral decisions and statements made by NAFTA Contracting Parties.[458] Claimant argues that Respondent's position is in conflict with the scope of claims that may be submitted under Section B of NAFTA Chapter 11, specifically pursuant to NAFTA Articles 1116(1) and 1117(1) of NAFTA, which provide that claims submitted under NAFTA Chapter 11 may not extend to alleged breaches of other NAFTA provisions or obligations arising under other international treaties that do not fall within the scope of Articles 1116(1) and 1117(1).[459] Claimant contends that NAFTA tribunals, like *Methanex v. United States of America* and *Bayview Irrigation District v. United Mexican States*, have rejected attempts to broaden the scope of claims to cover breaches

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454 Reply AC, ¶ 270; *see* Counter-Memorial AC, ¶ 515*, citing* **CL-0222-ENG**, *Aven v. Costa Rica*, Final Award, ¶ 736.

455 Reply AC, ¶ 271*, citing* **C-0007-SPA**, Notice of Intent, § 5.

456 Reply AC, ¶ 272; *see* Counter-Memorial AC, ¶ 515, n. 450*, citing* **CL-0227-ENG**, *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015, ¶¶ 4, 6, 36, n. 2.

457 Reply AC, ¶¶ 273-274*, citing* **CL-0228-ENG**, *Gavazzi v. Romania*, Decision on Jurisdiction, Admissibility and Liability, ¶ 154*, citing* **CL-0226-ENG**, *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019, ¶¶ 529-530.

458 Response on Counterclaim Jurisdiction, ¶ 151; *see* Counterclaim Memorial on Jurisdiction, ¶¶ 212, 219-220.

459 Response on Counterclaim Jurisdiction, ¶¶ 152-153*, citing* **C-0009-ENG**, NAFTA, Arts. 1116(1) and 1117(1).

of other treaties.[460] Claimant submits that all three NAFTA Contracting Parties have expressed the view that NAFTA does not allow claimants to bring claims alleging breaches of other treaties: (i) Mexico in *Bayview v. Mexico*; (ii) United States in *Methanex v. United States of America*; and (iii) Canada in *Detroit International Bridge Company v. Canada*.[461]

480. Claimant contends that, contrary to Respondent's argument, NAFTA Article 104 does not impose environmental obligations on investors that are susceptible of being enforced via NAFTA counterclaims by respondent States.[462] Claimant argues that the text of that provision makes it clear that the NAFTA Contracting Parties, and not investors, have the "choice among equally effective and reasonably available means of complying with such environmental obligations."[463] Claimant argues that this is further confirmed by the explicit application of NAFTA Article 104 only to "specific trade obligations", which are undertaken by and applied only among State parties.[464]

(e) Connection Between the Claim and the Counterclaim

481. Claimant submits that, contrary to Respondent's contention, the appropriate test is not whether there is a close connection between Respondent's counterclaim and Claimant's investment as a whole.[465] Claimant argues that the appropriate test is whether Respondent's counterclaim possesses a sufficiently close connection to the "primary claim" before this Tribunal.[466] Claimant contends that the primary claim for the purposes

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460 Response on Counterclaim Jurisdiction, ¶ 154, *citing* **RL-020-ENG**, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, 3 August 2025 ("*Methanex v. United States*, Final Award"), ¶ 5; **CL-0248-ENG**, *Bayview Irrigation District and others v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, ¶ 121.

461 Response on Counterclaim Jurisdiction, ¶ 157, *citing* **CL-0247-ENG**, *Bayview Irrigation District and others v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Mexico's Memorial on Jurisdiction, 19 April 2006, ¶ 2(b); **CL-0250-ENG**, *Methanex Corporation v. United States of America*, UNCITRAL, Reply Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment, 12 April 2001, pp. 32-33, *citing* **CL-0251-ENG**, *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Government of Canada's Memorial on Jurisdiction and Admissibility, 15 June 2013, ¶ 288.

462 Response on Counterclaim Jurisdiction, ¶ 155, *citing* **C-0009-ENG**, NAFTA, Art. 104(1); *see* Counterclaim Memorial on Jurisdiction, ¶ 218.

463 Response on Counterclaim Jurisdiction, ¶ 156, *citing* **C-0009-ENG**, NAFTA, Art. 104(1).

464 Response on Counterclaim Jurisdiction, ¶ 156, *citing* **C-0009-ENG**, NAFTA, Art 104(1).

465 Reply AC, ¶ 276.

466 Reply AC, ¶ 276; Response on Counterclaim Jurisdiction, ¶ 159, *citing* **RL-0176-ENG**, *Saluka Investments B.V. v. The Czech Republic*, PCA Case No. 2001-04, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004 ("*Saluka v. Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim"), ¶¶ 61, 63.

of this assessment is Claimant's ancillary claim, which relates to Respondent's shutdown of CALICA's remaining quarrying and export operations in La Rosita and Punta Venado.[467] Claimant contends that Respondent's counterclaim is much broader as it encompasses purported environmental damage from quarrying in El Corchalito and La Adelita.[468] Accordingly, Claimant argues that Respondent misrepresents the scope of the "primary claim" to relate more broadly to the entirety of Claimant's investment and should be rejected.[469]

482. Claimant submits that even if the scope of Claimant's "primary claim" were to be broadened, Respondent's counterclaim would still lack sufficient factual connection to Claimant's claims.[470] Claimant contends that its claims in this arbitration relate to breaches by Respondent that occurred in 2015 and later while the events underpinning Respondent's counterclaim occurred as early as the 1980s and span approximately 30 years.[471] Accordingly, Claimant argues that Respondent's counterclaim covers a much broader timeframe than any of its claims, thereby lacking the sufficiently close connection necessary to establish jurisdiction in this case.[472]

483. Claimant relies on the decisions in *Oxus Gold v. Uzbekistan*, *Saluka v. Czech Republic*, and *Paushok v. Mongolia*, to argue that the cause of action for the primary claim and the counterclaim must arise from the same legal instrument. Given that Respondent's counterclaim arises from domestic law while Claimant's claim arises from NAFTA, in its view there is a lack of legal connection between Claimant's claim and Respondent's counterclaim.[473]

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467 Reply AC, ¶ 276; Response on Counterclaim Jurisdiction, ¶ 161; *see* Memorial AC, ¶ 3.

468 Reply AC, ¶ 276; Response on Counterclaim Jurisdiction, ¶ 161; *see* Counter-Memorial AC, ¶ 511.

469 Reply AC, ¶ 276.

470 Response on Counterclaim Jurisdiction, ¶ 163.

471 Response on Counterclaim Jurisdiction, ¶ 163; *see* Reply, ¶ 91; *see also* Memorial AC, ¶¶ 10-89; *see also* Counterclaim Memorial on Jurisdiction, ¶ 33.

472 Response on Counterclaim Jurisdiction, ¶ 163.

473 Response on Counterclaim Jurisdiction, ¶¶ 164-168*, citing* **RL-0208-ENG**, *Oxus Gold v. Uzbekistan*, Final Award, ¶ 954; **RL-0176-ENG**, *Saluka v. Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim, ¶ 79; **RL-0177-ENG**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, ¶¶ 694-695*, citing, inter alia,* **CL-0253-ENG**, *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction in Resubmitted Proceeding, 10 May 1988, ¶¶ 125-127.

(f) Due Process and Procedural Efficiency

484. Claimant argues that Respondent's counterclaim is duplicative of domestic proceedings Respondent has lodged and encouraged against CALICA, which predate the submission of Respondent's counterclaim (*see* ¶ 455 above).[474] On this basis, Claimant submits that allowing Respondent's counterclaim will undermine order and procedural efficiency in this arbitration by triggering the very "duplication and inefficiency" and increased "transaction costs" against which Respondent warns.[475]

485. Claimant relies on the decisions in *Bureau Veritas v. Paraguay* and *Euram v. Slovakia* to argue that a finding that Respondent has waived its right to file a counterclaim would be consistent with fundamental principles of due process and procedural economy.[476] Claimant submits that Respondent had ample opportunity, in the previous phase of this arbitration, to submit counterclaims, but it waited nearly 18 months after the post-hearing submissions in the prior phase to submit its counterclaim.[477] Claimant argues that it would be contrary to due process and fairness, and be severely prejudicial to Claimant, if the counterclaim were to be entertained now.[478]

486. Claimant further contends that Respondent's request for leave to file a counterclaim also disregards the established procedural calendar and risks upending it to Claimant's detriment.[479] Claimant submits that all of these effects on the procedural calendar could have been avoided had Respondent sought leave to submit its counterclaim in a timely

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474 Response on Counterclaim Jurisdiction, ¶ 170*, citing* **C-0117-SPA**, Shutdown Order, pp. 291-294, 297-301; **R-0005-ESP**, October 2020 Resolution, pp. 163-164, 201-206,244-228; **C-0171-SPA**, PROFEPA Environmental Report, 2-5 May 2022, pp. 68-72; **C-0172-SPA**, PROFEPA Forestry Report, 2-5 May 2022, pp. 49-62; *see* Reply AC, ¶ 32.

475 Response on Counterclaim Jurisdiction, ¶ 171; *see* Counterclaim Memorial on Jurisdiction, ¶ 209.

476 Response on Counterclaim Jurisdiction, ¶ 177, *citing* **CL-0229-ENG**, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009 ("*Bureau Veritas v. Paraguay,* Decision on Objections to Jurisdiction"), ¶ 52; **CL-0221-ENG**, *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17, Second Award on Jurisdiction, 4 June 2014 ("*European American Investment Bank v. Slovakia*, Second Award on Jurisdiction"), ¶ 118. *See also* Reply AC, ¶¶ 277-278*, citing* **CL-0229-ENG**, *Bureau Veritas v. Paraguay,* Decision on Objections to Jurisdiction, ¶ 52; **CL-0221-ENG**, *European American Investment Bank v. Slovakia*, Second Award on Jurisdiction, ¶ 118; Response on Counterclaim Jurisdiction, ¶ 162.

477 Response on Counterclaim Jurisdiction, ¶ 178.

478 Response on Counterclaim Jurisdiction, ¶ 178. *See also* Reply AC, ¶ 279.

479 Reply AC, ¶ 254.

manner, and Claimant should not be disadvantaged with unnecessary and avoidable procedural delays because of Respondent's failure.[480]

487. As well as the additional submissions required, Claimant takes issue with the resulting need to lengthen what was envisioned to be a two-to-three-day hearing and having the award delayed further.[481]

488. Claimant further argues that Respondent's effort to pursue a counterclaim in this arbitration is another attempt at giving effect to President López Obrador's threats and politically motivated attacks on CALICA.[482]

D. NDP SUBMISSIONS

489. In this Section, the Tribunal summarizes the US Second NDP Submission in relation to the Tribunal's jurisdiction over the ancillary claim, as well as the Parties' respective comments thereon.

1. US Second NDP Submission

490. In the US Second NDP Submission, the United States provides its interpretation of USMCA Annex 14-C. The US Second NDP appends: (i) Appendix 1: the United States of America's Memorial on its Preliminary Objection, *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America,* ICSID Case No. ARB/21/63 (12 June 2023) (ii) Appendix 2: Expert Report of Professor Richard Gardiner, *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America,* ICSID Case No. ARB/21/63 (9 June 2023); and (ii) Appendix 3: Expert Report of Professor Hervé Ascensio, *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America,* ICSID Case No. ARB/21/63 (8 June 2023). The Tribunal understands Appendix 1 to elaborate upon the United States' position with respect to matters addressed in the US Second NDP Submission, and has included references to that position in the following summary. The Tribunal understands Appendix 2 and Appendix 3 to be provided in support of the US Second NDP Submission.

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480 Reply AC, ¶ 256.
481 Reply AC, ¶ 255.
482 Reply AC, ¶ 280.

491. The United States submits that Annex 14-C of the USMCA is a mere agreement to arbitration that does not include any extension of substantive obligations.[483] According to the United States, Annex 14-C only refers to Section B of NAFTA Chapter 11 and not to Section A of that same chapter. Whilst Section B contains provisions that relate to the consent to arbitration, Section A includes substantive obligations, which pursuant to the United States' interpretation are not encompassed by Annex 14-C.[484]

492. In line with the above, the United States contends that although the USMCA contains some general transitional provisions, the extension of the NAFTA's substantive provisions on investment protection whose breach could lead to arbitration does not figure among these general provisions.[485] In its view, USMCA Article 34.1, the transitional provision from NAFTA, only provides for a continuation of NAFTA Chapter 19 after the NAFTA's termination, and not NAFTA Chapter 11.[486] Given that there are no further indications that the USMCA Parties intended to keep a substantial part of NAFTA in force after its termination (apart from very specific provisions on legacy investment claims[487]), and there is no mention of "transition" in Annex 14-C in general, the United States submits that Annex 14-C does not install a transitional period.[488]

493. Regarding the temporal element of the breach, the United States relies on VCLT Article 70, pointing out that the obligations contained in a treaty end with the termination of the latter.[489] According to the United States, only breaches that have occurred before the termination of the NAFTA are admissible[490], as the breach must refer to a legal rule in force[491]. As such, the United States submits that the consent to arbitration expressed in Annex 14-C of the USMCA only pertains to acts that occurred before the NAFTA's termination on 1 July 2020.[492]

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483 US Second NDP Submission, Appendix 1, ¶¶ 13, 21, 24.
484 US Second NDP Submission, Appendix 1, ¶¶ 20, 67.
485 US Second NDP Submission, Appendix 1, ¶ 59, *citing* Appendix 2, ¶ C.6; Appendix 3, ¶ 19.
486 US Second NDP Submission, Appendix 1, ¶ 59.
487 US Second NDP Submission, Appendix 1, ¶ 17, *citing* Appendix 3, ¶ 32; *see also* Appendix 1, ¶¶ 20, 59.
488 US Second NDP Submission, Appendix 1, ¶ 17, *citing* Appendix 3, ¶ 32; *see also* Appendix 1, ¶¶ 20, 59.
489 US Second NDP Submission, Appendix 1, ¶ 12.
490 US Second NDP Submission, Appendix 1 ¶ 6, *citing* Appendix 2, ¶ F.2; Appendix 3, ¶¶ 8, 33.
491 US Second NDP Submission, Appendix 1, ¶ 31, *citing* Appendix 2, ¶ E.3; Appendix 3, ¶ 28.
492 US Second NDP Submission, Appendix 1, ¶ 13, *citing* Appendix 2, ¶ F.2; Appendix 3, ¶ 8.

494. Lastly, the United States sets out its interpretation on the context of the NAFTA and the USMCA by pointing out that both the USMCA Preamble and the Protocol Replacing NAFTA emphasize NAFTA's termination and its replacement by the USMCA.[493] According to the United States, the USMCA replaces the NAFTA with the intention of entirely superseding it, which is not accomplished when admitting a three-year overlap of both treaties creating confusion due to the formal and substantive differences between NAFTA and USMCA.[494]

2. Respondent's Comments on US Second NDP Submission

495. On 25 September 2023, Respondent filed its observations on the US Second NDP Submission ("**Respondent's NDP Observations**"). Respondent shares the United States' position on the interpretation of USMCA Annex 14-C, which in its view did not extend the substantive protections of NAFTA.[495]

496. According to Respondent, the NAFTA Contracting Parties are in agreement that NAFTA Article 1114 provides forceful protection of States' right to adopt, maintain or enforce measures to ensure that investment is undertaken in a manner sensitive to environmental concerns.[496]

497. Respondent likewise agrees with the United States that a claimant may not be awarded reparation for losses to the extent of its contribution to such losses.[497] In its view, NAFTA cannot protect investments that have been made contrary to the principle of good faith or where Claimant has contributed to the harm.[498]

3. Claimant's Comments on US Second NDP Submission

498. On 25 September 2023, Claimant filed its observations on the US Second NDP Submission ("**Claimant's Second NDP Observations**"). In Claimant's view, the US Second NDP Submission repeats arguments made in another arbitration proceeding which is distinguishable from the present case. In the present case, Claimant submits that

493 US Second NDP Submission, Appendix 1, ¶ 34.
494 US Second NDP Submission, Appendix 1, ¶ 62, *citing* Appendix 3, ¶ 30.
495 Respondent's NDP Observations, ¶ 15.
496 Respondent's NDP Observations, ¶ 11.
497 Respondent's NDP Observations, ¶ 20.
498 Respondent's NDP Observations, ¶ 22.

Respondent has consented to arbitrate the ancillary claim under NAFTA.[499] Claimant argues, *inter alia*, that the Parties have chosen NAFTA as the applicable law, and the Tribunal is bound by NAFTA Article 1131 and ICSID Convention 42(1) to honour that choice.[500]

499. In addition, Claimant submits that unlike the *TC Energy* case in which the United States is Respondent, the present case was initiated under NAFTA Chapter 11, and may proceed to its conclusion including the ancillary claim, pursuant to paragraph 5 of USMCA Annex 14-C.[501] For Claimant, the ancillary claim is inextricably linked to its pre-existing claims, also unlike the *TC Energy* case in which the United States has made its submission.[502]

500. Claimant disagrees with the United States' interpretation of USMCA Annex 14-C.[503] In its view, Respondent consented to the submission of a claim to arbitration under NAFTA Chapter 11 with respect to measures taken during the three year transition period following the USMCA's entry into force.[504] This is supported, according to Claimant, by the context of other provisions in Annex 14-C, by the object and purpose of both NAFTA and the USMCA, and by public statements by the United States, Canada and Mexico.[505]

501. In Claimants' view, contrary to the US Second NDP Submission, NAFTA Article 1114 is irrelevant in this dispute. For Claimant, it applies only to State acts taken for legitimate environmental reasons, which is not the case here, and Respondent has waived it in the present case.[506] Claimant likewise denies that the principle of contributory fault is applicable in this arbitration, since CALICA was not negligent in operating its investment, and has not caused or materially contributed to its damage.[507]

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499 Claimant's Second NDP Observations, ¶¶ 2, 7.
500 Claimant's Second NDP Observations, ¶ 31.
501 Claimant's Second NDP Observations, ¶¶ 35-36.
502 Claimant's Second NDP Observations, ¶ 38.
503 Claimant's Second NDP Observations, ¶ 42 *et seq*.
504 Claimant's Second NDP Observations, ¶ 49.
505 Claimant's Second NDP Observations, ¶¶ 52-74.
506 Claimant's Second NDP Observations, ¶¶ 83, 85.
507 Claimant's Second NDP Observations, ¶¶ 86-87.

E. TRIBUNAL'S ANALYSIS

502. In this Section, the Tribunal analyses and decides upon various issues with respect to its jurisdiction over and the admissibility of the Claimant's original claims, Claimant's ancillary claim, and Respondent's counterclaim in this arbitration. The Tribunal considers: (i) its jurisdiction *ratione temporis* with respect to Claimant's original claims (Section 1); (ii) the investor under NAFTA (Section 2); (iii) the investment under NAFTA (Section 3); (iv) jurisdiction under the ICSID Convention with respect to Claimant's original claims (Section 4); (v) the admissibility of Claimant's original claims (Section 5); (vi) jurisdiction over the port tariff claim (Section 6); (vii) any implications of proceedings in the Mexican Courts (Section 7); (viii) jurisdiction over Claimant's ancillary claim (Section 8); and (ix) jurisdiction over and admissibility of Respondent's counterclaim (Section 9).

1. Jurisdiction *Ratione Temporis* over Original Claims

503. Respondent does not raise an objection as such to the Tribunal's jurisdiction *ratione temporis* with respect to Claimant's original claims. Respondent's argument is rather that in light of Claimant's detailed account of historical facts, the Tribunal should be mindful of the three-year limitation period in NAFTA Articles 1116(2) and 1117(2) to avoid relying on facts pre-dating the limitation period (*see* ¶¶ 377-378 above).

504. Claimant does not deny the application of the NAFTA three-year limitation, and confirms that its claims relate to alleged breaches within the limitation period in the form of (i) Respondent's failure to amend the POEL 2009 by 5 December 2015, as required by the 2014 Agreements; (ii) Respondent's disregard of its judiciary's determination, made final in January 2017, that API Quintana Roo had no right to collect port fees from CALICA for over a decade; and (iii) Respondent's shutdown of CALICA's operations in El Corchalito in January 2018 (*see* ¶ 427 above). These events all fall within the three years prior to Claimant's commencement of its claim on 3 December 2018, when ICSID received its request for arbitration.

505. Accordingly, there is no dispute in relation to the Tribunal's jurisdiction *ratione temporis* over Claimant's original claims. NAFTA Articles 1116(2) and 1117(2) require an

investor to make a claim within three years of acquiring knowledge (or its enterprise acquiring knowledge) of the alleged breach and loss or damage.

506. The Tribunal confirms the Parties' agreed understanding with respect to NAFTA Articles 1116(2) and 1117(2) and only makes a determination with respect to the claims put forward by Claimant which fall within the three-year limitation period set out at ¶ 504 above. In doing so, the Tribunal is free to, and does, take into account facts prior to that three-year period which provide background and context to the claims and defences made by the Parties.

2. The Investor under NAFTA

507. It is undisputed that Claimant is an investor with protection under NAFTA, in accordance with NAFTA Articles 201 and 1139 (*see* ¶¶ 355 and 359 above). In this regard, Claimant is a privately owned for-profit corporation organized under the laws of the United States, and therefore an enterprise of a NAFTA Contracting Party. Since it has made an investment in Mexico (*see* ¶ 514 below), Claimant is an investor entitled to bring a claim against Respondent under NAFTA Article 1116(1).

508. With respect to CALICA, Respondent disputes the Tribunal's jurisdiction over investments made outside Mexico in what Claimant refers to as the "CALICA Network" (*see* ¶ 185 above). However, the Tribunal does not consider this to be a question of the Tribunal's jurisdiction *ratione personae* over CALICA.

509. CALICA is a subsidiary of Claimant constituted and organized under the laws of Mexico. It is indirectly owned and controlled by Claimant.[508] As such, pursuant to NAFTA Article 1117(1), Claimant is entitled to bring a claim in this arbitration on behalf of CALICA, being an "enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly" (*see* ¶ 358 above).

510. The question of the investments covered by Claimant's claim and the scope of damages is a separate one. Insofar as Respondent contends that the CALICA Network is not an enterprise of another Party under NAFTA (*see* ¶ 381 above), the Tribunal agrees.

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508 **C-0005-ENG**, CALICA Ownership Structure Certification; **C-0006-SPA**, Copy of Articles of Incorporation of Calizas Industriales del Carmen, S.A. de C.V.

However, Claimant does not claim that the CALICA Network is such an enterprise. Claimant's claim under NAFTA Article 1117(1) relates to CALICA only.

3. The Investment under NAFTA

511. Respondent raises an issue with respect to the Tribunal's jurisdiction over non-Mexican investments. The Tribunal finds it helpful to first determine Claimant's protected investments under NAFTA, before turning to consider Respondent's objection.

512. Claimant argues that its investment under NAFTA includes (i) CALICA, a corporation constituted under the laws of Mexico and an enterprise under NAFTA that is indirectly owned and controlled by Claimant; (i) indirect ownership and control of real estate in Mexico, including the Punta Venado port area and the limestone reserves in La Rosita, El Corchalito, and La Adelita, acquired for the sole purpose of developing the Project; (iii) indirectly holding the CALICA Port Concession; and (iv) committed capital in Mexico in connection with the Project, including hundreds of millions of dollars to produce and export aggregates.[509]

513. Pursuant to NAFTA Article 1101, NAFTA Chapter 11 applies to measures adopted or maintained by Respondent relating to (i) Claimant as an investor of another NAFTA Contracting Party; and (ii) Claimant's investments in the territory of Respondent (*see* ¶ 356 above).

514. Respondent does not contest that Claimant indirectly holds the investments in Mexico set out at ¶ 512 above for the purposes of jurisdiction, although its position is that only CALICA is a protected investment under NAFTA Chapter 11.[510] The Tribunal accepts that these investments are all covered by the definition of an investment under NAFTA (*see* ¶ 359 above) and are protected thereunder, specifically:

(i) CALICA is an enterprise under item (a) of the definition of investment in NAFTA Article 1139

509 Memorial, ¶ 165; *see* Memorial, ¶¶ 4, 20, 23-29, 28-38.
510 Rejoinder, ¶ 380.

(ii) the indirect ownership and control of the Punta Venado port area and the limestone reserves in La Rosita, El Corchalito, and La Adelita is "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes" under item (g) of the definition of investment in NAFTA Article 1139;

(iii) the CALICA Port Concession is an "interest[] arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including . . . concessions" under item (h) of the definition of investment in NAFTA Article 1139; and

(iv) the commitment of capital in connection with the Project to produce and export aggregates includes "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party…" under item (h) of the definition of investment in NAFTA Article 1139.

515. Respondent takes issue with Claimant's claims insofar as they refer to, and include quantum claims connected with, the "CALICA Network", which includes (i) three cargo vessels owned and operated by a Bahamian company, Vulica Shipping Company Ltd; (ii) US sales distribution yards located along the US Gulf Coast; and (iii) the sales and marketing operations of a US company Vulcan Construction Materials. Respondent argues that any claim regarding the treatment of non-Mexican investments is beyond this Tribunal's jurisdiction (*see* ¶ 380 above).

516. Claimant agrees with Respondent that only investments located in Mexico qualify for protection under NAFTA.[511] It therefore does not claim that the vessels, US distribution yards or sales and marketing operations referred to in ¶ 515 above are a part of the investment protected by NAFTA. However, relying on the decision in *S.D. Myers v. Canada*, Claimant argues that it is entitled to compensation for "the overall economic

[511] C-PHM, ¶ 15*, citing* 2021 Hearing Transcript (English), Day 1, 120:22-121:11 (Claimant's Opening Statement).

losses sustained by [the Claimant] that are a proximate result of [the Respondent's] measure".[512] In its view, this does not exclude non-Mexican investments, in particular because its investment was devised and established as a fully-integrated business.[513]

517. In the context of this case, the Tribunal considers the question of the scope of compensable losses to be an issue of quantum and not of jurisdiction. There is no dispute that NAFTA Chapter 11 does not protect Claimant's investments outside the territory of Mexico from measures adopted by Respondent and the Tribunal has no jurisdiction over such a claim (*see* ¶ 432 above). As a matter of jurisdiction, therefore, there is no issue to be addressed at this stage.

518. The Tribunal shall consider and decide upon the separate question of whether Claimant's claim for damages may include harm caused to the Claimant outside Mexico in Section XIV below. In doing so, it will take into account the Parties' respective answers to Tribunal Question 1 on that issue.

4. Jurisdiction under the ICSID Convention

519. Having satisfied itself that Claimant is an investor with a protected investment under NAFTA, the Tribunal must also ensure that it has jurisdiction under the ICSID Convention. The requirements for such jurisdiction are set out in Article 25 of the ICSID Convention (*see* ¶ 367 above).

520. Claimant submits that the Tribunal has *ratione personae* jurisdiction under ICSID Convention Article 25(1), since Respondent is a Contracting State of the ICSID Convention and Claimant is a national of another Contracting State.[514] For Claimant, the Tribunal also has jurisdiction *ratione materiae* under the ICSID Convention since (i) there is a legal dispute; and (ii) this dispute arises directly out of Claimant's investments.[515] The legal dispute, in Claimant's view, centers around adverse measures adopted by Respondent, including its alleged repudiation of its pledge to amend the

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512 C-PHM, ¶ 17, *citing* **CL-0132-ENG**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award (Damages), 21 October 2002 ("*S.D. Myers v. Canada*, Second Partial Award (Damages)"), ¶ 122.

513 C-PHM, ¶ 8, *citing* **C-0010-SPA**, Investment Agreement, pp. 12, 14 (Translation by Claimant). *See also* **CD-0001**, Claimant's Opening Presentation, slide 8.

514 Memorial, ¶¶ 167-170.

515 Memorial, ¶¶ 161-166.

POEL 2009, failure to comply with a decision of its judiciary confirming that API Quintana Roo had unlawfully collected port fees, and unlawful shutdown of operations at El Corchalito.[516]

521. Respondent has not contradicted Claimant's position with respect to the Tribunal's jurisdiction under the ICSID Convention.

522. The Tribunal finds that Claimant's original claims concern a legal dispute arising directly out of an investment, being the investments protected by NAFTA as identified at ¶ 514 above. The legal dispute is between Mexico, a Contracting State of the ICSID Convention, and Claimant, a juridical person with the nationality of the United States. The United States is also a Contracting State of the ICSID Convention and Claimant is therefore a "national of another Contracting State" within the meaning of Article 25 of the ICSID Convention.

523. Respondent gave its consent in writing to the Tribunal's jurisdiction under the ICSID Convention in NAFTA Article 1122 (*see* ¶ 363 above).

524. Claimant and CALICA gave their consent in writing to submit Claimant's original claims to ICSID in Claimant's Notice of Intent dated 3 September 2018,[517] the executed instrument of consent and waiver pursuant to NAFTA Article 1121 dated 3 December 2018,[518] and was confirmed in Claimant's Request for Arbitration.[519]

525. The Tribunal therefore finds that the requirements of Article 25(1) of the ICSID Convention (*see* ¶ 367 above) are met and that it has jurisdiction in this case.

5. Admissibility of the Claims

526. Aside from the objections raised above, Respondent has not challenged the admissibility of Claimant's original claims.

527. Under NAFTA Article 1120(1) (*see* ¶ 361 above), Claimant is required to wait six months from the events giving rise to a claim before submitting the claim to arbitration. Claimant

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516 Memorial, ¶ 166,
517 **C-0007-SPA**, Notice of Intent, p. 9.
518 **C-0008-ENG**, Consent and Waiver pursuant to NAFTA Art. 1121.
519 RfA, ¶ 28.

initiated arbitration by its Request for Arbitration dated 3 December 2018. Since the alleged measures giving rise to Claimant's original claims date from (i) 5 December 2015 (alleged failure to amend the POEL 2009); (ii) January 2018 (shut down of operations in El Corchalito and La Adelita); and (iii) January 2017 (alleged failure to reimburse port fees);[520] the Tribunal considers that Claimant complied with the waiting period.

528. NAFTA Article 1118 provides that the Parties should first attempt to settle a claim through consultation or negotiation (*see* ¶ 359 above). In the Notice of Intent, Claimant and CALICA requested consultations with representatives of Mexico to reach an amicable resolution of the dispute.[521] The Parties also extended the calendar in these proceedings by 70 days to explore the potential resolution of the dispute (*see* ¶¶ 35-36 above). The Tribunal therefore considers that NAFTA Article 1118 attempts were undertaken.

529. NAFTA Article 1119 requires Claimant to deliver a written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted (*see* ¶ 360 above). Claimant did so on 3 September 2018, prior to its Request for Arbitration on 3 December 2018. It therefore complied with this requirement.

530. NAFTA Articles 1121(1) and (2) require Claimant and CALICA to "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116 [and Article 1117], except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party" (*see* ¶ 362 above). Claimant and CALICA did so by letter dated 3 December 2018, ratified in the Request for Arbitration.[522]

531. Claimant further contends that the fork-in-the-road provision of NAFTA Annex 1120(1) is inapplicable.[523] This provision would bar Claimant from alleging in an arbitration that Mexico breached an obligation under NAFTA Chapter 11 if Claimant or CALICA had

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520 *See* Memorial, ¶ 176, n. 391.
521 **C-0007-SPA**, Notice of Intent, p. 10.
522 **C-0008-ENG**, Consent and Waiver pursuant to NAFTA Art. 1121; Request for Arbitration, ¶ 24.
523 Memorial, ¶ 183.

alleged in proceedings before a Mexican court or administrative tribunal that Mexico breached that obligation. Respondent has not alleged that Claimant is so precluded and the Tribunal finds that this provision does not apply to the present case.

6. The Port Tariff Claim

532. Claimant's port tariff claim is based on its assertion that after ten years of litigation, on 25 January 2017 it obtained a ruling from Mexico's Supreme Court that the collection of port fees by Mexico's Ministry of Communications and Transportation for CALICA's use of its own private terminal was illegal and void. Claimant contends that API Quintana Roo disregarded this ruling by continuing to collect fees for almost a year thereafter, and failing to reimburse CALICA the [redacted] collected from 2007 to 2017.[524]

533. Respondent argues that Claimant's claim for port fees is barred by NAFTA Article 2103, which limits the extent to which tax measures are subject to NAFTA (*see* ¶¶ 366 and 383 above). For the purpose of determining whether it has jurisdiction over Claimant's claim for the port fees, the Tribunal's analysis is limited to the question whether the fees that Claimant seeks reimbursement of have the character of a taxation measure.

534. In principle, the Tribunal agrees with Respondent that the terms "taxation measure" in NAFTA Article 2103 are defined broadly.[525] As held in prior NAFTA cases, they refer to any measure that "is part of the regime for the imposition of a tax".[526]

535. Claimant's claim for port fees is in the amount of [redacted]. To the extent that the port fees of [redacted] are a taxation measure, Claimant's claim would fall outside the Tribunal's jurisdiction, pursuant to Article 2103 of NAFTA. Claimant does not appear to dispute this, but argues that the port fees do not have the character of a taxation measure.

536. The disagreement between the Parties over the payment of the port fees has been the subject of at least 10 years of litigation in Mexico. The factual background on this issue is introduced at ¶¶ 271-278 above. In brief, Claimant alleges that the fees in question

524 Memorial, ¶ 225; Reply, ¶¶ 180-182; C-PHM, ¶ 141; C-RPHM, ¶ 67; *see* Memorial, ¶¶ 132, 137.
525 Counter-Memorial, ¶ 289.
526 **RL-005-ENG**, *Resolute Forest Products v. Canada*, Decision on Jurisdiction and Admissibility, ¶ 326.

were unlawfully collected by API Quintana Roo from 2007 to 2017.[527] Claimant submits that CALICA is the sole concessionaire of the Punta Venado infrastructure entitled to charge the fees, and that the port fees arose from vessels docking at CALICA's private port terminal.[528] In its view, the Mexican Supreme Court affirmed in 2017 that API Quintana Roo has no right to charge the fees in question.[529]

537. Respondent argues, *inter alia*, that the fees in question are *derechos* arising from use of national ports or terminals for public use outside an authorised port (*puerto habilitado*), obliging payment of a "harbour due", or deep-sea port fee for vessels entering the port.[530]

538. Tribunal Question 2 was related to the port fees issue, as follows:

> With respect to Claimant's claim for port fees, are those port fees to be considered (i) port fees (*tarifas de puerto*) as a service fee; (ii) port duties (*derechos de puerto*); or (iii) other (*see* Reply, ¶ 125; Rejoinder, ¶ 310)?

539. Likewise, Tribunal Question 3 asked:

> With respect to the Tribunal's jurisdiction over Claimant's claim for port fees, what is the relevance, if any, of Respondent's assertion that Claimant has sought recourse (*recursos de revisión fiscal*) against the Mexican authorities in relation to those fees (*see* Rejoinder, ¶ 311)?

540. The Tribunal will examine whether the amount sought by Claimant relates to taxation measures. In the present case, Claimant's claim would relate to a taxation measure to the extent that the contested port fees implicate "*derechos*" within the meaning of the Mexican Fiscal Code. This question of Mexican law is a matter of fact to be assessed by the Tribunal, and not a question of law (*see* ¶ 353 above).

541. The Tribunal considers it established that contributions falling under Article 2 of the Mexican Fiscal Code (*Código Fiscal de la Federación*) are taxes. Under this provision:[531]

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527 Memorial, ¶ 225.
528 C-PHM, ¶ 29, *citing* Rejoinder, ¶ 423; Atempa Statement, ¶ 17; *see* Rejoinder, ¶ 281.
529 Memorial, ¶ 67.
530 Counter-Memorial, ¶ 289.
531 **R-0061-ESP**, Federal Tax Code, Art 2(IV).

> *Las contribuciones se clasifican en impuestos, aportaciones de seguridad social, contribuciones de mejoras y derechos, las que se definen de la siguiente manera:*
>
> . . . .
>
> *IV. Derechos son las contribuciones establecidas en Ley por el uso o aprovechamiento de los bienes del dominio público, excepto cuando se presten por organismos descentralizados u órganos desconcentrados cuando en este último caso, se trate de contraprestaciones que no se encuentren previstas en la Ley Federal de Derechos. También son derechos las contribuciones a cargo de los organismos públicos descentralizados por prestar servicios exclusivos del Estado*.

542. The Mexican Federal Duties Law (*Ley Federal de Derechos*) is considered further at ¶ 546 below.

543. The Parties use different and overlapping terminology to describe the relevant port charges. Port duties (*derechos de puerto*) are levies paid to the Mexican government for the use of national ports or public port terminals and have the character of a tax. Port fees (referred to by Claimant as *tarifas de puerto*;[532] referred to by Respondent as *tarifas portuarias*[533]) are amounts that may be charged by port concessionaires to third parties for using their own infrastructure, and are not a tax. According to Respondent, "*tarifa de puerto*" (as opposed to *tarifa portuaria*) is a type of duty for the passage of vessels through territorial sea under Article 200 of the Federal Duties Law.[534]

544. Respondent's witness Mr. Atempa explains the difference between port duties and port fees as follows:[535]

> *. . . existe una amplia diferencia entre los Derechos de Puerto y las tarifas portuarias, que se puede resumir bajo los siguientes aspectos:*
>
> *a) Los Derechos de Puerto tienen el carácter de contribuciones. Las tarifas portuarias no son contribuciones, toda vez que son cobros por el uso de infraestructura o la prestación de servicios portuarios;*
>
> *b) En su carácter de contribuciones, los Derechos de Puerto son propuestos por el Ejecutivo Federal y aprobadas por el Congreso de la Unión. Las tarifas portuarias, en cambio, son establecidas por la*

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532 C-PHM, Appendix A, Answer to Tribunal Question 2.
533 Counter-Memorial, ¶ 248.
534 R-RPHM, Annex, ¶ 6. *See also* Atempa Statement, ¶¶ 9-17, 63.
535 Atempa Statement, ¶ 17.

SCT conforme a las atribuciones que estipula la LP, a través de las bases de regulación tarifaria, cuando no existen condiciones de competencia razonable;

c) Los Derechos de Puerto se causan por la simple entrada de las embarcaciones a los puertos nacionales o a las terminales de uso público fuera de puerto habilitado. Las tarifas portuarias se originan por el uso de la infraestructura portuaria concesionada mediante un instrumento jurídico como el título de concesión; y

d) La titularidad del cobro y aprovechamiento de los Derechos de Puerto corresponden al Estado Mexicano, el cual está obligado a destinar la totalidad de los ingresos recaudados por este concepto al Fondo de Desarrollo de la Marina Mercante Mexicana. La titularidad del cobro de las tarifas portuarias corresponde a los concesionarios para la recuperación de inversiones en infraestructura o mantenimiento de ella.

545. Leaving aside the different use of terminology by the Parties, the Tribunal would consider the fees in question to be a taxation measure if they were either (i) levies paid to the Mexican government for the use of national ports or public port terminals; or (ii) duties for the passage of vessels through territorial sea. Such fees are both destined for the Mexican State. They are therefore of a character that is part of the regime for the imposition of a tax, and would be a taxation measure under NAFTA Article 2103.

546. Respondent's position that the *"tarifas de puerto"* charged by API Quintana Roo are a tax is derived from the Mexican Federal Duties Law (*Ley Federal de Derechos*). This law sets out the relevant regime for ports in Chapter III, extracted in part as follows:[536]

Artículo 200. *Las personas físicas y morales que usen los puertos nacionales o las terminales de uso público fuera de puerto habilitado, pagarán por cada embarcación en tráfico de altura que entre a los mismos, el derecho de puerto de altura conforme a la cuota de* ***$7.39****, por unidad de arqueo bruto o fracción.*

Tratándose de embarcaciones que realicen tráfico mixto, se pagará el 90% de la cuota correspondiente al derecho de puerto de altura, por cada puerto o terminal de uso público fuera de puerto habilitado en que entren.

Artículo 200-A. *Las personas físicas y morales cuyas embarcaciones entren a los puertos nacionales o a las terminales de uso público fuera de puerto habilitado pagarán, por cada embarcación de altura dedicada*

536 **R-0054-ESP**, Federal Duties Law.

*exclusivamente a actividades turísticas, el derecho de puerto de altura, conforme a la cuota de **$3.27**, por unidad de arqueo bruto o fracción.*

Tratándose de las embarcaciones que realicen exclusivamente actividades turísticas y que en un viaje entren a diversos puertos nacionales, se pagará el 90% de la cuota a que se refiere el párrafo anterior, por cada uno de los puertos o terminales de uso público fuera de puerto habilitado, siguientes al primero.

***Artículo 201.** Las personas físicas y morales cuyas embarcaciones usen los puertos nacionales o las terminales de uso público fuera de puerto habilitado, pagarán por cada embarcación en tráfico de cabotaje que entre a los mismos, el derecho de puerto de cabotaje conforme a la cuota de **$2.35**, por unidad de arqueo bruto o fracción.*

Las embarcaciones dedicadas exclusivamente a actividades turísticas pagarán el 75% de la cuota del derecho de puerto de cabotaje, por cada puerto o terminal de uso público fuera de puerto habilitado en que entren.

***Artículo 201-A.-** Los derechos a que se refieren los artículos 200, 200-A y 201 de esta ley se pagarán dentro de los 5 días siguientes a aquél en que entre a puerto la embarcación o previo a su salida, lo que ocurra primero.*

***Artículo 202.-** Por las embarcaciones que atraquen en muelles propiedad de la Federación, por cada hora o fracción mayor de 15 minutos y por cada metro de eslora o fracción, se pagará el derecho de atraque conforme a las siguientes cuotas:*

. . . .

Para los efectos de este artículo, se entiende por embarcación comercial cualquiera que se destine a la realización de actos de comercio; por yate, toda embarcación que esté destinada exclusivamente al placer personal de sus propietarios o poseedores, sin perseguir fines de lucro; por embarcación arrejerada, aquella que únicamente utiliza el muelle para ser amarrada, por lo que no atraca en el mismo, o bien sólo hace contacto con él con su proa o su popa por hallarse en posición perpendicular al muelle; y por embarcación local comercial, la que opera únicamente en un puerto y está registrada en el mismo.

El derecho a que se refiere este artículo se pagará previamente al desatraque de las embarcaciones.

***Artículo 203.-** Las embarcaciones que utilicen dos o más puertos que, por razones geográficas y operativas, se encuentren integrados en una unidad, pagarán el derecho de puerto de altura o el de cabotaje, según sea el caso, únicamente cuando entren al primero de los puertos que formen la unidad.*

No se pagará el derecho de puerto por las embarcaciones que salgan de un puerto y regresen al mismo sin haber entrado a otro.

> *Las embarcaciones extranjeras que estén autorizadas para realizar el tráfico de cabotaje pagarán el derecho de puerto de cabotaje de conformidad con las cuotas que establece el artículo 201 de esta Ley.*
>
> *Las autoridades portuarias, antes de expedir el despacho de salida de una embarcación, verificarán el pago correspondiente de los derechos a que se refiere este capítulo.*
>
> ***Artículo 204.-*** *No se pagarán los derechos a que se refiere este capítulo, por las embarcaciones siguientes:*
>
> . . . .
>
> ***Artículo 204-A.*** *La totalidad de los ingresos que se obtengan por la recaudación de los derechos señalados en el presente capítulo, se destinarán al Fondo de Desarrollo de la Marina Mercante Mexicana.*
>
> . . . .
>
> ***Artículo 205.-*** *Los derechos a que se refiere este capítulo no se causarán cuando el uso o aprovechamiento del puerto de que se trata hayan sido concesionados a un administrador portuario.*

547. According to Respondent, Article 205 of the Federal Duties Law extracted at ¶ 546 above applied in the present case from 2007 to 2017, during which period API Quintana Roo held a concession at Punta Venado. Respondent argues that pursuant to this Article 205 of the Federal Duties Law, when a port or terminal is concessioned to an API, as was the case for Punta Venado, the relevant duty (*derecho*) takes the form of a port tariff (*tarifa de puerto*), without losing its character as a contribution within the meaning of the Mexican Fiscal Code.[537]

548. In this way, Respondent asserts that Claimant's claim relates to a port duty (*derecho*) regulated by Article 200 of the Federal Duties Law.[538] However, Article 205 of the Federal Duties Law states that the duties (*derechos*) referred to in Chapter III of the Federal Duties Law "will not be caused" (*no se causarán*) when the port has been concessioned to an API. On this basis, the Tribunal is not persuaded that the charges had the character of a *derecho*.

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537 Rejoinder, ¶¶ 281, 310; R-PHM, Annex A, ¶ 15; R-RPHM, Annex A, ¶ 5.
538 R-PHM, Annex A, ¶ 13.

549. Several items of contemporaneous correspondence from the Mexican authorities include references to the use of port infrastructure as the basis for the fees, rather than a form of duty for the passage of vessels through territorial sea.

550. In this regard, on 9 July 2007, the API Quintana Roo informed CALICA that from 1 July 2007, it would charge a *tarifa de puerto* to arrivals in Punta Venado for "*uso de infraestructura portuaria*".[539] In the same letter, one of the stated bases for the *tarifa de puerto* was Article 40, section X of the Mexican Port Law.[540] This provision states:[541]

> *Además de los derechos y obligaciones que se establecen para los concesionarios, corresponderá a los administradores portuarios:*
>
> . . . .
>
> *X. Percibir, en los términos que fijen los reglamentos correspondientes y el título de concesión, ingresos por el uso de la infraestructura portuaria, por la celebración de contratos, por los servicios que presten directamente, así como por las demás actividades comerciales que realicen*.

551. The same correspondence relied upon and extracted the relevant provisions of the concession of API Quintana Roo with respect to charges for the use of port infrastructure (*uso de infraestructura portuaria*).[542]

552. Two items of correspondence were later annulled by the Mexican courts, being the letters dated 24 July 2007 and 2 July 2009.[543] Accordingly, the Tribunal does not place weight on the assessment of the basis for the charges in those letters. In this regard, in response to CALICA's correspondence disagreeing with the new fee to be charged, on 24 July 2007 (*Oficio 7.3.3033.07 05963*) the SCT informed CALICA that "*es la API de Quintana Roo la única legitimada para cobrar la tarifa de puerto en Punta Venado por ser la concesionaria de dicho lugar*", while "*CALICA está facultada para cobrar por el uso de la infraestructura y los servicios concesionados, lo cual es independiente del arribo de las embarcaciones al lugar habilitado como Punta Venado, Quintana Roo, en el mar*

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539 **C-0056-SPA**, Quintana Roo Letter to CALICA, 9 July 2007, p. 3.
540 **C-0055-SPA**, Quintana Roo Letter to Agencia Consignataria, 4 July 2007, p. 4.
541 **R-0053-ESP**, Ports Law, DOF, Mexico City, 19 July 1993, Art. 40(X).
542 **C-0055-SPA**, Quintana Roo Letter to Agencia Consignataria, 4 July 2007, p. 4.
543 **C-0059-SPA**, Supreme Court Decision; **C-0057-SPA**, Letter No. API.DG.GJ.0405.07 from Javier F. Zetina González (State of Quintana Roo) to [redacted] (CALICA); **C-0106-SPA**, Decision of the Federal Tribunal on Fiscal and Administrative Matters, D.A. 482/2013-8536, dated 3 September 2014 ("Federal Tribunal Decision, 3 September 2014").

territorial de la República Mexicana, por cuyo supuesto la tarifa de puerto no forma parte de la concesión de CALICA".[544] The 2 July 2009 letter from the SCT to CALICA refers back to the assessment provided in the letter of 24 July 2007 and was also annulled.[545]

553. Respondent further relies on a communication dated 13 November 2017 (*Oficio 7.3.-2729.17 006538*) to support the fiscal nature of the charge. This letter was issued to comply with the judgment of the *Tribunal Federal de Justicia Fiscal y Administrativa* of 3 September 2014 as confirmed by the Mexican Supreme Court on 25 January 2017.[546] In it, the SCT instructed the captain of the port in Quintana Roo to charge a *derecho de puerto* to traffic entering "*la Terminal de Uso Publico fuera de puerto habilitada y denominada Terminal Punta Venado*" under Articles 200 and 201 of the Mexican Duties Law.[547]

554. However, the instruction to charge a port duty from 2017 does not shed light on the nature of the charges in the period 2007 to 2017. In this respect, in a separate letter on the same date the SCT informed CALICA that consistent with the same judgments of 2014 and 2017, the amended concession of API Quintana Roo had been annulled. By consequence, and as noted by Mr. Atempa, the territorial sea of Punta Venado was no longer concessioned to API Quintana Roo and reverted to the status of part of the public domain administered by the Mexican State.[548] It is therefore not a scenario in which Article 205 of the Mexican Duties Law comes into play.

555. Respondent submits that the fact that tax review appeals have been filed in relation to the validity of the API Quintana Roo's 2007 concession and the communications of 24 July 2007 and 2 July 2009 creates a presumption of the fiscal nature of the port fees.[549] As both Parties acknowledged in response to Tribunal Question 3, the *recurso de revision fiscal* is a procedure available to Mexican authorities against any decision granting an

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544 **C-0057-SPA**, SCT Letter to CALICA, 24 July 2007, p. 2.
545 **C-0058-SPA**, SCT Letter to CALICA, 2 July 2009.
546 R-RPHM, Annex, ¶ 11, *citing* **JAAL-0015**, Letter No. 7.3-2729.17 from Alejandro Hernández Cervantes (SCT) to José Ángel Suarez Vallejo, p. 3.
547 **JAAL-0015**, Letter No. 7.3-2729.17 from Alejandro Hernández Cervantes (SCT) to José Ángel Suarez Vallejo, p. 3.
548 Atempa Statement, ¶¶ 56(a), 57.
549 Rejoinder, ¶ 311; R-PHM, Annex A, ¶ 17; R-RPHM, Annex, ¶ 14.

amparo, and is not reserved for tax matters.[550] Respondent submits that the non-tax matters that could be covered by such a proceeding are not relevant to CALICA's requests.[551] However, due to the mixed nature of such proceedings the Tribunal is not persuaded that a presumption is created in the manner Respondent contends, and rejects this argument.

556. Respondent further submits that the fiscal character of the charges was taken for granted by the Mexican courts.[552] In this respect, Respondent refers to the decision of the *Tribunal Federal de Justicia Fiscal y Administrativa* of 3 September 2014, which describes the question at issue in those proceedings as follows:[553]

> *. . . la Litis a dilucidar en el presente Considerando, lo es el determinar, si el Acuerdo de Modificación de Concesión portuaria integral de los puertos de Quintana Roo de 25 de junio de 2007, así como el Oficio número 7.3.3033.07 05963 de fecha 24 de julio de 2007, emitidos por el Director General de Puertos de la Coordinación General de Puertos y Marina Mercante de la Secretaria de Comunicaciones y Transportes, cumplen con la debida fundamentación y motivación para determinar que la empresa Administración Portuaria Integral de Quintana Roo, S.A. de C.V., es la única legitimada para cobrar la tarifa de puerto en Punta Venado.*

557. The Tribunal does not find the above summary of the question before the *Tribunal Federal de Justicia Fiscal y Administrativa* to contain an assumption that the charges had a fiscal character.

558. In light of the foregoing, Respondent has not established to the satisfaction of the Tribunal that, as a matter of Mexican law, the fees charged by API Quintana Roo had the character of a *derecho*. According to Respondent, the charges are derived from the concession, and in particular, the use of maritime zones which contain infrastructure to facilitate safe entry and navigation through the port, requiring constant maintenance to prevent sedimentation and ensure maneuverability, among other things. Respondent argues that API Quintana Roo is obliged to maintain the concessioned assets.[554] It does not follow, without further substantiation, that such fees have the character of a *derecho*. In particular, Respondent

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550 C-PHM, Appendix A, Tribunal Question 3; R-PHM, Annex A, ¶¶ 17-18.
551 R-PHM, Annex A, ¶ 18.
552 R-RPHM, Annex, ¶ 10, *citing* **C-0106-SPA,** Federal Tribunal Decision, 3 September 2014, pp. 213, 250.
553 **C-0106-SPA**, Federal Tribunal Decision, 3 September 2014, p. 213 of the PDF.
554 Rejoinder, ¶¶ 278-288.

has not established that the fees were charged as a form of a duty for the passage of vessels through territorial sea (*see* ¶ 543 above).

559. However, and regardless of the Tribunal's decision on the issue of whether the port fees should properly be classified as a taxation measure, the Tribunal notes that it would find that Claimant's claim with respect to the port fees is without merit. Specifically, the Tribunal is not satisfied, based on the evidence presented by Claimant, that a Mexican court ordered repayment of the fees in question by API Quintana Roo to CALICA. To the contrary, the *Tribunal Federal de Justicia Fiscal y Administrativa* dated 3 September 2014 (upheld as binding by the Mexican Supreme Court in its decision of 25 January 2017) directed that the effect of its findings was, among other things, that the SCT was required to issue a new "Amended Agreement" in which it would duly give reasons for its determination that the API Quintana Roo was the only entity entitled to charge the *tarifa de puerto* in the entirety of the "*terminal de uso público fuera de puerto denominada Punta Venado*".[555]

560. While there are pronouncements contained in the Mexican court decisions that refer to CALICA's entitlement to charge the relevant fees as opposed to API Quintana Roo, those pronouncements stop short of any order to reimburse the fees in question.[556] Claimant has not established to the satisfaction of the Tribunal that reimbursement of the fees is the legal consequence of those findings or that the findings of the Mexican courts were equivalent to a measure confirming CALICA's entitlement to the repayment of the fees.

561. As such, the Tribunal finds Claimant's submission that as "a matter of common sense and Mexican law" API Quintana Roo was obliged to reimburse the fees[557] to be without merit and rejected by the Tribunal. To the extent that CALICA's legal action seeking reimbursement of the fees is also relevant to the factual background of Claimant's other claims, the Tribunal will consider those facts to the extent relevant.[558]

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555 **C-0106-SPA**, Federal Tribunal Decision, 3 September 2014, p. 265 of the PDF.

556 *See* **C-0106-SPA**, Federal Tribunal Decision, 3 September 2014, p. 269 of the PDF: "*dicha empresa* [i.e., CALICA] *es la facultada para seguir cobrando la tarifa de puerto*"; **C-0059-SPA**, Supreme Court Decision, p. 19 of the PDF: "Therefore, the . . . [API Quintana Roo] is not entitled to collect the port fee, with respect to vessels arriving at the geographical área of Punta Venado".

557 Reply, ¶ 116.

558 *See, e.g.,* Memorial, ¶ 135; Reply, ¶ 116.

562. In these circumstances, there can be no breach of NAFTA for failure to comply with a decision of the Mexican Court, as Claimant alleges, and Claimant's claim is rejected on that basis.

7. Proceedings before any Administrative Tribunal or Court

563. In its C-PHM, Claimant submits that while Respondent emphasized CALICA's domestic litigation proceedings at the Hearing, this has no bearing on the Tribunal's jurisdiction. In terms of NAFTA Article 1121 (*see* ¶ 362 above), Claimant contends that such proceedings are expressly permitted as they do not involve claims for compensatory damages.[559]

564. In response, Respondent asserts that it never argued that CALICA's legal proceedings before Mexican administrative tribunals or courts are inconsistent with the exemptions required by NAFTA.[560] In Respondent's view, the remedies pursued by Claimant before Mexican courts and tribunals undermine its claim of denial of fair and equitable treatment and risks unjust enrichment.[561]

565. In the circumstances, the Tribunal does not consider any issue to arise with respect to its jurisdiction in relation to CALICA's proceedings in Mexican courts or administrative tribunals. The Tribunal confirms that pursuant to NAFTA Article 1121, Claimant and CALICA have:

> . . . waive[d] their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116 [and 1117], except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

566. Since there is no assertion that the proceedings brought by CALICA are inconsistent with this provision, the Tribunal is satisfied that Claimant has provided and complied with the necessary waiver required by NAFTA.

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559 C-PHM, ¶ 20; *see* 2021 Hearing Transcript (Spanish), Day 1, 228:4-229:14, 243:5-244:14; **RD-0001**, Respondent's Opening Presentation, slides 28, 72.

560 R-RPHM, ¶ 17.

561 R-RPHM, ¶ 18.

567. Despite the above, the issue of proceedings brought by CALICA will be addressed as relevant to the arguments made by Respondent on the merits of Claimant's claims (*see* ¶¶ 1177 *et seq.* below).

8. Ancillary Claim

568. Respondent objects to this NAFTA Tribunal's jurisdiction over the ancillary claim on the basis that NAFTA ceased to be in force as of 1 July 2020, and was superseded by the USMCA.[562] At the Hearing on the Ancillary Claim, Respondent further raised an issue as to whether Claimant holds a "legacy investment" within the meaning of Annex 14-C to the USMCA,[563] i.e., "an investment . . . established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement".[564] The Tribunal considers this issue to be a part of Respondent's jurisdictional objection on the ancillary claim related to Annex 14-C of the USMCA.

569. The Tribunal will first consider the implications of PO7 for its jurisdiction over the ancillary claim. The Tribunal will then turn to the question whether Claimant holds a "legacy investment" within the meaning of Annex 14-C to the USMCA, before addressing other issues, as relevant.

(a) Implications of PO7

570. In Claimant's view, the Tribunal already made a positive finding of jurisdiction over the ancillary claim in PO7.[565] Claimant further disagrees with Respondent's argument based on the USMCA.[566]

571. By PO7, the Tribunal permitted Claimant to present the ancillary claim.[567] This permission was granted pursuant to Article 46 of the ICSID Convention and ICSID Arbitration Rule 40, which require an incidental or additional claim or counterclaim to

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562 Counter-Memorial AC, ¶ 407.
563 2023 Hearing Transcript (English), Day 1, 130:18-131:6.
564 **C-0314-ENG**, USMCA, Annex 14-C, ¶ 6(a).
565 Memorial AC, ¶ 90*, citing* PO7, ¶ 150*, citing* **C-0279-SPA**, Mining Panorama Report 2021, pp. 29-32.
566 Memorial AC, ¶ 114.
567 PO7, ¶ 160(b).

be "within the scope of the consent of the parties and . . . otherwise within the jurisdiction of the Centre."

572. In this respect, PO7 noted that the ancillary claim was to be considered in conjunction with the original claim, and that the requirements of written notice of a claim, the expiry of a six-month period and the investor's consent and waiver are covered by compliance with those requirements in relation to the original claim.[568] The Tribunal further stated that it "otherwise considers the ancillary claim to be within the scope of the consent of the Parties and within the jurisdiction of the ICSID".[569]

573. PO7 further specified that "consideration of the ancillary claim [would] be carried out respecting due process for both sides, including at a minimum further written submissions and evidence, and not based on the observations made to date".[570]

574. This issue was the subject of a Tribunal question to the Parties, asking (i) whether any of the Tribunal's findings in PO7 can be revised in light of the arguments regarding the USMCA raised by Respondent and by Claimant subsequent to the issuance of PO7; and (ii) what are the implications, if any, of the fact that Respondent brought its jurisdictional objection based on the supersession of NAFTA by the USMCA together with its Counter-Memorial on the Ancillary Claim of 19 December 2022.[571]

575. Respondent contends that the Tribunal may review PO7, but it is not necessary to do so, taking into account that PO7 was limited to ruling on the application for leave to file the ancillary claim.[572] In its view, its objection was raised timely with the Counter-Memorial on the Ancillary Claim, consistent with ICSID Arbitration Rule 41.[573] Respondent further relies on the case of *The Lopez Goyne Family Trust* which found that case-law and academic literature largely endorse the view that tribunals must address jurisdictional objections irrespective of when they were raised.[574]

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568 PO7, ¶ 149.
569 PO7, ¶ 150.
570 PO7, ¶ 157.
571 Tribunal Questions to the Parties dated 23 August 2023, ¶ 1.
572 R-PHM AC, ¶ 13. *See also* Counter-Memorial AC, ¶ 414.
573 R-PHM AC, ¶ 16.
574 R-PHM AC, ¶ 17*, citing* **CL-0243-ENG**, *Lopez Goyne v. Nicaragua*, Award, ¶ 364.

576. Claimant argues that the Tribunal's finding of jurisdiction in PO7 was correctly and definitively determined. Since Respondent was aware of the USMCA in May and June 2022, for Claimant there is no new fact nor exceptional circumstance that would justify reconsideration of PO7.[575]

577. Claimant further submits that the finding with respect to jurisdiction in PO7 should not be reconsidered, on the basis that Respondent cannot unilaterally withdraw its consent once perfected. The principle of *res judicata* additionally counsels against revising PO7, in its view.[576] According to Claimant, Respondent previously argued its case on the basis that NAFTA governs the Tribunal's jurisdiction over the ancillary claim, confirming the Parties' understanding that NAFTA is the law applicable to the ancillary claim.[577]

578. On this point, Respondent submits that Claimant is confusing the Parties' consent to arbitration and the law applicable to the merits of a dispute.[578] It argues that the Tribunal's jurisdiction is governed by USMCA Annex 14-C.[579] For Respondent, its consent is set out in the investment treaty and cannot be modified unilaterally, rendering Claimant's argument that it accepted jurisdiction under NAFTA by its written submissions to be meritless.[580]

579. The Tribunal agrees with Respondent that PO7 was issued for the purpose of admitting the ancillary claim in this arbitration. In this Award, the Tribunal does not revisit or reconsider that determination. To the extent that the Tribunal found, at the time of PO7, that the ancillary claim was within the scope of the consent of the Parties and within the jurisdiction of the ICSID, that finding was for the purpose of admitting the claim, and is necessarily subject to the rest of the Tribunal's directions in PO7, as well as the ICSID Convention and ICSID Arbitration Rules. In this respect, PO7 specified that due process would be respected, giving the Parties the opportunity to make further submissions in relation to the ancillary claim (*see* ¶ 573 above).

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575 C-PHM AC, ¶ 102; C-RPHM AC, ¶ 6.
576 C-PHM AC, ¶ 96; C-RPHM AC, ¶ 7.
577 C-PHM AC, ¶ 98; C-RPHM, ¶ 8. *See also* C-RPHM, ¶¶ 9-10.
578 R-PHM AC, ¶ 21.
579 R-PHM AC, ¶ 24.
580 R-PHM AC, ¶ 25*, citing* **RL-0242-ENG**, Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009), p. 141.

580. ICSID Arbitration Rule 41(1) sets out that an objection to jurisdiction over an ancillary claim is, in principle, to be filed no later than the filing of the rejoinder:

> [a]ny objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time.

581. In the present case, the ancillary claim was not yet admitted at the time of Respondent's Rejoinder on the original claims. As such, the basis for the objection was unknown to Respondent at that time.

582. Claimant correctly points out that Respondent could still have raised the objection earlier, since the issue of the USMCA superseding NAFTA was already known to it at the time of its submissions in relation to the admission of the ancillary claim. However, the Tribunal considers that Respondent has still respected the time limit in ICSID Arbitration Rule 41(1). Taking into account the procedural calendar for the filing of submissions in relation to the ancillary claim, Respondent's objection to the Tribunal's jurisdiction with the Counter-Memorial on the Ancillary Claim is timely. In this regard, Respondent's objection is not precluded by the Tribunal's directions in PO7 in the context of the admission of the ancillary claim.

583. Nor is it precluded by Respondent's own prior submissions which appear to acknowledge NAFTA as the basis for the Tribunal's jurisdiction over the ancillary claim. In this respect, Claimant argues that those submissions record a mutual agreement between the disputing parties on the applicable law, and a consent to arbitrate the ancillary claim under NAFTA, which cannot be unilaterally withdrawn by Mexico and which the Tribunal is bound to respect.[581] Claimant clarifies that it is not arguing consent by estoppel.[582] The Tribunal agrees with Respondent that its submissions do not modify its consent pursuant to a treaty, or by extension the Tribunal's jurisdiction. The Tribunal is not persuaded that by making those submissions, Respondent deprived itself of the opportunity to present

581 C-PHM AC, ¶¶ 7, 105.
582 C-RPHM AC, ¶ 8.

its jurisdictional objection in accordance with ICSID Arbitration Rule 41(1), as it is common practice in ICSID cases.

584. The Tribunal does not consider the principle of *res judicata* to prevent it from considering Respondent's jurisdictional objection either. The directions in PO7 were not issued as a decision or an award, and the cases relied on by Claimant therefore do not assist it on this point.[583]

585. The Tribunal further notes that Claimant had the opportunity to make written and oral submissions on Respondent's jurisdictional objection in its Reply on the Ancillary Claim, at the Hearing on the Ancillary Claim and Jurisdiction and Admissibility of the Counterclaim, and in two rounds of post-hearing submissions, which include responses to the Tribunal's questions related to this objection. This included the opportunity to respond to Respondent's argument that Claimant does not hold a "legacy investment" within the meaning of USMCA Annex 14-C, which was raised at the Hearing on the Ancillary Claim and Jurisdiction and Admissibility of the Counterclaim.[584]

(b) Whether Claimant Holds a Legacy Investment

586. The Tribunal will now decide on Respondent's objection that Claimant does not hold a "legacy investment" within the meaning of USMCA Annex 14-C, i.e., "an investment . . . established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of [the USMCA]".[585] The Tribunal recalls that Claimant's ancillary claim only concerns its quarrying site at La

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583 *See* **CL-0290-ENG**, *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, ¶ 45; **CL-0291-ENG**, *Landesbank Baden-Württemberg et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, ¶¶ 34-37; **CL-0061-ENG**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, ¶ 209; **CL-0288-ENG**, *JSC Tashkent Mechanical Plant and others v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/16/4, Award, 17 May 2023, ¶ 437; **CL-0292-ENG**, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, ¶ 135. *See also* C-PHM AC, ¶ 101; R-RPHM AC, ¶ 13.

584 It is noted that, in Respondent's view, the argument regarding whether Claimant holds a "legacy investment" was raised prior to the Hearing on the Ancillary Claim and Jurisdiction and Admissibility of the Counterclaim, in the Rejoinder-AC, ¶¶ 278-279. While at Rejoinder-AC, ¶ 279, Respondent mentions that "*Legacy comenzó su inversion en CALICA antes de que existiera el TLCAN*", the Tribunal does not find an argument made that Claimant did not hold a "legacy investment" under USMCA Annex 14-C. *See* 2023 Hearing Transcript (English), 187:15-188:3 (Tribunal Question to Respondent).

585 **C-0314-ENG**, USMCA, Annex 14-C, ¶ 6(a).

Rosita and its operations at Punta Venado, and not the quarrying sites at El Corchalito or La Adelita, which are in a different Municipality and subject to a different authorization.[586]

587. The legacy investment issue was the subject of two related Tribunal questions to the Parties: (i) is Claimant's investment in La Rosita a "legacy investment" for the purpose of USMCA Annex 14-C?; and (ii) is an investment made prior to 1994 an investment for the purpose of Chapter 11 of NAFTA?[587]

588. For Respondent, the USMCA parties decided to limit the scope of application of USMCA Annex 14-C to an investment acquired or established from the date of entry into force of NAFTA, rather than maintaining the scope of note 39 to NAFTA.[588] NAFTA note 39 provides that Chapter 11 "covers investments existing on the date of entry into force of this Agreement as well as investments made or acquired thereafter".[589]

589. In Respondent's view, La Rosita and Punta Venado were established in 1986 under the 1986 Investment Agreement and were acquired through sales and purchases in 1986 and 1987.[590] Respondent cites Claimant's account that by 1991, it had completed construction of a state-of-the-art processing plant in La Rosita and the first year of production was in 1990.[591] According to Respondent, a corporate restructuring of Claimant in 2015 is not sufficient to evade the definition of a legacy investment.[592]

590. Claimant submits that investments in existence when NAFTA entered into force are investments for the purpose of NAFTA Chapter 11, as per note 39 to NAFTA. In its view, it would be illogical and inconsistent with the purpose of the USMCA if Annex 14-C included only one category of NAFTA Chapter 11 protected investments and excluded others.[593]

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586 Memorial AC, ¶¶ 3-8.
587 Tribunal Questions to the Parties dated 23 August 2023, ¶ 2.
588 R-PHM AC, ¶ 19. *See* **CL-0297-ENG**, Notes to NAFTA text, 1 January 1992.
589 **CL-0297-ENG**, Notes to NAFTA text, p. 8 of the PDF, Note 39.
590 R-PHM AC, ¶ 20*, citing* **C-0029-SPA**, Punta Venado Title Deed; **C-0030-SPA**, La Rosita Title Deed.
591 R-PHM AC, ¶ 20*, citing* Memorial, ¶ 12; Memorial, ¶ 5; Chodorow First Report, ¶ 41; Memorial AC, ¶ 13.
592 R-RPHM AC, ¶ 16.
593 C-PHM AC, ¶ 112*, citing* **CL-0297-ENG**, Notes to NAFTA text, Note 39; **C-0319-ENG**, USMCA, Art. 34.1(1); **C-0318-ENG**, USMCA, Preamble. *See also* C-PHM AC, ¶ 114; C-RPHM AC, ¶ 14.

591. Claimant contends that it fully acquired its investment in La Rosita after 1 January 1994, and that the investment existed as at 1 July 2020. While the Project was launched in the late 1980s, prior to NAFTA, Claimant asserts that it acquired all rights and obligations from Legacy Vulcan Corporation in 2015.[594]

592. The Tribunal shall interpret the language of NAFTA, the Protocol Replacing NAFTA and the USMCA (in particular, paragraph 6(b) of Annex 14-C thereof) in good faith in accordance with the ordinary meaning to be given to their terms in their context and in the light of the object and purpose of the treaties, as per Article 31 of the VCLT.

593. It is undisputed that NAFTA has been superseded by the USMCA, which entered into force on 1 July 2020.[595]

594. The parties to the USMCA decided to put in place a transitional regime with respect to legacy investment claims and pending claims that would provide a level of continuity between the NAFTA and USMCA regimes. In that respect, the Protocol Replacing NAFTA specifies that the USMCA shall supersede NAFTA "without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA."[596]

595. USMCA Annex 14-C sets out the specific regime for "legacy investment claims and pending claims." The relevant provisions are set out at ¶¶ 371 *et seq.* above. Those provisions of USMCA Annex 14-C refer to NAFTA.

596. The question of NAFTA arbitrations pending at the time NAFTA was terminated is addressed in paragraph 5 of USMCA Annex 14-C, stating that an arbitration commenced while NAFTA was in force "may proceed to its conclusion" (*see* ¶ 375 above). Claimant argues on the basis of this provision that because this arbitration was commenced in December 2018, before the entry into force of the USMCA, it may proceed to its conclusion.[597] This is of no assistance to Claimant, because paragraph 5 states that "the Tribunal's jurisdiction with respect to such a claim is not affected by the termination of

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[594] C-PHM AC, ¶ 109*, citing*, *inter alia*, [redacted] First Statement, ¶¶ 13, n. 1, 26; Memorial, ¶ 17, n. 2; Reply AC, ¶ 119; **C-0046-ENG**, Vulcan Form 10-K 2001. *See also* C-PHM AC, ¶ 111.

[595] Counter-Memorial AC, ¶ 407; Reply AC, ¶ 116.

[596] **C-0313-ENG**, Protocol Replacing NAFTA, Art. 1.

[597] Claimant's Comments on the Second Article 1128 Submission of the United States of America and the 30 June 2023 Letter of Mr. Quetzal Tzab, ¶¶ 32-33.

NAFTA 1994" (emphasis added). The Tribunal understand the words "such a claim" to refer to the original claims submitted to the Tribunal, i.e., the "arbitration initiated pursuant to the submission of a claim…" It thus does not answer the question of jurisdiction over an ancillary claim filed after the termination of NAFTA in a case that was initiated prior to the termination of NAFTA.

597. Paragraph 1 of USMCA Annex 14-C provides the USMCA Contracting Parties' consent to submit claims "with respect to a legacy investment" to arbitration under Section B of Chapter 11 of NAFTA, in relation to an alleged breach of Section A of Chapter 11 of NAFTA (*see* ¶ 371 above). The consent expires three years after the termination of NAFTA, i.e., 1 July 2023.[598] A legacy investment is one established between 1 January 1994 and the date of termination of NAFTA.[599]

598. Paragraph 4 of USMCA Annex 14-C provides that arbitrations initiated pursuant to paragraph 1 may also proceed to their conclusion, unaffected by the expiration of consent referred to in paragraph 3 (*see* ¶ 374 above).

599. In relation to the definition of a legacy investment, the Tribunal is not persuaded that USMCA Annex 14-C incorporates or follows the temporal approach to investments under NAFTA note 39, as the language of Annex 14-C does not support that interpretation. Annex 14-C covers legacy investments "established or acquired between January 1, 1994, and the date of termination of NAFTA 1994".[600] It does not adopt the wording of NAFTA note 39 which provides that Chapter 11 "covers investments existing on the date of entry into force of this Agreement as well as investments made or acquired thereafter".[601] Importantly, the words "existing on the date of entry into force" of NAFTA are missing from Annex 14-C. The Contracting Parties to the USMCA agreed on a specific, narrower definition of legacy investments to which the extended protection of Annex 14-C would apply. The Tribunal must interpret the treaty language in good faith, and it is not for the Tribunal to rewrite that agreement, or to second-guess it. The Tribunal cannot give effect to an unexpressed intention of the USMCA Contracting Parties by implying a broader

598 **C-0314-ENG**, USMCA, Annex 14-C, ¶ 3.
599 **C-0314-ENG**, USMCA, Annex 14-C, ¶ 6(a).
600 **C-0314-ENG**, USMCA, Annex 14-C, ¶ 6(a).
601 **CL-0297-ENG,** Notes to NAFTA text, Note 39.

definition of covered investments that is not in the text. In this regard, the rules on treaty interpretation are rooted in a textualist approach.

600. While nothing turns on this in the present case, the Tribunal observes that notes which do not appear in the text of a treaty but accompany it (without constituting an annex), and equally footnotes that do appear as notes in the text of a treaty but not in the main text, are to be given effect in accordance with the intentions of the parties to a treaty, even if it is not the most elegant form of treaty drafting.

601. Being a limited extension of the protections provided under NAFTA beyond its termination, the Tribunal does not find it illogical or inconsistent with the object and purpose of the USMCA that a different and narrower temporal scope of protection would apply under Annex 14-C as compared to NAFTA. In this respect, the Preamble to the USMCA resolves to establish a "clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment."[602] There are many ways to achieve that purpose, and the clear regime set out in Annex 14-C is the manner agreed upon by the Contracting Parties to the USMCA.

602. To the extent that Claimant would consider its protection under NAFTA Chapter 11 to have abruptly expired under this interpretation, depriving it of an opportunity to reconfigure or reconsider its investments (being an argument that Claimant made primarily in relation to the expiration of substantive protections),[603] the Tribunal does not consider that a basis for a different interpretation of the plain language of the treaty.

603. The ordinary meaning of the words "established or acquired" in Annex 14-C to the USMCA refers to the stage of initiating or obtaining an investment, as opposed to expanding or restructuring an existing investment. This language is also to be distinguished from an investment "made" in a certain period, which would be capable of referring more generally to ongoing or additional investments. The Tribunal therefore

602 **C-0318-ENG**, USMCA, Preamble.

603 *See* Reply AC, ¶ 126*, citing* **CL-0141-ENG**, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 23 May 1969 ("VCLT"), Art. 31(1)-(2)*, citing* **C-0317-ENG**, NAFTA, Preamble*, citing* **C-0318-ENG**, USMCA, Preamble; Reply AC, ¶ 127*, citing, inter alia,* **CL-0206-ENG**, Frédéric G. Sourgens, *Chapter 15: Living on a Prayer: Termination of Intra-EU BITs and the Law of Treaties, in* THE VIENNA CONVENTION ON THE LAW OF TREATIES IN INVESTOR-STATE DISPUTES: HISTORY, EVOLUTION AND FUTURE (E. Shirlow, K. Gore eds. 2022), p. 325.

understands the protection of Annex 14-C to the USMCA to be granted in respect of investments that are started ("established") or obtained ("acquired") between 1 January 1994 and the termination of NAFTA on 1 July 2020.

604. In the ancillary claim, Claimant seeks protection of its investments in La Rosita and Punta Venado. As set out in Claimant's own submissions and evidence, the timeline for the establishment of those investments is as follows:

- 6 August 1986: CALICA and Respondent entered into the Investment Agreement.[604]

- 1986-1987: CALICA "acquired and developed the lots that additionally comprised the Project – La Rosita and Punta Venado".[605] A Mexican subsidiary of CALICA acquired the lots and leased them to CALICA.[606] CALICA received a permit and the CALICA Port Concession authorizing the construction and use of a port terminal in Punta Venado.[607]

- Mid-1987: site preparation at La Rosita was underway.[608]

- 1989: dredging of the harbour at Punta Venado was completed.[609] Approximately 75,000 tons of crushed stone base material were produced at La Rosita by a temporary processing plant.[610]

- January-February 1990: CALICA commenced port operations, making the first shipments to sales yards in the United States. Over 1.8 million tons were shipped in 1990.[611]

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604 Memorial AC, ¶ 10; Memorial, ¶ 25; **C-0010-SPA**, Investment Agreement.
605 Memorial AC, ¶ 10*, citing* **C-0029-SPA**, Punta Venado Title Deed, p. 8; **C-0030-SPA**, La Rosita Title Deed, p. 3.
606 Memorial, ¶ 29*, citing* **C-0029-SPA**, Punta Venado Title Deed; **C-0030-SPA**, La Rosita Title Deed.
607 **C-0028-SPA**, Project No. 28/86 Provisional Permit. *See* Memorial, ¶ 29.
608 [redacted] First Statement, ¶ 16.
609 [redacted] First Statement, ¶ 16.
610 [redacted] First Statement, ¶ 17.
611 [redacted] First Statement, ¶ 18; Memorial, ¶ 30.

- Early 1991: construction of a permanent processing plant in La Rosita was commenced and a Panamax vessel was acquired and converted into a self-unloading vessel.[612]

- 1991: CALICA's private port terminal was completed, the state-of-the-art permanent processing plant began operations, and the initial sales yards in the United States were ready. Shipments from CALICA to the United States in 1991 were 2.5 million tons.[613]

- October 1992: A second Panamax class bulk carrier purchased for conversion into a self-unloading vessel was placed in service.[614]

605. From the above timeline, it is clear that as at 1 January 1994, Claimant's investments in La Rosita and Punta Venado were mature, in the sense that the quarrying and shipping activities were underway at those sites and were producing revenue. In these circumstances, the Tribunal considers it artificial to describe Claimant's investment as having been "established or acquired" thereafter.

606. After 1 January 1994 Claimant did expand its investments. In 2015, for example, Claimant invested [redacted] for a supplemental processing plant at La Rosita.[615] However, the Tribunal considers this to be an expansion of an existing investment and not the establishment or acquisition of an investment within the meaning of USMCA Annex 14-C, paragraph 6(b).

607. Claimant's primary argument is that it acquired all rights and obligations relating to the Project from Legacy Vulcan Corporation in 2015. As described by Claimant:[616]

> At the time Legacy Vulcan started investing in Mexico, the company was called Vulcan Materials Company and was organized under the laws of the State of New Jersey, United States. In 2007, as part of a merger, Vulcan Materials Company was renamed Legacy Vulcan Corp. and became a subsidiary of a newly formed parent company named Vulcan Materials

612 [redacted] First Statement, ¶ 19.
613 First Statement, ¶¶ 19-20; Memorial, ¶ 30; Memorial AC, ¶ 13.
614 First Statement, ¶ 20.
615 **C-0089-ENG**, Authorization for Expenditure (AFE) Project Description, Plant 4511 Sac Tun, MX, Supplemental Plant, dated 24 April 2015 ("AFE Project Description"); [redacted] First Statement, ¶ 54.
616 Memorial, ¶ 17, n. 2.

> Company that was organized under the laws of the State of New Jersey, United States. In 2015, Legacy Vulcan Corp. was merged into Legacy Vulcan, a limited liability company.

608. It would be inaccurate to describe the 2015 merger of Legacy Vulcan Corp. into Legacy Vulcan LLC as an acquisition, in the sense of Claimant "obtaining" an investment that it did not previously own. The Tribunal agrees with Respondent that this transaction was rather a corporate restructuring.

609. Claimant itself does not emphasise the 2001 acquisition of Grupo ICA's share in the joint venture by Legacy Vulcan Corporation.[617] In any event, the Tribunal considers this to be another expansion of an existing investment and not the establishment or acquisition of an investment within the meaning of USMCA Annex 14-C, paragraph 6(b).

610. While the Tribunal accepts that the establishment of an investment is a process, often composed of a number of transactions and activities, the Tribunal is unable to disregard the specific language of Annex 14-C to the USMCA on the scope of protection of legacy investments. Claimant's investments in La Rosita and Punta Venado were not established or acquired between 1 January 1994 and 1 July 2022.

611. In light of the above, the Tribunal does not have jurisdiction over the ancillary claim.

612. In light of this finding, the Tribunal does not consider it necessary to address Respondent's additional arguments that USMCA Annex 14-C does not extend the substantive protections of NAFTA, but only the procedural right to make a claim based on events while NAFTA was in force,[618] or that the ancillary claim is inadmissible on the basis of the "unclean hands" doctrine,[619] both of which were opposed by Claimant.[620]

9. Counterclaim

613. In its directions of 10 March 2023, the Tribunal deferred its decision on its jurisdiction over and the admissibility of the counterclaim. In accordance with Articles 41 and 46 of the ICSID Convention (*see* ¶¶ 368 and 369 above) and Rules 40 and 41 of the ICSID

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617 *See* C-PHM AC, ¶ 109, n. 304.
618 R-PHM AC, ¶ 21.
619 *See* Counter-Memorial AC, ¶¶ 394-399; Rejoinder AC, ¶¶ 288-301.
620 *See, inter alia,* Memorial AC, ¶ 114; Reply AC, ¶¶ 138-141.

Arbitration Rules, the Tribunal joined the question of the admissibility and jurisdiction over the counterclaim to the merits of the counterclaim, to be decided in the final award. By agreement of the Parties, on 13 April 2023, the question of the admissibility of and jurisdiction over the counterclaim was subsequently bifurcated from the merits and quantum of the counterclaim, if any.

614. Accordingly, the Tribunal now decides on its jurisdiction over and the admissibility of the counterclaim. For the avoidance of doubt, Respondent's counterclaim was not already admitted on 10 March 2023, but Respondent's request for leave to brief the Tribunal on the counterclaim was granted.[621] For the purposes of the present analysis, the Tribunal assumes, without deciding, that counterclaims by respondent States against investors fall within the scope of, and is permitted by, NAFTA Chapter 11. The Tribunal takes no position on this point because, for other reasons, the counterclaim in this case is inadmissible.

615. The Tribunal will first address the implications of its finding on jurisdiction over the ancillary claim for Respondent's counterclaim, as well as the timeliness of the counterclaim, before turning to other issues as necessary.

(a) Criteria for Jurisdiction over and Admissibility of the Counterclaim

616. In ¶ 160 of PO7, the Tribunal decided to defer "any decision on any counterclaim to be presented by Respondent . . . to a reasoned application for leave by Respondent." With reference to this direction, the Tribunal subsequently asked the Parties two questions:

> 12. Is Respondent's counterclaim directed against Claimant's original claim and/or against Claimant's ancillary claim? Was it brought timely with respect to each, as applicable?
>
> 13. Is the Tribunal's jurisdiction over Respondent's counterclaim contingent on the Tribunal having jurisdiction over Claimant's ancillary claim?
>
> a. Assuming, without deciding, that the Tribunal has no jurisdiction over Claimant's ancillary claim, does this have as a consequence that the Tribunal does not have jurisdiction over Respondent's counterclaim?

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621 *See* Counterclaim Memorial on Jurisdiction, ¶ 202.

617. According to Claimant, if the Tribunal lacks jurisdiction over the ancillary claim, it also lacks jurisdiction over the counterclaim, since the counterclaim must be closely related to the primary claim and based on the same investment treaty that gives rise to the primary claim.[622] In its view, if the Tribunal adopts Respondent's view that NAFTA obligations terminated in July 2020, then the cause of action on which Respondent bases its counterclaim likewise terminated before that date.[623] Claimant asserts that Respondent has not made any claim that the Tribunal would have jurisdiction over its counterclaim under the USMCA.[624]

618. In Respondent's view, the Tribunal's jurisdiction over the counterclaim does not depend on its jurisdiction over the ancillary claim. It argues that the only requirement is that there be a factual connection between the counterclaim and the dispute under ICSID Arbitration Rule 40.[625] Because the counterclaim arises out of the investment, Respondent submits that there is a factual connection to the original claim. On this basis, Respondent contends that the counterclaim can survive even if the Tribunal decides that it does not have jurisdiction over the ancillary claim.[626]

619. Assuming, without deciding, that a respondent State may make a counterclaim under NAFTA (which is a disputed issue), the admission of such a counterclaim in this arbitration and the Tribunal's jurisdiction over it would be governed by the provisions of NAFTA, the ICSID Convention, and the ICSID Arbitration Rules.

620. ICSID Convention Article 46 provides:

> Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

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622 C-PHM AC, ¶ 155; Response on Counterclaim, ¶¶ 159, 164-168; 2023 Hearing Transcript (English), Day 1, 178:12-179:11 (Claimant's Opening Statement). *See also* C-PHM AC, ¶ 157*, citing* **RL-0171-ENG**, *Metal-Tech v. Uzbekistan,* Award, ¶ 413.

623 C-RPHM AC, ¶ 67.

624 C-RPHM AC, ¶ 68, n. 186.

625 R-PHM AC, ¶ 38.

626 R-PHM AC, ¶ 39*, citing* **RL-0208-ENG**, *Oxus Gold v. Uzbekistan*, Final Award*,* ¶ 954; **RL-0121-ENG**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, ¶ 1414.

621. ICSID Arbitration Rule 40, paragraphs (1) and (2) further provide as follows:

> (1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
>
> (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.

622. It follows from the above that any counterclaim must arise "directly out of the subject-matter of the dispute", be "within the scope of the consent of the parties" and otherwise "within the jurisdiction of the Centre". It must be presented "no later than in the counter-memorial", unless the Tribunal authorizes later presentation on a justified basis.

623. Respondent characterizes its counterclaim as covering factual issues referred to in both the original claim and in the ancillary claim, because the environmental damage generated by Claimant's breaches of environmental law is indivisible between its properties.[627] For Respondent, if the Tribunal has jurisdiction over an investment under Article 25 of the ICSID Convention, counterclaims arising out of the same investment should fall under ICSID jurisdiction.[628] Respondent argues that it is not necessary to have identity between the legal instruments being the basis for the claims and the counterclaim.[629]

624. Respondent submits that NAFTA is the basis of the counterclaim.[630] It does not base the counterclaim on the provisions of the USMCA. The Tribunal notes that paragraph 5 of USMCA Annex 14-C states that an arbitration commenced while NAFTA was in force "may proceed to its conclusion" (*see* ¶ 375 above).[631] Paragraph 5 states that "the Tribunal's jurisdiction with respect to such a claim is not affected by the termination of

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627 R-PHM AC, ¶ 29; Counterclaim Memorial on Jurisdiction, ¶¶ 240-244. *See also* R-RPHM AC, ¶¶ 87-88.
628 R-PHM AC, ¶ 30.
629 R-PHM AC, ¶ 37; R-RPHM AC, ¶ 90.
630 R-RPHM AC, ¶ 90. *See also* Counter-Memorial AC, ¶ 494; Counterclaim Memorial on Jurisdiction, ¶ 246(i).
631 **C-0314-ENG**, USMCA, Annex 14-C, ¶ 5. *See also* 2023 Hearing Transcript (English), Day 1, 53:10-16, 56:2-5 (Claimants Opening Statement).

NAFTA 1994" (emphasis added). As held at ¶ 596 above, the Tribunal understand the words "such a claim" to refer to the original claims submitted to the Tribunal, i.e., the "arbitration initiated pursuant to the submission of a claim…" It thus does not answer the question of a counterclaim filed after the termination of NAFTA in a case that was initiated prior to the termination of NAFTA. Like the ancillary claim, the counterclaim must fulfil the relevant requirements as set out at ¶¶ 620-622 above.

625. In order to determine whether the counterclaim fulfils the requirements, the Tribunal will first examine the subject-matter of the counterclaim before turning to its timeliness.

(b) Subject-matter of the Counterclaim

626. Under ICSID Convention Article 46 and ICSID Arbitration Rule 40(1), any counterclaim must arise "directly out of the subject-matter of the dispute" (*see* ¶¶ 620 and 621 above). The same criteria were applied by the Tribunal in relation to the admission of an ancillary claim in PO7.[632] In its Decision on Jurisdiction over the Czech Republic's Counterclaim, relied on by Claimant, the *Saluka Investments v. Czech Republic* tribunal referred to a "general legal principle" requiring a close connection between a counterclaim and the primary claim, being a common requirement under multiple legal instruments and procedural rules.[633] The Tribunal does not consider it necessary to apply a general legal principle on close connection in the present case, there being a specific requirement set out in the ICSID Convention and the ICSID Arbitration Rules.

627. It does not appear to be in dispute that a legal connection in addition to a factual connection is required between a claim and a counterclaim.[634] In that regard, the Parties have different understandings of what kind of legal connection is required. The Tribunal confirms that the "arising directly out of the subject-matter of the dispute" requirement in ICSID Convention Article 46 and ICSID Arbitration Rule 40(1) requires a factual and legal connection with the dispute, which is to be assessed in the circumstances of the case.

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632 PO7, ¶¶ 130-138.

633 **RL-0176-ENG**, *Saluka v. Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim, ¶ 61. *See* Response on Counterclaim Jurisdiction, ¶ 159.

634 Counterclaim Memorial on Jurisdiction, ¶¶ 238-239; Response on Counterclaim Jurisdiction, ¶ 164.

628. The connection requirement is separate to the assessment whether the counterclaim is "within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre". For present purposes, the Tribunal does not address the question whether the claim and the counterclaim must arise from the same legal instrument, which Claimant refers to as the "legal connection" requirement.[635] The Tribunal assumes, for present purposes, that a legal connection between the claims and the counterclaim exists and that NAFTA permits counterclaims (*see* ¶ 614 above).

629. Both Parties refer to the close connection requirement as a jurisdictional one,[636] although Respondent does cite the decision in *Metal-Tech v. Republic of Uzbekistan* which found that the connected subject-matter requirement is "generally deemed an admissibility and not a jurisdictional requirement".[637] Whether considered as a matter of jurisdiction or admissibility, the non-fulfilment of the connected subject-matter requirement would be the same, in that the Tribunal would be precluded from deciding on the counterclaim. Accordingly, while the Tribunal considers the connected subject-matter requirement to be jurisdictional, nothing turns on that question in the present case.

630. The Tribunal accepts that if a counterclaim by Respondent were possible under NAFTA, it may conceivably arise in relation to Claimant's investment as a whole, as opposed to being limited to those lots that were the subject of Claimant's original claims. This is because a counterclaim in relation to La Rosita, Punta Venado, La Adelita and El Corchalito may arise directly out of the subject-matter of the dispute, even if Claimant's original claims were only made in relation to El Corchalito, La Adelita and Punta Venado.

631. This is consistent with the Tribunal's directions in PO7 that the interconnection between La Adelita, El Corchalito and La Rosita is evident as a matter of fact from the record of these proceedings.[638] In PO7, the Tribunal noted that the "Project", as described by Claimant, includes "Claimant's Extraction Plant, Port Terminal and fleet of vessels to export the petrous materials quarried at La Rosita, El Corchalito, and La Adelita."[639] In

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635 *See* Response on Counterclaim Jurisdiction, ¶ 164.
636 Counterclaim Memorial on Jurisdiction, ¶ 174; Response on Counterclaim Jurisdiction, ¶ 159.
637 **RL-0171-ENG**, *Metal-Tech v. Uzbekistan,* Award, ¶ 407. *See* Counterclaim Memorial on Jurisdiction, ¶ 174, n. 174.
638 PO7, ¶ 136.
639 Request for Arbitration, p. 31; *see* PO7, ¶ 136.

the Tribunal's view, alleged non-compliance with environmental obligations arising from Claimant's activities in the Project as a whole arises directly out of the subject-matter of Claimant's original claims in this arbitration, which concern its investment in Punta Venado, El Corchalito and La Adelita.

632. It is true that Respondent's initial indication was that it reserved its right to file a counterclaim only with respect to the subject of Claimant's "new" claim ("*relacionada con el objeto de la nueva reclamación*").[640] The broader scope of the counterclaim that Respondent now seeks to admit is still closely connected to the subject-matter of Claimant's original claims. The question raised by this broader scope is rather a question of timeliness, which the Tribunal will address in the following Section.

