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.

[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]

---

[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.

---

[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).

[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.

[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.

---

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