(c) Timeliness of the Counterclaim

633. The Tribunal will examine the timeliness of the counterclaim filed by Respondent, noting that the subject-matter of the counterclaim concerns Claimant's operations in the Project as a whole, including La Rosita, El Corchalito and La Adelita, and is not limited to La Rosita.

i. Date of Filing of the Counterclaim

634. Under ICSID Arbitration Rule 40(2), any counterclaim must be presented "no later than in the counter-memorial", unless the Tribunal authorizes later presentation on a justified basis. The Tribunal will consider whether the counterclaim has been filed timely pursuant to this rule. While there would be no difference in the result, the Tribunal agrees with both Parties that the timely filing of the counterclaim is a matter of procedure or admissibility, as opposed to jurisdiction.[641] At this stage of the analysis, the Tribunal leaves aside Claimant's additional timeliness objection on the basis of NAFTA Articles 1116 and 1117.[642]

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640 Respondent's Response to the Claimant's Request for Provisional Measures and Leave to File an Ancillary Claim, ¶ 130.

641 Counterclaim Memorial on Jurisdiction, ¶ 206; Response on Counterclaim Jurisdiction, ¶ 173.

642 Response on Counterclaim Jurisdiction, ¶ 121, *citing* **CL-0246-ENG**, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 83; *see* Counter-Memorial, ¶ 275.

635. In Respondent's view, it timely requested leave to file the counterclaim on 26 May 2022, in response to Claimant's application for admission of the ancillary claim.[643] It further argues that the counterclaim was timely filed with the Counter-Memorial AC.[644]

636. The relevant dates and steps to consider are the following:

- On 23 November 2020, Respondent filed its Counter-Memorial in relation to Claimant's original claims.

- On 26 May 2022, Respondent stated in its Response to Claimant's Request for Provisional Measures and Leave to File an Ancillary Claim that in the event the Tribunal would admit Claimant's ancillary claim, it reserved the right to file a request for authorization to present a counterclaim related to the new claim ("*relacionada con el objeto de la nueva reclamación*").[645] No counterclaim in relation to Claimant's original claims was mentioned at that time.

- In PO7 dated 11 July 2022, the Tribunal stated in relation to an application for leave to file a counterclaim:[646]

> The Tribunal is open to considering any such application for leave by Respondent, which Respondent is at liberty to file. The Tribunal shall decide upon any application for leave to submit a counterclaim in accordance with the procedural rules, after giving Claimant the opportunity to comment.

- On 19 December 2022, Respondent filed its Counter-Memorial AC which included a request to file a counterclaim ("*Solicitud de Reconvención*").[647] The counterclaim sought to be introduced covered alleged environmental harm and failure to comply with environmental obligations in all three of Claimant's quarrying sites, i.e., covering both the original claims and the ancillary claim.[648]

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643 R-PHM AC, ¶ 32; Counterclaim Memorial on Jurisdiction, ¶ 201*, citing* PO7, ¶ 159.
644 R-PHM AC, ¶ 33.
645 Respondent's Response to Claimant's Request for Provisional Measures and Leave to File an Ancillary Claim, ¶ 130: ". . . México desea enfatizar que en caso de que el Tribunal autorice la presentación de la nueva reclamación que la Demandante pretende hacer pasar por subordinada, se reserva el derecho de presentar una solicitud de autorización para presentar una reconvención relacionada con el objeto de la nueva reclamación."
646 PO7, ¶ 159.
647 Counter-Memorial AC, ¶ 494. *See also* Counter-Memorial, ¶¶ 518, 521, 523, 524.
648 Counter-Memorial AC, ¶ 520.

637. The Tribunal therefore considers that Respondent's application for leave to file the counterclaim was made together with its Counter-Memorial AC, i.e., on 19 December 2022. Contrary to Respondent's submission, no application was filed on 26 May 2022. As noted in PO7, at that time Respondent only reserved its right to introduce a counterclaim and had not submitted a particularized application for leave to do so.[649]

638. Under ICSID Arbitration Rule 40(2), Respondent's Counter-Memorial in relation to Claimant's original claims was filed on 23 November 2020. In principle, the deadline for filing a counterclaim arising directly out of the subject-matter of the dispute was therefore 23 November 2020.

639. The Counter-Memorial on the Ancillary Claim is not the Counter-Memorial referred to in ICSID Arbitration Rule 40(2), at least with respect to the Parties' dispute that existed prior to the ancillary claim. Respondent argues that it was logical to expect that it would request leave to file the counterclaim no later than the Counter-Memorial on the Ancillary Claim, taking into account the Tribunal's directions in PO7.[650] However, the Tribunal's directions in PO7 were that any application for leave to submit a counterclaim is to be decided in accordance with the procedural rules, i.e., the ICSID Arbitration Rules (*see* ¶ 635 above). As Respondent's counterclaim had not been particularized and no request for leave had yet been filed, no determination on timeliness could have been made.

640. As noted by the Tribunal in PO7 in relation to the ancillary claim,[651] the later submission of the counterclaim does not exclude it from consideration, because ICSID Arbitration Rule 40(2) contemplates the potential admission of ancillary claims and counterclaims at a later stage, with the Tribunal's authorization.

641. The filing of Respondent's counterclaim on 19 December 2022 falls approximately two years after the relevant deadline under the ICSID Arbitration Rules. The question is whether the later submission is justified, taking into account the views of both Parties.

642. In the case of the ancillary claim, the Tribunal found that later admission was not excluded, *inter alia* on the basis that the ancillary claim arose from new facts that were

649 PO7, ¶ 159.
650 Counterclaim Memorial on Jurisdiction, ¶ 203.
651 PO7, ¶ 153.

directly connected to the existing dispute between the Parties. In particular, the ancillary claim concerns new alleged measures by Respondent in relation to Claimant's quarrying operations.[652] The Tribunal will consider whether this reasoning also applies in relation to the counterclaim in the following section.

ii. Whether the Counterclaim Concerns New Facts or New Awareness of Facts

643. New factual developments may justify the admission of an ancillary claim or counterclaim later than the default procedural deadline because such a claim could not have been brought earlier. This is not a rule, but reasoning applied by the Tribunal in the circumstances of the present case. In line with this reasoning, Respondent's position is that new awareness of pre-existing facts could likewise justify the late admission on the counterclaim, as set out below. Without deciding whether it accepts Respondent's position as a general proposition, the Tribunal will examine whether Respondent only became aware of new facts forming the basis for the counterclaim after the procedural deadline for filing such a counterclaim.

644. Respondent bases its counterclaim on (i) Claimant's alleged breaches of environmental legislation; (ii) Claimant's alleged breaches of environmental authorizations and agreements; and (iii) the evidence of damage to the ecosystem and surrounding inhabitants.[653]

645. According to Respondent, it only gained knowledge of Claimant's concealed breaches and misrepresentations, and identified the need to file a counterclaim, when considering Claimant's misrepresentation of President López Obrador's statements and the claims presented both in the arbitration and in the internal proceedings related to the May 2022 inspection.[654] Respondent further submits that it could only estimate the magnitude of the damage caused by CALICA's activities in the State of Quintana Roo upon issuance in 2022 of the SEMARNAT Dictamen.[655] It was this report which, in its view, provided

652 PO7, ¶¶ 139, 153-154.
653 Counterclaim Memorial on Jurisdiction, ¶ 23. *See also* Counter-Memorial AC, ¶ 30 *et seq*.
654 R-PHM AC, ¶ 34.
655 R-PHM AC, ¶ 35. *See* **C-0237-SPA**, SEMARNAT Dictamen.

Respondent with sufficient elements to confirm that Claimant is directly responsible for the environmental damage caused to the region's ecosystem.[656]

646. Respondent submits that Claimant's omissions were only detected by PROFEPA in May 2022, when reviewing:[657] (i) six self-assessment reports; (ii) two environmental impact statements;[658] (iii) an authorization;[659] (iv) the 1986 Investment Agreement;[660] (v) two inspection reports; (vi) three writs of offering documentary evidence; and (vii) related documents, being the request for modification of validity of the Federal EIA.[661] According to Respondent, the analysis of these documents required several months and indicated over 20 years of partial and inconsistent information from Claimant.[662]

647. Claimant does not agree. In its view, any counterclaim in respect of alleged violations of environmental law in El Corchalito and La Adelita has been waived, as these were the subject of Claimant's original claim submitted long ago.[663] In relation to La Rosita and Punta Venado, being the subject of the ancillary claim, Claimant argues that a counterclaim is also waived, as Respondent was also well aware of CALICA's activities in those lots prior to November 2020.[664]

648. To illustrate Respondent's knowledge of CALICA's activities since at least 1993, Claimant argues that Respondent complains that CALICA cleared forest vegetation for more than 30 years without the corresponding CUSTF authorization, however, Respondent had knowledge of CALICA's plan to clear vegetation since 1986.[665] Claimant asserts that: (i) during the 1993 PROFEPA inspection of La Rosita, PROFEPA described CALICA's production process, including the vegetation-clearing activities;[666]

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656 Counterclaim Memorial on Jurisdiction, ¶ 56.
657 R-PHM AC, ¶ 47.
658 **C-0010-SPA**, Investment Agreement, Annex 2; **C-0077-SPA**, CALICA's Environmental Impact Statement, Chapter II, dated 23 October 2000 ("CALICA EIS").
659 **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000.
660 **C-0010-SPA**, Investment Agreement.
661 **C-0149-SPA**, CALICA's Corchalito/Adelita Federal Environmental Authorization Renewal Application, dated 27 August 2020 ("Corchalito/Adelita Renewal Application, 27 August 2020").
662 R-PHM AC, ¶ 48.
663 C-PHM AC, ¶ 152. *See also* Response on Counterclaim Jurisdiction, ¶ 135.
664 C-PHM AC, ¶ 153.
665 Response on Counterclaim Jurisdiction, ¶¶ 128-130, *citing* **C-0010-SPA**, Investment Agreement, p. 20; *see* Counterclaim Memorial on Jurisdiction, ¶ 33.
666 Response on Counterclaim Jurisdiction, ¶ 130, *citing* **C-0280-SPA**, PROFEPA Inspection Report, 17 March 1993, pp. 5, 13.

and (ii) CALICA made mention of its vegetation-clearing activities in 1999, when requesting authorization to quarry El Corchalito.[667]

649. Claimant argues that the same is true regarding El Corchalito as Respondent has been aware of CALICA's quarrying there from the moment it commenced in the early 2000s and of CALICA clearing vegetation there for decades.[668]

650. The Tribunal agrees with Claimant that even assuming the Tribunal could have jurisdiction over Respondent's counterclaim, which it does not decide, the counterclaim is untimely under ICSID Arbitration Rule 40(1). It is a matter of record that the allegations made by Respondent in the counterclaim reflect assertions made by it throughout the course of this arbitration. As Respondent itself submits, throughout this arbitration it has alleged that Claimant failed to comply with its environmental impact authorizations and failed to obtain necessary authorizations to carry out its activities.[669] The allegation of potential environmental harm by CALICA also appears in the contemporaneous evidence. For example, PROFEPA documents dating from at least 2018 identify potential environmental harm at El Corchalito ("*la posible existencia de un daño al ambiente*").[670]

651. The counterclaim therefore does not concern newly-discovered facts or recent developments. Respondent was aware of the relevant facts that it now contends are the basis of the counterclaim, in particular the alleged breaches of environmental legislation, authorizations and agreements. It is not sufficient that Respondent has only recently reviewed or compiled the information that was previously available to it for it to constitute new information or new awareness. For those assertions that are newly-particularized, the Tribunal does not consider there to be a justified basis for raising them now, over two years after Respondent's Counter-Memorial on the original claims.

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667 Response on Counterclaim Jurisdiction, ¶ 130, *citing* **C-0077-SPA**, CALICA EIS, p. 240. *See also* Response on Counterclaim Jurisdiction, ¶¶ 131-132.

668 Response on Counterclaim Jurisdiction, ¶ 133, *citing, inter alia,* **C-0018-SPA**, Corchalito/Adelita State EIA, 11 December 1996; **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000. *See also* Response on Counterclaim Jurisdiction, ¶ 133, *citing* **C-0113-SPA**, CALICA's Eleventh Quadrimester Report and Corresponding Acknowledgements of Receipt, dated 23 May 2005 ("CALICA Eleventh Quadrimester Report, 23 May 2005"), p. 19 of the PDF; Response on Counterclaim Jurisdiction, ¶ 134.

669 Counterclaim Memorial on Jurisdiction, ¶ 24.

670 **C-0117-SPA**, Shutdown Order, p. 308.

652. In this regard, Respondent has not explained what was detected by its inspection of La Rosita in 2022 that was not previously known to it, or how this would relate to information about alleged breaches by Claimant in respect of all of its lots that was also not already known. Respondent argues that it was only after the May 2022 inspection of La Rosita that it detected that CALICA has fraudulently submitted misrepresented information and omissions regarding its compliance with environmental obligations.[671] The documents that were reviewed and apparently evidence this assessment appear to comprise the body of authorizations, inspection reports, self-assessment reports and similar dating back to the 1986 Investment Agreement.[672] While there are documents among those referenced that are more recent,[673] there is no indication that there was a basis in more recent documentation for Respondent to be alerted to Claimant's allegedly fraudulent conduct that it could not have known before.

653. Likewise, while the SEMARNAT Dictamen was issued in 2022,[674] and includes a study of the alleged environmental impacts of Claimant's extractive activities,[675] it does not reflect new or unknown actions by Claimant. The issuance of a new study cannot provide a basis for a counterclaim outside the procedural calendar in this arbitration. The Tribunal does not address the merits of the SEMARNAT Dictamen with respect to whether it accurately records the alleged impacts of Claimant's activities on flora and fauna, biodiversity, landscape and land and aquatic ecosystems. It is noted that its provenance and findings are challenged by Claimant.[676]

654. Nor is the Tribunal persuaded that alleged inconsistencies between Claimant's statements to the Mexican authorities and this Tribunal or the fact that Claimant "dared to distort" the statements of President López Obrador served as a trigger for it to discover Claimant's breaches for the first time ("*la apariencia de legalidad se perdió ante las autoridades mexicanas cuando la Demandante se atrevió a distorsionar los dichos del Presidente de México ante el Tribunal y ante un juez mexicano*.").[677]

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671 R-PHM AC, ¶ 47.
672 *See* R-PHM AC, ¶ 47.
673 *See, e.g.,* **C-0149-SPA**, Corchalito/Adelita Renewal Application, 27 August 2020; R-PHM AC, ¶ 47.
674 **C-0235-SPA**, SEMARNAT Dictamen PowerPoint, p. 17.
675 *See* Counter-Memorial AC, ¶ 129, *citing* **C-0237-SPA**, SEMARNAT Dictamen, p. 41.
676 *See, inter alia*, Response on Counterclaim Jurisdiction, ¶¶ 26-57.
677 Counterclaim Memorial on Jurisdiction, ¶ 140.

655. Along the same lines, Respondent alleges that it was confirmed, during the arbitration proceedings, that Claimant systematically and intentionally concealed its extraction projections and defaults from Respondent.[678] As evidence of Claimants "omissive attitude", Respondent relies on the conduct of and submissions made by Claimant during the arbitration in various respects.[679] For the avoidance of doubt, the Tribunal does not consider these allegations to provide a basis for a counterclaim by Respondent against Claimant at this stage of the arbitration.

656. Other evidence on the record, relied on by Claimant,[680] is inconsistent with Respondent's submission that the basis for the counterclaim was only detected after May 2022. The Tribunal observes that prior to the filing of the counterclaim, in February, March and April 2022 President López Obrador made a number of statements in press briefings referring to an intention to make an international claim against CALICA:

> 3 February 2022:[681]
>
> *. . . si ellos dicen que no, que quieren seguir explotando sin autorización, llevándose material o la denuncia pensando de que les vamos a pagar porque en los tribunales internacionales ellos tienen mucha influencia, pues yo creo que eso no va a ser conveniente para nadie, porque nosotros no nos quedaríamos nada más con esta denuncia, nosotros vamos, si es necesario, a acudir a la ONU y a otros tribunales internacionales, porque es destrucción de nuestro territorio. No puede permitirse que se destruya la naturaleza, el medio ambiente*. (emphasis added)
>
> 31 March 2022:[682]
>
> *Pero les dije: Si no se termina de extraer material en sus predios, que destruyen el medio ambiente, lo voy a dar a conocer, voy a hacer un video y*

678 R-PHM AC, ¶ 50.

679 R-PHM AC, ¶ 51, *citing* 2023 Hearing Transcript (Spanish), Day 1, 101-106; **R-0234-ESP**, File No. PFPA/29.4/1S.3/00008-11, 2011, pp. 32, 67, 161, 248, 252, 260; Respondent's Inspection Visit Brief, ¶¶ 45-48, **C-0237-SPA**, SEMARNAT Dictamen, pp. 69-70; **C-0208-SPA**, March 2016 Environmental Audit Report; **C-0126-SPA**, Bathymetric study of the extraction area of CALICA in Quintana Roo, Mexico, dated February 2018. *See* Counter-Memorial AC, § II.K.2.c.(1). *See also* Counterclaim Memorial on Jurisdiction, ¶¶ 41, 125; **R-0236-ESP**, INAH Letter No. 401.2C.7-2023/857; Counter-Memorial AC, ¶¶ 223-235; Rejoinder AC, ¶¶ 216-218, 238-243; PO 8, Section 8.2 of the Site Visit Protocol, n. 3. *See also,* **C-0168-SPA**, Transcript of President's Morning Press Conference, 2 May 2022. *See also* **R-0218-ENG**, Vulcan Materials Company, Form 10-K, 2022, p. 31, n. 5.

680 Response on Counterclaim Jurisdiction, ¶ 12.

681 **C-0178-SPA**, 2 February 2022, Press Conference, p. 23.

682 **C-0183-SPA**, 31 March 2022 Press Conference, p. 7.

> *voy a presentar una demanda en organismos internacionales y les voy a acusar de que destruyen el medio ambiente.* (emphasis added)
>
> 20 April 2022:[683]
>
> *Entonces, si se van a tribunales, porque además hay denuncias, pues vamos a tribunales y vamos a hacer la denuncia formal en organismos internacionales. A ver qué van a hacer los de la ONU, a ver qué va a hacer Greenpeace, que nos ayuden en esto.* (emphasis added)

657. Should Respondent have wished to file a counterclaim with respect to the breaches it alleges, which could readily have been identified earlier, it was at liberty to seek leave and proceed under the timelines set out in the applicable procedural rules.

658. In these circumstances, the Tribunal is not persuaded by Respondent's assertion that the counterclaim only materialized after May 2022, and is not persuaded that late admission of the counterclaim more than two years after the Counter-Memorial is justified. The events in 2022 cited by Respondent as justification for the late submission are not relevant to Respondent's ability to identify the breaches it alleges. Nor does the Tribunal consider any other circumstances to justify the late admission of the counterclaim.

659. The Tribunal will consider the procedural fairness implications of this conclusion in the following section.

iii. Procedural Fairness

660. The Tribunal's decision not to admit the counterclaim is consistent with considerations of procedural fairness to both Parties and the efficiency of the arbitration. The Tribunal concurs, in this respect, with other arbitral tribunals that have had to decide upon the admission of arguments raised late in proceedings, as relied on by Claimant.[684] In *Euram v. Slovakia*, the tribunal held that:[685]

> [i]n deciding whether a plea is "justifiably late", the [t]ribunal must […] have regard to whether there has been undue delay by the [r]espondent once it became aware of the facts and to whether there will be undue prejudice to the [c]laimant if the plea is admitted.

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683 **C-0185-SPA**, 20 April 2022 Press Conference, p. 9.
684 *See* Response on Counterclaim Jurisdiction, ¶ 177.
685 **CL-0221-ENG**, *European American Investment Bank v. Slovakia*, Second Award on Jurisdiction, ¶ 118.

661. In the present case, Respondent's counterclaim is not justifiably late, and was raised with undue delay by Respondent which was already aware of the relevant facts. In these circumstances, undue prejudice would be caused to Claimant by admission of the counterclaim.

662. In addition, the tribunal in *Bureau Veritas v. Paraguay* noted that:[686]

> . . . it would not be consistent with principles of due process and procedural economy to introduce new arguments into the preliminary phase when both parties had already agreed to an orderly procedural schedule, and where the parties had had ample opportunities to present their arguments.

663. The same considerations apply in the present case, as Respondent had ample opportunity to seek leave to file the counterclaim at an earlier stage in the proceedings.

(d) New Evidence

664. If the Tribunal finds that it does not have jurisdiction over the counterclaim, Respondent asserts that the Tribunal must consider the evidence of Claimant's misrepresentations and concealment pursuant to ICSID Arbitration Rule 38(2).[687] Rule 38 provides:

> (1) When the presentation of the case by the parties is completed, the proceeding shall be declared closed.
>
> (2) Exceptionally, 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, or that there is a vital need for clarification on certain specific points.

665. According to Respondent, the evidence on the counterclaim is relevant to the outcome of the case, in order to determine the manner and extent of Claimant's contribution to its own claims. As it is directly related to and dependent on the original proceeding, Respondent argues that it will allow the Tribunal to decide on damages.[688] In this context, Respondent makes reference to the SEMARNAT Dictamen, which in its view could not have been filed earlier.[689]

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686 **CL-0229-ENG**, *Bureau Veritas v. Paraguay*, Decision on Objections to Jurisdiction, ¶ 52.
687 R-PHM AC, § II.C.
688 R-PHM AC, ¶ 45.
689 R-PHM AC, ¶ 44.

666. Claimant denies that counterclaim-related allegations and evidence (specifically, the SEMARNAT Dictamen) could justify exceptional circumstances to reopen the record of the first phase of this arbitration, or that the SEMARNAT Dictamen is decisive over the issues raised in that phase.[690] In its view, it would prejudice Claimant to reopen the first phase of the arbitration to new evidence without giving Claimant the opportunity to rebut it in respect of the issues addressed in the first phase of this proceeding.[691]

667. The Tribunal did not declare the proceedings in this arbitration to be closed until 27 July 2026. Accordingly, there is no need to reopen the proceedings in order to admit the evidence on the counterclaim, which is already on the record.[692]

(e) Conclusion on the Counterclaim

668. In light of the above considerations, the Tribunal finds that the counterclaim is untimely pursuant to ICSID Arbitration Rule 40(2) and inadmissible in this arbitration. Accordingly, the Tribunal rejects Respondent's request for leave to file the counterclaim.

669. The Tribunal therefore does not consider it necessary to decide other matters in dispute between the Parties with respect to the counterclaim, including whether the Tribunal has jurisdiction over a counterclaim pursuant to NAFTA, whether NAFTA includes substantive obligations upon investors, whether the counterclaim made by Respondent is duplicative of domestic proceedings in Mexico, and the merits of the counterclaim.

10. Conclusion on Jurisdiction

670. For the above reasons, the Tribunal finds that it does have jurisdiction over Claimant's original claims, which are likewise admissible, although it rejects Claimant's claim with respect to the port tariff (*see* ¶ 562 above). The Tribunal finds by majority that it has no jurisdiction over Claimant's ancillary claim (*see* ¶ 611 above), and that Respondent's counterclaim is inadmissible (*see* ¶ 668 above).

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690 C-RPHM AC, ¶ 65.

691 C-RPHM AC, ¶ 65.

692 Further and in any event, the Tribunal does not consider the evidence filed in relation to the counterclaim to justify an adjustment to the damages to be awarded to Claimant on the basis of alleged contributory negligence.

IX. APPLICABLE LEGAL STANDARDS

671. In this Section, the Tribunal addresses the legal standards applicable to its decisions on Claimant's claims. Section A extracts relevant provisions of NAFTA. Sections B and C contain Claimant's and Respondent's positions on the applicable legal standards, respectively. Section D summarizes the NDP submissions, insofar as they relate to legal standards, as well as the Parties' comments on those submissions. Section E contains the Tribunal's analysis on these issues.

A. RELEVANT PROVISIONS

672. NAFTA Article 1103 is entitled "Most-Favored-Nation Treatment" ("**MFN Treatment**"), and states as follows:

> 1. Each [Contracting] Party shall accord to investors of another [Contracting] Party treatment no less favorable than that it accords, in like circumstances, to investors of any other [Contracting] Party or of a non-[Contracting]Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each [Contracting] Party shall accord to investments of investors of another [Contracting] Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-[Contracting]Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

673. NAFTA Article 1105 is under the heading "Minimum Standard of Treatment" ("**MST**") and provides:

> 1. Each [Contracting] Party shall accord to investments of investors of another [Contracting] Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
>
> 2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each [Contracting] Party shall accord to investors of another [Contracting] Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

B. CLAIMANT'S POSITION

674. The Tribunal follows the sequence in which the legal provisions were addressed in Claimant's submissions, i.e., NAFTA Article 1105 followed by NAFTA Article 1103.[693]

1. The Applicable Standard for NAFTA Article 1105

(a) The Minimum Standard of Treatment

675. Claimant invokes NAFTA Article 1105(1), pursuant to which each NAFTA Contracting Party is obliged to "accord to investments of investors of another [Contracting] Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[694]

676. Claimant relies on the decisions of prior NAFTA tribunals to assert that the MST under customary international law enshrined in NAFTA Article 1105(1) is infringed by conduct that "is unjust, arbitrary, unfair, discriminatory or in violation of due process,"[695] that involves a "complete lack of transparency and candour in an administrative process,"[696] or contravenes the investor's legitimate expectations.[697] In addition, Claimant argues that NAFTA tribunals have held that the MST is "infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic".[698]

677. Claimant submits that the content of the MST standard evolves and is shaped by the protections afforded by the fair and equitable treatment ("**FET**") standard included in more than two thousand bilateral investment treaties.[699] In its view, tribunals have

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693 *See* Memorial, §§ V.B; V.C.
694 Memorial, ¶ 188, *citing* **C-0009-ENG**, NAFTA, Art. 1105(1).
695 Memorial, ¶ 188, *citing* **CL-0005-ENG**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010 ("*Merrill & Ring v. Canada*, Award"), ¶ 208. *See also* Reply, ¶ 127.
696 Memorial, ¶ 188, *citing* **CL-0007-ENG**, *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 ("*Waste Management v. Mexico (II)*, Award"), ¶ 98. *See also* Reply, ¶ 127.
697 Memorial, ¶ 188, *citing* **CL-0004-ENG**, *Thunderbird v. Mexico*, Award, ¶ 147.
698 Memorial, ¶ 191, citing, inter alia, **CL-0007-ENG**, Waste Management v. Mexico (II), Award, ¶ 98.
699 Memorial, ¶¶ 189-190, *citing, inter alia,* **CL-0011-ENG**, *Mondev v. United States*, Award, ¶ 125.

recognized that the standard now affords foreign investors essentially the same level of protection as the autonomous FET standard.[700]

678. For Claimant, the autonomous FET standard requires:[701]

> . . . the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives.

679. Even if the MST under NAFTA Article 1105 has not evolved to the same level as the autonomous FET standard, Claimant argues that it is still entitled to protection at the level of the autonomous standard by virtue of the MFN treatment clause in NAFTA Article 1103.[702] In this regard, Claimant submits that the MFN clause imports the autonomous FET provisions contained in Mexico's BITs with Korea, Germany, Greece and the Netherlands, all of which post-date NAFTA.[703]

680. Claimant disagrees with Respondent's argument that the FTC Note precludes the application of the autonomous FET standard. For Claimant, the FTC Note did not impact or interpret NAFTA Article 1103 or NAFTA Annex IV. Claimant relies, in this respect, on the decision in *Pope & Talbot Inc. v. Canada* where it was stated that:[704]

> [E]very NAFTA investor is entitled, by virtue of Article 1103, to the treatment accorded to nationals of other states under BITs containing the

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700 Memorial, ¶ 192, *citing* **CL-0005-ENG**, *Merrill & Ring v. Canada*, Award, ¶ 211. *See also* Memorial, ¶ 193; Reply, ¶ 128; C-PHM, ¶ 35.

701 Reply, ¶ 128, *citing* **CL-0052-ENG**, *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 ("*Tecmed v. Mexico*, Award"), ¶ 154.

702 Memorial, ¶ 194, *citing* **C-0009-ENG**, NAFTA, Art. 1103. *See also* C-PHM, ¶ 36.

703 Memorial, ¶ 197, *citing* **C-0134-ENG**, Agreement between the Government of the United Mexican States and the Government of the Republic of Korea for the Promotion and Reciprocal Protection of Investments, signed on 14 November 2000, in force as of 6 July 2002; **C-0135-ENG**, Agreement between the United Mexican States and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments, signed on 25 August 1998, in force as of 23 February 2001; **C-0136-ENG**, Agreement between the Government of the United Mexican States and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, signed on 30 November 2000, in force as of 17 September 2002; **C-0137-ENG**, Agreement on Promotion, Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the United Mexican States, signed on 13 May 1998, in force as of 1 October 1999; Reply, ¶ 129.

704 C-PHM, ¶ 38, *citing* **CL-0031-ENG**, *Pope & Talbot Inc v. Government of Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002 ("*Pope & Talbot v. Canada*, Damages Award"), n. 54.

> fairness elements unlimited by customary international law. The [FTC] Interpretation did not purport to change that fact, nor could it.

(b) Legitimate Expectations

681. Claimant relies on the cases of *Thunderbird v. Mexico* and *Grand River v. United States* in support of its submission that NAFTA Article 1105 protects Claimant's and CALICA's legitimate expectations arising from Respondent's representations.[705]

682. Claimant further submits that arbitral tribunals have consistently recognized that specific assurances play a decisive role in the creation of legitimate expectations.[706]

683. Likewise, Claimant rebuts Respondent's contention that an investment in a developing country cannot justify legitimate expectations as to the stability of the investment environment. Claimant submits that it is seeking relief based on Respondent's repudiation of its specific written assurances that it would be allowed to quarry La Adelita, and Claimant's expectations regarding profitability are not relevant to the merits of that issue.[707]

684. While Claimant submits that Respondent has not embraced the concept of legitimate expectations, Claimant asserts that this is immaterial because (i) it has accepted the *Waste Management v. Mexico II* standard, which calls for a consideration of representations made by the host State which an investor relied upon to its detriment;[708] and (ii) it acknowledges that Article 1105 is breached when a NAFTA Contracting Party acts contrary to its specific representations or repeated encouragements to an investor.[709]

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705 Memorial, ¶ 227.

706 Reply, ¶¶ 132-133, *citing* **CL-0009-ENG**, *Bilcon v. Canada*, Award, ¶¶ 468-471, 589, also citing **CL-0019-ENG**, *Metalclad v. Mexico*, Award, ¶¶ 97-101. *See also* C-PHM, ¶ 44.

707 Reply, ¶ 137; *see* Counter-Memorial, ¶ 303; **RL-019-ENG**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 ("*MTD v. Chile*, Award"), ¶¶ 42, 169, 172.

708 C-PHM, ¶ 32, *citing* **CL-0009-ENG**, *Bilcon v. Canada*, Award, ¶ 589. *See* Counter-Memorial, ¶ 306; Rejoinder, ¶ 326.

709 C-PHM, ¶ 32, *citing* Rejoinder, ¶ 326.

(c) Arbitrary Conduct, Due Process, Good Faith

685. Claimant argues that State conduct has been held to be arbitrary and contrary to the FET standard when it is (i) politically motivated;[710] (ii) contrary to due process and good faith;[711] and (iii) infringes the rule of law.[712]

686. Claimant submits that Respondent has recognized in other proceedings that NAFTA Article 1105 protects against arbitrary conduct.[713] According to Claimant, conduct is arbitrary if it is "founded on prejudice or preference rather than on reason or fact".[714] Claimant submits that State conduct is arbitrary when it is not based on facts and legal norms but is based on domestic politics and discretion.[715] Claimant draws parallels to the cases of *Abengoa v. Mexico* and *Tecmed v. Mexico* where tribunals found a breach of the FET standard where investment sites were closed for political reasons rather than based on legitimate considerations.[716]

687. According to Claimant, it is also recognized that NAFTA Article 1105 includes the obligation to act in good faith, which requires Respondent (i) not to "manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination;"[717] (ii) to abstain from using legal instruments for purposes other than those for which they were created;[718] and (iii) not to take measures disproportionate to

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710 Memorial, ¶ 201, *citing* **CL-0046-ENG**, *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005 ("*Eureko v. Poland*, Partial Award"), ¶ 233.

711 Memorial, ¶ 201, citing, inter alia, **CL-0007-ENG**, Waste Management v. Mexico (II), Award, ¶ 98.

712 Memorial, ¶ 201, *citing, inter alia,* **CL-0048-ENG**, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 ("*Siag v. Egypt*, Award"), ¶¶ 453-454.

713 Memorial, ¶ 200, *citing* **CL-0042-ENG**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Mexico's Counter-Memorial, 22 May 1998 ("*Metalclad v. Mexico*, Mexico's Counter-Memorial") ¶ 841.

714 Memorial, ¶ 200, *citing* **CL-0043-ENG**, UNITED NATIONS CONFERENCE OF TRADE AND DEVELOPMENT, FAIR AND EQUITABLE TREATMENT (United Nations, 2012), p. 78. *See also* Reply, ¶ 154.

715 Memorial, ¶ 202, *citing* **CL-0050-ENG**, Rudolph Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 Santa Clara J. Int'l L. 7 (2014), p. 31. *See also* Reply, ¶ 155.

716 Memorial, ¶¶ 202-203, *citing, inter alia,* **CL-0047-SPA**, *Abengoa S.A. and COFIDES S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013, ¶¶ 647-652; **CL-0052-ENG**, *Tecmed v. Mexico*, Award, ¶ 164.

717 Memorial, ¶ 216, *citing* **CL-0027-ENG**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ("*Saluka v. Czech Republic*, Partial Award"), ¶ 307; C-PHM, ¶ 33, *citing* 2021 Hearing Transcript (English), Day 1, 89:15-86:1; Claimant's Comments on NAFTA Article 1128 Submissions, ¶¶ 17-21; **CL-0042-ENG**, *Metalclad v. Mexico*, Mexico's Counter-Memorial, ¶ 841.

718 Memorial, ¶ 216, *citing* **CL-0056-ENG**, *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 November 2010 ("*Frontier v. Czech Republic*, Award"), ¶ 300.

the ends they pursue.[719] Claimant further submits that repudiation of contractual obligations by a State may indicate failure to act in good faith.[720]

2. The Applicable Standard for NAFTA Article 1103

688. Claimant submits that via the MFN clause in NAFTA Article 1103, Respondent is required to accord Claimant and CALICA treatment no less favourable than that accorded to investors and investments in other post-NAFTA investment agreements.[721]

689. Claimant relies on the Mexico-Switzerland bilateral investment treaty ("**BIT**"), pursuant to which Mexico guarantees to "observe any other obligation it has assumed with regard to investments in its territory by investors of [Switzerland]". Since NAFTA contains no such guarantee, Claimant argues that this provision constitutes more favourable treatment and Claimant is entitled to receive at least the same treatment. If Claimant were not to enjoy substantive protection against Respondent's breach of "other obligations", such as those assumed in the 2014 Agreements, Claimant contends that it would receive treatment less favourable than that accorded by Mexico to Swiss investors.[722]

690. According to Claimant, Respondent seeks to create uncertainty where there is none by advocating for a reading of NAFTA Article 1103 that is not supported by NAFTA's text.[723] In Claimant's view, in NAFTA Annex IV, Respondent recognizes that (i) NAFTA Article 1103 applies when the more favourable treatment is granted through treaties that postdate NAFTA; and (ii) "treatment" in Article 1103 encompasses substantive protections afforded in those treaties.[724]

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719 Memorial, ¶ 216, citing, inter alia, **CL-0060-ENG**, Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012 ("Occidental v. Ecuador, Award").

720 Memorial, ¶ 217, *citing, inter alia,* **CL-0063-ENG**, BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (Cambridge University Press, 1953), p. 113; **CL-0067-ENG**, *Sapphire International Petroleums Ltd. v. National Iranian Oil Company*, Arbitral Award, 15 March 1963 ("*Sapphire v. National Iranian Oil Company*, Award"), pp. 172-173.

721 Memorial, ¶ 238; *see* Memorial, ¶ 194.

722 Memorial, ¶¶ 239-240, *citing* **C-0138-ENG**, Agreement between the Swiss Confederation and the United Mexican States on the Promotion and Reciprocal Protection of Investments, signed 10 July 1995, entered into force 14 March 1996, Art. 10(2). *See also* C-PHM, ¶ 41.

723 Reply, ¶ 183.

724 Memorial, ¶ 241; *see* Memorial, ¶ 195, *citing* **C-0133-ENG**, NAFTA, Annex IV – Schedule of Mexico: Exceptions from Most-Favored-Nation Treatment (Chapter 11) ("NAFTA, Annex IV"); Reply, ¶ 186, *citing* **CL-0141-ENG**, VCLT, Art. 31(1). *See also* Reply, ¶ 184; Counter-Memorial, ¶ 411.

691. Claimant argues that international tribunals have confirmed that umbrella clauses, such as Article 10(2) of the Mexico-Switzerland BIT, may be applied through MFN provisions.[725]

692. In Claimant's view, Respondent mischaracterizes the state of international law on this issue and the relevance of the cases it invokes. Claimant emphasizes that it is not seeking to import dispute settlement provisions from other BITs, but import substantive obligations from other treaties. According to Claimant, the importation of substantive obligations is a well-established principle,[726] recognized by multiple arbitral tribunals and commentators.[727] Claimant submits that Respondent's own authorities support this conclusion.[728] In addition, Claimant cites several decisions of investment treaty tribunals specifically validating the importation of umbrella clauses from other treaties.[729]

693. Contrary to Respondent's assertion, Claimant contends that NAFTA tribunals have not yet ruled directly on whether an umbrella clause may be imported from other treaties through Article 1103. Since the recently-negotiated USMCA explicitly restricts

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725 Memorial, ¶ 242, citing **CL-0078-ENG**, EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award, 11 June 2012 ("EDF v. Argentina, Award"), ¶ 933; **CL-0079-ENG**, Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, 8 April 2013 ("Arif v. Moldova, Award"), ¶ 396.

726 Reply, ¶ 188, citing, inter alia, **CL-0038-ENG**, Patrick Dumberry, The Importation of "Better" Fair and Equitable Treatment Standard Protection Through MFN Clauses: An analysis of NAFTA Article 1103, 14(1) TDM 1 (2017), pp. 2, 13-14; see Counter-Memorial, ¶ 407, n. 521.

727 Reply, ¶ 189, *citing, inter alia,* **CL-0031-ENG**, *Pope & Talbot v. Canada*, Damages Award, n.54; **CL-0032-ENG**, *ICS v. Argentina*, Award on Jurisdiction, ¶ 286; **CL-0035-ENG**, *United Parcel Service of America Inc v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Jurisdiction, 22 November 2002 ("*UPS v. Canada*, Award on Jurisdiction"), ¶ 97; **CL-0115-ENG**, *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006, ¶ 179; *see also* **CL-0116-ENG**, *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011, ¶¶ 11.2.3-11.2.4; **RL-030-ENG**, Rudolph Dolzer & Cristoph Schreuer, *Principles of International Investment Law* (Oxford 2012), p. 211; **CL-0117-ENG**, Ieva Kalnina, *White Industries v. The Republic of India: A Tale of Treaty Shopping and Second Chances*, 9(4) Transnat'l Disp. Mgmt. 1, 6 (2012); **CL-0118-ENG**, J.R. Weeramantry, TREATY INTERPRETATION IN INVESTMENT ARBITRATION (Oxford University Press, 2012), p. 177; **CL-0119-ENG**, S. Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 YALE J. INT'L L. 125, 163 (2007).

728 Reply, ¶¶ 190-191, citing **RL-040-ENG**, Simon Batifort & J. Benton Heath, The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization, 111 Am. J. Int'l L. 873 (2017).

729 Reply, ¶ 193, *citing, inter alia,* **CL-0078-ENG**, *EDF v. Argentina*, Award, ¶ 933; **CL-0079-ENG**, *Arif v. Moldova*, Award, ¶ 396; **CL-0122-ENG**, Noah Rubins, Thomas-Nektarios Papanastasiou and N. Stephan Kinsella, *The Substantive Law of Contemporary International Investment Protection* in INTERNATIONAL INVESTMENT, POLITICAL RISK, AND DISPUTE RESOLUTION: A PRACTITIONER'S GUIDE (2ND EDITION) (2020), ¶ 6.145.

application of the MFN clause, Claimant argues that the restriction would have been unnecessary if the NAFTA language already had the same restrictive effect.[730]

694. According to Claimant, the majority of tribunals have also concluded that the principle of *esjusdem generis* does not preclude investors from using the MFN clause to rely on the umbrella clause, even if that specific provision is absent from the base treaty. In this regard, Claimant asserts that a number of tribunals have stated that MFN clauses are designed to import standards of treatment unless specific treaty text expresses a clear intent to the contrary.[731]

695. Claimant submits that, contrary to Respondent's suggestion, most arbitral tribunals have held that a comparator investor is not needed when invoking the MFN clause to import a provision from another treaty. Relying on commentary by Prof. Stephan Schill, Claimant contends that the case of *İçkale v. Turkmenistan* relied on by Respondent erred in finding that the MFN treatment obligation only protects against *de facto* discrimination.[732] Claimant submits that under the prevailing approach to the MFN clause, it is sufficient for an investor to identify a third-party treaty that sets the standard of treatment that a hypothetical third-country investor "in like circumstances" would enjoy.[733]

696. In Claimant's view, the exceptions in NAFTA Annex IV (Schedule of Mexico) would not be needed at all if the qualifier "in like circumstance" already excluded benefits granted under third-party treaties. This would be contrary to the *effet utile* principle.[734]

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730 Reply, ¶ 192; **C-0157-ENG**, USMCA, Ch. 14, n. 22; *see* Counter-Memorial, ¶ 425.

731 Reply, ¶ 193, citing, inter alia, **CL-0121-ENG**, EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic**,** ICSID Case No. ARB/03/23, Annulment Proceeding, Decision, 5 February 2016, ¶¶ 237-238; **CL-0062-ENG**, MTD v. Chile, Award, ¶ 104; see Counter-Memorial, ¶¶ 417-422.

732 Reply, ¶ 194, citing **CL-0130-ENG**, Stephan W. Schill, MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath, 111 Am. J. Int'l L. (2017); see Counter-Memorial, ¶¶ 421-422; **RL-050-ENG**, İçkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Award, 8 March 2016 ("Şirketi v. Turkmenistan, Award").

733 Reply, ¶¶ 195-196, citing **CL-0130-ENG**, Stephan W. Schill, MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath, p. 932; **CL-0126-ENG**, Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶¶ 156-158; **CL-0131-ENG**, ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award, 18 May 2010, ¶ 73.

734 Reply, ¶ 197, citing **CL-0130-ENG**, Stephan W. Schill, MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath, p. 933.

C. RESPONDENT'S POSITION

1. The Applicable Standard for NAFTA Article 1105

(a) The Minimum Standard of Treatment

697. Respondent submits that the customary international law minimum standard under NAFTA Article 1105 is high, and prohibits conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety".[735] In addition, Respondent relies on the decision of the tribunal in *Cargill* referring, *inter alia*, to "gross misconduct, manifest injustice or . . . bad faith or the wilful neglect of duty."[736] For Respondent, allegations of violation of domestic law, general claims of unfairness, and self-defined "expectations" are not sufficient to breach this standard.[737]

698. In Respondent's view, Claimant has failed to discharge its burden to establish the existence and applicability of a rule of customary international law in line with its description of the legal standard.[738] Respondent relies, in this regard, on the test derived from the *North Sea Continental Shelf* case of the International Court of Justice setting out the two-step inquiry into (i) whether there is a general practice; and (ii) whether such general practice is accepted as law, i.e., *opinio juris*.[739]

699. Respondent further submits that arbitral awards rendered by *ad hoc* tribunals are not a source of customary international law, and awards that apply an autonomous standard are not relevant for the interpretation of NAFTA Article 1105.[740]

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735 Counter-Memorial, ¶ 299, *citing* **RL-014-ESP**, *Waste Management v. Mexico (II)*, Award, ¶ 98; Rejoinder, ¶ 321.

736 Counter-Memorial, ¶ 298, *citing* **RL-009-ESP**, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 ("*Cargill Inc. v. Mexico*, Award"), ¶¶ 285-286.

737 Counter-Memorial, ¶ 299.

738 Counter-Memorial, ¶¶ 293-294, *citing* **RL-009-ESP**, *Cargill Inc. v. Mexico*, Award, ¶ 273.

739 Counter-Memorial, ¶ 295, *citing* **RL-013-ENG**, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) I (Judgment of 3 February 2012), I.C.J., pp. 99, 122-123.

740 Rejoinder, ¶ 315, *citing* **RL-011-ENG**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 ("*Glamis Gold v. United States*, Award"), ¶ 605; **RL-009-ESP**, *Cargill Inc. v. Mexico*, Award, ¶ 277.

700. According to Respondent, it is misleading for Claimant to try to avoid the FTC Note by implying that NAFTA governments did not intend to reject the autonomous standard of FET or that customary international law has changed radically in just a few years.[741] In its view, one of the reasons for adopting the FTC Note was to exclude the *Pope & Talbot* tribunal's interpretation that the FET standard was additive to the requirements of international law.[742]

701. In addition, Respondent rebuts Claimant's reliance on the *Tecmed v. Mexico* decision, on the basis that (i) it did not interpret NAFTA; (ii) it held that the FET provision it applied was "free-standing"; and (iii) the concept of legitimate expectations on which it relied has been widely criticized.[743]

702. In relation to Claimant's invocation of NAFTA Article 1103 to import the autonomous FET standards under other treaties entered into by Mexico, Respondent contends that the FTC Note excludes that possibility.[744] Moreover, Respondent submits that Claimant has not identified a comparable subject in like circumstances as required by NAFTA Article 1103.[745]

(b) Legitimate Expectations

703. Respondent submits that the crux of Claimant's case rests on its alleged legitimate expectations arising from Respondent's representations. Respondent argues that the Tribunal must be careful not to base its analysis on Claimant's expectations as if they were a source of Respondent's obligations.[746]

704. Moreover, Respondent asserts that the word "legitimate" entails that the host State should not be liable for losses resulting from risky or erroneous business decisions.[747] In this

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741 Rejoinder, ¶ 317.

742 Rejoinder, ¶ 317, *citing* **RL-052-ENG**, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, ¶¶ 110, 117.

743 Rejoinder, ¶ 318, *citing* **RL-015-ESP**, *MTD Equity Sdn Bhd. & MTD Chile S.A. v. The Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007 ("*MTD v. Chile*, Decision on Annulment"), ¶ 67.

744 Rejoinder, ¶ 319.

745 Rejoinder, ¶ 320.

746 Counter-Memorial, ¶ 301, *citing* **RL-015-ESP**, *MTD v. Chile*, Decision on Annulment, ¶ 67.

747 Counter-Memorial, ¶ 302, citing **RL-016-ENG**, Peter Muchlinski, 'Caveat Investor'? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard, 55 Int'l & Comp. L. Q., 542 (2006).

regard, Respondent contends that investing in developing countries sometimes involves a higher degree of risk that is offset by a higher rate of return, meaning that an investment in a developing country cannot justify legitimate expectations as to the stability of the investment environment.[748] Respondent relies on the case of *MTD v. Chile* in support of this point, where it was found that the investor's negligence was a significant cause of its own loss and subtracted 50% of the claimed damages. In that case, the respondent had argued, *inter alia*, that the claimants had invested without performing significant due diligence.[749]

705. Even in a developed economy, Respondent contends that investor expectations must be justified by a proper risk assessment.[750] Respondent relies on decisions of other arbitral tribunals, some of which it contends have been selectively cited by Claimant, as follows:

(i) *Thunderbird v. Mexico*: where the tribunal found that there was no legitimate expectation where the investor had knowledge that the planned investment might violate host State law;[751]

(ii) *Grand River v. United States*: where the tribunal found that due to the "unsettled nature in relevant respects [of US domestic law], it is implausible to find that Mr. Montour could have reasonably expected, and reasonably relied on such an expectation as a prudent investor, that states would refrain from applying the MSA measures to him as they have done."[752]

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748 Counter-Memorial, ¶ 303, citing **RL-017-ENG**, Michele Potestà, Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept, 28 Foreign Inv. L.J. 88 (2013), p. 119; **RL-018-ENG**, Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007 ("Parkerings-Compagniet v. Lithuania, Award"), ¶¶ 335-336.

749 Counter-Memorial, ¶ 303, *citing* **RL-019-ENG**, *MTD v. Chile*, Award, ¶¶ 169-170.

750 Counter-Memorial, ¶ 304, citing **RL-020-ENG**, Methanex v. United States, Final Award, ¶¶ 9-10. See also Counter-Memorial, ¶ 307, citing **RL-016-ENG**, Peter Muchlinski, 'Caveat Investor'? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard.

751 Counter-Memorial, ¶ 305, *citing* **RL-021-ESP**, *Thunderbird v. Mexico*, Award, ¶¶ 137-163.

752 Counter-Memorial, ¶ 306, citing **RL-023-ENG**, Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award, 12 January 2011 ("Grand River v. United States, Award"), ¶¶ 141-142.

(iii) *Glamis Gold v. United States*: where the legitimate expectations claim failed in part because the claimant was "operating in a climate that was becoming more and more sensitive to the environmental consequences of open-pit mining."[753]

706. Respondent further relies on decisions in the cases of *S.D. Myers v. Canada*, *International Thunderbird Gaming v. Mexico*, *Glamis Gold*, *Chemtura v. Canada* and *UPS v. Canada* in support of its view that the role of a NAFTA Chapter 11 tribunal is not to second-guess or substitute for governmental decision-making.[754]

707. Respondent rebuts Claimant's reliance on the tribunal's decision in *Metalclad v. Mexico*, which it contends never used the term "legitimate expectations". Moreover, Respondent asserts that the portion of the award on which Claimant relies was overturned by the British Columbia Supreme Court.[755]

708. In addition, Respondent argues that the *Bilcon v. Canada* tribunal articulated a very high legitimate expectations standard, which it considered to have been met on facts clearly distinguishable from the present case.[756]

709. Respondent also relies on *Parkerings v. Lithuania* where it was stated that "not every hope amounts to an expectation under international law . . . . [C]ontracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law."[757] Citing *Schreuer* in support, Respondent argues that the opposite approach would bring all investor-State contracts under the FET standard, effectively constituting an umbrella clause.[758]

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753 Counter-Memorial, ¶ 307, *citing* **RL-011-ENG**, *Glamis Gold v. United States,* Award, ¶ 767.

754 Counter-Memorial, ¶¶ 310-313, *citing* **RL-026-ENG**, *S.D. Myers v. Government of Canada*, UNCITRAL, Partial Award*,* 13 November 2000, ¶ 261; **RL-021-ESP**, *Thunderbird v. Mexico*, Award ¶ 160; **RL-011-ENG**, *Glamis Gold v. United States*, Award, ¶¶ 803-805; **RL-027-ENG**, *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL, Award, 2 August 2010, ¶ 134; **RL-029-ENG**, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Separate Statement of Dean Ronald A. Cass, 24 May 2007. *See also* Rejoinder, ¶ 325.

755 Rejoinder, ¶ 326, *citing* **RL-077-ENG,** *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Decision of the Supreme Court of British Columbia on the Challenge by the Petitioner 2001 BCSC 664, 2 May 2001.

756 Rejoinder, ¶ 326, *citing* **RL-078-ENG**, *Bilcon v. Canada*, Award, ¶ 589.

757 Counter-Memorial, ¶ 399, *citing* **RL-018-ENG**, *Parkerings-Compagniet v. Lithuania*, Award, ¶ 344.

758 Counter-Memorial, ¶ 400, *citing* **RL-033-ENG**, United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, UNCTAD/DIAE/IA/2011/5 (2012), p. 70.

2. The Applicable Standard for NAFTA Article 1103

710. Respondent contends that there is no umbrella clause in NAFTA. Respondent disputes that the MFN clause in NAFTA Article 1103 can be used to import new substantive obligations, which it argues has never successfully been invoked under NAFTA.[759]

711. With reference to NAFTA Annex IV relied on by Claimant, Respondent argues that the Annexes deal with the Parties' reservations with respect to the regulatory treatment of investments. Thus, for Respondent, NAFTA Article 1103 does not refer to the concept of "treatment" broadly, as argued by Claimant, but to treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation, sale or other disposition of investments".[760] Specifically, in its view, Article 1103 does not establish any legal standard for proving the existence of an arbitral claim. Respondent submits that there is no evidence that the NAFTA Contracting Parties intended to import broad and vague obligations, such as the umbrella clause, through the MFN clause.[761]

712. In this respect, Respondent submits that when interpreting an MFN clause, investment tribunals should perform the same detailed analysis undertaken in interpreting a national treatment standard.[762] In its view, this analysis was not carried out in the *EDF v. Argentina* or *Arif v. Moldova* cases, and they are therefore not persuasive references or interpretations.[763]

713. Respondent characterizes the interpretation and application of MFN clauses as one of the most controversial issues in international investment law, meaning that the Tribunal must undertake a rigorous analysis in resolving this issue.[764] In Respondent's view, the arbitral

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759 Counter-Memorial, ¶¶ 401-402; Rejoinder, ¶ 350.

760 Rejoinder, ¶ 351.

761 Rejoinder, ¶ 352, *citing* **RL-081-ESP**, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Separate and Dissenting Opinion of J. Christopher Thomas, Q.C., 7 October 2011, ¶¶ 61-68.

762 Counter-Memorial, ¶ 403, citing **RL-036-ENG**, Facundo Pérez-Aznar, The Use of Most-Favoured-Nation Clauses to Import Substantive Treaty Provisions in International Investment Agreements, 20 J. Int'l Econ. L. 777 (2017), ¶ 7.275. See also Rejoinder, ¶ 355.

763 Counter-Memorial, ¶¶ 404-405, citing **RL-037-ENG**, EDF v. Argentina, Award; **RL-038-ENG**, Arif v. Moldova, Award, also citing **RL-039-ENG**, Tarcisio Gazzini and Attila Tanzi, Handle with care: Umbrella clauses and MFN treatment in investment arbitration, 14 J. World Investment & Trade 978 (2013); **RL-040-ENG,** Simon Batifort & J. Benton Heath, The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization.

764 Counter-Memorial, ¶ 407, *citing* **RL-041-ENG**, *Daimler Financial Services AG v. Argentine Republic,* ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 160; **RL-040-ENG**, Simon Batifort & J. Benton

tribunals in the cases of *Bayindir v. Pakistan* and *ATA Construction, Industrial and Trading Company v. Jordan* lack persuasive elements, for failing to address the qualifying language, which apparently was not addressed by the parties.[765]

714. According to Respondent, MFN is not a customary international law standard and specific treaty provisions are not uniformly drafted. It therefore submits that such provisions should not be approached with a preconceived notion of their essential nature or purpose.[766] In addition, Respondent invokes concerns that from a policy perspective, broad application of MFN clauses by tribunals could make it difficult for States to predict the scope of potential liability under investment agreements.[767] In this regard, Respondent argues that allowing investors to "pick and choose" via MFN clauses may allow an investor to construct a cause of action that may never have been in the contemplation of the contracting States.[768]

715. Relying on the VCLT, Respondent emphasizes that it is necessary to conduct a careful and treaty-specific interpretation of an MFN clause.[769] Respondent further highlights the principle of *ejusdem generis*, according to which the MFN clause only operates in "cases where there is a close identity between the subject-matter of the two sets of clauses at issue".[770] In its view, this is simply an elaboration of the general principle of the VCLT

Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, pp. 881-882; **RL-043-ENG**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts from the Award, 2 July 2018 ("*Krederi v. Ukraine*, Award"), ¶ 289. *See also* Rejoinder, ¶ 356.

765 Rejoinder, ¶ 364, citing **RL-084-ENG**, Julian Arato, The Margin of Appreciation in International Investment Law, 54 Va. J. Int'l L. 545 (2014), pp. 33, 35; **RL-085-ENG**, Irene M. Ten Cate, The Costs of Consistency: Precedent in Investment Treaty Arbitration, 51 Colum. J. Transnat'l L. 418 (2013), p. 27.

766 Counter-Memorial, ¶ 408, *citing* **RL-044-ESP**, International Law Commission, *Report of the International Law Commission on the work of its 30th session*, UN Doc. A/33/10 (1978), 11(2); **RL-040-ENG**, Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, p. 886.

767 Counter-Memorial, ¶ 409, citing **RL-040-ENG**, Simon Batifort & J. Benton Heath, The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization, pp. 875, 876.

768 Counter-Memorial, ¶ 410, *citing* **RL-045-ENG**, Sundaresh Menon, *The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions*, 108 ASIL Proc. 219 (2015), pp. 232-233.

769 Counter-Memorial, ¶¶ 411, 415, *citing* **RL-030-ENG**, Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law*, p. 208; **RL-043-ENG**, *Krederi v. Ukraine*, Award, ¶ 289.

770 Counter-Memorial, ¶ 413, *citing* **RL-047-ESP**, Yearbook of the International Law Commission, Volume II, Part II (1978), p. 31. *See also* Counter-Memorial, ¶¶ 412-415.

that one must look at the specific terms of a treaty provision to determine its scope and effect.[771]

716. Based on the wording of NAFTA Article 1103, which requires no less favourable treatment only "in like circumstances", Respondent submits that it is an MFN clause with an unusually restrictive approach, in that it defines the comparator.[772] In this regard, Respondent argues that none of the MFN clauses applicable in the cases of *EDF v. Argentina*, *Arif v. Moldova*, *Consutel v. Algeria* or *MTD v. Chile* included similar restrictive language.[773]

717. Respondent relies on the decision in *İçkale İnşaat Limited Şirketi v. Turkmenistan* where, by contrast, an MFN clause similarly contained a limitation to "treatment accorded in similar situations", where the tribunal held that the MFN clause prohibits discriminatory treatment of investments of investors when compared with the treatment accorded by the host State to investments of investors of any third State. This obligation only exists, in the *İçkale* tribunal's view, insofar as the investors are in a "similar situation".[774]

718. Likewise, Respondent relies on the decision in *Muhammet Çap v. Turkmenistan* which held, *inter alia*, that the benefit of the MFN clause is "not 'automatic'", and "[i]t must be shown that actual investors, found in a similar situation, were treated differently."[775]

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771 Counter-Memorial, ¶ 415, citing **RL-040-ENG**, Simon Batifort & J. Benton Heath, The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization, p. 885.

772 Counter-Memorial, ¶ 417, *citing* **RL-024-ENG**, Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2nd ed. 2017), ¶ 7.310. *See also* Rejoinder, ¶ 354, *citing* **RL-082-ENG**, Stephan W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and Benton Heath*, Amsterdam Law School Legal Studies Research Paper No. 2018-01, Amsterdam Center for International Law No. 2018-0, p. 17.

773 Rejoinder, ¶¶ 357-360, *citing* **R-0121-ESP**, Agreement between the Government of the French Republic and the Government of the Argentine Republic on the Reciprocal Promotion and Protection of Investments, Paris, 3 July 1991, Article 4; **R-0122-ENG**, Agreement between the Government of the French Republic and the Government of the Republic of Moldova on the Reciprocal Promotion and Protection of Investments, 8 September 1997; **RL-083-ENG**, *Consutel Group S.p.A. in liquidazione (Italy) v. People's Democratic Republic of Algeria*, PCA Case No. 2017-33, Final Award, 3 February 2020, ¶¶ 355, 358-359; **RL-019-ENG**, *MTD v. Chile*, Award, ¶ 104.

774 Counter-Memorial, ¶¶ 421-422, *citing* **RL-050-ENG**, *Şirketi v. Turkmenistan*, Award, ¶¶ 326-329. *See also* Rejoinder, ¶¶ 361-362.

775 Rejoinder, ¶ 362, citing **RL-092-ENG**, Muhammet Çap and Bankrupt Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No ARB/12/6, Award, 4 May 2021, ¶ 783.

719. According to Respondent, Claimant has not even attempted to identify an investor from another country that has received more favourable treatment than that accorded to CALICA in similar circumstances.[776]

720. Contrary to Claimant's argument that the comparable subject of the "in like circumstances" requirement could be hypothetical, Respondent contends that the term "in like circumstances" is also used in NAFTA Article 1102, so a claimant cannot evade the comparable subject requirement by simply pointing out that there is "theoretically" a domestic investor that could have received better treatment.[777]

721. Respondent finds further support for its interpretation of NAFTA Article 1103 in the language of Article 1103 which refers to treatment with respect to the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments", and is therefore limited to specific categories of activities. According to Respondent, this does not include the types of claims that may be made in a dispute settlement proceeding.[778]

722. Moreover, Respondent argues that it would be peculiar if the result of Claimant's interpretation would be that Respondent had obligations under the umbrella clause to US and Canadian investors while those countries had no such obligation to Mexican investors. In Respondent's view, the clause was intended to apply when Respondent had a more liberal reservation towards another country, e.g., to allow European investors to have majority ownership of companies in a particular industry, where NAFTA did not do the same for investors in similar circumstances from the US and Canada.[779]

723. According to Respondent, NAFTA arbitral decisions and subsequent practice in the form of NAFTA Article 1128 submissions do not support the importation of substantive provisions by NAFTA Article 1103.[780] Respondent relies on the FTC Note as well as

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776 Rejoinder, ¶ 355.

777 Rejoinder, ¶ 353, *citing* **RL-024-ENG**, Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, ¶ 7.268; *see* Reply, ¶¶ 194-196.

778 Counter-Memorial, ¶ 423.

779 Counter-Memorial, ¶ 424.

780 Counter-Memorial, ¶ 425, citing **RL-040-ENG**, Simon Batifort & J. Benton Heath, The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization, p. 899, 882.

submissions made by the NAFTA Contracting Parties in various proceedings in support of its interpretation.[781]

724. While no NAFTA tribunal to date has ruled on the introduction of an umbrella clause under NAFTA Article 1103, Respondent submits that the tribunal in *ADF v. United States* rejected the MFN claim due to the NAFTA Article 1108 procurement exception. It further noted that the claimant had failed to document, *inter alia*, the more favourable nature of other treaties' FET provisions and had failed to show a breach of FET.[782]

D. NDP SUBMISSIONS

1. US First NDP Submission

725. In its First NDP Submission, the United States provides its interpretation regarding (i) NAFTA Article 1105 and the MST, (ii) NAFTA Article 1103 and the MFN treatment and (iii) NAFTA Articles 1116 and 1117 and limitations on loss and damage.

726. With respect to item (i) of ¶ 725 above, the United States submits that FET as well as full protection and security do not go beyond the requirements of the customary international law minimum standard of treatment of aliens.[783] As this minimum standard is an umbrella concept, in its view NAFTA Article 1105 is not automatically breached when another provision of NAFTA or another international agreement is breached.[784] Therefore, the United States argues that a claimant needs to prove the existence and the applicability of

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781 Counter-Memorial, ¶¶ 427-433, *citing, inter alia*, **RL-054-ENG**, *Methanex Corporation v. United States of America,* UNCITRAL, Response of Respondent United States of America to Methanex's Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation, 26 October 2011, pp. 9, 11; **RL-055-ENG**, *Methanex Corporation v. The United States of America,* UNCITRAL, Third Submission of Canada Pursuant to NAFTA Article 1128, 8 February 2002, ¶ 11; **RL-040-ENG**, Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, pp. 901-902; **RL-010-ENG**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 ("*ADF v. United States*, Award"), ¶ 197; **RL-057-ENG**, *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL, Respondent's Counter-Memorial, 20 October 2008, ¶¶ 861-911; **RL-058-ENG**, *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL, Respondent's Rejoinder, 10 July 2009, ¶¶ 234, 236, 238-241; *see also* **RL-059-ENG**, *Chemtura Corporation v. Government of Canada*, UNCITRAL, Submission of the United States of America, 31 July 2009, ¶ 5; **RL-060-ENG**, *Chemtura Corporation v. Government of Canada*, UNCITRAL, Submission of Mexico Pursuant to Article 1128 of NAFTA, 31 July 2009, ¶¶ 2-5. *See also* Rejoinder, ¶ 365.

782 Counter-Memorial, ¶ 428, *citing* **RL-010-ENG**, *ADF v. United States*, Award, ¶ 197.

783 US First NDP Submission, ¶ 3.

784 US First NDP Submission, ¶¶ 3-4.

the relevant obligation under customary international law.[785] The United States further submits that in this context the failure to comply with domestic law does not necessarily lead to a violation of international law since domestic authorities have extended rights within their territory.[786] According to the United States, policy decisions of States, arbitral awards and judgements of international courts do not extend the scope of NAFTA Article 1105 as those decisions are not part of customary international law.[787] Further, the United States submits that the concept of FET under customary international law does not contain an obligation for the host State not to frustrate the investors' expectations.[788]

727. With respect to item (ii) of ¶ 725 above, the United States submits that the MFN principle cannot be used to extend the principle of FET.[789] The United States argues that three conditions need to be fulfilled in order to confirm a breach of the MFN principle, being that a claimant or its investments (i) were accorded "treatment"; (ii) were in "like circumstances" with identified investors or investments; and (iii) received treatment "less favourable" than that accorded to the identified investors or investments.[790] Highlighting the criteria of "less favourable treatment", the United States contends that although all parties to the NAFTA filed for the exceptions of Annex IV of the NAFTA[791], the MFN principle is not to be interpreted as a "*choice-of-law clause*" but rather addressing the comparison of the actual treatment accorded to the investors.[792]

728. With respect to item (iii) of ¶ 725 above, the United States firstly submits that NAFTA Articles 1116 and 1117 only provide compensation for loss or a damage that occurred due to a breach of a substantive obligation of NAFTA Chapter 11 Section A.[793] The United States contends that, in order to establish loss or a damage, all NAFTA Contracting Parties have agreed to require the investor to demonstrate proximate

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785 US First NDP Submission, ¶¶ 8-9.
786 US First NDP Submission, ¶ 9.
787 US First NDP Submission, ¶ 10.
788 US First NDP Submission, ¶ 12.
789 US First NDP Submission, ¶¶ 13-14.
790 US First NDP Submission, ¶ 16.
791 Annex IV of NAFTA contains the exception "to Article 1103 for treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement" (US First NDP Submission, ¶ 18) (emphasis omitted).
792 US First NDP Submission, ¶ 18.
793 US First NDP Submission, ¶ 19.

causation.[794] According to the United States, this requirement has also been imposed by NAFTA tribunals, as damages were only awarded in the presence of a "sufficient causal link."[795]

729. Secondly, the United States submits that the NAFTA definition of an investor is limited to a person that is seeking to make, making or having made an "investment" in the territory of another NAFTA Contracting Party, a definition which, according to the United States, all NAFTA Contracting Parties have agreed upon.[796] In the context of this definition, the United States underlines that this definition does not apply to persons other than investors, and that the investment must be in the territory of the respondent party.[797] According to the United States, the definition poses limitations with regard to the term "investment", as no "revenues or profits" can be considered an investment under NAFTA.[798]

730. Thirdly, the United States contends that only the loss or the damage that has been suffered by the investor itself (NAFTA Article 1116) or the loss or the damage that has been suffered by the enterprise of another party that the investor owns or controls (NAFTA Article 1117) can be invoked.[799] However, the United States stresses that NAFTA Article 1117 is not applicable to loss or damage that is incurred by an enterprise of a non-Contracting Party or of the same NAFTA Contracting Party as the investor.[800]

731. According to the United States, the distinction between NAFTA Articles 1116 and 1117 is based on two principles of customary international law: the first principle addresses the impossibility to claim loss or damage directly suffered by or on behalf of a shareholder, due to the separate legal personality of corporations.[801] Based on this principle, the United States opines that the decisive factor to characterize loss or a damage is not whether it was directly or indirectly suffered but whether the infringed right belonged to the

794 US First NDP Submission, ¶ 21.
795 US First NDP Submission, ¶ 22.
796 US First NDP Submission, ¶¶ 23-24.
797 US First NDP Submission, ¶¶ 24-25.
798 US First NDP Submission, ¶ 27.
799 US First NDP Submission, ¶¶ 29-30.
800 US First NDP Submission, ¶ 31.
801 US First NDP Submission, ¶ 33.

shareholder or the corporation.[802] The second principle invoked by the United States is that an international claim may not be brought against a State on behalf of its own nationals.[803] This principle is respected by NAFTA Article 1117, as only claims of an injury suffered by an "enterprise of another party" are invocable.[804]

732. Since nothing in the text of NAFTA Article 1116 implies permission for an investor to base a claim on an indirect injury, the United States submits that NAFTA Article 1117 is the only way for an investor to invoke indirect injuries – and that only in specific circumstances.[805]

2. Canada's NDP Submission

733. In its NDP Submission, Canada provided its interpretation regarding (i) NAFTA Article 1105 and the Minimum Standard of Treatment, (ii) NAFTA Article 1103 and MFN treatment and (iii) NAFTA Articles 1116 and 1117.

734. With respect to item (i) of ¶ 733 above, Canada submits that the MST is accorded by NAFTA Contracting Parties to investments of investors of another NAFTA Contracting Party.[806] This view is confirmed in the FTC Note, which in Canada's view has been confirmed as the definitive and binding interpretation of NAFTA Article 1105.[807] According to Canada, the MST is an objective standard of treatment for investors that is limited by customary international law.[808] In line with that, Canada argues that investment arbitration cannot be seen as a customary international law limitation of the MST.[809] Canada argues that even though decisions by investment arbitration tribunals can contain valuable analysis of State practice, it is not sufficient to prove State practice.[810]

735. Further, Canada submits that NAFTA Article 1105 should not be used by tribunals to question government practices and decision making as NAFTA Article 1105 is not

802 US First NDP Submission, ¶ 34.
803 US First NDP Submission, ¶ 36.
804 US First NDP Submission, ¶ 37.
805 US First NDP Submission, ¶¶ 37-38.
806 Canada NDP Submission, ¶ 3.
807 Canada NDP Submission, ¶ 4.
808 Canada NDP Submission, ¶¶ 4-5.
809 Canada NDP Submission, ¶ 8.
810 Canada NDP Submission, ¶ 8.

intended to provide an overall protection for investors for any kind of government action and so far, only a few concrete rules have been attributed to the standard.[811] In Canada's view, the investor's legitimate expectations are not part of the provided protection.[812]

736. With respect to item (ii) of ¶ 733 above, Canada provides an enumeration and interpretation of the three conditions required to invoke a breach of the MFN treatment.[813]

737. Concerning the first criterion of "treatment", Canada argues that hypothetical treatment resulting from obligations of other treaties is not sufficient to allege a breach of the NAFTA MFN obligation.[814] As actual treatment is required, in its view the existence of a treaty and the obligations flowing from that treaty are not sufficient.[815]

738. With respect to the second criterion of "like circumstances", Canada submits that this criterion requires a case-by-case approach and argues that the criterion is a substantive part of the MFN obligation and cannot be invoked as a defence by the NAFTA Contracting Parties.[816]

739. Canada further submits that NAFTA Article 1103 cannot alter the content of NAFTA Article 1105 nor the content of the MST standard of customary international law.[817]

740. With respect to item (iii) of ¶ 733 above, Canada submits that the authentic interpretation of NAFTA Article 1116 concerning losses suffered directly by the investor, and NAFTA Article 1117 concerning losses suffered directly by the enterprise and indirectly by the investor, has been approved by all NAFTA Contracting Parties.[818] According to Canada, NAFTA Article 1117 constitutes a derogation from customary international law as it allows a shareholder to claim damages for the enterprise in which it holds shares.[819] For

811 Canada NDP Submission, ¶¶ 9-10.
812 Canada NDP Submission, ¶¶ 11-13.
813 Canada NDP Submission, ¶ 16.
814 Canada NDP Submission, ¶¶ 22-23.
815 Canada NDP Submission, ¶¶ 24-25.
816 Canada NDP Submission, ¶¶ 18-20.
817 Canada NDP Submission, ¶ 26.
818 Canada NDP Submission, ¶¶ 27-30.
819 Canada NDP Submission, ¶ 31.

both provisions, Canada stresses the need of a proximate causation between the alleged breach and the alleged loss, with the burden of proof lying with the investor.[820]

741. As to the capacity of an investor, Canada relies on the requirements of VCLT Article 31 when submitting that NAFTA Articles 1116 and 1117 need to be interpreted in the context of other relevant NAFTA articles – such as NAFTA Articles 1139 and 1101.[821] On that basis, Canada argues that "an investor may only recover for damages it incurred in its capacity as an investor seeking to make, making, or having made, an investment in the territory of the other Party."[822]

742. According to Canada, an investor can only be compensated for the loss it has suffered, not for the loss suffered by third parties over which the Tribunal has no jurisdiction.[823]

3. US Second NDP Submission

743. In the US Second NDP Submission, the United States provides its interpretation regarding: (i) the content of the MST included in NAFTA Article 1105; (ii) the provisions of NAFTA Chapter 11 in the context of environmental issues (NAFTA Article 1114); and (iii) the notion of contributory fault.

744. With respect to item (i) of ¶ 743 above, the United States submits that the MST does not require the same due process in administrative decisions as for adjudicatory proceedings.[824] Further, the United States refers to the principle of good faith which is included in the NAFTA.[825] According to the United States, this principle only binds the parties to the Treaty among each other, but does not serve third parties, such as investors, as a source of obligation.[826] In consequence, in its view, it would not be possible for third parties to base a State's liability on a breach of good faith.[827]

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820 Canada NDP Submission, ¶ 32.
821 Canada NDP Submission, ¶ 37.
822 Canada NDP Submission, ¶ 40.
823 Canada NDP Submission, ¶ 41.
824 US Second NDP Submission, ¶ 3.
825 US Second NDP Submission, ¶ 4.
826 US Second NDP Submission, ¶ 4.
827 US Second NDP Submission, ¶ 5.

745. With respect to item (ii) of ¶ 743 above, the United States submits that States are not hindered in taking environmental measures, even in case these measures are disadvantageous to a certain investment.[828]

746. With respect to item (iii) of ¶ 743 above, the United States relies on Article 39 of the ILC Articles on State Responsibility, contending that when determining the reparation, Claimant's contribution to the injury needs to be taken into account.[829]

4. Claimant's Comments on NDP Submissions

747. On 28 June 2021, Claimant filed its observations on the US First NDP Submission and Canada NDP Submission ("**Claimant's First NDP Observations**") in which it addressed the issues of interpretation of NAFTA Articles 1105, 1103 and 1116 put forward by the United States and Canada, as summarized below.

748. First, Claimant contends that pleadings by States do not constitute subsequent agreements or practice under VCLT Article 31.[830] According to Claimant, these subsequent agreements and practices do not need to be considered by the Tribunal as they do not constitute objective interpretations but mainly reflect a specific defensive position of the NAFTA Contracting Parties.[831]

749. Second, with regard to NAFTA Article 1105, Claimant submits that it is undisputed by the United States and Canada that NAFTA Article 1105 applies the customary international law MST, and that this standard has evolved over time.[832] Further, contrary to the United States and Canada's position, Claimant contends that NAFTA Article 1105 prohibits conduct that is arbitrary or inconsistent with reasonable investor expectations and therefore provides equal protection as under the autonomous FET standard.[833]

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828 US Second NDP Submission, ¶ 6.
829 US Second NDP Submission, ¶ 7.
830 Claimant's First NDP Observations, ¶ 3.
831 Claimant's First NDP Observations, ¶ 4.
832 Claimant's First NDP Observations, ¶¶ 11, 13; *see also*, ¶ 12, *citing* Canada NDP Submission, ¶¶ 3-4 and US First NDP Submission, ¶ 4.
833 Claimant's First NDP Observations, ¶ 14.

750. Third, Claimant contends that it is entitled to treatment consistent with the autonomous FET standard under NAFTA Article 1103, even if the autonomous FET standard was not covered by NAFTA Article 1105.[834]

751. Lastly, Claimant submits with regard to NAFTA Article 1116 that: (i) it allows an investor of a party to recover all losses incurred, irrespective of their direct or indirect causation,[835] even if Claimant only claims directly suffered losses in this case;[836] (ii) the recovery of damages through NAFTA Article 1116 is not limited by the "capacity" of the investor;[837] and (iii) even if there was such a "capacity" limitation, Claimant has suffered losses in its capacity as investor since the losses are triggered through the direct interference of Respondent affecting CALICA as an integrated business.[838]

752. On 25 September 2023, Claimant filed its observations on the US Second NDP Submission ("**Claimant's Second NDP Observations**"). Claimant submits that the issue before the Tribunal is not whether due process requirements in administrative and judicial proceedings are the same, but whether denial of basic due process in administrative proceedings constitutes a breach of NAFTA Article 1105. In its view, it does.[839]

753. Claimant further disagrees with the United States in relation to good faith, arguing that NAFTA Article 1105 does include an obligation upon States to act in good faith.[840]

5. Respondent's Comments on NDP Submissions

754. Respondent did not file observations on the Canada NDP Submission or the US First NDP Submission.

755. On 25 September 2023, Respondent filed its observations on the US Second NDP Submission ("**Respondent's NDP Observations**"). Respondent argues that the United States' submission is aligned with its own arguments about NAFTA Article 1105, i.e.,

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834 Claimant's First NDP Observations, ¶ 22; see also Claimant's First NDP Observations, ¶¶ 23-26, citing **CL-0038-ENG**, Patrick Dumberry, The Importation of "Better" Fair and Equitable Treatment Standard Protection Through MFN Clauses: An Analysis of NAFTA Article 1103, pp. 2, 4.

835 Claimant's First NDP Observations, ¶¶ 30-33.

836 Claimant's First NDP Observations, ¶¶ 34-36.

837 Claimant's First NDP Observations, ¶ 57; *see also*, ¶¶ 58-63.

838 Claimant's First NDP Observations, ¶¶ 64, 70-71.

839 Claimant's Second NDP Observations, ¶ 75; *see also* Claimant's Second NDP Observations, ¶¶ 76-77.

840 Claimant's Second NDP Observations, ¶ 80.

that an investor has the burden of establishing the existence and applicability of the standard under customary international law, and meet a high standard for determining that government conduct is inconsistent with the MST.[841]

756. Respondent shares the position of the United States that the good faith principle is not a standalone basis for a breach of NAFTA Article 1105.[842] Likewise, Respondent agrees with the United States that the MST does not require the same due process in administrative decision-making as in adjudicatory proceedings. In its view, due process violations can only occur within an adversarial proceeding.[843]

E. TRIBUNAL'S ANALYSIS

1. The Applicable Standard for NAFTA Article 1105

(a) The Minimum Standard of Treatment

757. NAFTA Article 1105 (extracted in full at ¶ 673 above) requires the NAFTA Contracting Parties to "accord to investments of investors" of the other NAFTA Contracting Parties "treatment in accordance with international law, including fair and equitable treatment…"

758. The FTC Note adopted an interpretation of NAFTA Article 1105(1) as follows:[844]

> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
>
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

841 Respondent's NDP Observations, ¶ 4.
842 Respondent's NDP Observations, ¶ 7.
843 Respondent's NDP Observations, ¶ 9.
844 **C-0132-ENG**, NAFTA FTC, Notes of Interpretation of Certain Chapter 11 Provisions, dated 31 July 2001.

759. Pursuant to NAFTA Article 1131(2): "An interpretation by the [NAFTA Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section." As such, the Tribunal is bound by, and decides the Parties' dispute in accordance with, the interpretation of NAFTA Article 1105(1) provided by the FTC Note.

760. While the Parties' positions diverge with respect to certain aspects of the applicable standard under NAFTA Article 1105, they are in agreement that the standard set out by the tribunal in *Waste Management v. Mexico II* is the correct one.[845] In that case, the tribunal surveyed the articulation of the standard in NAFTA Article 1105 across a number of cases and held that such cases suggest:[846]

> . . . the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

761. The Tribunal subscribes to the standard set out in *Waste Management v. Mexico*, which is a high standard, and one that it considers consistent with the text of NAFTA Article 1105 and the FTC Note. The Tribunal shall apply it in the present case.

762. In light of the Parties' agreement on the standard applicable, the Tribunal considers the other disagreements in relation to the standard to be of little relevance, and limits itself to the following comments.

763. While Claimant relies on the statement by the tribunal in *Merrill & Ring v. Canada* that "fair and equitable treatment has become a part of customary law,"[847] the Tribunal does not understand the tribunal in *Merrill & Ring* to have made a finding that the autonomous

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845 Memorial, ¶ 191, *citing, inter alia,* **CL-0007-ENG**, *Waste Management v. Mexico (II)*, Award, ¶ 98; C-PHM, ¶ 31, *citing* 2021 Hearing Transcript (Spanish), Day 1, 275:7-17 (Respondent's Opening Statement); 2021 Hearing Transcript (English), Day 1, 228:9-18; **RD-0001**, Respondent's Opening Presentation, slide 64. *See also* Counter-Memorial, ¶ 299; Rejoinder, ¶ 321.

846 **CL-0007-ENG**, Waste Management v. Mexico (II), Award, ¶ 98.

847 Memorial, ¶ 192, *citing* **CL-0005-ENG**, *Merrill & Ring v. Canada,* Award, ¶ 211.

standard and the minimum standard of FET have converged. The tribunal in that case held that "convergence is not really the issue" and "the name assigned to the standard does not really matter."[848]

764. For present purposes, the Tribunal considers it established that a requirement of FET exists under customary international law. The indication given at ¶ 760 above gives meaningful content to that standard, the application of which will necessarily depend on the facts and circumstances of the specific case.

(b) Importation of Autonomous FET Standard via NAFTA Article 1103

765. In relation to Claimant's assertion that it may import the autonomous FET provisions from Mexico's BITs with Korea, Germany, Greece and the Netherlands via the MFN clause in NAFTA Article 1103,[849] Tribunal Question 4 asked as follows:

> With respect to the legal standard under NAFTA Article 1105 and Claimant's argument that the MFN clause in NAFTA Article 1103 enables the importation of autonomous fair and equitable treatment standards under Mexico's BITs with Korea, Germany, Greece and the Netherlands (*see* Memorial, ¶ 197; Reply, ¶ 120), what is the relevance, if any, of the NAFTA Free Trade Commission's Note of Interpretation of 31 July 2001 (*see* Rejoinder, ¶ 319)?

766. This question concerns the importation of an FET standard via NAFTA Article 1103. The importation of an umbrella clause via Article 1103 will be addressed at ¶¶ 790 *et seq.*below.

767. In Claimant's view, the FTC Note has no effect on the importation of the autonomous standard, since it interpreted NAFTA Article 1105 and not Article 1103.[850] Claimant further cites authorities and opinions which in its view support the importation of an autonomous FET standard in this way.[851]

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848 **CL-0005-ENG**, *Merrill & Ring v. Canada*, Award, ¶¶ 209-210.

849 Memorial, ¶ 197.

850 C-PHM, Appendix A, Tribunal Question 4; *see also* C-PHM, ¶ 38.

851 C-PHM, ¶ 39; C-PHM, Appendix A, Answer to Tribunal Question 4, *citing*, **CL-0031-ENG**, *Pope & Talbot v. Canada*, Damages Award, n. 54; **CL-0035-ENG**, *UPS v. Canada,* Award on Jurisdiction, ¶ 97; **CL-0038-ENG**, Patrick Dumberry, *The Importation of ''Better'' Fair and Equitable Treatment Standard Protection Through MFN Clauses: An analysis of NAFTA Article 1103*.

768. Respondent argues, on the other hand, that the FTC Note establishes a binding interpretation of NAFTA Article 1105 that is not subject to modification by a tribunal. According to Respondent, the other NAFTA Contracting Parties agree on this point.[852] Respondent further submits that under international law, the specific interpretation of NAFTA Article 1105 in the FTC Note takes precedence over Claimant's "unilateral, indirect and vague" interpretation that NAFTA Article 1105 could be modified by NAFTA Article 1103.[853]

769. Since the Parties agree on the FET standard to be applied, the Tribunal considers the question whether an autonomous standard can additionally be imported to have no practical significance in the present case. Because the issue has been raised by the Parties and inquiries made by the Tribunal, for the sake of completeness the Tribunal shall address this issue.

770. The Tribunal interprets NAFTA Articles 1103 and 1105 in good faith, in accordance with the ordinary meaning to be given to their terms in their context and in the light of their object and purpose, as per VCLT Article 31.

771. A good faith interpretation of NAFTA Article 1103 must not render meaningless the other provisions of NAFTA. Taking NAFTA Article 1103 in context, it provides for a most-favored nation treatment obligation, distinct from the minimum standard of treatment provided by NAFTA Article 1105. The purpose of NAFTA Article 1103 is not to override or to circumvent the protection agreed under NAFTA Article 1105. The effect of Claimant's interpretation would be to apply an FET standard other than the one set out in NAFTA Article 1105.

772. The Tribunal's understanding is confirmed by the FTC Note. Claimant's interpretation would contradict and render ineffective the interpretation of Article 1105 in the FTC Note. As already noted at ¶ 759 above, the Tribunal is bound by the FTC Note. It is not

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852 R-PHM, Annex A, ¶¶ 22-27, *citing*, **RL-063-ENG**, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Canada's Rejoinder on the Merits, 2 July 2014 ¶ 152; **RL-094-ENG**, *Pope & Talbot v. Canada*, Letter from Meg Kinnear, General Counsel, Trade Law Division, Canada, to Tribunal, 1 October 2001, p. 3; **RL-095-ENG**, *Pope & Talbot v. Canada*, Sixth Submission (Corrected) of the United States, 2 October 2001, p. 2; Oral Submission of the U.S. as a Non-Disputing Party, 2021 Hearing Transcript (English), Day 1, 13-14.

853 R-PHM, Annex A, ¶ 28.

open to the Tribunal to ignore the FTC Note by applying an FET standard other than the one set out in the FTC Note by way of a different provision of NAFTA.

773. The indication otherwise in a footnote cited by Claimant from a decision in *Pope & Talbot v. Canada* (*see* ¶ 680 above) does not alter the Tribunal's understanding of the FTC Note, the text of which is clear.

774. The Tribunal finds Claimant's argument relying on commentary by Professor Patrick Dumberry to be inapposite, insofar as that view speculates that the wording of FET standards agreed to by Mexico in post-NAFTA treaties is not tied to the MST under international law and it therefore "could be argued" that the autonomous standards agreed to in those treaties offer a better standard of protection and importation should be allowed.[854] The Tribunal considers that the mechanism of importing the FET standard from another treaty is contrary to its interpretation of NAFTA Article 1103 in context, as well as the FTC Note.

775. In any event, as discussed further at ¶¶ 792-800below, the Tribunal agrees that NAFTA Article 1103 concerns the comparison of actual treatment accorded to different investors or a class of investor in "like circumstances". In this case, the comparison between the treatment of Claimant and any less favorable treatment to investors in like circumstances is not evident (*see* ¶ 793 below).

776. The Tribunal therefore rejects Claimant's proposal to import the autonomous FET standard via NAFTA Article 1103.

(c) Legitimate Expectations

777. In the present case, Respondent has not argued that the protection of legitimate expectations is excluded from the MST under NAFTA Article 1105, although it argues that such expectations are not a source of Respondent's obligations, and that host States should not be held liable for losses resulting from risky or erroneous business decisions.[855]

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854 See **CL-0038-ENG**, Patrick Dumberry, The Importation of "Better" Fair and Equitable Treatment Standard Protection Through MFN Clauses: An analysis of NAFTA Article 1103, p. 14.

855 *See, e.g.,* Counter-Memorial, ¶¶ 301-302.

778. The Parties agree on the application of the FET standard in *Waste Management* which is extracted at ¶ 760 above. Relevant to the investor's legitimate expectations, the tribunal in that case held:[856]

> In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

779. The Tribunal accepts, for present purposes, that NAFTA Article 1105 provides protection of certain legitimate expectations, as described herein. That does not mean that "legitimate expectations" is a component element of "fair and equitable treatment" under customary international law that gives rise to an independent obligation. Instead, the Tribunal endorses the language used by the tribunals in *Thunderbird* and *Grand River* to describe the kind of legitimate expectations protected under NAFTA. In *Thunderbird* it was held that the concept of legitimate expectations relates:[857]

> . . . to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.

780. In Grand River v. United States, it was stated that:[858]

> . . . ordinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made explicitly or implicitly by a state party.

781. The Tribunal agrees with Respondent that the protection of "legitimate" expectations does not mean that an investor's own expectations become a source of international legal obligations. As set out above, expectations are legitimate when they reasonably and justifiably arise from a NAFTA Contracting Party's conduct. In particular, targeted representations or assurances that are made explicitly or implicitly by the host State and are relied on by an investor may give rise to a legitimate expectation that those expectations are honored. Moreover, an assessment of what will be legitimate or

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856 **CL-0007-ENG**, Waste Management v. Mexico (II), Award, ¶ 98.
857 **CL-0004-ENG**, *Thunderbird v. Mexico*, Award, ¶¶ 147, 195-196.
858 **CL-0018-ENG**, Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award, 12 January 2011, ¶ 141.

reasonable expectations in a particular case will take into account all the circumstances, including the nature of the investment, the level of risk, any due diligence conducted by the investor, and its investment decisions.

782. There is no disagreement between the Parties that the legitimate expectations component of FET does not protect an investor's financial expectations regarding the profitability of its investment, and does not indemnify the investor for financial loss resulting from a high-risk investment.[859] The Tribunal confirms this view, and agrees with Respondent that what will be legitimate or reasonable expectations in a particular case will take into account the level of risk of an investment.

783. The important role of specific assurances in the creation of legitimate expectations is also not in dispute between the Parties.[860] Both Parties rely on the case of *Bilcon v. Canada*, which held that specific representations are necessary to create legitimate expectations, rather than abstract references to the general legal framework in relation to an investment or general statements about the attractiveness of an investment destination.[861]

784. Relevant to legitimate expectations, and to the FET standard more broadly, the Tribunal is mindful that it does not act as an appeal instance, and it is not the task of this Tribunal to second-guess regulatory or other decisions taken by national authorities.

(d) Arbitrary Conduct

785. The Tribunal agrees with Claimant that conduct is arbitrary if it is "founded on prejudice or preference rather than on reason or fact."[862]

786. Claimant further argues that State conduct has been held to be arbitrary when it is (i) politically motivated;[863] (ii) contrary to due process and good faith;[864] and (iii) infringes

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859 *See* Counter-Memorial, ¶¶ 301-303; Reply, ¶ 136.

860 *See* Reply, ¶¶ 132-133, *citing* **CL-0009-ENG**, *Bilcon v. Canada*, Award, ¶¶ 468-471, 589, *also citing* **CL-0019-ENG**, *Metalclad v. Mexico*, Award, ¶¶ 97-101; Rejoinder, ¶ 326, *citing* **RL-078-ENG**, *Bilcon v. Canada*, Award, ¶ 589.

861 **CL-0009-ENG/RL-078-ENG**, *Bilcon v. Canada*, Award, ¶ 589.

862 Memorial, ¶ 200, *citing* **CL-0043-ENG**, UNCTAD, Fair and Equitable Treatment, p. 78. *See also* Reply, ¶ 154.

863 Memorial, ¶ 201, *citing* **CL-0046-ENG**, *Eureko v. Poland*, Partial Award, ¶ 233.

864 Memorial, ¶ 201, *citing, inter alia*, **CL-0007-ENG**, *Waste Management v. Mexico (II)*, Award, ¶ 98.

the rule of law.[865] Respondent, on the other hand, agrees with the United States that the good faith principle is not a standalone basis for a breach of NAFTA Article 1105.[866]

787. The Tribunal considers that the general principles of due process, good faith and respect for the rule of law are integrated into the MST under NAFTA Article 1105. This being said, the Tribunal does not consider the elements cited by Claimant to constitute standalone obligations under the MST standard. While arbitrary State conduct in breach of the MST may cover conduct that is contrary to due process, lacking in good faith, or fails to respect the rule of law, leading to the same result, the Tribunal does not find it helpful to conceive due process or good faith as independent obligations.

788. In relation to due process, Respondent agrees with the United States that the MST does not require the same due process in administrative decision-making as in adjudicatory proceedings. In its view, due process violations can only occur within an adversarial proceeding.[867] While due process considerations in administrative and adjudicatory legal proceedings may be different, the Tribunal finds no basis to exclude due process violations in administrative proceedings from being held to be arbitrary conduct or otherwise contrary to the MST.

2. Applicable Standard for NAFTA Article 1103

789. The full text of NAFTA Article 1103 is set out at ¶ 672 above. Pursuant to Article 1103, the NAFTA Contracting Party agrees to accord treatment which is ". . . no less favourable than it accords, in like circumstances…" to investors and investments of investors of other States. The agreement to accord such treatment relates specifically to "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

790. Claimant claims that by virtue of NAFTA Article 1103, although NAFTA contains no umbrella clause, it can seek the protection of umbrella clauses under other treaties applicable between Mexico and other States.[868] As Claimant acknowledges, no NAFTA

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865 Memorial, ¶ 201, *citing, inter alia*, **CL-0048-ENG**, *Siag v. Egypt*, Award, ¶¶ 453-454.
866 Respondent's NDP Observations, ¶ 7.
867 Respondent's NDP Observations, ¶ 9.
868 *See, inter alia*, Memorial, ¶¶ 238-242.

tribunal has yet ruled directly on whether an umbrella clause may be imported from other treaties through NAFTA Article 1103.[869]

791. The text of NAFTA does not explicitly exclude that treatment of an investor or investment of another State relating to "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments" may include an investor or investment availing itself of protections granted under another investment treaty.

792. However, for the words "in like circumstances" to have meaning, there must be a comparison between the treatment accorded to the investor in question and the allegedly more favorable treatment to an investor, which establishes that there is a strong factual parallel or "likeness" between the circumstances of the two. The Tribunal therefore rejects Claimant's contention that it is sufficient for an investor to identify a third-party treaty that sets the standard of treatment that a hypothetical third-country investor would enjoy. The fact of being a third-country investor is insufficient to qualify as "like circumstances", since that criterion is already included in the provision.

793. Claimant does not establish like circumstances by referring to a hypothetical "Swiss investor with quarrying operations in Mexico."[870] In the Tribunal's view, the like circumstances must be based on actual treatment (or "*de facto* treatment") that has occurred, and not hypothetical treatment in the abstract available to investors in like circumstances. This follows from the language in NAFTA Article 1103, which refers to treatment that the NAFTA Contracting Party "accords, in like circumstances." The "accords" requires a claimant investor to prove the allegedly preferential treatment that has in fact occurred, with reference to the "like circumstances" in which such actual treatment took place.

794. The Tribunal considers this view to be in line with the ordinary meaning of the terms of NAFTA Article 1103 in context, in the light of its object and purpose. In this respect, the purpose of the MFN clause is to ensure that investors protected by NAFTA do not receive less favorable treatment than investors of third States. This is in the context of the purpose

869 Reply, ¶ 192.
870 Reply, ¶ 195.

of NAFTA, which includes, in the Preamble, a purpose to "[e]nsure a predictable commercial framework for business planning and investment."[871] The Tribunal considers Claimant's proposed interpretation to create uncertainty and unpredictability in the text of the agreement reached by the NAFTA Contracting Parties, since it would enable cherry-picking in the abstract of legal standards from different treaties, contrary to the intended agreement set down in the text of NAFTA itself.

795. The Schedule of Mexico in Annex IV to NAFTA ("Exceptions from Most-Favored-Nation Treatment") is of no assistance to Claimant. Contrary to Claimant's argument, the Tribunal finds no acknowledgement in that document that "treatment" in Article 1103 encompasses substantive protections afforded in those treaties absent an assessment of "like circumstances" (*see* ¶ 690 above). The passage of Mexico's Annex IV relied on by Claimant provides:[872]

> Mexico takes an exception to Article 1103 for treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement.
>
> For international agreements in force or signed after the date of entry into force of this Agreement, Mexico takes an exception to Article 1103 for treatment accorded under those agreements involving:
>
> (a) aviation;
>
> (b) fisheries;
>
> (c) maritime matters, including salvage; or
>
> (d) telecommunications…

796. The reference to "treatment accorded under all bilateral or multilateral international agreements" in Annex IV does not add to the language of NAFTA Article 1103. The treatment referred to in Annex IV can only be the same treatment in Article 1103, i.e., treatment accorded "in like circumstances, to investors [or investments of investors] of any other Party or of a non-Party." The fact that the treatment of an investor in like

871 **C-0317-ENG**, NAFTA, Preamble.

872 **C-0133-ENG**, NAFTA, Annex IV - Schedule of Mexico: Exceptions from Most-Favored-Nation Treatment (Chapter 11). *See* Reply, ¶¶ 185-186.

circumstances may arise from protection that is accorded under an international agreement does not change the fact that like circumstances must exist in the relevant case.

797. It follows from the above that there may be limited scope, in practice, for NAFTA Article 1103 to be applied to import an umbrella clause from another treaty. However, it is not for the Tribunal to rewrite the language or scope of NAFTA as it has been drafted.

798. To the extent that other arbitral tribunals have reached a different conclusion on the operation of an MFN clause, the Tribunal does not consider the observations made by those tribunals in relation to different treaty provisions to be persuasive or to be binding on this Tribunal. The same applies to academic commentary espousing a different opinion.

799. Claimant further argues that the newly restrictive application of the MFN clause in the USMCA would not have been necessary if the language in NAFTA was already restrictive.[873] The Tribunal does not find the wording of the USMCA to aid its interpretation of NAFTA.

800. Accordingly, Claimant may not use NAFTA Article 1103 to avail itself of the protection of an umbrella clause found in another treaty without making a case that Respondent in fact accords or has accorded more favorable treatment to other investors in like circumstances. Since Claimant has not made a comparison between the treatment accorded to it and allegedly more favourable *de facto* treatment of another investor with a strong factual parallel to Claimant's circumstances, its arguments based on NAFTA Article 1103 are unsuccessful.

X. ALLEGED BREACHES IN RELATION TO LA ADELITA

A. CLAIMANT'S POSITION

801. According to Claimant, the process to amend the POEL 2009 was halted suddenly and without justification, contrary to the assurances and representations made. It argues that Respondent's authorities later repudiated their obligations to amend the POEL 2009

873 Reply, ¶ 192.

under the 2014 Agreements. As the POEL 2009 was never amended, Claimant contends that CALICA is unable to quarry La Adelita.[874]

802. Claimant denies that Respondent was justified in repudiating the POEL 2009 on the basis that it was purportedly against Mexican law to agree to a predetermined schedule to amend the POEL 2009 due to the public consultation stage.[875] In this regard, Claimant submits that (i) the Mexican authorities simply abandoned the process, without even scheduling the subsequent phases; and (ii) at no point was a technical or other basis put forward to suggest that La Adelita would not be rezoned.[876] Claimant asserts that the undisputed technical conclusion of the Committee to Amend the POEL was that La Adelita was apt for quarrying from a legal standpoint.[877]

803. Claimant further rebuts Respondent's assertion that the objectives of the 2014 Agreements were beyond the control of the parties. In its view, the Mexican instrumentalities that signed the 2014 Agreements had the power to amend that zoning regime. Claimant relies, in this regard, on the powers of the executive body of the Committee to Amend the POEL.[878]

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874 Memorial, ¶ 236; *see* Memorial, ¶¶ 114-120, 121-131; Reply, ¶¶ 152-153; C-PHM, ¶ 83-84; C-RPHM, ¶ 20.

875 C-PHM, ¶ 78. *See* Rejoinder, ¶ 255; 2021 Hearing Transcript (Spanish), Day 3, 836:11-841:20 (SOLCARGO Presentation).

876 C-PHM, ¶ 80, *citing* 2021 Hearing Transcript (Spanish), Day 3, 815:15-817:14 ([redacted] responding to questions from the Tribunal).

877 C-PHM, ¶¶ 81-82, *citing* **C-0095-SPA**, POEL Committee Fifth Session Minutes, 28 January 2016, p. 7; 2021 Hearing Transcript (Spanish), Day 3, 675:9-12.

878 C-RPHM, ¶ 21, *citing* 2021 Hearing Transcript (Spanish), Day 3, 761:6-763:1 ([redacted] Presentation), also citing [redacted] **0016-SPA**, Internal Regulations of the Local Ecological Land Use Planning Committee of the Municipality of Solidaridad, Quintana Roo ("Internal Regulations of the POEL Committee"), p. 4, Art. 6. The Tribunal notes that there are two versions of the Internal Regulations of the POEL Committee on the record: [redacted] **0016-SPA**, dated 2014 (without specific date), and **R-0118-SPA**, dated 7 March 2016, *i.e.*, between the fifth and sixth meetings of the Committee (see ¶¶ 249-250 above). According to Claimant's expert [redacted] **0016-SPA** is the version used on the Committee's website "which reflects local environmental records", and the differences between the two versions "are not drastic" (2021 Hearing Transcript (English), Day 3, 668:6-13). Respondent's SOLCARGO experts rely on the same version as [redacted] (*see* SOLCARGO Second Report ¶¶ 40 n 8, 54 n 22). The minutes of the sixth session of the Committee to Amend the POEL state that the *reglamento interno* of the Committee were to be found "*en la página de la Bitácora Ambiental"* (*see* **C-0096-SPA**). Respondent relied on the **R-0118-SPA** version, without commenting on the significance, if any, of any differences between the two versions (*see* Rejoinder, ¶ 332, n 535). In all the circumstances, the Tribunal refers to the [redacted] **0016-SPA** document as reflecting the internal regulations of the Committee, while noting relevant provisions of both versions for the sake of completeness.

804. Contrary to Respondent's argument that the 2014 Agreements are not "measures" under NAFTA Article 201, Claimant argues that the measure at issue in this arbitration is Respondent's repudiation of the 2014 Agreements, not the agreements themselves.[879] For Claimant, the term "measures" must be understood broadly to cover any act or omission of a State.[880]

1. Legal Nature of the 2014 Agreements

805. Claimant submits that even assuming the 2014 Agreements are not binding, at a minimum they constitute written representations that the POEL 2009 would be amended to recognize CALICA's vested rights to quarry La Adelita and were a representation that Respondent would take "all necessary actions" to amend the POEL 2009 by December 2015.[881] Claimant alleges that Dr. Mijangos admitted that at a minimum, Respondent had obligated itself to work to comply with the timeline that the parties set forth in the 2014 Agreements.[882]

806. Claimant further asserts in any event that the 2014 Agreements were binding and were at least highly serious and important acts of administration as acknowledged by Respondent's expert Dr. Mijangos.[883]

807. Claimant submits that Respondent's instrumentalities had the authority to enter into the 2014 Agreements under Mexican law, and no government official had ever suggested that they were invalid or non-binding.[884] Claimant further argues that the timeline that

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879 C-RPHM, ¶ 29; *see* R-PHM, ¶¶ 5, 9; Annex A – Question 14, ¶ 103.

880 C-RPHM, ¶ 30, *citing* **CL-0027-ENG**, *Saluka v. Czech Republic*, Partial Award, ¶ 459; **CL-0015-ENG**, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 26 March 2016 (*Mesa Power Group v. Canada*, Award), ¶¶ 254-256.

881 Reply, ¶ 147, *citing* [redacted] Report, ¶¶ 45-71; C-PHM, ¶¶ 87-88; C-RPHM, ¶ 10. *See* Counter-Memorial, ¶ 389.

882 C-RPHM, ¶ 12, *citing* 2021 Hearing Transcript (Spanish), Day 4, 971:12-972:17 (Mijangos Cross-Examination).

883 C-PHM, ¶¶ 87, 89, *citing* 2021 Hearing Transcript (Spanish), Day 4, 942:6-944:6 (Mijangos Cross-Examination).

884 C-RPHM, ¶ 11, *citing* Reply, ¶ 38; [redacted] Second Report, ¶¶ 12, 41-44, 52-54, 62-65; [redacted] Second Report, ¶¶ 138-145; C-PHM, ¶ 72; **CD-0003**, [redacted] Direct Presentation, slides 4-6; 2021 Hearing Transcript (Spanish), Day 3, 760:3-7 ([redacted] Presentation); [redacted] **0015-SPA**, Federal-State-Municipal Coordination Agreement for the Formulation, Approval, Issuance, Execution, and Monitoring of the Local Ecological Land Use Program of the Municipality of Solidaridad ("Federal-State-Municipal Coordination Agreement"), p. 12; **C-0080-SPA**, POEL 2009, pp. 19-20; 2021 Hearing Transcript (English), Day 2, 291:1-5 ([redacted] Cross-Examination); Memorial, ¶¶ 123, 131.

Mexico committed to follow to amend the POEL 2009 was consistent with Mexican law, and was not a summary procedure removed from the law.[885]

2. Legitimate Expectations

808. Claimant argues that Mexico gave explicit and unequivocal assurances and engaged in conduct indicating that CALICA would be able to conduct quarrying operations in La Adelita beginning in 2016. In this regard, Claimant relies on the Investment Agreement dating from 1986, which envisioned that the quarrying of La Rosita could be expanded to include other lots.[886] The same Investment Agreement deemed CALICA's project "feasible from an environmental standpoint."[887]

809. As the owner (rather than a concessionaire) of the lots at La Rosita, El Corchalito and La Adelita, Claimant submits that it has been free to use and quarry them, subject only to applicable land-use zoning and environmental permitting.[888]

810. Claimant contends that it also relied on actions by Respondent's authorities, including:[889]

(i) In April 1996, prior to acquiring La Adelita and El Corchalito, the State of Quintana Roo assured that quarrying operations were feasible in both lots under local environmental regulations;[890]

(ii) In September 1996, the Municipality of Solidaridad (which regulates local zoning) represented to CALICA that "it had no objection" to the quarrying activities planned by CALICA in La Adelita and El Corchalito;[891]

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885 C-RPHM, ¶ 13, *citing* [redacted] Second Report, ¶¶ 62-66; [redacted] Second Report, ¶ 147; *see* R-PHM, ¶ 35.

886 Memorial, ¶ 230; *see* Memorial, ¶ 27; Reply, ¶ 131; C-RPHM, ¶ 6.

887 C-PHM, ¶ 45, *citing* **C-0010-SPA**, Investment Agreement, pp. 6-7, 14, 16 (First and Eleventh Clauses).

888 C-PHM, ¶ 43, *citing* 2021 Hearing Transcript (Spanish), Day 3, 667:3-14 ([redacted] Presentation); 2021 Hearing Transcript (English), Day 3, 579:13-580:1.

889 Memorial, ¶ 233; Reply, ¶ 144.

890 Reply, ¶ 144, *citing* **C-0071-SPA**, Letter SIMAP/792/996, 19 April 1996, p. 1; **C-0072-SPA**, Letter SIMAP/791/1996, 19 April 1996, p. 1. *See also* Memorial, ¶¶ 73, 231, *citing* **C-0035-SPA**, La Adelita Title Deed, Seventh Whereas; **C-0034-SPA**, El Corchalito Title Deed, Ninth Whereas. *See also* Memorial, ¶ 235, *citing* [redacted] First Statement, ¶¶ 57, 60; C-PHM, ¶ 46.

891 Reply, ¶ 144, *citing* **C-0073-SPA**, Municipality of Solidaridad Letter, 2 September 1996. *See also* Memorial, ¶ 231; Memorial, ¶ 74; C-PHM, ¶ 46.

(iii) In December 1996, the State of Quintana Roo granted CALICA the Corchalito/Adelita State Environmental Authorization valid for five years from the initiation of quarrying (which began in 2001), acknowledging that the lots could be quarried above the water table and that the vegetation in areas to be quarried would be removed;[892]

(iv) In November 2000, SEMARNAT granted CALICA the Corchalito/Adelita Federal Environmental Authorization valid until 2020 but renewable for an additional 22 years (for quarrying below the water table), and envisioning that vegetation would be removed in the areas to be quarried;[893]

(v) In 2001, the State of Quintana Roo issued the *Programa de Ordenamiento Ecológico Territorial,* "**POET 2001**", zoning La Adelita and El Corchalito as "UGA 30" (*Unidad de Gestión* or Environmental Management Unit 30), with mining as a conditionally permitted activity and forestry (*forestal*) as an incompatible use;[894]

(vi) In 2001, CALICA commenced quarrying in El Corchalito, clearing vegetation and conducting extractive activities without any indication by the Mexican authorities that a CUSTF was required;[895]

(vii) In March 2006, the State of Quintana Roo extended the Corchalito/Adelita State Environmental Authorization for another five years, noting that quarrying those lots was feasible and listing "forestry" (*forestal)* as an incompatible use;[896]

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892 Memorial, ¶ 232; Reply, ¶ 144; C-PHM, ¶ 47, *citing* **C-0018-SPA,** Corchalito/Adelita State EIA, 11 December 1996.

893 Memorial, ¶ 232; Reply, ¶ 144; C-PHM, ¶ 49, *citing* **C-0017-SPA,** Corchalito/Adelita Federal EIA, 30 November 2000.

894 Reply, ¶ 144; C-PHM, ¶ 50, *citing* **C-0078-SPA**, POET 2001, pp. 13, 15-16, 42.

895 C-PHM, ¶ 51, *citing* [redacted] First Statement, ¶ 24; 2021 Hearing Transcript (English), Day 2, 303:4-7 ([redacted] Cross-Examination); 2021 Hearing Transcript (Spanish), Day 1, 210:7-10 (Question by Prof. Tawil to Counsel for Respondent); 2021 Hearing Transcript (English), Day 2, 302:22-304:5 ([redacted] Cross-Examination); 2021 Hearing Transcript (Spanish), Day 3, 676:21-678:3 ([redacted] Presentation).

896 Reply, ¶ 144; C-PHM, ¶ 48, *citing* **C-0074-SPA**, First Corchalito/Adelita State EIA Amendment, 3 March 2006, pp. 2, 15.

(viii) In October 2007, the Municipality of Solidaridad granted CALICA a Land Use License confirming that CALICA may "extract petrous material" from La Adelita and El Corchalito;[897]

(ix) In May 2009, the State of Quintana Roo issued the POEL 2009, explicitly recognising and respecting vested rights, which disclaimed applying retroactively to authorisations obtained before its enactment;[898]

(x) In March 2010, the High Court of Justice of the State of Quintana Roo confirmed that the POEL 2009 does not affect CALICA's permits to quarry La Adelita and El Corchalito, which was echoed by the State of Quintana Roo and the Municipality of Solidaridad;[899]

(xi) In May 2011, the State of Quintana Roo renewed the Corchalito/Adelita State Environmental Authorization, stating that they were subject to the previous zoning regime, which allows quarrying;[900]

(xii) In 2012, PROFEPA inspected CALICA's quarrying operations and found that CALICA complied with environmental laws and regulations;[901]

(xiii) Between 2003 and 2016, PROFEPA granted six Clean Industry Certificates to CALICA in recognition of its compliance with environmental commitments.[902]

811. For Claimant, these assurances were reinforced in the 2014 Agreements, in which Respondent and its instrumentalities, exercising their sovereign powers, pledged to amend the POEL 2009 in a way that would enable CALICA to secure the necessary vegetation-removal permit in La Adelita.[903] The MoU and the Amended MoU set out

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897 Memorial, ¶ 233; *see* Memorial, ¶ 79; Reply, ¶ 144; C-PHM, ¶ 56.

898 Reply, ¶ 144, *citing* **C-0080-SPA**, POEL 2009, p. 20; C-PHM, ¶ 57. *See also* C-RPHM, ¶ 8.

899 Memorial, ¶ 233; *see* Memorial, ¶¶ 82-83; Reply, ¶ 144, *citing* **C-0087-SPA**, Quintana Roo High Court Decision, 25 March 2010, pp. 3-4.

900 Memorial, ¶ 233, *citing* **C-0075-SPA**, Second Corchalito/Adelita State EIA Amendment, 19 May 2011, p. 4. *See also* Reply, ¶ 144; C-PHM, ¶ 48.

901 C-RPHM, ¶ 7. *See* C-PHM, ¶¶ 61, 125; Memorial, ¶ 57; Reply, ¶ 92; **C-0043-SPA**, PROFEPA Letter to CALICA, 10 December 2012, pp. 2, 57.

902 C-RPHM, ¶ 7. *See* Memorial, ¶ 57; Reply, ¶ 92; C-PHM, ¶ 126; **C-0037-SPA,** Clean Industry Certificate, 23 June 2003, through **C-0042-SPA,** Clean Industry Certificate, 27 July 2016.

903 Memorial, ¶ 234; *see* Memorial, ¶¶ 94, 98-99; Reply, ¶ 131, *citing* **C-0021-SPA**, MoU, p. 3; C-PHM, ¶¶ 64-65, *also citing* **C-0022-SPA**, Amended MoU, p. 14.

Respondent's agreements, with the Amended MoU including a detailed calendar specifying when each phase of the amendment process was to be carried out.[904]

812. According to Claimant, these repeated representations by Respondent constitute specific assurances made directly to the investor and were sufficient to cause Claimant to reasonably expect that CALICA would be able to move forward with quarrying operations in La Adelita in early 2016.[905]

813. When the State of Quintana Roo and the Municipality of Solidaridad failed to amend the POEL 2009 within the originally agreed timeframe, Claimant submits that the State and Municipality again assured CALICA that they would amend the POEL 2009 and committed to a phased process with a specific timeline for doing so.[906] In 2016, the State of Quintana Roo, in compliance with the 2014 Agreements, amended the Corchalito/Adelita State Environmental Authorization to extend its term to 2036, and the yearly quarrying area above the water table from 25 to 50 hectares.[907]

814. Claimant contends that in reliance on Respondent's pledge and the steps taken to amend the POEL 2009, Claimant committed additional investments in the Project worth approximately [redacted] between June 2014 and December 2017 that it would not have made without a firm commitment to amend the POEL 2009 to enable quarrying to begin in La Adelita. These long-term investments included (i) construction of a supplemental processing plant; (ii) construction of a new explosives storage facility; (iii) acquisition of heavy machinery; and (iv) two Panamax vessels designed for the project's specifications.[908]

815. According to Claimant, Respondent's instrumentalities took steps to comply with the 2014 Agreements, showing the reasonableness of Claimant's expectations. Specifically, Respondent: (i) extended the CALICA Port Concession until 2037; (ii) renewed the

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904 C-PHM, ¶¶ 65-67, *citing* **C-0021-SPA**, MoU, pp. 4-5; **C-0022-SPA**, Amended MoU, pp. 3-4.

905 C-PHM, ¶ 77, *citing* **CL-0153-ENG**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 376.

906 Reply, ¶ 144. *See* Memorial, ¶¶ 97-104.

907 C-PHM, ¶ 48, *citing* **C-0019-SPA**, Amendment to the Corchalito/Adelita State Environmental Impact Authorization, dated 29 February 2016, PDF p. 5 (*Condicionante* 2).

908 Memorial, ¶ 234; Reply, ¶ 146; C-PHM, ¶ 86, *citing* 2021 Hearing Transcript (English), Day 2, 309: 16-19 ([redacted] Redirect Examination); 2021 Hearing Transcript (English), Day 2, 443:7-10 ([redacted] Redirect Examination), *See* Memorial, ¶¶ 105-109; C-RPHM, ¶ 18.

Corchalito/Adelita State Environmental Authorization until 2036; and (iii) established the Committee to Amend the POEL, which held sessions, coordinated technical workshops and took steps in the POEL 2009 amendment process. CALICA, Claimant argues, (i) renounced its rights over the public terminal; (ii) withdrew the challenges to the proceeding to revoke CALICA's Port Concession; and (iii) continued paying real estate taxes based on an appraisal that courts had declared invalid. Even after the December 2015 deadline, Claimant submits that Respondent continued indicating that it would comply with the 2014 Agreements, and it was only in July 2018 that Governor Carlos Joaquín of Quintana Roo unequivocally repudiated them.[909]

816. Claimant further rebuts Respondent's argument that a delay by a municipal government to approve amendments to the zoning regulations cannot – by itself- constitute a violation of customary international law.[910] Claimant submits, in this respect that (i) Respondent repudiated its obligation to amend the POEL 2009 for political reasons, so there is no mere delay; (ii) Respondent and its instrumentalities failed to provide any technical or legal justifications for abandoning the process to amend the POEL 2009; (iii) it was reasonable for Claimant and CALICA to expect that the POEL 2009 would be amended in the timeframe agreed to in the 2014 Agreements; and (iv) the amendment to the POEL 2009 was limited to a simple change of the zoning area, which had been estimated by Respondent's officials to take no more than one year.[911]

817. Claimant denies that CALICA was negligent in not requesting the CUSTF (a permit granted by SEMARNAT to remove vegetation). In its view, CALICA was not required to obtain the CUSTF before 2009 because it did not plan to quarry La Adelita during that timeframe. In addition, Claimant contends that the State of Quintana Roo had explicitly recognized CALICA's vested right to quarry La Adelita when it issued the POEL 2009, and had assured amendment of the POEL 2009 to allow CALICA to obtain the CUSTF

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909 C-RPHM, ¶ 15, *citing* [redacted] Second Statement, ¶ 6; 2021 Hearing Transcript (English), Day 2, 293: 4-14 ([redacted] Cross-Examination); **C-0019-SPA**, Amendment to the Corchalito/Adelita State Environmental Impact Authorization, PDF p. 5; [redacted] First Statement, ¶ 59. *See* Memorial, ¶¶ 115-120; Reply, ¶ 34; C-PHM, ¶¶ 70-71. *See also* C-RPHM, ¶ 25.

910 Reply, ¶ 149. *See* Counter-Memorial, ¶¶ 354, 363.

911 Reply, ¶ 149, *citing* [redacted] Second Report, ¶ 151; [redacted] Second Statement, ¶¶ 4-5; Memorial, ¶¶ 119, 204. *See also* C-RPHM, ¶ 26.

necessary to commence quarrying.[912] Likewise, in November 2012, Claimant argues that PROFEPA inspected CALICA's facilities, permits and authorizations, and verified that the El Corchalito site had been cleared and quarried, and found no violation of environmental law, confirming that the CUSTF was not required.[913]

818. Under Mexican law, Claimant asserts that the CUSTF is only required for "forested terrains", which La Adelita was not.[914] In Claimant's view, SEMARNAT must consider the applicable zoning regime when considering whether to grant the CUSTF, and the CUSTF is therefore tied to that zoning regime. According to Claimant, prior to the POEL 2009, CALICA's lots were all zoned as incompatible for forestry.[915] Claimant further submits that Respondent's suggestion that CALICA could obtain the CUSTF today is at odds with its own arguments in this arbitration, i.e., that SEMARNAT would have to reject such a request because the POEL 2009 assigned La Adelita to UGA 5.[916]

819. Claimant asserts that contrary to Respondent's argument, an independent risk assessment is not a precondition for the formation of legitimate expectations where Respondent made repeated specific assurances regarding the investment. In its view, Respondent made assurances regarding the viability of quarrying activities in La Adelita before and after Claimant acquired that lot for that sole purpose, and it has been actively investing in the host country in light of those assurances for more than twenty years.[917]

820. In addition, Claimant denies that Respondent should be absolved of liability because mining operations can become "highly controversial". Claimant contends in this regard that: (i) CALICA is not engaged in mining operations under a concession, but quarrying operations as a lawful owner of the reserves in its lots; and (ii) arbitral tribunals have

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912 Reply, ¶ 150, *citing* [redacted] Second Report, ¶¶ 156-157; Memorial, ¶¶ 94, 99; C-PHM, ¶ 62. *See* Counter-Memorial, ¶ 342; Rejoinder, ¶¶ 158-166; 2021 Hearing Transcript (Spanish), Day 1, 185:1-187:15 (Respondent's Opening Statement).

913 C-PHM, ¶ 61, *citing* **C-0043-SPA**, PROFEPA Letter to CALICA, 10 December 2012, p. 2 (Translation by Claimant). *See also* C-RPHM, ¶¶ 36-37.

914 C-RPHM, ¶ 34, *citing* 2021 Hearing Transcript (English), Day 1, 39:10-20 (Claimant's Opening Statement); 2021 Hearing Transcript (Spanish), Day 3, 681:14-22 ([redacted] Presentation).

915 C-RPHM, ¶ 35, *citing, inter alia,* 2021 Hearing Transcript (Spanish), Day 3, 677:18-678:3, 702:12-704:18 ([redacted] Presentation and Cross-Examination); R-PHM, Annex A, Question 6, n. 225.

916 C-RPHM, ¶ 39. *See* R-PHM, Annex A, Question 9, ¶ 70, Question 7, ¶ 53.

917 Reply, ¶¶ 138-139, *citing, inter alia,* **CL-0111-ENG**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019, ¶ 396; **RL-020-ENG** *Methanex v. United States*, Final Award, Part IV, ¶¶ 8-10. *See* Counter-Memorial, ¶¶ 304-307.

consistently found States liable for breach of legitimate expectations in highly regulated industries where the State has made assurances or specific representations regarding the investments.[918]

821. Claimant distinguishes the cases relied on by Respondent to contend that not every breach of a contractual obligation by a State automatically amounts to a violation of legitimate expectations. In *Impregilo v. Pakistan*, Claimant argues that FET was not implicated because the merits were based on the application of the contract and unlike the present case, did not involve the exercise of state authority.[919] Likewise, in *Hamester v. Ghana* and *Parkerings v. Lithuania*, Claimant submits that the distinctions drawn between contractual obligations and legitimate expectations under international law are inapposite, since Claimant's case is that its legitimate expectations were not only formed from a contractual arrangement.[920]

822. For Claimant, an investor's financial expectations regarding the profitability of its investment are a separate issue to the treatment of the investment by the host State. It argues that Claimant is not seeking indemnification from Respondent for financial loss as a result of a high-risk investment. In this respect, Claimant contends that it is seeking relief under NAFTA Article 1105 based on its legitimate expectation that it would be able to quarry La Adelita, an important component of its CALICA Network, being a business with nearly three decades of profitability.[921]

3. Arbitrary Conduct, Due Process, Good Faith

823. In Claimant's view, Respondent's failure to amend the POEL 2009 pursuant to the 2014 Agreements, which effectively precluded CALICA from initiating operations in La Adelita, was based on political motivations and discretion. Claimant relies on the agreement in the MoU by the State of Quintana Roo and the Municipality of Solidaridad

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918 Reply, ¶ 140, *citing, inter alia,* [redacted] First Report, ¶ 20; **CL-0113-ENG**, *CEF Energia BV v. Italian Republic,* SCC Arbitration No. 2015/158, Award, 16 January 2019, ¶¶ 227, 247. *See* Counter-Memorial, ¶¶ 308-310.

919 Reply, ¶ 141, *citing* **RL-031-ENG**, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 (*Impregilo v. Pakistan,* Decision on Jurisdiction), ¶ 8. *See* Counter-Memorial, ¶¶ 393-400.

920 Reply, ¶ 142, *citing* **RL-035-ENG**, *Gustav FW Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶¶ 335-337; **RL-018-ENG**, *Parkerings v. Lithuania*, Award, ¶ 344.

921 Reply, ¶ 136.

to amend the POEL 2009 "for the inclusion of 'mining and exploitation of petrous material' at […] 'La Adelita'."[922] In its view, this was confirmed in the Amended MoU where it was pledged that the POEL 2009 would be amended by 5 December 2015.[923]

824. For Claimant, the Municipality of Solidaridad abandoned the POEL 2009 amendment process abruptly and without justification.[924] According to Claimant, political and ideological caprice of public officials was at fault, along with bias against CALICA designed to favour local interests over those of a US investor.[925] It argues that Mexican officials have admitted that they reneged on their obligation to amend the POEL 2009 because they deemed it politically unwise.[926] This was confirmed, according to Claimant, when the Governor of the State of Quintana Roo informed CALICA's General Manager on 17 July 2018 that: "You are not entering La Adelita – period."[927]

825. While Respondent argues that processes to issue POELs can be complex, can take years, and can be delayed, Claimant contends that this is unproven and no such issues were raised by former or current government officials at the federal, state or local level.[928] Claimant further submits that this is beside the point, as the State of Quintana Roo and the Municipality of Solidaridad agreed to a reasonable timeframe in the MoU and cannot abandon it without more.[929]

826. Claimant contends that Respondent's conduct was manifestly arbitrary.[930] In support of its assertion that Respondent's conduct was driven by politics, Claimant argues that:

(i) On 28 January 2016, Solidaridad councilwoman and later Mayor Laura Beristain publicly expressed her opposition to "land use changes" in the POEL 2009 via Twitter, using the #STOPCALICA hashtag. On the same day, the Committee to Amend the POEL approved the diagnostic report from its appointed expert

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922 Memorial, ¶ 204, *citing* **C-0021-SPA**, MoU.
923 Memorial, ¶ 204, *citing* **C-0022-SPA**, Amended MoU.
924 Memorial, ¶ 204; *see also* Memorial, ¶¶ 114-131; C-PHM, ¶ 91.
925 Reply, ¶ 158; C-PHM, ¶ 91.
926 Memorial, ¶ 204, *citing* [redacted] First Statement, ¶ 59.
927 Memorial, ¶ 204, *citing* [redacted] First Statement, ¶ 59.
928 Reply, ¶ 156, *citing* [redacted] Second Statement, ¶ 7; *see also* [redacted] First Statement, ¶¶ 40, 44-45, 47-52, 59; Reply, ¶ 159.
929 Reply, ¶ 159, *see* Reply, ¶¶ 52-54.
930 Memorial, ¶ 206, *citing* [redacted] First Statement, ¶ 59; Reply, ¶ 158.

identifying CALICA's lots as the most suitable areas for quarrying. Soon after, Claimant asserts that the Committee to Amend the POEL stopped convening, bringing the POEL 2009 amendment process to an end.[931]

(ii) On 17 August 2016, then Mayor-elect of Solidaridad, Cristina Torres, informed CALICA's General Manager that the Municipality of Solidaridad and the State of Quintana Roo would not voluntarily comply with the 2014 Agreements to avoid confrontation with the hotel industry and environmental groups.[932]

(iii) In March 2017, the Governor of the State of Quintana Roo, Carlos Joaquín, allegedly informed CALICA's General Manager that it would be politically "unpalatable" to allow CALICA to quarry La Adelita and that he was under pressure from the tourism industry to develop CALICA's lots.[933]

(iv) On 3 April 2017, the Legislature of the State of Quintana Roo approved a non-binding Point of Agreement introduced by Beristain, urging that the POEL 2009 not be amended to allow CALICA to quarry La Adelita, on the allegation (denied by Claimant) that CALICA was supplying materials to build a wall along the US-Mexico border.[934]

(v) On 5 April 2017, Solidaridad's mayor publicly denied that CALICA had asked the Municipality of Solidaridad to comply with its obligation to amend the POEL 2009.[935]

(vi) On 20 June 2017, the Secretary of Ecology and Environment of the State of Quintana Roo advised that there were no technical issues with CALICA's planned operations in La Adelita, but vested interests were using allegations against CALICA to advance their agendas.[936]

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931 Memorial, ¶ 205; *see* Memorial, ¶ 120, n. 281; Reply, ¶ 157.
932 Memorial, ¶ 205; *see* Memorial, ¶ 123; Reply, ¶ 157.
933 Memorial, ¶ 205; *see* Memorial, ¶ 125; Reply, ¶ 157; C-PHM, ¶ 92.
934 Memorial, ¶ 205; *see* Memorial, ¶ 126; Reply, ¶ 157, *citing* **C-0102-SPA**, Quintana Roo Lower House Session, 3 April 2017, p. 39.
935 Memorial, ¶ 205; *see* Memorial, ¶ 127.
936 Memorial, ¶ 205; *see* Memorial, ¶ 128; Reply, ¶ 157.

(vii) In August 2017, Governor Joaquín stated that amending the POEL 2009 would be politically difficult despite the lack of technical, objective issues with CALICA's planned activities in La Adelita.[937]

(viii) On 2 January 2018, CALICA filed in court to preserve its right to recover allegedly unlawful port fees collected by the API Quintana Roo. On 19 January 2018, API Quintana Roo threatened CALICA's General Manager with a shutdown of CALICA's operations if the efforts were not withdrawn. Five days later, PROFEPA issued an order prohibiting CALICA's operations in El Corchalito and La Adelita.[938]

(ix) On 22 January 2018, Marciano Toledo, a political ally and member of the team of Mayor Beristain led a protest outside CALICA's facilities, climbing the entrance gate with a chainsaw, holding pejorative signs against CALICA, and yelling allegations regarding the wall along the US-Mexico border echoing those made by Beristain;[939]

(x) In July 2018, Governor Joaquín stated that amending the POEL 2009 was not politically viable despite "the law being on CALICA's side" because interested parties could resort to activism and social opposition. He declared that CALICA "[is] not entering La Adelita – period."[940]

(xi) In September 2018, Beristain was elected Mayor of the Municipality of Solidaridad, has not amended the POEL 2009 as required by the 2014 Agreements, and continues to be ideologically opposed to CALICA.[941]

(xii) In March 2020, Mr. Toledo continued his public attacks against CALICA.[942]

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937 Memorial, ¶ 205; *see* Memorial, ¶ 129; Reply, ¶ 157.
938 Memorial, ¶ 205; *see* Memorial, ¶¶ 133-135.
939 Reply, ¶ 157, citing **C-0108-SPA**, Arma 'Chano' Toledo Protesta Contra CALICA: Arremete Activista Contra Trump y El Negocio de Exportación de Material Pétreo desde la Riviera Maya; "Es un Presidente de […]", Dice, NOTICARIBE, dated 22 January 2018.
940 Memorial, ¶ 205; *see* Memorial, ¶ 131; Reply, ¶ 157.
941 Memorial, ¶ 205. *See* Reply, ¶ 157.
942 Memorial, ¶ 205; *see* Memorial, ¶ 136, *citing* **C-0109-SPA**, *Aunque Calica se llame Sac Tun, sigue siendo una empresa ecocida: 'Chano' Toledo*, PEDRO CACHÉ NOTICIAS, dated 8 March 2020; Reply, ¶ 157.

827. Claimant asserts that Respondent failed to act in good faith, *inter alia*, by repudiating its obligation to amend the POEL 2009, with no technical or legal justification.[943]

4. Failure to Observe Obligations Under 2014 Agreements

828. Claimant contends that the Ministry of Communications and Transportation, the State of Quintana Roo, API Quintana Roo and the Municipality of Solidaridad entered into the 2014 Agreements in their sovereign capacity. According to Claimant, in the 2014 Agreements Respondent and its instrumentalities agreed to amend the POEL 2009, modify the API Quintana Roo Concession, assist with the calculation of CALICA's Port Concession fees, and reduce the cadastral values applicable to El Corchalito and La Adelita.[944]

829. In Claimant's view, Respondent repudiated the 2014 Agreements by failing to amend the POEL 2009 by 5 December 2015 so that CALICA could quarry La Adelita. As a consequence, Claimant asserts that CALICA will not be able to produce and commercialize aggregates from that lot.[945]

830. Claimant contends that Respondent's repudiation of the 2014 Agreements constitutes a breach of the umbrella clause in Article 10(2) of the Mexico-Switzerland BIT, forming a separate and independent basis for Mexico's liability and entitling Claimant to compensation for losses incurred from its inability to quarry La Adelita.[946]

B. RESPONDENT'S POSITION

1. Legal Nature of the 2014 Agreements

831. Respondent submits that the 2014 Agreements are not binding and are thus not even covered as "measures" under NAFTA Article 201.[947] According to Respondent, the 2014

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943 Memorial, ¶ 218; *see* Memorial, ¶ 216.

944 Memorial, ¶ 243; *see* Memorial, ¶ 95, *also citing* **CL-0077-ENG**, Guido Santiago Tawil, *The Distinction Between Contract Claims and Treaty Claims: An Overview*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? (A. J. van den Berg ed., 2007), p. 525; Reply, ¶ 199.

945 Memorial, ¶ 244; *see* Memorial, § II.H.1.

946 Memorial, ¶ 245; Reply, ¶ 200.

947 R-PHM, ¶ 9.

Agreements can only be considered as acts of the administration, expressing mutual declarations of intent.[948]

832. Respondent submits that the MoU and the Amended MoU are not legally binding documents, but reflect the intentions and wishes of different parties to seek to resolve various issues.[949] In its view, it was recognized in the MoU itself that the actions agreed therein were subject to compliance with applicable national law.[950]

833. Respondent further argues that Claimant's legal expert has shifted his position with respect to the legal nature of the 2014 Agreements, showing that these documents lack legal recognition in the Mexican legal framework. Respondent denies that the 2014 Agreements could be identified as "Coordination Agreements" or "Concertation Agreements" under environmental law, among other things because those agreements are public, unlike the 2014 Agreements.[951]

834. Respondent contends that the 2014 Agreements are not legally enforceable in Mexican courts, and that Claimant's witness [redacted] admitted (in contradiction to the evidence of [redacted] that CALICA itself did not believe the 2014 Agreements could be challenged in court.[952]

2. No infringement based on Respondent's alleged assurances

835. Respondent submits that Claimant had no vested rights to quarry La Adelita, nor were these alleged vested rights or assurances captured in the 2014 Agreements. In Respondent's view, CALICA could not have had any reasonable expectation about its ability to conduct extractive activities at La Adelita.[953]

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948 R-PHM, ¶ 10, *citing* 2021 Hearing Transcript (Spanish), Day 4, 942 (Mijangos Testimony).

949 Counter-Memorial, ¶¶ 379-380, *citing* SOLCARGO First Report, ¶¶ 81-83.

950 Counter-Memorial, ¶ 380.

951 R-PHM, ¶¶ 11-14, *citing* 2021 Hearing Transcript (Spanish), Day 3, 781-783 ([redacted] Testimony). *See* Counter-Memorial, ¶¶ 379-380; Rejoinder, ¶¶ 251-255.

952 R-PHM, ¶¶ 15-17, *citing* 2021 Hearing Transcript (Spanish), Day 2, 338 ([redacted] Testimony), 2021 Hearing Transcript (Spanish), Day 3, 801, 802 ([redacted] Testimony); 2021 Hearing Transcript (Spanish), Day 4, 983, 984 (Mijangos Testimony).

953 Rejoinder, ¶ 330; *see* Rejoinder, § D; [redacted] **0001**, Summary of Meeting at SCT/General Ports Direction 5:00 p. m. on 4 July 2013; [redacted] **0002**, Email from [redacted] to [redacted] dated 1 August 2013, p. 3.

836. Respondent submits that the 1986 Investment Agreement did not provide any guarantee that quarrying in new lots would be approved 30 years later, and is irrelevant in this arbitration. According to Respondent, the main quarry and processing plant was developed at La Rosita and continues to this day, while the other lot referred to in the Agreement was the port terminal.[954]

837. According to Respondent, Claimant is well aware of the environmental and land use disputes arising from mining operations which can often become highly controversial, including with respect to aggregates, citing examples of disputes involving extensive litigation over proposed gravel mining operation and operating mining operations in the United States.[955] Respondent cites two further examples of disputes involving Claimant and its predecessor companies, i.e., (i) the *Vulcan Materials Co. Greenville County* case relating to land acquired to mine granite in 1989, where community opposition developed; and (ii) *M&N Materials v. Town of Gurley, et al*, involving a dispute over the proposed use of land for a rock quarry in Alabama, where local community also opposed the operations.[956]

838. In these circumstances, Respondent argues that aggregate extraction companies cannot have a legitimate expectation that there will never be a problem in obtaining all the approvals required at multiple levels of government under different laws and regulations.[957]

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954 Counter-Memorial, ¶ 314. *See* Memorial, ¶ 27.

955 Counter-Memorial, ¶ 308, *citing* **R-0062-ENG**, KHTS, "*Decades-Long Battle Against CEMEX Soledad Canyon 'Mega Mine' Could Be Over*," 28 July 2020; **R-0063-ENG**, Complaint, *CEMEX, Inc. v. City of Santa Clarita et al.*, Cal. Superior Court, Case No. BC688074, 22 December 2017; **R-0064-ENG**, CEMEX's Reply in Support of its Motion for Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment, C*EMEX v. Dept. of Interior et al.*, U.S. District Court for the District of Columbia, Case No. 1:19-cv-01265, 30 October 2020; **R-0065-ENG,** Detroit News, "*Mine bid pits Michigan town against Boy Scouts*," 16 February 2016; **R-0066-ENG**, Complaint, *American Aggregates of Michigan and Great Lakes Council v. Township of Metamora, et al*., Case No. 2:20-cv-10553, 2 March 2020; **R-0067-ENG**, Notice of Motion Hearing, Case No. 2:20-cv-10553, 16 October 2020.

956 Counter-Memorial, ¶ 309, *citing* **R-0068-ENG**, *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 536 S.E.2d 892 (Ct. App. S.C. 2000); **R-0069-ENG,** Memorandum Opinion and Orders, *M&N Materials, Inc. v. Town of Gurley, et al.*, U.S. District Court for Northern District of Alabama, Civ. No. 5:14-CV-00184, 15 November 2015. *See also* Rejoinder, ¶ 323.

957 Rejoinder, ¶ 324.

839. Respondent rebuts Claimant's reliance on the measures set out below in support of its alleged legitimate expectations (*see* ¶ 810 above; Claimant's position below in italics), which in Respondent's view are a series of unrelated or non-binding actions:[958]

(i) *In April 1996, prior to acquiring La Adelita and El Corchalito, the State of Quintana Roo assured that quarrying operations were feasible in both lots under local environmental regulations*:[959] Respondent submits that no rational investor would rely on the letters cited by Claimant to make an investment in 2014 and 2017, since they contain brief statements indicating that mining may be feasible, subject to CALICA obtaining all required permits and authorisations, and subject to policy changes.[960]

(ii) *In September 1996, the Municipality of Solidaridad represented to CALICA that "it had no objection" to the quarrying activities planned by CALICA in La Adelita and El Corchalito*:[961] For Respondent, it is unclear how a single paragraph letter signed by the Municipal President of Solidaridad in 1996, expressly conditioning CALICA's activity on compliance with applicable ecological regulations, can create a legal obligation under Mexican or international law, or provide a basis for investments more than 20 years later.[962]

(iii) *In November 1996, the State of Quintana Roo granted CALICA the Corchalito/Adelita State Environmental Authorization, renewed until at least 2036 (for quarrying above the water table):*[963] According to Respondent, this Authorization remains in force as at the date of filing the Rejoinder, and Claimant does not explain how its issuance can create obligations for PROFEPA or SEMARNAT to exclude CALICA's violations of or compliance with federal environmental regulations or bind the Municipality of Solidaridad.[964]

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958 Rejoinder, ¶¶ 322-323.
959 Reply, ¶ 144, *citing* **C-0071-SPA**, Letter No. SIMAP/792/996, p. 1; **C-0072-SPA**, Letter SIMAP/791/1996, 19 April 1996, p. 1.
960 Rejoinder, ¶ 322; *see* Rejoinder, § B.1.
961 Reply, ¶ 144, *citing* **C-0073-SPA**, Municipality of Solidaridad Letter, 2 September 1996.
962 Rejoinder, ¶ 322; *see* Rejoinder, § B.1.
963 Memorial, ¶ 233; Reply, ¶ 144, *citing* **C-0018-SPA**, Corchalito/Adelita State EIA, 11 December 1996.
964 Rejoinder, ¶ 322; *see* Rejoinder, § B.2.

(iv) *In November 2000, SEMARNAT granted CALICA the Corchalito/Adelita Federal Environmental Authorization valid until 2020 but renewable for an additional 22 years (for quarrying below the water table)*:[965] Respondent argues that renewal of this 20-year authorisation was not guaranteed. In addition, it was granted without prejudice to compliance with other relevant authorisations and permits and conditioned on obtaining them, such as the CUSTF. It also required compliance with the terms and conditions of the authorisation.[966]

(v) *In 2001, the State of Quintana Roo issued the POET 2001, zoning La Adelita and El Corchalito to allow quarrying under certain conditions*:[967] According to Respondent, this POET 2001 was replaced by the POEL 2009 and is therefore not relevant for investments in 2014 and 2017. In any event, for Respondent this shows that the change of land use in El Corchalito and La Adelita was frequent and foreseeable, since the POET 2001 also replaced a 1994 zoning regime.[968]

(vi) *In March 2006, the State of Quintana Roo extended the Corchalito/Adelita State Environmental Authorization for another five years, noting that quarrying those lots was feasible*:[969] Respondent disputes the relevance of this authorisation, since Claimant has made no claim with respect to it. In any event, Respondent contends that like the Federal Authorization, it was expressly conditioned on compliance with any permits or authorisations necessary for the conduct of CALICA's activities.[970]

(vii) *In October 2007, the Municipality of Solidaridad granted CALICA a Land Use License confirming that CALICA may "extract petrous material" from La Adelita and El Corchalito*:[971] Respondent argues that the license does not contain a commitment, express or implied, not to apply any environmental regulations. To the contrary, it contends that the reference to land use code $Ff_3 30$ in the license implies recognition of a predominant conservation land use policy at El Corchalito

965 Memorial, ¶ 233; Reply, ¶ 144, *citing* **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000.
966 Rejoinder, ¶ 322; *see* Rejoinder, § B.3.
967 Reply, ¶ 144, *citing* **C-0078-SPA**, POET 2001, pp. 15-16.
968 Rejoinder, ¶ 322; *see* Rejoinder, § B.4. *See also* Rejoinder, ¶ 324.
969 Reply, ¶ 144, *citing* **C-0074-SPA**, First Corchalito/Adelita State EIA Amendment, 3 March 2006, p. 2.
970 Rejoinder, ¶ 322; *see* Rejoinder, § B.5.
971 Memorial, ¶ 233; *see* Memorial, ¶ 79; Reply, ¶ 144.

and La Adelita. Therefore, extraction of limestone was expressly conditioned on strict compliance with applicable regulations under the POET 2001.[972]

(viii) *In May 2009, the State of Quintana Roo issued the POEL, explicitly recognising and respecting vested rights, which disclaimed applying retroactively to authorisations obtained before its enactment*:[973] Respondent submits that nowhere in the judgement of the High Court of Justice of Quintana Roo does it state that CALICA had a general acquired right of "extraction". To the contrary, it only recognised acquired rights, to the exclusion of the CUSTF which had not been applied for. Respondent asserts that Claimant had decided to wait to apply for the CUSTF, negligently assuming that the regulation would be frozen in its favour.[974]

840. Moreover, Respondent argues that the MoU and the Amended MoU acknowledge that the Municipality may not be in a position to amend the POEL 2009. Respondent therefore questions any expectation by Claimant of alleged compliance with documents that were not binding, that it did not observe itself, and that provided for the possibility that the POEL 2009 could not be amended.[975]

3. Alleged Violation of the MoU cannot be a denial of FET

841. Respondent denies the alleged breach of the MoU and the Amended MoU by failing to amend the POEL 2009, and that this alleged breach constitutes a denial of FET in violation of NAFTA Article 1105.[976]

842. Respondent argues that the MoU failed to consider the inclusion and participation of various relevant stakeholders in the POEL 2009 modification process beyond the municipal or state authorities, including SEMARNAT, individuals who actively participate, and the Ecological Management Committee itself.[977] For Respondent, Claimant's position implies that Respondent had an international legal duty to prevent public criticism of CALICA. Since Mexican law expressly recognizes the need to include

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972 Rejoinder, ¶ 322; *see* Rejoinder, § B.6; **C-0078-SPA**, POET 2001, pp. 42, 53.
973 Reply, ¶ 144, *citing* **C-0080-SPA**, POEL 2009, ¶ 20.
974 Rejoinder, ¶ 322; *see* Rejoinder, § B.7(a). *See also* R-PHM, ¶ 46.
975 Rejoinder, ¶ 322; *see* Rejoinder, § D. *See also* R-PHM, ¶ 18.
976 Counter-Memorial, ¶ 378.
977 Counter-Memorial, ¶ 381, *citing* Díaz Statement, ¶ 11; Hernández Chávez Statement, ¶ 7.

society in the process of amending a POEL, Respondent argues that Claimant could not expect to carry out a summary procedure without the participation of various groups and their concerns.[978] The non-participation of SEMARNAT in the MoU or Amended MoU, in Respondent's view, highlights their non-binding and aspirational nature.[979]

843. According to Respondent, the MoU is unprecedented in the practice and regulation of the POEL 2009 modification process.[980] Respondent further submits that the MoU does not contain enforcement mechanisms for compliance and in the process of updating the POEL 2009, CALICA made no mention of it, demonstrating that they did not consider it to be mandatory.[981]

844. In addition, Respondent asserts that the MoU departed from applicable legislation by establishing strict and unrealistic deadlines. In recognition of the complexity of the process of adopting or updating a POEL, Respondent argues that the legislator has not provided mandatory deadlines for such processes.[982] Respondent relies on the evidence of its witnesses Mr. Hernández and Mr. Díaz that establishing a specific deadline for such modification would be inappropriate, not foreseen in the law, and not carried out in practice.[983]

845. Contrary to Claimant's argument that the amendment process to the POEL 2009 began without opposition or disagreement from civil society, Respondent submits that various social groups and environmental organizations opposed the modifications, as acknowledged by [redacted].[984]

846. Respondent therefore argues that the MoU and Amended MoU merely reflected the parties' intention to reach a common objective from a politically desirable perspective. They could not be legally binding under Mexican law, *inter alia*, due to the strict and unrealistic deadlines which were not in accordance with relevant legislation and

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978 R-PHM, ¶¶ 34-35, *citing* 2021 Hearing Transcript (Spanish), Day 3, 785 ([redacted] Cross-Examination). *See* Rejoinder, ¶¶ 332-335.

979 Counter-Memorial, ¶ 382, *citing* SOLCARGO First Report, ¶¶ 84-85.

980 Counter-Memorial, ¶ 383, *citing* Díaz Statement, ¶ 34; Hernández Chávez Statement, ¶¶ 16-17.

981 Counter-Memorial, ¶¶ 384-385, *citing* Díaz Statement, ¶ 38; SOLCARGO First Report, ¶ 84.

982 Counter-Memorial, ¶ 386, *citing* SOLCARGO First Report, ¶¶ 88, 103. *See also* R-PHM, ¶ 39.

983 Counter-Memorial, ¶¶ 387-388, *citing* Hernández Chávez Statement, ¶¶ 18-20; Díaz Statement, ¶¶ 35-36.

984 R-PHM, ¶¶ 32-33, *citing* 2021 Hearing Transcript (Spanish), Day 2, pp. 403-405 ([redacted] Testimony).

administrative practice, and the fact that the outcome depended on other agents that were not involved in the drafting of the instruments.[985]

847. In this sense, Respondent submits, and argues that Claimant's expert [redacted] admits, that the authorities involved in the 2014 Agreements could only undertake to push the process of modification of the POEL 2009 and could not ensure the outcome desired by CALICA, which depended on the deliberative process of the Committee to Amend the POEL.[986]

848. The non-binding nature of the 2014 Agreements is further established, in Respondent's view, by the fact that (i) CALICA did not follow the action plan set forth in each of them; (ii) CALICA never mentioned the MoU during the meetings of the Committee to Amend the POEL; and (iii) CALICA did not challenge the MoU before national courts.[987] For Respondent, Claimant's non-compliance with the 2014 Agreements was admitted by Claimant's witnesses at the Hearing, confirming that CALICA itself did not consider them binding.[988]

849. Respondent argues, relying on the testimony of Dr. Mijangos, that the 2014 Agreements only served as a work plan, which may or may not be carried out. As such, even if Respondent took some steps to perform the 2014 Agreements, they remain non-binding.[989]

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985 Counter-Memorial, ¶ 389, *citing* SOLCARGO First Report, ¶ 86.

986 R-PHM, ¶¶ 36-38, *citing* 2021 Hearing Transcript (Spanish), Day 3, 785, 811-812 ([redacted] Cross-Examination), *also citing* 2021 Hearing Transcript (Spanish), Day 3, 735 ([redacted] Cross-Examination); 2021 Hearing Transcript (Spanish), Day 1, 58 (Claimant's Opening Statement).

987 Counter-Memorial, ¶ 391, *citing* **C-0090-SPA**, POEL Committee Establishment Minutes, 30 October 2014; Hernández Chávez Statement, Annex B. *See* Counter-Memorial, ¶¶ 209-211; Rejoinder, ¶ 328; *see* Counter-Memorial, ¶¶ 206, 215-217, 227, 391; Rejoinder, § D; **C-0092-SPA**, POEL Committee Second Session Minutes, 21 November 2014. *See also* R-PHM, ¶¶ 27-31.

988 R-PHM, ¶¶ 19-22, *citing* 2021 Hearing Transcript (Spanish), Day 2, 348-349, 353, 355-357 ([redacted] Testimony), *also citing* **C-0021-SPA**, MoU; **C-0022-SPA**, Amended MoU; **C-0107-SPA**, CALICA's filing regarding port fees, 2 January 2018.

989 R-PHM, ¶¶ 24-26, *citing* 2021 Hearing Transcript (Spanish), Day 4, 987-989 (Mijangos Testimony), *also citing* 2021 Hearing Transcript (Spanish), Day 4, 983, 944-945 (Mijangos Testimony).

850. Moreover, since CALICA made no final payment under the Amended MoU because the POEL 2009 modification was not approved, Respondent submits that CALICA got exactly what it bargained for with respect to the Municipality.[990]

851. According to Respondent, the UGA applicable to La Adelita was subject to modification, as confirmed by Claimant's expert [redacted] In its view, Claimant could not expect environmental law and land use regulation to remain static, and the fact that the UGA changed was not only legally possible but foreseeable. For Respondent, CALICA cannot claim an absolute and irrevocable vested right to mine La Adelita derived from previous UGAs.[991]

852. Respondent further submits that it cannot be held responsible for Claimant's legal decision not to challenge the change of land use or assignment of a UGA.[992]

853. Even if the Municipality's actions could be characterized as a breach of "contract", Respondent contends that this does not automatically amount a violation of Chapter 11 of NAFTA, which does not contain an 'umbrella clause'.[993] Indeed, Respondent submits that NAFTA and other investment tribunals have found that a mere breach of contract by a State does not trigger an FET violation.[994] Respondent cites decisions by prior arbitral tribunals that NAFTA Chapter 11 is not a forum for resolving contractual disputes, and investment treaties are not insurance policies against bad business decisions.[995]

4. Arbitrary Conduct

854. Respondent has made certain arguments as a matter of both Claimant's legitimate expectations and the alleged arbitrary treatment of Claimant, which are addressed here.[996]

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990 Counter-Memorial, ¶ 392; Rejoinder, ¶ 329.

991 R-PHM, ¶¶ 40-42, *citing* 2021 Hearing Transcript (Spanish), Day 3, 735 ([redacted] Cross-Examination).

992 R-PHM, ¶ 42, *citing* 2021 Hearing Transcript (Spanish), Day 3, 735 ([redacted] Cross-Examination).

993 Counter-Memorial, ¶ 393, *citing* **RL-030-ENG**, Rudolph Dolzer & Cristoph Schreuer, *Principles of International Investment Law*, p. 152.

994 Counter-Memorial, ¶¶ 393-395, *citing* **RL-031-ENG**, *Impregilo v. Pakistan,* Decision on Jurisdiction, ¶¶ 266-270; **RL-032-ESP**, *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, ¶ 87. *See also* Counter-Memorial, ¶¶ 396, 399.

995 Counter-Memorial, ¶¶ 397-398, *citing, inter alia*, **RL-014-ESP**, *Waste Management v. Mexico (II)*, Award, ¶ 114; **RL-034-ESP**, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, ¶ 64.

996 See Counter-Memorial, ¶ 341 *et seq.*; Rejoinder, ¶ 331 *et seq.*

855. Respondent alleges that CALICA acquired the La Adelita property in 1996, but failed to request the necessary CUSTF for removal of the trees and vegetation (granted by SEMARNAT to remove vegetation). Relying on the evidence of its SOLCARGO experts, Respondent argues that the change of land use in forested terrain has been regulated for decades and the requirement to apply for a CUSTF long precedes the acquisition of La Adelita.[997]

856. In addition, Respondent submits that when SEMARNAT authorized extraction operations in the Corchalito/Adelita Federal Environmental Authorization, it was clear that CALICA was obliged to process and obtain other authorizations necessary to carry out its operations.[998] CALICA was also required, in its view, to start operations at La Adelita and to notify SEMARNAT of the same.[999]

857. For Respondent, in alleging breach of the MoU, Claimant is essentially asking the Tribunal to remedy its own negligence in failing to apply for the CUSTF, and commencing operations at El Corchalito only without proper notice.[1000] Respondent argues in this respect that while the POEL 2009 modified the land use of El Corchalito and La Adelita, it preserved rights acquired prior to its entry into force. The CUSTF was not such an acquired right as it was never applied for.[1001]

858. Respondent further submits that the review and modification of zoning regulations such as the POEL 2009 is a process that generally takes several years, as Claimant is aware. In this regard, the Respondent relies on examples of the modification of other zoning regimes in Quintana Roo and elsewhere, which in its view demonstrate that the suspension of the update of the POEL 2009 is not exceptional.[1002]

859. In recognition of the fact that the Municipality would have difficulty amending the POEL 2009 and the uncertainty that it would be achieved, Respondent asserts that the

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997 Counter-Memorial, ¶ 341, *citing* SOLCARGO First Report, ¶¶ 51, 117(i).

998 Counter-Memorial, ¶ 342, *citing* **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, Fifth Term, p. 35.

999 Counter-Memorial, ¶ 345, *citing* **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, Fourth Term, Sixth Term, pp. 35-36.

1000 Counter-Memorial, ¶¶ 342-343, *citing* SOLCARGO First Report, ¶ 105.

1001 Counter-Memorial, ¶ 344; *see also* Counter-Memorial, ¶ 346.

1002 Counter-Memorial, ¶¶ 347-352, *citing* Díaz First Statement, ¶¶ 22, 24, Annex I; Hernández Chávez Statement, ¶¶ 18-19, Annex C; SOLCARGO First Report, ¶¶ 89-91, 92, 96, 98, 99, 102.

Addendum to the MoU provided for progressive payments to the Municipality when targets were achieved. CALICA ultimately withheld payment of about 6 million pesos because modification was not implemented on the scheduled date.[1003]

860. Respondent therefore contends that the fact that the POEL 2009 amendment process is ongoing is not extraordinary and this delay, by itself, cannot constitute a violation of customary international law, especially when the claim is founded in the mere wishes reflected in the non-binding MoU.[1004] Respondent rejects the contention that there was a binding commitment to amend the POEL 2009 within a certain time frame, relying in *S.D Myers v. Canada* to assert that the minimum standard of treatment is not a license to second-guess all government actions.[1005]

861. Respondent submits that the process for modification of a POEL is complex and requires reconciling various competing interests.[1006] Respondent relies, *inter alia*, on the evidence of its witness Mr. Díaz, a SEMARNAT official, that common reasons for lengthening such procedures are "changes in government administrations, insufficient funding, new local regulations, lack of consensus among stakeholders, and opposition from a specific stakeholder."[1007] Respondent contends that having participated in the formulation process of the POEL 2009, which took more than three years, CALICA was aware of the complexity involved in modifying it.[1008] As such, Respondent submits that this process involves the participation of various actors and the outcome is beyond the will of the authorities or particular interests.[1009]

862. In Respondent's view, CALICA knew or should have known that its failure to process the CUSTF permit on time and postpone operations at La Adelita would have repercussions. In addition, CALICA's desire to begin operations at La Adelita would be controversial in the POEL 2009 amendment process, due to resistance from local business groups and environmental organizations that were official members of the Committee to

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1003 Counter-Memorial, ¶ 353.
1004 Counter-Memorial, ¶ 354.
1005 Rejoinder, ¶¶ 333-334, *citing* **RL-026-ENG**, *S.D. Myers v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 261.
1006 Counter-Memorial, ¶ 357, *citing* SOLCARGO First Report, ¶¶ 87, 91, 103.
1007 Counter-Memorial, ¶ 356, *citing* Díaz First Statement, ¶ 23.
1008 Counter-Memorial, ¶ 358.
1009 Counter-Memorial, ¶ 360.

Amend the POEL. Respondent asserts that CALICA failed to convince the local community that the proposed expansion of its operations was safe for the environment and the community.[1010]

863. In relation to the reasons for the suspension of the modification of the POEL 2009, Respondent relies on the evidence of its witness Mr. Hernández:[1011]

> *Mucho menos se abordó la posibilidad de que CALICA pagaría el estudio pendiente –una de las causas por la cual se detuvo el POELMS.*
>
> *Como ya lo mencioné, el proceso se detuvo debido a la falta de presupuesto para pagar al consultor y por el cambio de gobierno estatal, lo cual ocurrió en septiembre de 2016. En febrero de 2017, se reinstaló el comité de ordenamiento ecológico, pero al día de hoy no ha vuelto a sesionar. Lo anterior, debido a que en 2017 se publicó la Ley de Asentamientos Humanos Ordenamiento Territorial y Desarrollo Urbano de Quintana Roo, en la que se establece un nuevo instrumento de planeación territorial denominado ordenamiento territorial ecológico y de desarrollo urbano. La referida ley es la que el gobierno del Estado de Quintana Roo ha dado mayor impulso, dejando de apoyar la formulación y modificación de programas de ordenamiento ecológico.*

864. According to Respondent, quick and easy solutions to zoning disputes are rarely found, especially in democratic countries that protect rights to free speech and access to judicial systems. In many cases, Respondent submits that local communities have legitimate concerns, and have lost confidence in safety assurances by companies and government authorities.[1012] In this respect, Respondent contends that Claimant's implication that the Mexican State had an international legal duty to prevent public criticism of CALICA reflects its indifference to the local community in which it operates and should be condemned by the Tribunal. For Respondent, this is consistent with Claimant's attempt through the 2014 Agreements to ignore the important role of public participation in the amendment of the POEL 2009, and the transparent nature of the process.[1013]

1010 Counter-Memorial, ¶ 359, *citing* **C-0095-SPA**, POEL Committee Fifth Session Minutes, 28 January 2016, p. 5.

1011 Counter-Memorial, ¶ 360, *citing* Hernández Chávez Statement, ¶¶ 9-10 (footnote omitted).

1012 Counter-Memorial, ¶ 361.

1013 Rejoinder, ¶ 332, *citing* **R-0118-ESP**, POEL Committee, Internal Regulations of the POEL Committee of Municipality of Solidaridad, Quintana Roo ("Internal Regulations of the POEL Committee"), 7 March 2016.

865. Respondent therefore submits that community involvement in the highly regulated mining industry cannot constitute a violation of customary international law. Respondent argues that a reasonable investor would have anticipated the possibility of regulatory changes and conflicts.[1014]

5. Failure to Observe Obligations under the 2014 Agreements

866. Respondent asserts that Claimant has not demonstrated that there is an obligation that Respondent was required to observe or comply with. To the contrary, it argues that Claimant's claim is based on an erroneous premise as to the 2014 Agreements, in that those Agreements (i) are not binding; (ii) are not contracts, and in particular not transaction contracts; (iii) they do not establish any obligation; (iv) they are not legally enforceable; (v) they are not subject to judicial or administrative enforcement; and (vi) they do not generate any liability.[1015]

867. While Claimant contends that the SCT, the State of Quintana Roo, API Quintana Roo and the Municipality of Solidaridad entered into the 2014 Agreements in the exercise of their competence, Claimant itself endows the Agreements with a civil nature by characterizing them as transaction contracts as if they had been agreed between private parties.[1016]

868. In addition, Respondent contends that it is undisputed that Claimant itself did not comply with the alleged 2014 Agreements, so it cannot claim that Respondent repudiated them.[1017]

C. TRIBUNAL'S ANALYSIS

869. In this Section, the Tribunal will decide whether Respondent violated NAFTA Article 1105 by (i) arbitrary conduct with respect to La Adelita; or (ii) breaching Claimant's legitimate expectations with respect to its investment, specifically its expectation that CALICA would be able to conduct quarrying operations in La Adelita

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1014 Counter-Memorial, ¶ 362, *citing* **RL-025-ENG**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 130; **RL-020-ENG**, *Methanex v. United States,* Final Award, ¶ 9.

1015 Rejoinder, ¶ 367.

1016 Rejoinder, ¶ 368, *citing* Mijangos Report, ¶ 146(b).

1017 Rejoinder, ¶ 369.

beginning in 2016. Since a decision on whether Respondent breached Claimant's legitimate expectations or whether it acted arbitrarily in breach of the FET standard involves consideration of related facts, the Tribunal will address these arguments together.

870. In light of the Tribunal's rejection of Claimant's argument on the importation of the umbrella clause via NAFTA Article 1103 (*see* ¶ 800 above), the Tribunal does not need to give further consideration to Claimant's argument that Respondent has breached that clause of the Mexico-Switzerland BIT.

871. To recall, the La Adelita lot was acquired by Claimant in June 1996.[1018] It was never quarried. According to [redacted], CALICA did not initially commence quarrying La Adelita for operational reasons.[1019] Ultimately, Claimant contends that it was prevented from quarrying La Adelita due to Respondent's conduct.

872. Claimant relies on a number of alleged assurances from Respondent that it would be able to quarry La Adelita, dating back to 1986. Consistent with the Tribunal's reasoning at ¶¶ 504-506 above, the Tribunal takes into account these historical facts as context for Claimant's claim and not as an alleged breach of NAFTA. Claimant's position is that Respondent's breach of its legitimate expectations arose on 5 December 2015, when it failed to amend the POEL 2009, as required by the 2014 Agreements.

873. The relevant facts are set out in Section IV above. The Tribunal repeats and elaborates upon certain of those facts in this Section for the purposes of the discussion where relevant. In particular, in the following paragraphs the Tribunal will consider the various alleged representations and assurances relied upon by Claimant as the source of its legitimate expectations, also taking into account Respondent's arguments with respect to each of them (*see* ¶¶ 808-811 and 839-841 above).

874. Central to the evaluation of this claim is the POEL 2009, applicable to the Municipality of Solidaridad. Under the POEL 2009, about 90% of La Adelita is zoned as UGA 5, intended for conservation, where quarrying is prohibited.[1020] The remaining

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1018 **C-0034-SPA**, El Corchalito Title Deed.
1019 [redacted] First Statement, ¶ 24.
1020 **C-0080-SPA**, POEL 2009, pp. 62, 76. *See* Memorial, ¶ 80, Map 3.

approximately 9% of La Adelita's area is zoned as UGA 12 for "sustainable extraction", where quarrying is a conditional use. Within the UGA 12 area, only 30% of the area may be used for quarrying, with 70% to be maintained in natural vegetation.[1021]

875. For the purposes of evaluating Claimant's legitimate expectations with respect to its investments, as well as the arbitrariness of Respondent's conduct, the Tribunal finds it helpful to distinguish between the situation before and after the enactment of the POEL 2009, i.e., pre-2009 and post-2009. In the following Sections, the Tribunal will consider: (i) pre-2009 representations by Respondent; (ii) pre-2009 requirements for the CUSTF; (iii) the POEL 2009; (iv) the 2014 Agreements; (v) the binding nature of the 2014 Agreements; (vi) expectations arising from the 2014 Agreements; and (vii) whether Claimant's legitimate expectations were breached. These steps will enable the Tribunal to make its determination on the key issue for this claim, being whether the 2014 Agreements created legitimate expectations that were breached by Respondent.

1. Pre-2009 Representations

876. Claimant relies on several alleged representations and assurances by Respondent prior to 2009, which in its view gave rise to legitimate expectations that La Adelita could be quarried by CALICA.

877. In this regard, quarrying activities by CALICA in La Adelita were not specifically foreseen in the 1986 Investment Agreement between CALICA, Mexico's Federal Government, and the State of Quintana Roo (*see* ¶ 187 above). The Investment Agreement set out the development of two lots, being (i) La Rosita, where the main quarry and processing plant would be located; and (ii) Punta Venado, where a port terminal would be built (*see* ¶ 188 above).

878. According to Claimant, the Investment Agreement also envisioned the potential expansion of the Project, as per the following clause:[1022]

> FIFTH – The COMPANY shall submit for consideration of the SEDUE [i.e., the Ministry of Urban Development and the Ecology], SCT [i.e., the Ministry of Communications and Transportation] and the STATE [i.e., the Federal

1021 **C-0080-SPA**, POEL 2009, p. 83.
1022 Memorial, ¶ 27, *citing* **C-0010-SPA**, Investment Agreement, p. 6 (Translation by Claimant).

> Government], with at least two months in advance, any action that modifies the features of the Project in the terms in which it was originally stated, evaluated, or authorized; or the suspension or abandonment of the works before the approved deadlines, so that they can intervene in accordance with their authorities.

879. Prior to its purchase of La Adelita, Claimant sought and obtained a letter from the State of Quintana Roo dated 19 April 1996 which recognized the feasibility of using La Adelita for extractive industry activities ("*Factibilidad para el Uso del Suelo en actividades relacionadas con la industria extractiva y conexa*").[1023] This was without prejudice to obtaining other authorisations necessary to carry out the operations and reserving the possibility for the authorities to review and inspect the lots and order a shutdown or request protective measures:[1024]

> *1ª La presente FACTIBILIDAD se otorga sin perjuicio de que el titular tramite y en su caso obtenga de las autoridades competentes otras Licencias, Permisos, Autorizaciones, Concesiones y similares que para el caso se requieran.*

880. Similarly, other representations made by Respondent's instrumentalities gave positive indications with respect to the suitability of La Adelita for CALICA's quarrying activities. This included a 2 September 1996 letter from the Municipality of Solidaridad to CALICA, responsible for the zoning of La Adelita, stating that "to the extent you comply with the regulatory ecological legislation, this Municipality has no inconvenience whatsoever" in relation to the "feasibility for activities related to the extraction industry and ancillary activities" at La Adelita and El Corchalito.[1025]

881. It also included the Corchalito/Adelita State Environmental Authorization granted by the State of Quintana Roo on 11 December 1996.This was granted on a number of conditions, including:[1026]

> This authorization is granted regardless of the fact that the owner applies for and, if applicable, obtains other authorizations, concessions, licenses, permits and other similar documents which are required in order to carry out the construction works and its operation subject hereof.

1023 **C-0072-SPA**, Letter SIMAP/791/1996, 19 April 1996.
1024 **C-0072-SPA**, Letter SIMAP/791/1996, 19 April 1996, p. 1.
1025 **C-0073-SPA**, Municipality of Solidaridad Letter, 2 September 1996.
1026 **C-0018-SPA**, Corchalito/Adelita State EIA, 11 December 1996, p. 2 (Translation by Claimant).

882. The Federal EIA from SEMARNAT followed on 30 November 2000, granting CALICA authorization for quarrying in El Corchalito and La Adelita below the water table.[1027] According to Claimant, this authorization already foresaw the removal of vegetation in La Adelita:[1028]

> Activities to be developed in operating the project are:
>
> 1.- Preparation of the site.
>
> a) Clearing and cleaning of the land.
>
> b) Splicing.
>
> c) Drilling.

883. The Federal EIA likewise mentions the obligation of CALICA to obtain any other necessary authorizations and permits for matters not covered by it:[1029]

> In accordance with Article 35 of the General Law on Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*) and 49 of its Regulations in regard to Evaluation of the Environmental Impact, this authorization only refers to environmental aspects of works and activities described in the **FIRST** Term for the project **"Exploitation of Limestone beneath the Water Table in the El Corchalito and La Adelita Properties, in Solidaridad, Quintana Roo**," and therefore, **Calizas Industriales del Carmen, S.A. de C.V.** is bound to negotiate and obtain other authorizations, concessions, licenses, permits and similar documents required to perform and operate such works under this instrument. It shall be strictly responsible for the validity of the civil, mercantile or labor contracts which it signs to legally operate the authorized project, as well as for their fulfillment and the legal consequences that may be applied by the Ministry of the Environment, Natural Resources and Fishing (*Secretaría de Medio Ambiente, Recursos Naturales y Pesca*) and/or other federal, state or municipal authorities. (Emphasis in original)

884. La Adelita (like El Corchalito) is subject to the zoning regime of the State of Quintana Roo. The regime in place from 2001 to 2009 was the POET 2001. Under the POET 2001, La Rosita and Punta Venado were zoned as "UGA 19", being its *Unidad de Gestión Ambiental* or "Environmental Management Unit". UGA 19 lists "quarry" as the

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1027 **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, p. 11.

1028 Claimant's Opening Presentation, slide 17, *citing* **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, pp. 9-10 (Translation by Claimant).

1029 **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, p. 13.

predominant use and "forestry" and "flora and fauna" as incompatible uses.[1030] La Adelita (like El Corchalito) was zoned under the POET as "UGA 30", which lists "flora and fauna" as the predominant use, "infrastructure, quarrying, tourism" as conditioned uses and "forestry" among the incompatible uses.[1031] One condition for quarrying under UGA 30 was that 20% of vegetation was required to be preserved.[1032]

885. On 2 October 2007, the Land Use License for La Adelita and El Corchalito issued by the Municipality of Solidaridad provided the following authorized land use:[1033]

> EXPLOITATION OF STONE MATERIALS (INDUSTRIAL EXPLOITATION OF SAND, GRAVEL AND ROCK BY-PRODUCTS AND NON-MINERALSOILS AND QUARRIES) WITHOUT AFFECTING THE WATER TABLE. (Emphasis in original)

886. On 3 October 2007, the Municipality of Solidaridad issued an authorization for logging and clearing (*Autorización de Tala y/o Desmonte*) of El Corchalito and La Adelita.[1034] The license states that it does not provide an exemption from other licenses that may be required from other government authorities. The clearance of 1251.33 hectares was permitted, with a statement that:[1035]

> *CON FUNDAMENTO EN LOS ARTÍCULOS 35 Y 36 DEL REGLAMENTO DE ECOLOGÍA Y GESTIÓN AMBIENTAL, SE DETERMINA QUE DEBERÁ RECUPERAR LA COBERTURA VEGETAL REFORESTANDO LAS ÁREAS JARDINADAS. LA PRESENTE LICENCIA NO AUTORIZA EL DESMONTE DE LAS ÁREAS VERDES O DE DONACIÓN MISMAS QUE DEBERÁN MANTENERSE EN SU ESTADO NATURAL*. (Emphasis in original)

887. Taking the conduct and representations of Respondent prior to 2009 with respect to the ability to quarry La Adelita both individually and as a whole, the Tribunal finds that Claimant was given a number of positive indications directed specifically to it with respect to the feasibility of using the La Adelita site for Claimant's quarrying activities.

888. With respect to the 1996 Investment Agreement, the inclusion of a mechanism to seek consideration of modifications to the Project does not constitute an assurance that

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1030 **C-0078-SPA**, POET 2001, p. 12.
1031 **C-0078-SPA**, POET 2001, p. 15. *See* Memorial, ¶ 78; [redacted] First Report, ¶¶ 35, 43.
1032 **C-0078-SPA**, POET 2001, pp. 15, 24, condition "MAE 58".
1033 **C-0079-SPA**, Land Use License, dated 2 October 2007 (Translation by Claimant).
1034 [redacted]**0009**, License No. 447/2007 issued by the Municipality of Solidaridad, dated 3 October 2007.
1035 [redacted]**0009**, License No. 447/2007.

quarrying activities at an additional site will be approved. It merely gave rise to an expectation that such an application would be considered in accordance with the terms of the Investment Agreement.

889. None of the representations or conduct relied upon guaranteed an outcome that Claimant would be able to use the site for quarrying. Official authorizations were granted on each occasion subject to the requirement of obtaining necessary permits to carry out those activities (*see* ¶¶ 879 and 881 above). The same applies to the renewal of those authorizations.[1036] However, subject to compliance with applicable laws and regulations, there was no legal or other impediment identified to the use of La Adelita for quarrying activities. In particular, prior to 2009 the relevant zoning for land usage permitted quarrying subject to certain conditions (*see* ¶ 884 above).

2. Pre-2009 Requirement for CUSTF

890. One disputed matter between the Parties is whether, prior to 2009, Claimant was required to obtain an Authorization for Soil-Use Change in Forested Terrains (*Autorización de Cambio de Uso del Suelo en Terrenos Forestales*, "**CUSTF**") before being permitted to carry out quarrying in El Corchalito and La Adelita. The CUSTF authorizes the partial or total removal of vegetation from forested terrain to allow for non-forest activities.[1037] In Respondent's view, such authorization is granted by SEMARNAT as an exception and on the basis of a technical study and opinion of the *Consejo Estatal Forestal*.[1038]

891. The Tribunal posed a number of questions to the Parties on this issue.[1039] The requirement for the CUSTF is relevant to Claimant's legitimate expectations with respect to La Adelita, and in particular Respondent's argument that Claimant was negligent in not applying for the CUSTF prior to the POEL 2009. It therefore gives clarity as to the factual circumstances in which Claimants' expectations were formed.

892. According to Respondent, Claimant was required to obtain a CUSTF for the removal of vegetation with respect to La Adelita before commencing quarrying activities, and should

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1036 *See* C-PHM, Appendix A, Tribunal Question 11; R-PHM, Annex A, ¶¶ 76-81.

1037 [redacted]**0011**, 2018 Sustainable Forestry Law, Art. 7, Pt. VI. *See* Counter-Memorial, ¶ 200; C-PHM, ¶ 52.

1038 Counter-Memorial, ¶ 201.

1039 Tribunal Questions 6 to 8.

have done so in 2000 when quarrying activities in La Adelita were authorized by the Federal EIA.[1040] For Respondent, La Adelita is "forested terrain" under Federal Law regardless of and separate from its zoning by regional or municipal authorities, since the UGA classification does not attribute the quality of forest to a piece of land. Respondent argues that Claimant shifted its position at the Hearing on this issue, which was not addressed in detail before that.[1041]

893. Respondent emphasizes that the Federal EIA and the CUSTF permit are separate authorizations.[1042] This is confirmed, in its view, by the fact that in 2010 the CUSTF and Federal EIA procedures were unified, meaning that before that date it was required to request them separately.[1043] Accordingly, Respondent argues that CALICA had no absolute right to mine La Adelita derived from the Federal EIA, which is subject to obtaining other authorizations necessary to carry out its extractive activity, including the CUSTF.[1044]

894. Claimant, on the other hand, denies that a CUSTF was required in respect of La Adelita.[1045] For Claimant, the CUSTF requirement is tied to the applicable land use zoning. Since La Adelita's land use under the POET 2001 (2001-2009) categorized "forestry" as an incompatible use, it is Claimant's position that it was not required to apply for a CUSTF.[1046] Relying on the evidence of its expert [redacted] Claimant asserts that it is the Federal EIA and State EIA and licenses issued thereunder which regulate quarrying activities in El Corchalito and La Adelita, and not the CUSTF.[1047]

1040 Counter-Memorial, ¶ 203; R-PHM, Annex A, ¶ 34. *See also* R-PHM, Annex A, ¶¶ 35-63.

1041 R-PHM, ¶¶ 55-56, *citing* **R-0124-ESP,** Third Collegiate Court of the Twenty-Seventh Circuit, *Amparo* Review 16/2020, Judgment, 9 April 2021 ("*Amparo* Review 16/2020, Judgment"); Respondent's Comments of 11 November 2021, ¶¶ 14-16; 2021 Hearing Transcript (Spanish), Day 3, 725 ([redacted] Cross-Examination); Annex A, ¶ 54.

1042 R-PHM, ¶ 52, *citing* Respondent's Comments of 11 November 2021, ¶¶ 9-10.

1043 [redacted] First Report, ¶ 109; R-PHM, ¶ 54, *citing* [redacted] First Report, ¶¶ 108-110.

1044 R-PHM, ¶¶ 50-51, *citing* 2021 Hearing Transcript (Spanish), Day 3, 684 ([redacted] Cross-Examination).

1045 C-PHM, Appendix A, Tribunal Question 6.

1046 C-PHM, ¶ 53, Appendix A, Tribunal Question 6, *citing* 2021 Hearing Transcript (Spanish), Day 3, 681:19-22, 705:12-19 ([redacted] Presentation). *See also* C-PHM, Appendix A, Tribunal Questions 7-8.

1047 C-PHM, ¶ 52, *citing* 2021 Hearing Transcript (Spanish), Day 3, 677:5-9 ([redacted] Presentation); **CD-0001**, Claimant's Opening Presentation, slide 18; **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, p. 33.

Claimant further argues that litigation subsequent to the POEL 2009 confirmed the non-retroactive application of the POEL 2009 to affect the rights derived from its licenses.[1048]

895. Having carefully reviewed the submissions and evidence put forward by the Parties and their respective experts on these issues, the Tribunal is able to draw a number of conclusions, as set out in the following paragraphs.

896. Federal legislation defines "forested terrain" by reference to whether land is covered by forest vegetation. This is the case under the 1992 Forestry Law (*Ley Forestal*),[1049] the 2003 General Law for Sustainable Forest Development (*Ley General de Desarrollo Forestal Sustentable* 2003),[1050] and the 2018 General Law for Sustainable Forest Development (*Ley General de Desarrollo Forestal Sustentable* 2018).[1051] As recorded in

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1048 C-PHM, ¶¶ 58-60, *citing* **C-0086-SPA**, Letter DGOAyU/508/09 from José Alonso Durán Rodríguez (Municipality of Solidaridad) to Román Javier Figueroa García (CALICA), dated 1 September 2009, p. 4; Memorial, ¶ 81. *See* 2021 Hearing Transcript (English), Day 2, 321:22-322:6 ([redacted] responding to questions from the Tribunal); **C-0087-SPA**, Quintana Roo High Court Decision, 25 March 2010, pp. 14-15; **CD-0001-ENG**, Claimant's Opening Presentation, Slide 21; 2021 Hearing Transcript (English), Day 3, 644:13-645:3 ([redacted] redirect); **C-0075-SPA**, Second Corchalito/ Adelita State EIA Amendment, 19 May 2011, pp. 26-27; Rejoinder, ¶ 154. *See also* **C-0124-ESP**, CALICA Observations to Shutdown Order, 14 February 2018, ¶ 11 .

1049 **GCI-0008**, 1992 Forestry Law, Art. 3:

Las disposiciones de esta ley son aplicables en los terrenos forestales y en aquellos con aptitud preferentemente forestal, cualquiera que sea su régimen de propiedad. Son terrenos forestales los que están cubiertos por bosques, selvas o vegetación forestal de zonas áridas. Son terrenos de aptitud preferentemente forestal aquellos que no estando cubiertos por dicha vegetación, por sus condiciones de clima, suelo y topografía, puedan incorporarse al uso forestal, excluyendo aquellos que, sin sufrir degradación permanente, puedan ser utilizados en agricultura y ganadería. No se considerarán como terrenos forestales o de aptitud preferentemente forestal los situados en áreas urbanas.

1050 *See* R-PHM, Annex A, ¶ 40, n. 225, *citing* 2003 General Law for Sustainable Forest Development:

Para los efectos de esta Ley se entenderá por: XL. Terreno forestal: El que está cubierto por vegetación forestal; XLV. Vegetación forestal: El conjunto de plantas y hongos que crecen y se desarrollan en forma natural, formando bosques, selvas, zonas áridas y semiáridas, y otros ecosistemas, dando lugar al desarrollo y convivencia equilibrada de otros recursos y procesos naturales.

1051 **R-0026-ESP,** 2018 General Law for Sustainable Forest Development / [redacted] **0011**, 2018 General Law for Sustainable Forest Development, Art. 7(LXXI and LXXX). The Tribunal notes that Exhibit [redacted] **0011** was labelled as containing the 2003 General Law for Sustainable Forest Development, however the document contained therein is the 2018 law which superseded the 2003 law (*see* R-PHM, ¶ 40, n. 225). The 2018 law provides:

Para los efectos de esta Ley se entenderá por:

…

LXXI. Terreno forestal: Es el que está cubierto por vegetación forestal y produce bienes y servicios forestales. No se considerará terreno forestal, para efectos de esta Ley, el que se localice dentro de los límites de los centros de población, en términos de la Ley General de Asentamientos Humanos, Ordenamiento Territorial y Desarrollo Urbano, con excepción de las áreas naturales protegidas.

CALICA's Federal EIA, the dominant type of vegetation in La Adelita is "*selva baja subcaducifolia, con diferentes estadios de desarrollo en cada uno*".[1052]

897. Claimant has not disputed that La Adelita is in fact "covered by forest vegetation" within the meaning of these federal laws. In its Reply Post-Hearing Memorial (on the original claims), Claimant raised for the first time a potentially cumulative definition of "forested terrain" which would require the terrain to be both (i) covered by vegetation; and (ii) producing forestry goods and services in order to be considered "forested terrain" under Mexican law. In Claimant's view, its lots were not legally capable of producing forestry goods and services due to their zoning as non-forestry.[1053]

898. The Tribunal notes that the definition referred to by Claimant mentioning "forestry goods and services" is the one under the 2018 General Law for Sustainable Forest Development.[1054] Claimant has not established that the production of forestry goods and services is part of the definition of "forested terrain" under the 1992 Forestry Law or the 2003 General Law for Sustainable Forest Development (*see* ¶ 896 above), which were applicable prior to 2009. Nor has Claimant successfully rebutted Respondent's argument that the1992 Forestry Law or its successor, the 2003 General Law for Sustainable Forest Development, were applicable to La Adelita.[1055] Claimant argues, in this regard, that CALICA had vested rights to quarry La Adelita, relying on a decision of the Mexican Third Collegiate Court of the Twenty-Seventh Circuit dated 22 March 2021, stating that:[1056]

> *. . . al tener un derecho adquirido [propiedad y autorizaciones de uso de suelo y de extracción de material rocoso], no es dable aplicar de manera retroactiva la ley forestal vigente.* (Square brackets in original)

LXXX. Vegetación forestal: Es el conjunto de plantas y hongos que crecen y se desarrollan en forma natural, formando bosques, selvas, zonas áridas y semiáridas, y otros ecosistemas, dando lugar al desarrollo y convivencia equilibrada de otros recursos y procesos naturales.

1052 **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, p. 30 of the PDF.

1053 C-RPHM, ¶ 35, *citing* R-PHM, Annex A, n. 225; **R-0124-ESP**, *Amparo* Review 16/2020, Judgment, ¶¶ 65, 71.2, 109.

1054 **R-0026-ESP**, 2018 General Law for Sustainable Forest Development / **0011**, 2018 General Law for Sustainable Forest Development; **R-0124-ESP,** *Amparo* Review 16/2020, Judgment.

1055 *See* Counter-Memorial, ¶ 202; R-PHM, Annex A, ¶¶ 35-36.

1056 C-PHM, ¶ 60. The Tribunal notes that Claimant cites Exhibit **C-0124-SPA** in support. The Tribunal understands that Exhibit **R-0124-ESP** contains the court ruling referred to by Claimant.

899. This point does not assist Claimant, because there is no question of retroactive application of the definition of "forested terrain". The Tribunal is examining the definition of "forested terrain" according to the law in force after Claimant acquired its investment and before the POEL 2009 entered into force.

900. As such, the Tribunal understands that La Adelita was "forested terrain" under applicable federal law prior to 2009, according to the plain wording of the definitions in the law on record, although no contemporaneous ruling on that question by a Mexican authority or court has been placed on the record.

901. The requirement to seek a CUSTF in relation to forested terrain from SEMARNAT was at the relevant time (i.e., prior to 2009) legally independent of the Federal EIA. This is acknowledged by both Parties' experts on environmental law.[1057] The two authorizations were governed by two separate applicable laws, i.e., (i) the Federal EIA is issued under the General Law of Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*, "**LGEEPA**");[1058] and (ii) the CUSTF is issued under the 1992 Forestry Law (*Ley Forestal*) or the General Law for Sustainable Forest Development of 2003 or 2018 (*Ley General de Desarrollo Forestal Sustentable*).[1059]

902. The two authorizations were subsequently joined into a single authorization as of 2010, as also acknowledged by both Parties.[1060]

903. While Claimant's Federal EIA foresees the removal of vegetation at La Adelita by mentioning "Clearing and cleaning of the land" among the "activities to be developed in operating the project", given the separate legal basis for issuing the CUSTF, the Tribunal is not able to conclude that this served as authorization to clear the forested terrain on La

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1057 [redacted] First Report, ¶ 106: "Nevertheless, in federal matters, besides this AIA (which allows the extraction of petrous material below the water table), the Authorization for Soil-Use Change in Forested Terrains ("CUSTF", for its Spanish acronym) is required to remove the vegetation in the plot to be worked on. The CUSTF is regulated by the General Law for Sustainable Forest Development . . ."; SOLCARGO First Report, ¶117(i): "*El cambio de uso de suelo en terrenos forestales ha estado regulado durante décadas y es independiente del procedimiento de evaluación de impacto ambiental*."

1058 **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, p. 7.

1059 **GCI-0008**, 1992 Forestry Law; **R-0026-ESP**, 2018 General Law for Sustainable Forest Development [redacted] **0011**, 2018 General Law for Sustainable Forest Development.

1060 [redacted] First Report, ¶ 109; R-PHM, ¶ 54, *citing* [redacted] First Report, ¶¶ 108-110.

Adelita under the 1992 Forestry Law or 2003 General Law for Sustainable Forest Development. In particular, the Federal EIA specifically mentions that CALICA is responsible for applying for any authorizations that may be necessary outside the scope of the authorization granted by that document (*see* ¶ 883 above). In this regard, the 1992 Forestry Law and 2003 General Law for Sustainable Forest Development required technical studies that demonstrate that biodiversity is not compromised, nor will the removal of vegetation cause soil erosion, deterioration of water quality or a decrease in water catchment ("*con base en estudios técnicos justificativos . . . siempre que el nuevo uso no comprometa la biodiversidad y contribuya a evitar la erosión de suelos, el deterioro de la calidad del agua y la disminución en su captación*").[1061]

904. Nor is the Tribunal convinced that the zoning of La Adelita pursuant to the POET 2001 rendered the Forestry Law or General Law for Sustainable Forest Development inapplicable. Under the POET 2001, "forestry" is listed as an incompatible use with respect to La Adelita. The 1992 Forestry Law and the 2003 General Law for Sustainable Forest Development state that the CUSTF which is issued must comply with the applicable regulatory provisions, including the "ecological management program" (*programa de ordenamiento ecológico*), such as the POET 2001.[1062] However, the fact that a linkage exists between the CUSTF and the zoning regulations, meaning that a CUSTF will be issued (or refused) consistent with zoning regulations, does not imply that the entity is relieved of the obligation to apply for a CUSTF. The same applies to other

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1061 **C-0140-SPA**, 1992 Forestry Law/**GCI-0008**, 1992 Forestry Law, Art. 19. *See also* **R-0026-ESP**, 2018 General Law for Sustainable Forest Development/[redacted]**0011**, 2018 General Law for Sustainable Forest Development, Art. 93, and the corresponding provision under the 2003 General Law for Sustainable Development, Art. 117. The Tribunal notes that in its R-PHM, Annex A, ¶ 49, n. 232, Respondent identified that the version of the 1992 Forestry Law on the record inadvertently omits an amendment of 20 May 1997 which included Article 19 bis 11, which would have applied to CALICA at the relevant time. The text of that Article 19 bis 11 is not materially different from the version on the record, and provides:
La Secretaría sólo podrá autorizar el cambio de utilización de los terrenos forestales, por excepción, previa opinión del Consejo Regional de que se trate y con base en los estudios técnicos que demuestren que no se compromete la biodiversidad, ni se provocará la erosión de los suelos, el deterioro de la calidad del agua o la disminución en su captación.
Las autorizaciones que se emitan deberán atender lo que, en su caso, disponga el ordenamiento ecológico correspondiente, las normas oficiales mexicanas y demás disposiciones legales y reglamentarias aplicables.

1062 *See* **C-0140-SPA**, 1992 Forestry Law/**GCI-0008**, 1992 Forestry Law, Art. 19; **R-0026-ESP**, 2018 General Law for Sustainable Forest Development /[redacted]**0011**, 2018 General Law for Sustainable Forest Development, Art. 93, and the corresponding provision under the 2003 General Law for Sustainable Development, Art. 117.

licenses and authorizations issued by regional or municipal authorities (*see* ¶¶ 885-886 above).

905. For the above reasons, the Tribunal accepts as a fact the position that the zoning regime of the State of Quintana Roo does not override federal forestry laws. As stated by Respondent's experts SOLCARGO:[1063]

> . . . the Municipality cannot cancel those definitions or those characterizations [under the 1992 Forestry Law and the 2003 General Law for Sustainable Forest Development]. . . . One thing is to have a lot in which you can conduct industrial, mining, or cattle-raising activities, and a very different thing is that, because of that characterization, one is to understand that one no longer needs a CUSTF authorization.

906. This was confirmed by the Mexican courts in the decision of the Mexican Third Collegiate Court of the Twenty-Seventh Circuit dated 22 March 2021, which decided upon a challenge by CALICA and another entity to a 2018 decree. The 2018 decree had, among other things, enacted the 2018 General Law for Sustainable Forest Development. CALICA argued, unsuccessfully, that the 2018 *Ley General de Desarrollo Forestal Sustentable* encroached on the power of municipalities to regulate land use zoning.[1064] In this regard, the Court held:[1065]

> 73. . . . *si bien los municipios tienen atribuciones para autorizar, controlar y vigilar la utilización del suelo en el ámbito de su competencia,* ***lo cierto es que en materia forestal está sujeto a las disposiciones federales y/o locales previstas en materia de protección al ambiente y de preservación y restauración del equilibrio ecológico [competencia concurrente], pues el único que puede legislar en dicho ámbito es el Congreso de la Unión.***
>
> 74. *Lo anterior, sin que pase inadvertido que . . . el municipio tiene facultades para formular, aprobar y administrar la zonificación y planes de desarrollo urbano municipal, es decir, tiene amplia libertad para tomar decisiones en materia de desarrollo urbano; sin embargo, ello no abarca el ámbito forestal*. (Emphasis in original)

1063 2021 Hearing Transcript (English), Day 3, 725:6-19.

1064 **R-0124-ESP**, *Amparo* Review 16/2020, Judgment, ¶¶ 54-55.

1065 **R-0124-ESP**, *Amparo* Review 16/2020, Judgment, ¶¶ 73-74. *See also* **R-0124-ESP**, *Amparo* Review 16/2020, Judgment, ¶¶ 75-86.

907. The Tribunal therefore does not agree with the opinion of [redacted] that "the applicable legal instruments, provide that this article [i.e., Article 19 of the Forestry Law] does not apply to CALICA because it is not a forested terrain according to the law."[1066]

908. Regarding the timing of the authorization, Respondent argues that CALICA was able to apply for the CUSTF for La Adelita even if it did not immediately contemplate commencing its logging activities there.[1067] Claimant's expert [redacted] did confirm at the Hearing that there was no legal impediment for CALICA to request the CUSTF prior to 2009, even if [redacted] believes it was not needed.[1068] [redacted] emphasizes that the Forestry Law only requires the CUSTF to be obtained for the moment it will commence the exploitation of the lot and not before.[1069]

909. The Tribunal is satisfied that CALICA was not required to apply for a CUSTF as soon as its Federal EIA was granted, however it was open to CALICA to do so, even if it did not immediately intend to quarry La Adelita. In this regard, the only requirement to quarry that lot is that the CUSTF is obtained prior to removal of the vegetation.[1070]

910. Claimant's expert [redacted] gave evidence at the Hearing stating that "until the POEL 2009 was modified, the La Adelita lot would not have required an authorization for soil-use change in forestry terrains".[1071] However, this view seems to have evolved since [redacted] first report, which opined that:[1072]

> . . . within this 20-year period [of the Federal EIA], or the period of renewal, and depending on the way in which CALICA plans its production and the seasonal characteristic of its activities, to be able to extract petrous material in a plot with vegetation, it must request the Soil-Use Change in Forested Terrain for that concrete polygon.

1066 2021 Hearing Transcript (English), Day 3, 609:22-610:3.

1067 R-PHM, ¶¶ 45-46, *citing* 2021 Hearing Transcript (Spanish), Day 3, 706 ([redacted] Cross-Examination), also citing Reply, n. 354; R-PHM, Annex A, ¶ 39. *See also* SOLCARGO First Report, ¶ 117(v).

1068 2021 Hearing Transcript (English), Day 3, 611:22-612:9 ([redacted] Cross-Examination).

1069 [redacted] Second Report, ¶ 156.

1070 **C-0140-SPA**, 1992 Forestry Law/**GCI-0008**, 1992 Forestry Law, Art. 46(VIII).

1071 2021 Hearing Transcript (English), Day 3, 592:18-20.

1072 [redacted] First Report, ¶ 108. *See also* [redacted] First Report, ¶ 110.

911. Taking into account the foregoing, based on the evidence on Mexican law and regulations presented by the Parties, the Tribunal finds that CALICA *was* subject to the requirement to apply for a CUSTF in respect of La Adelita prior to 2009 and could have done so.

912. In practice, it appears that no CUSTF was obtained in relation to the removal of vegetation at any of Claimant's lots. El Corchalito, CALICA's lot which was identically zoned under the POET 2001, was quarried by CALICA commencing in 2001 prior to the enactment of the 2003 General Law for Sustainable Development.[1073] The Tribunal accepts the evidence of [redacted], which is not contradicted by other evidence on the record, that CALICA was not asked to apply for the CUSTF prior to the removal of vegetation from El Corchalito.[1074] Respondent itself states that it does not know whether CALICA obtained the CUSTF or any other similar permit prior to mining activities at El Corchalito.[1075]

913. The same applies to La Rosita. That lot was quarried commencing in the early 1990s and was subject to a different legal regime, however Claimant asserts that the CUSTF was not required by the authorities in spite of inspections carried out there.[1076]

914. In Claimant's view, the fact that no issue was raised regarding the absence of the CUSTF for La Rosita and El Corchalito is a strong indication that no such permit was legally required.[1077] As evidence of its expectation that no CUSTF was required, Claimant relies, *inter alia*, on (i) PROFEPA's 2012 inspection of CALICA's quarrying operations which found that CALICA complied with environmental laws and regulations; [1078] and (ii) the fact that between 2003 and 2016, PROFEPA granted six Clean Industry Certificates to CALICA in recognition of its compliance with environmental commitments.[1079]

1073 Memorial, ¶ 77, *citing* [redacted] First Statement, ¶ 24.

1074 2021 Hearing Transcript (English), Day 2, 303: 12-15: ". . . we carried out activities in El Corchalito and La Rosita for many years, 2000 onwards, without anyone requesting us for this specific authorization."

1075 R-PHM, Annex A, ¶ 51.

1076 C-PHM, ¶ 45, Appendix A, Tribunal Question 7, *citing* **C-0043-SPA**, PROFEPA Letter to CALICA, 10 December 2012, p. 2 of the PDF; Tribunal Question 8, *citing* 2021 Hearing Transcript (English), Day 2, 303: 4-15 ([redacted] Cross-Examination).

1077 C-RPHM, ¶ 37.

1078 C-RPHM, ¶ 7; *see* C-PHM, ¶¶ 61, 125; Memorial, ¶ 57; Reply, ¶ 92; **C-0043-SPA**, PROFEPA Letter to CALICA, 10 December 2012, pp. 2, 56, 57 of the PDF.

1079 C-RPHM, ¶ 7; *see* Memorial, ¶ 57; Reply, ¶ 92; C-PHM, ¶ 126; **C-0037-SPA**, Clean Industry Certificate, 23 June 2003, through **C-0042-SPA**, Clean Industry Certificate, 27 July 2016.

915. The Tribunal agrees with Respondent that government authorities are not required to request or invite entities to apply for authorizations that may be required under applicable law.[1080] The Tribunal does find it relevant, however, that federal authorities did not raise any absence of the CUSTF with CALICA in the context of their 2012 inspection carried out by PROFEPA, or otherwise, noting that the CUSTF is an authorization regulated at the federal level by SEMARNAT. In this regard, PROFEPA's resolution issued in December 2012 refers to the inspection carried out on CALICA with the very purpose of verifying whether it had the necessary authorizations in relation to the environment: [1081]

> *. . . con el objeto de verificar física y documentalmente que el o los responsables de la empresa citada, en donde presuntamente se pueden estar realizando obras o actividades que requieren de autorización en materia de impacto ambiental, . . . en lo referente a sus autorizaciones, permisos o licencias, otorgadas por la Secretaría de Medio Ambiente y Recursos Naturales; y si cuenta con autorización en materia de impacto ambiental vigente.*

916. PROFEPA examined the quarrying activities being undertaken at La Rosita and El Corchalito at that time, as well as the situation for La Adelita ("*aún no se empiezan las actividades de extracción y aprovechamiento de piedra caliza . . . sin embargo, dicho predio sí cuenta con autorización en materia de impacto ambiental. . .*").[1082]

917. PROFEPA concluded that there were no violations of environmental regulations detected at CALICA's lots:[1083]

> *. . . no haberse detectado hechos u omisiones presuntamente constitutivos de infracción a la normatividad ambiental, que deriven de la visita de inspección realizada a la citada empresa. Al respecto, se resuelve no instaurar procedimiento administrativo a la visitada y por consiguiente no imponer sanción administrativa alguna*.

918. In these circumstances, while Claimant could not reasonably expect to be exempt from legal requirements in force such as the CUSTF, it had received specific indications that it was in compliance with Mexican environmental regulations in the lots La Rosita and

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1080 *See* R-PHM, Annex A, ¶¶ 58-63.
1081 **C-0043-SPA**, PROFEPA Letter to CALICA, 10 December 2012, p. 1.
1082 **C-0043-SPA**, PROFEPA Letter to CALICA, 10 December 2012, p. 4.
1083 **C-0043-SPA**, PROFEPA Letter to CALICA, 10 December 2012, p. 56.

El Corchalito, where quarrying was already underway and no CUSTF had been obtained to clear vegetation.

919. The Tribunal has found that (i) a CUSTF requirement did exist as a matter of fact under applicable Mexican law with respect to La Adelita prior to 2009; and (ii) that requirement to obtain the permit had not yet materialized as Claimant had not commenced quarrying La Adelita. As such, the Tribunal rejects Respondent's position that Claimant was negligent in failing to acquire a CUSTF prior to the entry into force of the POEL 2009.[1084]

3. The POEL 2009

920. Key to the difficulties faced by Claimant and CALICA with respect to the quarrying of La Adelita is the change of the applicable zoning regime. In this respect, on 25 May 2009, the State of Quintana Roo replaced the POET 2001 zoning regime with the POEL 2009 , applicable to the Municipality of Solidaridad. Under the POEL 2009, most of La Adelita is zoned as UGA 5, intended for conservation, where quarrying is prohibited.[1085] The remaining approximately 9% of La Adelita's area is zoned as UGA 12 for "sustainable extraction", where quarrying is a conditional use. Within the UGA 12 area, only 30% of the area may be used for quarrying, with 70% to be maintained in natural vegetation.[1086]

921. In relation to the POEL 2009, the Tribunal inquired with the Parties whether Claimant was aware of the content of the POEL 2009 before it came into effect, and in particular whether it was aware that most of La Adelita would be classified as UGA 5 (*see* Tribunal Question 5). According to Claimant, a public consultation phase of the POEL 2009 took place from 19 to 29 January 2009, which included publication of a draft of the POEL 2009. CALICA submitted comments on the draft POEL 2009 on 22 and 29 January 2009, and 6 March 2009.[1087] Prior to the public consultation phase, Claimant contends that there is no evidence that CALICA knew that La Adelita would be rezoned.[1088]

1084 *See* Rejoinder, ¶ 322, 8th bullet.
1085 **C-0080-SPA**, POEL 2009, pp. 62, 76. *See* Memorial, ¶ 80, Map 3.
1086 **C-0080-SPA**, POEL 2009, p. 83.
1087 C-PHM, Appendix A, Tribunal Question 5, *citing* **C-0082-SPA**, CALICA's Legal Action Against the POEL, dated 15 June 2009, pp. 8-9; **C-0080-SPA**, POEL 2009, p. 23.
1088 C-PHM, ¶ 57, Appendix A, Tribunal Question 5.

922. Respondent refers to the same evidence of CALICA's participation in the public consultation process of the POEL 2009.[1089] It also highlights that maps dated 26 February 2009 with the new UGA designations were referred to by CALICA in its challenge to the POEL 2009, supporting its view that CALICA was aware of the contents of the POEL 2009 before it entered into force.[1090]

923. Neither Party has asserted that Claimant or CALICA was aware of the rezoning of La Adelita prior to January 2009.

924. The POEL 2009 specifies that it "does not apply retroactively to those specific cases in which official and in-force documents have been issued before the entry into force of this instrument, nor to their future renewal",[1091] and in addition under "*Control de Constitucionalidad*", provides:[1092]

> *Es muy importante precisar que este POEL, no se aplicará retroactivamente a los casos en concreto, que cuenten con documentos oficiales y vigentes hasta antes de su entrada en vigor, ni en lo general, ni en lo que toca a la futura renovación de los mismos, por parte de las autoridades competentes. Se reconocen y respetan pues, los derechos adquiridos concernientes, en los términos aquí precisados*.

925. On 15 June 2009, CALICA commenced a legal action against the State of Quintana Roo and the Municipality of Solidaridad to challenge the POEL 2009 with respect to quarrying in La Adelita and El Corchalito (*see* ¶ 227 above).[1093] On 25 March 2010, the High Court of Justice of the State of Quintana Roo found the claim inadmissible, concluding that the POEL does not affect CALICA's permits to quarry La Adelita and El Corchalito or their renewal. In this regard, the Court held that CALICA's "interests are not affected, as the [POEL 2009] . . . does not apply to it".[1094] This also reflects the positions taken by the

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1089 R-PHM, Annex A, ¶¶ 29-33.
1090 R-PHM, Annex A, ¶ 33, *citing* **C-0080-SPA**, POEL 2009, pp. 43-46; **R-0025-ESP**, Cartographic model of Solidaridad POEL, 25 May 2009.
1091 **C-0080-SPA**, POEL 2009, p. 6.
1092 **C-0080-SPA**, POEL 2009, p. 69, s. 2.6.
1093 **C-0082-SPA**, CALICA's Legal Action Against the POEL, 15 June 2009, p. 3.
1094 **C-0087-SPA**, Quintana Roo High Court Decision, 25 March 2010, p. 8. *See* Memorial, ¶ 83.

State of Quintana Roo and the Municipality of Solidaridad in the proceedings, which were that CALICA's vested rights in La Adelita were not affected by the POEL.[1095]

926. In terms of Claimant's legitimate expectations resulting from this ruling, it is important to note that the decision did not address the question of the CUSTF requirement. The Court considered the situation of five specific authorisations and licences held by Claimant prior to enactment of the POEL 2009: (i) "[i]t is noteworthy that the dates of publication and issuance of [the POEL 2009] . . . are subsequent to the date of issuance of each and every one of the documents offered by the plaintiff as evidence, regarding the acquired rights that it holds"; and (ii) "[t]he challenged legal instruments themselves [i.e., the POEL 2009] make the specific reference . . . that such norms will not be applicable to the procedures (*trámites*) initiated prior to the entry into force of the [POEL 2009]. . .."[1096]

927. Accordingly, while it was abundantly clear that those permits and rights acquired prior to the POEL 2009 were protected and preserved, the Court's decision does not answer the situation of the CUSTF. The CUSTF was not acquired prior to the POEL 2009 coming into effect and by definition was not a "vested right" held by Claimant. In light of the existence of the CUSTF requirement under Mexican law at the relevant time (*see* ¶ 919 above), in the Tribunal's view, it is therefore not correct to speak of Claimant holding a "vested right to quarry" La Adelita at the time of entry into force of the POEL 2009.[1097]

928. In May 2011, the State of Quintana Roo renewed the State EIA.[1098] The authorization states that El Corchalito, La Adelita and La Rosita are regulated by UGA 19 and 30 under decree published on 16 November 2001, i.e., the POET 2001 as opposed to the POEL 2009.[1099] According to Claimant, this was a confirmation of its vested right to quarry La Adelita and that no CUSTF was required to do so.[1100] Respondent denies this, arguing that the wording of the State EIA reflects a common practice in the use of technical and

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1095 **C-0083-SPA**, Answer from the Secretary of Urban Development and Environment of the State of Quintana Roo to CALICA's Legal Action Against the POEL, dated 8 July 2009, p. 6 of the PDF.
1096 **C-0087-SPA**, Quintana Roo High Court Decision, 25 March 2010, p. 11 (Translation by Claimant).
1097 *See, e.g.,* Memorial, ¶ 81; Reply, ¶ 4; C-PHM, ¶ 60.
1098 **C-0075-SPA**, Second Corchalito/ Adelita State EIA Amendment, 19 May 2011.
1099 **C-0075-SPA**, Second Corchalito/ Adelita State EIA Amendment, 19 May 2011, pp. 3-4.
1100 C-PHM, ¶¶ 60-61. *See also* Reply, ¶ 24.

legal language from previous official acts that could be confusing, but which has no substantive relationship with the renewal of the authorization.[1101]

929. Claimant argues that by referring to the POET as the applicable zoning regulation, without reference to the POEL 2009,[1102] the wording of the renewed State EIA appears to indicate that La Rosita, El Corchalito and La Adelita continued to be zoned pursuant to the POET 2001 rather than the POEL 2009 as at May 2011, even after the POEL 2009 had come into effect. This does not appear to be correct as a matter of fact, or to reflect Claimant's contemporaneous understanding, since the POEL 2009 mentions the newly applicable zoning for La Adelita (*see* ¶ 920 above), and was challenged by Claimant itself in 2009 (*see* ¶ 925 above). While lacking in clarity, the wording of the renewed State EIA does not establish that the prior POET 2001 regime continued to apply. Nor does it assist Claimant with respect to the CUSTF, which was a separate authorization to the State EIA as found by the Tribunal at ¶¶ 901 *et seq.* above.

930. On 14 April 2013, CALICA's counsel met with SEMARNAT's General Director of Forest and Soil Management to discuss, among other things, CALICA's plans to start operations in La Adelita. According to Claimant, CALICA was informed at that time that it was required to obtain the CUSTF to remove vegetation from La Adelita. While the POEL recognized CALICA's vested rights, SEMARNAT advised that an amendment of the POEL expressly allowing quarrying activities would be required for SEMARNAT to issue the CUSTF.[1103]

931. While Claimant refers to SEMARNAT's position as a "bureaucratic hiccup",[1104] it also submits that SEMARNAT is legally required to apply the provisions of the POEL in force

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1101 Rejoinder, ¶ 154, *citing* **C-0076-SPA**, Third Corchalito/ Adelita State EIA Amendment, 8 March 2016, p. 14 of the PDF; **C-0074-SPA**, First Corchalito/ Adelita State EIA Amendment, 3 March 2006, p. 20 of the PDF.

1102 **C-0075-SPA**, Second Corchalito/ Adelita State EIA Amendment, 19 May 2011, pp. 3-4 (Translation by Claimant): ". . . it is shown that the plots known as El Corchalito, La Adelita and La Rosita are regulated by [UGAs] nineteen and thirty (UGA 19 and 30) of the State Program for Ecological Order (*Programa de Orden amiento Ecológico Territorial*) of the Region known as the Cancun-Tulum Corridor. . .". In the original text: "*...se evidenció que los predios denominados El Corchalito, La Adelita, y La Rosita, se encuentran regulados por las Unidades de Gestión Ambiental diecinueve y treinta (UGA 19 y 30) del Programa de Ordenamiento Ecológico Territorial de la Región Denominada Corredor Cancún-Tulum…*". *See also* **C-0075-SPA**, p. 7.

1103 Memorial, ¶ 85, *citing* [redacted] First Statement, ¶ 25. *See* C-PHM, Appendix A, Tribunal Question 8, p. 16.

1104 C-PHM, ¶ 63.

and is precluded from granting the CUSTF to CALICA in respect of La Adelita under the current zoning regime. According to Claimant's expert [redacted] SEMARNAT may not apply any interpretation to the POEL with respect to the vested rights of CALICA.[1105]

932. Respondent likewise states that SEMARNAT would have to reject the application for a CUSTF were CALICA to apply for it now.[1106] In seeming contradiction to this position, Respondent also submits that Claimant could submit a technical study to justify issuance of a CUSTF to the relevant Directorate of SEMARNAT, which could rule in its favour in spite of the POEL (". . .*la DGGFS podría dictaminar como favorable el proyecto de desarrollo a pesar de lo que diga el programa de ordenamiento ecológico vigente*").[1107]

933. The 1992 Forestry Law which Respondent asserts is applicable to the question of the CUSTF states that a CUSTF shall be subject to the provisions of the applicable zoning regulations ("*Las autorizaciones que se emitan deberán atender lo que, en su caso, disponga el ordenamiento ecológico correspondiente, las normas oficiales mexicanas y demás disposiciones legales y reglamentarias aplicables*"),[1108] as does the 2003 General Law for Sustainable Forest Development (*see* also ¶ 904 above).[1109] In these circumstances, because the POEL 2009 excludes quarrying in almost all of the La Adelita lot (*see* ¶ 920 above), the Tribunal understands the default position to be that an application by CALICA for a CUSTF in respect of La Adelita while the current POEL applies would be rejected by SEMARNAT, without the Tribunal having to decide whether SEMARNAT would in fact reject it.

934. Neither the passage of the POEL in 2009, nor SEMARNAT's indication in 2013 that an amendment of the POEL would be necessary before it could issue the CUSTF, are alleged

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1105 [redacted] First Report, ¶¶ 113-117; 2021 Hearing Transcript (English), Day 3, 615: 14-16 ([redacted] Cross-Examination).

1106 R-PHM, Annex A, ¶¶ 52-53.

1107 R-PHM, Annex A, ¶ 70.

1108 *See* R-PHM, Annex A, ¶ 49, n. 232, where Respondent identified that the version of the 1992 Forestry Law on the record inadvertently omits an amendment of 20 May 1997 which included Article 19 bis 11, as quoted therein.

1109 See R-PHM, Annex A, ¶ 52, citing Article 117 of the 2003 General Law for Sustainable Forest Development: "Dichas autorizaciones deberán sujetarse a lo que, en su caso, dispongan los programas de ordenamientos ecológicos correspondientes, las Normas Oficiales Mexicanas y demás disposiciones legales y reglamentarias aplicables."

by Claimant to constitute a breach of the FET standard under NAFTA.[1110] Claimant's claims arise out of the alleged breach of the 2014 Agreements, which will be discussed below. At this stage, the Tribunal therefore takes note of these events as context for Claimants' legitimate expectations with respect to its investments.

4. The 2014 Agreements

935. On 12 June 2014, CALICA, the SCT, the State of Quintana Roo, API Quintana Roo and the Municipality of Solidaridad entered into two documents, followed by an amendment on 13 May 2015, as described at ¶¶ 232-243 above. These three documents are referred to as the "**2014 Agreements**"—although their legal nature is contested as we now discuss.

936. The Memorandum of Understanding ("**MoU**") is one of the 2014 Agreements and was signed between CALICA, API Quintana Roo, the State of Quintana Roo and the Municipality of Solidaridad, with the SCT acting as a witness. Its purpose was:[1111]

> . . . to reach a settlement with respect to the conflicts originated by the use and exploitation of the port infrastructure located in Punta Venado Quintana Roo, mainly with respect to the use and exploitation by CALICA of the Private Use Port Terminal, and by [API Quintana Roo] of the Public Use Port Terminal, as well as the resolution of other pending issues in relation to CALICA's operations in its current location in Quintana Roo, Mexico.

937. The parties to the MoU agreed, *inter alia*, in Section 3, to:

> Carry out the necessary actions before the municipal or state authorities, according to the legislation in force, to promote the execution of CALICA's social and business purpose (*objeto social*) and/or affiliates in the Private Use Terminal, consisting of the following:[1112]
>
> a) *Local Environmental Order Program ("POEL") of Solidaridad.*- The Municipality of Solidaridad and the Ministry of Ecology will review the POEL of the Municipality of Solidaridad to accomplish the incorporation of the "Use of Quarrying and exploitation of stone material" before the technical and executive bodies with respect to the

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1110 Reply, ¶ 120; 2021 Hearing Transcript (English), Day 1, 99:10-100:9 (Claimant's Opening Statement). *See* R-PHM, Annex A, ¶¶ 42-44.

1111 **C-0021-SPA**, MoU, p. 3 (Translation by Claimant).

1112 **C-0021-SPA**, MoU, Section 3.

> properties owned and/or possessed by CALICA and/or affiliates, known as "LA ROSITA", "EL CORCHALITO" and "LA ADELITA".
>
> In addition, the Municipality of [Solidaridad] and the Ministry of Ecology will negotiate with such technical and executive bodies for the POEL to allow the extraction and exploitation of limestone, stone materials, aggregates and derivatives, including cement, in an area of 50 hectares per year, and that such extraction and exploitation may be carried out for a period of 20 years, with the right to an extension in accordance with the applicable legislation, which will be negotiated with the Institute of Environmental Impact and Risk (*Instituto de Impacto y Riesgo Ambiental*) (INIRA).
>
> For the above, CALICA will provide the necessary technical information and will assist in the development of technical studies for the Ministry of Ecology and the Environment of the State of Quintana Roo and the Municipality of [Solidaridad] to grant the foregoing, so it will update the POEL of Solidaridad, which takes from 2 to 4 months, as of the moment that the announcement is issued, which will take place in July 2014.

938. Following further negotiations, on 13 May 2015 the parties to the MoU entered into an Addendum to the Memorandum of Understanding ("**Amended MoU**").[1113]

939. Section 1 of the Amended MoU provides a detailed timeline for the stages of the amendment of the POEL, tied to payments of contested real estate taxes by CALICA:[1114]

> Item a) *Local Environmental Order Program* of the Municipality of Solidaridad (*Programa de Ordenamiento Ecológico Local del Municipio de Solidaridad*) (POEL) of section 3 of the "MOU" is modified to be read as follows:
>
> 3. Carry out the necessary acts before the municipal and local authorities, pursuant to the applicable legislation, aimed to promote the implementation of the corporate purpose (*objeto social*) and businesses of CALICA and/or its affiliates in the Private Use Terminal, consisting of the following:
>
> a) Local Environmental Order Program ("POEL") of the Municipality of Solidaridad (*Programa de Ordenamiento Ecológico Local del Municipio de Solidaridad*).- The Municipality of Solidaridad and the Government of the State of Quintana Roo, acting through the SEMA, shall incorporate the Local Ecological Order Committee (*Comité de Ordenamiento Ecológico Local*) in order to update the POEL of the Municipality of Solidaridad (the "Environmental Order Committee"), made up of an executive body and a

1113 **C-0022-SPA**, Amended MoU.
1114 **C-0022-SPA**, Amended MoU, Section 1.

technical body with the purpose of proposing, managing and updating the *Local Environmental Order Program* ("POEL") of the Municipality of Solidaridad within this process in order to acknowledge the use of quarrying and exploitation of stone material within the properties owned and/or held by CALICA and/or its affiliates, known as "LA ROSITA", "EL CORCHALITO" and "LA ADELITA".

Additionally, the Municipality of Solidaridad and the SEMA shall carry out actions before the Environmental Impact and Risk Institute (*Instituto de Impacto y Riesgo Ambiental*) ("INIRA"), prior request by CALICA, to obtain the amendment of the terms and conditions regarding the authorizations through the issuance of the administrative acts which are necessary so that in each of the abovementioned plots, the extraction and exploitation of limestone, stone materials, aggregates and by-products, including, cement, can be carried out in a total surface area of 50 hectares per year and in order for such extraction and exploitation [to] be carried out for a term consisting of 20 years, with the right of renewal subject to the terms of the applicable legislation. The foregoing with the purpose of making the different local and federal environmental and port authorizations and the Local Environmental Order Program of the Municipality of Solidaridad consistent with each other.

For purposes of the foregoing, CALICA shall submit the request before the INIRA, provide the necessary technical information and prepare the technical studies in order for the SEMA and the Municipality of Solidaridad to achieve the foregoing.

Pursuant to the above, the Government of the State of Quintana Roo, through the SEMA and the Municipality of Solidaridad agree to carry out all the necessary actions before the Environmental Order Committee until the approval and publication of the following proposed amendments provided in this item a) of this section 3 of the MOU are obtained:

(i) Each of the discussions and agreements held in the Environmental Order Committee's meetings shall be documented, through the corresponding minutes, issued and signed by the committee's members.

(ii) The meeting for the incorporation of the Environmental Order Committee for the amendment of the POEL of the Municipality of Solidaridad shall be carried out from May 25 to May 29, 2015, and on May 26, 2015, CALICA shall pay the Municipality of Solidaridad an amount of $3,572,497.98, corresponding to the financial 2012 year for reforestation activities.

(iii) The first stage, which consists of the characterization (which includes the update, the presentation before the Environmental Order Committee and its corresponding validation) and the second stage, which consists of the assessment (which includes the amendment, the presentation before the Environmental Order

Committee and its corresponding validation) shall be carried out jointly from June 15 until July 31, 2015, and on July 14, 2015, CALICA shall pay the Municipality of Solidaridad an amount of $3,036,249.00, plus surcharges and restatements, applicable to the payment of real estate tax for the first three two-month terms of the 2013 financial year.

(iv) The third stage, which consist[s] of the forecasting (which includes the update, the presentation before the Environmental Order Committee and its corresponding validation), shall be carried out from August 10 until September 4, 2015.

(v) The fourth and last stage, which consists of the outlining (which includes the update, the presentation before the Environmental Order Committee and its corresponding validation), shall be carried out from September 17 until October 12, 2015.

(vi) The public consulting period for the proposed Model POEL shall be carried out between October 14 and October 27, 2015, and on October 14, 2015, CALICA would have to pay the Municipality of Solidaridad the amount of $3,036,249.00, plus surcharges and restatements, applicable to the payment of the last three two-month periods of the 2013 financial year.

(vii) The Committee's meeting for the approval of the Model POEL shall be carried out on November 11, 2015.

(viii) The Municipality of Solidaridad shall provide the Town Hall Council (*Cabildo del Ayuntamiento*) the updated POEL, approved by the Environmental Order Committee on November 13, 2015, which shall be analyzed for its approval between November 16 and 19, 2015.

(ix) Once the POEL is approved by the Town Hall Council (*Cabildo del Ayuntamiento*), the Municipality of Solidaridad shall send the POEL to the State Executive's branch between November 23 and 27, 2015, for its publication in the Official Gazette of the State of Quintana Roo.

(x) On December 5, 2015, at the latest, the amendment of the POEL of the Municipality of Solidaridad shall be published in the Official Gazette of the State of Quintana Roo. On the day immediately following the aforementioned publication, CALICA shall pay the Municipality of Solidaridad the amount of $6,072,498.00, plus surcharges and restatements, applicable to the real estate tax for the 2014 financial year.

The SEMA and the Municipality of Solidaridad shall do what is necessary to comply with the proposed schedule, in accordance with the two Committee's

> bodies' progress (the technical body and executive body), in the validation of the stages provided in the amendment process for the POEL of the Municipality of Solidaridad.

940. Respondent asserts that the 2014 Agreements were signed by officials from past administrations who are accused, under investigation or in prison for acts of corruption arising from the exercise of their duties as public servants.[1115] For Respondent, this prevented it from obtaining the version of events from former officials allegedly involved, since it would not be proper to rely on testimony from individuals facing criminal proceedings for acts of corruption.[1116]

941. At the 2021 Hearing, the Tribunal noted its duty to investigate the meaning of the reference to corruption in Respondent's submission, and invited Respondent to clarify "that there is no specific allegation of corruption in connection with these individuals in this case" and "[t]his is not an allegation of corruption against Legacy Vulcan; correct?". Respondent confirmed that it did not allege corruption by Claimant or in connection with the individuals who signed the 2014 Agreements in this case. [1117] Respondent's "only comment" was that it was prevented from requesting a witness statement from persons undergoing criminal proceedings.[1118]

5. Binding Nature of the 2014 Agreements

942. The Parties disagree on the binding nature of the 2014 Agreements under Mexican law. In Tribunal Question 14, the Tribunal asked the Parties:

> What is the relevance, if any, of a factual determination that the pledge to complete the 2009 POEL's amendment process by 5 December 2015 is binding/non-binding and enforceable/unenforceable under Mexican law?

943. Claimant argues that the 2014 Agreements are binding. However, according to Claimant, a factual determination whether the pledge to complete the POEL 2009 amendment process by 5 December 2015 is binding or non-binding and enforceable or unenforceable is not determinative of Claimant's claim of a breach of NAFTA Article 1105.[1119] For

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1115 Counter-Memorial, ¶ 205; Rejoinder, ¶ 176.
1116 Rejoinder, ¶ 176.
1117 2021 Hearing Transcript (English), Day 1, 234:14-20 (Tribunal Questions).
1118 2021 Hearing Transcript (English), Day 1, 232:5-9 (Tribunal Questions).
1119 C-PHM, Appendix A, Tribunal Question 14; *see also* C-PHM, ¶¶ 87-88, 90; Reply, ¶¶ 41, 147-148.

Claimant, the question of the binding nature is only relevant for its claim under NAFTA Article 1103, by which Claimant argues that Respondent must observe obligations it has assumed as guaranteed under the Mexico-Switzerland BIT.[1120]

944. Claimant asserts that its legitimate expectations need not arise from a binding instrument but can derive from State conduct or communications on which the investor reasonably relies.[1121] In Claimant's view, "clear, repeated encouragements" by Respondent to induce Claimant or CALICA's expectations or investments, and reasonable reliance to their detriment, suffices.[1122] For Claimant, the specific commitments contained in the written 2014 Agreements are the "epitome" of a State representation, regardless of their formal legally binding nature.[1123]

945. Claimant likewise submits that the binding nature of the commitments is irrelevant for its claim that Respondent acted arbitrarily, because Respondent's abandonment of the process to amend the POEL was based on prejudice, preference to local interests and bias.[1124] Claimant disagrees with Respondent's argument that the 2014 Agreements are not a "measure". It submits that NAFTA tribunals have found that the term "measures" in NAFTA must be understood broadly, including State conduct resulting from, or relating to, memoranda of understanding and other agreements executed by the State.[1125]

946. Respondent contends that the 2014 Agreements are not binding, both in the sense that they are unenforceable domestically, and in that they do not create international obligations. For Respondent, the 2014 Agreements are not "measures" under NAFTA Article 201, which "includes any law, regulation, procedure, requirement or practice".[1126] Respondent further submits that the Tribunal should not make a factual determination as to whether the Memorandum of Understanding is binding under Mexican law, which

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1120 C-PHM, Appendix A, Tribunal Question 14; Memorial, ¶ 241; Reply, ¶ 187.

1121 C-PHM, Appendix A, Tribunal Question 14, *citing* **CL-0004-ENG**, *Thunderbird v. Mexico,* Award, ¶ 147.

1122 C-PHM, Appendix A, Tribunal Question 14, *citing* **CL-0009-ENG**, *Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶ 572, also citing*, inter alia,* **CL-0004-ENG**, *Thunderbird v. Mexico,* Award, ¶ 147.

1123 C-PHM, Appendix A, Tribunal Question 14. *See also* C-PHM, ¶¶ 64-69; Memorial, ¶¶ 93-104; Reply, ¶¶ 27-34, 131.

1124 C-PHM, Appendix A, Tribunal Question 14, *citing* **CL-0072-ENG**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 263.

1125 C-RPHM, ¶ 30, *citing* **CL-0015-ENG**, *Mesa Power Group v. Canada*, Award, ¶¶ 254-256.

1126 R-PHM, Annex A, ¶ 103.

could (i) lack legal support under Mexican law; or (ii) be contrary to the process for the modification of environmental regulations under Mexican law.[1127]

947. The Tribunal rejects Respondent's argument that the 2014 Agreements are not covered by the definition of "measures" in NAFTA. At the outset, the 2014 Agreements are not the "measure" asserted by Claimant to have breached NAFTA Article 1105. Rather, the measure challenged by Claimant is Respondent's alleged "repudiation" of the 2014 Agreements by failing to amend the POEL by 5 December 2015.[1128]

948. The Tribunal concurs with the tribunal in *Mesa Power Group, LLC. v. Government of Canada* that the term "measures" under NAFTA must be understood broadly. The 2014 Agreements, whether binding or not, are conduct by a party to NAFTA. Respondent's alleged repudiation of the Amended MoU is an act or omission with the requisite formality to be considered a "law, regulation, procedure, requirement or practice" within the meaning of NAFTA Article 201. There is no additional hurdle imposed by NAFTA to prove that a "procedure, requirement or practice" is legally binding under domestic law.

949. For the avoidance of doubt, Respondent has not raised an objection with respect to the Tribunal's jurisdiction over this aspect of Claimant's claim, and the Tribunal does not consider it to give rise to an issue with respect to its jurisdiction.

950. The Tribunal recalls that it is deciding the issues in dispute in accordance with NAFTA and applicable rules of international law (*see* ¶ 345 above). Matters of Mexican law are a question of fact (*see* ¶ 353 above).

951. In order to decide whether Respondent has breached NAFTA Article 1105, the Tribunal does not consider a finding on the legally binding nature of the 2014 Agreements under Mexican law to be necessary. The binding nature of the 2014 Agreements may have been relevant to Claimant's claim under NAFTA Article 1103, but that has been rejected by the Tribunal (*see* ¶¶ 791-800 above).

1127 R-PHM, Annex A, ¶¶ 107-108.
1128 *See* C-RPHM, ¶ 29.

952. For the purposes of NAFTA Article 1105, whether legally binding or not, the provisions of the 2014 Agreements assented to by CALICA, API Quintana Roo, the State of Quintana Roo and the Municipality of Solidaridad constitute representations by Respondent to CALICA with respect to Claimant's investment, and specifically La Adelita. As such, those representations may, in principle, give rise to legitimate expectations by Claimant as to Respondent's treatment of its investment.

953. In these circumstances, the Tribunal does not find it necessary to address the debate between the Parties and their experts on the characterization of the 2014 Agreements under Mexican law and the Parties' capacity to enter into such agreements.

954. The Tribunal will focus on the wording of the 2014 Agreements as a record of representations made by the parties to those documents.

955. In that context, the Tribunal notes the disputed reference to the existence of a document recording an agreement ("*acuerdo*") to amend the POEL with respect to the land use for CALICA's lots, distinct from the MoU and the Amended MoU.[1129] According to Respondent, a series of miscommunications arose when implementing a request from the Federal Ministry of the Economy for documents relevant to this arbitration, and what was produced and referred to as an agreement to amend the POEL was in fact the minutes of a meeting of the Municipality in which the POEL was submitted for consideration ("*Acta de la Vigésima Cuarta Sesión Ordinaria del Ayuntamiento celebrado el 12 de marzo de 2009"*).[1130] According to Claimant, the Tribunal should draw adverse inferences from Respondent's failure to comply with the Tribunal's order to produce this agreement in its document production orders of PO4.[1131] On 13 February 2021, the Tribunal directed that

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1129 **R-0027-ESP**, Municipality of Solidaridad, Official Letter No. 1166-10/2020, 19 October 2020 ("Solidaridad Letter 1166-10/2020, 19 October 2020"), p. 25, referring to: "*Acuerdo con el Gobierno de Quintana Roo, y el Municipio de Solidaridad para reformar el Programa de Ordenamiento Ecológico Local del Municipio de Solidaridad de 2009 con respecto al uso de suelo de los predios de la empresa Calica, y con ello permitirle la explotación previamente autorizada por el Programa de Ordenamiento Ecológico Territorial de 2001*".

1130 R-PHM, ¶ 30, *citing* 2021 Hearing Transcript (Spanish), Day 2, 545-546, 549-550 (Durán Testimony); *see also* Durán Statement ¶¶ 7-11; **R-0094-ESP**, SE Letter No. 500/272/2020, 9 October 2020, p. 2 of the PDF; **R-0027-ESP**, Solidaridad Letter 1166-10/2020, 19 October 2020, pp. 26-27 of the PDF; **R-0027-ESP**, p. 25; **R-0091-ESP**, Letter No. SG/UTJ/0715/2020, 18 December 2020, p. 2 of the PDF.

1131 Claimant's Letter to the Tribunal dated 4 February 2021.

it would "weigh the evidence before it and draw such inferences as it deems fit, taking into account its relevance, weight and materiality."[1132]

956. Having weighed the evidence on record, the Tribunal accepts the evidence of Mr. Duran regarding the miscommunication that arose among Respondent's instrumentalities and is not persuaded that an additional document recording an agreement between the State of Quintana Roo and the Municipality of Solidaridad to amend the POEL exists and has been withheld. Further and in any event, the existence of such a document would not be determinative for the Tribunal's evaluation of the legitimate expectations created by the 2014 Agreements or the assessment of whether Respondent's conduct was arbitrary.

957. The Tribunal observes that while the Parties disagree on the binding nature of the 2014 Agreements, there is no essential disagreement between the Parties' respective experts that the language of the 2014 Agreements contains clearly expressed mutual intentions. In this regard, Respondent's expert Dr. Mijangos confirmed at the Hearing his view that the MoU is "a declaration of mutual intent with 'high ethical value' for the Parties that execute it, but without binding legal effect".[1133] Claimant's expert [redacted] is of the view that the MoU is binding and contains concrete commitments to take the necessary actions to amend the POEL.[1134]

958. The content of Claimant's expectations that can be derived from the representations made in the 2014 Agreements will be considered in the next sub-section.

6. Expectations Arising from the 2014 Agreements

959. Focusing on the terms of the MoU and Amended MoU, the parties expressed "their intention to reach a settlement" in relation to various conflicts and pending issues in relation to CALICA's operations.[1135] These conflicts are stated to have:[1136]

> . . . originated by the use and exploitation of the port infrastructure located in Punta Venado Quintana Roo, mainly with respect to the use and exploitation

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1132 Tribunal's Directions of 13 February 2021.

1133 2021 Hearing Transcript (English), Day 4, 801:12-14 (Mijangos Cross-Examination). *See* Mijangos Report, ¶ 36.

1134 2021 Hearing Transcript (English), Day 3, 656:4-20 ([redacted] Presentation); [redacted] Presentation, slides 8-10.

1135 **C-0021-SPA**, MoU, Purpose (Translation by Claimant).

1136 **C-0021-SPA**, MoU, Purpose (Translation by Claimant).

> by CALICA of the Private Use Port Terminal, and by APIQROO of the Public Use Port Terminal, as well as the resolution of other pending issues in relation to CALICA's operations in its current location in Quintana Roo, Mexico.

960. The quarrying of La Adelita falls into the "other pending issues" mentioned in the MoU. The Total Regularization Scheme is referred to in the MoU as "the determining reason for CALICA to enter into this [MoU]".[1137] The Total Regularization Scheme is one of the three 2014 Agreements and relates to the CALICA Port Concession (*see* ¶¶ 232-235 above).

961. With respect to the POEL, the parties to the MoU agreed to "[c]arry out the necessary actions before the municipal or state authorities, according to the legislation in force" (*see* ¶ 937 above), including in Section 3(a) to:

> (i) "... review the POEL… to accomplish the incorporation of the 'Use of Quarrying and exploitation of stone material' . . . with respect to the properties . . . known as 'LA ROSITA', 'EL CORCHALITO' and 'LA ADELITA'" ("revisarán EL POEL. . . para gestionar . . . la incorporación del 'Uso de Minería y explotación de material pétreo' con respecto a los inmuebles . . . conocidos como 'LA ROSITA', 'EL CORCHALITO' y 'LA ADELITA'") (see ¶ 937 above).[1138]
>
> (ii) ". . .negotiate with such technical and executive bodies for the POEL to allow the extraction and exploitation of limestone, stone materials, aggregates and derivatives . . . for a period of 20 years, with the right to an extension in accordance with the applicable legislation, which will be negotiated with the Institute of Environmental Impact and Risk . . ." ("gestionarán ante dichos órganos técnico y ejecutivo que el POEL permita que . . . se lleve a cabo la extracción y explotación de piedra caliza, materiales pétreos, agregados y derivados . . . por un plazo de 20 años, con derecho a prorroga en términos de la legislación aplicable, lo cual se gestionará ante el Instituto de Impacto y Riesgo Ambiental (INIRA)..."). [1139]

962. The Amended MoU substituted the above language in Section 3(a) with new text, including to:

> (i) ". . .incorporate the Local Ecological Order Committee . . . with the purpose of proposing, managing and updating the [POEL] of the

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1137 **C-0021-SPA**, MoU, Recitals (Translation by Claimant).
1138 **C-0021-SPA**, MoU, Section 3(a) (Translation by Claimant).
1139 **C-0021-SPA**, MoU, Section 3(a) (Translation by Claimant).

> Municipality of Solidaridad within this process in order to acknowledge the use of quarrying and exploitation of stone material within the properties . . . known as 'LA ROSITA'; 'EL CORCHALITO' and 'LA ADELITA'" ("instalarán el Comité de Ordenamiento Ecológico Local para la actualización del POEL del Municipio de Solidaridad. . . con el objeto [de] que dentro de este proceso se proponga, gestione y actualice el [POEL] del Municipio de Solidaridad para que en esta actualización se reconozca el uso de minería y explotación de material pétreo en los inmuebles . . . conocidos como 'LA ROSITA', 'EL CORCHALITO' y 'LA ADELITA'").[1140]
>
> (ii) ". . . carry out actions before the Environmental Impact and Risk Institute . . . prior request by CALICA, to obtain the amendment of the terms and conditions regarding the authorizations through the issuance of the administrative acts which are necessary so that in each of the abovementioned plots, the extraction and exploitation of limestone, stone materials, aggregates and by-products . . . can be carried out . . . and in order for such extraction and exploitation [to] be carried out for a term consisting of 20 years, with the right of renewal subject to the terms of the applicable legislation" (". . . gestionarán ante el Instituto de Impacto y Riesgo Ambiental (INIRA), previa solicitud de CALICA, la modificación de los términos y condicionantes de las autorizaciones mediante la emisión de los actos administrativos al efecto necesarios para que en cada uno de los referidos predios se lleve a cabo la extracción y explotación de piedra caliza, materiales pétreos, agregados y derivados . . . y que dicha extracción y explotación pueda realizarse por un plazo de 20 años, con derecho a prórroga en términos de la legislación aplicable").[1141]
>
> (iii)". . . the Government of the State of Quintana Roo, through the SEMA [Secretaría de Ecología y Medio Ambiente del Estado de Quintana Roo] and the Municipality of Solidaridad agree to carry out all the necessary actions before the Environmental Order Committee until the approval and publication of the following proposed amendments provided in this item a) of this section 3 of the MOU are obtained. . ." (". . . el Gobierno del Estado de Quintana Roo, a través de la SEMA y el Municipio de Solidaridad se comprometen a gestionar ante el Comité de Ordenamiento Ecológico todas las acciones necesarias hasta la aprobación y publicación de las propuestas de modificación establecidas en el presente inciso a) de esta sección 3 del MOU. . .").[1142]

963. The Amended MoU sets out a number of steps or milestones in the process of the review of the POEL before the Committee to Amend the POEL including a timeline in which

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1140 **C-0022-SPA**, Amended MoU, Section 3(a) (Translation by Claimant).
1141 **C-0022-SPA**, Amended MoU, Section 3(a) (Translation by Claimant).
1142 **C-0022-SPA**, Amended MoU, Section 3(a) (Translation by Claimant).

they will be carried out, and payments to be made by CALICA corresponding to certain steps (*see* ¶¶ 242-243above). The final step in that process states: [1143]

> On December 5, 2015, at the latest, the amendment of the POEL of the Municipality of Solidaridad shall be published in the Official Gazette of the State of Quintana Roo. On the day immediately following the aforementioned publication, CALICA shall pay the Municipality of Solidaridad the amount of $6,072,498.00, plus surcharges and restatements, applicable to the real estate tax for the 2014 financial year.

964. The final paragraph of the Amended MoU language of Section 3 provides: [1144]

> The SEMA and the Municipality of Solidaridad shall do what is necessary to comply with the proposed schedule, in accordance with the two Committee's bodies' progress (the technical body and the executive body), in the validation of the stages provided in the amendment process for the POEL of the Municipality of Solidaridad.

965. The Tribunal finds that the 2014 Agreements, and in particular Section 3(a) of the MoU and its substituted text in the Amended MoU with the above language, contain specific representations towards Claimant with respect to its investments in CALICA and the La Adelita property. These representations convey mutual intentions to carry out a number of steps with a view to amending the POEL so as to recognize quarrying as a permitted land use of La Adelita. The timeline of these steps is detailed, including not only a target date for the publication of the amended POEL, but time periods and deadlines for interim steps.

966. On the one hand, the achievement of those steps is phrased in mandatory language (". . .shall be carried out. . ."): "*deberá realizarse*" or ". . . *se llevará a cabo* . . ."). The Tribunal finds this language to be in stronger terms than a mere "work plan" that may or may not be carried out ("*plan de trabajo, que podia o no llevarse a cabo*"), as Respondent

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1143 **C-0022-SPA**, Amended MoU, Section 3(a) (Translation by Claimant). In the original Spanish: "A más tardar el 5 de Diciembre de 2015 deberá publicarse en el Periodico Oficial del Estado Quintana Roo el POEL actualizado del Municipio de Solidaridad. Al día inmediato siguiente a la publicación aquí referida, CALICA pagará al Municipio de Solidaridad la cantidad de $6,072,498.00, más actualizaciones y recargos, correspondientes al pago de predial del ejercicio de 2014."

1144 **C-0022-SPA**, Amended MoU, Section 3(a) (Translation by Claimant). In the original Spanish: "La SEMA y el Municipio de Solidaridad se darán a la tarea de cumplir con el calendario propuesto, conforme vayan avanzando los dos órganos del Comité de Ordenamiento Ecológico (órgano técnico y órgano ejecutivo), en la validación de las etapas previstas en el procedimiento de actualización del POEL del Municipio de Solidaridad."

characterizes it.[1145] On the other hand, the entire process to amend the POEL 2009 via the municipal and local authorities is at all times specifically stated in the *chapeau* of Section 3 to be "pursuant to the applicable legislation" ("*conforme a la legislación vigente*").[1146]

967. Section 3(vi) of the Amended MoU further contemplates the dates within which the "public consulting period for the proposed Model POEL" shall be carried out.[1147]

968. The Tribunal concludes from the foregoing that while Respondent conveyed its intention to Claimant to amend the POEL 2009 by 5 December 2015, such intention was at all times subject to procedures under applicable law. This is both stated expressly in the document and follows from the legal framework within which the MoU was to be performed. The Tribunal notes, in this respect, that:

(i) As described above, the Committee to Amend the POEL was comprised of (a) an executive body, including representatives of SEMARNAT, the State of Quintana Roo, and the Municipality of Solidaridad; and (b) a technical body, with members of other Mexican government entities, civil society, and the private sector, including CALICA (see ¶ 244 above).[1148]

(ii) As such, the Committee is not merely an instrumentality of the Respondent's authorities. Its composition reflects the diverse interests and perspectives of its members. Each of the members of the executive body and technical body may participate and vote in their respective bodies.[1149]

(iii) The executive body of the Committee to Amend the POEL, with decision-making powers, is composed of six members, with two representatives from each of the

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1145 R-PHM, ¶ 25.

1146 **C-0022-SPA**, Amended MoU, Section 3(a) (Translation by Claimant).

1147 **C-0022-SPA**, Amended MoU, Section 3(a)(vi) (Translation by Claimant). In the original Spanish: "*El periodo de consulta pública de la propuesta de Modelo del POEL. . ..*"

1148 [redacted]**0016-SPA**, Internal Regulations of the POEL Committee, Arts. 5, 6, 11 (**R-0118-SPA**, Art. 5, 6, 11); **C-0090-SPA**, POEL Committee Establishment Minutes, 30 October 2014, pp. 7-9.

1149 [redacted]**0016-SPA**, Internal Regulations of the POEL Committee, Arts. 10(I), 14(I), 23 (**R-0118-SPA**, Arts. 10(III), 14(I), 23). *See also* [redacted] Presentation, slide 16 (correcting [redacted] Report, at n 49).

Federal, State and Municipal governments.[1150] As such, four of the six members of the executive body represented signatories of the Amended MoU, i.e., the State of Quintana Roo and the Municipality of Solidaridad.[1151]

(iv) The responsibilities of the executive body of the Committee to Amend the POEL include convening meetings and creating a schedule of activities for the Committee.[1152] On the basis that the signatories of the Amended MoU had a majority vote on the executive body, the Tribunal accepts that it was within the power and control of Respondent's authorities to move forward the POEL amendment process by convening such meetings and scheduling the activities of the Committee.

(v) However, this does not mean that the executive body of the Committee to Amend the POEL had unfettered power to control the POEL amendment process. This was at all times to take place within the participatory process provided for under the law, which included the involvement of civil society in the membership of the technical committee,[1153] and the procedure of public consultation as referred to in the Amended MoU itself.[1154]

969. This conclusion is consistent with the expert evidence of both sides,[1155] including the evidence of Claimant's expert [redacted][1156]

> The authorities undertake what they start from the idea that it's perfectly viable to amend the POEL [2009] and the terms agreed upon so, as to enable CALICA to exploit its properties. . . . Now, they cannot agree that that is

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1150 [redacted]**0016-SPA**, Internal Regulations of the POEL Committee, Art. 6 (**R-0118-SPA**, Art. 6). *See also Reglamento de la Ley de Equilibrio Ecológico y Protección al Ambiente del Estado de Quintana Roo*, Art. 3, extracted in SOLCARGO Second Report, ¶ 51; **C-0090-SPA**, POEL Committee Establishment Minutes, 30 October 2014, pp. 6-7; 2021 Hearing Transcript (English) Day 3, 739:14-740-6 (SOLCARGO Cross-Examination).

1151 [redacted]**0016-SPA**, Internal Regulations of the POEL Committee, Art. 6 (**R-0118-SPA**,, Art. 6).

1152 [redacted]**0016-SPA,** Internal Regulations of the POEL Committee, Art. 8 (**R-0118-SPA**, Art. 8); [redacted]**0015-SPA**, Federal-State-Municipal Coordination Agreement, p. 7 [PDF]; 2021 Hearing Transcript (Spanish) Day 3, 871:17-872:1, 874:4-12 (SOLCARGO Cross-Examination).

1153 2021 Hearing Transcript (English) Day 3, 675:17-676:6 ([redacted] Cross-Examination).

1154 **C-0022-SPA**, Amended MoU, Section 3(a), p. 5 [PDF]. *See also* [redacted]**0016-SPA**, Internal Regulations of the POEL Committee, Art. 33 (**R-0118-SPA**, Art. 32); [redacted]**0015**, Federal-State-Municipal Coordination Agreement, p. 7.

1155 *See* 2021 Hearing Transcript (English), Day 3, 671:10-672-:7 ([redacted] Cross-Examination), 715:5-15, 717:11-14 (SOLCARGO Presentation), 738:8-12 (SOLCARGO Cross-Examination).

1156 2021 Hearing Transcript (English), Day 3, 692:12-693:1 (Tribunal Questions to [redacted]

> going to happen. Once the Memorandum of Understanding is signed because, in effect, there is a procedure spelled out in law. And the agreement establishes the respective proceedings. So, the authorities undertake to follow that procedure to its end.

970. This is important context for Claimant's legitimate expectations, as it is in the very nature of a public and participatory process subject to democratic principles and rule of law that public authorities are not able to guarantee a defined outcome in advance, nor a hard deadline by which such outcome will be achieved, although domestic law may set requirements in that regard. What Claimant could reasonably expect was for Respondent to undertake its best efforts to follow the procedures under applicable law to amend the POEL 2009, in accordance with the 2014 Agreements.

971. To the extent that Claimant argues that Respondent did guarantee a positive outcome, the Tribunal does not consider such an expectation to be a reasonable one. While Respondent's instrumentalities did have control over key aspects of the Committee's work, there was a limit on that control. For the same reason, in the Tribunal's view the timeline set out in the Amended MoU is necessarily aspirational – even with diligent efforts by public authorities, it was well within the range of reasonable outcomes that delays could occur.

7. Whether Respondent Breached Claimant's Legitimate Expectations

972. Revision of a POEL has four phases: (i) characterization: to describe the natural, social and economic conditions, identify sectoral activities, environmental attributes and areas and ecosystems requiring attention; (ii) diagnosis: analyzing compatible activities with the areas of the region and determining which areas should be conserved, developed or subjected to mitigation measures; (iii) forecast/prognosis: examining environmental issues resulting from the evolution of natural, social and economic variables in each area; and (iv) proposal: preparation of a draft local environmental regulation based on the previous phases, and public consultation on that draft.[1157] There are additional steps thereafter for (i) the approval of the POEL by the Committee to Amend the POEL; (ii) approval of the POEL by the Municipal Council; (iii) forwarding of the POEL to the

[1157] [redacted] First Report, ¶ 25. *See* Memorial, ¶ 114, n. 245.

State Executive for publication; and (iv) publication in the Official Gazette of the State of Quintana Roo.[1158]

973. In accordance with the intentions set out in the MoU and Amended MoU, certain steps were taken to revise and amend the POEL 2009 in this matter. The first two stages of characterization and diagnosis were carried out by the Committee to Amend the POEL.[1159] As part of the second stage of diagnosis, on 30 October 2015 the Committee's expert submitted a report entitled "Update to the Local Environmental Regulation of the Municipality of Solidaridad: Diagnostic Phase."[1160] The sites of La Adelita and El Corchalito were marked on a map prepared by the expert as most suitable for conducting quarrying operations.[1161] On 28 January 2016, the Committee to Amend the POEL approved the characterization and diagnosis phases by majority vote.[1162]

974. For Claimant, the initial steps taken to amend the POEL 2009 should be seen as "compliance" with the 2014 Agreements, demonstrating that they were more than mere expressions of intent.[1163] According to its witness [redacted], CALICA also carried out acts as agreed in the 2014 Agreements, such as (i) renouncing its rights over the public terminal; (ii) withdrawing legal challenges to the proceeding to revoke CALICA's Port Concession; and (iii) paying taxes over the Concession for the public terminal based upon the INDAABIN appraisal.[1164]

975. Respondent, on the other hand, argues that CALICA did not comply with the 2014 Agreements, evidencing that it did not consider them binding. Respondent submits that CALICA did not withdraw its legal challenge as required, citing [redacted] evidence that all challenge withdrawals were subject to Respondent's full compliance with the terms of the 2014 Agreements.[1165] Respondent further relies on [redacted] evidence that CALICA challenged INDAABIN's appraisal, even if it continued to make payments

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1158 Counter-Memorial, ¶ 240.

1159 2021 Hearing Transcript (English), Day 3, 744:8-11 (SOLCARGO Cross-Examination); [redacted] First Report, ¶ 120, Figure 3.

1160 **C-0097-SPA**, Diagnostic Report.

1161 **C-0097-SPA**, Diagnostic Report, p. 136.

1162 **C-0095-SPA**, POEL Committee Fifth Session Minutes, 28 January 2016, p. 7: "*Se aprueban por mayoria las etapas de caracterización y diagnostico*."

1163 C-PHM, ¶ 70.

1164 2021 Hearing Transcript (English), Day 2, 293: 4-14 ([redacted] Cross-Examination). *See* C-PHM, ¶ 70.

1165 R-PHM, ¶ 19, *citing* 2021 Hearing Transcript (Spanish), Day 2, 353 ([redacted] Cross-Examination).

according to that appraisal.[1166] In its view, the fact that Claimant seeks reimbursement in this arbitration of millions of dollars of port fees collected by API Quintana Roo is also contrary to the 2014 Agreements.[1167] Additionally, in the context of its argument that the 2014 Agreements are not binding under Mexican law, Respondent submits that CALICA's own failure to comply with the 2014 Agreements precludes Claimant from enforcing them.[1168]

976. The Tribunal finds that the evidence on performance of the 2014 Agreements confirms that the 2014 Agreements were more than a "work plan" (*see* ¶ 966 above). Both sides took serious steps towards carrying out the intentions expressed in those documents, even if those steps were incomplete. The Tribunal does not consider Claimant to have repudiated the 2014 Agreements, noting the steps undertaken on its side and the *quid pro quo* basis for the steps in the Agreements. The Tribunal is not making an assessment under Mexican law, but is assessing the Parties' conduct under NAFTA.

977. On 28 April 2016, the Committee to Amend the POEL held its next meeting, at which seven new members were integrated into the Committee.[1169] No further meetings of the Committee to Amend the POEL were convened, and no further phases were achieved in the process of review and amendment of the POEL 2009. As such, the phases of forecast and proposal referred to in ¶ 972 above were not completed.[1170] It should be noted that the meeting on 28 April 2016 was held some four months following the deadline set in the Amended MoU for publication of the amended POEL 2009 (*see* ¶ 963 above).

978. As noted above, Claimant has convincingly established that the State of Quintana Roo and the Municipality of Solidaridad control key positions in the executive body of the Committee to Amend the POEL which allowed them to coordinate meetings (see ¶ 968(iv) above).[1171] This was admitted by Respondent's experts SOLCARGO.[1172] As

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1166 R-PHM, ¶ 21, *citing* 2021 Hearing Transcript (Spanish), Day 2, 348-349 ([redacted] Cross-Examination).
1167 R-PHM, ¶ 22, *citing* 2021 Hearing Transcript (Spanish), Day 2, 355-357 ([redacted] Cross-Examination).
1168 Rejoinder, ¶¶ 234-236.
1169 **C-0096-SPA**, POEL Committee Sixth Session Minutes, 19 April 2016, p. 7: "*Se acuerda la inclusión de los 7 aspirantes a integrarse como parte del Comité*."
1170 2021 Hearing Transcript (English), Day 3, 744:12-21, 745:3-746:1 (SOLCARGO Cross-Examination).
1171 2021 Hearing Transcript (Spanish), Day 3, 768:10-769:4 ([redacted] Presentation). *See* C-PHM, ¶¶ 73-75.
1172 2021 Hearing Transcript (Spanish), Day 3, 864:15-865:14 (SOLCARGO Cross-Examination). *See* C-PHM, ¶¶ 74-75; C-RPHM, ¶ 22.

such, it was not out of the control of those government entities to take action to continue the activities of the Committee to Amend the POEL. Moreover, the amendment process was not held up due to public opposition, since the public consultation phase had not yet been reached (*see* ¶ 977 above).

979. The evidence on the record does not give a complete picture of the reason for which the POEL 2009 amendment process stalled. Respondent submits, in general, that there are often interruptions or delays to such processes due to a change of government, insufficient funding, new local regulations, lack of consensus among stakeholders, and opposition from a specific stakeholder.[1173] In relation to the specific situation of this POEL 2009 amendment process, the evidence of Mr. Hernández Chávez, who was directly involved, is that the process was halted due to the lack of budget to pay the Committee to Amend the POEL's expert and the change of state government in September 2016.[1174] He is further of the view that the State of Quintana Roo subsequently prioritized a different territorial planning instrument, which is why the Committee to Amend the POEL did not meet again in spite of being reinstalled in February 2017.[1175]

980. According to Claimant, Respondent's entities discontinued the amendment process for political reasons and have provided no technical or legal justifications for abandoning the process.[1176] In support, Claimant relies on the evidence of [redacted] who testifies that the local tourism sector controls economic activity in the State of Quintana Roo and has exerted political pressure to undermine CALICA's operations.[1177] Claimant and [redacted] describe the following events, in that regard:

(i) On 17 August 2016, Mayor-elect Ms. Cristina Torres told [redacted] that it would be difficult for the Municipality of Solidaridad and the State of Quintana Roo to voluntarily comply with the 2014 Agreements and that they "would rather

1173 Counter-Memorial, ¶¶ 355-356, *citing* Hernández Chávez Statement, ¶ 11; Díaz Mondragón Statement, ¶ 7.
1174 Hernández Chávez Statement, ¶¶ 9-10.
1175 Hernández Chávez Statement, ¶ 10.
1176 C-PHM, ¶¶ 48-49.
1177 C-PHM, ¶ 93, *citing* 2021 Hearing Transcript (English), Day 2, 341:1-342:2. *See also* C-RPHM, ¶ 26.

act on court orders than confront the hotel industry and environmental groups" opposed to CALICA's operations in Quintana Roo;[1178]

(ii) On 30 March 2017, Governor Joaquín said to [redacted] that "it would be unpalatable to the public to allow CALICA to quarry such large area [i.e., La Adelita] notwithstanding the environmental authorisations that Mexico's Federal Government and the State of Quintana Roo granted CALICA to do so", after which he added that tourism interests had been lobbying his administration to develop the lots that CALICA had quarried and, as such, that it would be politically beneficial to him for CALICA to show those interests that CALICA had a plan to develop or intended to sell the lakes that have formed in its lots;[1179]

(iii) On 3 April 2017, the legislature of the State of Quintana Roo approved a non-binding Point of Agreement introduced by the then state legislator and later Solidaridad Mayor, Ms. Beristain, urging that the POEL 2009 not be amended to allow CALICA to quarry La Adelita because CALICA was allegedly supplying materials to build US President Trump's "wall of hate";[1180]

(iv) On 5 April 2017, Mayor Torres stated during a press conference that:[1181]

> . . . to her administration, CALICA had not asked anything . . . and so [she did not] know where [the media was] getting the information that [the Municipality of Solidaridad] intend[ed] to make a modification [to the POEL], which also [did not] concern [the Municipality of Solidaridad].

(v) In August 2017, Governor Joaquín informed [redacted] that amending the POEL 2009 would be difficult, even if the Secretary of Ecology and Environment of the State of Quintana Roo had informed [redacted] that Governor Joaquín did not foresee technical, objective issues with CALICA quarrying La Adelita;[1182]

1178 [redacted] First Statement, ¶ 45. *See* Memorial, ¶ 123; Reply, ¶ 48.

1179 [redacted] First Statement, ¶¶ 48-49. *See* Memorial, ¶ 125; Reply, ¶ 48.

1180 **C-0102-SPA**, Quintana Roo Lower House Session, 3 April 2017, p. 19, statement of Laura Beristain. *See* Memorial, ¶ 126; C-RPHM, ¶ 26.

1181 **C-0104-SPA**, No existe ninguna petición de Calica, Q.Roo para el cambio de uso de suelo: Cristina Torres, NOTICIAS CANAL 10 (Translation by Claimant). See Memorial, ¶ 127; Reply, ¶ 48.

1182 [redacted] First Statement, ¶ 52. *See* Memorial, ¶ 129; Reply, ¶ 48.

(vi) In January 2018, an ally and member of Mayor Beristain's team of advisors participated in a protest outside CALICA's facilities, which included pejorative signs against CALICA and US President Trump;[1183]

(vii) On 17 July 2018, Governor Joaquín informed [redacted] that he understood the obligation that the State of Quintana Roo had assumed in the 2014 Agreements, but amending the POEL 2009 was not politically viable and therefore "highly unlikely within any foreseeable future". According to [redacted] he acknowledged that "the law is on CALICA's side" but "interested parties" might resort to activism and social opposition. Upon [redacted] proposal of an alternative solution, Governor Joaquín stated "You are not entering La Adelita – period".[1184]

981. The Tribunal observes that all of the above events occurred after the intended date by which the POEL 2009 should have been amended under the timeline agreed in the Amended MoU (*see* ¶ 963 above).

982. Regardless of whether Claimant or Respondent is correct about the reason that the process to amend the POEL was halted, no satisfactory explanation has been provided for the abandonment of the process. Respondent did not fulfil Claimant's legitimate expectation, based on Respondent's representations in the 2014 Agreements, that it would undertake its best efforts to carry out the intentions expressed therein.

983. In the Tribunal's view, this failure to act consistently with the specific representations made to Claimant is "arbitrary, grossly unfair, unjust or idiosyncratic", was in breach of representations reasonably relied on by Claimant, and displays a "complete lack of transparency and candour in the administrative process" contrary to the minimum standard of treatment required by NAFTA Article 1105, as elaborated in *Waste Management v. Mexico II* (*see* ¶ 760 above). It is also arbitrary in the sense that it is "founded on prejudice or preference rather than on reason or fact".[1185] Respondent chose

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1183 **C-0108-SPA**, Arma 'Chano' Toledo Protesta Contra CALICA: Arremete Activista Contra Trump y El Negocio de Exportación de Material Pétreo desde la Riviera Maya; "Es un Presidente de […]", Dice, NOTICARIBE. See C-RPHM, ¶ 26.

1184 [redacted] First Statement, ¶ 59. *See* Memorial, ¶ 131; Reply, ¶ 48.

1185 Memorial, ¶ 200, *citing* **CL-0043-ENG**, UNCTAD, Fair and Equitable Treatment, p. 78. *See also* Reply, ¶ 154.

to enter into the 2014 Agreements and to commit to going through the procedure to amend the POEL. Its abandonment of that process in manifest disregard of the 2014 Agreements violates Respondent's obligations with respect to the treatment of Claimant's investments under NAFTA.

984. The Tribunal is mindful that land use zoning has the potential to be a contentious issue and involves the balancing of competing social, economic and environmental interests, among others. In a vibrant democracy, such processes are not carried out in a vacuum. Respondent submits that there was resistance not only from local business groups, but also from environmental organizations.[1186] However, it has not been established that the process to amend the POEL 2009 under the applicable procedure halted for any valid reason, whether through public consultation or participation or otherwise.

985. It should be noted that Respondent did not guarantee that the process to amend the POEL 2009 would have been successful (*see* ¶¶ 970-971 above). It could be that, in certain circumstances, democratic public opposition would be justified. If Respondent had taken the necessary steps, but the process was unsuccessful for other reasons, such as public opposition, then Claimant would not have a valid complaint. The Tribunal does not find that Respondent breached NAFTA for failing to amend the POEL, but for failing to employ efforts to do so after April 2016.

986. Nor did Respondent guarantee that the outcome of amendment of the POEL 2009 would be that Claimant would be able to quarry La Adelita. The Tribunal recalls, as set out at ¶ 781 above, that the protection of "legitimate" expectations does not mean that an investor's own expectations become a source of international legal obligations. Expectations are legitimate when they reasonably and justifiably arise from a NAFTA Contracting Party's conduct. An assessment of what will be legitimate or reasonable expectations in a particular case will take into account all the circumstances.

987. The Tribunal recalls, in this respect, its conclusions above that: (i) Respondent's representations to Claimant about the feasibility of quarrying in La Adelita were all subject to the requirement of obtaining necessary permits to carry out those activities (*see*

[1186] Counter-Memorial, ¶ 359, *citing* **C-0095-SPA**, POEL Committee Fifth Session Minutes, 28 January 2016, p. 6 of the PDF.

¶ 889 above); (ii) a CUSTF requirement did exist as a matter of fact under applicable Mexican law with respect to La Adelita prior to 2009 (*see* ¶ 919 above), which was brought to Claimant's attention at the latest by 2013; (iii) the language of the POEL 2009 only preserved acquired rights by virtue of authorizations already obtained by CALICA before it came into force, which did not include the CUSTF (*see* ¶ 927 above); and (iv) Respondent's instrumentalities were not in a position to guarantee the amendment of the POEL 2009 as an outcome of the process, or a strict timeline in which that would take place (*see* ¶¶ 970-971 above).

988. For the above reasons, the Tribunal finds that Respondent's conduct with respect to La Adelita is in breach of NAFTA Article 1105, for failure to meet Claimant's legitimate expectations and for being arbitrary.[1187]

XI. ALLEGED BREACHES IN RELATION TO EL CORCHALITO

A. CLAIMANT'S POSITION

989. Claimant submits that Respondent denied due process to Claimant and CALICA by denying them the opportunity to demonstrate within PROFEPA's administrative proceeding that PROFEPA's Shutdown Order is unfounded, in accordance with their rights under Mexican law.[1188] In Claimant's view, this is an example of a decision which unreasonably departs from the principles of justice recognized by the principal legal systems of the world.[1189]

1187 In Professor Puig's view, NAFTA's FET protection is narrower. Generally, FET is breached by organs that administrate justice (criminal, civil, or administrative) when they fail to provide to the investment due process as embodied in the principal legal systems of the world. In limited instances, FET could be breached by organs other than those that administrate justice, like an agency of the executive branch, for example where a domestic remedy is unavailable. Moreover, under customary international law, legitimate expectations and good faith are not component elements of FET that give rise to independent State obligations. Therefore, in Professor Puig's view, for the Claimant to establish a violation of Article 1105 based on the '2014 agreements', the Claimant needed to establish how Mexico failed to safeguard the basic protections of the principle of due process in relation to them. This would have entailed, at the very least, for the Claimant to unsuccessfully enforce the '2014 agreements' in, for example, notoriously unjust, vastly deficient or egregious domestic proceedings, or to ascertain that local remedies to enforce their rights (criminal, civil, or administrative) were unavailable. Claimant did neither. Nonetheless, Professor Puig is entirely in support of the Award's main decision because the conduct with respect to *La Adelita* does not constitute a compensable breach of NAFTA as discussed in ¶¶ 1268 to 1291 below.

1188 Memorial, ¶ 208; *see* Memorial, ¶ 153.

1189 Reply, ¶ 163, *citing* **CL-0011-ENG**, *Mondev v. United States*, Award, n. 57.

990. For Claimant, Respondent also failed to provide adequate reasons for its shutdown of CALICA's operations in El Corchalito.[1190] In this regard, Claimant contends that the reliance by PROFEPA on "probable" non-compliance with the Corchalito/Adelita Federal Environmental Authorization for alleged excess extraction of approximately 1% over the limit to justify the Shutdown Order is legally deficient and disproportionate, since a finding of imminent risk of severe damage to natural resources was necessary.[1191]

991. Claimant asserts that Respondent issued the Shutdown Order (*Acuerdo de Emplazamiento*) halting quarrying operations in El Corchalito in January 2018 relying on PROFEPA's flawed area measurements.[1192] According to Claimant, PROFEPA again arbitrarily refused to admit CALICA's expert evidence to show that PROFEPA's area measurements were flawed.[1193]

992. Claimant submits that the purported violations included in the October 2020 Resolution were arbitrary and failed to accord due process, in that CALICA was denied an effective opportunity to defend itself against those new alleged violations in the administrative proceeding.[1194] Claimant relies on the opinion of its expert [redacted] that:[1195]

> Having worked at PROFEPA for a decade and having 15 years of experience in environmental law, this violation of the right to a defense and due process is one of the most serious and egregious examples of arbitrary conduct by this authority that I have witnessed.

993. In addition, Claimant contends that PROFEPA failed to duly notify CALICA of the Shutdown Order as required under Mexican law.[1196]

1190 Memorial, ¶ 212.

1191 Memorial, ¶ 213, *citing* [redacted] First Report, ¶¶ 169, 174; *see* Memorial, ¶¶ 174 *et seq*. *See also* C-RPHM, ¶ 63; Reply, ¶¶ 81-83.

1192 C-PHM, ¶ 107, *citing* **C-0117-SPA**, Shutdown Order, p. 300 of the PDF.

1193 C-PHM, ¶ 107, *citing* **C-0124-SPA**, CALICA Observations to Shutdown Order, p. 22; **C-0125-SPA**, PROFEPA Docket, 30 October 2018, p. 19 of the PDF; *see* Reply, ¶ 72.

1194 C-PHM, ¶¶ 118, 128.

1195 C-PHM, ¶ 121, *citing* [redacted] Second Report, ¶ 103. *See also* 2021 Hearing Transcript (Spanish), Day 3, 669:11-20.

1196 Memorial, ¶ 211; *see* Memorial, ¶ 152.

994. Claimant further argues that PROFEPA has created a catch-22 situation in which CALICA can only escape the shutdown if it first concedes the purported violation on which the shutdown is based.[1197]

995. Claimant contends that it is undisputed that PROFEPA did not conduct any environmental study during its 2017 inspections to determine whether CALICA's quarrying operations had caused environmental damage.[1198]

996. Claimant denies Respondent's argument that CALICA automatically caused environmental damage by allegedly violating its Corchalito/Adelita Federal Environmental Authorization and challenges Respondent's interpretation of the Federal Law on Environmental Liability in that regard.[1199]

997. Claimant also asserts that Respondent failed to act in good faith, *inter alia*, by:

(i) contending (through PROFEPA) that the alleged excess extraction resulted in an undefined "risk of damage to natural resources" because SEMARNAT purportedly had not evaluated the environmental impact of such alleged excess extraction, in circumstances where SEMARNAT's assessment had already covered a far greater extraction volume;[1200]

(ii) disproportionately stopping operations in El Corchalito and indefinitely barring operations in La Adelita for "probably" exceeding extraction limits by 1%, rather than allowing CALICA to demonstrate that no such excess had occurred, and delaying resolution of the case for over three years;[1201]

1197 Memorial, ¶ 210; Reply, ¶ 177.

1198 C-PHM, ¶ 135.

1199 C-PHM, ¶¶ 135-137, 140, *citing* **R-0080-ESP**, Federal Law on Environmental Liability (in force as of 24 May 2021), 7 June 2013, pp. 4, 5 of the PDF; 2021 Hearing Transcript (Spanish), Day 3, 690:18-692:9 ([redacted] Cross-Examination); *see* Rejoinder, ¶¶ 84, 87; 2021 Hearing Transcript (Spanish), Day 1, 250:22-251:8; 2021 Hearing Transcript (Spanish), Day 3, 688:22-690:21 (Counsel for Respondent during [redacted] Cross-Examination). *See also* C-PHM, ¶ 138.

1200 Memorial, ¶ 219, *citing* **C-0117-SPA**, Shutdown Order, p. 280; [redacted] First Report, ¶¶ 230, 248, 250; **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, p. 13 of the PDF; **C-0077-SPA**, CALICA EIS, pp. 28, 54; *see* Memorial, ¶ 150.

1201 Memorial, ¶ 220; *see* Memorial, ¶¶ 147, 150, 157, 159, *also citing* **CL-0062-ENG**, *MTD v. Chile*, Award, ¶ 109.

(iii) threatening (through the API Quintana Roo) to shut down CALICA's operations if CALICA did not stop seeking reimbursement for amounts collected from CALICA for over a decade, and proceeding (through PROFEPA) to shut down operations five days later;[1202]

(iv) placing CALICA in a catch-22 situation by requiring CALICA to admit that it exceeded the extraction limit in order to lift the Shutdown Order and close its administrative proceeding;[1203]

(v) aggravating the dispute by filing a criminal complaint against CALICA based on CALICA's alleged quarrying of 2.15 hectares without authorisation, which proceeding remains pending.[1204]

B. RESPONDENT'S POSITION

998. Respondent asserts that the basis for the partial and temporary closure of the El Corchalito property was the result of CALICA: (i) extracting material below the water table over a larger area, than what was established in the Corchalito/Adelita Federal Environmental Authorization, based on the information that PROFEPA had in the file; (ii) concentrating operations on the El Corchalito site, instead of distributing it between the two properties referred to in the Federal EIA; and (iii) extracting at a rate greater than 7 hectares per year below the water table, exceeding the annual extraction rate by 16% as of 2017 and not only 1% as Claimant argues. As a consequence, Respondent contends that even if the total area exploited was 139.2 hectares as Claimant submits, CALICA would have exceeded the 140 hectares limitation shortly thereafter.[1205]

999. Respondent submits that PROFEPA's actions were consistent with applicable Mexican law, as well as its general practices and authority. In this respect, PROFEPA determined that CALICA did not operate at El Corchalito and La Adelita in a manner consistent with

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1202 Memorial, ¶ 221; *see* Memorial, ¶¶ 133-135.
1203 Memorial, ¶ 222; *see* Memorial, ¶ 157. *See also* Reply, ¶ 170.
1204 Memorial, ¶ 222; *see* Memorial, ¶ 158.
1205 Counter-Memorial, ¶ 318, *citing* SOLCARGO First Report, ¶¶ 58-59; R-PHM, ¶ 62; *see* Rejoinder, ¶¶ 20-25.

its own approved plans under the Corchalito/Adelita Federal Environmental Authorization and the MIA (*Manifestación de Impacto Ambiental*).[1206]

1000. For Respondent, Claimant asks the Tribunal to act like a Mexican court regarding technical, legal and factual issues that have arisen in the Mexican proceedings, including related to specific techniques used to measure the mining areas. Respondent argues that no customary international law standard addresses such technical issues in Mexican environmental law.[1207] In its view, it is not appropriate for these issues to be resolved by an international arbitral tribunal.[1208]

1001. Moreover, Respondent submits that Claimant does not address one of the fundamental aspects of CALICA's violation, being that it exploited the area authorized for a 20-year exploitation in only 17 years, in breach of the extraction formalities on the two properties.[1209]

1002. According to Respondent, CALICA and not PROFEPA is responsible for the delays in the substantiation and completion of the proceedings before PROFEPA, due to appeals and lawsuits brought before Mexican courts.[1210] In Respondent's view, CALICA could have accepted the determinations and resolved them more quickly, but made the strategic decision to litigate and use the international investment arbitration proceeding to pressure Respondent's authorities.[1211]

1003. Respondent submits that CALICA was given the opportunity to defend itself by presenting arguments and evidence as it saw fit. It argues that PROFEPA's determination sets forth in detail the factual and legal arguments presented by CALICA in each of its briefs, and responds to each in detail citing relevant facts, legislation and Mexican judicial precedents.[1212]

1206 Counter-Memorial, ¶ 315.
1207 Counter-Memorial, ¶ 315.
1208 Rejoinder, ¶ 336.
1209 Counter-Memorial, ¶ 315; Rejoinder, ¶ 337.
1210 Counter-Memorial, ¶¶ 315-316, *citing* **RL-011-ENG**, *Glamis Gold v. United States,* Award, ¶ 779.
1211 Counter-Memorial, ¶ 320.
1212 Counter-Memorial, ¶ 317.

1004. According to Respondent, the legal proceedings on which Claimant's claims are based are ongoing, such as PROFEPA's final Resolution and CALICA's request for renewal of the Corchalito/Adelita Federal Environmental Authorization and there will be further developments.[1213] In any event, Respondent submits that CALICA has been afforded ample opportunity to participate in the PROFEPA proceedings and has had full access to the Mexican courts. Accordingly, Respondent asserts that CALICA has been afforded due process and the PROFEPA proceedings are not inconsistent with Respondent's obligations under NAFTA Article 1105.[1214]

1005. Specifically, Respondent submits that CALICA has exercised, and continues to exercise, its right to due process at the stage of the inspection visits, the temporary partial closure by the Shutdown Order, the October 2020 Resolution, and in the Mexican courts.[1215] In addition, Respondent argues that PROFEPA's October 2020 Resolution compiled and analyzed CALICA's evidence and representations, concluding that CALICA violated the Corchalito/Adelita Federal Environmental Authorization, but giving CALICA the possibility to regularise its situation.[1216]

1006. Respondent submits that PROFEPA acted in accordance with the law and principles of good faith. Respondent relies on the evidence of its SOLCARGO experts, in this respect, that PROFEPA:[1217]

> . . . went beyond the minimum requirements imposed by law to decree a safety measure because, not satisfied with its own findings, it gave CALICA the opportunity to demonstrate the absence of risk to the environment, which the company was unable to do.

1007. For Respondent, PROFEPA's actions were always aimed at protecting the environment from harm and complying with its regulatory framework and were therefore in good faith.[1218] In the assessment of Respondent's SOLCARGO experts, "[t]he imposition of

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1213 Counter-Memorial, ¶ 321; Rejoinder, ¶ 339.
1214 Counter-Memorial, ¶¶ 321-322.
1215 Counter-Memorial, ¶¶ 323-324, *citing* Rodríguez Rosas First Statement, ¶ 49; SOLCARGO First Report, ¶ 222. *See also* Counter-Memorial, ¶ 325, *citing* SOLCARGO First Report, ¶ 62; Rejoinder, ¶ 340.
1216 Counter-Memorial, ¶¶ 326-327, *citing* SOLCARGO First Report, ¶¶ 247, 249, 250.
1217 Counter-Memorial, ¶ 337, *citing* SOLCARGO First Report, ¶ 137. *See also* Counter-Memorial, ¶ 339, *citing* Balcázar First Statement, ¶ 90.
1218 Counter-Memorial, ¶ 338.

the Closure was a safety/corrective measure duly founded and motivated, based on the environmental damage actually observed at the Project site".[1219]

C. TRIBUNAL'S ANALYSIS

1008. Claimant submits that PROFEPA's proceedings and the resulting shutdown of operations in El Corchalito violated NAFTA Articles 1103 and 1105 on the basis that it was arbitrary, denied CALICA due process, and failed to provide adequate reasons.

1009. The Tribunal has rejected Claimant's arguments on the basis of NAFTA Article 1103 and does not give them further consideration here (*see* ¶¶ 776 and 800 above).

1010. Claimant's claims revolve around certain measures by Respondent in respect of El Corchalito. The Tribunal will examine whether these measures, individually or as a whole, breach the MST in NAFTA Article 1105. In particular, the Tribunal will determine whether Respondent's conduct was "arbitrary, grossly unfair, unjust or idiosyncratic" or "involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process" (*see* ¶ 760 above).

1011. In determining whether Respondent's conduct was arbitrary, the Tribunal will consider whether it was "founded on prejudice or preference rather than on reason or fact" (*see* ¶ 785 above).[1220]

1012. According to Claimant, it is recognized that NAFTA Article 1105 includes the obligation to act in good faith, which requires Respondent (i) not to "manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination";[1221] (ii) to abstain from using legal instruments for purposes other than

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1219 Counter-Memorial, ¶ 338, *citing* SOLCARGO First Report, ¶ 58.

1220 Memorial, ¶ 200, *citing* **CL-0043-ENG**, UNCTAD, Fair and Equitable Treatment, p. 78. *See also* Reply, ¶ 154.

1221 Memorial, ¶ 216, *citing* **CL-0027-ENG**, *Saluka v. Czech Republic*, Partial Award, ¶ 307.

those for which they were created;[1222] and (iii) not to take measures disproportionate to the ends they pursue.[1223]

1013. Consistent with the Tribunal' reasoning at ¶ 787 above, the Tribunal considers that general principles of due process, good faith and respect for the rule of law are part of the MST under NAFTA Article 1105, although there is no standalone obligation to act in good faith or to ensure due process. As such, a breach of the MST may arise from conduct which is contrary to good faith, lacking in due process, manifestly in violation of consistency and transparency, involve use of a legal instrument for purposes other than those for which they were created, or from measures disproportionate to the ends they pursue.

1014. The Tribunal will first review the factual background to this claim in Section 1 below, before addressing the basis for the supplemental inspection (Section 2); the failure to consider expert evidence (Section 3); the basis for the Shutdown Order (Section 4); the October 2020 Resolution (Section 5); the catch 22 situation (Section 6); and the implications of domestic legal proceedings (Section 7). The Tribunal's conclusion on El Corchalito is found in Section 8.

1. Factual Background on El Corchalito

1015. The factual background to this claim is set out at ¶¶ 257 to 269 above and is elaborated in this Section.

1016. On 12 May 2017, PROFEPA ordered an inspection to verify CALICA's compliance with the Federal EIA.[1224] On 15-19 May 2017, PROFEPA's inspectors visited El Corchalito and La Adelita, *inter alia*, to measure the area that CALICA had quarried in El Corchalito.[1225]

1017. The Inspection Report issued on 19 May 2017 ("**First PROFEPA Inspection Report**") made a number of findings:[1226]

1222 Memorial, ¶ 216, *citing* **CL-0056-ENG**, *Frontier v. Czech Republic*, Award, ¶ 300.
1223 Memorial, ¶ 216, *citing, inter alia,* **CL-0060-ENG**, *Occidental v. Ecuador*, Award.
1224 **C-0114-SPA**, First PROFEPA Inspection Order, 12 May 2017.
1225 **C-0115-SPA**, First PROFEPA Inspection Report, 19 May 2017.
1226 **C-0115-SPA**, First PROFEPA Inspection Report, 19 May 2017, pp. 4-5, 39, 47 of the PDF.

(i) Extraction activities had only been carried out at El Corchalito;

(ii) Extraction of stone material above the water table was completed 100%, and extraction had begun below the water table;

(iii) No activity had been carried out at La Adelita, which remained in its natural condition; and

(iv) Three bodies of water ("*espejos de agua*") were observed at the location of extraction below the water table, and were found to measure (1) 817,999m^2, (2) 434,849 m^2 and (3) 149,688 m^2 respectively, i.e., a total of 140.25 hectares. These bodies of water form at places where extraction below the water table takes place, as the water rises to the surface following extraction.[1227]

1018. On 26 May 2017, CALICA made observations on the First PROFEPA Inspection Report. It asserted, *inter alia*, that PROFEPA's inspectors had: (i) failed to establish an inspection protocol; (ii) acknowledged that their measurements were "estimates" and "approximations"; and (iii) used inadequate and improperly calibrated instruments, including a Global Positioning System (GPS) device.[1228] CALICA offered to provide expert evidence by a civil engineer Mr. de la Cruz on the topographical survey and spatial representations in a specific portion of the Report.[1229]

1019. PROFEPA accepted expert evidence from CALICA's expert Mr. de la Cruz in October 2017.[1230] In parallel, PROFEPA appointed an expert, Mr. David May, who also provided his views in October 2017.[1231]

1020. In November 2017, SEMARNAT addressed a note to CALICA, stating that both Mr. de la Cruz and Mr. May had found that the coordinates of the polygons listed in the First PROFEPA Report were not properly identified in the Report, the spatial representations in the Report did not coincide with those of the experts, and the experts further reached

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1227 *See* **C-0115-SPA**, First PROFEPA Inspection Report, 19 May 2017, p. 39 of the PDF; Balcázar First Statement, ¶ 31.
1228 **C-0116-SPA**, CALICA Observations to PROFEPA, 26 May 2017, pp. 25-26 of the PDF.
1229 **C-0116-SPA,** CALICA Observations to PROFEPA, 26 May 2017, p. 32 of the PDF.
1230 **C-0120-SPA**, De la Cruz Hernández Report.
1231 **C-0145-SPA**, May Gutiérrez Report.

the same view that "*la configuración espacial del* '*Espejo de Agua número 3*' *es incorrecta, así como el desfase en los 'Caminos internos secundarios*'".[1232]

1021. In light of the differences identified by the experts, SEMARNAT indicated that it was considered necessary to carry out a supplemental inspection ("*visita de inspección complementaria*") in order to verify CALICA's compliance, specifically in relation to the surfaces and georeferenced location of the works and activities in the project to quarry under the water table in El Corchalito and La Adelita.[1233]

1022. On 24 November 2017, PROFEPA ordered another inspection of El Corchalito and La Adelita,[1234] which took place on 27-29 November 2017.[1235] In the resulting inspection report ("**Second PROFEPA Inspection Report**"), it was noted that an irregularly shaped body of water ("*espejo de agua*") was observed, formed as a result of extraction of material below the water table. Based on the measurements taken of the georeferenced location of the polygon that forms the body of water ("[*l*]*a ubicación georreferenciada del poligono que forma el espejo de agua*"), the body of water was assessed to be 1,421,520.02209 m^2 (i.e., 142.15 hectares) in size.[1236]

1023. It is noted that between the First PROFEPA Inspection Report and the Second PROFEPA Inspection Report, the three bodies of water observed in El Corchalito merged into one. According to Respondent, this evidences the continued mining below the water table in that period.[1237]

1024. On 28 November 2017, CALICA filed observations on the PROFEPA Second Inspection Report, disputing, *inter alia*, the methodology of the measurements, and the determination of coordinates and surfaces.[1238] In CALICA's view, the GPS device and technique used to carry out the measurements (including a fiberglass tape) created

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1232 **C-0119-SPA**, Note from SEMARNAT to CALICA regarding the experts' coinciding reports, dated 17 November 2017 ("Note from SEMARNAT to CALICA"), p. 6.

1233 **C-0119-SPA**, Note from SEMARNAT to CALICA, p. 6.

1234 **C-0121-SPA**, Supplemental PROFEPA Order, 24 November 2017.

1235 **C-0118-SPA**, Second PROFEPA Inspection Report, 27 November 2017, pp. 4, 13, 49 of the PDF.

1236 **C-0118-SPA**, Second PROFEPA Inspection Report, 27 November 2017, p. 10 of the PDF. *See also* pp. 16, 33-36 of the PDF.

1237 Counter-Memorial, ¶ 76, *citing* Balcázar First Statement, ¶ 55.

1238 *See, e.g.,* **C-0146-SPA**, CALICA's Observations to the Second PROFEPA Inspection Report, dated 27-29 November 2017 ("CALICA Observations to the Second PROFEPA Inspection Report"), pp. 6, 7, 8, 12.

reasonable doubts about the veracity of the measurements in the PROFEPA Second Inspection Report.[1239] CALICA offered an expert report by the civil engineer Mr. de la Cruz to address the measurements recorded in the PROFEPA Second Inspection Report.[1240]

1025. With respect to El Corchalito, on 22 January 2018, PROFEPA issued an *Acuerdo de Emplazamiento* ordering the shutdown of activities at El Corchalito based on the findings of the supplemental inspection ("**Shutdown Order**").[1241] The Shutdown Order imposed a partial and temporary closure of the El Corchalito site as a safety measure ("*medida de seguridad*") due to CALICA's:[1242]

> … probable breach detected during the inspection visits, **by presumably having exceeded 2.15 hectares of the authorized surface area for the extraction of limestone below the water table, and considering that the company has already carried out the total use of the total surface area of extraction of limestone below the water table which was authorized yearly until 2020.** (Emphasis in original)
>
> … *(probable incumplimiento detectado durante las visitas de inspección realizadas,* ***al presuntamente haberse rebasado en 2.15 hectáres el área autorizada para la extracción de roca caliza por debajo del manto freático, aunado a que la empresa ya realizó el aprovechamiento total de la superficie de extracción de roca caliza por debajo del nivel freático el cual le fue autorizado en anualidades hasta el 2020.)*** (Emphasis in original)

1026. The "partial" nature of the closure relates to the fact that it took effect in El Corchalito (extraction activities never having commenced in La Adelita), and did not cover CALICA's activities at La Rosita.[1243] While quarrying had not taken place in La Adelita, Claimant argues that the Shutdown Order applied equally to that lot, "further precluding activities there."[1244]

1027. According to the Shutdown Order, CALICA held an authorization for a total of 140 hectares of extraction under the water table during the lifetime of the Project, calculating based on the entitlement to quarry seven hectares below the water table annually during

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1239 **C-0146-SPA**, CALICA Observations to the Second PROFEPA Inspection Report, pp. 12-15.
1240 **C-0146-SPA**, CALICA Observations to the Second PROFEPA Inspection Report, pp. 16-17.
1241 **C-0117-SPA**, Shutdown Order.
1242 **C-0117-SPA**, Shutdown Order, pp. 8 of the PDF (Translation by Claimant), 280.
1243 Rodríguez Rosas First Statement, ¶ 118.
1244 Memorial, ¶ 149. *See also* Reply, ¶ 58.

20 years.[1245] The Shutdown Order reported that the calculation of the size of the *espejo de agua* in El Corchalito was 1,421,520.02209m^2 (corresponding to the PROFEPA Second Inspection Report), being 2.15 hectares more than had been authorized, taking into account the 20 year lifetime of the Project.[1246]

1028. The Shutdown Order stated that as a result of the additional 2.15 hectares of extraction without authorization, there was a risk of damage to natural resources, as the authorities were not in a position to determine the environmental impacts, and it was practically impossible to remedy the impact, as the subsoil is non-renewable.[1247]

1029. In this regard, the Shutdown Order held that the extraction beyond the authorized limit may cause, *inter alia,* (i) permanent and irreversible damage to the soil structure; (ii) an increase in noise level from drilling and blasting, transport and processing; (iii) an increase of pollution from gasses and dust; (iv) a decrease in air quality; (v) impact on land stability; (vi) impact on human health and quality of life for the neighboring inhabited areas and vegetation and agricultural crops; and (vii) impact on underwater supply wells with potential salt water pollution.[1248]

1030. In the Shutdown Order, PROFEPA stated with respect to the expert evidence of Mr. de la Cruz proffered by CALICA (*see* ¶ 1024 above) that while the methodology used by the PROFEPA inspectors was not adequate for the generation of a topographical survey, it was suitable for the task which was carried out, being the generation of a cartographic document for the georeferencing of points of interest to obtain approximate surfaces, distances and lengths.[1249] For this reason, PROFEPA considered it appropriate to reject the expert evidence offered by CALICA, on the basis that it was not "directly related" to the actions carried out by PROFEPA, as it had not carried out a topographic survey:[1250]

> *En virtud de lo anterior, esta Dirección General* ***considera procedente desechar la prueba pericial ofrecida por el promovente****, al no estar directamente relacionada con las actuaciones realizadas por esta autoridad,*

1245 **C-0117-SPA**, Shutdown Order, pp. 275-276.
1246 **C-0117-SPA**, Shutdown Order, p. 277.
1247 **C-0117-SPA**, Shutdown Order, p. 278.
1248 **C-0117-SPA**, Shutdown Order, pp. 8 of the PDF (Translation by Claimant), 279-280; *see also* pp. 298-299.
1249 **C-0117-SPA**, Shutdown Order, p. 170.
1250 **C-0117-SPA**, Shutdown Order, p. 171.

> *al no haberse realizado en ningún momento un "**levantamiento topográfico**" en el predio materia de la visita de inspección en cita*. (Emphasis in original)

1031. The Shutdown Order noted that, if CALICA did not temporarily close El Corchalito, this would constitute "*delitos, de conformidad con* [el] *Código Penal Federal*," which may be punished with imprisonment.[1251]

1032. In order to lift the Shutdown Order, the Order stated that CALICA was required to present to PROFEPA an amended Federal EIA issued by SEMARNAT.[1252]

1033. In the Shutdown Order, CALICA was ordered to present a number of documents to PROFEPA. Among those was a bathymetric study of the body of water (*espejo de agua*) in El Corchalito, to determine compliance with the authorized extraction volume, to be carried out by an experienced higher education or research institution.[1253] CALICA was also ordered to present a georeferenced plan of the area quarried below the water table.[1254]

1034. On 24 January 2018, PROFEPA notified the Shutdown Order to CALICA.[1255] The same day, PROFEPA personnel executed the Shutdown Order at CALICA's facilities.[1256]

1035. On 14 February 2018, CALICA filed its observations disputing the findings of the Shutdown Order, and submitting a number of documents. CALICA also offered expert reports by (i) civil engineer Mr. de la Cruz on the topographical survey and/or measurements and spatial representations in a specific part of the Shutdown Order,[1257] and (ii) an expert on agronomical engineering parasitology.[1258]

1036. On 30 October 2018, PROFEPA declined to consider the expert report of Mr. de la Cruz offered by CALICA, on the basis that it was not directly related to the actions carried out by the authority, which did not undertake a topographic survey:[1259]

1251 **C-0117-SPA**, Shutdown Order, p. 280.
1252 **C-0117-SPA**, Shutdown Order, p. 281; *see also* p. 284.
1253 **C-0117-SPA**, Shutdown Order, p. 286.
1254 **C-0117-SPA**, Shutdown Order, p. 285.
1255 **R-0007-ESP**, PROFEPA Notice, 24 January 2018.
1256 **C-0122-SPA**, Profepa clausura proyecto de la empresa Calica en Playa, SIPSE.COM.
1257 **C-0124-SPA**, CALICA Observations to Shutdown Order, p. 22.
1258 **C-0124-SPA**, CALICA Observations to Shutdown Order, p. 23.
1259 **C-0125-SPA**, PROFEPA Docket, 30 October 2018, p. 18.

> *En virtud de lo anterior, esta Dirección General* ***considera procedente desechar la prueba pericial en materia de Ingeniería Civil ofrecida por el promovente****, al no estar directamente relacionada con las actuaciones realizadas por esta autoridad, al no haberse realizado en ningún momento un "****levantamiento topográfico****" en el predio materia de la visita de inspección en cita.* (Emphasis in original)

1037. On 30 October 2020, PROFEPA issued Administrative Resolution No. PFPA/4.1/2C.27.5/00028-17/012/2020 dated 30 October 2020 (the "**October 2020 Resolution**").[1260] This Resolution determined that CALICA had not disproven ("*no desvirtuó*") the probable infractions identified in the Shutdown Order and had: (i) exceeded the authorisation for extraction by 2.15 hectares; (ii) undertaken extraction in only one of the two authorised lots in which the Project should have been carried out; and (iii) without authorisation, undertaken extraction under the water table at a rate of exploitation different to the authorised 7 hectares per year.[1261]

1038. In the October 2020 Resolution, PROFEPA imposed the following on CALICA:

- Fines in an amount of MXN 7,985,053.92 for non-compliance with the law and environmental damage;[1262]
- Imposition, as a sanction, of the partial, temporary closure of El Corchalito with respect to the additional 2.15 hectares exploited by CALICA;[1263]
- Corrective measures to order CALICA to: (i) adhere to its Federal EIA in carrying out its activities; (ii) submit to PROFEPA the Federal EIA issued by SEMARNAT certifying the area of extraction for the additional 2.15 hectares exploited, or a modification to the Federal EIA extending the total authorised area below the water table and authorising the extraction exclusively in El Corchalito; and (iii) carry out reforestation and other actions necessary to recharge the aquifer damaged by CALICA's activities.[1264]

1260 **R-0005-ESP**, October 2020 Resolution. According to [redacted], the October 2020 Resolution was notified to CALICA on 6 November 2020.
1261 **R-0005-ESP**, October 2020 Resolution, pp. 161-162.
1262 **R-0005-ESP**, October 2020 Resolution, p. 234.
1263 **R-0005-ESP**, October 2020 Resolution, pp. 169-198, 219-223, 234.
1264 **R-0005-ESP**, October 2020 Resolution, pp. 230-234.

1039. In addition, the October 2020 Resolution mentioned that CALICA did not prove that it had: (i) a signalling system to avoid accidents prior to the First PROFEPA Inspection Report; (ii) civil liability insurance for third party damage caused by its transporters; (iii) results of the evaluation of impacts of its extraction, with video support; or (iv) delivered semi-annual results to SEMARNAT during the period of the Restoration Program of the Reforested Area.[1265] CALICA was ordered to submit certain documentation to PROFEPA on these matters.[1266]

2. Basis for Supplemental Inspection

1040. Claimant argues that there was no basis in Mexican law for PROFEPA's "supplemental inspection". Claimant relies on [redacted] and [redacted] in support of its view that PROFEPA's inspections are not legally equivalent to evidence-gathering exercises under the law cited by PROFEPA and Respondent, but are rather acts of authority.[1267]

1041. Respondent asserts that the site inspections, including the supplemental inspection, were validly carried out under Mexican law. In this respect, Respondent argues that supplemental inspections are not independent procedures but are part of the same procedure to obtain further evidence or understanding of the facts.[1268] Respondent disagrees with the analogies drawn by [redacted] and [redacted] between supplemental inspections in fiscal matters and environmental matters.[1269]

1042. Moreover, Respondent asserts that the supplementary inspections were challenged before the Mexican courts, which so far have not declared them illegal or invalid. According to Respondent, the supplementary visits are based on Articles 49 and 50 of the Federal Law of Administrative Procedure (*Ley Federal de Procedimiento Administrativo*, "**LFPA**"),

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1265 **R-0005-ESP**, October 2020 Resolution, pp. 162-163.

1266 **R-0005-ESP**, October 2020 Resolution, pp. 230-234.

1267 Reply, ¶ 172, *citing* [redacted] Second Report, ¶¶ 14-17, 20; [redacted] Report, ¶¶ 144, 149, 156, 166-170; **R-0005-ESP**, October 2020 Resolution**,** pp. 38-39; *see also* Reply, ¶ 66; Counter-Memorial, ¶ 62; Rodríguez Rosas First Statement, ¶¶ 33-34.

1268 Counter-Memorial, ¶¶ 335-336, *citing* Rodríguez Rosas First Statement, ¶¶ 30-31; SOLCARGO First Report, ¶ 152. *See also* Rejoinder, ¶ 340, *citing* Mijangos Report, ¶¶ 184-186; R-PHM, ¶ 57, *citing* SOLCARGO First Report, ¶ 151; 2021 Hearing Transcript (Spanish), Day 4, 935-936 (Mijangos Testimony).

1269 R-PHM, ¶¶ 58-59, *citing* 2021 Hearing Transcript (Spanish), Day 3, 778, 803 ([redacted] Testimony); Rodríguez Rosas First Statement, ¶¶ 64-77.

complementary to the General Law of Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*, "**LGEEPA**").[1270]

1043. Based on the evidence presented, the Tribunal does not consider it established that the supplementary inspection of El Corchalito by PROFEPA was irregular in the sense of being contrary to Respondent's obligations of FET under NAFTA.

1044. Title Six, Chapter II of the LGEEPA covers PROFEPA's power to carry out inspections, and the conditions and procedures pursuant to which such inspections shall be carried out. Article 162 provides, in part, that:[1271]

> *Las autoridades competentes podrán realizar, por conducto de personal debidamente autorizado, visitas de inspección, sin perjuicio de otras medidas previstas en las leyes que puedan llevar a cabo para verificar el cumplimiento de este ordenamiento…*

1045. As confirmed by [redacted] there is no specific regulation for supplemental inspections.[1272]

1046. The November 2017 note from SEMARNAT indicating the need for the supplemental inspection (*see* ¶¶ 1020-1021 above) references the above provision and other Mexican legislation as its basis.[1273] It further specifically references Article 50 of the LFPA, as follows:[1274]

> ***SEGUNDO.-*** *En razón de las diferencias detectadas entre las representaciones espaciales resultantes de los dictámenes periciales y el acta de inspección, se considera necesario con fundamento en el artículo 50 de la Ley Federal de Procedimiento Administrativo, a efecto de allegarse de los medios de prueba necesarios, para un mejor proveer dentro del expediente administrativo en que se actúa, y contar con certidumbre, así como no afectar la esfera jurídica del inspeccionado,* ***ordena realizar una visita de inspección complementaria,*** *cuyo objeto será verificar el cumplimiento del Término Primero de la Autorización de Impacto Ambiental, número* ***D.O.O.DGOEIA.-0007237*** *de fecha treinta de noviembre del dos mil, específicamente con relación a las superficies y ubicación georreferenciada de las obras y actividades que integran el proyecto denominado* ***"Aprovechamiento de Roca Caliza por Debajo del Manto Freático en los***

1270 R-PHM, ¶ 60, *citing* 2021 Hearing Transcript (Spanish), Day 4, 932, 933 (Mijangos Testimony).
1271 **C-0127-SPA**, LGEEPA, Art. 162, p. 78.
1272 2021 Hearing Transcript (English), Day 3, 575:1-2 ([redacted] Presentation).
1273 **C-0119-SPA**, Note from SEMARNAT to CALICA, p. 8.
1274 **C-0119-SPA**, Note from SEMARNAT to CALICA, p. 6.

> ***Predios El Corchalito y La Adelita en Solidaridad Quintana Roo",*** *promovido por la moral denominada* ***Calizas Industriales del Carmen, S.A. de C.V.*** (Emphasis in original)

1047. In the Second PROFEPA Inspection Report, the nature of the supplemental inspection was stated to be "con el fin de contar con mayores elementos para mejor proveer dentro del expediente administrativo citado al rubro, la visita tendrá por objeto verificar **el cumplimiento del Término Primero de la Autorización del Impacto Ambiental**…"[1275] (Emphasis in original)

1048. Article 49 of the LFPA provides as follows:[1276]

> *Los actos necesarios para la determinación, conocimiento y comprobación de los hechos en virtud de los cuales deba pronunciarse resolución, se realizarán de oficio por el órgano que tramite el procedimiento.*

1049. Article 50 of the LFPA provides:[1277]

> *En los procedimientos administrativos se admitirán toda clase de pruebas, excepto la confesional de las autoridades. No se considerará comprendida en esta prohibición la petición de informes a las autoridades administrativas, respecto de hechos que consten en sus expedientes o de documentos agregados a ellos.*
>
> *La autoridad podrá allegarse de los medios de prueba que considere necesarios, sin más limitación que las establecidas en la ley.*
>
> *El órgano o autoridad de la Administración Pública Federal ante quien se tramite un procedimiento administrativo, acordará sobre la admisibilidad de las pruebas ofrecidas. Sólo podrá rechazar las pruebas propuestas por los interesados cuando no fuesen ofrecidas conforme a derecho, no tengan relación con el fondo del asunto, sean improcedentes e innecesarias o contrarias a la moral y al derecho. Tal resolución deberá estar debidamente fundada y motivada.*

1050. The Tribunal is satisfied from the above provisions and the PROFEPA documentation that the supplementary inspection had a valid legal basis under Mexican law and is not persuaded that it was improper for such an inspection to be carried out in principle. Contrary to the evidence of [redacted] that "there is no room for this type of visit in

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1275 **C-0121-SPA**, Supplemental PROFEPA Order, 24 November 2017, p. 3.
1276 **C-0110-SPA**, Mexican Federal Law of Administrative Procedure ("LFPA"), Art. 49, p. 14.
1277 **C-0110-SPA**, LFPA, Art. 50, p. 14.

the procedures stated,"[1278] it is established that supplementary visits can and do take place in practice.[1279]

1051. Claimant argues that Article 50 of the LFPA cannot be relied on as a basis for the inspection because PROFEPA's inspectors cannot be considered as gathering "proof" as administrative reports are not "means of proof" under Mexican law (unlike expert reports).[1280] However, the Tribunal accepts the evidence of Dr. Mijangos that PROFEPA's power to carry out inspections in environmental matters is broad, subject to applicable law.[1281] The Tribunal further accepts that the supplemental inspection formed part of the proceeding that included the first inspection:[1282]

> *PROFEPA procedió a realizar una inspección complementaria, lo cual no tuvo por objeto modificar el acto que dio origen a la visita, sino contar con todos los elementos que permitan la adopción de una decisión fundada, motivada y razonada…*

1052. It follows that the Tribunal is not persuaded by [redacted] evidence that the supplementary inspection is invalid as it sought to remedy conduct that PROFEPA had itself classified as deficient,[1283] or because supplementary inspections are "unusual".[1284] Nor does the Tribunal consider that the alleged procedural defects in the supplementary inspection such as exceeding the scope of the purposes of the visit, the use of incorrect data from the first inspection, or the improper identification of inspectors,[1285] would render the supplementary inspection arbitrary or in breach of CALICA's due process rights under NAFTA even if they were established.

3. Failure to Consider Expert Evidence

1053. Claimant takes issue with PROFEPA's failure to consider expert evidence offered by CALICA that contradicts PROFEPA's finding that CALICA had exceeded its authorized quarrying extraction limits. In this regard, while PROFEPA accepted the first submission

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1278 2021 Hearing Transcript (English), Day 3, 666:1-3 ([redacted] Presentation). *See also* [redacted] Second Report, ¶¶ 13-15.
1279 2021 Hearing Transcript (English), Day 4, 795:16-796:6 (Mijangos Presentation).
1280 Reply, ¶ 66; C-RPHM, n. 116.
1281 2021 Hearing Transcript (English), Day 4, 795:1-4, 795:16-796:6 (Mijangos Presentation).
1282 Mijangos Report, ¶ 186. *See also* SOLCARGO First Report, ¶¶ 138-144.
1283 2021 Hearing Transcript (English), Day 3, 574:5-7; [redacted] First Report, ¶¶ 150, 153.
1284 [redacted] First Report, ¶ 151.
1285 [redacted] First Report, ¶¶ 158-168.

of expert evidence from CALICA (*see* ¶ 1019 above), Claimant asserts that following the PROFEPA Second Inspection Report and the Shutdown Order, CALICA offered to submit the same kind of independent expert evidence to scrutinize the measurements, but Respondent rejected this offer for no valid reason (*see* ¶¶ 1030 and 1036 above).[1286] For Claimant, Respondent's conduct was contrary to due process and arbitrary.[1287]

1054. While PROFEPA refused CALICA's evidence for being not "directly related" to its measurement, Claimant relies on the evidence of [redacted] to contend that this drew an artificial distinction between a "topographic survey" and a "georeferenced survey".[1288]

1055. Claimant argues that the acceptance of its first submission of evidence does not illustrate that it was given adequate opportunity to present evidence and defend itself, because the same kind of independent expert evidence was rejected by Respondent on the following two occasions.[1289]

1056. Respondent contends that the rejection of the expert evidence was because CALICA did not provide new elements for the environmental authority to consider, since the second and third expert opinions contained information identical to that which had already been presented by CALICA's first expert report, and accepted by PROFEPA.[1290]

1057. Respondent further argues that the rejection of CALICA's second and third expert opinions was because they referred to a topographic survey, instead of a georeferenced survey as PROFEPA had done.[1291]

1286 Reply, ¶ 162; C-PHM, ¶ 101, *citing* **C-0146-SPA**, CALICA Observations to the Second PROFEPA Inspection Report, pp. 32-42; **C-0117-SPA**, Shutdown Order, p. 191.

1287 Reply ¶160; C-PHM, ¶ 97.

1288 Reply, ¶ 164, *citing* [redacted] Report, ¶ 54; C-PHM, ¶ 102, *citing* **C-0117-SPA**, Shutdown Order, p. 191, also citing 2021 Hearing Transcript (Spanish), Day 3, 626:2-5 (Rodríguez Cross-Examination); C-PHM, ¶ 103, *citing* 2021 Hearing Transcript (Spanish), Day 4, 1032:21-1034:1 ([redacted] Redirect Examination), also citing [redacted] Second Report, ¶¶ 57, 61. *See also* C-PHM, ¶ 104; C-RPHM, ¶ 45.

1289 Reply, ¶ 162; C-PHM, ¶ 101, *citing* **C-0146-SPA**, CALICA Observations to the Second PROFEPA Inspection Report, pp. 32-42; **C-0117-SPA**, Shutdown Order, p. 191.

1290 R-PHM, ¶¶ 76-78, *citing* 2021 Hearing Transcript (Spanish), Day 4, 1016, 1029 (Rábago Testimony); 2021 Hearing Transcript (Spanish), Day 3, 885-886 (Del Razo Ochoa Testimony); *see also* R-PHM, ¶¶ 80-81.

1291 R-PHM, ¶ 79, *citing* 2021 Hearing Transcript (Spanish), Day 4, 1027 ([redacted] Testimony). *See also* R-PHM, ¶ 82.

1058. The Tribunal notes Respondent's concern that Claimant attempts to have the Tribunal rule on technical issues assessed by PROFEPA.[1292] The Tribunal's task is not to rule on, or to second-guess, technical assessments made by PROFEPA. The Tribunal's determination relates to whether Respondent's conduct is consistent with the MST under NAFTA, applying the standard as set out at ¶¶ 1010-1013 above.

1059. The Tribunal considers Respondent's refusal to consider Claimant's expert evidence to be without rational basis related to the facts and therefore arbitrary (*see* ¶¶ 1030 and 1036 above). In this respect, the Tribunal makes the following observations.

(a) The Relevance of Due Process

1060. While NAFTA Article 1105 does not include a standalone obligation to ensure due process, a breach of the MST may arise from conduct which is, *inter alia*, lacking in due process, manifestly in violation of consistency and transparency, or involve use of a legal instrument for purposes other than those for which they were created (*see* ¶ 1013 above).

1061. By Respondent's account, the alleged extraction of limestone over a larger area and at a higher rate than authorized was the main reason ("*principal motivo*") to order the temporary and partial closure of El Corchalito.[1293] The opportunity for Claimant to be heard with respect to that decision is therefore not incidental but of fundamental importance. This is concerned not with the acceptance of CALICA's position on the merits, but with the opportunity to present that position for due consideration by the authority making a determination.

(b) Rejection for Not Being "Directly Related"

1062. Respondent granted Claimant a partial right to be heard when it gave the opportunity for CALICA to present expert evidence challenging the measurements taken by PROFEPA as recorded in the First PROFEPA Inspection Report (*see* ¶ 1019 above). However, this opportunity was deficient. In the Shutdown Order of January 2018, which implemented a partial and temporary closure of the El Corchalito site for presumably having exceeded the authorized surface area of extraction (*see* ¶ 1025 above), and again on 30 October

1292 *See* R-PHM, ¶ 84.
1293 Counter-Memorial, ¶ 74.

2018 (*see* ¶ 1036 above), PROFEPA rejected the expert evidence offered by CALICA on the basis that it was not "directly related" ("*no estar directamente relacionada*") to the actions carried out by PROFEPA.[1294]

1063. This stated reason for refusal to consider CALICA's expert evidence is unreasonable to the extent that the Tribunal finds it to be arbitrary, i.e., founded on prejudice or preference rather than on reason or fact. The expert evidence sought to be introduced by CALICA related to the measurements taken by PROFEPA of parts of the El Corchalito site. The exclusion of that evidence on the basis that it was a topographic survey as opposed to the georeferenced survey carried out by PROFEPA is artificial and untenable in the circumstances. The expert evidence is clearly directly related to PROFEPA's conduct which was to take measurements on the El Corchalito site which were used as the basis for PROFEPA's determination that CALICA had exceeded its permitted extraction limit. The Tribunal is not satisfied that there is a meaningful difference between a topographical survey and a georeferenced survey that would render the measurements by CALICA's expert irrelevant, and accepts the evidence of Claimant's expert [redacted] that in certain contexts, the terms may be used interchangeably.[1295]

1064. Moreover, CALICA's second rejected offer of February 2018 was for expert evidence on the topographical survey "and/or" measurements, thus leaving no doubt that its evidence related to measurements in general ("*levantamiento topográfico plasmado y/o mediciones y las representaciones espaciales*").[1296]

1065. Even on the basis of CALICA's first rejected offer of November 2017, the direct connection between CALICA's expert evidence and PROFEPA's actions was identified by CALICA when it proffered the report, describing it as relating to the topographic survey and spatial representations in sheets 20 to 47 of the PROFEPA Second Inspection Report:[1297]

> ***Pericial en Materia de Ingeniería Civil**, con referencia únicamente al levantamiento topográfico plasmado y las representaciones espaciales que*

1294 **C-0117-SPA**, Shutdown Order, p. 171; **C-0125-SPA**, PROFEPA Docket, 30 October 2018, p. 18.

1295 2021 Hearing Transcript (English), Day 4, 879:22-881:3 ([redacted] Direct Examination). *See also* [redacted] Report, ¶ 61.

1296 **C-0124-SPA**, CALICA Observations to Shutdown Order, p. 22.

1297 **C-0146-SPA**, CALICA Observations to the Second PROFEPA Inspection Report, p. 16.

> *obra en las hojas* […] *20 a 47 del Acta de Inspección No. 001-17-C, levantadas por los Inspectores Asistentes, la cual estará a cargo del* ***Ingeniero Civil Tomás de la Cruz Hernández****...* (Emphasis in original)

1066. This is confirmed by the seven points mentioned to be addressed by the expert, which include whether his measurements coincide with those of PROFEPA and the adequacy of the methodology and equipment used by PROFEPA:[1298]

> *Que diga el perito:*
>
> *1. Que utilizando el cuadro de coordenadas plasmado en las hojas 20 a 36 del Acta de Inspección No. 001-17-C, elabore un plano de los polígonos descritos señalando su denominación;*
>
> *2. Que diga el perito, si los polígonos resultantes se encuentran debidamente identificados y en su caso, identifique cualquier inconsistencia sobre los mismos;*
>
> *3. Que diga el perito, si el plano por él generado, coincide con las representaciones espaciales elaboradas por la autoridad que obran a hojas 37 a 47 del Acta de Inspección No. 001-17-C;*
>
> *4. Que diga el perito si la metodología utilizada por la autoridad es la adecuada, eficiente y eficaz para la generación de los documentos topográficos que obra a hojas 37 a 47 del Acta de Inspección No. 001-17-C que tiene a la vista, agregando el perito todo lo que estime pertinente conforme a su leal saber y entender;*
>
> *5. Que diga el perito el tiempo y medios necesarios para realizar el levantamiento topográfico señalado en el Acta de Inspección No. 001-17-C respecto de un predio con una superficie superior a 350 (trescientos cincuenta) hectáreas para que tenga un debido sustento técnico y validez científica.;*
>
> *6. Que diga el perito las características técnicas del receptor GPS marca Trimble modelos Pathfinder ProXRT, con un controlador Trimble Recon, receptor FGPS ProXR y antena GNSS;*
>
> *7. Que el perito señale con precisión cuáles son sus conclusiones sobre los temas que conforman el presente dictamen pericial, así como las fuentes de información que consultó para realizarlo.*
>
> *Esta prueba se relaciona con los hechos que se mencionan en este escrito por virtud del cual CALICA, formula observaciones y ofrece pruebas en relación con los hechos y/u omisiones asentados en el Acta de Inspección No. 001-17-*

[1298] **C-0146-SPA**, CALICA Observations to the Second PROFEPA Inspection Report, pp. 16-17.

> *C correspondiente a la visita de inspección realizada los días 27, 28 y 29 de noviembre de 2017.*

1067. In addition to being without rational basis, PROFEPA's conduct was also manifestly inconsistent in that the rejected expert evidence was of the same nature (i.e., a topographical survey and spatial representations) that had been offered by CALICA and accepted by PROFEPA following the First PROFEPA Inspection Report (*see* ¶ 1019 above). Respondent agrees that both CALICA's expert (Mr. de la Cruz) and PROFEPA's expert (Mr. May) found inaccuracies in the survey reflected in the First PROFEPA Inspection Report. In its view, this necessitated the supplementary inspection that was carried out in November 2017 (*see* ¶ 1021 above).[1299] This confirms the relevance of the rejected evidence to PROFEPA's measurements referenced in the Second PROFEPA Inspection Report and the Shutdown Order.

1068. On the basis of the foregoing, even assuming that it was required for CALICA's evidence to be directly related to PROFEPA's actions, the Tribunal finds that the stated basis for rejecting CALICA's evidence was not based on reason or fact. The Tribunal accepts Claimant's position[1300] that the rejection of CALICA's evidence appears designed to prevent CALICA demonstrating that the measurements were inaccurate or defective.

(c) Submission of Evidence under Mexican Law

1069. Article 164, second paragraph of the LGEEPA refers to the opportunity to make observations and offer evidence following an inspection by PROFEPA:[1301]

> *Concluida la inspección, se dará oportunidad a la persona con la que se entendió la diligencia para que en el mismo acto formule observaciones en relación con los hechos u omisiones asentados en el acta respectiva, y para que ofrezca las pruebas que considere convenientes o haga uso de ese derecho en el término de cinco días siguientes a la fecha en que la diligencia se hubiere practicado.*

1070. The Tribunal accepts Claimant's position and the expert evidence of Claimant's expert [redacted] that the general principle under Mexican law on the submission of evidence

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1299 Counter-Memorial, ¶ 60.

1300 *See* Reply, ¶ 165, *citing* **CL-0051-ENG**, Christoph Schreuer, *Arbitrary or Discriminatory Measures*, IN THE FUTURE OF INVESTMENT ARBITRATION, 183 (R. Alford, C. Rogers, eds. 2009), p. 188; *see also* Reply, ¶¶ 70-73.

1301 **C-0127-SPA**, LGEEPA, Art. 164, p. 79.

in administrative proceedings is in favour of the admission of evidence, with refusal of evidence being limited to defined situations.[1302] Article 50 of the LFPA provides, in relevant part:[1303]

> *El órgano o autoridad de la Administración Pública Federal ante quien se tramite un procedimiento administrativo, acordará sobre la admisibilidad de las pruebas ofrecidas. Sólo podrá rechazar las pruebas propuestas por los interesados cuando no fuesen ofrecidas conforme a derecho, no tengan relación con el fondo del asunto, sean improcedentes e innecesarias o contrarias a la moral y al derecho. Tal resolución deberá estar debidamente fundada y motivada.*

1071. Article 50 of the LFPA allows evidence to be rejected where it is unrelated to the merits of the case ("*no tengan relación con el fondo del asunto*"), as opposed to where evidence is not "directly related" to the actions of the authority in question, which was the justification given by PROFEPA ("*al no estar directamente relacionada con las actuaciones realizadas por esta autoridad*") (*see* ¶¶ 1025 and 1036 above). A "directly related" standard is more restrictive and would allow greater scope for the exclusion of evidence.

1072. The Tribunal's understanding of Article 50 of the LFPA was confirmed by Respondent's expert Mr. del Razo Ochoa of SOLCARGO at the Hearing:[1304]

> Mr. Arvelo:… I wanted to confirm that you know that the evidence presented in administrative procedures, such as the one installed by PROFEPA, can only be rejected on the basis of a few grounds, and one is that there be no relationship with the merits of the matter?
>
> Mr. del Razo Ochoa: That's right.

1073. Mr. Machado, also of SOLCARGO, acknowledged that the word "directly" (in the sense of "directly related") does not appear in Article 50 of the LFPA, but opined that "not being related" and "not being directly related" are all the same, and that there was an interpretation of the legal provision by the administrative authority.[1305]

1302 Reply, ¶ 164, *citing* [redacted] First Report, ¶¶ 213-214; [redacted] Report, ¶ 108; C-PHM, ¶ 103, *citing* 2021 Hearing Transcript (Spanish), Day 3, 885:3-887:3 (SOLCARGO Cross-Examination).

1303 **C-0110-SPA**, LFPA, Art. 50, p. 13.

1304 2021 Hearing Transcript (English), Day 3 755:21-756:5 (SOLCARGO Cross-Examination).

1305 2021 Hearing Transcript (English), Day 3, 757:18-758:1, 758:14-18 (SOLCARGO Cross-Examination).

1074. The Tribunal is not persuaded that the wording of Article 50 of the LFPA which allows rejection of evidence that "*no tengan relación con el fondo del asunto*" (*see* ¶ 1070 above) is the same as a standard that would reject evidence "*al no estar directamente relacionada con las actuaciones realizadas por esta autoridad*" (*see* ¶ 1030 above). The Tribunal acknowledges the discretion of a public authority which has appropriate leeway to apply the law. However, that discretion cannot justify arbitrary conduct that would constitute the breach of an international obligation. Seeking to hold CALICA's evidence to a higher standard than that provided by law contributes to the arbitrariness of the treatment of CALICA.

(d) Additional Basis of Exclusion for Identical Evidence

1075. It was only in the October 2020 Resolution that PROFEPA gave an additional reason for the rejection of the second and third expert opinions of Mr. de la Cruz. At this time, PROFEPA added that the reports offered by CALICA were identical and did not provide additional information.[1306] Respondent now relies on the alleged identical nature of the evidence as a basis for its assertion that Claimant failed to adequately exercise its right to present new and appropriate information.[1307]

1076. With respect to the three reports of Mr. de la Cruz being the same,[1308] the October 2020 Resolution stated, *inter alia*:[1309]

> *La prueba pericial en materia de Ingeniería Civil ofrecida por la empresa, como ya se ha señalado, no fue desechada de manera ilegal y prejuiciosa, sino que su desechamiento, se debió a que no tiene relación con las actuaciones realizadas por esta autoridad ambiental federal en las diligencias de inspección realizadas y las mediciones practicadas en ellas, toda vez que la autoridad a través de sus inspectores no realizó en un "levantamiento topográfico" en el predio visitado,* ***aunado a que el contenido del cuestionario sobre el que se señaló debía versar, se identifica plenamente con aquel que sirvió de base para el desahogo de la misma***

1306 **R-0005-ESP**, October 2020 Resolution**,** p. 52.

1307 R-PHM, ¶¶ 80-81.

1308 The first report being the report dated 26 October 2017 that had been accepted by PROFEPA (*see* **C-0120-SPA**, De la Cruz Hernández Report); the second report being the report offered with CALICA's observations in November 2017 (*see* **C-0146-SPA**, CALICA Observations to the Second PROFEPA Inspection Report, p. 16) and the third report being the report offered with CALICA's observations in February 2018 (*see* **C-0124-SPA**, CALICA Observations to Shutdown Order, p. 22).

1309 **R-0005-ESP**, October 2020 Resolution, p. 52.

> ***prueba ofrecida el veintiséis de mayo de dos mil diecisiete***. (Emphasis added)

1077. The Tribunal does not consider that a justification provided two years after the fact and during the pendency of this arbitration proceeding can supplement the reasons for rejection provided when rejecting the evidence in January and October 2018. When rejecting CALICA's evidence, there was no assertion that it was unnecessary as similar evidence had already been filed and taken into account by PROFEPA. Mr. del Razo Ochoa's view was that PROFEPA's reaction was ". . . okay, I have already seen all of the inconsistencies that I think were expressed with the production of the previous questionnaires. I am satisfied and I think that the evidence is not proper."[1310] However, this does not accord with the evidence on record as to the reasons provided to CALICA for rejecting their offers of evidence at the time.

1078. Moreover, the second and third offers of expert evidence by CALICA related to measurements in the Second PROFEPA Inspection Report. While the proffered expert evidence has the same subject matter (or, as was put to [redacted] in cross-examination, there is no "substantive difference" between them),[1311] the measurements in question were different to the measurements in the First PROFEPA Inspection Report.[1312] As such, they could not be identical to the first expert report that was offered. The fact that the second and third expert reports of Mr. de la Cruz are identical is inapposite, as they both challenge the measurements in the Second PROFEPA Inspection Report and neither of them were taken into account.

(e) Accuracy of PROEFPA's Measurements

1079. In Claimant's view, CALICA's evidence would have shown that PROFEPA's measurements were inaccurate and sloppy, but PROFEPA deliberately turned a blind eye to these errors.[1313] Respondent disagrees.[1314] While noting that Claimant's concerns

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1310 2021 Hearing Transcript (English), Day 3, 763:15-19 (Del Razo Ochoa Cross-Examination).

1311 2021 Hearing Transcript (English), Day 4, 875:5-9 ([redacted] Cross-Examination). *See also* [redacted] Report, ¶ 54.

1312 *See* 2021 Hearing Transcript (English), Day 3, 552:1-10 (Rodríguez Cross-Examination); 2021 Hearing Transcript (Spanish), Day 3, 633:17-634:7 (Rodríguez Cross-Examination).

1313 C-PHM, ¶¶ 105-106, *citing, inter alia,* [redacted] Second Report, ¶¶ 63-66; 2021 Hearing Transcript (English), Day 4, 886:14-20 ([redacted] responding to questions from the Tribunal).

1314 *See, inter alia,* R-PHM, ¶ 90, *citing* 2021 Hearing Transcript (Spanish), Day 4, 1014 [redacted] Testimony).

about the measurements are not frivolous, the Tribunal does not consider it proper to further speculate as to whether PROFEPA would have reached a different conclusion about its measurements had it taken into account CALICA's evidence. For present purposes, the important point is that the CALICA's counter-evidence on an issue that was determinative of its rights in El Corchalito was arbitrarily excluded.

(f) Whether the Evidence was Admitted

1080. Respondent's assertion, denied by Claimant,[1315] that the expert reports were in fact admitted by PROFEPA but were rejected or excluded (*desechadas*) for not being directly related to the object of the supplementary inspection is unsupported by the evidence. CALICA's offer to submit such evidence was rejected before the expert evidence was submitted. The offer only contains the questions or issues that CALICA intended for the expert Mr. de la Cruz to address ("he will have to answer the following questionnaire" / ("*deberá contestar el siguiente cuestionario*").[1316]

1081. Additionally, this submission is inconsistent with another submission by Respondent that the expert evidence offered by CALICA does not contain a survey with new elements, but is simply a questionnaire of less than one page requesting the analysis of technical aspects that had already been considered when CALICA's first expert report was admitted.[1317] The offer to submit expert evidence contains the questions to be addressed by the expert, and not the report itself. This was well understood by PROFEPA when it accepted CALICA's first May 2017 offer of an expert report. The expert report addressing the questions was subsequently produced to PROFEPA in October 2017 (*see* ¶¶ 1018-1019 above).

(g) Alleged Deficiencies and Differences in the Measurements

1082. Respondent further argues that the deficiencies in measurements during the supplementary inspection by PROFEPA are attributable to CALICA, which never indicated the coordinates of measurement at the site as it was required to.[1318] The Tribunal

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1315 R-PHM, ¶ 77; C-RPHM, ¶ 44.

1316 **C-0146-SPA**, CALICA Observations to the Second PROFEPA Inspection Report, pp. 7, 40; **C-0124-SPA**, CALICA Observations to Shutdown Order, p. 22.

1317 R-PHM, ¶ 88.

1318 R-PHM, ¶ 85, *citing* 2021 Hearing Transcript (Spanish), Day 4, 1109-1110 (Rábago Testimony).

is not persuaded on the evidence that this is the case. Further and in any event, this does not provide a justification for the refusal of consideration of CALICA's offered evidence.

1083. Respondent also takes issue with the evidence of Claimant's expert [redacted] which in its view is based on assumptions and reflects uncertainty, since he did not make a survey himself.[1319] One aspect of the exercise carried out by [redacted] was to evaluate the methodology of PROFEPA for arriving at its measurements, by comparing PROFEPA's measurements to the report of CALICA's expert Mr. de la Cruz of January 2020.[1320] The Tribunal has weighed this evidence in its analysis, noting that it is not decisive for the Tribunal's determinations in this arbitration for alleged breaches of NAFTA whether [redacted] himself carried out a survey.

1084. Additionally, Respondent submits that [redacted] fully validated ("*plenamente validada*") PROFEPA's measurements, which is denied by Claimant.[1321] The Tribunal agrees with Claimant that [redacted] only confirmed that he had successfully replicated PROFEPA's calculations,[1322] which he used for the purpose of the comparison referred to in ¶ 1083 above.

1085. According to Respondent, the measurement points of El Corchalito were determined by CALICA during the supplementary inspection by PROFEPA and any issue with those points is therefore attributable to Claimant.[1323] Claimant denies this account.[1324] According to the record of the inspection:[1325]

> *El método que se llevó a cabo para la obtención de planos georrefenciados* [sic], *fue el levantamiento en campo de vértices definidos por el visitado de cada uno de los límites de los predios, obras, actividades que se llevan a cabo en el sitio de inspección…*

1086. The evidence does not support Respondent's account, since it refers to the measurement points of the lots as opposed to the points used to measure the body of water. [redacted]

1319 R-PHM, ¶ 90.
1320 [redacted] Report, ¶ 39.
1321 R-PHM, ¶ 84, *citing* 2021 Hearing Transcript (Spanish), Day 4, 1024-1025 ([redacted] Testimony); C-RPHM, ¶ 51.
1322 *See* 2021 Hearing Transcript (English), Day 4, 871:18-872:7 ([redacted] Cross-Examination); [redacted] Report, ¶ 29.
1323 R-PHM, ¶¶ 92-93.
1324 C-RPHM, ¶ 50.
1325 **C-0118-SPA**, Second PROFEPA Inspection Report, 27 November 2017, p. 20.

confirmed this understanding in redirect examination at the 2021 Hearing, while he had initially expressed a view more aligned with Respondent's argument during cross-examination, as relied on by Respondent.[1326] As such, while the record does state that CALICA had informed PROFEPA that the *espejo de agua* had formed as a result of the extraction of material under the water table,[1327] the Tribunal is not persuaded that it was CALICA that had provided the measurement points to PROFEPA. Further and in any event, this does not provide a justification for the refusal of consideration of CALICA's subsequently offered evidence and was not a reason provided for the refusal of that evidence.

1087. For Respondent, PROFEPA is not obliged to take measurements using the method that best suits the affected company. It only has to validate compliance with the terms and conditions of the Federal EIA.[1328] Respondent asserts that this is the way Mexican environmental legislation was designed, and the conditions under which CALICA decided to invest. The private party is obliged to present all the evidence within its reach and provide elements to the authority at the opportune procedural stage.[1329]

1088. The Tribunal does not suggest that PROFEPA was obliged to take measurements using the method that best suited CALICA. However, it follows from the Tribunal's conclusions above that CALICA was denied the opportunity to present all the evidence at the appropriate procedural stage. This rendered the process by which PROFEPA reached its conclusions, and took measures against CALICA, to be arbitrary.

1089. Another argument put forward by Respondent is that survey results on different days will necessarily differ due to the difference in the level of the *espejo de agua* found in El Corchalito arising from external factors (*e.g.,* evaporation, rain, water filtration, etc.).[1330] This may be the case, but is not decisive for present purposes, since it does not provide a

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1326 2021 Hearing Transcript (English), Day 4, 878:14-879:4 ([redacted] Cross-Examination), 881:4-22 ([redacted] Redirect Examination).
1327 **C-0118-SPA**, Second PROFEPA Inspection Report, 27 November 2017, p. 10.
1328 R-PHM, ¶ 73.
1329 R-PHM, ¶ 73.
1330 R-RPHM, ¶ 69.

justification for the refusal of consideration of CALICA's subsequently offered evidence and was not a reason provided for the refusal of that evidence.

(h) Conclusion on Failure to Consider Expert Evidence

1090. For the above reasons, the Tribunal finds that Respondent arbitrarily refused to consider CALICA's offered expert evidence in relation to the measurements of extraction at El Corchalito. In this respect, CALICA was not afforded due process in the procedure by which PROFEPA reached its conclusions about CALICA's compliance with environmental regulations, and took action adversely affecting CALICA.

1091. While the Tribunal duly takes note of the findings of Mexican courts, its conclusions above are not altered by the fact that CALICA has unsuccessfully challenged PROFEPA's refusal to consider its expert evidence in Mexican courts.[1331] This Tribunal makes its determination that the MST has not been met under the NAFTA, with a different legal basis and involving different legal considerations to those applied by Mexican courts.

4. Basis for the Shutdown Order

1092. Claimant alleges that the Shutdown Order did not have a proper basis under Mexican law, lacked good faith and was disproportionate.[1332]

1093. In this regard, the Shutdown Order established the partial and temporary shutdown of El Corchalito and La Adelita as a security measure on the following basis:[1333]

> … in light of the probable breach detected during the inspection visits, **by presumably having exceeded 2.15 hectares of the authorized surface area for the extraction of limestone below the water table, and considering that the company has already carried out the total use of the total surface area of extraction of limestone below the water table which was authorized yearly until 2020.** (Emphasis in original)

1331 *See* R-RPHM, ¶ 68; **R-0086-ESP**, Specialized Chamber in Environmental and Regulatory Matters of the Federal Administrative Court, Annulment Proceeding No. 73/21-EAR-01-6, Interlocutory Resolution, 19 April 2021.

1332 Memorial, ¶ 213, *citing* [redacted] First Report, ¶¶ 169, 174; Memorial, ¶¶ 219-220; Reply, ¶¶ 81-89.

1333 **C-0117-SPA**, Shutdown Order, p. 8.

1094. In Claimant's view, a "probable breach" is insufficient as Mexican law requires a finding of imminent risk of damage to natural resources. Arguing that the alleged excess extraction was approximately 1% over the limit, Claimant also submits that the shutdown on this basis was disproportionate.[1334]

1095. Insofar as Respondent's witness Ms. Balcázar gives a statement about alleged environmental harm in these proceedings, Claimant contends that Respondent cannot try to supply the missing demonstration of environmental harm in this way, when PROFEPA did not conduct the necessary studies at the time. In any event, Claimant argues that its experts [redacted] and [redacted] establish that no environmental or ecological impacts flowed from CALICA's activities in El Corchalito beyond those deemed manageable by SEMARNAT.[1335]

1096. Article 170 of the LGEEPA, cited in the Shutdown Order as the legal basis for the security measure,[1336] provides as follows, in part:[1337]

> *Cuando exista riesgo inminente de desequilibrio ecológico, o de daño o deterioro grave a los recursos naturales, casos de contaminación con repercusiones peligrosas para los ecosistemas, sus componentes o para la salud pública, la Secretaría, fundada y motivadamente, podrá ordenar alguna o algunas de las siguientes medidas de seguridad:*
>
> *I.- La clausura temporal, parcial o total de las fuentes contaminantes, así como de las instalaciones en que se manejen o almacenen especímenes, productos o subproductos de especies de flora o de fauna silvestre, recursos forestales, o se desarrollen las actividades que den lugar a los supuestos a que se refiere el primer párrafo de este artículo…*

1097. According to Respondent, a modification of the natural conditions without authorization under Mexican law is sufficient to establish the existence of environmental harm, without

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1334 Memorial, ¶ 213, *citing* [redacted] First Report, ¶¶ 169, 174; *see* Memorial, ¶¶ 174 *et seq*. *See also* C-PHM, ¶¶ 135-137, 138, 140, *citing* **R-0080-ESP**, Federal Law on Environmental Liability, pp. 4-5; 2021 Hearing Transcript (Spanish), Day 3, 690:18-692:9 ([redacted] Cross-Examination); *see* Rejoinder, ¶¶ 84, 87; 2021 Hearing Transcript (Spanish), Day 1, 250:22-251:8, 2021 Hearing Transcript (Spanish), Day 3, 688:22-690:21 (Counsel for Respondent during [redacted] Cross-Examination); C-RPHM, ¶ 63; Reply, ¶¶ 81-83; Reply, ¶ 173, *citing* [redacted] Second Report, ¶¶ 49, 79, 85, 87, 163.

1335 Reply, ¶ 174, *citing* [redacted] Report, ¶¶ 8-14.

1336 **C-0117-SPA**, Shutdown Order, p. 7.

1337 **C-0127-SPA**, LGEEPA, Art. 170.

needing to prove the harm in question.[1338] Claimant argues that this interpretation of the Mexican legislation is incorrect.[1339]

1098. In response to a question from the Tribunal about what damage to the environment had been caused by the alleged additional 2 hectares of quarrying, Respondent's expert Mr. Rábago testified that:[1340]

> … one would have to look at the definition of "environmental harm" as understood in Mexico, which is to engage in any activity that must have an environmental impact without having an express authorization.
>
> In this regard, these 2.15 hectares, as they were not authorized, well, all of the activities undertaken and their environmental consequences would be categorized as "harm".
>
> The main one, and especially mindful of the definition of the legislation, is the nonpresence of 2.15 hectares of a natural resource called "land" which was exploited for its own benefit without the correspondence authorization.

1099. [redacted] disagrees, arguing that the authorities must prove an adverse and measurable loss, change, impairment, impact or modification to the environment. In [redacted] view, Respondent wrongly relies on a carve out to an exception to the definition of damage in the law.[1341]

1100. In this respect, Article 2(III) of the *Ley Federal de Responsabilidad Ambiental* provides:[1342]

> *Para los efectos de esta Ley se estará a las siguientes definiciones, así como aquellas previstas en la Ley General del Equilibrio Ecológico y la Protección al Ambiente, las Leyes ambientales y los tratados internacionales de los que México sea Parte. Se entiende por:*
>
> …
>
> *III. Daño al ambiente: Pérdida, cambio, deterioro, menoscabo, afectación o modificación adversos y mensurables de los hábitat, de los ecosistemas, de los elementos y recursos naturales, de sus condiciones químicas, físicas o*

1338 R-PHM, ¶ 66, *citing* 2021 Hearing Transcript (Spanish), Day 4, 1119 (Rábago Testimony). *See also* Rejoinder, ¶ 84; R-RPHM, ¶¶ 95-98; R-PHM, ¶ 63, *citing* 2021 Hearing Transcript (Spanish), Day 3, 844 (Del Razo Ochoa Testimony).

1339 C-PHM, ¶¶ 135-140.

1340 2021 Hearing Transcript (English), Day 4, 954:15-955:6 (Rábago Testimony).

1341 2021 Hearing Transcript (English), Day 3, 600:5-601:11 ([redacted] Cross-Examination).

1342 **R-0080-ESP**, Federal Law on Environmental Liability, Art. 2(III).

> *biológicas, de las relaciones de interacción que se dan entre éstos, así como de los servicios ambientales que proporcionan. Para esta definición se estará a lo dispuesto por el artículo 6o. de esta Ley…*

1101. Article 6 of the Ley Federal de Responsabilidad Ambiental further provides:

> *No se considerará que existe daño al ambiente cuando los menoscabos, pérdidas, afectaciones, modificaciones o deterioros no sean adversos en virtud de:*
>
> ***I.** Haber sido expresamente manifestados por el responsable y explícitamente identificados, delimitados en su alcance, evaluados, mitigados y compensados mediante condicionantes, y autorizados por la Secretaría, previamente a la realización de la conducta que los origina, mediante la evaluación del impacto ambiental o su informe preventivo, la autorización de cambio de uso de suelo forestal o algún otro tipo de autorización análoga expedida por la Secretaría; o de que,*
>
> ***II.** No rebasen los límites previstos por las disposiciones que en su caso prevean las Leyes ambientales o las normas oficiales mexicanas.*
>
> *La excepción prevista por la fracción I del presente artículo no operará, cuando se incumplan los términos o condiciones de la autorización expedida por la autoridad.*

1102. Based on the competing interpretations of the above legislation, the Tribunal prefers the evidence of [redacted] and the position of Claimant that to establish the existence of damage to the environment it is necessary to establish adverse and measurable loss, change, deterioration, impairment, impact or modification ("*[p]érdida, cambio, deterioro, menoscabo, afectación o modificación adversos y mensurables*" (*see* ¶ 1101 above). The language relied on by Respondent is indeed a carve-out to the exception provided for in Article 6 of the *Ley Federal de Responsabilidad Ambiental* ("*La excepción prevista por la fracción I del presente artículo no operará, cuando se incumplan los términos o condiciones de la autorización expedida por la autoridad*," (*see* ¶ 1101 above). The Tribunal is not persuaded as a matter of fact that this language establishes a positive definition of environmental damage based on any non-compliance with the terms and conditions of an authorization.

1103. The Tribunal notes that while Claimant's expert [redacted] was taken to the same legal provisions under cross-examination and is relied on by Respondent as having confirmed

its interpretation,[1343] [redacted] While familiar with federal environmental legislation, the Tribunal does not find [redacted] statement to be a compelling affirmation of Respondent's position:[1344]

> Q. … can we consider that there is environmental harm when there is a breach of the terms or conditions of the authorization issued by the authority? Is that right?
>
> A. [redacted] Well, to put it- -and I'm sorry if I don't express myself in the correct manner using the appropriate legal terms, but from the legal standpoint, that is what is said, although, technically speaking, that's not how it happens.

1104. As such, leaving aside the issue of the correctness of the measurements of extraction and taking PROFEPA's description of the situation at face value, it is difficult to align a "probable breach" for "presumably having exceeded 2.15 hectares of the authorized surface area for the extraction of limestone below the water table" with the legal bases for ordering a shutdown in Article 170 of the LGEEPA. Those legal bases require circumstances such as an imminent risk of ecological imbalance, serious damage or deterioration to natural resources or contamination with dangerous repercussions (*see* ¶ 1096 above).

1105. While the correctness of the measurements of the surface area of extraction is contested by Claimant,[1345] the Tribunal notes that it is not the Tribunal's task to rule on, or to second-guess, technical assessments made by PROFEPA (*see* ¶ 1058 above). The Tribunal gives due deference to PROFEPA's assessment of the situation at the El Corchalito site at the relevant time. In this regard, evidence on the extent of environmental damage as measured by experts engaged in these arbitration proceedings after the fact is of limited assistance.

1106. The Tribunal further notes that in the Shutdown Order PROFEPA mentions that the excess extraction "presumably" exerted greater pressure on the ecosystem

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1343 R-PHM, ¶ 67, *citing* 2021 Hearing Transcript (Spanish), Day 4, 1077-1078 ([redacted] Testimony).

1344 2021 Hearing Transcript (English), Day 4, 917:20-918:6.

1345 *See* C-PHM, ¶ 113, *citing* Mendoza Second Statement, ¶¶ 6-7; **C-0167-SPA**, Navy Expert Report, dated 6 September 2021, pp. 2-3, 4, 42, 47, 85 (Background (c), (d), Seventh Conclusion); [redacted] Second Report, ¶ 20; **C-0148-SPA**, Expert Report of de la Cruz Hernández filed with the Mexican Office of the Attorney General (*Fiscalía General de la República*), dated 23 January 2020 ("De la Cruz Hernández Expert Report"), p. 3.

("*presuntamente se llevó a cabo una mayor presión sobre el ecosistema*"),[1346] and affected a number of natural processes ("*se ven afectados una serie de procesos naturales*")[1347] (*see also* ¶¶ 1028-1029 above). It would therefore not be accurate to conclude that PROFEPA's closure of the site was based on a mere technicality without consideration of environmental harm that was or that may be underway.

1107. In this respect, the Tribunal is not able to conclude, as [redacted] opines, that the reference to a risk of damage to natural resources is made "in an obvious attempt to meet a procedural requirement."[1348]

1108. In respect of the proportionality of the measure, Claimant contends that the excess extraction area that was measured based on the bodies of water that had formed represented just over 1% of the extraction area, which it submits is minimal.[1349]

1109. Respondent asserts that the excess area rather represents 16% of the permitted extraction area, given that Claimant was only permitted to extract at a rate of seven hectares per year.[1350] Further and in any event, Respondent argues that the 1% non-compliance was sufficient reason for the sanctions imposed by the authorities.[1351]

1110. The Federal EIA states in respect of El Corchalito and La Adelita that "28 hectares a year will be exploited, of these 7 will be below the water table."[1352] In the Shutdown Order, PROFEPA referred to this provision of the Federal EIA and the 20 year term of the authorization and calculated the total permitted area of extraction below the water table, stating that CALICA "has the environmental impact authorization for the utilization of a total of 140 has. below the water table throughout the project's useful lifetime."[1353] In finding that the surface area of the *espejo de agua* exceeded the authorization, PROFEPA stated that it was "equivalent to a total of 142.15 hectares of extractive utilization below

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1346 **C-0117-SPA**, Shutdown Order, p. 298.
1347 **C-0117-SPA**, Shutdown Order, p. 299.
1348 [redacted] First Report, ¶ 175.
1349 Memorial, ¶ 147; Reply, ¶¶ 58, 74, 162.
1350 Counter-Memorial, ¶ 339, *citing* SOLCARGO First Report, ¶¶ 58-59; Rejoinder, ¶ 22, *citing* SOLCARGO Second Report, ¶ 105; R-PHM, ¶ 83.
1351 Rejoinder, ¶ 20.
1352 **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, p. 11.
1353 **C-0117-SPA**, Shutdown Order, p. 3 (Translation by Claimant).

the water table accumulated to this date, *i.e.,* 2.15 hectares more than the authorized surface area for the referred to project, considering a useful lifetime of twenty years."[1354]

1111. The Tribunal will give further consideration to the annual permitted extraction area at ¶¶ 1140 *et seq.* below. For present purposes, the Tribunal notes that in the Shutdown Order PROFEPA did not refer to CALICA having exceeded a permitted annual rate of extraction. Consistent with PROFEPA's own characterization of the excess extraction, it did represent 1.5% of the total permitted surface area of extraction under the water table and not 16%, as Respondent asserts.[1355] Respondent's calculation appears to be arrived at based on Respondent's view that CALICA was under an obligation to limit its annual extraction to 7 hectares below the water table, meaning that after 17 years of extraction, it could have extracted a maximum of 119 hectares.[1356] In this context, Respondent argues that CALICA's 142.15 hectares of extraction exceeded its limit by 23.15 hectares at that moment in time, rather than having exceeded it by 2.15 hectares.[1357] By Respondent's logic, 23.15 hectares in excess / 140 hectares maximum = 16.5%. The Tribunal does not accept this position, as (i) it was not the stated basis of PROFEPA's determination, which found an excess of 2.15 hectares not 23.15 hectares;[1358] and (ii) it has not been established that an annual permitted extraction surface area below the water table applied (*see* ¶¶ 1142 and 1145 below).

1112. In the Shutdown Order, it was noted that the areas measured by PROFEPA during the inspection and supplementary inspection were "estimated" and "approximate".[1359] This is confirmed by Respondent, which submits that the measurement methodology was not exact, but was nevertheless adequate for the purpose and that CALICA was informed of a potential variation of +/- 1 to 4 m in the coordinates.[1360]

1354 **C-0117-SPA**, Shutdown Order, p. 5 (Translation by Claimant).
1355 2.15/140 x 100 = 1.53%.
1356 Counter-Memorial, ¶¶ 338-339; SOLCARGO First Report, ¶¶ 58-59; Balcázar First Statement, ¶ 90.
1357 2021 Hearing Transcript (English), Day 1, 212:17-213:4 (Respondent's Opening Statement).
1358 *See* **C-0117-SPA**, Shutdown Order, p. 5.
1359 **C-0117-SPA**, Shutdown Order, pp. 136, 170, 187, 190.
1360 Counter-Memorial, ¶ 42. *See also* Balcázar First Statement, ¶ 30.

1113. Noting the acknowledged approximate nature of the measurements, the Tribunal finds the closure of the El Corchalito site based on exceeding the authorized extraction limit by 2.15 hectares to be a slim basis for a measure with such severe consequences.

1114. Moreover, it follows from the Tribunal's determination at ¶ 1090 above that the finding of "probable breach" and presumed excess extraction was made in circumstances where CALICA had offered, and was refused, the opportunity to present evidence contradicting the measurements upon which that finding was based.

1115. Beyond the refusal to accept expert evidence offered by CALICA, Claimant alleges that PROFEPA ignored other evidence that the extraction limits had not been exceeded, including a georeferenced plot and bathymetric study that PROFEPA itself ordered to be undertaken as "corrective measures" in the Shutdown Order. According to Claimant, this evidence showed that CALICA had not exceeded 140 hectares of quarrying and was within the limits prescribed by its Federal EIA.[1361]

1116. There is further disagreement between the Parties as to the nature of the findings and their relevance, if any, in relation to (i) measurements taken during criminal investigation proceedings; (ii) measurements by experts designated by Mexico's Attorney General's Office in December 2020; (iii) measurements by CALICA's expert Mr. de la Cruz in January 2020; and (iv) measurements taken by the Mexican Navy in July 2021.[1362]

1117. In Respondent's view, the evidence obtained via a bathymetric study was not conclusive regarding the volume of extraction. Accordingly, PROFEPA did not issue a sanction for the volume extracted.[1363] It also disputes Claimant's characterization of the findings of the Mexican Navy. Respondent further emphasizes that surveys undertaken on different days will be different, due to external factors, and that the measurements were taken in different legal proceedings.[1364]

1361 2021 Hearing Transcript (English), Day 1, 55:6-56:11; Memorial, ¶ 209; *see* Memorial, ¶¶ 154-155; Reply, ¶ 79, *citing* **C-0126-SPA**, Bathymetric study of the extraction area of CALICA in Quintana Roo, Mexico, dated February 2018; C-PHM, ¶ 113; C-RPHM, ¶ 48.

1362 C-PHM, ¶¶ 113-116, *citing, inter alia*, **C-0167-SPA**, Navy Expert Report; **C-0148-SPA**, De la Cruz Hernández Expert Report; **R-0126-ESP**, Respondent's Letter to the Tribunal dated 8 November 2021; C-RPHM, ¶ 48.

1363 Counter-Memorial, ¶¶ 101, 329-330, *citing* Balcázar First Statement, ¶¶ 71, 79.

1364 R-RPHM, ¶¶ 69-73, *citing*, *inter alia***, C-0167-SPA**, Navy Expert Report. *See also* R-PHM, ¶¶ 95-96.

1118. It is not the task of this Tribunal to determine the correctness of the measurements taken by PROFEPA as compared to measurements taken at different times and in different legal proceedings. The evidence of other measurements does confirm for the Tribunal the slim basis for the finding that was made in the Shutdown Order that CALICA had exceeded its authorized extraction limits.

1119. As noted by SOLCARGO, PROFEPA's measurements relate to the surface area of extraction and not to the volume of material actually extracted by CALICA.[1365] While Claimant contests the measurement of the bodies of water as a basis for drawing conclusions about the volumes that had been extracted at all,[1366] the Tribunal does not consider this specific matter to amount to or add to the arbitrary treatment of CALICA.

1120. Insofar as Claimant submits that the Shutdown Order failed to afford CALICA due process as it was based on the supplemental inspection by PROFEPA which was "invalid *ab initio*",[1367] the Tribunal rejects this argument in light of its conclusion above that the supplemental inspection was not arbitrary or in breach of CALICA's due process rights under NAFTA (*see* ¶ 1052 above).

1121. Additionally, Claimant claims that PROFEPA failed to duly notify CALICA of the Shutdown Order in advance as required under Mexican law.[1368] [redacted] view is that PROFEPA did not serve notice at the correct domicile and did not present a Visit Order. As such, CALICA was never duly notified.[1369] Respondent denies this, arguing that notification was made to persons authorized to receive and hear notifications in person.[1370] Respondent further submits that CALICA's challenge to the notification of the Shutdown Order was unsuccessfully contested in the Mexican courts.[1371]

1365 SOLCARGO First Report, ¶ 190.
1366 Memorial, ¶ 147.
1367 Memorial, ¶¶ 214-215.
1368 Memorial, ¶ 211; *see* Memorial, ¶ 152.
1369 [redacted] First Report, ¶¶ 199-204; [redacted] Second Report, ¶¶ 33-39.
1370 Counter-Memorial, ¶¶ 71-72, *citing* **C-0117-SPA**, Shutdown Order; **R-0007-ESP**, PROFEPA Notice, 24 January 2018; Balcázar First Statement; SOLCARGO First Report; Counter-Memorial, ¶ 333, *citing* Balcázar First Statement, ¶ 81. *See also* SOLCARGO First Report, ¶¶ 174-179; SOLCARGO Second Report, ¶¶ 19-20.
1371 Counter-Memorial, ¶ 73, *citing* **R-0008-ESP**, Second District Court of Quintana Roo, *Amparo Indirecto* No. 300/2018, Initial Filing ("Indirect *Amparo* 300/2018, Initial Filing").

1122. The Tribunal is not persuaded that there was a defect in the notification of the Shutdown Order that adversely affected CALICA's rights in a way that amounted to or contributed to treatment contrary to NAFTA Article 1105.

1123. The same applies to the alleged lack of due authorization of the inspectors, for which Claimant argues that the inspectors' identifications had apparently expired.[1372] According to Respondent, the credentials were valid but there was a typographical error in the inspection report.[1373] The Tribunal does not consider that this issue amounted to or contributed to treatment contrary to NAFTA Article 1105.

1124. Assessing the evidence as a whole, the Tribunal finds that PROFEPA's closure of El Corchalito on the basis of the reasons given, i.e., a "probable" breach on a "presumed" excess quarrying is disproportionate to a degree of arbitrariness, i.e., founded on prejudice or preference rather than on reason or fact (*see* ¶ 1011 above). When considered together with the other measures taken in relation to the El Corchalito site, the Tribunal considers this treatment to constitute a breach of NAFTA Article 1105.

1125. The Tribunal notes that Claimant asserts that the Shutdown Order was issued to "make good" on a threat issued orally by an API Quintana Roo attorney during a meeting five days prior to the Shutdown Order, in the context of litigation about the collection of port fees. At the meeting, Claimant alleges that the attorney stated, "if CALICA continues to take these kinds of measures against API Quintana Roo and the State of Quintana Roo, we will shut down your operations".[1374] The Tribunal does not consider it established that such a threat, if made, was carried out by means of the Shutdown Order, but notes that the Shutdown Order has been determined to be arbitrary on other bases.

1126. The Tribunal further observes that Claimant submits that PROFEPA aggravated the dispute by filing a criminal complaint against CALICA based on the findings in the Shutdown Order.[1375] The Tribunal does not consider these additional circumstances of the exercise of prosecutorial powers to constitute a breach of NAFTA Article 1105. They

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1372 *See* Memorial, n. 334; [redacted] First Report, ¶¶ 167-169.
1373 Counter-Memorial, ¶ 41.
1374 Memorial, ¶ 135, *citing* [redacted] First Statement, ¶ 57.
1375 Memorial, ¶ 222.

rather reflect increasingly difficult relations between CALICA and the Mexican authorities and are taken into account as context to that extent.

5. October 2020 Resolution

1127. Claimant submits that the October 2020 Resolution was arbitrary because it sanctioned CALICA based on "shifting rationales".[1376] In this regard, Claimant argues that the October 2020 Resolution included new alleged breaches which were not identified in the Shutdown Order, being (i) failing to quarry El Corchalito and La Adelita simultaneously; and (ii) quarrying El Corchalito at a faster annual pace than authorized.[1377] Respondent relies on the alleged breaches as justification for its measures in relation to El Corchalito.[1378]

1128. For Claimant, the timing of the Resolution a few weeks before Respondent's Counter-Memorial suggests that PROFEPA raised these issues to give a semblance of legitimacy to its unlawful measures.[1379]

1129. Respondent disputes Claimant's account, arguing that the shutdown of El Corchalito was based on determinations that were well known by CALICA.[1380] Respondent argues that Claimant's focus on the 2.15 hectares is too narrow, as the First PROFEPA Inspection Report and the Second PROFEPA Inspection Report and the Shutdown Order already evidence that the quarrying was limited to one lot and the schedule at which the quarrying was undertaken.[1381] According to Respondent, CALICA was aware of its obligations under the Federal EIA since 2000 when its authorization was granted.[1382] Once on notice of its obligations under the Federal EIA and alleged violation of them, Respondent's view

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1376 C-PHM, ¶ 118.

1377 C-PHM, ¶ 119, *citing* **R-0005-ESP**, October 2020 Resolution, pp. 54, 115, 163. *See also* Reply, ¶ 166, *citing* **C-0117-SPA**, Shutdown Order, pp. 271-273; [redacted] Second Report, ¶¶ 102-108; **R-0005-ESP**, October 2020 Resolution, p. 220; C-RPHM, ¶¶ 54-56.

1378 Counter-Memorial, ¶¶ 75, 338-339; Rejoinder, ¶¶ 73, 98-99.

1379 Reply, ¶ 167.

1380 2021 Hearing Transcript (English), Day 1, 210:2-9 (Respondent's Opening Statement).

1381 2021 Hearing Transcript (English), Day 1, 205:6-17, 207:2-10 (Respondent's Opening Statement). *See also* Rejoinder, ¶ 73*, citing* Balcázar Second Statement, ¶ 6.

1382 2021 Hearing Transcript (English), Day 1, 209:3-16 204:19-205:2 (Respondent's Opening Statement).

is that Claimant failed to disprove the violations and the October 2020 Resolution "confirmed" them.[1383]

1130. The Tribunal accepts that fair and equitable treatment of CALICA under NAFTA required it to be informed of the grounds upon which El Corchalito would be subject to a closure, among other things in order to provide it with the opportunity to respond to those grounds. CALICA's general knowledge and undertaking to comply with the conditions of its Federal EIA does not meet that requirement. Whether a failure to give notice and an opportunity to respond amounts to a breach of the FET standard will be assessed in the specific circumstances.

1131. Respondent's position is further that the Shutdown Order identifies a general violation of the Federal EIA, from which CALICA was to understand that it had violated an obligation to quarry El Corchalito and La Adelita simultaneously, and had exceeded an annual pace of quarrying.[1384] In its view, CALICA had over two years to submit information with regard to its compliance.[1385] The Tribunal is not persuaded by this account, as the Shutdown Order is not framed in terms of a general violation. It mentions that CALICA had presumably exceeded the total surface area of extraction by 2.15 hectares (*see* ¶ 1093 above), among other alleged specific violations.[1386]

1132. Moreover, a general violation without specifying the grounds would not fulfil the purpose of informing CALICA of the basis for the shutdown and providing it with an opportunity to respond. As stated by Respondent's witness Ms. Balcázar,[1387] the purpose of an *acuerdo de emplazamiento* such as the Shutdown Order is to inform the entity of probable violations of environmental law arising from the inspection, giving the opportunity to the

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1383 2021 Hearing Transcript (English), Day 1, 207:2-13 (Respondent's Opening Statement); Rejoinder, ¶¶ 74-75.

1384 *See*, *e.g.*, 2021 Hearing Transcript (English), Day 1, 210:10-19 (Respondent's Opening Statement); R-RPHM, ¶ 81. *See also* Balcázar First Statement, ¶ 90.

1385 R-RPHM, ¶ 82.

1386 *See* **C-0117-SPA**, Shutdown Order, pp. 291-294.

1387 The Tribunal notes that Ms. Balcázar was not called for cross-examination at the Hearing. The Tribunal has taken into account her written witness statements to the extent it considers appropriate in all the circumstances, neither disregarding that evidence nor deeming it to be accepted by Claimant.

inspected party to present arguments and evidence that it considers relevant to rebut the alleged probable violations, thereby respecting the right to be heard and due process:[1388]

> *El Acuerdo de Emplazamiento es un acto de la autoridad, en este caso de la PROFEPA, a través del cual se le hacen saber al visitado los probables incumplimientos a la normatividad ambiental que resultaron del estudio de los hechos y omisiones que hayan sido circunstanciados en el Acta de Inspección, valorados conjuntamente con los argumentos y pruebas que en su caso la persona inspeccionada hubiere presentado durante la visita de inspección o dentro de los 5 días hábiles siguientes al cierre del Acta de Inspección; y en el cual se le concede un término de 15 días hábiles para que manifieste lo que a su derecho convenga y ofrezca las pruebas que considere pertinentes para controvertir los probables incumplimientos que se le atribuyen.*
>
> *Es así que con el Acuerdo de Emplazamiento se respeta la garantía de audiencia y de debido proceso que como derechos humanos están establecidos en los artículos 14 y 16 de la Constitución Política de los Estados Unidos Mexicanos, porque se le hace sabedor al interesado del procedimiento administrativo que la autoridad ha iniciado a su nombre y se le da la oportunidad de manifestarse ante esa autoridad para defenderse de lo que se le atribuye.*

1133. The Tribunal considers, below, the issue of quarrying two lots, followed by the annual extraction limits.

(a) Failure to Quarry Two Lots Simultaneously

1134. With respect to the failure to quarry both lots, the October 2020 Resolution stated that the contravention was not only for exceeding the extraction limit "*sino que* [CALICA] *omitió hacer esa explotación por debajo del manto freático de ambos predios*,"[1389] adding, *inter alia*, that CALICA had not made it known to the authorities that only one lot would be exploited to allow for the evaluation of environmental impacts of developing only one of the lots:[1390]

> *… se desprende que la extracción de roca caliza por debajo del nivel freático se realizaba únicamente en el predio "El Corchalito", sin que a la fecha de emisión de la presente Resolución Administrativa,* ***CALICA*** *hubiera acreditado ante esta autoridad que contaba con la autorización de la modificación del oficio resolutivo* ***D.O.O.DGOEIA.-0007237*** *del treinta de*

1388 Balcázar First Statement, ¶¶ 68-69.
1389 **R-0005-ESP**, October 2020 Resolution, p. 53.
1390 **R-0005-ESP**, October 2020 Resolution, p. 114. *See also* **R-0005-ESP**, October 2020 Resolution, p. 161.

> *noviembre de dos mil para explotar el material solamente en el predio "El Corchalito", por lo que al no haberlo hecho del conocimiento de la autoridad sustantiva, y someterlo de igual manera al procedimiento de Evaluación de Impacto Ambiental, se generó que esa autoridad competente no pudiera determinar los posibles impacto*[s] *ambientales adicionales tanto acumulativos, sinérgicos, significativos o relevantes que se generarían sobre el ecosistema donde* […] *la promovente ha realiz*[ado] *únicamente el desarrollo del proyecto referido.*

1135. The Shutdown Order had not identified an issue with quarrying only one of the two lots, and the Tribunal does not consider that to be covered by the alleged violation of exceeding the surface area of extraction.

1136. Nor was CALICA on notice in general terms of an obligation to quarry both lots simultaneously. The source of this obligation is linked in the October 2020 Resolution to the Federal EIA:[1391]

> *Como en la Autorización de Impacto Ambiental se resolvió que la operación y mantenimiento del* ***PROYECTO*** *debía realizarse en una superficie total de* [redacted] *hectáreas, dividido en dos predios "La Adelita" de* [redacted] *ha y "El Corchalito" de* [redacted] *hectáreas…*

1137. According to Respondent, the relevant obligation is derived from the First and Fourth Terms of the Federal EIA.[1392] While the First Term of the Federal EIA refers to both El Corchalito and La Adelita as being part of the project,[1393] it does not mention an obligation to quarry both lots simultaneously. The Fourth Term obliges CALICA to notify the authorities in advance of modifications and prohibits works other than those authorized.[1394] The ordinary meaning of the language of the authorization is that the project is authorized to be carried out in both lots, without necessarily implying an obligation to carry it out in both lots. In the circumstances, the Tribunal does not consider CALICA to have been notified of the existence of an obligation to quarry both lots by the Federal EIA.

1391 **R-0005-ESP**, October 2020 Resolution, p. 53.

1392 R-RPHM, ¶ 81.

1393 "… the project 'Exploitation of Limestone beneath the Water Table in the El Corchalito and La Adelita Properties, in Solidaridad, Quintana Roo', in a total area of 1,251 ha, divided into two properties, La Adelita with 882.13 ha and El Corchalito with 369.30 ha…" **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, pp. 10, 31.

1394 **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, pp. 13, 35.

1138. The fact that CALICA cannot be understood to have been on notice of the alleged violation is underscored by the fact that PROFEPA was already aware that La Adelita had not been exploited. Based on the record of these proceedings, neither PROFEPA nor any other authority had ever previously alleged this to be a breach of CALICA's environmental obligations.[1395] Leaving aside the Clean Industry Certificates which are of contested relevance,[1396] in 2012, a PROFEPA audit report noted that extraction activities had not commenced in La Adelita, but found no violation of CALICA's environmental obligations.[1397] The same can be derived from reports of operations submitted by CALICA to PROFEPA.[1398] Respondent's answer is that as at 2012, CALICA still could have exploited La Adelita, but could not in 2017 when it had used its entire permitted area for exploitation.[1399] The fact remains that the obligation cannot be derived from the face of the documents before the Tribunal.

1139. As such, the Tribunal considers that prior to the October 2020 Resolution CALICA was not on notice of, and did not have an opportunity to rebut, the allegation that it had breached a requirement to quarry Corchalito and La Adelita simultaneously.

(b) Exceeding Annual Extraction Limits

1140. Regarding the rate of extraction, the October 2020 Resolution stated:[1400]

> … ***CALICA, llevó a cabo la explotación de material pétreo por debajo del manto freático a un ritmo de explotación diverso al autorizado que es de únicamente 7 hectáreas anuales por debajo del nivel freático, sin que de manera previa hubiera obtenido modificación a la autorización contenida en el citado oficio resolutivo***… (Emphasis in original)

1141. With respect to the annual surface area to be extracted the Shutdown Order calculates the total surface area by reference to the accumulated annual surface area of 7 hectares under

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1395 *See, inter alia*, **C-0113-SPA**, CALICA Eleventh Quadrimester Report, 23 May 2005; **C-0037-SPA**, Clean Industry Certificate, 23 June 2003; **C-0038-SPA**, Clean Industry Certificate, 16 December 2005; **C-0039-SPA**, Clean Industry Certificate, 31 July 2008; **C-0040-SPA**, Clean Industry Certificate, 28 February 2012; **C-0041-SPA**, Clean Industry Certificate, 2 June 2014; **C-0042-SPA**, Clean Industry Certificate, 27 July 2016.

1396 *See* Reply, ¶ 92; C-PHM, ¶ 126; R-RPHM, ¶ 79.

1397 **C-0043-SPA**, PROFEPA Letter to CALICA, 10 December 2012, pp. 5, 56-57.

1398 **C-0113-SPA**, CALICA Eleventh Quadrimester Report, 23 May 2005, p. 9.

1399 R-RPHM, ¶ 79. *See also* 2021 Hearing Transcript (English), Day 3, 539:13-541:3 (Rodríguez Cross-Examination).

1400 **R-0005-ESP**, October 2020 Resolution, p. 224.

the water table ("the total surface area of extraction of limestone below the water table which was authorized yearly until 2020," *see* ¶ 1093 above), but does not separately find that the annual limits have been breached.[1401]

1142. The Federal EIA further refers to an annual surface area to be exploited: "28 hectares a year will be exploited, of these 7 will be below the water table."[1402] For this reason, the reference point of 7 hectares per year extracted under the water table was not unknown to CALICA, although the Tribunal does not find it clearly established that an annual limit was in place.

1143. According to the October 2020 Resolution, the source of the annual pace of exploitation under the water table was a "work schedule" by which CALICA is alleged to have set out its pace of exploitation. To the extent that this work schedule is the work plan referred to in CALICA's environmental impact statement, and upon which the Federal EIA was based, it mentions that those amounts are averages: "it is intended to [exploit] an average of 28 hectares per year, of which 7 are below the water table" ("*se pretende explotar un promedio de 28 hectáreas anuales, de las cuales corresponden 7 hectáreas debajo del nivel freático*").[1403]

1144. In Claimant's view, the October 2020 Resolution "improperly morphed" a potential violation identified in the Shutdown Order relating to the total of material to be extracted per year *("…acreditó que ha realizado el aprovechamiento del banco de conformidad con el total anual de materiales para aprovechar*") [1404] into a violation based on the area quarried per year. [1405] The Federal EIA refers to "an estimated production of 248'765,360 tons of gravel and 120'957,909 tons of bases; the annual total of materials to be exploited will be 5'922,746.66 tons of gravel and 2'879,950.21 tons of bases." [1406] The Tribunal considers this requirement to be distinct from the matter of the permitted surface area for exploitation. As there is no explicit link made between the annual total of materials to be exploited of gravel and base and the annual surface area requirement mentioned by

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1401 **C-0117-SPA**, Shutdown Order, p. 8.
1402 **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, p. 11.
1403 **C-0077-SPA**, CALICA EIS, pp. 5, 67; *see also* p. 82.
1404 **C-0117-SPA**, Shutdown Order, p. 292.
1405 Reply, ¶ 94.
1406 **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, p. 11.

PROFEPA in the October 2020 Resolution, it remains unclear whether the alleged "morphing" has taken place as Claimant speculates, and the Tribunal does not consider that its conclusions turn on that issue.

1145. For the above reasons, the Tribunal finds that while CALICA could arguably be understood to be on notice of a reference point of 7 hectares per year of annual extraction under the water table, the existence of such obligation as a maximum annual limit was less than clear. Moreover, CALICA had not been informed of an alleged breach of that obligation prior to being sanctioned on that basis in the October 2020 Resolution.

1146. Claimant further takes issue with PROFEPA's focus on the surface area to be extracted, without considering the overall picture of volumes and depth of extraction, which in its view is necessary to assess the impacts of CALICA's activities in its lots.[1407] The Tribunal does not consider it necessary to make a finding on this point, having found a breach of NAFTA Article 1105 on other grounds.

1147. The Tribunal's finding is based on PROFEPA's failure to give CALICA an opportunity to respond to the alleged violations before sanctioning them for those violations. It is therefore not necessary or appropriate for the Tribunal to decide upon the merits of the alleged violations.

6. Catch 22 Situation

1148. Claimant's position is that PROFEPA has created a catch-22 situation in which CALICA can only escape the shutdown of El Corchalito if it first concedes the purported violation on which the shutdown is based.[1408]

1149. Respondent contends that there was no catch-22 as CALICA did not have to concede that it exceeded its extraction limit, Claimant asserts that the lifting of the shutdown was conditioned on CALICA obtaining an amendment of the Corchalito/Adelita Federal Environmental Authorization to allow underwater quarrying beyond 140 hectares. In Claimant's view, the alternative of offering to pay damages for the alleged excess extraction, followed by a court challenge, was not offered. Moreover, for Claimant it is

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1407 Reply, ¶ 96.
1408 Memorial, ¶ 210; Reply, ¶ 177.

not meaningfully different, as it would have required CALICA to admit that it had wrongfully caused damage to the environment.[1409]

1150. In Claimant's view, PROFEPA also preserved the shutdown of El Corchalito in its October 2020 Resolution by again requiring CALICA to seek an amendment of the Corchalito/Adelita Federal Environmental Authorization, which was about to expire at the time of the Resolution. According to Claimant, biased bureaucratic impediments have prevented CALICA from complying with this condition for lifting the shutdown.[1410]

1151. Respondent denies that the only way for CALICA to resolve the situation was to acknowledge its responsibility for the alleged harm. In its view, compliance with PROFEPA's decision would only determine the environmental harm caused objectively, and did not prevent CALICA from challenging any non-conformity in court.[1411] Respondent therefore argues that CALICA had several alternatives available to it but decided not to pursue them, in favour of litigation. Respondent relies on the evidence of its SOLCARGO experts, in this respect, to submit that CALICA placed itself in the situation of not being able to renew the Corchalito/Adelita Federal Environmental Authorization, as it could have made a request to the authority to enter into an agreement to carry out actions to repair and compensate the environmental damage, but decided not to.[1412] As such, Respondent denies that CALICA was in any catch 22 situation.[1413]

1152. The Tribunal finds it helpful to recount several events before making its determination on this issue. It is noted that the events implicate both the modification and the renewal of CALICA's Federal EIA.

1153. At the time of issuing the Shutdown Order in January 2018, the lifting of the shutdown was conditioned on CALICA presenting to PROFEPA an amended Federal EIA issued by SEMARNAT (*see* ¶ 1032 above). In this respect, the Shutdown Order specified "*las acciones necesarias para subsanar las irregularidades que las motivaron, así como los*

1409 Reply, ¶ 171, *citing* [redacted] Second Report, ¶¶ 88-89, 94-95, 164. *See* Counter-Memorial, ¶ 331.
1410 C-PHM, ¶ 131, *citing* **R-0005-ESP**, October 2020 Resolution, pp. 171-172, 231-232, 235; [redacted] Second Report, ¶¶ 67-78.
1411 Counter-Memorial, ¶ 331, *citing* SOLCARGO First Report, ¶¶ 235-237.
1412 Counter-Memorial, ¶ 332, *citing* SOLCARGO First Report, ¶ 63.
1413 Rejoinder, ¶ 340, *citing* Rodríguez Rosas Second Statement, ¶¶ 137-143.

plazos para su realización, a fin de que una vez cumplidas se ordene el retiro de las mismas" as follows:[1414]

> *… Presentar a esta Dirección General de Impacto Ambiental y Zona Federal Marítimo Terrestre de la Procuraduría Federal de Protección al Ambiente,* ***en un plazo no mayor a diez días hábiles . . . original para cotejo, o en su defecto, copia certifica da de la autorización correspondiente, para el caso de que se hubiesen autorizado modificaciones al Oficio Resolutivo Número D.O.O.DGOEIA.-0007237*** [i.e., the Federal EIA]***, con relación a las obras y actividades de explotación autorizades del citado proyecto, que para tal efecto haya emitido la*** *[SEMARNAT].* (Emphasis in original)

1154. In February 2018, CALICA filed an *Amparo Indirecto* 300/2018 against the Shutdown Order, which was dismissed in December 2018.[1415] The appeal (*recurso de revisión no.* 63/2019) was also dismissed in November 2020.[1416]

1155. On 27 August 2020, CALICA submitted an application for renewal of its Federal EIA which was due to expire in December 2020.[1417]

1156. By letter dated 23 October 2020 (notified on 27 October 2020), SEMARNAT requested further information in relation to the application for renewal, asking CALICA to provide (i) the validation by PROFEPA of its last compliance report on the terms and conditions of the Federal EIA; (ii) confirmation whether CALICA is subject to any ongoing procedure instituted by PROFEPA in relation to the development of the project; and (iii) copies of any four-monthly reports validated by PROFEPA.[1418]

1157. In the October 2020 Resolution, CALICA was ordered as a corrective measure to submit to PROFEPA the Federal EIA issued by SEMARNAT certifying the area of extraction for the additional 2.15 hectares exploited, or a modification to the Federal EIA extending

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1414 **C-0117-SPA**, Shutdown Order, p. 281; *see also* p. 284.

1415 **R-0074-ESP**, Second District Court of the State of Quintana Roo, *Amparo Indirecto* 300/2018, 10 December 2018 ("*Amparo Indirecto* 300/2018"), p. 4. *See also* **RD-0003**, Table I: CALICA's Challenges against PROFEPA and SEMARNAT Measures; 2021 Hearing Transcript (English), Day 1, 200:13-201:3 (Respondent's Response to Tribunal Question).

1416 **R-0075-ESP**, First Collegiate Court of the State of Quintana Roo, *Amparo* under Review 63/2019, 3 November 2020 ("*Amparo* under Review 63/2019"), p. 2. *See also* **RD-0003**, Table I: CALICA's Challenges against PROFEPA and SEMARNAT Measures; 2021 Hearing Transcript (English), Day 1, 200:13-201:3 (Respondent's Response to Tribunal Question).

1417 **C-0149-SPA**, Corchalito/Adelita Renewal Application. *See* **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, p. 35.

1418 **C-0150-SPA**, Letter from SEMARNAT Requesting Additional Information from CALICA, dated 23 October 2020.

the total authorised area below the water table and authorising the extraction exclusively in El Corchalito (*see* ¶ 1038 above):[1419]

> *… Presentar a esta Dirección General de Impacto Ambiental y Zona Federal Marítimo Terrestre en un plazo* ***no mayor a diez días hábiles****, contados a partir del día hábil siguiente a aquél en que surta efectos la notificación de la presente Resolución Administrativa, de conformidad con el artículo 32 de la Ley Federal de Procedimiento Administrativo de aplicación supletoria a la materia, la autorización de impacto ambiental para llevar a cabo la extracción de roca caliza por debajo del manto freático en la superficie de 2.15 hectáreas dentro del predio "El Corchalito" no contempladas en el oficio resolutivo* ***D.O.O.DGOEIA.-0007237*** *del treinta de noviembre de dos mil* [i.e., the Federal EIA] *o, en su caso, la autorización que modifique el oficio resolutivo citado respecto de la superficie total a aprovechar por debajo del manto freático, así como para realizar este aprovechamiento sólo en el predio "El Corchalito", que para tal efecto otorgue la Secretaría de Medio Ambiente y Recursos Naturales.*

1158. On 19 November 2020, CALICA responded to SEMARNAT's correspondence of 23 October 2020 (*see* ¶ 1156 above) stating that while PROFEPA had, since 2001, issued reports in favour of CALICA, it had never informed CALICA of a "validation" of its report. CALICA further noted that SEMARNAT would have full access to the information sought as PROFEPA is an organ within SEMARNAT.[1420]

1159. Also, in its correspondence of 19 November 2020, CALICA sought modification of its Federal EIA as ordered by the October 2020 Resolution (*see* ¶ 1157 above). It did so under reservation of its rights and without accepting responsibility: [1421]

> *Es por lo anteriormente señalado que dentro del presente cumplimiento,* ***sin aceptar, ni reconocer expresa o tácitamente responsabilidad alguna en el presente procedimiento y haciendo expresa reserva de derechos para impugnar en su caso la legalidad y/o constitucionalidad del mismo****, y de manera* ad cautelam*, se exhibe en alcance a la solicitud de modificación en materia de impacto ambiental presentada por mi representada el 27 de agosto de 2020 y dentro de este mismo procedimiento en que se actúa, la propuesta de modificación de la Autorización en Materia de Impacto Ambiental del Proyecto denominado "Aprovechamiento de Roca Caliza por Debajo del Manto Freático en los Predios "El Corchalito" y "La Adelita"*

1419 **R-0005-ESP**, October 2020 Resolution, p. 230.

1420 **C-0153-SPA**, Letter from CALICA Responding to SEMARNAT's Request for Additional Information, dated 19 November 2020, p. 7.

1421 **C-0153-SPA**, Letter from CALICA Responding to SEMARNAT's Request for Additional Information, p. 9.

> *en Solidaridad, Quintana Roo" para que contemple la extracción de roca caliza por debajo del manto freático en una superficie adicional de 2.15 hectáreas dentro del predio denominado "El Corchalito*["]. *Al efecto, se adjunta como* ***Anexo 1*** *el Anexo Técnico que aborda y justifica a detalle en qué consiste la modificación por una superficie.* (Emphasis in original)

1160. On 4 December 2020, SEMARNAT addressed a letter to CALICA with reference to its request for extension of the Federal EIA of 27 August 2020, reiterating the need for a validated report from PROFEPA:[1422]

> … *Para que esta* ***DGIRA*** [i.e., the *Dirección General de Impacto y Riesgo Ambiental* of SEMARNAT] *se encuentre en posibilidad de dar respuesta a la solicitud de ampliación de plazo (pr*[ó]*rroga), en concordancia con lo señalado en los* ***ANTECEDENTES*** *que integran el presente oficio, es necesario que se cuente con la* ***validación*** *de la* ***PROFEPA*** *al último informe de cumplimiento de Términos y Condicionantes y de esta manera disponer con los elementos de juicio que garanticen la emisión de una determinación fundada y motivada a la solicitud realizada por la* ***promovente****.* (Emphasis in original).

1161. On 18 February 2021, CALICA filed its third four-monthly report of 2020, stating that it covered the period from 12 September 2020 to 12 January 2021.[1423] PROFEPA took the position that the report could only cover the period until the expiry of the Federal EIA in December 2020.[1424]

1162. On 6 May 2021, PROFEPA issued a document by which it validated the compliance of CALICA with each of the terms of its Federal EIA based on the report presented by CALICA to PROFEPA on 18 February 2021. Compliance with certain terms was validated in whole or in part ("*se valida*"), while others were not validated ("*no se valida*") and others were declared to be not subject to validation ("*no son materia de validación*").[1425] According to Claimant, this "supposed" validation document was issued suddenly after its Reply submission in this arbitration (dated 22 February 2021).[1426] According to Respondent, the validation document could only be issued by PROFEPA once CALICA had submitted the last report on compliance, which was filed by CALICA

1422 **C-0154-SPA**, SEMARNAT Letter to CALICA, dated 4 December 2020, p. 9.

1423 **MYBM-005**, Third Quadrimester Report 2020, January 2021. *See also* **R-0085-ESP**, PROFEPA, Letter No. PFPA/4.1/8C.17.5/162/2021, 6 May 2021, p. 6.

1424 **R-0085-ESP**, PROFEPA, Letter No. PFPA/4.1/8C.17.5/162/2021, 6 May 2021, p. 10. *See also* Balcázar Second Statement, ¶ 57.

1425 **R-0085-ESP**, PROFEPA, Letter No. PFPA/4.1/8C.17.5/162/2021, 6 May 2021, pp. 6, 61-62.

1426 C-PHM, ¶ 134.

in February 2021.[1427] Claimant challenges that account on the basis that CALICA had submitted many compliance reports previous to the one filed in February 2021.[1428]

1163. As from 9 September 2020, the status of CALICA's application for renewal of the Federal EIA is stated to be suspended due to a proceeding before PROFEPA ("*suspendido por procedimiento ante PROFEPA*").[1429]

1164. In November 2020, CALICA challenged the actions of SEMARNAT with respect to the suspension of renewal of the Federal AIA in *Amparo Indirecto* 815/2020-IV, which proceedings remained pending as at the time of filing the C-RPHM.[1430]

1165. Respondent argues that the authorities have not been able to resolve the merits of this point due to CALICA's multiple challenges of SEMARNAT's actions in national courts.[1431] Claimant denies that its court challenge prevents SEMARNAT from deciding on the application.[1432]

1166. Claimant challenges the SEMARNAT requirement for CALICA to file a "validated" compliance report from PROFEPA.[1433] The Tribunal does not consider the requirement of a validated report to be an arbitrary one, noting that it is listed in the Federal EIA as the only document required to accompany a request for renewal of the authorization:[1434]

> … This authorization shall be in effect for **twenty years** for work focused on preparing the site, construction, operation and maintenance of the project, as of the day after this authorization is received, period which can be extendable as determined by this Ministry, as long as requested in writing by [CALICA] before this General Department for Ecological Order and Environmental Impact (*Dirección General de Ordenamiento Ecológico e Impacto Ambiental*) thirty calendar days before the expiration date. Such request must

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1427 2021 Hearing Transcript (English), Day 1, 219:9-16 (Respondent Opening Statement). *See also* R-RPHM, ¶¶ 90-91.

1428 C-PHM, Appendix A, Answer to Tribunal Question 12, p. 26.

1429 [redacted]**0013**, Status of Application: Modifications to Authorized Projects in Matters of Environmental Impact, 20 February 2021.

1430 **R-0078-ESP**, Seventh District Court in the State of Quintana Roo, *Amparo* Proceeding No. 815/2020-IV, Initial Filing, 13 November 2020 ("*Amparo* Proceeding No. 815/2020-IV, Initial Filing"); **R-0079-ESP**, Seventh District Court in the State of Quintana Roo, *Amparo* Proceeding No. 815/2020-IV, Motion to Amend Complaint, undated ("*Amparo* Proceeding No. 815/2020-IV, Motion to Amend Complaint"). *See* C-RPHM, ¶ 61; **RD-0003**, Table I: CALICA's Challenges against PROFEPA and SEMARNAT Measures.

1431 R-RPHM, ¶ 93.

1432 C-RPHM, ¶ 61.

1433 Reply, ¶ 103, *citing* [redacted] Second Statement, ¶ 13.

1434 **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, p. 13 (Translation by Claimant).

> be presented together with the validation issued by the Federal Attorney's Office for Environmental Protection (PROFEPA) (*Procuraduría Federal de Protección al Ambiente*) of the last report on fulfilment of the conditioning factors. (Emphasis in original)

1167. Nor is the Tribunal convinced by Claimant's suggestion that the authorities' conduct was arbitrary because it required CALICA to first concede the purported violation on which the shutdown was based (*see* ¶ 1148 above). This is based on [redacted] view that CALICA would have had to expressly acknowledge that it has exceeded the extraction limits under it environmental impact authorization and negotiate an amendment "in which it reckons having committed an irregularity."[1435] However, following the October 2020 Resolution, Claimant did seek the amendment required by the authorities without accepting responsibility and while expressly reserving its rights (*see* ¶ 1159 above).

1168. Even so, the Tribunal is satisfied that the measures were arbitrary in the sense of placing CALICA in a catch-22 situation where PROFEPA required CALICA to obtain modification of its Federal EIA in order to lift the shutdown. The process of modification became linked to the application to renew the Federal EIA which was approaching expiry (*see* ¶¶ 1155, 1159 above). In order to issue the renewal of the Federal EIA, SEMARNAT required validation of compliance by PROFEPA (*see* ¶ 1160 above), which was not forthcoming due to PROFEPA's finding that CALICA had violated its Federal EIA (*see* ¶ 1162 above).

1169. In these circumstances, the arbitrary findings reached by PROFEPA in the Shutdown Order and the October 2020 Resolution were self-perpetuating. The absence of a mechanism to lift the shutdown in El Corchalito was an additional and significantly arbitrary measure by Respondent as it deprived Claimant of access to an effective remedy to resolve its situation. It is conduct which is grossly unfair and unjust, contrary to the MST enshrined in NAFTA Article 1105.

1170. In addition, Claimant has questioned whether SEMARNAT could have granted the amendment to the Federal EIA while PROFEPA's administrative proceeding remained open, i.e., prior to the October 2020 Resolution. In Claimant's view, PROFEPA

[1435] [redacted] First Report, ¶ 226 (Translation by Claimant).

unjustifiably kept the proceeding open for more than two years.[1436] While this question is no longer the most pertinent one since the issuance of the October 2020 Resolution which closed the PROFEPA proceedings, the Tribunal observes that Respondent does not contradict Claimant's view. Respondent submits that CALICA could have obtained the termination of PROFEPA's proceeding by entering into an agreement with it to repair and compensate damage to the environment.[1437] Respondent does not suggest that SEMARNAT could have granted the amendment to the Federal EIA while PROFEPA's proceeding was pending. This is consistent with the status of CALICA's application which has been listed by SEMARNAT since 9 September 2020 as suspended due to a proceeding before PROFEPA ("*suspendido por procedimiento ante PROFEPA*").[1438] This situation adds to the arbitrariness of Respondent's conduct, as for over two years between the Shutdown Order and the October 2020 Resolution, it was also not possible to obtain the lifting of the shutdown via the measure specified in the Shutdown Order.

1171. Following issuance of the October 2020 Resolution and the validation report of May 2021, Respondent's SOLCARGO experts hypothesize that SEMARNAT could still have granted the renewal of the Federal EIA because PROFEPA had only found CALICA to be non-compliant with four terms of the Federal EIA.[1439] Respondent further states that as at the R-RPHM, CALICA had not yet submitted PROFEPA's validation of the compliance report to SEMARNAT.[1440] In Claimant's view, the application lacked a real prospect of being granted because PROFEPA's validation states that CALICA had violated the Federal EIA.[1441]

1172. The Tribunal agrees with Claimant that in light of the non-validation by PROFEPA of CALICA's compliance, the application for renewal of the Federal EIA was futile and without prospects of success. For the purposes of deciding whether Respondent's conduct was arbitrary, the Tribunal does not consider it necessary to decide whether Claimant's application for renewal of the Federal EIA would otherwise have been successful. The

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1436 C-PHM, ¶ 130, *citing* [redacted] Second Report, ¶¶ 181-187; 2021 Hearing Transcript (Spanish), Day 3, 776:11-13. *See* Counter-Memorial, ¶ 332. *See also* [redacted] First Report, ¶ 251, n. 169.

1437 Counter-Memorial, ¶ 332, *citing* SOLCARGO First Report, ¶ 63.

1438 [redacted]**0013**, Status of Application: Modifications to Authorized Projects in Matters of Environmental Impact, 20 February 2021, p. 2.

1439 SOLCARGO Second Report, ¶ 130.

1440 R-RPHM, ¶ 92.

1441 C-PHM, Appendix A, Answer to Tribunal Question 12, p. 26; C-RPHM, ¶ 61.

Tribunal notes, in this respect, that Claimant's position is that there is no reason it would not have been renewed.[1442] Respondent emphasizes that renewal was not automatic and would have been subject to SEMARNAT's environmental analysis.[1443]

1173. For present purposes, the Tribunal merely notes that a request for renewal or extension of an authorization is necessarily subject to consideration by the relevant authority, which in the case of SEMARNAT includes analysis of the relevant environmental situation and impact of the continuation of a project. As pointed out by Ms. Rodríguez, this evaluation process is specifically provided for in the Federal EIA:[1444]

> ***DECIMOTERCERO.-*** *La Secretaría de Medio Ambiente, Recursos Naturales y Pesca podrá evaluar nuevamente la Manifestación de Impacto Ambiental, de considerarlo necesario, con el fin de revalidar la autorización otorgada, modificarla, suspenderla, anular o revocarla si estuviera en riesgo el equilibrio ecológico o se produjeran afectaciones negativas imprevistas en el ambiente, de acuerdo con las atribuciones que le confiere el Artículo 62, fracción VI del Reglamento Interior de la Secretaría de Medio Ambiente, Recursos Naturales y Pesca*.

1174. Respondent has further argued that the shutdown of El Corchalito was not total, because it was only subject to accreditation of the exceeded extraction area and compliance with technical conditions.[1445] In Tribunal Question 12, the Tribunal asked Claimant for its position on this issue.[1446] Claimant denies Respondent's account, on the basis of its view that the conditions were impossible to meet and the shutdown was in fact total and indefinite.[1447]

1442 C-RPHM, ¶ 58.

1443 Counter-Memorial, ¶ 319; R-PHM, ¶ 107, *citing* 2021 Hearing Transcript (Spanish), Day 3, 649-650 (Rodríguez Testimony).

1444 Rodríguez Rosas Second Statement, ¶ 138; **C-0017-SPA**, Corchalito/Adelita Federal EIA, 30 November 2000, p. 43.

1445 Rejoinder, ¶ 75.

1446 Tribunal Questions to the Parties of 11 August 2021, Question 12: "Please advise, on the basis of the evidence in the record, Claimant's position with regard to Respondent's argument that the shutdown of CALICA's operations was not total, but subject to accreditation of the excess extraction area and the completion of certain technical conditions (*see* Rejoinder, ¶ 75)."

1447 C-PHM, Appendix A, Answer to Tribunal Question 12, pp. 24-25.

1175. In light of the Tribunal's conclusion that the shutdown implemented by Respondent in El Corchalito was self-perpetuating (*see* ¶ 1169 above), the Tribunal agrees with Claimant that the effect of the shutdown was total and indefinite, even if it was stated in the Shutdown Order and the October 2020 Resolution to be partial and temporary ("*clausura parcial temporal*" in the Shutdown Order and "*clausura temporal parcial*" in the October 2020 Resolution).[1448]

1176. Likewise, Respondent argues that regardless of whether CALICA had exceeded the 140 hectare limit, it would not have been able to continue mining if it was just under the 140 hectares.[1449] However, in this hypothetical scenario, there would have been no finding that CALICA had exceeded the 140 hectare limit, meaning that the primary basis for the shutdown of El Corchalito falls away, with follow-on effects for the basis of the October 2020 Resolution and the impossibility of lifting the shutdown. The Tribunal does not consider it appropriate to speculate about the measures that CALICA would have been required to take in order to continue its quarrying operations if it had been considered to be close to the 140-hectare limit, without exceeding it.

7. Domestic Legal Proceedings

1177. The Tribunal observes that a number of separate legal proceedings were commenced by CALICA in respect of the measures taken by PROFEPA and SEMARNAT. Tribunal Question 13 asked the Parties about the relevance, if any, of the fact that certain of those proceedings remained pending as at the date of the hearing.[1450]

1178. The following proceedings have been brought to the Tribunal's attention in relation to the measures taken in El Corchalito:[1451]

1448 **C-0117-SPA**, Shutdown Order, pp. 7 (Translation by Claimant), 280; **R-0005-ESP**, October 2020 Resolution, p. 234.

1449 R-PHM, ¶ 5.

1450 Tribunal Questions to the Parties of 11 August 2021, Question 13: "What is the relevance, if any, of the fact that certain legal proceedings remain ongoing in Mexico in relation to measures adopted by PROFEPA and by SEMARNAT (*see* **RD-0003**, Table I: CALICA's Challenges against PROFEPA and SEMARNAT Measures; Rejoinder, ¶ 43)?"

1451 *See* **RD-0003**, Table I: CALICA's Challenges against PROFEPA and SEMARNAT Measures; C-PHM, Appendix A, Answer to Tribunal Question 13, p. 28; R-RPHM, ¶ 84.

(i) *Amparo Indirecto* 1841/2017: brought in relation to the supplementary inspection of El Corchalito. Dismissed.[1452]

(ii) *Amparo Indirecto* 829/2018: brought in relation to the refusal to take into account the expert evidence offered by CALICA in relation to El Corchalito. Dismissed.[1453]

(iii) *Amparo Indirecto* 300/2018: brought in relation to the Shutdown Order and closure of El Corchalito. Dismissed.[1454]

(iv) *Juicio de Nulidad* 73/21-EAR-01-6: brought in relation to the October 2020 Resolution and associated sanctions and closure of El Corchalito.[1455]

(v) *Amparo Indirecto* 815/2020-IV: brought in relation to the suspension of the process of renewal of the Federal EIA.[1456]

1179. Of the above proceedings, only (iv) and (v) remained pending at the time of filing the post-hearing memorials on Claimant's original claims.[1457] It was noted by [redacted] at the Hearing on the original claims that the pending *nulidad* proceeding may have taken up to five more years to conclude.[1458]

1180. In Respondent's view, the domestic court proceedings litigated by CALICA have a potential impact on this arbitration, as Claimant seeks to resolve substantive issues simultaneously in Mexican courts.[1459] For those that remained pending, Respondent argues that the court decisions may result in a finding of nullity in respect of the measure that would remove its effect on CALICA. For those that are concluded, Respondent contends that it demonstrates CALICA's intention to litigate in different forums and use this arbitration as an appellate mechanism.[1460] Respondent further submits that the legal

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1452 **R-0086-ESP**, Specialized Chamber in Environmental and Regulatory Matters of the Federal Administrative Court, Annulment Proceeding No. 73/21-EAR-01-6, Interlocutory Resolution, 19 April 2021.

1453 **R-0055-ESP**, Second District Court, *Amparo Indirecto* 829/2018.

1454 **R-0008-ESP**, Indirect *Amparo* 300/2018, Initial Filing; **R-0074-ESP**, *Amparo Indirecto* 300/2018**; R-0075-ESP**, *Amparo* under Review 63/2019.

1455 **R-0076-ESP**, Annulment Proceeding No. 73/21-EAR-01-6, Initial Filing; **R-0086-ENG**, *United States v. Louisiana*, 394 U.S. 11 (1969).

1456 **R-0078-ESP**, *Amparo* Proceeding No. 815/2020-IV, Initial Filing; **R-0079-ESP**, *Amparo* Proceeding No. 815/2020-IV, Motion to Amend Complaint.

1457 C-PHM, Appendix A, Answer to Tribunal Question 13, p. 28.

1458 2021 Hearing Transcript (Spanish), Day 3, 700:1-6; 2021 Hearing Transcript (English), Day 3, 607:10-14.

1459 R-PHM, ¶ 5.

1460 R-PHM, Annex A, Answer to Tribunal Question 13, ¶¶ 91-93; *see also* R-PHM, ¶¶ 101-105.

proceedings show that CALICA has been able to exercise its rights and has therefore received fair and equitable treatment in Mexico.[1461]

1181. Claimant submits that NAFTA contains no requirement to exhaust domestic remedies.[1462] For Claimant, NAFTA expressly provides that CALICA may file or maintain domestic proceedings for injunctive or declaratory relief relating to the same measures claimed to be in violation of NAFTA. In its view, Respondent's violations are background facts, but the Tribunal is not required to find that Respondent breached Mexican law in order to find that it breached NAFTA.[1463] Further, according to Claimant, while exhaustion of domestic remedies has been required for denial of justice claims based on judicial conduct, no such requirement exists for fair and equitable treatment claims premised on administrative conduct such as Claimant's claims in this arbitration.[1464]

1182. While Respondent also accuses CALICA of postponing the conclusion of the PROFEPA proceeding by its domestic litigation,[1465] Claimant contends that PROFEPA was able (and was required to) move forward with the administrative proceeding notwithstanding the *amparo* lawsuit. Relying on [redacted] Claimant further submits that it was unreasonable for PROFEPA to suspend activity for two years when it was required to move forward, and to delay issuing a final resolution for more than a year after it was no longer precluded by court order from doing so.[1466]

1183. The Tribunal agrees with Claimant that NAFTA does not preclude CALICA from pursuing domestic proceedings for injunctive or declaratory relief in relation to the same measures claimed to violate NAFTA. In this regard, NAFTA Article 1121 sets out the conditions precedent to submission of a claim to arbitration, which in Article 1121(1)(b)

1461 Counter-Memorial, ¶ 325.
1462 Reply, ¶ 168.
1463 C-RPHM, ¶ 59; C-PHM, ¶¶ 22-23, 25-26, *citing* **C-0009-ENG**, NAFTA, Art. 1121. *See also* Reply, ¶ 176, *citing* **CL-0016-ENG**, *Glamis Gold v. United States,* Award, ¶¶ 771, 779.
1464 C-PHM, ¶ 26, *citing, inter alia,* **CL-0003-ENG**, Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* [Excerpts], ¶ 7.104.
1465 R-PHM, ¶ 106; *see also* R-PHM, ¶¶ 109-110.
1466 Reply, ¶ 169, *citing* [redacted] Report, ¶¶ 180-184, 187. *See* Counter-Memorial, ¶ 32. *See also* C-RPHM, ¶ 61.

includes a requirement that the investor waive certain rights. That waiver includes a carve-out for injunctive and declaratory relief not involving the payment of damages:[1467]

> … the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

1184. While Respondent argues that the domestic proceedings may impact on the Tribunal's findings, it has not suggested that CALICA's conduct entails a violation of the above provision.

1185. In addition, the Tribunal notes that Respondent relies on a number of prior decisions of arbitral tribunals in respect of the failure of a claimant to exhaust domestic remedies, being a requirement going to the substance of the alleged breach as opposed to being a procedural or jurisdictional matter.[1468] However, as Respondent itself states,[1469] these cases generally relate to alleged denial of justice claims, which entail an assertion that a judicial act constitutes a breach of international law.

1186. The Tribunal considers a denial of justice claim to be distinct from the present case in which Claimant asserts a breach of the MST standard for arbitrary treatment and failure to accord due process, *inter alia*, in relation to its treatment in administrative proceedings relating to the El Corchalito lot. The actions taken by an investor with respect to domestic remedies may be relevant in the circumstances of a particular case.[1470] However, to the extent that the cases or commentary cited by Respondent would favor a general

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1467 **C-0009-ENG**, NAFTA, Art. 1121.

1468 R-PHM, Annex A, Answer to Tribunal Question 13, ¶¶ 94-100, *citing* **RL-004-ESP**, *Corona Materials v. Dominican Republic*, Award, ¶ 248; **RL-096-ENG**, *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 282; **RL-021-ESP**, *Thunderbird v. Mexico*, Award, ¶ 156.

1469 See, inter alia, R-PHM, Annex A, Answer to Tribunal Question 13, ¶ 99: "… el tribunal en Waste Management II enfatizó que, para que un inversionista tenga éxito en una reclamación de denegación de justicia…"

1470 *See, e.g.,* **CL-0004-ENG**, *Thunderbird v. Mexico,* ¶¶ 85 (Question 9.3), 197, 201.

substantive requirement of exhaustion of domestic remedies in relation to a claim for breach of the MST, this Tribunal does not agree.

1187. The Tribunal takes due account of the existence and nature of the legal proceedings initiated by CALICA and their outcomes, where applicable. The Tribunal does not consider these domestic proceedings to alter the conclusions reached in relation to Claimant's claims. As noted at ¶ 1091 above, this Tribunal makes its determination under the NAFTA, with a different legal basis and involving different legal considerations to those applied by Mexican courts.

1188. The Tribunal further notes that factual developments in domestic legal proceedings may have taken place since the time of filing of the Parties' post-hearing briefs on Claimant's original claims. Because the existence and nature of such proceedings do not alter the Tribunal's conclusions under NAFTA, the Tribunal does not consider any such developments to be determinative for present purposes.

8. Conclusion on El Corchalito

1189. For the above reasons, the Tribunal finds that Respondent's conduct in relation to Claimant's investment in El Corchalito was arbitrary, grossly unfair, unjust and idiosyncratic, and involved a lack of due process leading to an outcome which offends judicial propriety in relation to: (i) PROFEPA's refusal to consider expert evidence contradicting its own measurements of CALICA's alleged excess extraction; (ii) the disproportionate closure of El Corchalito in the Shutdown Order on the basis of the reasons given, i.e., a "probable" breach for "presumed" excess quarrying of a marginal amount in excess of the authorized surface area, itself based on the evidence that PROFEPA had not given CALICA adequate opportunity to challenge; (iii) the maintenance of the closure of El Corchalito in the October 2020 Resolution, which likewise relied on the contested evidence, as well as on new alleged violations of environmental law, in relation to which CALICA had no opportunity to respond before being sanctioned; and (iv) the impossibility of lifting the shutdown of El Corchalito ordered by the Shutdown Order and the October 2020 Resolution via the means specified by PROFEPA for doing so, therefore placing CALICA in a catch-22 situation and leading to a *de facto* total and indefinite shutdown.

1190. Taken as a whole, the Tribunal finds Respondent's measures in relation to El Corchalito to be pretextual, i.e., designed to achieve the outcome of shutting down CALICA's operations in El Corchalito. As such, the Tribunal is satisfied that the measures taken were founded on prejudice or preference rather than on reason or fact, were lacking in good faith, lacked transparency and even-handedness, and involved the use of legal instruments for purposes other than those for which they were created.

1191. Whether the measures identified in ¶ 1189 above are taken individually or as a whole, Respondent has breached NAFTA Article 1105 in relation to its treatment of Claimant's investment in El Corchalito.[1471]

XII. ALLEGED BREACHES IN RELATION TO LA ROSITA

1192. The Tribunal has found that it has no jurisdiction over Claimant's ancillary claim. The Parties' respective positions on the merits of the ancillary claim are shortly outlined at ¶¶ 440-441 and 393 above.

1193. In the circumstances, it is not necessary for the Tribunal to address the merits of the ancillary claim, and the Tribunal makes no determination in that respect.

[1471] In Professor Puig's view, Article 1121 of NAFTA does not provide a basis for the dispensation of substantive requirements of Article 1105. The three Contracting Parties have noted that Article 1105 entails "the obligation not to deny justice in … administrative adjudicatory proceedings" (*see e.g.,* USMCA Art. 14.6.(2)(a) and CP-TPP Art. 9.6.(2)(a)). Therefore, a NAFTA Chapter 11 claimant with an admissible claim under Article 1105 maintaining the permanent nullification of investment rights must pursue, at the very least, all the available instances of the proceeding that constitutes the basis of the breach. The administrative proceeding at issue in this case was composed of two instances: (i) the investigation/decision phase before the federal agency that is part of the executive branch (the PROFEPA); and (ii) the adjudicatory/appeal phase before an autonomous body (the *Tribunal Federal de Justicia Administrativa* or TFJA). The TFJA is an independent, quasi-judicial federal body created by Mexico's Congress. The TFJA is an administrative adjudicatory tribunal that reviews agency determinations, and is separate from the executive, legislative, and judicial branches of Mexico. While not a Court, its decisions can be reviewed by Mexico's Supreme Court. Notably, Mexico's Constitution recognizes the TFJA as the authority for safeguarding against corruption, upholding the principles of due process in determinations by agencies and, in this case, the authority that could have permanently nullified, as a matter of substance, the rights of the Claimant to quarry *El Corchalito* based on PROFEPA's determination. In Professor Puig's view, Articles 1121 and 1105 should not be read to circumvent the governance structures of Mexico, including the TFJA. Nevertheless, the measure at issue is PROFEPA's temporal Shutdown Order (and related actions leading to it). Not being final, that order of the agency was not subject to appeal before the TFJA. Importantly, Mexican Federal Courts reviewed the temporal Shutdown Order (*see* ¶ 1154 above) without redressing the very problematic procedural deficiencies and conduct of the PROFEPA. Therefore, Professor Puig does not disagree with the primary conclusion in relation to the temporal Shutdown Order and related measures.

1194. The Tribunal briefly notes the NDP and amicus submissions on the merits of the ancillary claim below. Claimant also commented on these submissions, disagreeing with the US submission and asking the Tribunal to disregard Mr. Tzab's submission which in its view is biased and inaccurate.[1472]

A. US SECOND NDP SUBMISSIONS

1195. In the US Second NDP Submission, the United States provides its interpretation regarding: (i) the content of the MST included in NAFTA Article 1105; (ii) the interpretation of provisions of NAFTA Chapter 11 in the context of environmental issues (NAFTA Article 1114); and (iii) the notion of contributory fault.

1196. With respect to item (i) of ¶ 1195 above, the United States submits that the MST does not require the same due process in administrative decisions as for adjudicatory proceedings.[1473] Further, according to the United States, the principle of good faith only binds the parties to the Treaty among each other, but does not serve third parties. As such, in its view it would not be possible for third parties to base a State's liability on a breach of good faith.[1474]

1197. With respect to item (ii) of ¶ 1195 above, the United States submits that States shall not be hindered in the taking of environmental measures, even in case these measures are disadvantageous to a certain investment.[1475]

1198. With respect to item (iii) of ¶ 1195 above, the United States relies on Article 39 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, contending that when determining the reparation, Claimant's contribution to the injury needs to be taken into account.[1476]

1472 Claimant's Comments on the Second Article 1128 Submission of the United States of America and the 30 June 2023 Letter of Mr. Quetzal Tzab, ¶¶ 75-88, 89-101.
1473 US Second NDP Submission, ¶ 3.
1474 US Second NDP Submission, ¶¶ 4-5.
1475 US Second NDP Submission, ¶ 6.
1476 US Second NDP Submission, ¶ 7.

B. AMICUS SUBMISSION

1199. In the Tzab Amicus Submission dated 30 June 2023, Mr. Tzab, representing the local and Indigenous communities from Playa del Carmen, provides his view regarding the environmental and human rights impact of Claimant's activities on the communities.[1477]

1200. Mr. Tzab submits that the communities' constitutional right to a sound environment is endangered by the future medical and environmental consequences of Claimant's operations in Playa del Carmen.[1478] Arguing that the continuation of Claimant's quarrying would have posed a negative impact to wildlife and the population of the area, Mr. Tzab contends that Respondent's closing of the mine was justified in the given context, is fully supported by international law and applies international human rights law.[1479]

1201. In this context, Mr. Tzab asserts that the Rio Declaration on Environment and Development ("**Rio Declaration**"), the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**"), the American Convention on Human Rights ("**ACHR**") and the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights ("**Protocol of San Salvador**") are part of both: (i) the rules of international law applicable to the dispute; and (ii) the corpus of rules of relevance in interpreting NAFTA.[1480]

XIII. ALLEGED BREACHES IN RELATION TO PORT TARIFFS

1202. The Parties' respective positions on the merits of the claim for port tariffs are shortly outlined at ¶¶ 532 and 387 above. The Tribunal addressed the question of whether the port tariffs are properly classified as a taxation measure and thus outside the Tribunal's jurisdiction above (*see, inter alia*, ¶ 558 above). However, and regardless of the Tribunal's decision on that issue of jurisdiction, the Tribunal noted that Claimant's claim with respect to the port fees is without merit, and is rejected (*see* ¶¶ 559-562 above).

1477 Tzab Amicus Submission, p. 1.
1478 Tzab Amicus Submission, p. 1.
1479 Tzab Amicus Submission, p. 2.
1480 Tzab Amicus Submission, p. 2.

XIV. QUANTUM AND RELIEF SOUGHT

1203. Taking into account its findings on liability in relation to Claimant's claims and Respondent's counterclaims, the Tribunal will proceed to determine the quantum of Claimant's claims in these proceedings. The Tribunal has found a breach of NAFTA Article 1105 in relation to La Adelita and El Corchalito, as set out at ¶¶ 988 and 1191 above.

1204. Noting that the Tribunal has no jurisdiction in relation to the La Rosita claim, the Tribunal does not give further consideration to that claim (*see* ¶¶ 1192-1193 above). Likewise, the Tribunal has rejected the claim for port fees (*see* ¶ 1202 above).

A. RELEVANT PROVISIONS

1205. NAFTA Article 1116(1) provides that an investor may submit a claim to arbitration for alleged breach of Section A of Chapter 11 of NAFTA where "the investor has incurred loss or damage by reason of, or arising out of, that breach".[1481] Likewise, under NAFTA Article 1117(1), an investor may submit a claim to arbitration on behalf of an enterprise of another Party that it owns or controls directly or indirectly, where "the enterprise has incurred loss or damage by reason of, or arising out of", a breach.[1482]

1206. NAFTA Article 1135 provides, with respect to the "Final Award":

> 1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:
>
> (a) monetary damages and any applicable interest;
>
> (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.
>
> A tribunal may also award costs in accordance with the applicable arbitration rules.
>
> 2. Subject to paragraph 1, where a claim is made under Article 1117(1):

[1481] **C-0009-ENG**, NAFTA, Art. 1116(1).
[1482] **C-0009-ENG**, NAFTA, Art. 1117(1).

(a) an award of restitution of property shall provide that restitution be made to the enterprise;

(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A Tribunal may not order a Party to pay punitive damages.

B. THE APPLICABLE STANDARD AND SCOPE OF THE CLAIM

1. Claimant's Position

1207. Claimant argues that pursuant to NAFTA Article 1135, given that restitution is not an option in this case, Claimant is entitled to monetary compensation.[1483] According to Claimant, NAFTA does not prescribe how these monetary damages are to be calculated and the Tribunal should therefore calculate Claimant's damages in accordance with customary international law.[1484]

1208. Claimant submits, relying on the *Chorzów Factory* case and its codification in the ILC Articles on State Responsibility, that it is entitled to full reparation for the losses caused by Respondent's alleged violations of NAFTA, which would entail returning Claimant to the position it would have been in had Respondent complied with its obligations.[1485] This includes, in its view, both the loss suffered and the loss of profits.[1486]

1483 Memorial, ¶¶ 249-250, *citing* **C-0009-ENG**, NAFTA, Art. 1135.

1484 Memorial, ¶ 250, *citing* **C-0009-ENG**, NAFTA, Art. 1131; *see* Memorial, § V.A.

1485 Memorial, ¶¶ 246, 251, 252, 254, *citing* **CL-0080-ENG**, *Case Concerning the Factory at Chorzów*, PCIJ Judgment No. 13, Decision on the Merits, 13 September 1928 ("*Chorzów Factory*, Judgment"), pp. 46-47*, citing*, *inter alia*, **CL-0081-ENG**, *ADC Affiliate Limited & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 ("*ADC Affiliate v. Hungary*, Award"), ¶ 48; **CL-0082-ENG**; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007 ("*ADM v. Mexico*, Award"), ¶ 281; Reply, ¶ 201; C-RPHM, ¶ 69; Memorial, ¶ 252, *citing* **C-0139-ENG**, ILC Articles on State Responsibility, Arts. 31, 36; Reply, ¶ 201; C-RPHM, ¶ 71. *See also* Memorial, ¶ 253, *citing* **CL-0059-ENG**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 ("*S.D. Myers v. Canada*, Partial Award"), ¶ 311*, citing* **CL-0084-ENG**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic*, SCC Arbitration V (2015/095), Final Award, 23 December 2018, ¶ 548; C-RPHM, ¶ 71, *citing* **CL-0149-ENG**, Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA case law on Article 1105*, p. 301 (Kluwer Law International 2013).

1486 Memorial, ¶ 252, *citing* **CL-0082-ENG**, *ADM v. Mexico*, Award, ¶ 281.

1209. Claimant contends that the purpose of an award of damages is the same irrespective of the nature of the host State's breach of international obligations.[1487]

(a) NAFTA Articles 1116 and 1117

1210. Claimant submits that the plain and ordinary meaning of NAFTA Article 1116 is that Claimant, an "investor of a Party", can claim for "loss or damage" incurred "by reason of, or arising out of" a breach of Section A of NAFTA Chapter 11.[1488] In Claimant's view there is no dispute that CALICA and its reserves, among other assets in Mexico, qualify as an "investment" pursuant to NAFTA Article 1139.[1489] Claimant relies on the wording of NAFTA Article 1101(1) that Chapter 11 applies to measures adopted or maintained by a NAFTA Contracting Party relating to "investments of investors of another Party in the territory of the Party."[1490]

1211. Claimant denies that NAFTA Article 1116 limits recoverable damages to direct loss or damage suffered by Claimant as shareholder of CALICA.[1491] According to Claimant, it may establish "through a chain of causation" that it has suffered loss or damage as a consequence of State conduct that immediately impacted an indirectly-owned downstream entity.[1492]

1212. Claimant submits that Respondent's argument that Claimant cannot bring a claim under NAFTA Article 1117 on behalf of the CALICA Network is misplaced and irrelevant.[1493] Claimant does not claim that the CALICA Network is an "enterprise of a Party" as defined by NAFTA and has not brought claims under NAFTA Article 1117 on behalf of the CALICA Network.[1494] Claimant brings (i) derivative claims under NAFTA Article 1117(1) on behalf of CALICA, as an "enterprise" of Claimant in the territory of

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1487 Memorial, ¶ 254, citing **CL-0087-ENG**, Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, 20 August 2007 ("Vivendi v. Argentina, Award"), ¶ 8.2.7.

1488 C-RPHM, ¶¶ 74, 76, *citing* **C-0009-ENG**, NAFTA, Art. 1116(1).

1489 C-RPHM, ¶¶ 75, 79, *citing* **C-0009-ENG**, NAFTA, Art. 1139.

1490 C-RPHM, ¶ 75, *citing* **C-0009-ENG**, NAFTA, Art. 1101(1).

1491 C-RPHM, ¶ 78, *citing* R-PHM, ¶¶ 136-137.

1492 C-RPHM, ¶ 79; *see* **CL-0159-ENG**, *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶ 130.

1493 Reply, § IV.A.2.

1494 Reply, § IV.A.2; *see also* Reply, ¶ 213.

Respondent; and (ii) direct claims under NAFTA Article 1116 for losses it has suffered as an investor as a consequence of Respondent's alleged violations.[1495]

(b) Territorial Scope of Damages and Causation

1213. Claimant contends that NAFTA does not impose a territorial limitation on the scope of recoverable damages caused by its alleged treaty violations. Accordingly, Claimant's claim for damages relates to the CALICA Network as a whole, and not only those suffered as a result of CALICA's lost profits within Mexico.[1496] Claimant accepts that the Vulica shipping business ("**Vulica**") and the US sales distribution yards ("**US Yards**") do not qualify as investments under NAFTA as a matter of jurisdiction, but submits that they are not excluded from the scope of recoverable damages.[1497]

1214. According to Claimant, neither NAFTA Article 1116 nor NAFTA Article 1117 sets limits, other than causation, as to the nature and scope of recoverable damages for NAFTA violations.[1498] Claimant asserts that it is entitled to recover losses it sustains throughout the CALICA Network as long as the proximate cause of those losses is the Respondent's interference with its investment in Mexico.[1499]

2. Respondent's Position

1215. Respondent agrees that the standard of compensation applicable under NAFTA for breaches other than expropriation is that of full reparation, and the *Chorzow Factory* case correctly articulates that standard.[1500] Respondent contends, however, that monetary compensation under the full reparation standard is limited to the legally relevant loss so as to avoid unlimited liability and an inequitable result, defined by the principles of causation and reasonable certainty of harm.[1501] Respondent further submits that the

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1495 Reply, ¶ 213.
1496 Reply, ¶¶ 204, 206, *citing* Counter-Memorial, ¶ 458. *See also* Reply, ¶ 212.
1497 Reply, ¶¶ 204, 207, 243; C-PHM, ¶ 167.
1498 Reply, ¶¶ 207, 243.
1499 Reply, ¶¶ 209, 211-212; C-PHM, ¶ 168, *citing* **CL-0132-ENG**, *S.D. Myers v. Canada*, Second Partial Award (Damages), ¶ 118.
1500 Counter-Memorial, ¶ 446, *citing* **CL-0080-ENG**, *Chorzów Factory*, Judgment, p. 47.
1501 Counter-Memorial, ¶ 447, *citing* **RL-065-ENG**, Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, p. 115.

provisions of NAFTA, which limit compensable damages, prevail over the *Chorzów Factory* full reparation standard.[1502]

(a) NAFTA Articles 1116 and 1117

1216. Respondent submits that Claimant has erroneously combined claims for damages brought under NAFTA Articles 1116(1) and 1117(1).[1503] According to Respondent, the request for compensation in the Reply states that "[d]etermining that this breach has caused damages to the Claimant" and "[o]rdering the Respondent to pay the Claimant compensation," pursuant to which Respondent argues that the request for compensation is limited to a claim under NAFTA Article 1116(1).[1504] Respondent argues that claims under NAFTA Articles 1116 and 1117 are not interchangeable, and an investment cannot claim damages suffered directly by the investor, and an investor cannot claim, on its own, damages suffered directly by its investment.[1505] According to Respondent, Claimant must specify which damages it claims under NAFTA Article 1116 and which under NAFTA Article 1117.[1506]

1217. Respondent argues that a claim for damages under NAFTA Article 1116 is a "direct" claim as it relates to the treatment accorded to the investor and the loss or damage suffered by the investor, not to the treatment accorded to its investment in the territory of another NAFTA Contracting Party.[1507] Respondent therefore submits that Claimant fails to make a *prima facie* case for damages under NAFTA Article 1116(1), which is an irremediable defect in Claimant's damages claim, as an investor's right to submit a claim to arbitration on its own behalf is conditioned on the investor having incurred loss or damage by virtue of, or as a consequence of, the breach.[1508]

1502 R-PHM, ¶ 123.
1503 Counter-Memorial, § IV.C.2, ¶ 465; Rejoinder, ¶ 409.
1504 Rejoinder, ¶ 409, *citing* Reply, ¶ 288(c)-(d). *See also* Counter-Memorial, ¶ 469, *citing* Memorial, ¶ 347(c)-(d).
1505 R-RPHM, ¶ 13, *citing* United States Brief 1128, ¶¶ 29-35, 37. *See also* Counter-Memorial, ¶ 466; Rejoinder, ¶¶ 410, 419.
1506 R-RPHM, ¶ 13.
1507 R-PHM, ¶ 137, *citing* Canada Brief 1128, 7 June 2021, ¶¶ 29-30, nn. 28-29; United States Brief 1128, ¶¶ 31-33.
1508 Counter-Memorial, ¶ 468.

1218. Respondent submits that any damages for harm suffered by the investment are payable to the investment pursuant to NAFTA Article 1135(2)(b),[1509] as opposed to the investor.[1510] Respondent submits that Claimant's claim for damages under NAFTA Article 1117(1) is incomplete as its request for relief fails to refer to damage suffered by the investment that should be paid to the investment.[1511]

1219. Respondent further argues that since the claim is for breach of NAFTA Article 1105 and that obligation is owed to the investment, Claimant can only bring a claim under NAFTA Article 1116(1) if it can show that Claimant, as opposed to its investment, suffered indirect loss or damage. That loss or damage must result from Claimant's involvement in the protected investment that was affected by the alleged breach of NAFTA Article 1105.[1512] Respondent contends that such damages, if proven, are paid to Claimant and are not necessarily equivalent to the damages suffered by the investment itself.[1513] Claimant cannot therefore claim damages suffered by CALICA, which has to be made under NAFTA Article 1117.[1514] Respondent argues that Claimant has failed to state a claim for damages in relation to NAFTA Article 1117.[1515]

(b) Territorial Scope of Damages and Causation

1220. According to Respondent, the NAFTA Contracting Parties have a common position that NAFTA Chapter 11 limits the host State's liability to damage or loss suffered by the investment made within its territory.[1516] As such, losses related to investments made outside Mexico, which are not part of CALICA, cannot in its view be the subject of a NAFTA claim.[1517] Respondent's position is that NAFTA does not offer protection to companies that do not fit the definition of investment or to nationals of other countries,

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1509 NAFTA Article 1135(2)(b): "Subject to paragraph 1, where a claim is made under Article 1117(1): […] (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise."
1510 R-PHM, ¶ 140.
1511 Counter-Memorial, ¶ 475.
1512 Counter-Memorial, ¶ 466; Rejoinder, ¶ 410; R-PHM, ¶ 143.
1513 Counter-Memorial, ¶ 466.
1514 R-PHM, ¶ 138.
1515 R-PHM, ¶ 139.
1516 R-PHM, ¶ 127.
1517 R-PHM, ¶ 128, *citing* 2021 Hearing Transcript (English), Day 2, 422-423 ([redacted] Testimony); *see also* R-PHM, ¶ 132; R-RPHM, ¶¶ 14-15.

except in their capacity as "investors of another Party."[1518] As such, in its view, Claimant can only recover damages suffered as a CALICA investor, not as an indirect investor in the other two components of the alleged CALICA Network in the Bahamas and the United States.[1519]

1221. Respondent further submits that vertical business integration cannot be used to extend the coverage of a treaty, which would fundamentally alter the investment treaty regime.[1520]

1222. With respect to the causation of damages, Respondent argues that both factual and legal causation must be established.[1521] The factual causation inquiry is whether the wrongful conduct played a role in generating the damage or injury, determined by the "but-for" test.[1522] Legal causation, which establishes the legally relevant harm, is established where the wrongful conduct is a sufficient, proximate, adequate, foreseeable or direct cause of the damage or injury.[1523]

3. Tribunal's Analysis

1223. In this Section, the Tribunal will first consider the applicable standard for the determination of the quantum of damages and relief sought by Claimant in general (Section (a) below), before turning to consider the implications of NAFTA Articles 1116 and 1117 for the standard (Section (b)). The Tribunal will then address the issues of territorial scope of damages and causation, which in this case raise related considerations (Section (d)).

1518 R-RPHM, ¶ 14. *See also* R-PHM, ¶¶ 133, 134, 136, *citing* Canada Brief 1128, ¶ 40; United States Brief 1128, ¶ 28; R-RPHM, ¶ 10, *citing* Canada Brief 1128, ¶ 36, *citing* United States Brief 1128, ¶ 23.

1519 Rejoinder, ¶ 417; R-PHM, ¶¶ 134, 136, 143; R-RPHM, ¶¶ 10, 12.

1520 R-PHM, ¶ 125, *citing* Rejoinder, ¶ 392; Canada NDP Submission, ¶¶ 36-41; US NDP Submission, ¶¶ 23-38.

1521 Counter-Memorial, ¶ 451, *citing* **RL-065-ENG**, Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, p. 135.

1522 Counter-Memorial, ¶ 451.

1523 Counter-Memorial, ¶¶ 451-452; *see also* Counter-Memorial, ¶ 452, *citing* **RL-070-ENG**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award (Preliminary Award on Jurisdiction and Admissibility), 7 August 2002, ¶ 138.

(a) Standard for Compensation

1224. NAFTA Articles 1116, 1117 and 1135 are relevant to the compensation to be awarded to Claimant in this matter (*see* ¶¶ 1205-1206 above). NAFTA Articles 1116 and 1117 will be further discussed at ¶¶ 1236 *et seq.* below.

1225. NAFTA Article 1135 sets out the types of relief that may be awarded by an arbitral tribunal. As Claimant does not claim the restitution of property in the present case, the Tribunal must determine its claim for "monetary damages and any applicable interest".[1524] It is noted that pursuant to NAFTA Article 1135(3), the Tribunal "may not order a Party to pay punitive damages".[1525]

1226. NAFTA does not set the applicable standard for the calculation of monetary damages. However, it does specify that the Tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law".[1526]

1227. The Tribunal accepts both Parties' submissions that the standard set out in the *Chorzów Factory* case, as codified in the ILC Articles on State Responsibility, applies under international law.[1527] Article 31(1) of the ILC Articles on State Responsibility provides that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".[1528] As set out in *Chorzów Factory*, the principle is that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[1529]

1228. In its R-PHM, Respondent argues that NAFTA provisions prevail over customary international law, including the *Chorzow Factory* full reparation standard.[1530] In Claimant's view, this is a new position taken by Respondent that NAFTA deviates from the full reparation standard under customary international law.[1531]

1524 **C-0009-ENG**, NAFTA, Article 1135(1)(a).
1525 **C-0009-ENG**, NAFTA, Article 1135(3).
1526 **C-0009-ENG**, NAFTA, Article 1131(1).
1527 Memorial, ¶ 251; Counter-Memorial, ¶ 446.
1528 **C-0139-ENG**, ILC Articles on State Responsibility, p. 63 of the PDF.
1529 **CL-0080-ENG**, *Chorzów Factory*, Judgment, p. 47.
1530 R-PHM, ¶ 123.
1531 C-RPHM, ¶ 70. *See also* C-RPHM, ¶¶ 71-73.

1229. The Tribunal considers it uncontroversial that the provisions of NAFTA apply to the determination of any relief to be awarded to Claimant. This is consistent with NAFTA Article 1131(1) quoted at ¶ 1226 above. Relevant provisions include NAFTA Articles 1116 and 1117 regarding the claiming entity and the matter of causation, as well as Article 1135 on types of relief (*see* ¶¶ 1205-1206 above).

1230. The Tribunal may not award damages or other relief that would be inconsistent with the provisions of NAFTA. To the extent that Claimant's claim would go beyond what is provided for or permitted by NAFTA, it would fall outside the scope of recoverable damages. For present purposes, the Tribunal finds no conflict between NAFTA and international law that would require a finding that NAFTA "prevails" over international law. However, the Tribunal affirms that the provisions of NAFTA set the limits of recoverable damages.

(b) Causation

1231. Under NAFTA Articles 1116 and 1117, a claim may only be made by an investor on its own behalf or on behalf of an eligible enterprise for "loss or damage" that the investor or enterprise has incurred "by reason of, or arising out of" a breach.[1532] In accordance with the plain meaning of these terms, the loss or damage must be causally connected to the breach.

1232. This is reflected in Article 31, Comment 9 of the ILC Articles on State Responsibility, which states with respect to the causal link between the wrongful act and the loss that the phrase "injury . . . caused by the internationally wrongful act of a State" in Article 31 of the ILC Articles on State Responsibility "is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act".[1533]

1233. The causation requirement for compensable harm is not in dispute between the Parties.[1534] Both sides refer to the need to establish both factual and legal causation of the

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1532 **C-0009-ENG**, NAFTA, Arts. 1116(1), 1117(1).

1533 **C-0139-ENG**, ILC Articles on State Responsibility, p. 64 of the PDF.

1534 *See, e.g.,* C-RPHM, ¶ 82, *citing* **CL-0059-ENG**, *S.D. Myers v. Canada*, Partial Award, ¶ 316; Counter-Memorial, ¶ 451, *citing* **RL-065-ENG**, Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law*, p. 135. *See also* Counter-Memorial, ¶ 443.

harm alleged to be suffered.[1535] Factual causation is established by the "but-for" test, which means that the claimant must show that its losses "would in fact have been averted if the Respondent had acted in compliance with its legal obligations" under NAFTA.[1536]

1234. Legal causation is the inquiry whether the wrongful act and the loss are sufficiently proximate to allow compensation. Respondent refers to this as the "legal relevant" loss (*daño juridicamente relevante*), i.e., whether the breach is a sufficient, proximate, adequate, foreseeable or direct cause of the damage.[1537] Article 31, Comment 10 of the ILC Articles on State Responsibility states, in this respect, that "[t]he notion of a sufficient causal link which is not too remote is embodied in the general requirement in Article 31 that the injury should be in consequence of the wrongful act".[1538] The Comment further states that the criteria of "directness", "foreseeability", or "proximity" have been applied in this context, and the link has been referred to as losses "attributable to [the wrongful] act as a proximate cause". Damage may also be described as "too indirect, remote, and uncertain to be appraised". This notion may lead to the "exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation".[1539]

1235. The causation requirement has been confirmed by NAFTA tribunals and has been referred to as the requirement of a "sufficient causal link,"[1540] a "sufficiently clear direct link"[1541] or that the breach is the "*proximate* cause" of the harm.[1542]

1535 C-RPHM, ¶ 83, citing **CL-0172-ENG**, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. The Government of Canada, PCA Case No. 2009-04, Award on Damages, 10 January 2019 ("Bilcon v. Canada, Award on Damages"), ¶ 114, citing **CL-0059-ENG**, S.D. Myers v. Canada, Partial Award, ¶¶ 122, 140; Counter-Memorial, ¶¶ 451-452. See also Counter-Memorial, ¶ 452, citing **RL-070-ENG**, Methanex v. United States, Partial Award, ¶ 138.

1536 **CL-0172-ENG**, *Bilcon v. Canada*, Award on Damages, ¶ 114.

1536 C-RPHM, ¶ 83; see **CL-0082-ENG**, Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/04/5, Award, 21 November 2007 ("ADM v. Mexico, Award"), ¶ 282.

1537 Counter-Memorial, ¶ 451.

1538 **C-0139-ENG**, ILC Articles on State Responsibility, p. 65 of the PDF.

1539 **C-0139-ENG**, ILC Articles on State Responsibility, pp. 64-65 of the PDF.

1540 **CL-0059-ENG**, *S.D Myers v. Canada*, Partial Award, ¶ 316.

1541 **CL-0082-ENG**, *ADM v. Mexico*, Award, ¶ 282.

1542 **CL-0132-ENG**, *S.D. Myers v. Canada*, Second Partial Award (Damages), ¶ 140.

(c) NAFTA Articles 1116 and 1117

1236. Claimant files its investment claims on its own behalf under NAFTA Article 1116(1) and on behalf of its enterprise, CALICA, under NAFTA Article 1117(1).[1543] While Respondent takes issue with Claimant's failure to distinguish between the two claims (*see* ¶ 1216 above), Claimant argues that the distinction between claiming under Article 1116 and 1117 in the present case is "an almost entirely formal one", given that Claimant is the sole indirect owner of CALICA, and there is no question regarding how much of CALICA's losses flow through to it.[1544]

1237. The Tribunal accepts that for the purpose of a claim under NAFTA Article 1116(1) by an investor, a common measure of compensation to a claimant which is a shareholder in an enterprise is the impact of the State conduct on the claimant's financial position as a shareholder.[1545] Where that claimant is the sole shareholder, it is possible that the losses may be the same as the losses to the enterprise itself. In that context, this does not mean that the claimant makes a claim for loss or damage to the corporation in which it invested, but that the quantum of the loss to the claimant investor may be equal to the loss or damage to the corporation in which it invested.

1238. Respondent takes issue with such an assumption in the present case because contrary to the cases of *UPS v. Canada* and *Pope & Talbot v. Canada* where the claimants were the sole owners of the investments, in this arbitration, the chain of ownership between Claimant and its investment involves three intermediary companies.[1546] In this regard, in *UPS v. Canada* the arbitral tribunal reasoned that "if there were multiple owners and divided ownership shares for UPS Canada, the question of how much of UPS Canada's losses flow through to UPS . . . may have very different purchase".[1547] Respondent

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1543 Memorial, ¶ 20; C-PHM, ¶ 13, *citing* 2021 Hearing Transcript (English), Day 1, 77:1-12 (Claimant's Opening Statement); **C-0009-ENG**, NAFTA, Art. 1116(1).

1544 Reply, ¶ 214, *citing* **CL-0134-ENG**, *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007 ("*UPS v. Canada*, Award on the Merits"), ¶ 35.

1545 **RL-091-ENG**, Sergey Ripinsky & Kevin Williams, Damages in International Investment Law, British Institute of International and Comparative Law, 2008, p. 157. See Rejoinder, ¶ 411.

1546 Rejoinder, ¶¶ 413-414, *citing* **CL-0134-ENG**, *UPS v. Canada*, Award on the Merits, ¶ 24, *citing* **CL-0031-ENG**, *Pope & Talbot v. Canada*, Damages Award, ¶ 80.

1547 Rejoinder, ¶ 414, *citing* **CL-0134-ENG**, *UPS v. Canada*, Award on the Merits, ¶ 35.

disagrees, in any event, with the interpretation of the *UPS v. Canada* tribunal that there is no difference between NAFTA Articles 1116 and 1117.[1548]

1239. The Tribunal does not consider Respondent to raise a relevant issue for this case, which is not a situation of multiple owners or divided ownership of shares. Claimant is the sole shareholder of CALICA. The fact that Claimant holds its shares in CALICA indirectly through three intermediary companies does not alter the fact that the harm suffered by CALICA flows, via its 100% shareholding, to Claimant.

1240. In this regard, according to Claimant's certification of the ownership structure of CALICA, CALICA is owned by Claimant through two intermediary entities. Claimant holds 100% of the shares in Vulcan International, BV (Netherlands), which in turn holds 100% of the shares in VGCM, BV (Netherlands). VGCM, BV owns over 99% of the shares in CALICA. A single remaining share is held by Vulcan Gulf Coast Materials, LLC (US), an entity which is 100% owned by VGCM, BV. This is represented visually as follows:[1549]

1548 Rejoinder, ¶ 306, *citing* **CL-0134-ENG**, *UPS v. Canada*, Award on the Merits, ¶¶ 34, 35.
1549 **C-0005-ENG**, CALICA Ownership Structure Certification, p. 3.

1241. The Tribunal is satisfied, based on the above, that the distinction between a claim under NAFTA Articles 1116 and 1117 in the present case is a formal one, and rejects Respondent's objection to the contrary.[1550]

1242. Respondent points out that in accordance with NAFTA Article 1135(2)(b), "where a claim is made under Article 1117(1)", any award of damages "shall provide that the sum be paid to the enterprise". Claimant's claim for relief requests an order for "the Respondent to pay to the Claimant".[1551] It does not seek any payment to be made to CALICA, the enterprise owned or controlled by Claimant for the purposes of NAFTA Article 1117. As such, while Claimant states that its claim is made under both

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1550 *See* Counter-Memorial, ¶ 468; Rejoinder, ¶ 416.

1551 Memorial, ¶ 347(d); Reply, ¶ 288(d). *See also* Memorial, ¶ 347(c); Reply, ¶ 288(c).

Articles 1116 and 1117,[1552] in effect it has only made a claim for compensation directly to Claimant under Article 1116[1553] and not for compensation to CALICA under Article 1117, which would have required Claimant to seek compensation to be paid to CALICA.

1243. The Tribunal will address the objection relating to the CALICA Network in the following Section.

(d) Territorial Scope of Damages and Causation

1244. Respondent objects to Claimant's claim for damages insofar as it includes harm suffered by the "CALICA Network", which is not an enterprise of another NAFTA Contracting Party, nor are Vulica or the US Yards "investments of investors" of another NAFTA Contracting Party.[1554] Respondent argues that Claimant can only bring a claim in the name of CALICA, a Mexican investment, not a claim in the name of the CALICA Network.[1555] In its view, NAFTA does not permit the inclusion of damages related to other entities, which are not legally part of CALICA and are not protected investments under the treaty.[1556]

1245. Claimant accepts that Vulica and the US Yards do not qualify as investments under NAFTA as a matter of jurisdiction, but submits that they are not excluded from the scope of recoverable damages.[1557]

1246. As noted in the context of the Tribunal's considerations on jurisdiction, there is no dispute that NAFTA Chapter 11 does not protect Claimant's investments outside the territory of Mexico from measures adopted by Respondent and the Tribunal has no jurisdiction over such a claim (*see* ¶¶ 517-518 above). When addressing its jurisdiction, the Tribunal reserved its decision on whether Claimant's claim for damages may include harm caused

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1552 Memorial, ¶ 20; C-PHM, ¶ 13, *citing* 2021 Hearing Transcript (English), Day 1, 77:1-12 (Claimant's Opening Statement); **C-0009-ENG**, NAFTA, Art. 1116(1).
1553 *See* C-PHM, ¶ 151.
1554 Counter-Memorial, ¶ 471; R-PHM, ¶ 143; R-RPHM, ¶ 11.
1555 Counter-Memorial, ¶ 473; R-RPHM, ¶ 12.
1556 Counter-Memorial, ¶ 474; R-PHM, ¶ 140.
1557 Reply, ¶¶ 204, 207, 243; C-PHM, ¶ 167.

to its investments outside Mexico, which shall now be determined in relation to the scope of compensable losses.

1247. While Claimant does not bring claims on behalf of the CALICA Network, its damages claim is calculated on the basis of the reduction in value of the CALICA Network.[1558] This includes the "integrated business" of "the quarrying operations and export facility in Quintana Roo, the shipping business [i.e., Vulica], and the US Yards established for the purpose of distributing Calica aggregates in the US [i.e., the US Yards]".[1559] Vulica is a Bahamian entity that owns and charters vessels to ship aggregates from Punta Venado to the US.[1560] The US Yards refers to fourteen "US distribution yards along the US Gulf Coast and Atlantic seaboard".[1561]

1248. The Parties' disagreement on this issue requires the Tribunal to consider whether damages in relation to losses incurred outside Mexico may be recovered under NAFTA.

1249. Respondent reads a territorial limitation on recoverable damages as arising from a combined reading of (i) NAFTA Article 1101 (scope of application of NAFTA limited to measures by a Contracting Party relating to "investors of another Party" and "investments of investors of another Party in the territory of the Party"; (ii) NAFTA Article 1139 (definition of "investor of a Party"); and (iii) NAFTA Article 1105 (treatment to be accorded to "investments of investors of another Party") together with (iv) NAFTA Article 1116 ("the investor has incurred loss or damage") or NAFTA Article 1117 ("the enterprise has incurred loss or damage") as applicable to the claim.[1562]

1250. Claimant denies that these provisions limit the recoverability of damages. In its view, Respondent conflates NAFTA's undisputed jurisdictional territoriality requirement with Claimant's entitlement to full reparation.[1563] With respect to NAFTA Article 1105, Claimant submits that while a claimant seeking to establish the host state's liability for a breach of NAFTA Article 1105(1) must demonstrate that the adverse measure is directed

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1558 *See* Brattle First Report, ¶ 21.
1559 Brattle First Report, ¶ 11. *See also* Brattle First Report, ¶ 2.
1560 Brattle First Report, ¶ 39.
1561 Brattle First Report, ¶¶ 2, 45.
1562 R-PHM, ¶¶ 132-143.
1563 C-PHM, ¶ 167.

to the relevant protected investment, once a treaty breach is established, compensation is to be determined in accordance with NAFTA and the full reparation standard under customary international law, without any distinction between investments and investors.[1564]

1251. The Tribunal draws a distinction between (i) the scope of NAFTA, which delineates the type and extent of protection from measures by the host State offered to investors and investments, and (ii) the type and extent of compensation that may be awarded for a breach of its provisions.

1252. While the jurisdictional limitations of the NAFTA provisions are well-noted, the Tribunal finds no textual basis in the Treaty for an absolute exclusion of damages for harm suffered outside the host State.

1253. In this regard, under NAFTA Article 1101, setting out the scope of Chapter 11, measures adopted or maintained by a NAFTA Contracting Party fall within scope insofar as they relate, *inter alia*, to (i) investors of another NAFTA Contracting Party and (ii) investments of investors of another NAFTA Contracting Party "in the territory of" the host State Contracting Party.[1565] The investments of investors that are protected (as defined in NAFTA Article 1139) are therefore those in the territory of the host State. However, that does not answer the question of whether, separate to the question of liability relating to "measures adopted or maintained", harm that occurs outside the host State's territory as a result of a measure inside the host State is compensable.

1254. For the same reason, NAFTA Article 1105 does not assist on this point. The minimum standard of treatment which is to be accorded to "investments of investors" refers to the measures or treatment by the host State.[1566] It does not address the question of compensable harm, which according to NAFTA Articles 1116 and 1117 can be claimed either by the investor or by an investor on behalf of an enterprise it owns or controls.

1564 C-RPHM, ¶ 80.
1565 **C-0009-ENG**, NAFTA, Art. 1101.
1566 **C-0009-ENG**, NAFTA, Art. 1105(1).

1255. This does not mean that the recovery of damages under NAFTA is limitless. Importantly, it is required to establish a causal link between the wrongful act and the harm (*see* ¶¶ 1231-1235 above).

1256. NAFTA Articles 1116(1) and 1117(1) require, respectively, that "the investor has incurred" or "the enterprise has incurred" the loss or damage being claimed. This ties the claim to the protected entities under NAFTA which must have suffered the loss in question. Whether the investor or enterprise has suffered a loss is a question of fact to be determined in a particular case.

1257. Based on the above, the Tribunal follows Respondent (and the Non-Disputing Party Submissions) insofar as they assert that, under NAFTA, investors are linked to their investments, investments are linked to the territory of another Contracting Party, and claimed losses must be causally connected to the breach. By reason of these limitations, claimed losses will typically be incurred in the territory of the host State. However, the Tribunal does not follow Respondent in its view that NAFTA excludes in an absolute sense any claim for losses that have occurred outside the host State.

1258. Canada's Non-Disputing Party Submission also refrains from an absolute statement in this regard: "*In most cases*, direct and foreseeable loss incurred by an investor with respect to its investment in the territory of another NAFTA Party will not extend to damages suffered outside the territory of that NAFTA Party" (emphasis added).[1567]

1259. In light of the foregoing, there is no textual requirement under NAFTA that the loss or damage is incurred on the territory of the host State and the Tribunal rejects Respondent's argument to that effect. It is required to establish in the circumstances of a particular case that (i) the investor or enterprise (as relevant) incurred a loss; and (ii) there is a sufficient causal link between the breach and the loss.

1260. The Parties disagree on the role and effect of the NAFTA Contracting Parties' Article 1128 submissions. In Respondent's view, the NAFTA Contracting Parties have a common interpretation of NAFTA, as expressed in their submissions, to the effect that

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[1567] Canada NDP Submission, ¶ 41.

the Tribunal cannot award damages for investments outside the host State.[1568] Claimant argues that NAFTA Article 1128 submissions are of limited value for interpretation, because they are made for the purpose of addressing or responding to particular issues in a discrete dispute, and are not an objective view of overarching treaty interpretation or a joint view on the scope of NAFTA.[1569]

1261. The Tribunal recognizes that there are different views on whether and how a common position derived from submissions made by the NAFTA Contracting Parties informs the interpretation of NAFTA. The Tribunal does not consider that submissions made before an arbitral tribunal in a dispute constitute an "agreement relating to the treaty" within the meaning of VCLT Article 31(3)(a). At most, they could be considered in the context of "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", under VCLT Article 31(3)(b).

1262. However, and noting the existence of joint interpretive statements by the NAFTA Contracting Parties regarding the interpretation of NAFTA issued by the FTC the Tribunal does not consider the positions expressed by NAFTA Contracting Parties in their submissions in this and other arbitrations to alter the conclusions reached above based on the ordinary meaning to be given to the terms of NAFTA in their context and in light of its object and purpose.

1263. The Parties have also debated the nature and relevance of previous decisions of NAFTA tribunals such as *Cargill v. Mexico*, *S.D. Myers v. Canada*, *ADM v. Mexico*, *Canadian Cattlemen v. United States* and *Bayview v. Mexico*.[1570] While the Tribunal is not bound by the decisions of previous arbitral tribunals, those decisions are largely consistent with the in-principle conclusions reached by this Tribunal on the territoriality of damages. Important distinctions arise from the specific facts and circumstances of each case, some of which the Tribunal will highlight:

(i) In *S.D. Myers v. Canada*, the tribunal held that:

1568 R-PHM, ¶ 132. *See also* R-PHM, ¶ 136, n. 138.

1569 Claimant's Comments on NAFTA Article 1128 Submissions, ¶ 4.

1570 *See, inter alia,* Reply, ¶¶ 208-210; Rejoinder, ¶¶ 393-404; 2021 Hearing Transcript (English), Day 1, 122-126 (Claimant's Opening Presentation); R-PHM, ¶ 145.

> "[t]here is no provision that requires that all of the investor's losses must be sustained within the host state in order to be recoverable. The test is that the loss to the (foreign) investor must be suffered as a result of the interference with its investment in the host state."[1571]

In *S.D. Myers*, the United States investor carried out waste remediation services in the United States, while its Canadian subsidiary carried out marketing and logistical support for the United States entity's service.[1572] The tribunal found that the "fact that some of the totality of SDMI's losses [i.e., the US investor] due to interference with its investment involved cross-border services does not prevent SDMI from recovering them."[1573] While emphasizing the need to establish causation, the *S.D. Myers* tribunal considered that losses for upstream activities of the investor outside the host State were compensable.

(ii) In *ADM v. Mexico*, the claimants' investment was a Mexican distributor of high fructose corn syrup ("**HFCS**") manufactured in the US. The tribunal limited the damages awarded to those suffered by the claimants' Mexican subsidiary, and declined to award damages for the US investors' lost profits sales of HFCS that would have been produced in the United States and exported to Mexico. This was on the basis that the US investors did not suffer such losses "in their capacity as investors in Mexico".[1574] The *ADM* tribunal endorsed the respective interpretations of the NAFTA Contracting Parties that "protection does not apply to investments located in the territory of the investor, nor investments located outside the territory of the State that violated the rights afforded to investors under the NAFTA".[1575] Respondent relies on this case as supporting its interpretation of NAFTA Chapter 11.[1576] Claimant distinguishes this case on the basis that in the present case, it claims lost profits on aggregates that CALICA would have produced in Mexico for export to the United States, which in its view are losses incurred by Claimant as an investor in Mexico.[1577] While the scenario concerned

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1571 **CL-0132-ENG**, *S.D. Myers v. Canada*, Second Partial Award (Damages), ¶ 118.
1572 **CL-0132-ENG**, *S.D. Myers v. Canada*, Second Partial Award (Damages), ¶ 126.
1573 **CL-0132-ENG**, *S.D. Myers v. Canada*, Second Partial Award (Damages), ¶ 139.
1574 **CL-0082-ENG**, *ADM v. Mexico*, Award, ¶¶ 270, 274.
1575 **CL-0082-ENG**, *ADM v. Mexico*, Award, ¶ 272.
1576 Rejoinder, ¶ 407.
1577 2021 Hearing Transcript (English), Day 1, 125:18-126:2 (Claimant's Opening Presentation).

upstream as opposed to downstream losses such as those in the present case, the *ADM* tribunal did apply a territorial limitation that excluded the recovery of damages suffered outside the host State, and did not appear to draw the distinction noted by this Tribunal at ¶ 1251 above between the type and extent of protection from measures by the host State and the extent of compensation that may be awarded.

(iii) In *Cargill v. Mexico,* the arbitral tribunal held that Mexico had violated NAFTA Articles 1102, 1105 and 1106 in relation to the same tax and import permit requirements for HFCS that were at stake in *ADM*.[1578] The tribunal awarded damages for the losses suffered by Cargill's Mexican subsidiary as well as the upstream losses of Cargill, the US parent company. In doing so, it found that the upstream "business income, particularly business income so closely associated with a physical asset in the host country and not mere trade in goods, is both an element of a larger investment and an investment in and of itself".[1579] With respect to the facts of that case, it stated that "the profits generated by Cargill's sales of HFCS to its subsidiary, Cargill de Mexico, for CdM's marketing, distribution and re-sale of that HFCS, were so associated with the claimed investment, CdM, as to be compensable under the NAFTA."[1580]

(iv) Like the tribunal in *Cargill*, Claimant distinguishes *Cargill* from the *ADM* case on the basis that the Mexican subsidiary in *ADM* was both a distributor and a producer, while in *Cargill* the Mexican subsidiary distributed, but did not manufacture, HFCS in Mexico, and depended on the HFCS sold to it by its parent.[1581] Respondent disagrees with the findings in *Cargill* but argues that in any event, the claimed losses solely related to sales in Mexico through the Mexican investment and did not concern "mere trade in goods" or losses outside Mexico.[1582] The Tribunal observes that the focus of the tribunal in *Cargill* appears

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1578 **CL-0017-ENG**, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 ("*Cargill v. Mexico*, Award"), ¶¶ 223, 305, 319.

1579 **CL-0017-ENG**, *Cargill v. Mexico*, Award, ¶ 522.

1580 **CL-0017-ENG**, *Cargill v. Mexico*, Award, ¶ 523.

1581 2021 Hearing Transcript (English), Day 1, 124:17-21. *See* **CD-0001**, Claimant's Opening Presentation, slide 111; **CL-0017-ENG**, *Cargill v. Mexico*, Award, ¶ 524.

1582 Rejoinder, ¶¶ 393, 396-399.

to have been on whether the losses resulted from an "inextricable part of Cargill's investment",[1583] which could also be suffered by the investor outside the host State, although the sales of the product in question were all in Mexico.

(v) The award in *Cargill v. Mexico* was challenged before the courts in Ontario, Canada. The Ontario Superior Court rejected Mexico's argument that NAFTA Articles 1116, 1101 and 1139 "jurisdictionally limit" the scope of a damages award to damages suffered in Mexico and exclude Cargill's investments in the United States. The Court held that "there is not such limiting language" in NAFTA Chapter 11.[1584]

(vi) In *Canadian Cattlemen v. United States*, the tribunal found it had no jurisdiction over the claimants' claims because all of the investments at issue were located in the investors' home State and the claimants had not made investments in the United States, being the respondent State that had adopted the contested measures.[1585] In doing so, the tribunal dismissed the claimants' argument that it had jurisdiction based on the integration of the investment across borders.[1586] Respondent relies on the case in support of its view that the integration of Claimant's multinational business does not justify extending NAFTA Chapter 11 protection outside the territory of the respondent State.[1587] Claimant argues that the cases are inapposite.[1588] The Tribunal notes that the *Cattlemen* determination was on jurisdiction and not the territorial scope of compensable harm. As such, it does not provide guidance for the present question. The same applies to the case

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1583 **CL-0017-ENG**, *Cargill v. Mexico*, Award, ¶ 523.

1584 **CL-0133-ENG**, *The United Mexican States v. Cargill, Incorporated,* 2011 ONCA 622 (Ont CA),4 October 2011, ¶¶ 65, 72, 84.

1585 **RL-088-ENG**, *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, 28 January 2008 ("*Canadian Cattlemen v. United States*, Award on Jurisdiction"), ¶¶ 31, 193.

1586 *See* **RL-088-ENG**, *Canadian Cattlemen v. United States*, Award on Jurisdiction, ¶¶ 190-192.

1587 Rejoinder, ¶ 389, *citing* **RL-088-ENG**, *Canadian Cattlemen v. United States*, Award on Jurisdiction, ¶ 145.

1588 2021 Hearing Transcript (English), Day 1, 123:3-124:6 (Claimant's Opening Statement); *see* **CD-0001**, Claimant's Opening Presentation, slide 110.

of *Bayview v. Canada* which is relied on by Respondent in the same context and concerned a jurisdictional finding.[1589]

1264. The Tribunal considers the above decisions to confirm its view expressed in ¶ 1259 above, i.e., that there is no specific textual requirement under NAFTA that the loss or damage is incurred on the territory of the host State, provided that (i) the investor or enterprise (as relevant) incurred a loss; and (ii) there is a sufficient causal link between the breach and the loss. These are the requirements set out in the text of NAFTA and will be the reference point for the analysis of Claimant's damages claim before the Tribunal, together with the full reparation standard set out in the *Chorzów Factory* case (*see* ¶ 1227 above).

(e) Standard of Proof

1265. Claimant argues that the standard of proof is the "balance of probabilities", which in the damages context means that the evidence is "enough for the judge to be able to admit with sufficient probability the existence and extent of the damage".[1590] Claimant agrees with Respondent that damages need not be determined with absolute certainty, which in its view means that the settling of damages is not an exact science and "the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred".[1591]

1266. Respondent endorses the principle that damages need not be determined with absolute certainty, while asserting that damages must also be reasonable and speculation should be avoided.[1592] Respondent does not disagree that the standard of proof is the balance of

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1589 **RL-089-ESP**, *Bayview Irrigation District and others v. United Mexican States*, ICSID Case No. ARB(AF)05/1, Award, 19 June 2007, ¶ 104; *see* Rejoinder, ¶ 391; *see also* 2021 Hearing Transcript (English), Day 1, 123:3-124:6 (Claimant's Opening Statement); **CD-0001**, Claimant's Opening Presentation, slide 110.

1590 Reply, ¶ 218, *citing* **CL-0067-ENG**, *Sapphire v. National Iranian Oil Company*, Award, p. 27, also citing, *inter alia*, **CL-0137-ENG**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, ¶ 371.

1591 Reply, ¶ 217, *citing* **CL-0087-ENG**, *Vivendi v. Argentina*, Award, ¶ 8.3.16.

1592 Counter-Memorial, ¶ 455, citing **RL-071-ENG**, Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited, IUSCT Case No. 56, Partial Award Concurrent Opinion of Judge Brower, Part Two, 14 July 1987, ¶ 238; **RL-072-ENG**, Gemplus, S.A., SLP, S.A. and Gemplus Industrial S.A. de C.V. v. The United Mexican States, ICSID Case No. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010, ¶ 56; **RL-073-ENG**, BG Group Plc. v. The Republic of Argentina, UNCITRAL,

probabilities, while in its view this requires that the asserted fact is "more likely than not to be true" and the damage cannot be "speculative or uncertain".[1593]

1267. The Parties are aligned that the standard of proof is the balance of probabilities and the Tribunal does not find their respective positions on the interpretation of that standard to diverge significantly. Damages cannot always be fixed with certainty, but should not be awarded on a speculative basis. The Tribunal will apply the standard in the circumstances of this case based on the evidence and arguments presented to it.

C. LA ADELITA: QUANTUM AND RELIEF SOUGHT

1268. The Tribunal recalls its decision at ¶ 988 above with respect to La Adelita that Respondent is in breach of NAFTA Article 1105 for failure to meet Claimant's legitimate expectations and for arbitrary conduct.

1269. The Tribunal also recalls its findings at ¶¶ 983-987 above, *inter alia* that (i) Respondent did not breach NAFTA for failing to amend the POEL 2009, but for failing to attempt to do so after April 2016; (ii) Respondent did not guarantee that the process to amend the POEL 2009 would have been successful, or a strict timeline in which amendment would take place; (iii) Respondent did not guarantee that the outcome of the amendment process of the POEL 2009 would be that Claimant would be able to quarry La Adelita; (iv) Respondent's representations to Claimant about the feasibility of quarrying in La Adelita were all subject to the requirement of obtaining necessary permits to carry out those activities; (v) a CUSTF requirement did exist as a matter of fact under applicable Mexican law with respect to La Adelita prior to 2009, which was brought to Claimant's attention at the latest by 2013; and (vi) the language of the POEL 2009 only preserved acquired rights by virtue of authorizations already obtained by CALICA before it came into force, which did not include the CUSTF.

Final Award, 24 December 2007, ¶ 428; **RL-074-ENG**, Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 104; **RL-075-ENG**, S.D. Myers v. Canada, Second Partial Award (Damages), ¶ 173.

[1593] Rejoinder, ¶ 376, *citing* **RL-086-ENG**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, ¶ 124; **CL-0087-ENG**, *Vivendi v. Argentina*, Award, ¶ 175.

1270. The Tribunal further recalls that as stated at ¶ 972 above, revision of a POEL has four phases: (i) characterization: to describe the natural, social and economic conditions, identify sectoral activities, environmental attributes and areas and ecosystems requiring attention; (ii) diagnosis: analyzing compatible activities with the areas of the region and determining which areas should be conserved, developed or subjected to mitigation measures; (iii) forecast/prognosis: examining environmental issues resulting from the evolution of natural, social and economic variables in each area; and (iv) proposal: preparation of a draft local environmental regulation based on the previous phases, and public consultation on that draft.[1594] There are additional steps thereafter for (i) the approval of the POEL by the Committee to Amend the POEL; (ii) approval by the Municipal Council; (iii) forwarding to the State Executive for publication; and (iv) publication in the Official Gazette.[1595]

1271. The first two stages of characterization and diagnosis were carried out by the Committee to Amend the POEL (*see* ¶ 973 above).[1596] As part of the second stage of diagnosis, on 30 October 2015 the Committee's expert submitted a report entitled "Update to the Local Environmental Order Program of the Municipality of Solidaridad: Diagnostic Phase."[1597] The sites of La Adelita and El Corchalito were marked on a map prepared by the expert as most suitable for conducting quarrying operations.[1598] On 28 January 2016, the Committee to Amend the POEL approved the characterization and diagnosis phases by majority vote.[1599]

1272. The Tribunal's conclusions on liability raise the question of whether the damages claimed in relation to La Adelita are for harm incurred by reason of, or arising out of, the specific breach that was found. In particular, what damages may be awarded considering that Respondent did not guarantee that the process to amend the POEL 2009 would have been successful, or a strict timeline in which amendment would take place.

1594 [redacted] First Report, ¶ 25. *See* Memorial, ¶ 114, n. 245.

1595 Counter-Memorial, ¶ 240.

1596 2021 Hearing Transcript (English), Day 3, 744:8-11 (SOLCARGO Cross-Examination); [redacted] First Report, ¶ 120, Figure 3.

1597 **C-0097-SPA**, Diagnostic Report.

1598 **C-0097-SPA**, Diagnostic Report, p. 136.

1599 **C-0095-SPA**, POEL Committee Fifth Session Minutes, 28 January 2016, p. 7 of the PDF: "*Se aprueban por mayoria las etapas de caracterización y diagnostico*."

1273. Claimant's claim for damages in respect of La Adelita is premised on its assertion that Respondent's failure to modify the POEL prevented extraction operations at La Adelita.[1600] "But-for" Respondent's failure, Claimant argues, CALICA would have been able to commence operations in La Adelita in early 2016 and quarry all three lots (La Rosita, El Corchalito and La Adelita) until reserves were exhausted.[1601] This scenario assumes, *inter alia,* that the Committee to Amend the POEL would have completed its activities and enacted an amendment to the POEL so as to permit Claimant to carry out quarrying at La Adelita.

1274. Claimant submits that the Committee to Amend the POEL did not find a technical or other basis to suggest that the amendment process would not result in a rezoning of La Adelita that would allow quarrying. It argues that up to early 2016, the amendment process "was heading toward such a rezoning".[1602] In this regard, the Claimant argues that the Mexican Center for Environmental Law (*Centro Mexicano de Derecho Ambiental, A.C.* "**CEMDA**") stated during a meeting of the Committee to Amend the POEL that it did not see major problems with CALICA's exploitation activities in La Adelita if it had an authorization and vested right:[1603]

> *La Lic. Alejandra Serrano de CEMDA, comenta que si ya existe una autorización y tienen un derecho adquirido no le ve mayor problema para realizar su actividad de explotación, aún que [sic] el POEL no lo permita*.[1604]

1275. Claimant further relies on the fact that the expert of the Committee to Amend the POEL concluded that La Adelita and El Corchalito were the most suitable lots for quarrying in the Municipality of Solidaridad, and the Committee approved the expert's diagnostic report in January 2016.[1605]

1276. Respondent, on the other hand, argues that CALICA had failed to convince the local community that the proposed expansion of its activities was safe for the environment and the surrounding community, and for this reason the process to amend the POEL 2009

1600 Brattle First Report, ¶ 65; 2021 Hearing Transcript (English), Day 5, 1049:2-7 (Chodorow Cross-Examination).
1601 Memorial, ¶ 265.
1602 C-PHM, ¶ 80.
1603 C-PHM, ¶ 81.
1604 **C-0092-SPA**, POEL Committee Second Session Minutes, 21 November 2014, p. 6.
1605 C-PHM, ¶ 81, *citing* **C-0097-SPA**, Diagnostic Report, pp. 7, 142-145.

would be controversial.[1606] In its view, several environmental groups belonging to the conservation sector expressed their disagreement with various aspects of the zoning of the Municipality of Solidaridad.[1607]

1277. In addition, Respondent relies on a letter to the Committee to Amend the POEL dated 3 February 2016 presented by four environmental groups to the Committee to Amend the POEL expressing disagreement, *inter alia*, with what they saw as methodological and information deficiencies in the draft diagnosis and characterization submitted to the technical committee.[1608]

1278. The letter referred to by Respondent was signed by the CEMDA, the Amigos de Sian Ka'an, A.C., Moce Yax Cuztal, A.C. and Centinelas del Agua, A.C. It states, in part, as follows, setting out three "principal omissions" objected to in the Fifth Session of the Committee to Amend the POEL of 28 January 2016:[1609]

> *Por medio del presente las organizaciones firmantes queremos hacer de su conocimiento los hechos suscitados el día Jueves 28 de Enero del presente año en la 5° Sesión de Trabajo del Comité de ordenamiento Ecológico Local del Municipio de Solidaridad, así como también manifestar nuestra inconformidad como Sector Conservación respecto al proceso que se llevó en la sesión para validar las primeras dos etapas del modelo, de manera poco transparente y con irregularidades en la votación.*

1279. The Minutes of the Fifth Session of the Committee to Amend the POEL likewise record that CEMDA and the Amigos de Sian Ka'an expressed their disagreement with the approval of the diagnostic phase, due to the lack of time to review particular maps.[1610]

1280. The first two stages of amendment of the POEL were completed on 28 January 2016, after Claimant's valuation date of 6 December 2015 for its damages corresponding to

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1606 Counter-Memorial, ¶ 359.

1607 Counter-Memorial, ¶ 241, *citing* **R-0049-ESP**, Daltabuit Godás, M., & Meade de la Cueva, C. A., *El movimiento ambientalista de Quintana Roo*, UNAM, CRIM, 8 June 2012; **R-0050-ESP**, Underwood, Carlos, "*Calica: La minera que arrasa con todo e[n] playa del Carmen*", Revés; **R-0051-ESP**, Pacheco, Daniel," *'Solo pedimos que se respete el uso de suelo previo' Calica*", Novedades Quintana Roo.

1608 Counter-Memorial, ¶ 242, *citing* **R-0052-ESP**, Environmental NGOs Letter, 3 February 2016. *See also* Counter-Memorial, ¶ 359.

1609 **R-0052-ESP**, Environmental NGOs Letter, 3 February 2016, p. 2.

1610 **C-0095-SPA**, POEL Committee Fifth Session Minutes, 28 January 2016, p. 6.

Respondent's breach in relation to La Adelita.[1611] As at Claimant's valuation date, progress on the POEL amendment therefore remained to be formalized. Moreover, two substantive steps remained, being (iii) forecast/prognosis: examining environmental issues resulting from the evolution of natural, social and economic variables in each area; and (iv) proposal: preparation of a draft local environmental regulation based on the previous phases, and public consultation on that draft (*see* ¶ 1270 above).

1281. According to Claimant, the diagnostic phase is the second and most taxing of the four phases of the amendment process.[1612] In its view, "all that was left" was essentially for the Committee to assess how quarrying activities would evolve in the Municipality of Solidaridad and to propose a draft of the amendment to the POEL.[1613]

1282. However, the Tribunal does not consider it established by Claimant on the balance of probabilities that, but for Respondent's breach by failing to continue the POEL amendment process, the POEL amendment would have been successful, and Claimant would have been permitted to quarry in La Adelita in 2016. Even if the diagnostic phase was the most onerous one, the remaining forecast/prognosis and public consultation phases were substantive and potentially controversial steps.

1283. The Tribunal recalls that the work of the Committee to Amend the POEL was carried out within the framework of a participatory process, which included the involvement of civil society in the membership of the technical committee and the procedure of public consultation (see ¶ 968 above). The applicable legal framework included provisions to prioritise the protection of the environment. In that regard, the *Ley de Equilibrio Ecológico y la Protección del Ambiente del Estado de Quintana Roo* ("**LEEPA**") sets out the objective of ecological zoning to "*preservar y restaurar el equilibrio ecológico y proteger el ambiente*", and thereby to favour land uses with the least environmental impact and the greatest benefit to the population.[1614] As such, while the Tribunal has held that it was within the power and control of Respondent's authorities to move forward

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1611 *See* Brattle First Report, ¶ 68; 2021 Hearing Transcript (English), Day 5, 1050:3-8 (Chodorow Cross-Examination).

1612 Reply, ¶ 48.

1613 Reply, ¶ 49.

1614 **R-0001-SPA/[redacted]0014-SPA**, *Ley de Equilibrio Ecológico y la Protección al Ambiente del Estado de Quintana Roo*, 16 August 2018 ("LEEPA"), Art. 14(IV). *See* Solcargo First Report, ¶ 73. *See also* **R-0001-SPA/[redacted]0014-SPA**, LEEPA, Art. 15.

the POEL amendment process by convening meetings and scheduling the activities of the Committee (see ¶ 968 above), it has equally held that Respondent could not guarantee a defined outcome of the POEL amendment process, it being a public and participatory process subject to democratic principles and the rule of law (see ¶ 970 above). Claimant has failed to show convincingly that the outcome of such a process could be pre-defined. Rather, the outcome is uncertain and speculative, and the Claimant's position would reduce any public consultation, as well as the Committee's response to such consultation, to a *fait accompli*.

1284. The Tribunal notes that four environmental groups had already expressed objections to the proceedings of the Committee to Amend the POEL following the Fifth Session of 28 January 2016 at which the characterization and diagnostic phases were completed. The public consultation stage, in particular, is not a mere formality and, based on the evidence on record, its outcome is difficult to predict. Aside from environmental issues, various circumstances were likely to play a role in that outcome and the evidence does not support a conclusion that the result would have been in Claimant's favor.

1285. The Tribunal is not persuaded by Claimant's assertion that because the diagnostic phase was approved, this means that the remaining steps would be successful. Nor does the identification of La Adelita and El Corchalito by the Committee to Amend the POEL's expert as the most suitable lots for quarrying in the Municipality of Solidaridad ensure the success of the POEL amendment.

1286. As for the CEMDA's statement that it did "not see major problems" with CALICA's exploitation activities, this statement is recorded in the Minutes of the Second Session of the Committee to Amend the POEL of 21 November 2014. [1615] This is a positive indication in respect of CALICA's activities, but is not a comment about the amendment of the POEL. Additionally, it must be taken into account together with CEMDA's subsequent oral and written objections to the Fifth Session of the Committee to Amend the POEL which do not reflect positively on the amendment process (*see* ¶¶ 1278-1279 above).

[1615] **C-0092-SPA**, POEL Committee Second Session Minutes, 21 November 2014, p. 6.

1287. In terms of the likely outcome of a public consultation phase, Respondent has also submitted evidence of environmental groups disagreeing with zoning in the Municipality of Solidaridad.[1616] These evidence an environmental movement in Quintana Roo concerned with the impact of CALICA's activities on the environment dating back to the commencement of CALICA's activities, according to a 2012 report:[1617]

> *Cuando se dio la concesión a esta empresa, un grupo de quintanarroenses se preocupó pues se percató de que las obras de infraestructura y la extracción del material pétreo ocasionarían una severa afectación al medio ambiente. Las preocupaciones ciudadanas habían surgido principalmente en Cancún, a raíz de la acelerada contaminación de la laguna Nichupté.*

1288. In all the circumstances, the Tribunal finds that it is not established that the outcome of the amendment to the POEL would have been successful for Claimant in the absence of Respondent's breach, taking into account the stages still required for completion including public consultation.

1289. Claimant bears the burden of proving the assertions supporting its claim for damages, which the Tribunal finds to be unsupported in respect of La Adelita. Claimant has failed to prove that it would have obtained the amendment of the POEL and have been able to quarry at that site "but-for" Respondent's measures. Claimant has not advanced another theory of damages with respect to the quarrying business and La Adelita. Claimant's claim for damages in respect of La Adelita is therefore rejected.

1290. The Tribunal understands that the conclusion will be unsatisfactory to Claimant, which has faced Respondent's inaction with respect to the process to amend the POEL. However, damages cannot be awarded for hypothetical harm, but only harm incurred by reason of, or arising out of a breach. The Tribunal's determination is also in line with its conclusion in respect of liability that Respondent did not guarantee that the process to amend the POEL 2009 would have been successful, or a strict timeline in which amendment would take place. In those circumstances, the damages claimed in relation to

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1616 See **R-0050-ESP**, Underwood, Carlos, "Calica: La minera que arrasa con todo e[n] playa del Carmen", Revés; **R-0051-ESP**, Pacheco, Daniel,"'Solo pedimos que se respete el uso de suelo previo' Calica", Novedades Quintana Roo.

1617 **R-0049**, Daltabuit Godás, M., & Meade de la Cueva, C. A., *El movimiento ambientalista de Quintana Roo*, UNAM, CRIM, p. 103 del PDF. *See also* pp. 104-108; **R-0050-ESP**, Underwood, Carlos, "*Calica: La minera que arrasa con todo e[n] playa del Carmen*", Revés; **R-0051-ESP**, Pacheco, Daniel, "*'Solo pedimos que se respete el uso de suelo previo' Calica*", Novedades Quintana Roo.

La Adelita fail as a matter of factual causation, because it is not established that they would have been averted if Respondent had acted in accordance with NAFTA (*see* ¶ 1233 above).

1291. In light of this conclusion, the Tribunal does not consider it necessary to decide upon other aspects of Claimant's claim for damages in relation to La Adelita, including Respondent's argument that Claimant's parent company's contemporaneous documents do not record a loss in value of CALICA's assets or an impact for the alleged [redacted] loss that Claimant claims. [1618]

D. EL CORCHALITO: QUANTUM AND RELIEF SOUGHT

1292. The Tribunal recalls its decision at ¶¶ 1189-1191 above with respect to El Corchalito that Respondent is in breach of NAFTA Article 1105 in relation to: (i) PROFEPA's refusal to consider expert evidence contradicting its own measurements of CALICA's alleged excess extraction; (ii) the disproportionate closure of El Corchalito in the Shutdown Order on the basis of the reasons given, i.e., a "probable" breach for "presumed" excess quarrying of a marginal amount in excess of the authorized surface area, itself based on the evidence that PROFEPA had not given CALICA adequate opportunity to challenge; (iii) the maintenance of the closure of El Corchalito in the October 2020 Resolution, which likewise relied on the contested evidence, as well as on new alleged violations of environmental law, in relation to which CALICA had no opportunity to respond before being sanctioned; and (iv) the impossibility of lifting the shutdown of El Corchalito ordered by the Shutdown Order and the October 2020 Resolution via the means specified by PROFEPA for doing so, therefore placing CALICA in a catch-22 situation and leading to a *de facto* total and indefinite shutdown.

1293. The Tribunal notes that according to Claimant, the Shutdown Order against El Corchalito also had the effect of "further precluding" quarrying in La Adelita, although no quarrying was taking place there at the time (*see* ¶¶ 1025-1026 above). However, in its claim for damages for this breach ("Breach # 2" in the Brattle Reports), the damages claimed relate to El Corchalito only and not La Adelita.[1619] Claimant's valuation is carried out on the

[1618] Counter-Memorial, ¶ 467.
[1619] Brattle First Report, ¶ 66.

basis that "Legacy Vulcan did not expect to be able to access La Adelita at the time when Breach #2 occurred", and therefore the "but-for" scenario does not include extraction at La Adelita.[1620]

1294. Of course, the Tribunal may not award damages that have not been claimed and therefore has no basis to award damages for the shutdown of La Adelita in relation to the same shutdown that affected El Corchalito (Breach #2). However, and in any event, the question does not arise, because the Tribunal has concluded at ¶ 1288 above on the balance of probabilities that it is not established that the amendment of the POEL would have been successful in the absence of Respondent's breach. As such, the assumption in Claimant's model that it would not be able to access La Adelita in the but-for scenario is correct.

1295. The Parties and their experts disagree on various elements of the discounted cash flow ("**DCF**") analysis which will be addressed below. The Tribunal first addresses the issue of causation (Section 1), before giving an overview of the Parties' respective valuations (Section 2). The Tribunal then determines Respondent's objection to Claimant's model insofar as it includes damages related to the CALICA Network (Section 3). The Tribunal will then turn to consider the various CALICA-only approaches (Section 4).

1. Causation

1296. Claimant argues that it has established that Respondent's alleged measures have deprived Claimant of its rightful access to its Mexican reserves and Respondent does not dispute that Claimant's inability to access El Corchalito has eliminated access to [redacted][1621]

1297. Respondent disputes that Claimant has established causation of its damages, *inter alia* on the basis that the measures complained of are not permanent.[1622] In this regard, Respondent relies on Claimant's submission that it would give Respondent "the option to pay less than the full amount ordered" if Respondent's instrumentalities were to take

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1620 Brattle First Report, ¶¶ 184-185.

1621 C-PHM, ¶ 152; 2021 Hearing Transcript (English), Day 1, 115:7-9 (Claimant's Opening Statement); Brattle Second Report, ¶ 5, n. 3.

1622 Counter-Memorial, ¶¶ 454, 486; R-RPHM, ¶ 104.

a number of steps within a period of three months from the issuance of this Award, which it refers to as "Settlement Measures".[1623]

1298. In Claimant's view, this request does not mean that Respondent's measures are not permanent. It only means that the "Settlement Measures" would advance Claimant's ultimate goal of resolving the dispute amicably, as only Respondent has the power to revert the wrongful measures.[1624]

1299. Based on the Tribunal's conclusion that Respondent's measures led to a *de facto* total and indefinite shutdown of El Corchalito (*see* ¶ 1189 above), the Tribunal is satisfied that the assessment of harm incurred by reason of, or arising out of a breach includes an assumption that CALICA could not quarry El Corchalito after 24 January 2018, and that Respondent's measures were permanent. The Tribunal therefore rejects Respondent's objection to causation on this ground.

2. Overview of Valuations

1300. In this Section the Tribunal will provide an overview of the Parties' respective positions on the quantum of damages due as a result of the alleged breach in respect of El Corchalito. This breach is referred to in the expert reports as "Breach #2".

1301. Claimant's claim for damages in relation to El Corchalito is based on the following assumptions, as set out by its expert Mr. Chodorow:[1625]

> On 24 January 2018, the Respondent shut down Calica's quarrying activities on the El Corchalito site. I am instructed that this shutdown was a second, independent breach of NAFTA. The shutdown was imposed approximately two years after Breach #1 [i.e., in respect of La Adelita], so I understand that Legacy Vulcan did not expect to be able to access La Adelita at the time when Breach #2 [i.e., in respect of El Corchalito] occurred. Therefore, the damages calculation related to Breach #2 reflects the loss in FMV of the Calica Network to Legacy Vulcan as a consequence of its inability to quarry El Corchalito. I have been instructed to calculate damages to Legacy Vulcan assuming that Calica does not regain the right to continue operations at El Corchalito in the future.

1623 Counter-Memorial, ¶ 486, *citing* Memorial, ¶ 347(e).
1624 Reply, ¶ 238.
1625 Brattle First Report, ¶¶ 184-185.

> I calculate damages for Breach #2 using the same DCF method and the same types of data sources applied to estimate damages for Breach #1. However, the But-For World for Breach #2 reflects the fact that Breach #1 has already occurred and therefore assumes that extraction operations can occur only on La Rosita and El Corchalito. The Actual World for Breach #2 assumes that Calica can continue to operate only on La Rosita, and that Calica does not have the ability to quarry El Corchalito in the future.

1302. Respondent's expert Credibility describes the exercise in similar terms: [1626]

> Calculation of But-For CALICA enterprise value, as of 24 January 2018, assuming CALICA is able to fully produce La Rosita and El Corchalito until the two lots are depleted.
>
> *Less*, calculation of Actual CALICA enterprise value, as of 24 January 2018, assuming CALICA is able to fully produce only La Rosita reserves until it is fully depleted.

1303. Claimant submits that a fair market valuation ("**FMV**") using a DCF analysis is the appropriate measure of damages.[1627] According to Claimant, the FMV of an asset or group is defined as:[1628]

> the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.

1304. Respondent raised an apparent objection in its Rejoinder to the FMV approach, submitting in a footnote that the applicable measure is not the FMV of CALICA (or the CALICA Network) because this is not an expropriation claim. The only relevant losses, in Respondent's view, are Claimant's losses as an investor of another Party, not its losses in general.[1629] This was not a focus of Respondent's arguments on quantum, and it is noted that both sides' experts agree on the FMV and DCF approach.[1630]

1626 Credibility First Report, ¶ 138, *citing* Exhibit 3.2.

1627 Memorial, ¶¶ 255, 260. *See also* Memorial, ¶ 257, *citing* **CL-0089-ENG**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 ("*Crystallex v. Venezuela*, Award"), ¶ 886, *citing* **CL-0090-ENG**, *Phillips Petroleum Company Iran v. The Islamic Republic of Iran and The National Iranian Oil Company*, IUSCT Case No. 39, Award, 29 June 1989, ¶ 111; Memorial, ¶ 258, *citing* Brattle First Report, ¶¶ 70, 74, 75.

1628 Memorial, ¶ 256, *citing* Brattle First Report, ¶ 69; Reply, ¶ 246; *see* Credibility First Report, Definition of "FMV".

1629 Rejoinder, ¶ 378, n. 625.

1630 C-PHM, Appendix B, ¶ 2; R-PHM, Annex B, ¶ 2.

1305. Based on its conclusions above with respect to causation and the ownership of CALICA by Claimant (*see* ¶¶ 1296-1299 above), the Tribunal is satisfied that the FMV of CALICA insofar as it concerns the El Corchalito reserves is the appropriate measure of damages for Respondent's breach. As CALICA was at the relevant time a going concern with established relationships and a record of profitable operations, a DCF analysis is appropriate.

1306. It is noted, in this respect, that Claimant does not allege that Respondent destroyed the full value of CALICA (or the CALICA Network) and does not seek to recover the entire FMV of CALICA. Claimant claims damages based on the reduction in FMV of CALICA attributable to the reduced cash flows that the business is expected to generate as a result of Respondent's measures.[1631] Claimant submits that Respondent's alleged wrongful measures affected the profitability and longevity of the Project, because it was forced to engage in more expensive below-water quarrying and its reserves will be exhausted at least 20 years earlier than anticipated.[1632] According to Claimant, those measures have materialised into lost future profits for Claimant and have negatively impacted the FMV of Claimant.[1633]

1307. This is measured by the difference between the "but-for" value of the business and its actual value. The Parties' experts are aligned in their positions that:[1634]

(i) In the "but-for" scenario, as of 24 January 2018 CALICA would be able to quarry La Rosita and El Corchalito, but not La Adelita.

(ii) In the actual scenario, as of 24 January 2018 CALICA can quarry La Rosita only.

1308. The experts further agree that the valuation date for the purposes of that assessment in relation to El Corchalito is 24 January 2018.[1635] The Tribunal notes that since the valuation date, subsequent factual developments prevented CALICA from quarrying in the La Rosita lot, which were the subject of the ancillary claim (*see* ¶¶ 304 *et seq.* above).

1631 Memorial, ¶¶ 258-259, *citing* Brattle First Report, ¶¶ 70, 75.
1632 Memorial, ¶ 255, *citing* Brattle First Report, ¶ 83.
1633 Memorial, ¶ 255, *citing* Brattle First Report, ¶¶ 70, 77.
1634 Memorial, ¶ 316; C-PHM, ¶ 156; Brattle First Report, ¶ 194; Credibility First Report, ¶ 138, *citing* Exhibit 3.2.
1635 C-PHM, Appendix B, ¶ 13; R-PHM, Annex B, ¶ 13.

Such *ex-post* developments are not taken into account because damages have been assessed as at the valuation date in 2018. As such, the "but-for" and actual scenarios for the valuation of damages both correctly include La Rosita, even if CALICA subsequently became unable to quarry there.

1309. Both sides experts also test the reasonableness of their respective DCF valuations against the market values of similar companies, referred to as "comparables". [1636]

1310. Claimant claims [redacted] in damages (exclusive of interest) for Respondent's breach in relation to El Corchalito, as summarized in the table below: [1637]

[redacted]

1311. Respondent, on the other hand, quantifies any damages due in respect of El Corchalito as [redacted] (excluding interest). Respondent's valuation is based on the FMV of CALICA as the Mexican entity alone, in isolation from the CALICA Network: [1638]

[redacted]

1636 C-PHM, ¶ 149, *citing* 2021 Hearing Transcript (English), Day 1, 131:18-132:2; Brattle First Report, ¶¶ 72, 74; Credibility First Report, ¶¶ 122-123; Brattle First Report, ¶ 152; Brattle Second Report, ¶ 226.

1637 Brattle First Report, ¶ 195, Table 14.

1638 Rejoinder, ¶ 488; Credibility Second Report, ¶ 155, Table 5.6.

1312. In addition to its own valuation model, in relation to the CALICA Network advocated by Claimant, Respondent makes an alternative calculation based on Claimant's submission that the damages should be calculated by reference to the CALICA Network and not only the Mexican entity of CALICA. If the CALICA Network is included, Respondent's experts calculate damages in the amount of [redacted], excluding interest.[1639] Finally, Mexico did not advance an alternative damages calculation relating to the temporal Shutdown Order alone.

3. The Calica Network

1313. The Tribunal held at ¶ 1264 above that compensation for loss or damage incurred outside the host State is not excluded, in principle, by NAFTA. However, it must be established with respect to all damages that (i) the investor or enterprise (as relevant) incurred a loss; and (ii) there is a sufficient causal link between the breach and the loss.

(a) Claimant's Position

1314. Claimant argues that the seamless integration and interdependence of the CALICA Network's downstream and upstream components show that any measure affecting the production component of the CALICA Network has direct and immediate repercussions on the CALICA Network as a whole.[1640] Claimant contends that its inability to exploit El Corchalito prevents access to reserves, which Respondent does not dispute, and this causes losses across the full CALICA Network.[1641]

1315. Claimant contends that the Investment Agreement, particularly Recital IV, makes it clear that Respondent knew from the outset that the purpose of the Project was to serve foreign markets by sea, as opposed to local markets.[1642] Claimant argues that Respondent continues to ignore that the shipping and distribution components of the CALICA Network were created, developed, and operated for the sole purpose of giving CALICA aggregates access to highly profitable United States Gulf Coast markets, and therefore, contrary to Respondent's assertion, the Vulica vessels and the U.S. Yards are not

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1639 Rejoinder, ¶ 490; Credibility Second Report, ¶ 17, Table 1.2.
1640 C-RPHM, ¶ 84.
1641 Reply, ¶ 241; C-RPHM, ¶ 84, *citing* Reply, ¶ 244; Brattle Second Report, ¶ 56.
1642 C-RPHM, ¶ 85, *citing* C-PHM, Appendix A, Question 1.

independent components of Claimant's global operations.[1643] According to Claimant, they are cost components of the supply chain necessary to bring Claimant's reserves to market and extract value from them.[1644]

1316. Claimant argues, relying on the Brattle Expert Report, that the profit potential of the CALICA Network is dependent on access to the CALICA Mexico reserves in light of: (i) the focus of Vulica and U.S. Yards on transporting and distributing aggregates from CALICA Mexico; and (ii) the lack of economically viable alternative aggregate sources to feed these operations.[1645] According to Claimant, therefore, in order to restore Claimant to its pre-breach economic position, damages across the CALICA Network should be included.[1646]

(b) Respondent's Position

1317. Respondent argues that, contrary to Claimant's contention, if the Tribunal determines that the damages suffered by Vulica and the U.S. Yards can be claimed, such damages would not meet the legal causation requirement of sufficiency, proximity, adequacy, predictability or direct cause of the damage as they are not proximate to the alleged breaches and were not predictable by Respondent, for the following reasons:[1647]

(a) CALICA is the protected investment that produces the limestone aggregates;

(b) Damages are only related to trade in goods produced by the protected investment that were sold in a Mexican port to Claimant at a fair market price and exported by Claimant from Mexico;

(c) The alleged losses are intermediate losses that occurred outside Mexico and are related to economic activity in the Bahamas and the United States;

1643 C-RPHM, ¶ 85, *citing* C-PHM, ¶ 171; R-PHM, ¶ 126.

1644 C-RPHM, ¶ 85; *see* C-PHM, ¶ 171.

1645 Reply, ¶ 244, *citing* Brattle Second Report, ¶ 56.

1646 Reply, ¶ 244, *citing* Brattle Second Report, ¶ 56. *See also* Reply, ¶ 241; Memorial, §§ II.2-4; C-PHM, ¶¶ 153-154, *citing* 2021 Hearing Transcript (English), Day 5, 991: 12-15 (Chodorow Presentation), *citing* [redacted] First Statement, ¶ 26, *citing* 2021 Hearing Transcript (English), Day 2, 427:11-12 ([redacted] Cross-Examination), *citing* 2021 Hearing Transcript (English), Day 2, 405:1-22 ([redacted] Response to Questions from the Tribunal); C-PHM, ¶ 175, *citing* 2021 Hearing Transcript (English), Day 5, 990:13-16 (Chodorow Presentation).

1647 Rejoinder, ¶ 430.

(d) Vulica and the U.S. Yards were not protected investments under NAFTA Chapter 11;

(e) Vulica and the U.S. Yards were not owned by any protected investment; and

(f) Vulica and the U.S. Yards were part of a large multinational enterprise whose components were organised in connection with the company's interests, of which Respondent was not part of nor aware about.

1318. Respondent contends that while CALICA was founded with the idea of exporting aggregates, it does not follow that the potential damages to third parties dedicated to transporting and marketing the aggregates beyond the Mexican borders were foreseeable.[1648] According to Respondent, in order for damages to third parties to be foreseeable, it would be necessary to conclude that: (i) there were no economically viable alternative sources for CALICA's aggregates, as the claimed damages would have only materialised in that case; and (ii) Respondent was aware of that fact.[1649] Respondent argues that neither premise has been proven by Claimant.[1650]

1319. Respondent submits that if this Tribunal were to accept Claimant's argument with respect to liability for damages to the CALICA Network, this will have widespread adverse implications with respect to State liability under investment treaties.[1651] Respondent argues that in addition to being liable for damages related to investments made within their territories, States would also be liable for down-stream damages related to the products produced by those investments and subsequently traded on the international market.[1652]

1320. Respondent argues that by measuring damages suffered by the CALICA Network, as opposed to CALICA, the Brattle Expert includes in its analysis freight revenues, U.S. Yards revenue, costs and CAPEX, and thereby attributes to CALICA the freight earnings associated with the Vulica operation in the Bahamas and the earnings of the Claimant's

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1648 R-RPHM, ¶ 105.
1649 R-RPHM, ¶ 105; *see* Counter-Memorial, ¶ 488.
1650 R-RPHM, ¶ 105.
1651 Rejoinder, ¶ 384.
1652 Rejoinder, ¶ 385.

United States distribution unit.[1653] Respondent contends that this error substantially inflates the amount of damages attributed to Claimant's investment.[1654]

(c) Tribunal's Analysis

1321. Respondent objects to Claimant's valuation because it includes Vulica and the US Yards, i.e., it values the CALICA Network as a whole as opposed to CALICA on a standalone basis.

1322. The decision on this point includes the issue of legal causation, i.e., whether there is a sufficient causal link between the loss or damage suffered to satisfy the requirement under NAFTA that the investor or enterprise has incurred that loss "by reason of, or arising out of" a breach.[1655] Relevant to that causal link are the foreseeability of the damages and their proximity to the breach.[1656]

1323. As set out at ¶ 1247 above, while Claimant does not bring claims on behalf of the CALICA Network, its damages claim is calculated on the basis of the reduction in value of the CALICA Network.[1657] This includes the "integrated business" of "the quarrying operations and export facility in Quintana Roo, the shipping business [i.e., Vulica], and the US Yards established for the purpose of distributing Calica aggregates in the US [i.e., the US Yards]".[1658] Vulica is a Bahamian entity owned by Claimant that owns and charters vessels to ship aggregates from Punta Venado to the US.[1659] The sales and marketing operations for the US Yards are carried out by Vulcan Construction Materials, LLC (prior to 2015 Vulcan Construction Materials, LP and prior to 2001 Vulcan/ICA Distribution Company).[1660]

1324. According to Claimant's Brattle experts, the US Yards refers to 14 "US distribution yards along the US Gulf Coast and Atlantic seaboard".[1661] Claimant's witness [redacted] refers

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1653 Counter-Memorial, ¶ 491, *citing* Credibility First Report, ¶¶ 115-121.
1654 Counter-Memorial, ¶ 491. *See also* Credibility First Report, ¶ 57.
1655 **C-0009-ENG**, NAFTA, Arts. 1116(1), 1117(1).
1656 *See, e.g.,* **CL-0132-ENG**, *S.D. Myers v. Canada*, Second Partial Award (Damages), ¶ 122.
1657 *See* Brattle First Report, ¶ 21.
1658 Brattle First Report, ¶ 11. *See also* Brattle First Report ¶ 2.
1659 Brattle First Report, ¶ 39.
1660 [redacted] First Statement, ¶ 14. *See also* Memorial, ¶ 24; Brattle First Report, ¶ 45; Counter-Memorial, ¶ 457.
1661 Brattle First Report ¶¶ 2, 45, *citing* **C-0088-ENG**, Board Memorandum, 11 July 2014, p. 2.

to 11 sales distribution yards and two direct-customer shipment locations.[1662] A list of network leases as at December 2015 includes 12 leases.[1663] The yard locations are leased from third parties and not owned, although Claimant has also referred to its "ownership" of the yards.[1664] The legal entity/ies party to the leases or operating the yards have not been identified.[1665]

1325. It is common ground that the "CALICA Network" is not a legal entity or an "investment" within the meaning of NAFTA Chapter 11 (*see* ¶¶ 1244-1246 above).[1666] According to the evidence of Claimant's witnesses [redacted] and [redacted] the CALICA Network operates as a vertically-integrated export project, built and managed as an integrated business with separate management structure.[1667]

1326. The CALICA Network does not have its own financial statements.[1668] Respondent contends that the CALICA Networks is not a division recognized by VMC in the 2018 Form 10-K filed by VMC, nor is it mentioned in the VMC 10-K, and the only reference to "CALICA" is a reference to Calizas Industriales del Carmen, S.A. de C.V.[1669]

1327. However, evidence on the record shows that the term "CALICA Network" was used by Claimant's parent VMC internally to refer to the combined quarrying, shipping and distribution operations for management and reporting purposes.[1670] In the course of business, the company also calculated the "netback value" of CALICA reserves by reference to the realized price or expected realized price of the aggregates, deducting the transportation and production costs which includes the Vulica and US Yards costs.[1671]

1662 [redacted] First Statement, ¶ 49.

1663 **DC-0114**, Yard Network Leases. *See* Brattle First Report, ¶ 125.

1664 [redacted] First Statement, ¶ 49; Reply, ¶ 212: "… losses suffered by Legacy Vulcan through its ownership of Vulica and the U.S. Yards …." *See also* Brattle First Report, ¶ 124.

1665 *See* **DC-0114**, Yard Network Leases; Credibility First Report, ¶ 11(iii).

1666 Counter-Memorial, ¶ 457.

1667 [redacted] First Statement, ¶¶ 13, 27; [redacted] Second Statement, ¶ 4; [redacted] Second Statement, ¶¶ 11-14.

1668 Credibility First Report, ¶ 58; 2021 Hearing Transcript (English), Day 5, 1138:7-11 (Credibility Presentation); Brattle Second Report, ¶ 87.

1669 Rejoinder, ¶ 441, *citing* [redacted] **0002**, Vulcan Materials Company, Form 10-K for the Fiscal Year Ended 31 December 2018 ("Vulcan Materials Company, Form 10-K"), p. 106 under "NAFTA ARBITRATION".

1670 [redacted] **0005**, CALICA Sales Managers Mtg, Q2 2013 Netback Review, September 2013; [redacted] **0006**, CALICA Sales Managers Meeting, Q3 Netback Review & Prelim. 2015 Budget, 13 November 2014; [redacted] **0007**, CALICA Sales Managers Meeting, Q1 2015 Netback Review, 22 May 2015, p. 3; **C-0089-ENG**, AFE Project Description, p. 6. *See* [redacted] Second Statement, ¶ 8.

1671 **DC-0093**, Netback Data; [redacted] **0008**, Calica Netback, December 1999; [redacted] Second Statement, ¶ 7; 2021 Hearing Transcript (English), Day 5, 989:9-17 (Chodorow Presentation).

The Tribunal is therefore not persuaded that the concept of the CALICA Network is fictional or contrived for the purpose of this arbitration.[1672]

1328. Claimant's valuation is premised on Claimant "owning" the CALICA Network and thus suffering a loss of value based on the whole Network.[1673] However, rather than "owning" all elements of the Network (the US Yards are leased but not owned), in reality Claimant's analysis focuses on CALICA's ownership of the reserves of aggregates in Mexico.

1329. Central to Claimant's analysis is its assertion that the FMV of CALICA is based on the netback value of CALICA's aggregates for serving the US Gulf Coast area which in its view is "its highest and best use".[1674] According to Brattle, the "true source of value to the CALICA Network is attributable to its reserves", drawing an analogy to the value of oil reserves:[1675]

> To figure out the value of those reserves in the ground, you start with the realized price or the expected realized price, and then you deduct off the costs in order to get those reserves to market – that's the transportation costs and the production costs – and the rest of the value, that's the netback value associated with the reserves themselves, which really create the value in this process.

1330. Building on this assertion, Claimant's valuation model uses the sale price of CALICA's aggregates to customers in the United States for determining the value of CALICA's aggregates and ultimately CALICA itself.[1676] According to Claimant and Brattle, the value of CALICA is equal to the value of the CALICA Network minus the value of the downstream assets necessary to monetise the CALICA reserves (i.e., the Vulica shipping and US Yards distribution network).[1677] Due to the interdependence of the upstream and

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1672 *See* Counter-Memorial, ¶ 473; Reply, ¶ 221.

1673 *See, e.g.,* Brattle First Report, ¶ 71: "… I estimate damages as the *reduction* in the FMV of the Legacy Vulcan due to the alleged breaches that diminished the value of its ownership interest in the Calica Network." (Emphasis in original).

1674 C-PHM, ¶¶ 172, 175, *citing* 2021 Hearing Transcript (English), Day 5, 989:10-22 (Chodorow Presentation); *see also* 2021 Hearing Transcript (English), Day 5, 991:2-4 (Chodorow Presentation); C-RPHM, ¶ 108.

1675 2021 Hearing Transcript (English), Day 5, 989:19-21, 989:9-17 (Chodorow Presentation). *See also* C-PHM, ¶ 173, *citing* 2021 Hearing Transcript (English), Day 2, 433:11-16 ([redacted] Cross-Examination).

1676 *See* Brattle First Report, ¶¶ 98, 185, 188. *See also* Memorial, ¶¶ 320, 276, *citing* Brattle First Report, § IV.A.3.

1677 2021 Hearing Transcript (English), Day 5, 991:20-992:1 (Chodorow Presentation).

downstream aspects of the Network, the best alternative to building the downstream capacity of the CALICA Network is to buy it from Claimant.[1678] A potential buyer, in its view, would think about the value of CALICA as its netback value for serving the Gulf Coast.[1679]

1331. For Respondent, the FMV of CALICA should be based on the hypothetical sale of the CALICA business unit in Mexico alone, which is to be calculated based on CALICA's revenues in Mexico without reference to the sales transactions of CALICA's aggregates outside Mexico.[1680] Claimant's approach, in Credibility's view, essentially bundles the profits of CALICA, Vulica and Legacy Vulcan throughout the CALICA Network.[1681] If CALICA itself was engaged in the production, transportation and marketing of the aggregates in the United States, Respondent argues that the value of CALICA would include the cash flows associated with those activities, but that is not the case here.[1682]

1332. Having carefully considered the Parties' respective positions, the Tribunal concludes that the correct valuation of losses to Claimant and CALICA as a result of Respondent's breach should exclude losses associated with the CALICA Network outside Mexico. Even if it operates in certain respects as an integrated business unit, it would not be accurate to characterize the CALICA Network as a single investment bearing common risks, making common profits or suffering common losses. The risks associated with Claimant's investment in Mexico were divided and allocated to separate legal entities across different jurisdictions. Neither Claimant nor CALICA were the relevant entity which sold CALICA's aggregates in the United States.

1333. In particular, the transport and distribution of CALICA's aggregates are downstream activities involved in bringing the aggregates to market in the United States. Losses to those downstream entities are not sufficiently proximate to be considered as loss or damage incurred "by reason of, or arising out of" a breach under NAFTA.[1683] In circumstances where NAFTA provides protection against losses to investors and

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1678 2021 Hearing Transcript (English), Day 5, 991:11-18 (Chodorow Presentation).
1679 2021 Hearing Transcript (English), Day 5, 991:2-4 (Chodorow Presentation). *See also* C-PHM, ¶ 175, *citing* 2021 Hearing Transcript (English), Day 5, 990: 17-22 (Chodorow Presentation).
1680 R-PHM, Annex A, ¶ 8; Credibility First Report, ¶ 70.
1681 Credibility First Report, ¶ 70.
1682 R-PHM, Annex A, ¶ 10.
1683 **C-0009-ENG**, NAFTA, Arts. 1116(1), 1117(1).

investments as defined under the Treaty, it would be an exceptional situation in which losses would be awarded based on damage suffered by other entities in the international chain of downstream supply and distribution of a product.

1334. Losses to the CALICA Network therefore do not satisfy the legal causation requirement under NAFTA in terms of remoteness. That may be the case even if it is correct as a matter of factual causation that losses suffered to the Vulica shipping business and US Yards distribution operations are connected to the losses suffered as a result of Respondent's breach in relation to El Corchalito, i.e., a "consequence of a shortfall in Calica Mexico's aggregates production due to the alleged breaches is the loss of profits along the full Calica Network."[1684]

1335. Claimant argues that the losses of the CALICA Network were foreseeable because Respondent knew from the outset that the Project was to serve foreign markets by sea as opposed to the Mexican market.[1685] This is reflected in Recital IV to the Investment Agreement, which states:[1686]

> The COMPANY has prepared and presented before SEDUE and the STATE GOVERNMENT, a Project for the exploitation of the materials bank, to obtain aggregates for the manufacture of construction materials and for the direct use of limestone for the same purposes. Such products are intended mainly for their exportation by sea. The Project also includes the construction, at the same site, of the port infrastructure works and facilities necessary for the handling and exportation of the products, through the use of vessels suitable for the transportation of large volumes.

1336. Foreseeability is another element of the legal causation analysis that may be considered relevant in determining whether an act has caused a loss for which a State will be responsible (*see* ¶ 1234 above). The language in Recital IV of the Investment Agreement provides support for Claimant's assertion with respect to the arguably more foreseeable activities of Vulica. However, even if foreseeability alone would be enough, it remains the case that a separate entity and not Claimant or CALICA carried out the exportation by sea, and indeed Recital IV of the Investment Agreement does not specify otherwise.

1684 Brattle Second Report, ¶ 56. *See* Reply, ¶ 244.
1685 *See, inter alia*, C-RPHM, ¶ 85.
1686 **C-0010-SPA**, Investment Agreement, p. 4 of the PDF.

1337. Additionally, Recital IV to the Investment Agreement does not include any reference to distribution activities of Claimant's US Yards, which are far from being a foreseeable compensable loss. It is not because an investment activity is export-oriented that a respondent State will be liable for all downstream losses arising in an investor's chain of export activities.

1338. In the circumstances, the Tribunal agrees with Respondent that CALICA should be valued in isolation from the CALICA Network.

1339. Claimant submits that even if the relevant measure of damages were the diminution in the FMV of CALICA alone, the result is the same, on the basis that: (i) no rational seller would sell CALICA for a price that does not account for the profits that can be derived from using CALICA as part of a network with shipping and distribution of reserves in the US Gulf Coast market;[1687] (ii) the price that Claimant would demand for CALICA would be equal to the FMV of the CALICA Network minus what Claimant could get from selling of the ships and yard business;[1688] and (iii) the willing buyer would also be willing to pay a price for CALICA that includes expected cash flows from serving the Gulf Coast.[1689] According to Claimant, no hypothetical buyer would purchase CALICA Mexico in order to serve the local market. Given the integrated nature of the CALICA Network, if there was a transaction for the sale of CALICA, it would be a transaction for the entire CALICA Network as happened in 2001, when Claimant bought out Grupo ICA's interests in the joint venture.[1690]

1340. Respondent disagrees, arguing that under this approach there is a hypothetical sale of the investments in the Bahamas and the United States in addition to the Mexican business

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1687 C-PHM, ¶ 175, *citing* Brattle Second Report, ¶ 15, n. 15. *See also* Reply, ¶¶ 246-248, *citing* Brattle Second Report, ¶ 62; C-PHM, ¶¶ 171, 176, 179, 182, *citing* 2021 Hearing Transcript (English), Day 5, 991:5-10 (Chodorow Presentation), *citing* 2021 Hearing Transcript (English), Day 5, 989:7-18 (Chodorow Presentation), *citing* **CD-0006**, Chodorow Presentation, slides 16-18; [redacted] First Statement, ¶¶ 22-23; [redacted] Second Statement, ¶ 16; [redacted] First Statement, ¶ 69, *citing* Brattle Second Report, ¶¶ 61-62; C-RPHM, ¶ 106.

1688 C-PHM, ¶ 175, *citing* 2021 Hearing Transcript (English), Day 5, 990:17-22 (Chodorow Presentation).

1689 C-PHM, ¶ 176, *citing, inter alia*, 2021 Hearing Transcript (English), Day 5, 991:1-10 (Chodorow Presentation); Brattle Second Report, ¶ 62.

1690 C-PHM, ¶¶ 176-178, *citing* Brattle Second Report, ¶ 15, n. 15, *citing* 2021 Hearing Transcript (English), Day 5, 991:11-20, 992:4-9 (Chodorow Presentation), *citing* 2021 Hearing Transcript (English), Day 2, 422:19-423:5 ([redacted] Cross-Examination).

unit, which it submits is inconsistent with a NAFTA Chapter 11 damages claim.[1691] According to Respondent, to suggest that the combined value of CALICA, Vulica and the US Yards resides 100% in CALICA contradicts the evidence provided by the Claimant itself.[1692] In support, Respondent relies on the EY Report, which in its view demonstrates that approximately 80% of the value of the materials is added outside of Mexico.[1693]

1341. Respondent further contends that a hypothetical buyer of CALICA could decide to sell the aggregates in Mexico to companies, such as VMC, that market the aggregates in another country, just as CALICA does, without investing in transportation and facilities in the US.[1694]

1342. The Tribunal is not persuaded by Claimant's alternative argument, since it includes the same non-proximate and unforeseeable elements of Claimant's supply and distribution chain to quantify damages due for Respondent's breach. Moreover, the Tribunal does not find Claimant's purchase of its joint venture partner's interest to provide guidance for present purposes, as it relates to Claimant itself buying the remaining share of its own business. The Tribunal is satisfied that a hypothetical buyer would not necessarily intend to invest in the transportation and distribution of aggregates outside Mexico, and that the sale of CALICA as a standalone entity without factoring in the CALICA Network elements is the correct approach.

1343. The NAFTA cases relied upon by Claimant (and opposed by Respondent) confirm both the exceptional nature of awarding damages for losses in relation to the activities of non-parties to the arbitration and that there is no easy analogy to Claimant's operations to be found in those cases.[1695] In that regard, the Tribunal notes:

- In *S.D. Myers v. Canada*, the tribunal awarded damages which included losses to the home State investor for upstream activities. The case did not concern

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1691 Rejoinder, ¶ 378.
1692 R-RPHM, ¶ 118.
1693 R-RPHM, ¶ 119, *citing* **DC-0023**, Vulcan Materials Company, 2015 Calizas Industriales del Carmen S.A. de C.V., Transfer Pricing Documentation, 6 September 2016 ("Vulcan Materials Company, Transfer Pricing Documentation"), pp. 15-18; Counter-Memorial, ¶ 488.
1694 R-RPHM, ¶ 123.
1695 *See* Reply, ¶ 208, *citing* [redacted] First Statement, ¶¶ 8-9; Rejoinder, ¶ 394.

compensation for the activities of entities other than the investor or for downstream investment activities.[1696]

- In *Cargill v. Mexico,* the tribunal awarded damages for the losses suffered by Cargill's Mexican subsidiary as well as the upstream losses of Cargill, the US parent company. The damages did not concern downstream losses and the tribunal emphasized that the upstream business income was "not mere trade in goods".[1697]

1344. In light of the Tribunal's determination, it is not necessary to consider the extent to which losses to the CALICA Network were "incurred" by Claimant or CALICA, being required by NAFTA, noting that Respondent has objected to the lack of evidence on whether alleged losses of Vulica and the US Yards flowed to Claimant. [1698]

1345. Nor is it necessary to further address certain objections by Respondent to Claimant's calculations insofar as they concern the CALICA Network component of Claimant's valuation, which shall be removed entirely from the analysis. This includes Respondent's arguments that Claimant's gross profit calculations for the CALICA Network and its projected CALICA sales volumes are inflated.[1699]

4. Appropriate CALICA-only Valuation

1346. The Tribunal turns to consider the most accurate and appropriate valuation of Claimant's losses in light of its conclusion that losses to the CALICA Network should be excluded from the analysis. The Tribunal's determination of those losses must be based on the evidence presented by the Parties to the Tribunal.

(a) Claimant's Model

1347. Claimant's valuation includes inputs based on the CALICA Network. Claimant did not present a CALICA-only valuation limited to the Mexican entity. Claimant's expert

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1696 **CL-0132-ENG**, *S.D. Myers v. Canada*, Second Partial Award (Damages), ¶ 139.
1697 **CL-0017-ENG**, *Cargill v. Mexico*, Award, ¶ 522.
1698 R-PHM, ¶ 129.
1699 Credibility First Report, ¶¶ 170, 171-174, 194-196, 208-210.

acknowledged it would have been possible to value CALICA in isolation from the CALICA Network, although he considered such an exercise to be artificial.[1700]

1348. In the circumstances, Claimant's model does not correctly reflect the damages suffered and the Tribunal rejects it as a basis for the quantification of damages due as analyzed above. The same applies to Respondent's alternative calculation based on the CALICA Network (*see* ¶ 1312 above).

1349. At a minimum, Claimant's model would require adjustment in order to exclude the CALICA Network-related damages from the valuation. The Tribunal will turn to that option in the following section.

(b) Potential Deduction from Claimant's Model

1350. Respondent's Credibility experts have quantified the impact of alleged "distortions" in Claimant's damages analysis which in its view are caused by valuing the CALICA Network instead of CALICA. These individual impacts are set out as non-additive deductions from Claimant's model. Claimant's model values the loss in FMV of the CALICA Network at [redacted] (excluding mitigation; [redacted] after mitigation):[1701]

[redacted]

[1700] 2021 Hearing Transcript (English), Day 5, 1012:4-12 (Chodorow Cross-Examination).

[1701] Credibility First Report, ¶ 121, Table 6.11. *See also* Credibility First Report, ¶¶ 80-120; Brattle First Report, ¶ 194.

1351. Claimant disagrees with Respondent's proposed reductions as a matter of law and standard valuation practice.[1702]

1352. The first deduction modelled by Respondent seeks to remove the CALICA Network-related shipping and US Yards revenues, costs and capex from Claimant's valuation.[1703] The correction, according to Credibility, requires a deduction of 96.2% of Claimant's claimed damages, to a [redacted].[1704] Claimant objects to this deduction, *inter alia,* on the basis that the calculation mixes real (net of inflation) and nominal (inflation inclusive) dollars.[1705] In its second report, Credibility accepted this critique in respect of its own model, providing an updated valuation based on real dollars only.[1706] However, it did not revalue the deduction.

1353. While the Tribunal agrees that the CALICA Network-related revenues, costs and capex should be excluded, in light of the above considerations it is not persuaded that the proposed 96.2% reduction is an accurate measure of that exclusion. Since the revenues, costs and capex are a fundamental part of the DCF analysis, the Tribunal does not have satisfactory evidence before it as to the correct deduction from Claimant's model to remove the CALICA Network from the analysis.

1354. It is further noted that the USD 5.8 million amount of "corrected damages" proposed by Credibility pursuant to this deduction is significantly less than Credibility's own updated valuation of USD 9.6 million (excluding interest) for the El Corchalito breach.[1707]

1355. The Tribunal therefore rejects a potential adjustment of Claimant's model as a basis for the calculation of damages, based on the evidence presented to it.

1356. In the circumstances, it is not necessary to give further consideration to the details of Claimant's proposed model. Because the Claimant's model has been rejected, it is not necessary to decide upon the Parties' other disagreements on the parameters of that

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1702 *See, inter alia,* Reply, ¶ 254, *citing* Brattle Second Report, ¶ 126.
1703 Credibility First Report, ¶ 86.
1704 Credibility First Report, ¶ 97.
1705 Reply, ¶ 254; Brattle Second Report, ¶¶ 126-128.
1706 Credibility Second Report, ¶ 164. *See also* Rejoinder, ¶ 475.
1707 Rejoinder, ¶ 488; Credibility Second Report, ¶ 155, Table 5.6.

model, such as the gross profit margins assumed by Claimant,[1708] projected sales volumes of the CALICA Network,[1709] and projected price growth.[1710]

1357. Additionally, Respondent had objected that there does not appear to be a risk of possible loss of sales to end-users in the CALICA Network because Claimant has alternative sources for aggregates in the United States with growing reserves to supply the two primary regions served by the CALICA Network.[1711] The Parties engaged in significant debate, *inter alia*, over (i) whether CALICA's aggregates have unique qualities or whether they may be substituted for other aggregates available on the market; (ii) whether such substitution is commercially viable; (iii) the reliability of Claimant's contingency plan for such substitution; (iv) whether the withdrawal of CALICA's aggregates from the market would have increased local prices; and (v) whether Claimant's claim should more properly be the difference between the profits Claimant would have made from CALICA aggregates, and the presumably smaller profits it would make from aggregates from alternative sources.[1712] All of these points relate to a scenario in which damages are

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1708 *See, e.g.,* R-RPHM, ¶¶ 128-129; Reply, ¶¶ 251, 258, *citing* Credibility First Report, ¶¶ 174, 188-189; Brattle Second Report, ¶¶ 113, 182; [redacted] Second Statement, ¶ 10; C-PHM, ¶¶ 187-188, *citing* 2021 Hearing Transcript (English), Day 5, 1148:2-17 (Hart and Vélez Presentation), *citing* [redacted] Second Statement, ¶¶ 6-7; C-PHM, ¶ 190, *citing* 2021 Hearing Transcript (English), Day 5, 1179:15-17 (Hart and Vélez Cross-Examination); 2021 Hearing Transcript (English), Day 5, 1181:6-13 (Hart and Vélez Cross-Examination); Reply, ¶ 251, *citing* [redacted] First Statement, ¶ 21.

1709 Reply, ¶ 253, *citing* Credibility First Report, ¶¶ 62, 201, *citing* Brattle Second Report, ¶ 118, *citing* [redacted] First Statement, ¶ 22; C-RPHM, ¶ 100; Reply, ¶ 263, *citing* Brattle Second Report, ¶ 184; Credibility First Report, ¶ 299.ii.a; Brattle First Report, ¶ 44; C-RPHM, ¶¶ 100-101, *citing* 2021 Hearing Transcript (English), Day 5, 1068:14-1069:17 (Chodorow Cross-Examination); Counter-Memorial, ¶ 514, *citing* Credibility First Report, ¶ 208; C-PHM, ¶ 186; *see* **C-0088-ENG**, Board Memorandum, 11 July 2014, pp. 1-2.

1710 Memorial, ¶ 319, *citing* Brattle First Report, ¶ 188; C-PHM, ¶ 186, *citing* **CD-0006**, Chodorow Presentation, slide 12; [redacted] First Statement, ¶ 48; [redacted] First Statement, ¶ 28; Brattle Second Report, ¶ 124; C-RPHM, ¶ 104; *see* **DC-0030**, Federal Reserve Bank of St. Louis, "Gross Domestic Product: Implicit Price Deflator, Index 2012=100, Annual, Seasonally Adjusted," accessed 12 February 2020; C-RPHM, ¶¶ 102-103; C-RPHM, ¶ 104*, citing* Credibility First Report, Figure 1.4.

1711 Counter-Memorial, ¶ 482, *citing* Credibility First Report, ¶¶ 75-77; Rejoinder, ¶ 449.

1712 *See, inter alia,* Rejoinder, ¶¶ 450-451, *citing* Reply, ¶¶ 233-234; Rejoinder, ¶ 452, *citing* Reply, ¶ 234; [redacted] **0003**, Vulcan Materials Company, Mitigation Analysis; Rejoinder, ¶ 453, *citing* Credibility Second Report, ¶¶ 94, 95, 97; Rejoinder, ¶¶ 454-455; R-PHM, ¶¶ 162-163; R-PHM, ¶ 171, *citing* 2021 Hearing Transcript (English), Day 2, 387; R-PHM, ¶ 172, *citing* 2021 Hearing Transcript (English), Day 2, 390; R-RPHM, ¶ 106, *citing* [redacted] **0009**, Vulcan Materials Co., 10-K (FY 2015), 25 February 2016, p. 9; R-RPHM, ¶¶ 108-109; R-PHM, ¶¶ 163, 166, *citing* 2021 Hearing Transcript (English), Day 2, 384-385; R-PHM, ¶ 173, *citing* 2021 Hearing Transcript (English), Day 2, 391-392; R-PHM, ¶ 171, *citing* 2021 Hearing Transcript (English), Day 2, 387; R-PHM, ¶ 174; R-RPHM, ¶¶ 110-114; R-RPHM, ¶ 128, *citing* **C-0089-ENG**, AFE Project Description, p. 9; R-PHM, ¶ 168, *citing* 2021 Hearing Transcript (English), Day 5, 1146; *see* Credibility First Report, ¶ 169; *see also* **CRED-10**, VMC 2019 Annual Report.; R-PHM, ¶ 170, *citing* 2021 Hearing Transcript (English), Day 5, 1168; R-RPHM, ¶ 115; Reply, ¶ 234, *citing* Brattle First Report, ¶¶

calculated based on the returns from sales in the US, i.e., arising from the CALICA Network. As that model has been rejected, these points of the Parties' debate do not need to be further analysed or determined.

(c) Respondent's Model

1358. Respondent's primary valuation model is calculated to exclude the CALICA Network from its analysis (*see* ¶ 1311 above).

1359. This is implemented by defining the limit of compensable losses at the moment the limestone aggregates were purchased from CALICA by VMC at fair market value; title to the goods passed from CALICA to VMC, and CALICA's participation ceased.[1713] Accordingly, to determine the value of CALICA's aggregates, Respondent's valuation is based on the transfer price at which CALICA sells the aggregates to VMC at the port in Mexico.[1714] A transfer price is "the price at which related parties transact with each other" used for each entity's separate tax reporting.[1715]

1360. Claimant's expert argues that the transfer pricing has no role in the ordinary course of business and is an artificial exercise required to divide the overall profitability of the network across tax jurisdictions.[1716] In Claimant's view, the determination of the transfer price is backward-looking, in that it seeks to reward the risk taken to bring the product to market, which is different from the forward-looking FMV exercise.[1717]

1361. Based on the evidence put forward by the Parties, the Tribunal considers the transfer price to be the most appropriate input to determine the value of CALICA's aggregates, since it

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160-163; Brattle Second Report, ¶ 37; C-PHM, ¶ 157, *citing* Brattle First Report, Tables 8, 14; **CD-0001**, Claimant's Opening Presentation, slide 115; C-PHM, ¶¶ 162-163, *citing* Brattle Second Report, ¶ 38, *citing* 2021 Hearing Transcript (English), Day 2, 389:21-390:11 ([redacted] Cross-Examination); Reply, ¶¶ 235, 236; C-RPHM, ¶ 96, *citing* [redacted] First Statement, ¶¶ 71-72; C-PHM, ¶¶ 158-159, 161, *citing* 2021 Hearing Transcript (English), Day 5, 1146: 4-6 (Hart and Vélez Presentation), *citing* 2021 Hearing Transcript (English), Day 5, 1155:20-1156:1 (Hart and Vélez Presentation), *citing* 2021 Hearing Transcript (English), Day 5, 1157:3-1158:22 (Hart and Vélez Cross-Examination); C-RPHM, ¶ 95, *citing* 2021 Hearing Transcript (English), Day 5, 1168:5-15 (Hart and Vélez Cross-Examination (Ms. Vélez)); C-RPHM, ¶ 98, *citing* Brattle First Report, ¶ 104; C-RPHM, ¶ 97, *citing* [redacted] First Statement, ¶ 39; [redacted] First Statement, ¶ 17.

1713 Rejoinder, ¶¶ 400, 460, *citing* Credibility Second Report, ¶ 4.

1714 Counter-Memorial, ¶ 493, *citing* Credibility First Report, ¶¶ 53, 69.

1715 Credibility First Report, ¶ 65, *citing* **CRED-16**, Investopedia, Transfer Price Definition.

1716 2021 Hearing Transcript (English), Day 5, 987:14-19 (Chodorow Presentation).

1717 C-RPHM, ¶ 107; 2021 Hearing Transcript (English), Day 5, 988:1-12 (Chodorow Presentation). *See also* [redacted] Second Statement, ¶ 12.

is the price at which CALICA sells those aggregates. Importantly, the transfer price has been independently tested by Ernst & Young to determine that it reflects an arms-length transaction for compliance with US Internal Revenue Service requirements ("**EY Report**").[1718] The EY Report evaluation included performance of an economic analysis and comparable firm research to apply third party benchmarks and determine ranges of reasonable results for the transactions.[1719]

1362. The Tribunal is mindful that actual prices may be higher than the transfer price. However, Claimant has not put forward alternative evidence as to what such price would be in a CALICA-only valuation model.

1363. In addition, while Claimant criticizes the transfer price as a "backward-looking" method, the Tribunal considers it an appropriate and independent measure. In that regard, the Tribunal does not consider it established that the transfer price seeks to compensate Claimant for finding a quarry and developing its commercial operation.

(d) Conclusion on Appropriate CALICA-Only Valuation

1364. For the above reasons, the Tribunal determines that the principal assumptions underlying Respondent's valuation most properly reflect the Tribunal's conclusions on liability and the scope of damages.

1365. While accepting Respondent's model as a basis for the calculation of damages, the Tribunal notes that Claimant has a number of objections to Respondent's valuation. The Tribunal will therefore consider, and decide upon, those objections at ¶ 1366 *et seq.* below. The Tribunal will first address certain general objections regarding Claimant's proof of loss.

5. General Objection on Proof of Loss

1366. Respondent makes certain objections to Claimant's claim for damages that relate to Claimant's proof of loss. Those objections primarily relate to the amount of Claimant's

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1718 **DC-0023**, Vulcan Materials Company, Transfer Pricing Documentation, pp. 2-3.
1719 **DC-0023**, Vulcan Materials Company, Transfer Pricing Documentation, p. 2.

claim based on the CALICA Network and the evidence in support of it. Since the Tribunal has already rejected Claimant's valuation, those objections are not strictly relevant.

1367. However, to the extent that Respondent objects that Claimant has failed to prove any loss at all, for completeness the Tribunal considers it appropriate to address such an objection even if Claimant's valuation has been rejected. In that regard, the Tribunal will consider Respondent's objection that Claimant did not carry out a contemporaneous impairment analysis, disproving its claimed loss.

1368. Respondent argues that a loss of the magnitude claimed by Claimant constitutes a triggering event for conducting an impairment analysis, whilst there is no evidence that such an analysis was performed.[1720] According to Respondent, the fact that such an analysis was not performed means that Claimant did not believe that the alleged NAFTA violations caused the loss claimed in this arbitration.[1721] This is relevant, Respondent argues, because Claimant has failed to offer a single contemporaneous piece of evidence of the actual and materialised damage.[1722]

1369. Respondent contends, relying on Credibility Experts, that under the Financial Accounting Standards Board ("**FASB**") and Accounting Standards Codification 360 ("**ACS 360**"), Claimant must perform an impairment analysis when changes in events or circumstances indicate that the carrying value of an asset may not be recoverable.[1723]

1370. Claimant denies that it was required to report an impairment, and disputes the relevance of this for the extent of damages.[1724] It asserts that it conducts impairment testing at the higher level of the "Gulf Aggregates" group.[1725] Claimant further contends, relying on the Brattle Expert, that an impairment loss shall be recognised only if the carrying amount

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1720 Rejoinder, ¶ 444, *citing* Credibility Second Report, ¶¶ 55-57. *See also* Rejoinder, ¶ 447, *citing* Credibility Second Report, ¶ 66.

1721 Rejoinder, ¶ 446.

1722 R-RPHM, ¶ 103.

1723 Rejoinder, ¶ 446, *citing* Credibility Second Report, ¶¶ 56, 63-64.

1724 Reply § IV.3(b)(1); Reply, ¶ 229, *citing* [redacted] **0002**, Vulcan Materials Company, Form 10-K, p. 109. *See also* Reply, ¶ 228, *citing* Credibility First Report, ¶ 24, *citing* [redacted] First Statement, ¶ 24; C-RPHM, ¶ 8; Reply, ¶ 229, *citing* [redacted] First Statement, ¶¶ 24-25; C-RPHM, ¶ 89, *citing* [redacted] **0002**, Vulcan Materials Company, Form 10-K, p. 110; Reply, ¶ 227, *citing* Brattle Second Report, ¶ 76; [redacted] Second Statement, ¶¶ 30-32; C-RPHM, ¶¶ 87-88, *citing* **CRED-06**, Vulcan Materials Company, 2015 Annual Report, p. 70; [redacted] Second Statement, ¶ 31, *also citing* **CRED-58**, FASB ASC 360, Property, Plant, and Equipment, p. 3; Reply, ¶ 230, *citing* Brattle Second Report, ¶ 79, *citing* Brattle First Report, ¶ 187, Figure 17.

1725 C-RPHM, ¶ 87; [redacted] Second Statement, ¶ 31.

of a long-lived asset is not recoverable and exceeds its fair value.[1726] On the basis that the net book value of the CALICA Network's assets was [redacted], while the FMV of the CALICA Network is estimated at [redacted], Claimant argues that this requirement is not met. [1727]

1371. Insofar as Respondent's objection regarding the lack of impairment analysis relates to the full amount of Claimant's claim for both La Adelita and El Corchalito calculated on the basis of the CALICA Network losses, it is no longer relevant. The Tribunal has already rejected Claimant's claim for CALICA Network losses which were significantly higher than Respondent's valuation. The Tribunal has also rejected Claimant's claim for losses in relation to the La Adelita lot. It is not clear that Respondent maintains its objection for an award of damages in the magnitude of Respondent's valuation, which represents a significantly lower amount. However, for the avoidance of doubt the Tribunal will address it.

1372. While noting Respondent's point regarding evidence of losses, the Tribunal does not consider the lack of impairment analysis to disprove the existence of loss by Claimant or CALICA, in particular with respect to a claim for damages for the El Corchalito lot only. As at the date for the valuation of damages, CALICA's operations continued with respect to the La Rosita lot and the claim does not relate to a complete loss of CALICA's business. The Tribunal does not consider it necessary to make an assessment of Claimant's or VMC's internal accounting practices with regard to impairment testing or their compliance with United States Securities and Exchange Commission ("**SEC**") requirements.

1373. The Tribunal therefore rejects this objection. Contrary to Respondent's objection, the Tribunal finds that Claimant has substantiated the existence of losses to CALICA as a result of Respondent's breach of NAFTA. The Tribunal accepts Claimant's evidence that CALICA's aggregates have value as a high quality crushed limestone which is the

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1726 Reply, ¶ 227, *citing* Brattle Second Report, ¶ 76.

1727 Reply, ¶ 227, *citing* Brattle Second Report, ¶ 76. While Claimant does not specify the currency of the valuation, the Tribunal understands it to be in USD. [redacted] Second Statement, ¶¶ 30-32; C-RPHM, ¶¶ 87-88*, citing* **CRED-0006**, Vulcan Materials Company, 2015 Annual Report, p. 70, *also citing* 2021 Hearing Transcript (English), Day 5, 1030: 12-17 (Chodorow Cross-Examination).

preferred aggregate for particular applications.[1728] Aggregates of CALICA's quality are not easily sourced for substitution, as demonstrated when replacements were sought during a COVID shutdown in 2020.[1729] The Tribunal further accepts that the lost ability to quarry in the El Corchalito lot resulted in an adjusted quarrying plan, lower expected sales after reserves at La Rosita were exhausted and reduced cash flows to CALICA.[1730]

1374. In addition, Respondent objects that 33 investment reports prepared by independent investment analysts between 2013 and 2019 also do not report any negative impact, current or future, on Claimant's financial results caused by the alleged violations.[1731] Respondent argues that Claimant did not report any lost sales revenue in its aggregates business segment, on or about the valuation date, and instead in February 2020, management presentation to investors reported positive trajectories in key indicators.[1732] According to Respondent, the failure to report suggests that Claimant did not suffer such a loss and that its claim for damages is being brought in bad faith.[1733]

1375. Claimant contends that there were no lost sales yet due to its modified extraction plans, although this has entailed higher costs and capital expenditures.[1734] As it owns the reserves in El Corchalito and has not claimed that Respondent expropriated them Claimant argues that there was no requirement to remove these reserves from VMC's statements.[1735]

1376. VMC's annual reports are not the applicable reference for lost sales under Respondent's model which is being used by the Tribunal. In any event, as a matter of general evidence of loss and for the sake of completeness, the Tribunal also rejects this objection, for the

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1728 **C-0088-ENG**, Board Memorandum, 11 July 2014, Letter of Recommendation, p. 3; Brattle First Report, ¶ 3. *See also* Brattle First Report, ¶¶ 48-49; [redacted] First Statement, ¶ 37.

1729 *See* Brattle Second Report, ¶ 38, *citing* [redacted] **0010**, BWN Netback Profit by Source; **DC-00126**, Sea route & distance, Port of Playa del Carmen to Port of Jacksonville: 862 nautical miles; [redacted] Second Statement, ¶ 33; [redacted] Second Statement, ¶ 18.

1730 **DC-0092**, Calica Quarrying Plan Scenarios Spreadsheet, 2019; **DC-0010**, Workpaper J; Brattle First Report, ¶¶ 186-187; [redacted] First Statement, ¶¶ 60-66.

1731 Counter-Memorial, ¶ 482, *citing* Credibility First Report, ¶¶ 26-27. *See also* Credibility First Report, ¶ 74; Credibility Second Report, ¶ 86.

1732 Counter-Memorial, ¶ 482, *citing* Credibility First Report, ¶ 30.

1733 Rejoinder, ¶ 448.

1734 Reply, ¶ 230, *citing* Credibility First Report, ¶ 28, Figure 1.2, *citing* Brattle Second Report, ¶ 79, *citing* Brattle First Report, ¶ 187, Figure 17. *See also* Reply, ¶ 232, *citing* [redacted] Second Statement, ¶ 54.

1735 C-RPHM, ¶ 90, *citing* [redacted] **0002**, Vulcan Materials Company, Form 10-K, p. 26; *see* 2021 Hearing Transcript (English), Day 2, 429:4 ([redacted] Cross-Examination: "We own the reserves").

same reason. As at the date for the valuation of damages, CALICA's operations continued with respect to the La Rosita lot and the claim in relation to El Corchalito does not relate to a complete loss of CALICA's business. Lost sales are reflected in Claimant's model upon the exhaustion of La Rosita's reserves [redacted].[1736] As noted at ¶ 1308 above subsequent factual developments prevented CALICA from quarrying in the La Rosita lot, but such *ex-post* information is not taken into account as the valuation date is in 2018.

1377. Respondent further objects to the evidence used to support Claimant's claim for damages on a number of grounds, including that (i) it uses unverified statements by company employees;[1737] (ii) it does not rely on contemporaneous corporate documents, or compare documents with accounting records;[1738] (iii) it uses uncorroborated documents prepared for the purpose of this arbitration;[1739] and (iv) it relies on *ex post* information to support an *ex ante* analysis.[1740] Claimant disputes Respondent's assertions.[1741] The Tribunal will weigh the evidence as it sees fit when making its determinations on the Parties' specific assertions below and does not consider it necessary to make a finding in relation to the reliability or sufficiency of the evidence in general terms.

6. Respondent's Model: Issues/Objections Raised

1378. Claimant objects to Respondent's valuation of losses to Claimant. Claimant objects, *inter alia*, in relation to (i) sales projections; (ii) cost of sales; (iii) export sales price; (iv) capex; (v) discount rate; (vi) taxes; and (vii) the reasonableness of the valuation.

1379. Claimant has further objected to Respondent's model regarding the exclusion of the CALICA Network and the use of the transfer price for export sales to VMC. The Tribunal has already rejected those objections (*see* ¶¶ 1338-1345, 1361-1363 above).

1736 Brattle Second Report, ¶ 79; Brattle First Report, ¶ 187, Figure 17; [redacted] Second Statement, ¶ 24.
1737 Rejoinder, ¶ 435. *See also* Rejoinder, ¶ 463.
1738 Counter-Memorial, § IV.C.3.a. *See also* Rejoinder, ¶ 445, *citing* Credibility Second Report, ¶¶ 60, 64.
1739 Counter-Memorial, ¶¶ 465, 476, 480, *citing* Credibility First Report, ¶¶ 59-63; Rejoinder, ¶ 433.
1740 Counter-Memorial, ¶¶ 477, 479.
1741 *See, inter alia,* Reply, ¶ 225, *citing* Credibility First Report, ¶ 60, *citing* [redacted] Second Statement, ¶¶ 27-28.

(a) Sales Projections

1380. Respondent's model uses a three-year average of CALICA's 2015-2017 annual export sales volumes and local sales volumes, projected in the future.[1742] Credibility assumed forecasted annual export sales volume of 10.7 million tons, applying a cap of 13.5 million tons per year based on ship loading capacity constraints.[1743]

1381. According to Respondent, there was nothing unorthodox about this approach and international tribunals often condition the use of DCF models on the existence of a history of profitable operations in consideration of the fact that historical results are often the basis for projecting future results.[1744]

1382. Claimant objects to the use of historical performance averages as the basis for future projections, adjusted only to inflation.[1745] In its view, valuation is an inherently forward-looking exercise and Respondent ignores, *inter alia*, the expected higher future demand.[1746] Claimant's own forecasts are that annual sales volumes would [redacted].[1747] This forecast would be reached using investments made in 2015 to approve the construction of a supplemental plant and a haul truck and a new shiploader to avoid downtime, adding [redacted] of additional capacity per year.[1748]

1383. Respondent disagrees with Claimant's forecasts, arguing *inter alia* that they are inaccurate and do not explain the sources or method used.[1749]

1384. Having reviewed each side's evidence on sale projections, the Tribunal prefers Respondent's evidence of projected sales based on the actual sales immediately preceding the valuation date. Claimant's projection made for the period 2016-2018 (i.e., immediately prior to Breach #2) was demonstrated to be inaccurate, undermining it as a basis for projection in subsequent years. In this regard, Claimant's forecast was 22.3%

1742 Rejoinder, ¶ 469; Credibility First Report, ¶ 141; Credibility Second Report, ¶ 121.
1743 Credibility Second Report, ¶¶ 121-122.
1744 Rejoinder, ¶ 468, Figure 12; *see*, *inter alia*, **CL-0019-ENG**, *Metalclad v. Mexico*, Award, ¶¶ 119-120.
1745 Reply, ¶ 267; Brattle Second Report, ¶¶ 141, 181.
1746 Brattle Second Report, ¶ 141.
1747 C-PHM, ¶ 100*, citing* Brattle First Report, ¶ 58. *See also* C-RPHM, ¶ 101.
1748 Brattle First Report, ¶ 58.
1749 Rejoinder, ¶ 468; R-PHM, ¶ 176, *citing* 2021 Hearing Transcript (English), Day 5, 1146-1147; R-PHM, ¶ 177, *citing* 2021 Hearing Transcript (English), Day 5, 1067-1068, 1070.

off the actual sales in 2016 and 34.9% in 2017.[1750] Mr. Chodorow emphasized that while "the error was large", this does not reduce the reliability of the projection which was carried out on an *ex ante* basis.[1751] He highlighted that significant hurricane activity in 2017 along the US Gulf Coast, the flooding of one of CALICA's largest yards in the same year, and delays to planned projects for LNG assets in the Gulf Coast all reduced demand.[1752]

1385. While unexpected events may affect sales forecasts, there was sufficient opportunity to review and adjust forecasts in light of actual data in 2016 and 2017 to be taken into account for valuation purposes in relation to the El Corchalito breach. The Tribunal further notes that sales forecasts are not mere aspirations, but should be a reliable and realistic indicator of anticipated sales insofar as they can be accurately assessed.[1753]

1386. Additionally, according to Claimant, [redacted] Taking into account this maximum, a limit of [redacted] as proposed by Respondent is reasonable. [redacted] evidence to the contrary is based on [redacted] view that such a constraint did not apply, taking into account that exports in July 2015 were [redacted], which would be [redacted] annualized.[1755] However, there is no evidence that such an amount was actually exported. According to Credibility, CALICA's greatest historical total annual sales volume was [redacted][1756]

1750 Credibility First Report, ¶ 200, Table 10.8. *See also* 2021 Hearing Transcript (English), Day 5, 1066:9-1069:18 (Chodorow Cross-Examination; Tribunal Questions to Mr. Chodorow).

1751 2021 Hearing Transcript (English), Day 5, 1068:1-5 (Tribunal Questions to Mr. Chodorow).

1752 2021 Hearing Transcript (English), Day 5, 1068:11-1069:9 (Tribunal Questions to Mr. Chodorow).

1753 *See also* 2021 Hearing Transcript (English), Day 5, 1067:16-1068:13 (Tribunal Questions to Mr. Chodorow).

1754 **C-0089-ENG**, AFE Project Description, p. 7.

1755 [redacted] Second Statement, ¶ 24.

1756 Credibility First Report, ¶ 206.

1387. It is noted that Claimant made investments in 2015 to increase capacity with a supplemental crushing plant.[1757] On the other hand, Respondent points out that it should be taken into account that the decision to invest in that expansion was taken in the context that the existing plant was operating at close to capacity.[1758] The Tribunal is not persuaded that these investments are decisive for the present sales forecasts.

1388. In all the circumstances, the Tribunal finds Respondent's projections based on the actual data to be more accurate and reasonable as a basis for projecting future sales.

(b) Cost of Sales

1389. Respondent's model assumes forecasted CALICA cost of sales based on a three-year average (2015-2017) projected in constant real terms, i.e., consistent with inflation.[1759]

1390. Claimant objects that Respondent's valuation fails to take into account that some CALICA costs are variable and others are fixed. In its view, the Credibility valuation thereby misestimates CALICA's production costs forecasts.[1760] Claimant further objects that Respondent's valuation does not reflect the increase in costs due to the acceleration of extraction below the water table.[1761]

1391. Respondent submits that the fixed and variable costs were not separated as they were projected as a composite cost based on the figures in CALICA's financial statements.[1762] Respondent argues that Credibility's projections are constant in real terms and are unlikely to vary with sales volume as the model also holds sales constant in real terms.[1763]

1392. With respect to the cost increase due to accelerated extraction below the water table, Respondent submits that Claimant's expert has no technical expertise in quarry

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1757 *See* Reply, ¶ 253, *citing* [redacted] First Statement, ¶ 21; C-PHM, ¶ 186; *see* **C-0089-ENG**, AFE Project Description, p. 6; C-RPHM, ¶ 100, *citing* [redacted] First Statement, ¶ 28; [redacted] Second Statement, ¶¶ 21-22; 2021 Hearing Transcript (English), Day 5, 1062:9-1063-6 (Chodorow Cross-Examination).

1758 R-PHM, ¶ 179, *citing* **C-0089-ENG**, AFE Project Description; 2021 Hearing Transcript (English), Day 5, 1076:8 *et seq*.

1759 Credibility First Report, ¶ 142; Credibility Second Report, ¶ 120. *See also* C-PHM, Appendix B, item 32; R-PHM, Annex B, item 32.

1760 Reply, ¶ 268, *citing* Brattle Second Report, ¶¶ 143, 182.

1761 Reply, ¶ 275, *citing* Brattle Second Report, ¶ 159. *See also* C-PHM, Appendix B, item 32; R-PHM, Annex B, item 32.

1762 Rejoinder, ¶ 479.

1763 Rejoinder, ¶ 480, *citing* Credibility Second Report, ¶ 115.

operations and engineering, and that his forecasts have not been validated by an expert in this field.[1764] Respondent further argues that the Brattle Expert Report improperly relies on data from a non-formulaic spreadsheet that does not identify sources and is a document that appears to be prepared for this arbitration and not in the normal course of business.[1765]

1393. The Tribunal considers the projection of costs on a combined fixed and variable basis, by reference to CALICA's financial statements, to be an acceptable basis for Respondent's model. In line with the Tribunal's conclusion on sales volumes at ¶ 1388 above, the Tribunal likewise accepts that such costs should be projected consistent with inflation. The Tribunal therefore rejects Claimant's objection to this element of Respondent's valuation.

1394. With regard to the accelerated extraction below the water table, the Tribunal accepts Claimant's position that such costs were incurred as a result of Respondent's breach. According to Brattle, below-water production causes a loss of [redacted], meaning that CALICA needs to excavate [redacted], increasing drilling and blasting costs per saleable ton of aggregate.[1766] Claimant's witness [redacted] attests that "[g]iven the substantial increase in below-water extraction due to the inability to quarry La Adelita, CALICA went from owning two production draglines in 2015 to seven draglines today."[1767]

1395. The Tribunal does not consider Respondent's general concern with the data provided by Claimant in relation to such costs to warrant disregarding that data. However, Claimant has not quantified the impact that it asserts the exclusion of below-water production costs has had on Respondent's model. There is no exact translation from Claimant's model to Respondent's model, *inter alia*, as Claimant calculated those costs on a variable "per saleable ton" basis while Respondent has combined fixed and variable costs.[1768] From

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1764 Rejoinder, ¶ 480, *citing* Credibility Second Report, ¶ 116.
1765 Rejoinder, ¶ 481, *citing* Credibility Second Report, ¶¶ 115-120.
1766 Brattle First Report, ¶ 114, *citing* [redacted] First Statement, ¶¶ 60-61; **DC-0092**, Calica Quarrying Plan Scenarios Spreadsheet, 2019.
1767 [redacted] First Statement, ¶ 62.
1768 Brattle First Report, ¶ 115.

[redacted] evidence, it is also not possible to ascertain how many of the extra draglines are attributable to the inability to quarry La Adelita as opposed to El Corchalito.

1396. In the circumstances, the Tribunal considers Claimant's objection to Respondent's model to be valid and finds it appropriate to adjust Respondent's model by an amount representing the additional drilling and blasting costs associated with the shift towards below-water quarrying. In the absence of specific evidence on the quantum of such costs in Respondent's model, the Tribunal exercises its inherent power to assess the amount of such damages to be added as a lump sum to Respondent's valuation. Taking into account the data available to the Tribunal in relation to (i) drilling and blasting costs per saleable ton;[1769] (ii) the below-water excavation loss and cost premium;[1770] (iii) the saleable tons per year in the Respondent's model;[1771] (iv) the percentage of below-water excavation in the actual and but-for scenarios;[1772] and (v) discounting to present value in accordance with the Tribunal's determination below,[1773] the Tribunal assesses the lump sum to be added to Respondent's valuation in relation to El Corchalito as USD 1.5 million.

(c) Export Sales Price

1397. Respondent's model assumes a forecasted export sales price of USD5.46 per ton based on CALICA's three-year average of export sale prices prior to the valuation date. These prices are forecast in constant real terms over the remaining quarry life, i.e., in line with inflation.[1774]

1398. Claimant objects that Respondent manipulates the data to minimize price growth, as for the period 1999 to 2015, [redacted][1775] In Claimant's view, the forecast average sales prices should grow at a rate much higher than the rate of inflation. According to Brattle, the prices for CALICA aggregates in US Gulf Coast markets have grown significantly faster than inflation over

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1769 Brattle First Report, ¶ 110, Table 5; DC-0002, Workpaper B, USD 0.58 per saleable ton.
1770 Brattle First Report, ¶ 114.
1771 Credibility First Report, Exhibit 3.3, CRED-0061; Credibility Second Report, Exhibit 1.3, CRED-0080: 11,864,556 tons / year.
1772 For 2016-2021: Brattle First Report, ¶ 113; DC-0010, Tab J19.
1773 7.97% WACC, see ¶ 1417 below.
1774 Credibility First Report, ¶ 141; Credibility Second Report, ¶ 129.
1775 C-PHM, ¶¶ 102-103, *citing* **DC-0001**, Table A-1.

long periods of time, even during the global financial crisis. [1776] In this respect, Brattle opines that the longest possible time period should be used as the basis of the calculation of price growth.[1777]

1399. Respondent disagrees, submitting that (i) Claimant's witness [redacted] gave evidence that "VMC usually assumes that prices will grow at the rate of inflation when making investment decisions"; (ii) it is common practice in DCF analyses to hold projected commodity prices constant beyond the valuation date in real terms; and (iii) CALICA's export sales only increased at an average annual rate of 0.6% from 2016 to 2019, which is significantly lower than the [redacted] forecast by Brattle.[1778] Respondent visually represents the differences between the Parties in the following graph:[1779]

1400. Under cross-examination, Mr. Chodorow agreed that there was a period of accelerated growth between 2005 and 2009, at least partly explained by the US housing bubble, ending at the time of the global financial crisis.[1780] During other periods prior to 2005 and 2009-2014, thus excluding the housing bubble period, Respondent established that

1776 Brattle Second Report, ¶ 123. *See also* Reply, ¶ 267; Brattle Second Report, ¶¶ 124, 141.
1777 2021 Hearing Transcript (English), Day 5, 1087:10-15 (Chodorow Cross-Examination).
1778 Rejoinder, ¶¶ 471-473, *citing* [redacted] First Statement, ¶ 28; Credibility Second Report, ¶¶ 131-133, Figure 5.3; R-PHM, ¶ 181, *citing* 2021 Hearing Transcript (English), Day 5, 1082; R-PHM, ¶ 182, *citing* 2021 Hearing Transcript (English), Day 5, 1087. *See also* R-PHM, ¶¶ 188-189.
1779 Rejoinder, ¶ 473, *citing* Credibility Second Report, ¶ 133, Figure 5.3.
1780 2021 Hearing Transcript (English), Day 5, 1089:11-15, 1090:16-1091:3 (Chodorow Cross-Examination).

prices grew at approximately the same pace as inflation.[1781] Claimant argues that by stopping at 2014, however, Respondent excludes the large price increase in 2015.[1782]

1401. The Tribunal notes that while [redacted] did state that VMC usually assumes that prices will grow at the rate of inflation, Respondent omitted that such assumption applies "when making investment decisions." Otherwise, [redacted] indicated that VMC "expects prices for aggregates generally, and CALICA aggregates specifically, to continue increasing at a rate faster than inflation."[1783]

1402. Having assessed the evidence of both sides, the Tribunal prefers Respondent's approach of assuming that prices increased at the rate of inflation. While price growth has fluctuated over a long period prior to the valuation date, when comparing the accuracy of Respondent's approach to Claimant's approach overall, the Tribunal is convinced that price growth at inflation is the closest to a realistic assessment to be made as at the valuation date.

(d) Capex

1403. Respondent's initial valuation assumed forecasted capex of USD 17.2 million projected in real terms over the remaining quarry life after the valuation date. This was based on the average 2016-2017 CALICA capex. Credibility excluded what in its view are distortions in CALICA's 2015 capex resulting from its acquisition of a supplemental plant. The forecasted annual CALICA capex in the "actual" scenario is equal to capex in the "but-for" scenario in Respondent's model.[1784] In its updated model, Credibility adjusted its approach to (i) forecast but-for capex as USD 11.0 million, based on a three-year average annual normalized CALICA capex prior to the valuation date; (ii) exclude the capital spend for below-water equipment in addition to the supplemental plant and proceeds of sales of PP&E; (iii) add a capital investment of USD 5.8 million in the actual scenario for an authorized investment of a below-water dragline in March 2017.[1785]

1781 *See* R-PHM, ¶¶ 184-187.
1782 C-RPHM, ¶ 103.
1783 [redacted] First Statement, ¶ 28.
1784 Credibility First Report, ¶ 144; Credibility Second Report, ¶ 136. *See also* Counter-Memorial, ¶¶ 522-533; Rejoinder, ¶ 489.
1785 Credibility Second Report, ¶ 146.

1404. Claimant disagrees with the reliance on capex from 2016 and 2017, because in these years CALICA was investing heavily in draglines to allow it to move quickly to 100% below-water extraction.[1786] Claimant argues that Credibility Experts effectively assumed that CALICA will perpetually have to buy multiple draglines in every future year despite them not being needed under the extraction plans in the but-for scenario.[1787]

1405. The Tribunal observes that Credibility has taken into account certain of Claimant's objections when updating its model between its first and second report, *inter alia*, to distinguish between the capex required in the but-for and actual scenarios, and to adjust for the large expenditure for a below-water dragline in 2017. In the circumstances, having reviewed the Parties' respective positions and evidence, the Tribunal considers Respondent's updated approach to capex to be a reliable input to the valuation model and rejects Claimant's objections to the extent that they are maintained.

(e) Discount Rate

1406. Respondent's valuation initially provided for a Weighted Average Cost of Capital ("**WACC**") discount rate of 12.11% in relation to the El Corchalito breach, adjusted to 11.55% in Credibility's Second Report.[1788] This rate is composed of the following elements:[1789]

1786 Reply, ¶ 274.
1787 Reply, ¶ 274, *citing* Brattle Second Report, ¶ 158.
1788 Credibility First Report, ¶ 147; Credibility Second Report, ¶ 111.
1789 Credibility Second Report, Table 5.2.

Table 5.2: Credibility 2 Calculation of CALICA Breach #2 WACC[124]

Cost of Equity		
Nominal Risk-Free Rate	2.80%	Nominal 20-year US Treasury rate, reflective of the CALICA's approximate remaining life of quarry
Equity Risk Premium	5.08%	
Unlevered Beta	1.15	Assuming CALICA is in the emerging market mining & metals category
D/E Ratio	0.00	Based on 2017 CALICA financial statements [DC-0089]
Levered Beta	1.15	Based on the unlevered beta and D/E ratio
Size Risk Premium	3.58%	Based on Duff & Phelps Valuation Handbook (2016) for Micro-Cap companies having market capitalization less than $448 million
Country Risk Premium (Mexico)	1.38%	Based on Prof. Damodaran's 2015 ratings-based default spreads
Nominal Cost of Equity	**13.62%**	
Real Risk-Free Rate	0.73%	Real 20-year US Treasury rate, reflective of CALICA's approximate remaining life of quarry
Implied Inflation Rate	2.07%	Calculated as the difference between the nominal and real 20-year US Treasury rate as of the Breach #2 Valuation Date
Real Cost of Equity	**11.55%**	
After-Tax Cost of Debt		
Pre-tax Cost of Debt	0.00%	Based on 2015 CALICA financial Statements [DC-0089]
Tax Rate	40.00%	30% corporate income tax plus 10% PTU
After-Tax Cost of Debt	**0.00%**	
Weighted Average Cost of Capital		
% Debt Capital	0.00%	Based on 2015 CALICA financial statements [DC-0089]
% Equity Capital	100.00%	Based on 2015 CALICA financial statements [DC-0089]
Weighted Average Cost of Capital	**11.55%**	

1407. Claimant argues that Respondent's proposed discount rate is excessive and overstated and objects to a number of elements of it.[1790] Claimant's own discount rate for its model based on the CALICA Network, i.e., including the activities outside Mexico, was 6.8%, excluding its political risk premium of 0.81%. Respondent had separately objected to Claimant's calculation of that rate.[1791]

1408. With respect to Respondent's original discount rate, Claimant objected that the cash flow analysis was forecast in real dollars but discounted at a nominal-dollar rate.[1792] Respondent took on board this objection by adjusting its updated discount rate to real terms, with an implied inflation rate of 2.07%.[1793]

1790 Reply, ¶ 269.

1791 *See, inter alia,* Memorial, ¶ 323, *citing* Brattle First Report, ¶ 192; Appendix C, ¶ 11; Appendix D, ¶ 11; Counter-Memorial, ¶ 499, *citing* Credibility First Report, ¶¶ 99-102; Counter-Memorial, ¶ 500, *citing* Credibility First Report, ¶¶ 99, 103; Counter-Memorial, ¶ 501, *citing* Credibility First Report, ¶¶ 100-101, 104-106; Counter-Memorial, ¶ 502, *citing* Credibility First Report, ¶¶ 101-102, 106, Table 6.3, Table 6.4.

1792 Reply, ¶ 269, *citing* Brattle Second Report, ¶ 144.

1793 Rejoinder, ¶ 484; Credibility Second Report, ¶ 110.

1409. Claimant further objected that Respondent's original discount rate was based on an excessive cost of debt which was illogically higher than the cost of equity. Claimant asserts that Credibility had calculated the cost of debt based on an effective interest rate calculation on Claimant's debt issued long ago, i.e., embedded cost of debt. Further, Claimant argues that Credibility treated amounts as interest though they are not actually interest, for example the cost to retire debt early.[1794] In its updated discount rate Respondent adjusted the debt-to-equity ratio to reflect the figure reported in CALICA's 2015 and 2017 financial information.[1795]

1410. Claimant further disagrees with Respondent's proposed (i) size risk premium; (ii) Mexico country risk premium; (iii) the CALICA beta; and (iv) the cost of debt, as set out in the following paragraphs.

1411. In relation to the size risk premium, (item (i) of ¶ 1410 above), Claimant submits that the 3.58% small company risk premium added by Respondent is incorrect on the basis that: (i) the application of a small company premium lacks a solid economic foundation and its use had declined or is ill advised; (ii) CALICA has ready access to capital through healthy cash flows, substantial amounts of holdings in cash and securities, and faces a minimal risk of failure due to its logistical advantages in serving the fast-growing demand of the US Gulf Coast, but for the breaches; (iii) CALICA is owned by Claimant and, at a higher level, VMC which are both large companies that require no small company risk premium; (iv) large companies that would be potential buyers of CALICA could hold the asset without incurring a small company discount and would bid up the price, eliminating the artificial discount.[1796]

1412. Respondent disagrees, relying on studies in support of the use of size premiums for a company such as CALICA.[1797] In Credibility's opinion, size premium data continues to be published and sold and other valuation practitioners continue to consider it necessary

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1794 Reply, ¶ 272, *citing* Brattle Second Report, ¶ 152.
1795 Rejoinder, ¶ 487, *citing* Credibility Second Report, ¶ 110.
1796 Reply, ¶ 270, *citing* Brattle Second Report, ¶¶ 146-148.
1797 Rejoinder, ¶ 485, *citing* Credibility Second Report, ¶¶ 101-105.

to make such an adjustment.[1798] For a company with an enterprise value of less than [redacted] Credibility relies on Duff & Phelps data as the basis for its 3.58% rate, which it argues is consistent with the calculation of 3.81% arrived at with the calculation using Ibbotson & Associates.[1799]

1413. In relation to the country risk premium (item (ii) of ¶1410 above), Claimant contends that Respondent's rate is higher than Respondent's sovereign spread, i.e. the extra return expected by investors for the added risk of lending to a government. In its view, this is inconsistent with CALICA's actual risk profile and the fact that the CALICA Network faces little or no risk related to the Mexican market as more than 90% of its revenue comes from sales made in the US.[1800] Brattle argues that the sovereign spread is excessive or arbitrary basis for calculating country risks, and not appropriate to CALICA due to its revenue from export sales in USD, lack of exposure to currency devaluation and protection from country risk under NAFTA.[1801] In Claimant's own model, country risk was accounted for by applying an 0.76% haircut to CALICA Network cash flows, separate to the WACC discount rate, which is equivalent to having added a premium of 0.81% to the discount rate.[1802]

1414. Respondent disagrees, contending that the figures used in the calculation were based on Professor Damodaran's figures, which are a reliable and standard benchmark for country risk premium, and in any case the Brattle Expert does not provide any alternative or source for a country risk premium on the basis of NAFTA.[1803]

1798 Credibility Second Report, ¶ 104, *citing* **CRED-068**, James Searby, *The Country Risk Premium in International Arbitration*, The European and Middle Eastern Arbitration Review 2011, Global Arbitration Review in association with FTI Consulting Limited, p. 24; **CRED-067**, Shannon P. Pratt & Roger J. Grabowski, *Cost of Capital: Applications and Examples*, 5th Edition, John Wiley & Sons, Inc., 2014, p. 297; **CRED-069**, Aswath Damodaran, *Alternatives to the CAPM: Part 2: Proxy Models*, Musings on Markets, p. 2.

1799 Credibility Second Report, ¶ 102, *citing* **CRED-31**, Duff & Phelps, *2016 Valuation Handbook-Guide to Cost of Capital*, John Wiley & Sons, Inc., 2016, p. 4; **CRED-066**, Ibbotson Associates, *Stock, Bonds, Bills and Inflation* (2013 Yearbook), p. 221.

1800 Reply, ¶ 271, *citing* Brattle Second Report, ¶ 149.

1801 Brattle Second Report, ¶ 149, *citing* [redacted] First Statement, ¶ 27; **DC-0087**, Calica Financials Spreadsheet, December 2015, Pres Letter tab, cells H20 and H24; **CRED-64**, Exhibit 6, 6 Summary tab, cells D20 and E20.

1802 Brattle First Report, ¶¶ 157-158; 192.

1803 Rejoinder, ¶ 486, *citing* Credibility Second Report, ¶¶ 106-107.

1415. In relation to the beta parameter (item (iii) of ¶1410 above), Claimant argues that Respondent's calculation is internally inconsistent as Credibility uses one set of purported comparables, which is the emerging markets metals and mining companies, to estimate CALICA's "beta" for calculating the cost of equity but estimates the cost of debt and leverage ratio using a set of primarily coal companies that have a materially different risk profile.[1804]

1416. Respondent submits that its calculations were based on Professor Damodaran's 2015 and 2017 unlevered betas for emerging markets, which are appropriate as CALICA is classified as an arm's length mining company in E&Y's transfer pricing report and Mexico is generally considered to be an emerging market.[1805]

1417. Taking into account the Parties' respective views on the components of the discount rate, the Tribunal accepts Respondent's proposed discount rate subject to removal of the size risk premium, which the Tribunal finds to be unjustified based on the evidence before it. The correct discount rate to be applied is therefore 7.97%.

(f) Taxes

1418. Respondent's valuation is calculated on the basis of (i) 30% Mexican corporate income tax rate; (ii) 10% Workers' Participation on Profits ("**PTU**") and (iii) 10% tax on CALICA dividends.[1806]

1419. Claimant objects to Respondent's tax calculation on the basis that the PTU is already included in CALICA's operating costs and in its view is therefore double-counted. In addition, Claimant asserts that dividends paid by CALICA are exempt from Mexican dividend tax.[1807]

1420. In relation to the PTU (item (ii) of ¶ 1418 above), Claimant asserts that it is paid on income generated by CALICA's affiliate *Servicios Integrales, Gestoría y Administración, S.A. de C. V.* ("**SIGA**") and CALICA's subsidiary *Rapica Servicios*

1804 Reply, ¶ 271, *citing* Brattle Second Report, ¶ 150.
1805 Rejoinder, ¶ 487.
1806 Credibility Second Report, ¶ 148.
1807 Reply, ¶ 273; Brattle Second Report, ¶¶ 133-134. *See also* Reply, ¶¶ 256(c), 273, *citing* [redacted] Second Statement, ¶ 34; Brattle Second Report, ¶ 135, *citing* Credibility First Report, ¶ 128.

Técnicos y Administrativos, S.A. de C.V. ("**RASETA**"), which employ the workers in Mexico rather than CALICA. [1808] According to [redacted]:[1809]

> The costs (general overhead and administrative costs), which are recorded in the Longview database and reflected in the cost data provided to Brattle, as well as in CALICA's financial statements, already incorporate the PTU paid by those entities. The Mexican government is aware of this approach through past audits of SIGA and RASETA and has raised no concerns.

1421. For the dividend tax, according to [redacted]:[1810]

> While it is correct that all earnings in Mexico generated after December 31, 2013 and distributed to a non-resident or individual shareholder are subject to a withholding tax of 10%, I understand from our tax advisors that this withholding tax can be eliminated under exemptions from withholding tax available under applicable tax treaties between Mexico and the United States and Mexico and the Netherlands.

1422. Respondent disagrees with Claimant's position on the basis that its assertions lack support by financial information or a tax specialist's opinion.[1811]

1423. The Tribunal accepts her evidence that the PTU is already accounted for in CALICA's operating costs and that exemptions are available for the dividend tax, as per the arrangements that she testifies to. Noting that Respondent does not contradict that evidence aside from citing the lack of documentary or expert evidence in support, the Tribunal finds on the balance of probabilities that Claimant's assertions are established. Accordingly, no PTU or dividend tax shall be included. Respondent has made alternative calculations of its valuation based on the inclusion or exclusion of PTU and dividend tax. The "No PTU or Dividend Tax" calculation shall apply.

(g) Reasonableness

1424. Claimant additionally objects that Respondent's model fails the test of reasonableness and leads to an implausible valuation of CALICA Mexico which is understated relative to its contribution towards VMC's profits. In this regard, its view is that the valuation of

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1808 Reply, ¶¶ 256(b), 258, 273*, citing* [redacted] Second Statement, ¶ 33; Brattle Second Report, ¶¶ 133, 182*, citing* Credibility First Report, ¶ 123.

1809 [redacted] Second Statement, ¶ 33.

1810 [redacted] Second Statement, ¶ 34.

1811 Rejoinder, ¶ 483*, citing* Credibility Second Report, ¶ 150.

CALICA Mexico at [redacted], or approximately [redacted] of VMC's value at the end of 2015 but for the breach, is inconsistent with the fact that it contributed [redacted] of VMC's total "**EBITDA**" (earnings before interest, taxes, depreciation and amortization) of [redacted] during that year. [1812]

1425. Claimant's argument regarding the reasonableness of Respondent's valuation is noted. As Mr. Chodorow himself states, such a "rough sizing test", which was suggested by Respondent in relation to Claimant's model, "is admittedly imprecise."[1813] Respondent's experts argue in favour of the reasonableness of their valuation based on comparison with comparable companies.[1814] The Tribunal will consider the reasonableness of the calculation based on Respondent's model together with the market analysis of comparable companies in the following Section.

7. Market Approach

1426. Each Party has tested the reasonableness of their valuations using a market analysis to compare their respective valuations with the value of what they see as comparable companies.[1815] As described by Claimant, this method "infers the value of an asset based on how the market values comparable assets."[1816] In this context, the Parties refer to metrics including the EBITDA multiple, which is arrived at by dividing the asset's enterprise value ("**EV**") by EBITDA.[1817]

1427. The exercise was carried out by the Parties on the basis of the "but-for" enterprise value of CALICA or the CALICA Network, as per their respective positions.[1818]

1428. The Tribunal will consider the Parties' views on comparables below. Since the Tribunal has rejected a valuation that includes the CALICA Network elements, the focus is on the comparisons relevant to a CALICA-only valuation and not the companies which were put forward as comparable to the CALICA Network.[1819] However, in light of Claimant's

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1812 Reply, ¶ 276, *citing* Brattle Second Report, ¶ 177.
1813 Brattle Second Report, ¶ 177.
1814 *See* Credibility Second Report, ¶ 15.
1815 Reply, ¶ 239, *citing* Brattle First Report, ¶ 75; Credibility First Report, ¶ 152. *See also* Rejoinder, ¶ 493.
1816 Memorial, ¶ 298.
1817 Memorial, ¶ 298; Counter-Memorial, ¶ 517.
1818 Brattle First Report, ¶ 181; Credibility First Report, ¶ 159.
1819 *See, e.g.,* Reply, ¶ 249; Rejoinder, ¶¶ 516-518; C-PHM, ¶¶ 195-196; C-PHM, Appendix B, items 65-66; R-PHM, Annex B, items 65-66.

submission that the value of CALICA is effectively the same as the value of the CALICA Network,[1820] Claimant's submissions on the market value of the CALICA Network are also relevant to take into account when considering market value in the CALICA-only scenario.

(a) Claimant's Position

1429. According to Claimant's market analysis of the CALICA Network, an EBITDA multiple range of [redacted] is reasonable.[1821] In the absence of comparable companies that purely sell aggregates, Claimant uses VMC (i.e., Claimant's parent) as a comparator.[1822] In its view, VMC remains a reasonable comparable even if valuing CALICA Mexico only, because, like VMC, the vast majority of profits for both CALICA and the CALICA Network are generated from the production and sale of aggregates destined for United States markets.[1823] Claimant's Brattle expert also analyses corporate transactions involving aggregates and VMC's other significant business segments.[1824]

1430. Claimant disagrees with Respondent's use of the EY Report as the basis for its comparables analysis, *inter alia*, because (i) the analysis in the EY Report is for the allocation of CALICA Network profits for tax purposes;[1825] (ii) the EY Report uses coal companies, which are not comparable; and (iii) the mining companies used as comparables in the EY Report are only comparable with CALICA's routine activity, i.e., quarrying, but are not comparable to the non-routine aspects accounting for [redacted] of CALICA's operating profits, such as its strategic location that allows it to reach high-priced markets on the United States Gulf Coast.[1826] For Claimant, the EY Report itself

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1820 *See* C-PHM, ¶¶ 169-180.

1821 Memorial, ¶ 302. *See also* C-PHM, ¶ 192*, citing* Brattle First Report, ¶¶ 172, 177-180*, citing* 2021 Hearing Transcript (English), Day 5, 997:13-17 (Chodorow Presentation); 2021 Hearing Transcript (English), Day 5, 1133:15-21 (Hart and Vélez Presentation).

1822 Brattle First Report, ¶ 175.

1823 Reply, ¶ 249*, citing* Brattle Second Report, ¶ 95.

1824 Brattle First Report, ¶ 178.

1825 Reply, ¶ 279*, citing* **DC-0023**, Ernst & Young LLP, "2015 Calizas Industriales del Carmen S.A. de C.V. Transfer Pricing Documentation," dated 6 September 2016, p. 24.

1826 Reply, ¶ 279*, citing* **DC-0023**, Ernst & Young LLP, "2015 Calizas Industriales del Carmen S.A. de C.V. Transfer Pricing Documentation," dated 6 September 2016, p. 24; Brattle Second Report, ¶ 173; C-PHM, ¶ 193.

recognizes that coal producers are not comparable by adjusting the 1% rate of return based on coal companies to a 13% rate of return for CALICA.

(b) Respondent's Position

1431. Respondent's market analysis is based on the same companies that the EY Report used for the transfer pricing study that it prepared for Claimant, excluding two.[1827] Credibility compares the EV/EBITDA multiple of the set of comparables – ranging from 2.06x to 6.27x – with CALICA's multiple (2.5x) and conclude that it is within the range of the comparables.[1828]

1432. Respondent defends the use of the same comparables as were used in the EY Report on the basis that they should be equally appropriate for valuation purposes and for the determination of transfer prices.[1829]

(c) Tribunal's Analysis

1433. Claimant's market analysis is consistent with its position that the value of CALICA is effectively the same as the value of the CALICA Network. The Tribunal has rejected this position (*see* ¶ 1428 above). The Tribunal has rejected a valuation based on the value of the CALICA Network, and has determined that the relevant valuation should be assessed as the value of CALICA alone. Consistent with that determination, the Tribunal accepts Respondent's view that the more appropriate comparable companies for a market analysis would be those in mining operations, as opposed to companies with shipping and distribution functions.[1830]

1434. The Tribunal further accepts Respondent's position that the reliability of a market analysis depends on the existence of comparable companies and the availability of sufficient information.[1831] In the present case it was challenging to identify accurate comparables. Claimant considered a group of six companies for its own analysis, ultimately rejecting five of them and relying mainly on Claimant's own parent company

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1827 Rejoinder, ¶¶ 494-495*, citing* Reply, ¶ 249*, citing* [redacted] First Statement, ¶ 34*,* and *citing* Credibility Second Report, ¶¶ 228, 230-233.
1828 Rejoinder, ¶ 495.
1829 R-RPHM, ¶ 132*, citing* C-PHM, ¶¶ 191-193.
1830 *See* Credibility First Report, ¶ 157.
1831 Counter-Memorial, ¶ 516*, citing* Credibility First Report, ¶¶ 191-194.

as a comparator.[1832] Respondent's analysis uses coal companies, which, as noted by Claimant, have different economic considerations, including climate-related policies and competition from alternative power generation technologies. [1833] Respondent had initially included Martin Marietta and US Lime, which were removed from its analysis following Claimant's critique.[1834]

1435. In the circumstances of the present case, the Tribunal considers the market analysis to be indicative only as a reasonableness check. This is consistent with the evidence presented by the Parties which provided comparables within a range of values or multiples (*see* ¶¶ 1429, 1431 above).

1436. The Parties disagree on their interpretation of the EY Report and the value of CALICA as compared to the coal companies referred to therein (*see* ¶ 1430 above).[1835] However, the Tribunal finds Respondent's market analysis to be more convincing in general terms, drawn from the companies identified in the EY Report. The EY Report is an independent opinion prepared for the purpose of attesting that CALICA's sales of aggregates to VMC reflect an arms-length transaction for compliance with US Internal Revenue Service requirements. It includes an economic analysis and comparable firm research to apply third party benchmarks and determine ranges of reasonable results for the transactions.[1836]

1437. The comparable companies identified by Credibility have EV/EBITDA multiples between 2.06x and 6.27x:[1837]

1832 Reply, ¶ 249.

1833 *See* Reply, ¶¶ 249, 277-278*, citing* Brattle Second Report, ¶¶ 42, 163-164*, citing* [redacted] First Statement, ¶ 34.

1834 Reply, ¶ 278*, citing* Brattle Second Report, ¶¶ 166-167; Credibility First Report, ¶ 155; Credibility Second Report, ¶ 238.

1835 *See* R-RPHM, ¶ 133*, citing* C-PHM, ¶ 193.

1836 **DC-0023**, Ernst & Young LLP, "2015 Calizas Industriales del Carmen S.A. de C.V. Transfer Pricing Documentation," dated 6 September 2016, p. 2.

1837 Credibility Second Report, ¶ 238, Table 7.1.

Table 7.1: Summary of 2015 Comparable Companies' and CALICA's EV/EBITDA Multiples[230]

(USD millions)	EV	EBITDA	EV / EBITDA
Alliance Resource Partners, LP	$1,678.18	$814.67	2.06
Cloud Peak Energy, Inc.	$494.51	$123.79	3.99
Corsa Coal Corp.	$96.21	$18.70	5.15
Foresight Energy	$2,121.78	$338.41	6.27
Rhino Resources Partners, LP	$69.55	$15.00	4.64
Average			**4.42**
CALICA	[redacted]		

1438. Respondent's valuation falls within this range, with a multiple of 2.58x. As such, the Tribunal considers the market approach to confirm its findings that Respondent's valuation is more accurate than Claimant's for the purposes of quantifying Claimant's damages.

8. Double Taxation

1439. Claimant submits that pursuant to the principle of full reparation, it should be protected from the consequences of taxes that would not have been payable in the absence of Respondent's alleged wrongful measures that would effectively result in double taxation.[1838] Tribunal Question 17 asked as follows:

> Concerning Claimant's claim to an award adjusted to avoid double taxation under the principle of full reparation, please provide (based on the evidence on the record) a legal and economic comparison between the situation that Claimant's income resulting from the project in the regular course of business would encounter and that to be applied to a compensation awarded to Claimant by this Tribunal, if so decided.

1440. Claimant contends that the lost profits attributable to the US Yards have already been reduced to account for United States taxes payable on that income.[1839] According to Claimant, as an award ordering monetary compensation to Claimant would be taxed at a combined United States federal and state income corporate tax rate of 25.6%, Claimant's income from the US Yards will effectively be taxed twice.[1840]

1838 Memorial, ¶ 342.
1839 Memorial, ¶ 343, *citing* Brattle First Report, ¶ 201.
1840 Memorial, ¶ 343, *citing* [redacted] First Statement, ¶ 27; Brattle First Report, ¶ 203. *See also* C-PHM, Appendix A, Question 17, p. 39.

1441. Claimant argues that to eliminate the effect of double taxation, the damages must be adjusted upward, assuming that the Award will be taxed at the US corporate tax rate of 25.6% applicable to VMC's income.[1841]

1442. Claimant submits that Credibility Experts have not substantiated their assertion that United States taxes levied on the Award would be offset by foreign tax credits due on taxes paid in Mexico.[1842] Claimant contends that to the extent that part of the Award related to the U.S. Yards will also be taxed in Mexico, the same income would effectively be taxed thrice given that the Brattle Expert calculated damages to the U.S Yards after tax and the Award will also be taxed in the United States.[1843] According to Claimant, relying on the Brattle Expert, if it were to receive foreign tax credits for those Mexican taxes, it would eliminate the third taxation but would not address the double taxation of U.S. Yard income, and full reparation would require that the Award be adjusted to remove the effects of the second taxation.[1844]

1443. According to Claimant, an adjustment to reverse the effective double taxation of the US Yards income is required even in a CALICA-only valuation. In this regard, Claimant submits that any hypothetical transaction for the sale of CALICA, the willing buyer and seller would value the reserves in Mexico based on the income that could be generated by owning the CALICA reserves after payment of all necessary taxes, including US income tax on income allocated to the US Yards.[1845]

1444. Respondent submits that Claimant's request to avoid double taxation is misguided, because:[1846] (i) Claimant incorrectly assumes that damages incurred by non-covered investments can be claimed under NAFTA, and if the Tribunal rejects this approach, the double taxation problem would not exist;[1847] (ii) Claimant's request is based on the unproven assumption that the US corporate rate would apply to an award in this case, while it is at least possible that the US tax would be offset by foreign tax credits due to

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1841 Memorial, ¶ 343, *citing* Brattle First Report, ¶ 204. *See also* Memorial, ¶ 344; Reply, ¶¶ 283-284; Reply, ¶ 285, *citing* Credibility First Report, ¶¶ 250-251; *see* [redacted] First Statement, ¶ 27.

1842 Reply, ¶ 286.

1843 Reply, ¶ 286, *citing* Brattle Second Report, ¶ 69; *see* [redacted] First Statement, ¶ 27.

1844 Reply, ¶ 286, *citing* Brattle Second Report, ¶ 69.

1845 C-PHM, Appendix A, Question 17, p. 42.

1846 Counter-Memorial, ¶ 537.

1847 Counter-Memorial, ¶ 538; Rejoinder, ¶ 500.

taxes paid in Mexico;[1848] and (iii) Claimant assumes that the award will be paid to it, however, given that the Claimant brought the claim under NAFTA Articles 1116 and 1117, NAFTA Article 1135(2)(b) requires that any damages arising out of NAFTA Article 1117 be paid to the investment. Respondent argues that if the Tribunal considers that the claim has been properly brought under NAFTA Article 1117, the double taxation issue would not exist.[1849]

1445. Respondent further asserts that it would be impossible to determine at this time how and to what extent the award will be taxed in the United States or in Mexico.[1850] Respondent further argues that Claimant itself notes that the award would likely be taxed at corporate tax rate of 25.6% and has not presented any expert evidence on taxation.[1851] Respondent therefore submits that the requested tax increase would be uncertain, speculative and should not be considered by the Tribunal.[1852]

1446. The Tribunal rejects Claimant's proposed adjustment for double taxation which does not arise in light of the Tribunal's conclusions. In this regard, the Tribunal has rejected Claimant's valuation based on the CALICA Network which included the US Yards amounts alleged to give rise to this issue. The Tribunal has further rejected Claimant's argument that CALICA should be valued based on the netback value of reserves including the prices obtained for its aggregates in the US.

9. Conclusion

1447. In light of the above, the Tribunal grants compensation to Claimant for Respondent's breach of NAFTA in respect of El Corchalito in the amount of USD 15,884,117.00. This pre-interest amount is calculated based on Respondent's "No PTU or Dividend Tax" model, adjusting for the corrected discount rate of 7.97% instead of 11.55% (*see* ¶ 1417 above), with the addition of below-water blasting and drilling costs, as follows:[1853]

1848 Counter-Memorial, ¶ 539.
1849 Counter-Memorial, ¶ 540.
1850 Rejoinder, ¶ 501; R-PHM, Annex A, ¶ 113.
1851 Rejoinder, ¶ 501*, citing* Reply, ¶ 285.
1852 Rejoinder, ¶ 501.
1853 **CRED-080**, Tab 1.4 "WACC", Tab 1 Summary, Breach 2.

Breach 2	
(See Exhibit 1.2 for Details)	
	No PTU or Dividend Tax
Valuation Date	24-Jan-18
WACC	7.97%
CALICA Enterprise Value - Actual	$38,434,186
CALICA Enterprise Value - But-For	52,818,303
Total Loss of Enterprise Value	**$14,384,117**
Pre-Award Interest	1,186,036
Total Loss of EV plus Pre-Award Interest	**$15,570,153**

	USD
Amount awarded pursuant to Respondent's model	14,384,117.00
Below-water blasting and drilling	1,500,000.00
Total	15,884,117.00

1448. Claimant's claim for interest on the amount will be addressed in the following Section.

XV. INTEREST

1449. In this Section the Tribunal will decide upon pre- and post-award interest.

A. CLAIMANT'S POSITION

1450. Claimant submits that it is entitled to pre-award interest at a commercially reasonable interest rate that will provide it full compensation for Respondent's violations of NAFTA, which investment tribunals routinely award.[1854]

[1854] Memorial, ¶ 338, citing, inter alia, **CL-0095-ENG**, John Gotanda, The Unpredictability Paradox: Punitive Damages and Interest in International Arbitration, 10(4) JWIT 553 (2009), pp. 564-570; **CL-0097-ENG**,

1451. According to Claimant, "full reparation" requires it to receive pre-award interest based on Respondent's sovereign borrowing rate, using the yield on one-month United States Treasury bills and the spread that Mexico pays over US Treasuries to borrow in US dollars, or the spread on credit-default swaps.[1855] In its view this is appropriate due to the risk it bore as a forced lender of a default by the Respondent.[1856]

1452. Claimant claims pre-award interest compounded annually until the Award is rendered.[1857]

1453. Claimant submits that Respondent should also be ordered to pay post-award interest on the quantum of the Award, calculated on a compound basis, until actual and full payment, even if the Award is converted into a judgement of a court of a State party to the ICSID Convention.[1858]

B. RESPONDENT'S POSITION

1454. Respondent does not dispute that if damages are awarded, (i) full reparation typically includes pre-award and post-award interest; and (ii) interest is usually ordered to compensate the claimant for the time value of money.[1859]

1455. Respondent disagrees with the interest rate used by Claimant and the compounding period.[1860] Respondent submits that since the damages calculations are denominated in US dollars, the appropriate rate for calculating pre-award interest would be the United States Treasury risk-free rate, i.e., the five year Treasury bond with annual compounding.[1861] Alternatively, if Claimant calculates pre-award interest based on the Mexican borrowing rate, then, as a matter of consistency, Respondent argues that the risk-free rate used to calculate the discount rate should also be the Mexican borrowing rate.[1862]

Illinois Central Railroad Co. (U.S.A.) v. United Mexican States, Award, 6 December 1926, US-Mexico General Claims Commission, 4 U.N. Reports of International Arbitral Awards, ¶ 5.

1855 Memorial, ¶ 339, *citing* Brattle First Report, ¶ 193; Reply, ¶ 280; Brattle Second Report, ¶ 195.

1856 Memorial, ¶ 339, *citing* Brattle First Report, ¶ 199.

1857 Memorial, ¶ 340.

1858 Memorial, ¶ 341, *citing*, *inter alia*, **CL-0102-ENG**, *Perenco v. Ecuador*, Award, ¶ 1023.

1859 Counter-Memorial, ¶ 532.

1860 Counter-Memorial, ¶ 533.

1861 Counter-Memorial, ¶ 533, *citing* Credibility First Report, ¶¶ 243-245; Rejoinder, ¶¶ 498-499.

1862 Rejoinder, ¶ 498, *citing* Credibility Second Report, ¶ 292.

C. TRIBUNAL'S ANALYSIS

1. Applicable Legal Standard

1456. There is no dispute between the Parties that full reparation to Claimant includes the payment of both pre-award and post-award interest (*see* ¶¶ 1450, 1453 and 1454 above).

1457. Indeed, NAFTA Article 1135(2)(b) states that the award is to reflect "any applicable interest." The payment of interest is also consistent with the full reparation standard in *Chorzów Factory*, pursuant to which an award of damages "must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." As stated at ¶ 1227 above, the full reparation principle is also set out in Article 31(1) of the ILC Articles on State Responsibility.[1863]

1458. In these circumstances, the Tribunal considers it uncontroversial to repeat the observation of the tribunal in *Vivendi v. Argentina* that:[1864]

> Absent treaty terms or provisions in the governing law to the contrary, it is generally accepted that international tribunals may award interest to an injured claimant; indeed the liability to pay interest is now an accepted legal principle.

1459. The Tribunal therefore determines that pre-award and post-award interest under international law must be granted on principal amounts awarded to Claimant, to the extent required to "make full reparation for the injury caused" by the Respondent's breach of NAFTA and to "reestablish the situation which would, in all probability, have existed" for Claimant in the absence of that breach.

2. Function of Interest

1460. An understanding of the function of interest may impact upon the amount and terms upon which interest is awarded.

1863 **CL-0080-ENG**, *Chorzów Factory*, Judgment, p. 47; **C-0139-ENG**, ILC Articles on State Responsibility, p. 63.

1864 **CL-0087-ENG**, *Vivendi v. Argentina*, Award, ¶ 9.2.1.

1461. Claimant argues that by being deprived of its investment rights without compensation on the date of the alleged breach, it has effectively become a forced lender of Respondent whereby Claimant is financing Respondent's internationally wrongful conduct from the date of the breach to the date of the Award.[1865] According to Claimant, pre-award interest must compensate both the time value of money and the risk Claimant bore.[1866]

1462. Respondent contends that a common theory applied by international tribunals is that the claimant is only entitled to interest to compensate it for the time value of money, and not risk compensation.[1867] Taking into account that the most common interest rates applied by international tribunals are United States Treasury and LIBOR, in Respondent's view this demonstrates that tribunals generally do not find that the claimant is considered a forced lender to the respondent.[1868]

1463. The Tribunal notes that it is common ground between the Parties that interest should, at least, compensate Claimant for the time value of money.

1464. The Tribunal agrees with the observation of the tribunal in *LG&E v. Argentina* that "interest recognizes the fact that, between the date of the illegal act and the date of actual payment, the injured party cannot use or invest the amounts of money due."[1869] This lost opportunity to use or invest the amounts of money is also compensated by interest, although it should not be assumed that the injured party would always make optimal use of that opportunity, and the injured party should not be compensated for risks it did not bear.

1465. In relation to Claimant's characterization of itself as a "forced lender" to Respondent, the Tribunal is not persuaded that such an approach is accurate in relation to pre-award interest. In this regard, it has not been established how the forced lender characterisation

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1865 Memorial, ¶ 339; Reply, ¶ 281.

1866 Memorial, ¶ 339*, citing* **CL-0098-ENG**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007 ("*LG&E v. Argentina*, Award"), ¶ 55; Brattle First Report, ¶ 193.

1867 Rejoinder, ¶ 498*, citing* Credibility Second Report, ¶ 296.

1868 Rejoinder, ¶ 498*, citing* Credibility Second Report, ¶ 297. *See also* Counter-Memorial, ¶ 533*, citing* Credibility First Report, ¶ 243; Counter-Memorial, ¶ 534.

1869 **CL-0098-ENG**, LG&E v. Argentina, Award, ¶ 55. See also **CL-0096-ENG,** Pierre Bienvenu & Martin Valasek, Compensation for Unlawful Expropriation, and Other Recent Manifestations of the Principle of Full Reparation in International Investment Law, in 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE (van den Berg ed., 2009), p. 261.

would reestablish the situation which would, in all probability, have existed for Claimant in the absence of that breach (*see* ¶ 1459 above). In particular, in a NAFTA-compliant but-for scenario, the Tribunal is not convinced that Claimant would have made a loan to Respondent. As such, the Tribunal considers that the forced lender scenario bears no relationship to the but-for scenario for the award of compensation.

1466. In the circumstances, the Tribunal finds that the primary function of interest based on the purposes identified by the Parties is to compensate for the time value of money and the lost opportunity cost.

3. Compounding Period

1467. Both Parties apply compound interest.[1870] The Tribunal confirms that compound interest is necessary to achieve full reparation as required by international law, and is consistent with the time value of Claimant's losses as well as reflecting economic reality. In this regard, the Tribunal subscribes to the view of the tribunal in *Azurix v. Argentina*, which held that "compound interest reflects the reality of financial transactions, and best approximates the value lost by an investor."[1871]

1468. There was originally some uncertainty on Respondent's side as to whether Claimant had applied a monthly compounding period, which Respondent opposed.[1872] Claimant subsequently clarified that it used simple annualised rates and then applied them so that they do not have the effect of monthly compounding.[1873] Claimant contends that numerous tribunals have recognised that applying compound interest in this way achieves the full reparation required under international law.[1874]

1469. Following this clarification, it appears that the Parties are aligned in their position that interest should be compounded annually.[1875] The Tribunal considers annual compounding to be appropriate and consistent with the full reparation principle.

1870 Memorial, ¶ 340*, citing*, *inter alia*, **CL-0028-ENG**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 ("*Azurix v. Argentina*, Award"), ¶ 440; Counter-Memorial, ¶ 533; Credibility First Report, ¶ 245.

1871 **CL-0028-ENG**, *Azurix v. Argentina*, Award, ¶ 440.

1872 Counter-Memorial, ¶ 535*, citing* Credibility First Report, ¶ 245.

1873 Reply, ¶ 282*, citing* Brattle Second Report, ¶ 3.

1874 Memorial, ¶ 340*, citing*, *inter alia*, **CL-0028-ENG**, *Azurix v. Argentina*, Award, ¶ 440.

1875 Memorial, ¶¶ 340-341; Reply, ¶ 282; Rejoinder, ¶ 499.

4. Interest Rate

1470. Claimant claims interest based on Respondent's sovereign borrowing rate, using the yield on one-month US Treasury bills and the spread that Mexico pays over US Treasuries to borrow in US dollars, or the spread on credit-default swaps.[1876]

1471. Respondent argues in favour of the US Treasury risk-free rate, which in its view is the five-year Treasury bond.[1877]

1472. Having determined that the primary purpose of interest is to compensate for the time value of money and the lost opportunity to use or invest funds, the Tribunal does not consider that a "risk-free rate" would fully compensate Claimant for its loss, as it reflects only the time value of money but not the lost opportunity to invest its funds. On the other hand, the Tribunal does not consider that the risk premium that lenders charge on sovereign debt to Mexico accurately reflects the lost opportunity to Claimant. The Tribunal has determined that interest does not function to compensate Claimant for the risk of lending money to Respondent.

1473. In all the circumstances, the Tribunal considers that the appropriate interest rate is the risk-free rate adding a premium of 2% to adequately account for the lost opportunity cost.

1474. The Parties agree that a risk-free rate is a US Treasury bill or bond rate, but disagree on the appropriate maturity rate of the bill or bond. Claimant argues in favour of the one-month US Treasury bill rate while Respondent advocates for the five-year US Treasury bond rate. According to Brattle, a short-term rate is appropriate because it does not reflect any premium for liquidity and insulates Claimant from unanticipated interest rate and inflation risk.[1878]

1475. The Tribunal finds a five-year bond rate to be too long taking into account the period of time over which Claimant was deprived of its funds. Likewise, the Tribunal considers the one-month US Treasury bill rate to reflect a maturity period which is too short. International tribunals commonly choose six-month or one-year US Treasury bills. In the

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1876 Memorial, ¶ 339, *citing* Brattle First Report, ¶ 193; Reply, ¶ 280; Brattle Second Report, ¶ 195.
1877 Counter-Memorial, ¶ 533, *citing* Credibility First Report, ¶¶ 243-245; Rejoinder, ¶¶ 498-499.
1878 Brattle First Report, ¶ 198.

circumstances of this case, the Tribunal considers the six-month US Treasury bill rate to reflect the appropriate amount and maturity period for the risk-free portion of the interest rate, taking into account the period over which Claimant has been deprived of its funds. In the circumstances of this case, there is no need to distinguish between pre-award and post-award interest. The applicable interest rate for pre-award and post-award interest shall therefore be at the rate of the six-month US Treasury bill + 2%.

5. Period

1476. There is no dispute that interest shall accrue as from the valuation date, i.e., 24 January 2018.[1879] It shall run until full and final payment of the amount due from Respondent to Claimant.

6. Conclusion

1477. In light of the above considerations, the Tribunal awards compound interest on the amount awarded to Claimant, calculated at the six-month US Treasury bill rate +2%, from 24 January 2018 until the date of full and final payment, compounded annually. Such interest shall apply even if the Award is converted into a judgement of a court of a State party to the ICSID Convention.

XVI. COSTS

1478. Considering the foregoing decisions, the Tribunal shall decide on the allocation and quantification of costs in these proceedings. The Tribunal first sets out the relevant NAFTA and ICSID Arbitration Rule provisions (Section I.A), before summarising the Parties' positions (Section B). In Section C the Tribunal sets out its considerations on costs.

A. RELEVANT TREATY AND ICSID ARBITRATION RULE PROVISIONS

1479. NAFTA Article 1135(1) states, in relation to a "Final Award," that where a Tribunal "makes a final award against a Party, the Tribunal may award," *inter alia*, "costs in accordance with the applicable arbitration rules."[1880]

1879 *See* Brattle First Report, ¶ 200; Credibility First Report, ¶ 246.
1880 *See* ¶ 1206 above.

1480. ICSID Convention Article 61(2) provides as follows:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

1481. ICSID Arbitration Rule 28 is entitled "Cost of Proceeding," and provides:

> (1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:
>
> > (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
> >
> > (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.
>
> (2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

1482. In addition, ICSID Arbitration Rule 47(1) states, in relevant part, that:

> The award shall be in writing and shall contain:
>
> …
>
> (j) any decision of the Tribunal regarding the cost of the proceeding.

B. THE PARTIES' POSITIONS

1. Claimant's Position

1483. Claimant submits that the principle of full reparation requires that Claimant be made whole for costs incurred in this arbitration, as well as legal expenses.[1881] Claimant contends that a non-prevailing respondent should bear the costs of arbitration and the prevailing claimant's reasonable costs of representation as part of full reparation.[1882]

(a) Amount of Costs

1484. Claimant's Submission on Costs dated 11 February 2022 quantified its costs for the first phase of the arbitration as follows:[1883]

1485. Claimant states that "ICSID Arbitration Fees" set out in the table above includes the $25,000 Request for Arbitration lodging fee paid in December 2018, $200,000 advance payment made in October 2019, and the $250,000 advance payment made in June 2021.[1884] Claimant further states that "Miscellaneous Costs" in the table above includes

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1881 Memorial, ¶ 346; Reply, ¶ 287. *See also* Claimant's Submission on Costs (Ancillary Claim and Jurisdiction / Admissibility of the Counter Claim) dated 15 March 2024 (C-CS 2), ¶ 7*, citing* **CL-0080-ENG**, *Chorzów Factory*, Judgment, p. 47; **CL-0081-ENG**, *ADC Affiliate v. Hungary*, Award, ¶ 484; **CL-0059-ENG**, *S.D. Myers v. Canada*, Partial Award, ¶ 311; **CL-0139-ENG**, *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v. The United Mexican States*, and *Talsud S.A. v. The United Mexican States*, ICSID Cases Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010, ¶ 17.21.

1882 Memorial, ¶ 346*, citing*, *inter alia*, **CL-0104-ENG**, *British Caribbean Bank Limited (Turks & Caicos) v. The Government of Belize*, Award, PCA Case No. 2010-18, 19 December 2014, ¶¶ 317, 325.

1883 Claimant's Submission on Costs dated 11 February 2022 (C-CS 1), ¶ 2.

1884 C-CS 1, n. 1.

the fees for a vendor that assisted with the preparation of exhibits and costs of "lodging and the like" for witnesses and other hearing participants not reflected elsewhere.[1885]

1486. Claimant's Submission on Costs dated 15 March 2024 quantified its costs in relation to the Ancillary Claim phase of the arbitration as follows:[1886]

1487. "ICSID Arbitration Fees" in the table above is clarified to exclude the arbitration fees specified in Claimant's Submission on Costs dated 11 February 2022 (i.e., $475,000), and includes only the $300,000 advance payment Claimant made in August 2022, the $225,000 advance payment Claimant made in January 2023, and the $250,000 advance payment Claimant has made pursuant to the Tribunal's letter of 5 March 2024.[1887] Further, Claimant clarifies that "Legal Fees" in the table above were incurred from March 2022 through February 2024 and assume that Claimant will prevail in the Ancillary Claim. In the event of Claimant failing in the Ancillary Claim, its legal fees would be [redacted].[1888] Claimant further states that "Miscellaneous Costs" are costs of "lodging and the like" for the July 2023 Site Visit and 2023 Hearing not reflected elsewhere.[1889]

1885 C-CS 1, n. 2.
1886 C-CS 2, ¶ 1.
1887 C-CS 2, n. 1.
1888 C-CS 2, n. 2.
1889 C-CS 2, n. 3.

(b) Reasonableness

1488. In relation to the costs associated with the original claims, Claimant submits that its costs are reasonable considering the factual complexity and the corresponding volume of evidence in this case, the length of the proceeding, as well as the extensive briefing. Claimant submits that these were necessitated by Respondent's choices in the arbitration.[1890]

1489. In relation to the phase addressing the ancillary claim and jurisdiction over the counterclaim, Claimant argues that its fees and costs are also reasonable "partly because Mexico's conduct unduly delayed the proceeding" and unreasonably increased Claimant's costs. [1891] In support of this assertion, Claimant points to Respondent's conduct in both phases of the arbitration (*see* ¶¶ 1494-1495 below).

(c) Allocation of Costs

1490. Claimant asserts that it is entitled to recoup its costs in full. In this respect, Claimant submits that ICSID Convention Article 61(2) and Article 28(1) of the ICSID Arbitration Rules give the tribunal wide discretion to allocate costs and expenses between the Parties.[1892] Claimant submits that "numerous ICSID tribunals" have been guided by the general principle that the "costs follow the event" or that the losing party pays and accordingly required that the losing party pay all or part of the costs incurred by the winning party.[1893] In Claimant's view, this approach is also in line with the international

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1890 C-CS 1, ¶ 6; Claimant Email to the Tribunal dated 22 February 2022.

1891 C-CS 2, ¶ 3.

1892 C-CS 1, ¶ 3*, citing* **CL-0058-ENG**, *TECO Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶ 151; **CL-0045-ENG**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 ("*Plama Consortium v. Bulgaria*, Award"), ¶ 316.

1893 C-CS 1, ¶ 4, citing, inter alia, **CL-0173-ENG**, Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/14/32, Award, 5 November 2021, ¶¶ 601-602, 609-610; **CL-0045-ENG**, Plama Consortium v. Bulgaria, Award, ¶ 316; **CL-0048-ENG**, Siag v. Egypt, Award, ¶ 621; **CL-0081-ENG**, ADC Affiliate v. Hungary, Award, ¶ 533; **CL-0057-ENG**, Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶¶ 1643, 1645; **CL-0169-ENG**, Lion Mexico Consolidated LP v. United Mexican States, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021, ¶¶ 905, 909. See also C-CS 2, ¶ 2.

law principle that a prevailing claimant must be compensated in full for the damage caused by the wrongful measures of a State.[1894]

1491. Claimant argues that in allocating costs, tribunals have also considered whether such costs are reasonable in the circumstances of a case.[1895] Claimant submits that tribunals have considered the procedural conduct of the parties as also relevant to allocation of costs where such conduct delayed the proceedings or increased costs unnecessarily. Claimant points to Respondent's conduct in the arbitration in both phases as justifying Respondent covering Claimant's costs in this arbitration.[1896]

1492. In the first phase of the arbitration, Claimant states that Respondent answered Claimant's 140-page Memorial — submitted with only four witnesses (two factual and two experts), with a 187-page Counter-Memorial and eight fact and expert witnesses, thus forcing Claimant to adjust its Reply submission accordingly. Claimant further submits that Respondent then added more experts to its Rejoinder submission and called every one of Claimant's witnesses/experts to testify at the Hearing (requiring additional time and expense).[1897]

1493. Claimant further submits that Respondent insisted on litigating every issue (from proposed redactions, most of which the Tribunal accepted, to the submission of new evidence post-dating the written and oral stages of the proceeding), and asserted new arguments at a late stage, including in its post-hearing brief. Despite this, Claimant submits that it endeavored to present a targeted case, even refraining from calling certain witnesses for cross-examination at the Hearing.[1898]

1894 C-CS 1, ¶ 5, *citing* **CL-0080-ENG**, *Chorzów Factory*, Judgment, ¶ 125; **RL-087-ENG**, *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015, ¶ 599; **CL-0138-ENG**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, ¶ 207; **CL-0081-ENG**, *ADC Affiliate v. Hungary*, Award, ¶ 533.

1895 C-CS 1, ¶ 6, *citing* **CL-0174-ENG**, *Los Inversores PV c. El Reino de España*, PCA Case No. 2012-14, Final Award, 28 February 2020, ¶ 904.

1896 C-CS 2, ¶ 3*, citing, inter alia,* **CL-0300-ENG**, *Burlington Resources Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017 ("*Burlington Resources v. Ecuador*, Decision on Reconsideration and Award"), ¶ 620.

1897 C-CS 1, ¶ 6.

1898 C-CS 1, ¶ 6.

1494. In relation to the phase which considered the ancillary claim and jurisdiction over the counterclaim, Claimant states that a relatively straightforward procedural schedule was originally envisioned for this phase, including a two-day hearing. However, Claimant asserts that Respondent "upended this calendar" – resulting in a hearing that was as long as that of the first phase of the arbitration. Claimant states that Respondent employed unreasonable tactics which added complexity to the Ancillary Claim phase, including:

(i) Respondent's belated request for leave to file a counterclaim (leading to additional briefing) and seeking to "manufacture post-hoc support for it" via the SEMARNAT Dictamen developed and publicized without notice to CALICA or Claimant;

(ii) Respondent's shift in position on jurisdiction by conceding in the lead up to PO7 that NAFTA governed Respondent's consent over the Ancillary Claim and applied to events after the USMCA entered into force, only to argue later that the USMCA governed Respondent's consent and foreclosed jurisdiction over that claim;

(iii) Respondent's request for a costly site visit that occurred at the eve of the Hearing, for which Claimant and CALICA provided transportation, meals, and other arrangements without prejudice to the allocation of costs;

(iv) Respondent's belated attempt to introduce — after the Hearing — lengthy and old documents totalling over 1,000 pages that could have been filed much earlier in the arbitration; and

(v) Respondent's filing of unnecessarily lengthy submissions (in some instances double the size of Claimant's) replete with "outlandish fraud allegations and distracting red herrings."[1899]

1495. Claimant also states that it was forced to incur increased costs as a result of the continued "public attacks" Respondent mounted against Claimant and its investment throughout these proceedings. Claimant submits that these attacks continued despite directions in

[1899] C-CS 2, ¶ 3.

PO7 to Respondent not to "take . . . action[s] that might further aggravate or extend the dispute between the Parties." Claimant submits that such attacks are not good faith conduct expected of litigants in arbitration. Claimant accordingly submits that tribunals have considered it appropriate for the party engaging in unreasonable or dilatory conduct to bear the resulting costs.[1900]

2. Respondent's Position

1496. Respondent requests the Tribunal to order Claimant to pay the costs and expenses Respondent has incurred as a result of this arbitration, including: (i) Respondent's share of the Tribunal's expenses; (ii) Respondent's share of the costs of administering the ICSID proceedings; (iii) the fees of Respondent's external legal counsel; and (iv) the costs of the experts hired by Respondent.[1901]

(a) Amount of Costs

1497. In its submission dated 11 February 2022, Respondent submits that the costs incurred by it in these proceedings at that stage amounted to a total of USD 1,829,515.39, which includes payments to ICSID as well as the fees and expenses of external legal consultants and legal and damages experts. The breakdown of the costs incurred by Respondent are as follows:[1902]

Concepto	Persona/Entidad	Monto
Consultores Externos	- Tereposky and De Rose, LLP. - Pillsbury Winthrop Shaw Pittman, LLP.	USD $848,535.00
Pagos al CIADI	- CIADI	USD $450, 000.00
Expertos	- Solórzano, Carvajal, González y Pérez Correa, S.C. - Mtro. Carlos Rábago Estela	USD $73,921.57
	- Credibility International, LLC	USD $440,000.00
	- Dr. Javier Mijangos y González	USD $17,058.82
TOTAL		USD $1,829,515.39

1900 C-CS 2 ¶ 4, citing **CL-0302-ENG**, Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 1255; **CL-0303-ENG**, Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru, ICSID Case No. ARB/19/28, Award, 20 December 2023, ¶ 1358; **CL-0225-ENG**, Karkey v. Pakistan, Award, ¶¶ 1062–1063. See also C-CS 2 ¶ 5.

1901 Counter-Memorial, ¶ 541.

1902 R-CS 1, p. 5.

1498. In its submission dated 15 March 2024, Respondent states that the costs incurred by it in the ancillary claim phase of the proceedings amount to a total of USD 2,499,514.05 which include payments to ICSID as well as the fees and expenses of external legal consultants and experts in law and damages. The breakdown of costs incurred by Respondent are as follows:[1903]

Concepto	Personalidad/Entidad	Monto USD[8]
Consultores Externos	Pillsbury Winthrop Shaw Pittman LLP.	$345,324.46
	Tereposky & DeRose LLP.	$492,963.00
Pagos al CIADI	Pagos al Centro	$775,000.00[9]
Expertos	Credibility International LLC.	$410,000.00
	Solórzano Carvajal González y Pérez Correa, S.C.	$92,536.36*
Asesoría Legal	Asesoría Legal Externa	$48,656.25
Salarios	Funcionario Públicos[10]	$324,002.74*
Visita in Situ	Viáticos	$9,627.66*
	Sobrevuelo en helicóptero	$1,403.58*
	Total	**$2,499,514.05**

1499. Respondent clarifies that the amount of "Salarios" of public servants involved in the arbitration corresponds to the percentage that each public servant allocated to Respondent's defense, which is calculated as a percentage of their monthly salary. The salaries of witnesses hired by Mexico are not included in the amount claimed.[1904] The salaries of public servants are only claimed in R-CS 2 and not R-CS 1.

(b) Reasonableness

1500. Respondent submits that the Tribunal is required to analyse the reasonableness of the amounts spent by each Party. In Respondent's view, this is relevant because if there is significant difference in the costs of representation of the Parties; the costs of Claimant may be limited or equated, given the same level of skill, professionalism, efficiency, integrity and quality of defence of Respondent.[1905]

1501. In its email to the Tribunal dated 15 February 2022, Respondent states that Claimant's reported legal costs are dramatically higher than those presented by Respondent.

1903 R-CS 2, p. 4. The amounts marked with an * in the table of costs were paid in Mexican pesos and were converted to USD at an exchange rate of MXN 17.6 pesos per USD 1.

1904 R-CS 2, n. 10.

1905 R-CS 2, p. 3, *citing* **RL-113-ESP**, *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019 ("*B-Mex v. Mexico*, Partial Award"), ¶ 270.

Respondent accordingly requests the Tribunal to scrutinize the reasonableness of the costs presented by Claimant in relation to the first phase.[1906]

1502. Respondent submits that both the fees of the external consultants and experts and the proportional share of the salaries of its government officials who worked on the case were reasonable and their services were necessary for the proper defence of the proceedings.[1907]

(c) Allocation of costs

1503. Respondent submits that its costs should be paid in full.[1908] In its Counter-Memorial and Rejoinder on the original claims, Respondent justifies its claim for costs on the basis that: (i) Respondent did not violate any of its obligations under NAFTA; and (ii) Claimant has filed a meritless claim in an attempt to obtain an undue benefit.[1909] In its submissions on the ancillary claim, the grounds for Respondent's claim for costs include: (i) Claimant filed a claim over which the Tribunal lacks jurisdiction; and, if applicable, (ii) Respondent did not violate any of its obligations under NAFTA; and (iii) Claimant filed a meritless claim with the sole intent of obtaining an undue benefit;[1910] (iv) Claimant filed an inadmissible claim because it did not have "clean hands" due to non-compliance with national law.[1911]

1504. Respondent contends that pursuant to ICSID Convention Article 61(2), the Tribunal has broad discretion to allocate costs of the Parties, the fees and expenses of the members of the Tribunal and ICSID fees. Respondent states that there is no uniform practice in the exercise of this discretion. It submits that the overriding principle is to achieve a "fair and appropriate" overall result in the allocation of costs.[1912]

1505. Respondent asserts that all circumstances and the outcome of the arbitration are relevant. These include the extent to which each party prevailed (i.e., the relative success of each

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1906 Respondent's Email to the Tribunal dated 15 February 2022.
1907 R-CS 1, p. 5; R-CS 2, p. 4.
1908 R-CS 1, p. 5*, citing* Counter-Memorial, ¶¶ 541-542; Rejoinder, ¶¶ 502-503; R-CS 2, p. 4*, citing* Counter-Memorial AC, ¶¶ 634-636; Rejoinder AC, ¶¶ 491-494.
1909 Counter-Memorial, ¶¶ 541-542; Rejoinder, ¶¶ 502-503.
1910 Counter-Memorial AC, ¶ 635; Rejoinder AC, ¶ 492.
1911 Rejoinder AC, ¶ 492.
1912 R-CS 1, p. 1; R-CS 2, p. 1.

Party), including the outcome of the stages of a case and whether these were mixed, the complexity and novelty of the issues and whether the arguments presented by the Parties have merit. [1913] Respondent submits that depending on the circumstances, the aforesaid considerations have resulted in the losing party paying all of the prevailing Party's costs, the losing Party paying all costs and a proportionate share of representation expenses, the prevailing party receiving a proportionate share of the total amount of their costs, or each Party paying its own costs.[1914]

1506. Respondent also relies on the decisions of previous arbitral tribunals which have awarded costs in favour of a respondent State where it considered that the case presented by the claimant had no merit.[1915]

1507. Respondent further submits that awarding all or a proportion of costs to the winning party, while a relevant factor, should not be the only factor to be considered. In its view, the circumstances that gave rise to the claims may be relevant. Additionally, Respondent submits that the Tribunal must consider the procedural burden imposed by each Party, as well as the determination on jurisdiction and merits of the case. In this respect, Respondent submits that the Tribunal must consider the fact that the ancillary claim filed by Claimant suffered from jurisdictional deficiencies and unnecessarily prolonged the arbitration. Respondent accordingly submits that the costs incurred in the ancillary claim

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1913 R-CS 1, p. 2*, citing* **RL-100-ESP**, *Burlington Resources v. Ecuador*, Decision on Reconsideration and Award, ¶ 620; **RL-101-ENG**, *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Decision on Tariff and Other Remaining Issues (Award Appendix C), 9 February 2001, ¶¶ 170, 172; **RL-103-ESP**, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, ¶ 236; **CL-0006-ENG**, *Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, ¶ 9.14; **RL-104-ENG**, *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1, Award, 13 September 2021, ¶¶ 723-4; **RL-105-ESP**, *Urbaser v. Argentina*, Award, ¶¶ 1232-1233; **CL-0089-ENG**, *Crystallex v. Venezuela*, Award, ¶¶ 956-960; **RL-102-ENG**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Award, 20 February 2015 [Redacted], ¶ 176; **RL-099-ENG**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, ¶ 694; **RL-106-ENG**, *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis*, ICSID Case No. ARB/95/2, Award, 13 January 1997, ¶ 8.05; **RL-107-ESP**, *KBR, Inc. v. United Mexican States*, Case No. UNCT/14/1, Final Award, 30 April 2015, ¶ 160.

1914 R-CS 1, p. 3*, citing* **RL-108-ENG**, *ACP Axos Capital GmbH v. Republic of Kosovo*, ICSID Case No. ARB/15/22, Award, 3 May 2018, ¶ 275; **RL-109-ESP**, *Carlos Rios and Francisco Javier Rios v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021, ¶ 639; **RL-110-ENG**, *Plama Consortium v. Bulgaria*, Award, ¶ 324.

1915 R-CS 1, p. 4*, citing* **RL-111-ESP**, *Mr. Joshua Dean Nelson v. The United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, 5 June 2020 ("*Nelson v. Mexico*, Final Award"), ¶¶ 394-395; **RL-112-ENG**, *Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020 ("*Vento v. Mexico*, Award"), ¶ 338.

phase of the arbitration are entirely because of Claimant's actions. In this respect, Respondent states that:

- The arbitration was procedurally concluded and only the issuance of the award remained. However, a new stage of the arbitration was commenced as a result of Claimant's request – which forced the Parties to incur costs even though the ancillary claim was outside the jurisdiction of this Tribunal;

- Claimant made multiple requests to introduce new evidence that was not materially or legally relevant and only generated additional costs within the proceedings. In its view, the opposite is true of its two requests to introduce new evidence relevant to the case.

- Claimant has exhibited bad faith, as demonstrated by its unlawful acts in the course of its activities in Mexico and the concealment of information in relation its allegation that Respondent had breached PO7.

- Claimant's costs of representation are high compared to that of Respondent. According to C-CS 1, Claimant's costs are nine times higher than Respondent's costs.[1916]

1508. For its part, Respondent states that its counterclaim is closely linked to Claimant's investment and actions. Respondent argues that it was sufficiently careful and procedurally responsible in requesting the bifurcation of its counterclaim so that the Tribunal could first analyse its admissibility and jurisdiction, and only if satisfied proceed to decide the merits. Respondent submits that this request was made considering the significant costs already incurred in this case.[1917]

1509. Respondent contends that the extent to which each Party prevails in its case, mixed determinations, if any, the complexity of the measures in dispute and the facts must be taken into account. In this respect, Respondent submits that the present arbitration is a

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1916 R-CS 2, pp. 1-2. *See also* R-CS 1, p. 4*, citing* **RL-113-ESP**, *B-Mex v. Mexico*, Partial Award, ¶ 270.
1917 R-CS 2, p. 2.

clear example of the complexity of the claims and the application of substantive national and international law.[1918]

1510. According to Respondent, should the Tribunal determine that it does not have jurisdiction, there are precedents to support awarding costs and expenses of legal representation to the prevailing Party.[1919]

1511. Respondent states that all principles and considerations set forth in R-CS 1 and R-CS 2 are relevant to the Tribunal's allocation of costs in this arbitration. Respondent accordingly requests for the full payment of its costs in the arbitration.[1920]

C. TRIBUNAL'S ANALYSIS

1. Applicable Legal Standard

1512. The Tribunal has wide discretion in the exercise of its power to order costs under ICSID Convention Article 61(2) and ICSID Arbitration Rule 28 (*see* ¶¶ 1480, 1481 above). Neither provision contains a rule to be followed according to which a party should bear or be awarded costs.

1513. In general, the successful party in an investment arbitration may be awarded costs, subject to the specific circumstances of the case. The Tribunal agrees with Respondent that an assessment of which Party has been successful entails a determination of each Party's relative success and failure in its claims and defences.

1514. ICSID Arbitration Rule 28(2) also requires that costs are "reasonably incurred." Another relevant consideration to the reasonableness and allocation of costs which has been referred to by both Parties is the procedural conduct of the Parties. The Tribunal therefore considers the Parties' relative success and failure, the reasonableness of costs, and procedural conduct in turn below.

1515. The Tribunal has reviewed and taken note of the Parties' respective references to decisions on costs in other investment arbitrations. Given the highly fact-specific nature

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1918 R-CS 2, p. 3, *citing* **CL-0089-ENG**, *Crystallex v. Venezuela*, Award, ¶¶ 957-960.

1919 R-CS 2, p. 3, *citing* **RL-112-ENG**, *Vento v. Mexico*, Award, ¶ 338; **RL-111-ESP**, *Nelson v. Mexico,* Final Award, ¶¶ 394-395.

1920 R-CS 2, p. 4.

of the assessment of costs, the Tribunal will be guided by the specific circumstances of this case.

2. Relative Success and Failure

1516. The Tribunal sets out the successful Party for each of the jurisdictional objections and claims made below:

(i) Respondent's objection that the Tribunal has no jurisdiction over the Claimant's original claims: Claimant is the successful Party (*see* ¶ 670 above)

(ii) Claimant's claim in relation to the port tariffs: Respondent is the successful Party (*see* ¶¶ 562 and 1202 above).

(iii) Respondent's objection that the Tribunal has no jurisdiction over Claimant's ancillary claim: Respondent is the successful Party (*see* ¶ 611 above). Accordingly, Claimant was unsuccessful in relation to the ancillary claim.

(iv) Claimant's objection that Respondent's counterclaim is inadmissible: Claimant is the successful Party (*see* ¶ 668 above).

(v) Claimant's proposal to import an autonomous FET standard and for importation of the umbrella clause via NAFTA Article 1103: Respondent is the successful Party (*see* ¶¶ 776, 800 above).

(vi) Claimant's claim for Respondent's breach of NAFTA Article 1105, for failure to meet its legitimate expectations and for Respondent's arbitrary conduct in relation to La Adelita: Claimant is the successful Party (*see* ¶ 988 above).

(vii) Claimant's claim for Respondent's breach of NAFTA Article 1105, for being arbitrary, grossly unfair, unjust, idiosyncratic, and involving a lack of due process leading to an outcome which offends judicial propriety in relation to Claimant's investment in El Corchalito: Claimant is the successful Party (*see* ¶¶ 1189 - 1191 above).

(viii) Claimant's claim for damages in relation to La Adelita: Respondent is the successful Party (*see* ¶¶ 1288 - 1291 above).

(ix) Claimant's claim for damages in relation to El Corchalito: Claimant is partially successful in establishing a basis for damages to be awarded, while the Tribunal rejected its calculations and ultimately awarded an amount representing a fraction of that claimed (*see* ¶ 1447 above).

(x) Claimant's claim for losses caused to the CALICA Network: Respondent is the successful Party (*see* ¶ 1338 above).

1517. In summary, Claimant succeeded with respect to Respondent's jurisdictional objections on the original claim but failed with respect to Respondent's jurisdictional objections on the ancillary claim. Further, the Respondent failed to establish jurisdiction with respect to its counterclaim.

1518. On the merits, Claimant succeeded in establishing a breach of the NAFTA Article 1105 in relation to La Adelita and El Corchalito. However, the Tribunal did not find in Claimant's favour in respect of La Rosita or the port tariffs.

1519. On damages, Claimant was ultimately awarded an amount of USD 15,884,117.00, while its total claim was [redacted]. It therefore succeeded only marginally in relation to damages.

1520. On the basis of the above, the Tribunal therefore considers that the Parties have been roughly equally successful in their respective claims and jurisdictional objections, while a large proportion of Claimant's claim for damages was rejected.

3. Procedural Conduct

1521. The Tribunal has reviewed and takes note of the Parties' respective accounts of the proceedings. Many of the instances of procedural conduct invoked by one side against the other fall within the reasonable exercise of a party's right to pursue its legal claims and defences in the arbitration. In this respect, not every unsuccessful procedural application justifies an adverse award of costs. The Tribunal considers that each side conducted itself with due professionalism, and without bad faith or abusive procedural tactics. Therefore, the Tribunal shall not make an adverse award on costs on either Party on account of procedural conduct.

1522. To the extent that Respondent argues that Claimant should be responsible for the costs of the proceedings due to having "unclean hands" for having breached environmental legislation,[1921] the Tribunal does not consider any adjustment to costs on this basis to be appropriate.

4. Reasonableness of Costs

1523. The Tribunal notes that Parties are free to choose their legal representatives. This may lead to differences in costs, and such a difference alone does not deem those costs unreasonable.

1524. Further, as noted in ¶ 1521 above in relation to Parties' conduct in these proceedings, the Tribunal finds that neither Party has unjustifiably incurred expenses in the legitimate pursuit and defence of claims in the arbitration.

1525. The Tribunal considers that the reasonableness of costs under ICSID Arbitration Rule 28(2) may take into account the amount in dispute, the complexity of proceedings, and their length, among other relevant factors. Therefore, in the particular facts and circumstances of this case, the Tribunal finds that the costs incurred by both Parties are reasonable.

5. Conclusion on Allocation of costs

1526. Taking into account the Tribunal's conclusions above regarding (i) the roughly equal success and failure of Claimant and Respondent in respect of the claims and objections in the arbitration, while a large proportion of Claimant's claim for damages was rejected; (ii) their procedural conduct; and (iii) the reasonableness of costs claimed, as well as the particular circumstances of the present case, the Tribunal determines that each Party should bear half of the costs of the arbitration, comprising the fees and expenses of the Tribunal and the ICSID administrative costs. In addition, each Party should bear its own legal and other costs.

[1921] Rejoinder AC, ¶ 493.

6. Quantification of Costs

1527. Taking into account the Tribunal's decision in ¶ 1526 above, since each side shall bear its own legal and other costs, the Tribunal does not need to determine the amount of such costs. The legal and other costs include the costs advanced by each Party for expenses incurred in relation to the Site Visit.

1528. In relation to the costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, these amount to (in USD):

Arbitrators' fees and expenses	
Albert Jan van den Berg	1,164,485.20
Guido Santiago Tawil	583,334.45
Sergio Puig	747,922.31
ICSID's administrative fees	366,000.00
Direct expenses	241,233.60
Total	**3,102,975.56**

1529. Noting that neither side is ordered to pay the opposing Party any amount in respect of costs, the question of interest on costs does not arise.

XVII. CONCLUSIONS

1530. In this Section, the Tribunal summarises its decisions with respect to each of the Parties' relief sought in this arbitration. The Tribunal considers the most recent requests for relief to be the Parties' respective current relief sought, and therefore bases its conclusions on the requests made in Claimant's reply submissions (on both the original claims and the ancillary claim/counterclaim) and Respondent's rejoinder submissions (on both the original claims and the ancillary claim/counterclaim).

1531. As a general point, the Tribunal declares that this Award is made without prejudice to any right that any person may have in the relief under applicable domestic law.

A. CLAIMANT

1. Original Claims

1532. The Tribunal reached the following conclusions with respect to the requests for relief set out in Claimant's Reply. Where these requests substantially mirror requests made in the Memorial, the Memorial reference is also provided.

1533. Request (a) for an award "[u]pholding the claims asserted by the Claimant in this proceeding" (*see* Reply, ¶ 288(a)) (*see also* Memorial, ¶ 347(a)): this request is partially granted to the extent summarized below.

1534. Request (b) for a declaration (*see* Reply, ¶ 288(b)) (*see also* Memorial, ¶ 347(b)):

> . . . that the Respondent has breached NAFTA and applicable principles of international law:
>
> i. By failing to accord the Claimant's investments, including CALICA, fair and equitable treatment in violation of Article 1105; and
>
> ii. By failing to observe the obligations it has assumed regarding the Claimant's investments (an international obligation that is applicable through the most-favored-nation clause of Article 1103 of NAFTA).

1535. The above request is granted with respect to (i) (*see* ¶¶ 988 and 1191 above), while noting that the Tribunal's finding is in relation to NAFTA. In the absence of a specific identification of the "applicable principles of international law", the declaration will refer to a breach of NAFTA only. The request is rejected with respect to (ii) (*see* ¶ 800 above).

1536. Request (c) for a determination "that this breach has caused damages to the Claimant" (*see* Reply, ¶ 288(c)) (*see also* Memorial, ¶ 347(c)): this request is granted (*see* ¶ 1447 above).

1537. Request (d) for an order for Respondent to pay to Claimant compensation (*see* Reply, ¶ 288(d)) (*see also* Memorial, ¶ 347(d)):

> . . . in accordance with NAFTA and customary international law, in an amount sufficient to provide full reparation to the Claimant for the damages incurred as a result of the Respondent's conduct in violation of NAFTA, including:

i. Compensation for damages arising out of Mexico's repudiation of the 2014 Agreements in the amount of [redacted];

ii. Compensation for damages arising out of Mexico's shutdown of CALICA's operations in El Corchalito in the amount of [redacted]

iii. Compensation for port fees that Mexico illegally charged CALICA and Vulica and never reimbursed in the amount of [redacted]

iv. Compensation of [redacted] million to account for the double taxation that would result on a portion of this Award;

v. Pre-Award compound interest at a rate reflecting the cost of short-term borrowing by the Government of Mexico from the date of each breach to the date of the award, and post-Award compound interest also reflecting the cost of short-term borrowing by the Government of Mexico from the date of the Award until actual and full payment by Mexico, even if the Award is converted into a judgement of a court of a State party to the ICSID Convention.

1538. This request is partially granted with respect to (ii), with the Tribunal's award of a lesser amount of damages arising out of Respondent's shutdown of CALICA's operations in El Corchalito in the amount of USD 15,884,117.00 (*see* ¶ 1447 above). Items (i), (iii) and (iv) are rejected (*see* ¶¶ 1289, 1202 and 1446 above). Item (v) is partially granted, with the Tribunal's award of pre-Award compound interest calculated at the six-month US Treasury bill rate +2%, from 24 January 2018 until the date of full and final payment, compounded annually (*see* ¶ 1477 above).

1539. Request (e) asking for the Tribunal to make an award (*see* Reply, ¶ 288(e)) (*see also* Memorial, ¶ 347(e)):

> Giving Respondent the option to pay less than the full amount ordered above for items (i), (ii), (iv) and (v) if Mexico's instrumentalities, (x) within three months from the issuance of the Award, were to amend the POEL to expressly allow quarrying operations by CALICA in La Adelita, *and* (y) immediately close all administrative and judicial proceedings against CALICA arising out of the inspection of El Corchalito, allowing CALICA to resume operations normally with no penalties to CALICA or any of its affiliates or any of their respective employees, agents, advisors or other representatives (collectively, the "Settlement Measures"), in which case the Respondent shall pay the damages effectively incurred up to the performance of the Settlement Measures.

1540. The Tribunal does not consider it appropriate to make a conditional order based on events postdating the issuance of the Award, and declines to make the order sought by Claimant.

1541. Request (f) for an order for Respondent "to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of legal representation, plus interest thereon" (*see* Reply, ¶ 288(f)) (*see also* Memorial, ¶ 347(f)). This request is not granted, as the Tribunal has ordered each Party to pay its own legal and other costs and to bear in equal shares the fees and expenses of the Tribunal and the administrative fees and direct expenses of ICSID (*see* ¶ 1526 above).

1542. Request (g) for "[s]uch other or additional relief as may be appropriate under the applicable law or that may otherwise be just and proper" (*see* Reply, ¶ 288(g)) (*see also* Memorial, ¶ 347(g)). No argument or particularized request has been made in relation to this request. The Tribunal considers that it would violate its mandate if it were to grant relief outside the pleaded cases of the Parties. In the absence of further substantiation, this request for relief is in the Tribunal's view a meaningless legal recitation and is rejected.

2. Ancillary Claim and Counterclaim

1543. Request (a) for an award "[u]pholding [Claimant's] ancillary claim and dismissing [Respondent's] jurisdictional objection to this claim" (*see* Reply AC, ¶ 281(a)) (*see also* Memorial AC, ¶ 185(a)). This request is rejected (*see* ¶ 611 above). It follows that requests (b),[1922] (c)[1923] and (d)[1924] fall away.

1544. Request (e) in relation to costs is addressed as set out at ¶ 1541 above.

1545. Request (f) for an order "[r]ejecting [Respondent's] request for leave to file its counterclaim" (*see* Reply AC, ¶ 281(f)). This request is granted (*see* ¶ 668 above).

[1922] "Declaring that [Respondent] has breached NAFTA and applicable principles of international law by failing to accord [Claimant's] investments, including CALICA, fair and equitable treatment in violation of Article 1105." (Reply AC, ¶ 281(b)).

[1923] "Determining that this breach has caused damages to [Claimant]." (Reply AC, ¶ 281(c)).

[1924] "Ordering [Respondent] to pay to [Claimant] compensation, in accordance with NAFTA and customary international law, in an amount sufficient to provide full reparation to [Claimant] for the damages incurred as a result of the wrongful conduct at issue regarding this ancillary claim, including…" (Reply AC, ¶ 281(d)).

1546. Request (g) in relation to additional relief is rejected, consistent with the Tribunal's reasoning in ¶ 1542 above.

B. RESPONDENT

1. Original Claims

1547. The request for the Tribunal to reject Claimant's claims is partially granted and partially rejected, as reflected in relation to Claimant's claims above (*see* Rejoinder, ¶ 504; Counter-Memorial, ¶ 543).

1548. The request for Claimant to pay the costs of the arbitration (*see* Rejoinder, ¶ 502; Counter-Memorial, ¶ 541). This request for costs is not granted, as the Tribunal has ordered each Party to pay its own legal and other costs and to bear in equal shares the fees and expenses of the Tribunal and the administrative fees and direct expenses of ICSID (*see* ¶ 1526 above).

2. Ancillary Claim and Counterclaim

1549. Request for a finding that the ancillary claim is inadmissible (*see* Response AC, ¶ 633; Rejoinder AC, ¶ 490), as follows:

> *633. La Demandada solicita respetuosamente a este Tribunal resolver:*
>
> *(i) Que la reclamación de la Demandante es inadmisible porque se basa en conductas irregulares en contravención de la normativa ambiental; y, en su caso,*
>
> *(ii) Que carece de competencia ratione temporis respecto a las reclamaciones formuladas por la Demandante porque se basan en hechos que ocurrieron cuando el TLCAN ya no se encontraba vigente; o, en su caso,*
>
> *(iii) Que la reclamación de la Demandante carece de méritos y, en consecuencia, México no es responsable de ninguna supuesta violación al TLCAN; o en su caso,*
>
> *(iv) Que el monto de daños equivale al cálculo que presentó la Demandada.*

1550. The above request is partially granted in that the Tribunal finds the ancillary claim inadmissible (*see* ¶ 611 above). As the ancillary claim is inadmissible, the Tribunal did not consider it necessary to determine the other arguments raised (*see* ¶ 612 above).

1551. The request for Claimant to pay the costs of the arbitration is addressed as set out in ¶ 1548 above.

1552. The request for the Tribunal to determine that it holds jurisdiction and competence over the counterclaim (*see* Counterclaim Memorial on Jurisdiction, ¶ 248). This request is rejected (*see* ¶ 668 above).

XVIII. DECISIONS

1553. FOR THE FOREGOING REASONS, the Tribunal renders the following decisions:

(A) DECLARES that Respondent has breached NAFTA by failing to accord Claimant's investments, including CALICA, fair and equitable treatment in violation of Article 1105;

(B) DETERMINES that this breach has caused damage to Claimant;

(C) ORDERS Respondent to pay to Claimant compensation for damages arising out of Mexico's shutdown of CALICA's operations in El Corchalito in the amount of USD 15,884,117.00;

(D) ORDERS Respondent to pay compound interest on the amount awarded in (C) calculated at the six-month US Treasury bill rate +2%, from 24 January 2018 until the date of full and final payment, compounded annually;

(E) REJECTS Respondent's request for leave to file its counterclaim on the basis that the counterclaim is inadmissible;

(F) DETERMINES that each Party will bear its legal and other costs in respect of the arbitration;

(G) DETERMINES that the Parties will bear the fees and expenses of the Tribunal and ICSID's administrative fees and direct expenses in equal shares;

(H) REJECTS all other claims and requests.

THE ARBITRAL TRIBUNAL

[Signed]

Professor Guido Santiago Tawil
Arbitrator
(subject to the attached dissenting opinion)

Date: 27 July 2026

Professor Sergio Puig
Arbitrator

Date:

Professor Albert Jan van den Berg
Presiding Arbitrator

Date:

THE ARBITRAL TRIBUNAL

Professor Guido SantiagoTawil
Arbitrator
(subject to the attached dissenting opinion)

Date:

[Signed]

Professor Sergio Puig
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Professor Sergio Puig
Arbitrator

Date:

[Signed]

Professor Albert Jan van den Berg
Presiding Arbitrator

Date: 27 July 2026

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

LEGACY VULCAN, LLC

Claimant

and

UNITED MEXICAN STATES

Respondent

ICSID Case No. ARB/19/1

DISSENTING OPINION OF PROFESSOR DR. GUIDO SANTIAGO TAWIL

1. The Tribunal proposes, by majority, to (i) decline its jurisdiction over Claimant's claims on the Ancillary Claim; (ii) declare that Respondent breached Claimant's rights under NAFTA Article 1105 but grant no compensation to Claimant concerning La Adelita and a very limited one concerning El Corchalito; and (iii) determine that each Party shall bear its own costs, while the fees and expenses of the Tribunal and the Centre shall be paid by halves.

2. I respectfully dissent.

(A) *Jurisdiction on the Ancillary Claim*

3. In order to decline the Tribunal's jurisdiction concerning the Ancillary Claim, the majority concludes that (i) PO 7 was only issued for the purposes of admitting the ancillary claim and did not prevent the Tribunal from considering Respondent's jurisdictional objection later in the proceedings;[1] and (ii) that Claimant does not hold a "legacy investment" within the meaning of USMCA Annex 14-C, i.e., "an investment [. . .] established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement."[2]

4. In order to conclude that Claimant does not hold a "legacy investment", it considered that Legacy Vulcan LLC did not establish or acquire an investment within the meaning of USMCA Annex 14-C, paragraph 6(b) during such period.[3]

5. I disagree.

6. While I have some reservations on how the majority considers that PO 7 should be constructed, I accept that the matter leaves some room for debate.

[1] Award, ¶¶ 579-585.
[2] USMCA, Annex 14-C, ¶ 6(a), **C-0314-ENG**.
[3] Award, ¶ 610.

7. Where I am unable to agree is in the conclusion that Claimant does not have a legacy investment concerning La Rosita and Punta Venado within the meaning of USMCA Annex 14-C.

8. Even if Claimant's acquisition of all rights and obligations relating to the Project from Legacy Vulcan Corporation in 2015 was considered a corporate restructuring and not an acquisition (as the majority argues),[4] I just can't see how Claimant's 2001 acquisition of ICA's interest in the Project[5] and the fact that additional significant investments were made in La Rosita and Punta Venado could not be considered as the acquisition or establishment of an investment during the relevant period within the meaning of USMCA Annex 14-C, paragraph 6(b).

9. I do not agree that in order to determine if Claimant's investment is a legacy investment a distinction should be drawn between the wording of NAFTA note 39 (which provides that Chapter 11 "covers investments existing on the date of entry into force of this Agreement as well as investments *made or acquired* thereafter") and Annex 14-C of the USMCA (which refers as covered legacy investments those "*established or acquired* between January 1, 1994 and the date of termination of NAFTA 1994"), as described in the Award.[6]

10. Even if one would be interested in drawing such a distinction (view with which I do not agree) it is clear to me that the 2001 purchase of ICA's interest in the Project is a typical example of an "*acquisition*" under both legal bodies and I fail to see why such acquisition or the other investments made from 1994 in La Rosita or Punta Venado would not qualify as a legacy investment under the wording of Annex 14-C.

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[4] Award, ¶ 608.

[5] *See* p. 5 of Legacy Vulcan (then Vulcan Materials Company), Form 10-K for the 2001 Fiscal Year, 27 March 2002 ("**Vulcan Materials Company's Form 10-K**"), **C-0046-ENG** and ¶ 26 of Witness Statement of [redacted] 18 May 2020 ("[redacted] **First Statement**"), both mentioned by Claimant in fn. 304 of its Post Hearing Brief on the Ancillary Claim.

[6] Award, ¶ 599 (added emphasis).

11. The 2001 acquisition of ICA's interest was not a minor transaction. It meant a significant investment in the Project – it involved a payment of [redacted] in cash[7] – and to consider that such investment or others performed in La Rosita or Punta Venado after 1994 (as the [redacted] investment made in 2015 for a supplemental processing plant at La Rosita[8]) would not qualify as established or acquired in such period would not be, in my view, a reasonable construction of Article 6 (a) of Annex 14-C.

12. Therefore, I firmly disagree with the allegation that by admitting that Claimant had a legacy investment the Tribunal would be rewriting or second guessing what the parties to the USMCA intended to say in Annex 14-C.[9] On the contrary, in my view, the majority's opinion is both introducing limitations not foreseen in USMCA Annex 14-C and distorting rather than clarifying its meaning.[10]

13. As mentioned above, Claimant's investments in La Rosita and Punta Venado between 1 January 1994 and 1 July 2020 were significant. They were performed in the regular course of the Project's development and not in order to circle any treaty limitation. Therefore, I am of the view that Claimant's investment qualifies as a legacy investment under USMCA Annex 14-C and that on such ground this Tribunal has jurisdiction to hear Claimant's Ancillary Claim.

14. In light of its finding, the majority has considered unnecessary to address Respondent's additional arguments that USMCA Annex 14-C does not extend the substantive protections of NAFTA, but only the procedural right to make a claim based on events while NAFTA was in force, or that the Ancillary Claim is inadmissible on the basis of the "unclean hands" doctrine, both of which were opposed by Claimant.[11]

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[7] Vulcan Materials Company's Form 10-K for the 2001 Fiscal Year, **C-0046-ENG**, p. 5.
[8] Authorization for Expenditure (AFE) Project Description, Plant 4511 Sac Tun, MX, Supplemental Plant, dated 24 April 2015, **C-0089-ENG**; [redacted] First Statement ¶ 54.
[9] Award, ¶ 599.
[10] *See*, in another context, *Access Business Group LLC v. United Mexican States (ICSID Case No. ARB/23/15)*, Dissenting Opinion of Arbitrator Franco Ferrari, 21 November 2025, **RL-0262-ENG**, ¶14.
[11] Award, ¶ 612.

15. Based on the grounds on which the Tribunal has declined its jurisdiction on the Ancillary Claim I agree that it is unnecessary to address such matters in the present case.

(B) *Applicable Standard for NAFTA Article 1103*

16. Prior to addressing the merits of Claimant's claims, the majority of the Tribunal has examined the legal standards applicable to its decision, in order to conclude that "(s)ince Claimant has not made a comparison between the treatment accorded to it and allegedly more favourable *de facto* treatment of another investor with a strong factual parallel to Claimant's circumstances, its arguments based on NAFTA Article 1103 are unsuccessful."[12]

17. I disagree.

18. NAFTA Article 1103 is entitled "Most-Favored-Nation Treatment" ("**MFN treatment**"), and states as follows:

> 1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

19. The majority of the Tribunal is of the view that in order "for the words 'in like circumstances' to have meaning, there must be a comparison between the treatment accorded to the investor in question and the allegedly more favorable treatment to an investor, which establishes that there is a strong factual parallel or 'likeness' between the circumstances of the two. The Tribunal (….) rejects Claimant's contention that it

[12] Award, ¶ 800.

is sufficient for an investor to identify a third-party treaty that sets the standard of treatment that a hypothetical third-country investor would enjoy. The fact of being a third-country investor is insufficient to qualify as 'like circumstances', since that criterion is already included in the provision. Claimant does not establish like circumstances by referring to a hypothetical 'Swiss investor with quarrying operations in Mexico'. In the Tribunal's view, the like circumstances must be based on actual treatment (or '*de facto* treatment') that has occurred, and not hypothetical treatment in the abstract available to investors in like circumstances. This follows from the language in NAFTA Article 1103, which refers to treatment that the NAFTA Contracting Party 'accords, in like circumstances'. The 'accords' requires a claimant investor to prove the allegedly preferential treatment that has in fact occurred, with reference to the 'like circumstances' in which such actual treatment took place."[13]

20. I disagree. I am not convinced that NAFTA's Article 1103 (and the terms "in like circumstances" therein included) requires a comparator investor in order to invoke the MFN clause to import a higher standard of protection from another treaty. As expressed by the arbitral tribunal in *European American Investment Bank,* "it is not a matter of comparison with the actual treatment accorded to a specific third State investor, but of comparison between the standard of treatment guaranteed to a group of investors by one treaty and the standard of treatment guaranteed to another group of investors by another treaty." [14] The mere existence of the third-party treaty is sufficient.[15]

21. Such view unnecessarily restricts the protection (and delays its application in time) as it could not be invoked if an investment under such third treaty has not yet materialized.

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[13] Award, ¶¶ 792-793.

[14] *European American Investment Bank AG (Austria) v. The Slovak Republic*, UNCITRAL, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, **CL-0128 ENG**, ¶ 435.

[15] Abby Cohen Smutny, Petr Polášek & Chad Farrell, *The MFN Clause and its Evolving Boundaries* in Arbitration Under International Investment Agreements: A Guide to the Key Issues (K. Yannaca-Small ed., 2018), **CL-0129-ENG**, ¶ 23.20 ("The beneficiary of the MFN clause, however, does not need to show that the third-party state (or its nationals) have, in fact, invoked the benefits of the third party treaty. The mere existence of the third-party treaty is sufficient").

If such view was the correct one, treaties would be including some protections immediately available to investors and other ones which availability would be delayed in time and conditioned to the conduct of third parties foreign to the dispute (eventual investors under the third treaty), what in my view has no reasonable justification.

22. Moreover, even if a comparison was hypothetically required (what in my view is not the case) the question to be asked should be – at the most – if such protection would be available under the third treaty if a Swiss investor in like/similar circumstances would have effectively made such investment. In other words, in order to turn applicable NAFTA Article 1103 the comparison is not necessary. But even if it was, it does not need to find a Swiss investor that effectively had quarrying operations in Mexico or Quintana Roo but simply needs to be asked: if the investment in similar projects (or even in the very same CALICA) would have been made by a Swiss investor, would such investor be entitled to the additional protection that Claimant seeks now under the third treaty? (i.e. the right to elevate claims of breach of obligations to treaty claims under Article 10 (2) of the Mexico-Switzerland BIT).[16]

23. As the third-party treaty invoked by Claimant provides the protection claimed and, in my view, a Swiss investor would be entitled to it I must conclude that Claimant was entitled to invoke the protection of the umbrella clause provided in Article 10 (2) of the Mexico-Switzerland BIT via NAFTA Article 1103.

(C) *The Port Tariff Claim.*

24. In its section of Jurisdiction and Admissibility, the Award addresses Claimant's Port Tariff claim in order to conclude that "regardless of the Tribunal's decision on the issue of whether the port fees should properly be classified as a taxation measure, the Tribunal notes that it would find that Claimant's claim with respect to the port fees is without merit. Specifically, the Tribunal is not satisfied, based on the evidence

[16] Reply, ¶ 186.

presented by Claimant, that a Mexican court ordered repayment of the fees in question by API Quintana Roo to CALICA. To the contrary, the *Tribunal Federal de Justicia Fiscal y Administrativa* in its decision dated 3 September 2014 (upheld as binding by the Mexican Supreme Court in its decision of 25 January 2017) directed that the effect of its findings was, among other things, that the SCT was required to issue a new 'Amended Agreement' in which it would duly give reasons for its determination that the API Quintana Roo was the only entity entitled to charge the *tarifa de puerto* in the entirety of the '*terminal de uso público fuera de puerto denominada Punta Venado.*'"[17] As such, Claimant's submission that as "a matter of common sense and Mexican law" API Quintana Roo was obliged to reimburse the fees, is "without merit and rejected by the Tribunal."[18]

25. While I agree in general terms with the majority's analysis about the legal nature of the charges, I disagree with the conclusion expressed in the Award.

26. While it is true that in its decision dated 3 September 2014 (upheld as binding by the Mexican Supreme Court in its decision of 25 January 2017) the *Tribunal Federal de Justicia Fiscal y Administrativa* directed that the effect of its findings was, among other things, that the SCT was required to issue a new "Amended Agreement" in which it would give reasons for its determination that the API Quintana Roo was the only entity entitled to charge the *tarifa de puerto* in the entirety of the "*terminal de uso público fuera de puerto denominada Punta Venado,*"[19] it declared the annulment of the concession attributed to the API Quintana Roo in contravention to the concession granted to CALICA in order that a new decision be issued taking into account the concession granted in August 2005 to CALICA. It also prohibited the API Quintana Roo from collecting port tariffs in Punta Venado.

[17] Award, ¶ 559.
[18] Award, ¶ 561.
[19] Decision of the Federal Tribunal on Fiscal and Administrative Matters, D.A. 482/2013-8536, 3 September 2014, **C-0106-SPA**, p. 264 [PDF p. 265].

27. The practical effect of such decision – and in particular the confirmation *by the Tribunal Federal de Justicia Fiscal y Administrativa*[20] and the Supreme Court that it was not the API Quintana Roo but CALICA the one entitled to collect the port tariffs and that such decision could no longer be challenged[21] – is that the collection of the port tariffs by API Quintana Roo was declared illegal, in violation of CALICA's rights, and that such decision could not further be challenged.

28. In such circumstances, (i) API Quintana Roo's continued charging of port tariffs to CALICA for the use of CALICA's private terminal through 3 December 2017; [22] and (ii) API Quintana Roo's failure to reimburse the amounts illegally collected, notwithstanding CALICA's reimbursement claim before the courts,[23] constitute clear violations of CALICA's rights and of the protections granted to the investor under NAFTA.

(D) *Alleged Breaches and Damages in Relation to La Adelita.*

29. I concur with the general analysis made in the Award of the breaches incurred by Respondent concerning La Adelita, with the exception of (i) the conclusion that CALICA needed to obtain a CUSTF in order to quarry La Adelita, and (ii) the view expressed in the Award concerning the 2014 Agreements and the importation of the umbrella clause existing in Article 10(2) of the Mexico-Switzerland BIT via NAFTA Article 1103 (to which I have referred in section (B) above).

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[20] *Id*., pp. 267-268 [PDF pp. 268-269] ("*Por lo que, si con la Concesión de la hoy parte actora Calizas Industriales del Carmen S.A. de C.V, (….) se le otorgó la terminal de uso público que por Decreto Presidencial publicado en el Diario Oficial de la Federación el día 17 de abril de 1998, se modificó el carácter de Puerto de 'Punta Venado' por el de terminal de uso público fuera de habilitado, invariablemente se le debe pagar por su uso la tarifa de puerto a que aluden los artículos 200, 200-A y 201 de la Ley Federal de Derechos (…) En consecuencia, si no se ha revocado la concesión de la terminal fuera de puerto habilitado Punta Venado que se le otorgó a la parte actora Calizas Industriales del Carmen, S.A. de C.V., dicha empresa es la facultada para seguir cobrando la tarifa de puerto, como lo venía haciendo hasta antes de la publicación del supracitado Acuerdo Modificatorio impugnado en el presente juicio*").

[21] Decision of Mexico's Supreme Court, Claim 1256/2016, 25 January 2017, **C-0059-SPA**, pp. 19-20.

[22] Memorial, ¶ 132 and Witness Statement of [redacted], 18 May 2020 ("[redacted] **First Statement**"), ¶ 46.

[23] CALICA's filing regarding port fees, 2 January 2018, **C-0107-SPA**.

30. In my view, the different statements, representations and actions summarized in para. 810 of the Award provided Claimant with the reasonable expectation that it would be able to conduct quarrying operations in La Adelita and that the POEL 2009 would not affect such right.

31. As we know, POEL 2009 – dated 25 May 2009 – stated in its Transitory Clause Fifth that "[t]he procedures commenced prior to the entry into force of this Decree shall be resolved in accordance with the applicable legislation in force when such procedures initiated; thus, this Decree shall not apply retroactively to those specific cases in which official and in-force documents have been issued before the entry into force of this instrument, nor to their future renewal."[24] Such understanding was confirmed by the High Court of Justice of Quintana Roo in its 25 March 2010 decision.[25] And that was also the position taken by the State of Quintana Roo and the Municipality of Solidaridad in the court proceedings, making it clear that CALICA's vested rights in La Adelita were not affected by the POEL 2009.[26]

32. While the Award takes the position in its para. 927 that the Court's decision does not answer the situation of the CUSTF as it was not acquired prior to the POEL 2009 coming into effect and, therefore, would not be a "vested right" held by Claimant, the facts before us support, in my view, a very different conclusion.

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[24] POEL (*Programa de Ordenamiento Ecológico Local*), 25 May 2009, **C-0080-SPA** (Partial Translation into English provided with the document), p. 6 [PDF].

[25] Decision by the High Court of Justice of the State of Quintana Roo, 25 March 2010, **C-0087-SPA**, which considered that CALICA's challenge to the 2009 POEL (juicio contencioso administrativo de nulidad del decreto que aprueba el POEL 2009 y decisiones subsecuentes del Municipio de Solidaridad) should not proceed due to the fact that they were not applicable to CALICA ("*En consecuencia, advirtiendo de las constancias del presente asunto que el Programa de Ordenamiento Ecológico Local del Municipio de Solidaridad, Quintana Roo y del Acuerdo del Ayuntamiento de Solidaridad, Quintana Roo por el que se aprueba tal Programa, de veinticinco de mayo de dos mil nueve y veintisiete de marzo de dos mil nueve, respectivamente, no resultan aplicables ni en los trámites presentes, ni en lo que toca a sus futuras renovaciones (…). Siendo que todos los documentos antes citados, son derechos adquiridos de la accionante con fecha anterior a la publicación de los Ordenamientos Legales impugnados, por tanto, resulta notorio que no se le afectan los intereses del actor, toda vez que las normas que controvierte no trascienden respecto a los permisos, autorizaciones y licencias que ostenta*".) (p. 22 of the PDF).

[26] Answer from the Secretary of Urban Development and Environment of the State of Quintana Roo to CALICA's Legal Action Against the POEL, 8 July 2009, **C-0083-SPA**, p. 6.

33. There are several reasons that support, in my opinion, the view that a CUSTF was not required to quarry La Adelita prior to 2009.

34. As explained by Claimant, under Mexican law, the CUSTF is only required for "forested terrains" (a legal status that depends not only on the presence of trees but on the lot's official land use designation), which La Adelita was not.[27] When considering whether to grant the CUSTF, SEMARNAT needs to consider the applicable zoning regime and, prior to the POEL 2009, CALICA's lots were all zoned as incompatible for forestry.[28] Therefore, the problem was introduced by the POEL 2009,[29] which assigned about 90% of La Adelita to UGA 5,[30] intended for conservation and where quarrying is prohibited.[31]

35. Even more importantly, as described in paras. 913-914 of the Award, no CUSTF was required nor obtained in relation to the removal of vegetation of El Corchalito – which was identically zoned as La Adelita under the POET 2001 and was quarried by CALICA commencing in 2001[32] – nor La Rosita, where quarrying commenced in the early 1990s and the CUSTF was not required by the authorities in spite of multiple inspections carried out there.[33] The authorities' views confirming CALICA's

[27] C-RPHM ¶ 34; *citing* 2021 Hearing Transcript (English) Day 1, 39:10-20 (Claimant's Opening Statement); 2021 Hearing Transcript (Spanish) Day 3, 681:14-22 ([redacted] presentation).

[28] C-RPHM ¶ 35; *citing, inter alia,* 2021 Hearing Transcript (Spanish) Day 3, 677:18-678:3, 702:12-704:18 ([redacted] presentation and cross-examination); R-PHM, Annex A, Question 6, n. 225.

[29] As explained in para 884 of the Award, under the POET 2001, while La Rosita and Punta Venado were zoned as "UGA 19" (which lists "quarry" as the predominant use and "forestry" and "flora and fauna" as incompatible uses), La Adelita and El Corchalito were zoned under the POET as "UGA 30", which lists "flora and fauna" as the predominant use, "infrastructure, quarrying, tourism" as conditioned uses and "forestry" among the incompatible uses. For quarrying under UGA 30 20% of vegetation was required to be preserved.

[30] C-RPHM ¶ 39; *see* R-PHM, Annex A, Question 9, ¶ 70, Question 7, ¶ 53.

[31] POEL (Programa de Ordenamiento Ecológico Local), 25 May 2009, **C-0080-SPA**, p. 62, 76. *See* Memorial, ¶ 80; Map 3.

[32] Memorial, ¶ 77; *citing* [redacted] First Statement, ¶ 24.

[33] C-PHM ¶ 45; Appendix A, Tribunal Question 7; *citing* Letter No. PFPA03.2/2C27.5/0006/12/0037 from Arturo Estrada Ángel (PROFEPA) to CALICA, 10 December 2012 (**PROFEPA's inspection**), **C-0043-SPA**, p. 2; Tribunal Question 8; *citing* 2021 Hearing Transcript (English) Day 2, 303:4-15 ([redacted] cross-examination). Particularly telling was the testimony of [redacted] a former PROFEPA chief prosecutor, at the hearing on the Ancillary Claim: "*En 37 años, las autoridades nunca han exigido un [CUSTF] en La Rosita […] He visto que […] decenas de inspectores han pasado por esos predios, sobre todo decenas de informes a autoridades ambientales, federales, estatales y municipales se dieron por parte de la empresa en diversos períodos y en diversas*

compliance with the applicable environmental regulations at the time are clear in PROFEPA's December 2012 inspection and resolution,[34] referred to in paras. 916-918 of the Award.

36. The alleged lack of the CUSTF was only raised in April 2013 by SEMARNAT based on the new zoning regime modified by the POEL 2009.[35]

37. The fact that no authority was requesting at the time a CUSTF in order to quarry La Adelita or any of CALICA's other lots[36] and that neither the State of Quintana Roo nor the Municipality of Solidaridad raised in the court proceedings any reservation concerning CALICA's environmental permits to quarry La Adelita are in my view decisive to consider that obtaining a CUSTF was not necessary prior to POEL 2009.

38. If that would have been the case, CALICA would have been allowed to continue the court proceedings initiated at the time in order to challenge the regime change and discuss before such fora any eventual noncompliance with the environmental regulations.

39. To sustain that CALICA's actions were unnecessary in order to challenge POEL 2009 and, therefore, dismiss the court's proceedings initiated by CALICA based on the fact that it had vested rights, that the POEL 2009 did not affect its vested rights and conclude later that such vested rights were in fact not such because it was missing a permit not required by the authorities at the time (as the CUSTF) does not appear to me to be a fair conclusion.

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oportunidades a todos funcionarios especialistas en el tema ambiental. […] [N]inguno determinó que el [CUSTF] era necesario." 2023 Hearing Transcript (Spanish) Day 3, 762:2-763:1 ([redacted] direct examination).

[34] PROFEPA's inspection, **C-0043-SPA**, p. 56.

[35] Memorial, ¶ 85; *citing* [redacted] First Statement, ¶ 25. See C-PHM, Appendix A, Tribunal Question 8, p. 16. Precisely due to SEMARNAT´s position that under the POEL 2009 a CUSTF was required and that, in order to obtain one, POEL 2009 needed to be amended was that the 2014 Agreements were pursued. [redacted] First Statement, ¶ 24.

[36] *See* the situation of El Corchalito that had exactly the same zoning that La Adelita before and after the POEL 2009, the result of PROFEPA's December 2012 inspection and decision, etc.

40. Even if the legal construction of Mexican law on the matter could be an area of debate (as it has been the case among the Parties and experts in this proceeding and is now among the members of the Tribunal), the contemporary conduct of all those involved in the matter supports the conclusion that obtaining a CUSTF was not necessary nor required prior to POEL 2009.

41. The 2014 Agreements – described in paras. 935 et seq. of the Award – reinforced the different assurances and representations provided by the authorities. Based on them Claimant made significant additional investments in the Project[37] with the expectation that CALICA would be able to initiate the quarrying operations in La Adelita in early 2016.

42. While the majority concludes that Respondent acted in an arbitrary and grossly unfair way by breaching the representations made to Claimant and displayed a complete lack of transparency and candour in the administrative process in violation to the protections granted under NAFTA Article 1105[38] it decides to grant no compensation to Claimant in the understanding that, on the balance of probabilities, even if Respondent had continued with the POEL amendment process, such process would not have succeeded and Claimant would not have been able to quarry La Adelita from 2016 onwards.[39]

43. I cannot agree.

[37] As referred to in ¶814 of the Award, in reliance on Respondent's pledge and the steps taken to amend the POEL 2009 to enable quarrying to begin in La Adelita, Claimant committed additional investments in the Project worth approximately [redacted] between June 2014 and December 2017. These investments included (i) construction of a supplemental processing plant; (ii) construction of a new explosives storage facility; (iii) acquisition of heavy machinery; and (iv) acquisition of two Panamax vessels designed for the Project's specifications. See also the testimony of [redacted] at the hearing, 2021 Hearing Transcript (English), Day 2, 309:16-19.

[38] Award, ¶ 983.

[39] Award, ¶¶1282 and 1290 (adding that even if the POEL was successfully amended, it has not been established that the CUSTF would have been granted).

44. The 2014 Agreements and the process of amendment of POEL 2009 cannot be seen as an isolated process but as the Parties' agreed solution to a problem caused by Respondent's prior actions (i.e. the situation created by the POEL 2009's rezoning of Claimant's lots affecting its existing rights).[40] Therefore, Respondent's decision not to move forward with the agreed proceedings obliged Respondent to seek alternative solutions or, in their absence, to compensate Claimant for the damages caused by the situation that those agreements were supposed to solve.

45. As with any other agreement, it could well have happened that the amendment process of the POEL 2009 undertaken under the 2014 Agreements could have failed for reasons foreign to the Parties. But that was not the case. It did not succeed due to the authorities' voluntary decision – either motivated by political concerns, tourism development purposes[41] or any other unknown goals – not to continue it and, therefore, to consolidate the irregular situation caused by their own prior actions.

46. The Tribunal does not know what would have happened if the authorities had moved forward with the amendment process and devoted all the necessary efforts with the firm intent of modifying POEL 2009. What it could reasonably be expected is that if such process failed for reasons foreign to the parties to the 2014 Agreements, those very same parties – acting in good faith and in the same spirit that guided the 2014 Agreements – would have looked for alternative solutions in order to restore

[40] As mentioned in the Purpose of the MoU signed on 12 June 2014 (Binding Memorandum of Understanding entered into between CALICA, API Quintana Roo, the State of Quintana Roo, and the Municipality of Solidaridad, 12 June 2014, **C-0021-SPA**), its purpose was to reach a settlement of the existing conflicts and the resolution of other pending issues in relation to CALICA's operations in Quintana Roo.

[41] The fact that the local tourism sector wanted to develop CALICA´s properties and thus were exerting political pressure to undermine CALICA´s operations and investments were explained by [redacted] during the Hearing: "[I was told] by different officials from different levels of Government that they were under pressure from tourism industries to make available our operations for their […] tourism development. This had been stated to me by, for example, the Undersecretary of Mining, by Governor Joaquín, by the Junior Ministers of Ports and Merchant Marine, even by the Mexican Navy". 2021 Hearing Transcript (English), Day 2, 339.2-342:2 [redacted] answering questions from the Tribunal). The relevance that the government gave to the development of tourism in the Yucatán Peninsula has been clear throughout this case. In fact, the Mayan Train was considered by the Mexican Government its most relevant infrastructure project in the 2019-2024 National Development Plan. *See* Plan Nacional de Desarrollo 2019-2024, published in the DOF on 12 July 2019, **R-0142-ESP**, p. 29.

Claimant's rights or, otherwise, compensate the damages that the changes introduced by POEL 2009 have caused.

(E) *Alleged Breaches and Damages in Relation to El Corchalito.*

47. The Tribunal has concluded that "Respondent's conduct in relation to Claimant's investment in El Corchalito was arbitrary, grossly unfair, unjust and idiosyncratic, and involved a lack of due process leading to an outcome which offends judicial propriety in relation to: (i) PROFEPA's refusal to consider expert evidence contradicting its own measurements of CALICA's alleged excess extraction; (ii) the disproportionate closure of El Corchalito in the Shutdown Order on the basis of the reasons given, i.e., a 'probable' breach for 'presumed' excess quarrying of a marginal amount in excess of the authorized surface area, itself based on the evidence that PROFEPA had not given CALICA adequate opportunity to challenge; (iii) the maintenance of the closure of El Corchalito in the October 2020 Resolution, also based on the contested evidence, which Resolution included new alleged violations of environmental law, in relation to which CALICA had not had opportunity to respond before being sanctioned; and (iv) the impossibility of lifting the shutdown of El Corchalito ordered by the Shutdown Order and the October 2020 Resolution via the means specified by PROFEPA for lifting them, placing CALICA in a catch-22 situation and leading to a *de facto* total and indefinite shutdown."[42]

48. Taken as a whole, the Tribunal found "Respondent's measures in relation to El Corchalito to be pretextual, i.e., designed to achieve the outcome of shutting down CALICA's operations in El Corchalito. As such, […] the measures taken were founded on prejudice or preference rather than on reason or fact, were lacking in good faith, lacked transparency and even-handedness, and involved the use of legal instruments for purposes other than those for which they were created."[43]

[42] Award, ¶ 1189.
[43] Award, ¶ 1190.

49. In the Tribunal's opinion, Respondent's measures justify a finding of a breach of NAFTA Article 1105 in relation to Respondent's treatment of Claimant's investment in El Corchalito.[44]

50. However, when called to decide on the relief sought by Claimant, the majority sides in most relevant issues with Respondent's positions by (i) isolating CALICA from the CALICA Network;[45] (ii) rejecting in its entirety Claimant's model for the quantification of damages due;[46] (iii) accepting Respondent's model and valuation based on the transfer price at which CALICA sells the aggregates to VMC at the port in Mexico;[47] (iv) accepting to limit sales price growth to the inflation rate;[48] (v) preferring Respondent's approach to Capex,[49] discount rate (subject to the removal of the size risk premium)[50] and comparable companies analysis;[51] etc.

51. Once again, I cannot agree.

52. Claimant thoroughly explained why damages could not be calculated in the present case by isolating CALICA from the CALICA Network. CALICA was created as an export-driven business. The purpose of the Project was, from the very beginning, to serve foreign markets by sea, not the Mexican market. The CALICA Network operated as a vertically integrated export project and its shipping and distribution components were created, developed, and operated for the sole purpose of giving CALICA aggregates access to the US Gulf Coast markets.[52]

[44] Award, ¶ 1191.
[45] Award, ¶ 1338.
[46] Award, ¶¶ 1348, 1356-1357.
[47] Award, ¶ 1361.
[48] Award, ¶¶ 1393 and 1402.
[49] Award, ¶ 1405.
[50] Award, ¶ 1417.
[51] Award, ¶ 1438.
[52] Award, ¶¶ 1315 and 1325.

53. But even if Claimant´s position was not accepted and compensation was limited to damages or loss suffered by the investment made within the Mexican territory, I find no reasonable justification for rejecting Claimant's model in its entirety and adopting Respondent's model and valuation based on the transfer price at which CALICA "sells" the aggregates to VMC at the port of Mexico.

54. Learned counsel and arbitrators are well aware that transfer pricing is an artificial exercise required to divide the overall profitability of a network across different tax jurisdictions[53] and that transfer prices do not reflect the actual prices at which a product is sold.[54]

55. The Tribunal could have asked the Parties to provide alternative evidence or request the experts to perform additional calculations[55] in order to adequately compensate Claimant but decided not to do so.

56. The practical effect of the majority's decisions is that while the Tribunal has concluded that Respondent has breached NAFTA by failing to accord Claimant's investments, including CALICA, a fair and equitable treatment in violation of Article 1105 in relation to both La Adelita and El Corchalito, it awards no damages concerning La Adelita and provides a minimum compensation (less than 10% of the amounts claimed in this concept) with regards to El Corchalito.

[53] Counter-Memorial, ¶ 493, also cited in the Award, ¶ 1359.
[54] Award, ¶ 1362 ("The Tribunal is mindful that actual prices may be higher than the transfer price. However, Claimant has not put forward alternative evidence as to what such price would be in a CALICA-only valuation model").
[55] In order to determine the FMV of CALICA, Claimant's model is based on the netback value of CALICA's reserves. To determine such value, Claimant's expert (Brattle) used the realized or expected sales price of the aggregates in the US and then discounted the transportation and marketing costs. The majority could have explored other alternatives, including the possibility of making additional haircuts; construct a different value considering both the realized or expected sales price of the aggregates in the US and the transfer price; or perform other alternative calculations.

57 Such decisions (in addition to the majority's denial of the Tribunal's jurisdiction on the Ancillary Claim concerning the shutdown of La Rosita's lot) do not provide, in my view, a fair answer to Respondent's actions and Claimant's claims in the present case.

[Signed]

Professor Guido Santiago Tawil

Arbitrator

Date 27 July 2026